

# EASTERN WATER LAW™

## & POLICY REPORTER

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## FEATURE ARTICLE

U.S. DISTRICT COURT VACATES TRUMP-ERA SECTION 401  
CLEAN WATER ACT CERTIFICATION RULES

By Stephen J. Odell

The U.S. District Court for the Northern District of California rejected the U.S. Environmental Protection Agency's request to voluntarily remand a case without vacating the revisions to federal Clean Water Act (CWA) certification regulations subject to challenge, and instead vacated the revised regulations in remanding the matter to the agency for the further modifications it indicated it plans to adopt. [*In re Clean Water Act Rulemaking*, \_\_\_ F.Supp.4th \_\_\_, Case Nos. C 20-04636 *et seq.* (N.D. Cal. Oct. 21, 2021).]

### Background

On July 13, 2020, the U.S. Environmental Protection Agency (EPA) promulgated revisions to its rules under which states and authorized Tribes certify that activities requiring federal approval that may result in discharges of pollutants to U.S. navigable waters within their borders comply with all applicable water quality and related standards pursuant to Section 401 of the federal Clean Water Act. 85 Fed. Reg. 42,210 (July 13, 2020). The previous version of the regulations had been in effect since 1971, when EPA promulgated rules to govern certification under section 21(b) of the original Federal Water Pollution Control Act of 1948, which the CWA amended upon its enactment a year later, in 1972. *Id.* at 42,211. Because the rules apply to any activity requiring a federal license or permit that may result in discharge into navigable waters of the U.S., they have a wide berth of application, and therefore the 2020 rule revisions, again, the first to be made after nearly 50 years, attracted a lot of attention, eliciting more than 125,000 comments on the proposed version before going into effect in September 2020. *Id.* at 42,213.

As a substantive matter, perhaps the most important modification reflected in the revised certification rules was to explicitly define the scope of Section 401 certification as limited to ensuring that the discharge subject to federal approval complies with "water quality requirements," which the rules defined as encompassing those emanating from §§ 301, 302, 303, 306, and 307 of the CWA. *Id.* at 42,230-42,231. Another significant element of the revised rules clarified the scope of Section 401 certification only encompasses water quality impacts from the potential discharge associated with a federally licensed or permitted project, and may not include conditions related to the project's activities or operations, thereby rejecting the broader scope of such certifications that the Supreme Court upheld as a reasonable interpretation of Section 401 in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). *Id.* at 42,232-42,234. Finally, the revised rules expressly confined Section 401 certification to point source discharges into navigable waters of the U.S., and therefore does not encompass non-point source discharges or discharges into other waters. *Id.* at 42,234-42,235.

With respect to procedural changes, the revised rules authorized EPA to establish the reasonable amount of time for a certifying authority to process a request for Section 401 certification and, importantly, clarified that this period could not exceed one year or be tolled for any reason. *Id.* at 42,235-42,236. They also authorized EPA to determine whether a certifying authority's denial has complied with the rule's procedural requirements, and to deem certifications waived if not.

The opinions expressed in attributed articles in *Eastern Water Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of the *Eastern Water Law & Policy Reporter*.

### Immediate Challenges Brought in the District Court

A series of environmental groups filed a complaint to challenge the revised Section 401 certification regulations the same day they were published in the Federal Register. *In re Clean Water Act Rulemaking*, Case nos. C 20-04636 et seq., 2021 WL 4924844, at \*3 (N.D. Cal. Oct. 21, 2021). A group of 20 states and the District of Columbia followed up shortly thereafter by filing their own complaint to challenge the revised rules, as did several Tribes and a few other environmental groups, and all three cases were eventually consolidated. *Id.* Eight other states and a number of industry associations also intervened in the cases as defendant-intervenors. *Id.*

Less than a month after the Biden administration took office, the parties filed a joint motion for a 60-day stay on the ground that the revised regulations at issue were included within the purview of an Executive Order President Biden issued the day he took office directing agencies to review certain actions undertaken during the Trump administration for potential suspension, revision, or rescission. *Id.* (citing Exec. Order 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021)). The court granted the motion, as well as two follow-up motions of Federal Defendants to extend the stay by approximately two more months while EPA conducted its review of the revised certification rules and decided on a course of action. During the pendency of this stay in the litigation, EPA issued a Notice of Intent to further revise the Certification Rule. Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29541 (June 2, 2021).

Shortly thereafter, Federal Defendants moved the court to remand the revised certification regulations to EPA without *vacatur*, which plaintiffs opposed, setting the stage for the court's opinion on whether to grant the remand and, if so, with or without *vacatur* of the regulations.

### The District Court's Decision

In addressing Federal Defendants' Motion, the District Court first set forth the rubric for evaluating an agency's request for a voluntary remand in *California Cmty's. Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012)(CCAT) (citing *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1027–28 (Fed. Cir. 2001)), in which

the Ninth Circuit Court of Appeals concluded that “[g]enerally, courts only refuse voluntarily requested remand when the agency’s request is frivolous or made in bad faith.” *Id.* at \*4 (quoting CCAT, 688 F.3d at 992).

### Remand and *Vacatur*

Having dispensed with that question, the court turned to the much thornier issue of the standard for deciding whether any remand should be with or without *vacatur*.

In doing so, the court first grappled with what it found to be a split of authority among District Courts on whether a court may order *vacatur* of an agency action for which remand is sought without ruling on the merits of the claims challenging its validity. *Id.* After noting that the Ninth Circuit had not addressed the question directly, the District Court ultimately concluded that it had the authority to vacate an agency's action without first making a determination as to its validity when an agency seeks a voluntary remand. *Id.* at \*\*4-5. It premised its conclusion in this regard on the rationale from a sister District Court within the Ninth Circuit that had reasoned that:

... because *vacatur* is an equitable remedy, and because the APA [Administrative Procedure Act] does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of *vacatur* without a decision on the merits. *Id.* at \*5 (quoting *Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011)).

### Analysis under the *Allied-Signal* Decision

The court then pivoted to determining that the factors the Ninth Circuit has indicated courts should apply in considering whether to vacate agency actions found to be invalid should also be utilized in considering whether to vacate an agency action for which voluntary remand is sought, even without any conclusive determination as to its validity. *Id.* (citing CCAT, 688 F.3d at 992) (adopting factors set forth in *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993)). As set forth in *Allied-Signal*, the court quoted these factors as constituting:

[1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the

agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed. *Id.* (quoting *Allied-Signal*, 988 F.2d at 150-51).

After briefly sloughing off Federal Defendants' and defendant-intervenors' arguments against its adoption of the *Allied-Signal* factors as the standard it should use in deciding whether to vacate the revised Section 401 certification regulations, *id.* at \*\*5-6, and readily finding that remand was appropriate under the lenient CCAT standard of review applicable to that issue, *id.* at \*\*6-7, the court engaged in an application of those factors.

In initially addressing the seriousness of the revised certification regulations' alleged deficiencies, the court homed in on the narrowing of the scope of the Section 401 certification they prescribed, and the attendant narrowing of the conditions that a state or authorized Tribe can therefore impose in providing such certifications. *Id.* at \*\*7-8. The court found that this narrowing in the scope of certification represented "an antithetical position" to the Supreme Court's interpretation of Section 401 in its opinion in *PUD No. 1* "without reasonably explaining the change." *Id.* at \*7. On that basis, the court stated that it:

... harbored significant doubts that EPA correctly promulgated the certification rule due to the apparent arbitrary and capricious changes to the rule's scope. *Id.*

The court also relied on a statement in an EPA official's declaration that one of the agency's purposes in requesting the remand to revise the challenged rule was to "restore" the principles of cooperative federalism inherent in the CWA, which the court read as an acknowledgment that the rule's scope "is inconsistent with and contravenes the design and structure of the Clean Water Act," and was therefore not entitled to judicial deference. *Id.* at \*8. It also relied on a list of eleven "substantial concerns" EPA openly indicated it had with the revised certification regulations to quite easily conclude that significant doubt existed that the regulations were free from serious deficiencies. *Id.*

With respect to the second *Allied-Signal* factor, the potentially disruptive consequences of *vacatur*, the court relied principally on the fact that the revised certification regulations had only been in effect for 13

months in determining that "*vacatur* will not intrude on any justifiable reliance." *Id.*

The court also relied on the extent to which a faulty rule left in place without *vacatur* could result in possible environmental harm and concluded that such harm might be substantial, in particular in light of certain specific hydropower projects on the Skagit River in Washington for which Section 401 certification will be needed from the state in the near term. *Id.* at \*9.

Having found that both *Allied-Signal* factors supported *vacatur*, the court vacated the revised certification regulations upon their remand to EPA, which the court noted would result in a temporary return to the previous version of such regulations until Spring 2023, by which time EPA has projected it intends to issue a new Section 401 certification rule. *Id.* at \*10.

### Conclusion and Implications

The import and potential impact of the District Court's decision can be deduced solely from the fact that the litigation involved more than half of the states in the country, as described above.

At the same time, as the court also noted, the revised certification regulations were only in effect for 13 months prior to their *vacatur*, and so it is unlikely that too many projects had commenced during that window in reliance on them, although it can be imagined that more projects would have sought to avail themselves of their narrower scope and receive the requisite certification under Section 401 if the court had left them in place pending EPA's issuance of a new set of regulations that, as noted above, the agency plans to accomplish by Spring 2023.

With respect to the court's analysis, it was relatively straightforward in most respects and its task was made considerably easier by the fact that EPA, the agency seeking the remand, itself identified a litany of "substantial concerns" it had with the regulations. Perhaps the most significant ruling was the court's determination that it need not engage in an evaluation of the merits of plaintiffs' claims in order to find *vacatur* appropriate, although there seems little doubt that the court would have ruled in favor of plaintiffs on at least one of their claims given the rather strong language it used in finding serious deficiencies existed in the regulations under the first *Allied-Signal* factor.

It is worth noting in conclusion that the court's opinion appears to reflect simply the latest example



of the increasingly prevalent “ping-pong” trend in the environmental regulatory arena in which agency rules and policy pronouncements simply volley back and forth every time an Administration of a different party assumes office. Such a trend, of course, makes it exceedingly difficult for agency officials and regulated entities to plan and evaluate projects, most of which

take multiple years to successfully navigate the approval process, and new regulations most often take a new Administration two years or more to promulgate through the Notice-and-Comment process.

The District Court’s opinion is available at the following link: <https://ecf.cand.uscourts.gov/doc1/035121199368> (PACER registration required)

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## EASTERN WATER NEWS

STUDY ADDRESSES EFFECTS OF DROUGHT INTENSITY  
ON DEEP GROUNDWATER AQUIFERS

A recent study on the relationship between multi-year precipitation droughts and groundwater aquifers without human management found that an increase in the severity of a drought can prolong the recovery of groundwater levels, particularly in aquifers with deeper groundwater tables. The study found an average groundwater recovery of three years for shallow aquifers. In addition to drought severity for deep groundwater aquifers, the study determined that the second most important factor controlling groundwater recovery time was mean annual recharge potential.

### Background

The study, published in the *Journal of Hydrology*, analyzed observation wells in “unconfined” aquifers with a mean depth of eight meters across the conterminous United States. The study analyzed groundwater responses and recovery from multi-year droughts in aquifers with no appreciable human management, mostly in the northeast. (Despite most of the observation wells being located in the northeast, the study concluded that its findings were consistent for observation wells across the United States.) Specifically, the study relied on 266 observation wells within the coterminous United States, none of which were located in high or medium density development areas, and only nine were located in low density development areas. Each observation well had at least ten consecutive years of data available from the Climate Response Network maintained by the U.S. Geological Survey (USGS). None of the wells were located on irrigated lands.

### Defining Drought

According to the study, “drought” can be defined in multiple ways, including “meteorological drought as a result of reduced precipitation,” “hydrological drought affecting streamflow,” “snow drought,” “agricultural drought where declining soil moisture results in crop failure,” and “groundwater drought due

to decline in groundwater levels.” Different definitions of drought entail different “spatial and temporal scales,” and the study indicates that a key challenge in “quantifying groundwater response to meteorological drought is quantifying consistent drought periods for different hydrological metrics.” The study focuses on the relationship between multi-year meteorological droughts and groundwater droughts, and addresses three questions:

- (1) Do precipitation or subsurface properties play a stronger role in controlling groundwater response time to precipitation drought initiation?
- (2) What factors influence the trajectory of groundwater recovery to drought?
- (3) Under what conditions are precipitation or geographic properties impacting lagged groundwater response to drought?

### ‘Groundwater Lag Time’

To answer these questions, the study focuses on two variables called “groundwater lag time” and “recovery time.” Groundwater lag time represents:

...the time that it takes until changes in precipitation propagate through the vadose zone and/or changes in streamflow in a connected surface water-groundwater system impact groundwater levels.

In other words, groundwater lag time means the time it takes precipitation to impact groundwater levels. The recovery time consists of:

...the lag time between the cessation of negative monthly precipitation and groundwater anomalies, and the time needed for the groundwater levels to rise to the 5-year average pre-drought groundwater levels.

In other words, recovery time means the time between the end of a multi-year drought and a return

to five-year pre-drought average groundwater levels. Thus, the study looks at how long it takes rain or snow to impact groundwater levels relative to a multi-year drought, and how long it takes groundwater levels to return to pre-drought levels, *i.e.* to recover water lost from the aquifer during the drought.

As a general matter, the study found that wells in the western regions of the United States had longer groundwater lag times than wells in more humid regions of the eastern United States. Notably, the “drought intensity” is the “most significant factor influencing groundwater lag time” for areas with deep groundwater levels, followed by the “mean annual potential recharge.” Areas with shallow groundwater levels are impacted most by geographic properties such as elevation, percent vegetation canopy cover, and temperature.

The study found that groundwater levels across “multiple aquifer systems” had recovered from drought within ten years the majority of the time (85 percent), and that storage recovery rate for aquifers is greatest during the first year following the end of a drought. However, the storage recovery rate declines in the following years. While the study acknowledges that it is still unclear if drought properties, such as intensity, severity, and duration, exert greater control over groundwater lag time than geographic properties such as temperature, the study:

...suggests that if precipitation droughts become more intense in the future, the time-lag between precipitation drought and groundwater response may decrease.

That is, drought intensity may accelerate the impacts of drought on groundwater levels, thus

increasing groundwater recovery time absent human management efforts.

In particular, the study concludes that there may be a significant lag time—up to 15 years—between precipitation and groundwater droughts, and the severity of a drought may increase the recovery time of an aquifer. Accordingly, the study suggests that:

...in a changing climate, an important management consideration is to understand the most important set of factors that control groundwater [lag time].

Those factors, at least for deep groundwater aquifers, appear to be drought intensity and the annual recharge potential of an aquifer.

## Conclusion and Implications

The study provides a broad observational analysis of the relationship between drought characteristics and groundwater response, as well as how geographical properties may impact groundwater response to drought. According to the study, for much of the western United States, deep groundwater levels are most likely to be impacted by the intensity of droughts, which may prolong recovery times for groundwater levels absent human management efforts. This may underscore the role active groundwater management plays in maintaining groundwater supplies, including maximizing recharge activities following prolonged droughts. The Study: appeared in the *Journal of Hydrology* 603 (2021) 126917, which is accessible online at: <https://www.sciencedirect.com/science/article/abs/pii/S0022169421009677>. (Miles Krieger, Steve Anderson)

## NEWS FROM THE WEST

In this month’s News from the West we focus on drought and fossil fuel drilling. In California, the state has gone from partial drought emergency declarations to full state declarations. And water restrictions will soon follow. A coastal city that has used river water now faces brackish water intrusion due to lower river

flows which has necessitated building a desalination plant. More such projects are in the pipeline. We also report on efforts in California and Colorado to establish minimum setbacks from oil and gas drilling projects to address ongoing groundwater contamination.



## State of Drought Emergency Extended to all 58 Counties in California as Lack of Precipitation Persists and Conservation Efforts Fall Flat of Goals

With the current drought still appearing to have no end in sight, California Governor Gavin Newsom, on October 19, 2021, issued a proclamation extending the drought emergency statewide and further urging Californians to step up their water conservation efforts.

### Voluntary Conservation Efforts

Back in July, Governor Newsom issued an executive order imploring Californians to voluntarily reduce their water use by 15 percent as compared to 2020 in order to protect the State's water reserves and complement ongoing local conservation mandates. Despite Governor Newsom's pleas, Californians reduced their water use at home by a meager 1.8 percent statewide in July compared to last year's water use. Since then, these numbers have certainly increased, with August's report indicating an average conservation of about 5 percent statewide.

Leading this conservation effort has been the north Coast region, reducing water use by 18.3 percent compared to last year's figures, with the San Francisco Bay Area and Sacramento River regions following at 9.9 percent and 8.1 percent reductions in water use, respectively. On the other side of the coin, the South Coast region—which houses over half of the State's population—was only able to achieve a 3.1 percent reduction in water use from last year.

### Statewide Proclamation of Emergency

As a part of Governor Newsom's Statewide proclamation of a drought emergency, he acknowledged that:

...sustained and extreme high temperatures have increased water loss from reservoirs and streams, increased demands by communities and agriculture, and further depleted California's water supplies.

With that said, the Governor reiterated that:

...the most impactful action Californians can take to extend available supplies is to re-double

their efforts to voluntarily reduce their water use by 15 percent from their 2020 levels.

Primarily, the Governor's proclamation adds the eight counties not previously included in the drought state of emergency: Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Francisco and Ventura. With the lackluster conservation figures reported for the South Coast region in August, it immediately stands out that the counties of Los Angeles, Orange, San Diego, and Ventura all lie within this region, along with portions of San Bernardino and Riverside counties.

In addition to the inclusion of the remaining counties as being in a state of drought emergency, the proclamation also requires local water suppliers to implement water shortage contingency plans that are responsive to local conditions and prepare for the possibility of a third dry year. Noting that long-term weather forecasts for the winter rainy season, dire storage conditions of California's largest reservoirs, low moisture content in native vegetation, and parched soils magnify the likelihood that drought impacts will continue in 2022, the Governor's proclamation emphasizes that we are not out of the woods yet even with the winter months arriving.

Another notable inclusion in the Governor's proclamation is the grant of authority to the State Water Resources Control Board to adopt emergency regulations as needed to supplement voluntary conservation by prohibiting certain wasteful water practices. Among such "wasteful water practices," the proclamation includes the use of *potable* for: water for sidewalk and building washing; the individual private washing of vehicles; irrigation of ornamental landscapes including turf during and within 48 hours after at least a quarter inch of rainfall; and for decorative fountains or the topping-off of decorative lakes and ponds.

### Conclusion and Implications

With the rest of the state being brought under the umbrella of the drought emergency, the Governor continues to stress that this is a statewide problem necessitating statewide response. Furthermore, this statewide proclamation has since been complemented by the Metropolitan Water District, which declared a regional drought emergency shortly after, calling on local water suppliers to implement all

conservation measures possible to reduce usage. This regional proclamation is a huge follow up to the Governor's statewide proclamation as MWD manages water deliveries to 26 agencies in six counties, including the aforementioned Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura counties. For more information on the proclamation, see: <https://www.gov.ca.gov/2021/10/19/governor-newsom-expands-drought-emergency-statewide-urges-californians-to-redouble-water-conservation-efforts/>; and see: <https://www.gov.ca.gov/wp-content/uploads/2021/10/10.19.21-Drought-SOE-1.pdf>. (Wesley A. Miliband, Kristopher T. Strouse)

## **Fort Bragg, California, Launches New Desalination System as Drought Response with Help from the State Water Resources Control Board**

The current drought has taken its toll on many communities throughout California, but for the residents of Fort Bragg, a new desalination-reverse osmosis system could help ease the impacts the drought has had on the north coast city.

### **Background**

The City of Fort Bragg's (City) primary water source comes from the Noyo River, the largest of the City's three surface water sources that serves the nearly 3,000 customer connections in the area. Suffering a similar fate as the Sacramento-San Joaquin River Delta, however, the Noyo River has suffered from increased saltwater intrusion as a result of lowered flows at the river's mouth as a result of the drought. This summer, in fact, flows in the Noyo reached such a low level that Fort Bragg's water system was considering pulling from its emergency reservoir to maintain a sufficient supply for the area's residents. Despite the grim situation the City was facing, it instead sought to utilize desalination to extract more drinking water supplies from the river, requesting emergency funding from the State Water Resources Control Board (SWRCB or State Water Board) to do so.

### **The Project and Funding**

Working together with the SWRCB, the City's initial application for funding was approved in May 2021, and thanks to expedited approvals through the State Water Board's Emergency Drinking Water

Program, the City and the SWRCB were able to have the desalination unit delivered by September 24 with testing the following week.

While the speed in which the SWRCB and the City were able to get the desalination up and running is obviously an impressive enough feat, the State Water Board also funded 100 percent of Fort Bragg's grant request, totaling \$691,796. Using the funding and assistance from the State Water Board, the City was able to get the desalination-reverse osmosis system up and running with the additional support of a new shallow groundwater well treatment system that can produce an 57,000 gallons of water per day, providing the City with a much needed boost to its current supplies.

Fort Bragg's new desalination unit is designed to release desalinated water into a raw water pond that flows into the City's existing full-sized treatment plant. Mounted on a concrete skid, the unit can produce 200 gallons a minute of desalinated water. Although the unit has a maximum running time of 12 hours per day, the unit is capable of processing up to 144,000 gallons in a 24-hour period when factoring in the run time restrictions.

Perhaps as a gage of the desalination plant's success, in late October 2021, and *after* the recent state wide drought proclamation by Governor Newsom, the city council passed a resolution rescinding the Stage 2 Water Warning and lifting all mandatory water conservation restrictions within the Fort Bragg water service area. (See: <https://www.mendocinobeacon.com/2021/11/01/fort-bragg-city-council-lifts-all-water-conservation-restrictions/>)

Commenting on the project, Joe Karkoski, deputy director of the State Water Resources Control Board's Division of Financial Assistance stated:

Fort Bragg came to us with a creative solution, and our team worked with them to address any obstacles to making it happen quickly. . . .Expedited approvals through our Emergency Drinking Water Program allow us to help people in communities like Fort Bragg who are struggling with drought impacts.

### **Conclusion and Implications**

The impact this new desalination system will have on the City of Fort Bragg is undeniable and helps the City work towards a more reliable water system,

but the City's project may have big implications throughout the state. The State Water Resources Control Board has worked to fund countless drought assistance projects for other cities, water systems, and households throughout the state to repair or replace wells, provide hauled or bottled water, install point-of-use treatment systems, conduct well testing and provide technical assistance. When push comes to shove, the State Water Resources Control Board and the City of Fort Bragg seem to have proven that these drought assistance programs can also be conducted in an expedited timeframe. Within the span of just four months, for example, the City of Fort Bragg was able to have its initial application approved and a desalination unit delivered and ready to use only a few weeks later.

The timeline in which Fort Bragg was able to receive the much-needed aid provided by the State Water Resources Control Board may be the exception and not the rule, but it at least shows that the State Water Board is capable of working together with local water systems to quickly resolve problems brought on by the drought. For more information, see: [https://www.waterboards.ca.gov/press\\_room/press\\_releases/2021/pr10122021-fort-bragg-desalination.pdf](https://www.waterboards.ca.gov/press_room/press_releases/2021/pr10122021-fort-bragg-desalination.pdf). (Wesley A. Miliband, Kristopher T. Strouse)

### California Proposes Setback Requirement for New Oil and Gas Wells—How Does it Measure Up?

On October 21, 2021, the California Department of Conservation's Geologic Energy Management Division (CalGEM) released a draft regulation that would prohibit new oil and gas wells and facilities within 3,200-feet from homes, schools, hospitals, and other sensitive locations (<https://www.conservation.ca.gov/calgem/Documents/public-health/PHRM%20Draft%20Rule.pdf>) If approved, California's setback requirement would become the nation's largest statewide buffer zone between oil wells and communities. Colorado currently has the nation's largest setback requirement from oil wells as 2,000 feet; but it has several exceptions. Therefore, as proposed, California's setback requirement is significantly larger than Colorado's and lacks exceptions. As California continues the rulemaking process, it is valuable to see how the rule compares to the nation's current most stringent buffer zone.

### Background

A 2017 study approximates that 17.6 million people in the United States live within one mile of an oil or gas well. (Eliza Czolowski et al, *Toward Consistent Methodology to Quantify Populations in Proximity to Oil and Gas Development: A National Spatial Analysis and Review*, Environmental Health Perspectives (Aug. 23, 2017), <https://doi.org/10.1289/EHP1535>.) In October 2021, CalGEM's scientific advisory panel, organized to inform its setback requirement rulemaking released responses to CalGEM's questions (hereinafter Panel Responses to CalGEM) for developing setback regulations, and found that living near oil and gas wells may increase certain health risks, including increased risk of respiratory disease, cancer, and reproductive harm ([https://www.conservation.ca.gov/calgem/Documents/public-health/Public%20Health%20Panel%20Responses\\_FINAL%20ADA.pdf](https://www.conservation.ca.gov/calgem/Documents/public-health/Public%20Health%20Panel%20Responses_FINAL%20ADA.pdf)) (See Panel Responses to CalGEM, at p. 1-11.) However, the scientific advisory panel also concluded that adequate setback requirements (also referred to as buffer zones) that establish minimum distances between oil and gas wells and locations that support human activities or natural ecosystems, can operate to protect the health and safety of communities most directly affected by oil and gas operations, and minimize these adverse health impacts. (See: Panel Responses to CalGEM, at p. 12-13.) While there is no consensus on the appropriate distance for protective setbacks from oil and gas operations; the panel's research showed that studies consistently demonstrate evidence of harm at distance less than one kilometer (approximately 3,200 feet) from oil and gas wells. In absence of a federal setback requirement, some municipalities and states have imposed their own setbacks. Most major oil producing states have a setback requirement, including Texas, Colorado, and New Mexico. While California state law declares that any well drilled within 100 feet of a property line or public road a *de facto* nuisance; California is currently the only oil producing state without a statewide setback requirement. As such, in 2019, Governor Gavin Newsom directed CalGEM to strengthen health and safety protections for communities near oil and gas facilities. CalGEM spent two years developing the proposed setback regulations and accompanying proposed regulations, which include more protective pollution control measures for existing oil and gas wells and facilities. As California continues the

rulemaking process, provided below is a comparison of how California's draft regulations compare with Colorado's rules for buffer areas for new oil and gas well regulations.

## Colorado's Setback Requirement

In April 2019, Colorado approved Senate Bill (SB) 19-181, which overhauled the state's oil and gas well regulations. (Colo. Rev. Stat. Ann., § 34-60-102(1) (West).) In November 2020, as per the SB 19-181 requirements, Colorado's Oil & Gas Conservation Commission (COGCC) approved new rules for oil and gas well, including adoption of a 2,000-foot buffer zone between new wells and homes, school, and other occupied building. (See: COGCC Rule 604; [https://cogcc.state.co.us/documents/reg/Rules/LAT-EST/Complete%20Rules%20\(100%20-%201200%20Series\).pdf](https://cogcc.state.co.us/documents/reg/Rules/LAT-EST/Complete%20Rules%20(100%20-%201200%20Series).pdf)) This 2,000-foot buffer was significantly larger than any other statewide buffer zone in the country.

Although Colorado's setback requirement is regarded as the most stringent in the nation, there are a series of practicable exceptions to the requirement. The exceptions allow operators to drill as close as 500 feet from homes, but they do not apply to schools. (See: COGCC Rule 604.) Operators can seek informed consent from tenants or property owners to drill within the buffer zone. (*Id.* at Rule 604(b)(1).) Operators can also drill within the buffer zone if the well is located within an approved Comprehensive Area Plan that organizes multiple drill sites. (*Id.* at (b)(2).) Additionally, the drill pad may be located in the buffer zone so long as the wells, tanks, and compressors are 2,000-feet from homes. (*Id.* at (b)(3).) Lastly, COGCC can allow an exception to the setback requirement if the conditions of approval will provide substantially equivalent protections. (*Id.* at (b)(4).)

In addition to the setback requirement for new wells, COGCC also approved more protective regulations for existing wells that include tougher protections for air quality and wildfire and more stringent requirements for well construction.

## California's Proposed Setback Requirement

CalGEM released detailed draft rules for protection of communities from health and safety impacts of oil and gas production operations, including a proposal

of requiring a 3,200-foot setback for new oil and gas wells from homes, schools, hospitals, nursing homes, and other sensitive locations before approving any Notice of Intention to drill a new well with a new surface location. (Proposed Cal. Code Regs., tit. 14 (hereinafter Proposed Rules), § 1765.)

It is worth noting that the proposed 3,200 feet buffer zone is notably larger than what other states have instituted, including nearly a quarter of a mile larger than Colorado's 2,000 feet buffer zone. But the California's proposed setbacks are based on CalGEM's scientific advisory panel's recommendations after a review of epidemiological studies relevant to oil and gas production. Additionally, unlike Colorado's setback requirement, California's Proposed Rules lacks flexibility and exceptions. The only exception to the 3,200-foot setback requirement is when it is necessary to drill a well to actively alleviate a threat to public safety (for instance, to relieve underground pressure). (Proposed Rules, § 1765.)

The Proposed Rules also require approval and implementation of a Leak Detection and Response Plan by an operator of an existing wellhead or other production facility located within the setback mitigation area; and within two years of the rules' effective date, the operators shall stop production and injection operations within the setback mitigation area where a Leak Detection and Response Plan is not fully implemented. (Proposed Rules, § 1766.) The Proposed Rules also propose adding vapor venting prevention systems (and the requirements for such systems) for all permanent and temporary equipment used for oil and gas production that are located within the setback mitigation area. (Proposed Rules, § 1766.1.) The Proposed Rules further impose sound, lighting and dust control measures, and provide for gas and water quality sampling requirements for oil and gas production facilities and equipment located within the setback mitigation area. (Proposed Rules, §§ 1766.3–1766.7.)

In addition to the above requirements, the Proposed Rules also require that prior to commencing any work that requires a Notice of Intention under Public Resources Code section 3203, the operators shall notify the "property owners and tenants within a 1500-foot radius of the wellhead or within 500 feet of the surface representation of the horizontal path of the subsurface parts of the well in writing," and "offer to sample and test water wells or surface water



on their property before and after drilling;” with the requirements for any water sampling and testing set forth in the Proposed Rules. (Proposed Rules, § 1766.2.) Prior to commencing drilling, the operator shall provide CalGEM with documentation of the effort to identify and notify property owners and tenants. (Proposed Rules, § 1766.2(c).)

### Conclusion and Implications

California’s Proposed Rules are still in the early stages of the rulemaking process. There are ample opportunities for interested parties to get involved in the rulemaking process and help shape California’s overhaul of oil and gas regulations. CalGEM is taking public comment on the Proposed Rules through December 21, 2021, and details for submitting comments can be found in the Notice of Proposed rulemaking: (<https://www.conservation.ca.gov/calgem/>

[Documents/public-health/PHRM%20Notice%20of%20Public%20Comment%20Period%20and%20Workshop.pdf](#))

After the public comment period ends, CalGEM will conduct an in depth economic analysis and submit the Proposed Rules to the Office of Administrative Law for another process of receiving public comment and refinement.

As noted above, California’s proposed setback requirement is significantly larger than Colorado’s and lacks exceptions and flexibility. However, CalGEM is in the early rulemaking process and the rule may still change and flexibility may still be added to the setback requirement as interested parties continue to work with CalGEM in the rulemaking process. However, some see that the Proposed Rules send a strong message that California intends to pass strict oil and gas regulations.

(Breana Inoshita, Hina Gupta)



## REGULATORY DEVELOPMENTS

### U.S. ENVIRONMENTAL PROTECTION AGENCY RELEASES POLYFLUOROALKYL SUBSTANCES MULTI-YEAR PLAN ‘ROAD MAP’

On October 18, 2021, the U.S. Environmental Protection Agency (EPA) published a national PFAS testing strategy using its authority under the Toxic Substance Control Act (TSCA). The primary goal with the testing strategy is to have more scientific data for EPA to utilize in taking future regulatory and administrative actions. The EPA intends to use authority under TSCA to require the manufacturers of PFAS to both conduct and fund these studies.

#### Background

Per- and polyfluoroalkyl substances (PFAS), according to the EPA:

- are widely used, long lasting chemicals, components of which break down very slowly over time;
- because of their widespread use and their persistence in the environment, many PFAS are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment;
- PFAS are found in water, air, fish, and soil at locations across the nation and the globe;
- scientific studies have shown that exposure to some PFAS in the environment may be linked to harmful health effects in humans and animals;
- there are thousands of PFAS chemicals, and they are found in many different consumer, commercial, and industrial products. This makes it challenging to study and assess the potential human health and environmental risks.

#### The PFAS Roadmap

The PFAS Strategic Roadmap (Roadmap) is a multi-year plan that sets forth the agency's goals and priorities for addressing per- and polyfluoroalkyl substances through a three-pronged approach: regula-

tory; administrative; and enforcement activities. The Roadmap draws out a plan for addressing PFAS from the beginning of its lifecycle by reviewing and utilizing the science of PFAS. Throughout the Roadmap, it is clear the EPA aims to crackdown on the production and use of PFAS and minimize effects on human health and the environment. Some of the proposed actions could potentially increase the liability for water and wastewater districts, as well as municipalities, as it relates to PFAS limitations and triggers. The key to successfully overcoming these new hurdles, will be a clear understanding of the limitations, expectations, roles, and responsibilities. As the EPA releases opportunity for public comment and consideration on new actions related to PFAS, each district and municipality can have a voice to help shape the next steps the EPA takes with regards to PFAS.

The EPA has provided three concurrent stages for controlling PFAS compounds as described in the Roadmap: research; restriction; and remediation. The purpose of the research is to gain a comprehensive understanding of the potential harms related to PFAS and to ensure that the PFAS restrictions and remediation efforts are based on clear and specific scientific evidence. EPA's PFAS Council has set a goal of stopping the PFAS issue at the source. To achieve this, the EPA will utilize new data and studies to ensure that excessive amounts of new PFAS will not be introduced into the stream of commerce. Further remediation will provide guidelines on how to remove PFAS in areas where there are high concentrations and how to address PFAS levels known to be harmful to human and environmental health. To achieve throughout each of the three prongs, EPA has set an expected timeline of actions it is currently proposing.

#### Research

Currently, there are 4,700 known PFAS compounds and little is known about the toxicity and potential harms caused by most of these compounds. The Roadmap recognizes that understanding the potential harms is necessary to successfully restrict

and remediate PFAS use, and the key to more understanding is more data and research. Beginning Fall 2021 and ongoing over the next few years, EPA seeks to develop additional methods to more extensively detect and monitor PFAS in the air, ground, and water. As of the publishing of the Roadmap, the EPA has validated methods of measurability of 29 PFAS compounds in drinking water; 24 PFAS compounds in groundwater, surface water, and wastewater; and selected PFAS in air emissions.

In October 2021, the EPA published a national PFAS testing strategy using its authority under the Toxic Substance Control Act. The primary goal with the testing strategy is to have more scientific data for EPA to utilize in taking future regulatory and administrative actions. The EPA intends to use authority under TSCA to require the manufacturers of PFAS to both conduct and fund these studies.

EPA intends to issue a proposed rulemaking in 2022 to categorize PFAS on the Toxics Release Inventory (TRI) and designate it as a “Chemical of Special Concern.” While PFAS has been a reportable chemical for certain industries since 2020, this proposed 2022 change will expand those industries and add additional PFAS to the TRI. By Winter 2022, the EPA plans to use its authority under TSCA to finalize a rule on the gathering of data, including data-points on use, production, disposal, exposures, and hazards.

In addition to general PFAS research, EPA will conduct a specific risk assessment of two compounds of PFAS: perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) in biosolids. Expected by Winter 2024, the assessment will set the basis as to whether and in what ways, the EPA will regulate PFOA and PFOS in biosolids.

The research performed will inform the steps that could potentially best address the production, use, and harm of PFAS, through additional restrictions and new remediation measures.

## Restrictions

In fall 2021, the EPA published toxicity assessments for two PFAS compounds: hexafluoropropylene oxide dimer acid and its ammonium salt (GenX chemicals). In this toxicity assessment, the EPA stated that oral ingestion of no more than 3 parts-per-trillion (ppt) per day would not impact the health of most people. These toxicity assessments set the stage for future toxicity assessments on five additional

PFAS compounds: PFBA, PFHxA, PFHxS, PFNA, and PFDA. Further, the toxicity assessments have led the EPA to re-examine the standards set for PFOS, PFOA, and perfluorobutanesulfonic acid (PFBS). Following the release of the toxicity assessment, the EPA stated that oral ingestion of no more than 0.0015 ppt per day of PFOA and 0.0079 ppt per day of PFOS would not impact the health of most people. Because the EPA used an oral ingestion rate of 20 ppt per day to create the 70 ppt health advisory limit for both PFOA and PFOS, the EPA will likely create a new lower health advisory limit.

EPA also announced that the drinking water regulation for GenX would be coming in Spring 2022. In addition, the EPA’s Roadmap sets forth the intention to set a national primary drinking water regulation for PFOA and PFOS through a proposed rule in Fall 2022 to be finalized by the Fall of 2023. This action will be in addition to the Fourth Regulatory Determination published in March 2021, in which EPA declared it would regulate PFOA and PFOS in drinking water. In the next few months, the EPA is expected to finalize the Fifth Unregulated Contaminant Monitoring Rule (UCMR 5), which is expected to provide critical information on the frequency and levels of 29 PFAS compounds in national drinking water systems.

Utilizing data on PFOA and PFOS, in Winter 2022, EPA will produce recommendations on the criteria for aquatic life; this will not include a recommendation for GenX compounds. Then taking into account drinking water and fish consumption, EPA will develop a human-health criteria for PFOA and PFOS around Fall 2024.

Also, by the end of 2024, the EPA intends to utilize Effluent Limitations Guidelines (ELGs) to establish nationwide technology-based regulatory limits on the level of specified pollutants in wastewater discharged into surface waters and municipal sewage treatment facilities. In addition, the EPA is expected to propose a rule in Summer 2023 (to be finalized by Summer 2024) that would restrict PFAS discharges from industrial categories. Included in this action, the EPA will conduct studies to gather information on other areas of industrial discharge where data is currently limited as well as monitor the phase-out of industrial use of PFAS categories including pulp, paper, paperboard, and airports—this specific component is expected to be addressed in the ELG Plan 15 in Fall

2022. To further ensure minimal PFAS entrance into the stream of commerce, EPA will more stringently apply its pre-manufacture notice review process for new PFAS and impose strict safety requirements as a condition of new use.

## Remediation

Although there have been few concrete remediation paths provided, the EPA has begun laying the foundation for future remediation and recovery actions, which are expected to be finalized once methods to perform the remediation are developed. The Roadmap has given little guidance on how to remove PFAS from contaminated resources because more research is needed to understand how a cleanup could be done effectively. As of now, granulated active carbon systems have been used to remove some PFAS compounds from water systems. However, new research has shown that granulated active carbon is not effective against all PFAS compounds, such as GenX compounds.

Critical to current and future holders of a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit, the EPA is seeking to leverage existing and future permit processes to reduce discharges of PFAS at the source. Specifically, EPA will propose that NPDES permits: 1) contain conditions based on production elimination and substitution where a reasonable alternative to using PFAS is available; 2) require best management practices to address PFAS containing firefighting foams for Stormwater permits; 3) require enhanced public notification and engagement with downstream communities and public water systems; and 4) require pretreatment programs to include source control and best management practices to protect wastewater treatment plant discharges and biosolid applications.

Additionally, the EPA has initiated the process to propose adding PFOA, PFOS, PFBS, and GenX compounds to the Resource Conservation and Recovery Act (RCRA) Hazardous Constituents list. Adding these compounds to the list would make them subject to corrective action. Following the designation, the

EPA intends to clarify the regulations under the RCRA Corrective Action Program so that all PFAS compounds can be subject to clean up through this process, without EPA having to first add each individual compound.

Lastly, EPA is expected to propose a rule in Spring 2022 which would designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). When finalized, this designation would allow the EPA and other federal agencies to seek compensation for the cleanup and remediation of PFOA and PFOS from responsible parties. In addition to the designation of PFOA and PFOS, in the Spring of 2022, EPA will be seeking comments on a whether the agency should also designate precursors to PFAS, additional PFAS, and groups or subgroups of PFAS as hazardous substances under CERCLA. The addition of any PFAS compound under CERCLA opens up the possibility of citizen suits against water and wastewater agencies and municipalities.

## Conclusion and Implications

The EPA Roadmap approaches PFAS control using research, restrictions and remediation. The research performed will inform additional restrictions and new remediation measures. Although the EPA Roadmap currently lacks clear restrictions or remediation requirements, it is evident that the EPA is attempting to create standards regards PFAS and related chemicals based on scientific research that, in the EPA's view, best protect human health and the environment. As the EPA PFAS Council indicated, it will be proposing actions to both best address PFAS at the source, while also taking actions to ensure both human and environmental health are prioritized and protected. These additional actions could add additional checks and steps agencies will need to take to ensure compliance with new regulations. EPA's Roadmap on PFAS is available online at: [https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap\\_final-508.pdf](https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf).

(Steve Anderson)

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**PENALTIES & SANCTIONS**

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**RECENT INVESTIGATIONS, SETTLEMENTS,  
PENALTIES AND SANCTIONS****Civil Enforcement Actions and Settlements—  
Water Quality**

•November 10, 2021—EPA fined the County of Hawai'i \$28,500 for failure to meet the milestone requiring complete design of the Pāhala Wastewater Treatment Facility in Pāhala, Hawaii. In June 2017, EPA and the County of Hawai'i voluntarily entered into an order for the Pāhala Community Large Capacity Cesspools Closure Project. Under the agreement, approximately 272 properties served by the LCCs in the Pāhala and Nā'ālehu communities will be connected to the new County wastewater treatment facilities. An additional 95 properties not currently served by the LCCs in the Pāhala and Nā'ālehu communities will receive access to the new wastewater treatment facilities.

•November 15, 2021—EPA has assessed penalties totaling \$81,474 against two commercial ships over inspection, monitoring, and reporting violations in California and Louisiana. The MSC Aurora container ship and the Western Durban bulk carrier both violated EPA's Vessel General Permit (VGP) issued under the Clean Water Act (CWA). From November 2016 to July 2021, the MSC Aurora failed to conduct required routine visual inspections for 11 voyages to Ports of Long Beach, Los Angeles, and Oakland. The MSC Aurora also failed to submit timely annual reports to EPA for 2016—2019. For these multiple inspections and reporting violations, Mediterranean Shipping Company, SRL has agreed to pay a civil penalty of \$66,474 under the settlement. In August 2017, the Western Durban failed to perform monthly functionality monitoring and an annual calibration of the ballast water treatment system before discharging ballast water at the Port of New Orleans. The ship also failed to conduct required biological monitoring after the discharge. EPA assessed penalties totaling \$15,000 to the Tokyo-based Victoria Ship Management company.

•November 17, 2021—The Berkeley County Public Service Sewer District in West Virginia will pay a \$518,400 penalty, make extensive improvements to its sewer and stormwater systems, and implement a state-directed supplemental environmental project valued at \$1.14 million under a settlement with federal and state authorities, the U.S. Department of Justice, U.S. Environmental Protection Agency (EPA) and West Virginia Department of Environmental Protection (WVDEP) announced. The settlement resolves chronic alleged violations of the federal Clean Water Act and the West Virginia Water Pollution Control Act. The settlement requires Berkeley to pay civil penalties of \$432,000 to the United States and \$86,400 to WVDEP. Berkeley will satisfy remaining penalties owed to WVDEP by implementing a supplemental environmental project. This project requires Berkeley to provide treatment for sewage from the White Bush Landing and Midway mobile home parks in Falling Waters, West Virginia, a project valued at \$1,145,000. In addition to the penalty, the settlement requires extensive improvements to Berkeley's sewer and stormwater systems at an EPA-estimated cost of \$50 million to ensure compliance with federal and state pollution control laws. Improvements include: 1) Establishing a comprehensive MS4 program; 2) Assessing capacity, mapping, and developing a medial measures plan for the sewage collection system; 3) Evaluating and taking corrective actions at underperforming treatment systems.

Training employees; 4) Developing and implementing a pump station inspection program and corrective action plan; 5) Conducting inspections and taking corrective actions to prevent stormwater and groundwater from entering sewer pipes; 6) Educating the public on handling/disposal of fats, oil and grease; 7) Requiring reports to keep EPA and WVDEP informed of problems and progress toward various consent decree milestones.



### **Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste**

•October 20, 2021—EPA reached a settlement with hazardous waste treatment company Clean Harbors for improper management of hazardous waste at its facility in San Jose, California. Improper storage and management of hazardous wastes poses threats to human health or the environment. The company has agreed to pay a \$25,000 civil penalty. Clean Harbors' facility in San Jose provides wastewater treatment for generators of corrosive liquids, as well as fuel blending. EPA conducted an inspection in 2019 under the federal Resource Conservation and Recovery Act and found that the facility was operating out of compliance with their California Department of Toxic Substance Control (DTSC) hazardous waste permit by failing to replace metal tags on equipment used to transfer hazardous waste, which can help readily distinguish the equipment required to be monitored under hazardous waste management regulations. In addition, Clean Harbors failed to separate containers of incompatible hazardous waste during storage, which can lead to employee injuries or a release to the environment through fire or explosives.

•November 9, 2021—EPA reached a settlement with the Phillips 66 Company for violation of limits on the Company's storage of hazardous waste at the Phillips 66 Carson, Calif. refinery. Under this agreement, Phillips 66 will pay a penalty of \$87,276 and process the remaining excess oil-based hazardous waste into usable product by December 31, 2021. The company violated the Resource Conservation and Recovery Act (RCRA). Instead of disposing of the oil-based hazardous waste off-site, Phillips 66 has agreed to provide EPA more oversight of the excess material until it is recycled into useable product.

•November 10, 2021—EPA penalized Nutrien Ag Solutions Inc. for allegedly applying pesticides that were cancelled by the federal government and applying them in a manner inconsistent with the products' labeling. The Colorado-based company, which sells, distributes, and applies pesticides mainly for farming operations, will pay \$668,100. According to EPA, Nutrien Ag Solutions violated the Federal Insecticide, Fungicide, and Rodenticide Act when it allegedly used two dicamba products in a manner

inconsistent with the approved label on at least 27 occasions, in violation of the Agency's cancellation order. Further, EPA alleged that the company violated the law on 33 occasions when it applied other dicamba products on multiple Kansas farms during periods of high wind speeds in violation of pesticide label requirements.

•November 15, 2021—EPA announced a settlement with US Technology Media (UST Media) to resolve alleged violations of hazardous waste environmental laws at UST Media's facilities in Georgia, Ohio, and Utah. Under this settlement agreement, UST Media will pay a \$200,000 civil penalty. This settlement resolves alleged violations of the Resource Conservation and Recovery Act (RCRA) and related state laws and regulations. The alleged RCRA violations include improper management and storage of hazardous waste without a RCRA permit. UST Media generated a spent blast media (SBM) that is toxic for cadmium, chromium and lead and accumulated it at all three of UST Media's facilities. As part of this settlement, UST Media will cease receipt of SBM at all facilities until the company disposes of the 3.4 million pounds of this material currently on site in compliance with the Consent Agreement. If the company chooses to accept hazardous SBM in the future, it will do so in compliance with all applicable hazardous waste laws.

•November 17, 2021—EPA recently finalized a settlement with MacDermid Enthone Inc. (MacDermid), a chemical manufacturer, to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA) at the company's facility in West Haven, Conn. EPA performed an inspection of the facility and found several RCRA regulatory violations, including the failure to determine if some of its waste chemicals were hazardous, the failure to properly label hazardous waste containers and a hazardous waste tank, and the failure to provide adequate aisle space in the facility's hazardous waste storage area for employees and emergency personnel. Under the settlement, MacDermid agreed to pay a penalty of \$86,769 for alleged violations of RCRA regulations at its chemical manufacturing facility. The company has certified that it corrected its violations and will maintain compliance with federal and state hazardous



waste laws. As a result of EPA's enforcement action, MacDermid corrected its RCRA violations and established new compliance procedures, including new procedures to ensure that the facility's hazardous wastes are properly identified and handled. MacDermid also permanently closed and removed a 500-gallon underground hazardous waste storage tank from the facility.

### **Indictments, Sanctions, and Sentencing**

- October 26, 2021—A Tennessee woman pleaded guilty to fabricating discharge monitoring reports required under the Clean Water Act and submitting those fraudulent documents to state regulators in Tennessee and Mississippi. According to court documents and information in the public record, DiAne Gordon, 61, of Memphis, was the co-owner and chief executive officer of Environmental Compliance and Testing (ECT). ECT held itself out to the public as a full-service environmental consulting firm and offered, among other things, sampling and testing of stormwater, process water and wastewater. Customers, typically concrete companies, hired ECT to take samples and analyze them in a manner consistent with Clean Water Act permit requirements. Gordon claimed to gather and send the samples to a full-service environmental testing laboratory. The alleged results were memorialized in lab reports and chain of custody forms submitted to two state agencies, Mississippi Department of Environmental Quality (MDEQ) and the Tennessee Department of Environment and Conservation (TDEC), to satisfy permit requirements. In reality, Gordon fabricated the test results and related reports. She even forged documents from a reputable testing laboratory in furtherance of her crime. Gordon then billed her clients for the sampling and analysis. Law enforcement and regulators quickly determined that Gordon created and submitted, or caused to be submitted, at least 405 false lab reports and chain of custody forms from her company in Memphis to state regulators since 2017. Pursuant to the terms of her plea agreement, Gordon will pay \$201,388.88 in restitution to the victims of her crime.

- November 15, 2021—Under a proposed settlement to resolve liability for natural resource damages, Honeywell International Inc. and others have agreed to a settlement with a value of approximately

\$6.25 million to restore natural resources and their services, and to preserve, in perpetuity, over more than 70 acres of natural undeveloped habitat along the Buffalo River in Buffalo, New York. The complaint alleges that Honeywell is the successor to Allied Chemical Corp./Buffalo Color Corp., which manufactured dyestuffs and/or organic chemicals at a facility along the river, and discharged process and cooling waters containing hazardous substances into the river from the mid-1960s to the early 1970s. As part of the proposed settlement, Honeywell entered into separate agreements with ten other entities that were also allegedly responsible for releasing hazardous substances into the river. The settlement will restore native species on over 70 acres of land that will be preserved in perpetuity in its undeveloped condition along the Buffalo River in an otherwise predominantly urban environment. The settlement also includes the payment of \$4.25 million for proposed natural resource restoration projects to create natural habitat and access to the river for the use and enjoyment of the public. A portion of the recovery will also be used to fund cultural and ecological restoration programs on behalf of Tuscarora Nation.

- November 18, 2021—San Diego-based JM Fisheries LLC, G.S. Fisheries Inc., the companies' manager, and the chief engineer of the commercial fishing vessel Capt. Vincent Gann have agreed to pay a total of \$725,000 in civil penalties to settle federal Clean Water Act claims related to oil pollution violations on the vessel. The companies and their manager have also agreed to perform corrective measures to prevent future Clean Water Act violations. The United States alleges in the complaint that, on April 20, 2018, the defendants discharged oil and oily mixtures from the fishing vessel Capt. Vincent Gann's engine room bilge into Pago Pago Harbor, American Samoa, while performing repairs on the vessel. The complaint further alleges a host of violations of pollution control regulations, including a failure to properly maintain and operate the vessel's onboard oily water treatment system and a non-approved bypass modification to the system. To resolve the claims in the complaint, the consent decree requires the companies and company manager James Sousa to perform corrective measures on all vessels they own or operate. The stipulated settlement agreement requires the Capt.

Vincent Gann's chief engineer, Edward DaCosta, to pay a civil penalty of \$5,000 to resolve the claims alleged against him in the complaint. This penalty

amount is based on a demonstrated limited ability to pay a higher penalty.  
(Andre Monette)

## LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT IN GEORGIA UPHOLDS CLEAN WATER ACT  
CITIZEN SUIT PFAS COMPLAINT  
AGAINST INDUSTRIAL SEWAGE DISCHARGES

A Georgia U.S. District Court has accepted a class action citizen suit complaint and upheld it against Motions to Dismiss from numerous carpet and other manufacturers and a publicly owned treatment works (POTW) in Dalton, Georgia. The manufacturers are all alleged to have known that their industrial discharges contained per-and polyfluoroalkyl substances (PFAS) that these chemicals are contaminants that resist treatment by the POTWs, and are causing pass through of harmful quantities of the chemicals. The passed-through contamination is entrained in sludge that is sprayed upon a large land application area adjacent to the Conasauga River in Dalton Georgia. From there it is moves by natural surface and groundwater movement into the river. The river water is soon drawn into the Rome, Georgia water supply.

### The Claims

PFAS are a group of synthetic chemicals that repel oil and water and are resistant to heat and chemical reactions. Due to their chemical stability and oil and water repellent properties, PFAS have been widely used in carpet and textile production to provide water and stain resistance. These same properties also make PFAS persistent in the environment once introduced, and there is no known environmental breakdown mechanism. PFAS are toxic and have been linked to adverse health effects, including cancer, immunotoxicity, thyroid disease, ulcerative colitis, and developmental defects to fetuses. Because PFAS are water soluble and highly mobile, contaminated drinking water is a meaningful source of human exposure to PFAS.

The plaintiff class of Rome drinking water consumers alleges long term harm and threats to their health from the drinking water, which contain PFAS. The City of Rome filed and is maintaining a similar suit. There are important pendant state law claims in this case, as well as federal Clean Water Act allegations against the Dalton POTW and solid waste authority.

### The District Court's Decision

In *Johnson v. 3M*, 2021 U.S. Dist., \_\_\_F. Supp.4th\_\_\_; 2021 WL 4745421, (Sept. 20, 2021) the Dalton utilities defendants, *viz.* the City of Dalton d/b/a Dalton Utilities (Dalton Utilities), and the Dalton Whitfield Solid Waste Authority DWSWA) defendants had filed motions to dismiss. They argued that there was insufficient specificity and timeliness to the citizen suit notice, such that they were not adequately apprised of the facts or violations alleged. The District Court made short work of the municipal defendants' arguments. Noting that details of a history of repeated violations were provided to the defendants in mid-2020, more than 60 days before the case reached the district court via a defense removal action, the court finds their motion unavailing.

Additionally, Dalton argued that the citizen suit allegations were a disguised end-run around the State of Georgia's permitting process. As such, they were allegedly an unlawful collateral attack on the state permit, and the plaintiffs should not be allowed to pursue them in federal court. The District Court quickly dispatched that argument as a mischaracterization of the complaint, which is a straightforward assertion of continuing daily violations of the federal Clean Water Act that is permitted by law, irrespective of the state's process.

Dalton also argued the complaint improperly asserts that the land application system requires an NPDES permit, because it is a non-point source.

The court cited several relevant Georgia and other federal court cases determining that equipment such as is employed in Dalton would characterize the facility as a point source. *Cf. Flint Riverkeeper, Inc. v. Southern Mills, Inc.*, 276 F.Supp.3d 1359, 1367-68 (M.D. Ga. 2017). Thus, there was factual and legal doubt as to the assertions of Dalton, and dismissal was not appropriate.

Dalton's remaining legal defense, that the pursuit of the Clean Water Act complaint by plaintiffs, deprive it of due process was unavailing. Unlike cases

where defendants that possess a permit under the National Pollutant Discharge Elimination System may claim a permit shield, the land application site (LAS) had no NPDES permit. Dalton conceded that the state agency had issued the LAS permit based on Dalton Utilities' representation that its LAS was a "no discharge system." The District Court found that:

Plaintiff's Complaint adequately alleged that the LAS system does not operate according to its design as a 'no discharge system,' but instead Dalton Utilities' operation of the LAS system results in discharges of PFAS to the Conasauga River and its tributaries.

The court found no due process violations.

The Solid Waste Authority, unlike the POTW, is accused by plaintiffs of being an illegal discharger by reason of discharges of its leachate from solid waste landfills it operates. The leachate allegedly contains PFAS that are passing through the POTW and escaping to the rivers after going through the treatment works. The central legal violation charged against the Solid Waste Authority is a violation of national pretreatment standards. (40 C.F.R. § 305(a)(1) provides that a user shall not introduce into a POTW any pollutant(s) which cause Pass Through or Interference.)

"Pass Through" is defined by the CWA as a discharge which:

...exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources is a cause of a violation of any requirement of the POTW's NPDES permit. 40 C.F.R. § 403.3(p).

In addition to the "pass through" allegations, the Solid Waste authority was accused of violating the General Stormwater Permit regulations. The court

found unpersuasive the argument that there were not specificity of industrial pollutants in the complaint, since the PFAs are clearly man-made non-stormwater contents in the SWA's stormwater.

## State Law Claims

As to the numerous manufacturing defendants, the plaintiffs' allegations were all based on state common law violations of negligence, negligence *per se*, and nuisance, rather than federal CWA violation allegations. (These counts were the heart of the original case as filed in state court.) Given that the case was removed to federal court, the District Court maintained the counts under doctrines of pendant jurisdiction and generally upheld the complaints against dismissal motions. It finds that the "economic loss rule" is inapplicable where the alleged personal injury is involved and a duty of care by the defendants is present. It found that duty present in the circumstances of the knowing pass-through violations alleged. The applicability of state common law defenses mentioned and other aspects of Georgia law is quite extensive and worthy of review, but beyond the scope of this article.

Chemical suppliers were also included as defendants. The case against so called "supplier defendants," based on state common law, is generally dismissed.

## Conclusion and Implications

This holding and decision signal that irrespective of whether or how soon the federal EPA adopts specific standards regarding the use, discharge or disposal of PFAs or materials containing PFAs, the courts of the United States may provide a remedy for persons exposed to these sorts of chemicals, especially where the discharge or disposal occurs or has occurred when the dischargers know that the PFAs are present and possibly dangerous to human health or the environment.

(Harvey M. Sheldon)

## JUDICIAL DEVELOPMENTS

## D.C. CIRCUIT FINDS AGENCY'S EXPRESSED INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS NOT SUFFICIENT TO AVOID MOOTING OF LAWSUIT

*State of Alaska v. U.S. Department of Agriculture*, \_\_\_F.4th\_\_\_, Case No. 17-5260 (D.C. Cir. Nov. 16, 2021).

An appeal challenging the perennially-controversial Roadless Rule's application to National Forests in Alaska was set for oral argument before the D.C. Circuit when it was rendered moot, in part, by adoption of an exemption for Alaska's Tongass National Forest. That exemption was a result of a notice-and-comment rulemaking process by the Trump administration. The incoming Biden administration made clear its intention to initiate a new process to reimpose the Rule on the Tongass. Nonetheless, the D.C. Circuit Court of Appeals affirmed the dismissal of the state's challenge as moot.

### Background

In 2001, the Forest Service, within the Department of Agriculture, adopted the "Roadless Rule," which prohibits road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands. 66 Fed.Reg. 3244 (Jan. 12, 2001). The State of Alaska challenged the Roadless Rule on the basis of its impact on use of the Tongass and the Chugach National Forests, which together comprise vast areas of the state. The state's focus has been on the rule's impact on the timber harvesting industry and "the communities dependent on" the Tongass' "resources."

Alaska dismissed its first suit challenging the Roadless Rule when the Department of Agriculture agreed to exempt the Tongass. That 2003 exemption, however, was struck down by a U.S. District Court in 201—the current lawsuit promptly followed. This 2011 lawsuit was dismissed on statute of limitations grounds, reinstated by the District of Columbia Circuit, and then summary judgment was granted to the Department of Agriculture. Before oral argument on the state's subsequent appeal, in 2018 the agency agreed to initiate a new rulemaking process to, once again, exempt the Tongass from the Roadless

Rule, and in 2021 "issued a final rule exempting the Tongass from the Roadless Rule." 36 C.F.R. § 294.50 (2021). However:

...after the 2020 Presidential election, the Agriculture Department announced its intention to propose a new rulemaking that would 'repeal or replace the 2020 Tongass Exemption' from the Roadless Rule.

### The D.C. Circuit's Decision

The 2021 exemption rendered moot that portion of the state's 2011 lawsuit challenging application of the Rule to the Tongass:

Finding a case 'plainly moot' when the agency order has been 'superseded by a subsequent ... order' is so routine that our court usually 'would handle such a matter in an unpublished order.' Citing *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992).

The D.C. Circuit issued an opinion to address the state's arguments that 1) the "voluntary cessation" doctrine should be applied against a federal agency, and 2) "the prospect of a new regulation reimposing the Roadless Rule on the Tongass saves the case from mootness."

### The Voluntary Cessation Doctrine

The voluntary cessation doctrine:

...prevent[s] a private defendant from manipulating the judicial process by voluntarily ceasing the complained of activity, and then seeking a dismissal of the case, thus securing freedom to 'return to his old ways.' *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990).



Clarke articulated “serious doubts” as to the appropriateness of applying this doctrine to federal agencies:

[I]t would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose. 915 F.2d at 705.

The Circuit Court “reiterated” its concerns in *National Black Police Ass’n v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997), and endorsed those concerns once again by declining to assign these underhanded motives to the Department of Agriculture.

### **Analysis under the *National Wildlife Federation* Decision**

The state’s second argument relied on a Department of Agriculture’s 2021 letter to the District Court, in which is stated its intention to initiate a new rulemaking process to eliminate the Tongass exemption from the Roadless Rule. The letter also stated:

Upon publication, the proposed rule will be subject to notice and comment proceedings. As part of such proceedings—and before promulgating any new final rule to re-impose the 2001 Roadless Rule or similar management prescriptions to the Tongass National Forest—USDA will consider environmental impact reviews under the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), and timber market analysis under the Tongass Timber Reform Act, 16 U.S.C. § 539d, that were not available when USDA first promulgated the 2001 Roadless Road (without a Tongass Exemption). Unless and until USDA issues a new final rule for inventoried roadless areas within the Tongass National Forest, the 2020 Tongass Exemption will remain in effect and the Roadless Rule ‘shall not apply to the Tongass National Forest.’ See 36 C.F.R. § 294.50 (2021).

The Circuit Court found these circumstances to be “directly on point” with those presented in *National Wildlife Federation v. Hodel*, 839 F.2d 694, 742 (D.C.

Cir. 1988), in which the defendant federal agency suspended a challenged rule when that rule was remanded for agency reconsideration by the District Court, at the same time announcing the intention “to propose new regulations.” *Ibid.* The challengers in *that* case argued that their suit should not be mooted as the intent to impose new regulations presented an issue “capable of repetition, yet evading review.” Quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This, however, was:

. . .not a clever manipulation of regulatory and appellate procedure designed to escape review; it was merely a prudent response to the district court’s remand order. *National Wildlife Federation v. Hodel*, 839 F.2d at 742.

Were new regulations adopted, they would then be challengeable.

A more fundamental problem with continuing to litigate in the absence of currently-applicable regulations is the federal court’s lack of authority to issue advisory opinions. The court:

. . .cannot presume that any such future rule-making will repeal the Tongass exemption in toto [and d]oing so would be inconsistent with the purpose of notice-and-comment rulemaking under the Administrative Procedure Act.

Furthermore, the court stated:

[T]o determine whether the Roadless Rule will be reapplied to the Tongass would require us to speculate about future actions by policymakers. The Rule itself has been controversial from its inception. See *Organized Village of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 979-81 (9th Cir. 2015) (*en banc*) (M. Smith, J., dissenting). New notice-and-comment rulemaking, and new environmental assessments, take time. Intervening events, such as elections or changes in policy priorities, bearing on these processes are unpredictable. The content of any future regulation is currently unknowable.

Thus, the dismissal as moot of the challenge to the Roadless Rule, as applied to the Tongass, was affirmed.

## Conclusion and Implications

The dramatic shifts in policy aims and priorities of the executive branch over the past six years continue to percolate through the federal courts, as years-long litigations take dramatic twists and turns. Litigants, having invested many years and substantial resources in a case, and with the potential for a changing of

the guard (comparatively) just around the corner, are understandably loathe to see their claims mooted. Nonetheless, longstanding and deeply engrained principals of judicial restraint and economy virtually pre-ordained the outcome here. The court's opinion is available online at: <https://www.leagle.com/decision/infco20211116147>.  
(Deborah Quick)

## FIRST CIRCUIT FINDS AGENCY'S EXPRESS INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS INSUFFICIENT TO AVOID MOOTING A GROUNDWATER CONTAMINATION CLAIM

*United States v. Puerto Rico Industrial Development Company*,  
\_\_\_F.4th\_\_\_, Case No. 19-1874 (1st Cir. Nov. 17, 2021).

Applying the U.S. Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, \_\_\_U.S. \_\_\_, 140 S. Ct. 1462, 1473, 206 L.Ed.2d 640 (2020), the First Circuit Court of Appeals has clarified that property owner liability for Superfund clean-up costs of groundwater contamination does not depend on the U.S. Environmental Protection Agency establishing the exact process by, or location at, which release of the contaminant occurred.

### Background

Since at least 1968, the Puerto Rico Industrial Development Company (PRIDCO) has owned land in a southeastern coastal area of Puerto Rico in the Municipality of Maunabo (Property). Consistent with its purpose as a public corporation, PRIDCO developed the Property with "industrial structures" that, from 1969, were leased for manufacturing uses involving the production of modular circuit prints, biomedical and reactive instruments, solar panels, laminated bedroom furniture, fruit juice, guitars, and prefabricated piping for frame walls.

Maunabo Well #1, a municipal water supply well, is located adjacent to the southern boundary (and downgradient) of the Property. In the period between 2001 and 2004, tests detected elevated levels of volatile organic compounds (VOCs) including tetrachloroethene (PCE), trichloroethene (TCE), and cis-1,2-dichloroethene (cis-1,2-DCE) in the drinking water of municipal water customers from Well #1.

Tests in 2002 revealed that the groundwater associated with the well contained the same compounds, with the concentration of PCE exceeding the federal maximum contaminant level.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, authorizes the U.S. Environmental Protection Agency (EPA) "to investigate and respond to the release of hazardous substances, contaminants and pollutants into the environment," including by compiling a list of "contaminated sites for cleanup, commonly known as Superfund sites," undertake itself "the necessary response measures as to Superfund site[s]" and sue potentially responsible parties (PRPs) for reimbursement of the costs of those remedial actions. *Atl. Richfield Co. v. Christian*, \_\_\_U.S. \_\_\_, 140 S. Ct. 1335, 1346 (2020). PRPs are defined in the statute to include:

...the owner and operator of a vessel or a facility ... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. 42 U.S.C. § 9607(a).

EPA began investigating the Maunabo Area Groundwater Contamination Superfund Site (Site), which includes both the Property and Maunabo Well #1, in 2005, adding the Site to the National Priorities List in 2006. 71 Fed. Reg. 56399, 56403 (Sept. 27,

2006). The investigation identified a “contaminated plume,” the cis-1,2-DCE plume’ (or the PRIDCO Plume) as being located “under the surface of PRIDCO’s property and extend[ing] downgradient towards Maunabo Well #1.” Further details include that the PRIDCO Plume contains high concentrations of TCE and cis-1,2-DCE, a degradation product of TCE. The EPA reports show there are no test results which have detected these two contaminants on the Property in the soil directly above the PRIDCO Plume. Those same reports state that:

[t]he configuration of the cis-1,2-DCE plume indicates that a release of Site-related contaminants ... occurred at or near the [PRIDCO] property.” That is where cis-1,2-DCE “exceed[ed] the groundwater screening criteria.

The parties agreed the contamination is not naturally occurring.

The investigation culminated in a 2021 Final Remedial Investigation/Feasibility Study Report, on which PRIDCO commented to contest its identification as a PRP. EPA replied that:

... ‘site related contamination was detected in the groundwater on the [PRIDCO] property and immediately downgradient [thereof],’ which follows the direction the groundwater flows.

EPA issued a Record of Decision selecting an active treatment method--air sparging--as the appropriate remedial treatment for the PRIDCO Plume, and subsequently sought from PRIDCO contribution for cleanup costs. The District Court entered summary judgment for EPA on the basis that the agency had established a *prima facie* case for PRIDCO’s liability under CERCLA.

### The First Circuit’s Decision

CERCLA provides that:

...the owner and operator of a ... facility. . .from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . . 42 U.S.C. § 9607(a). . . . [P]roperty owners are strictly liable for the hazardous materials on their property, regardless of whether or not they

deposited them there. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010).

To establish a *prima facie* case for liability against PRIDCO as a property owner, EPA has the burden of proving that the Property constitutes a ‘facility’ as defined by 42 U.S.C. § 9601(9); PRIDCO owns the facility, *id.* §§ 9601(20), 9607(a); there was a release, or threatened release of a hazardous substance’ from the facility, *id.* §§ 9601(14), (22), 9607(a); and, as a result, the United States incurred response costs ‘not inconsistent with the national contingency plan,’ *id.* §§ 9601(23)–(25), 9607(a).

This is in contrast with the agency’s burden of proof to establish the liability of past owners and operators, arrangers, and transporters, with respect to whom EPA must prove that they engaged in “disposal” of the contaminants. 42 U.S.C. § 9607(a).

“Release” is defined under CERCLA as:

... any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. 42 U.S.C. § 9601(22) (emphasis supplied by the Court).

Courts have broadly construed this definition:

...to include passive migration into the environment, *see United States v. CDMG Realty Co.*, 96 F.3d 706, 715 (3d Cir. 1996) (concluding that Congress used the term ‘leaching’ in its definition of ‘release’ but not of ‘disposal’ to include passive migration only for the former); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997) (same).

Thus, the First Circuit rejected PRIDCO’s argument that EPA had failed to prove PRIDCO had taken an active part in the contamination of the Property. It further rejected PRIDCO’s contention that EPA had failed to prove its allegation in the pleadings that the release occurred, actively, “at” the Property, rather than, passively, “from” the Property:

It is the statute that governs here, not the language used by the United States in its pleadings. As just explained, the undisputed evidence satisfies the ‘release’ element as provided in the statute.

The presence of the contaminants linked to the Property in the downgradient PRIDCO Plume and Maunabo Well #1 was sufficient to establish PRIDCO's property owner liability.

### Applying the *County of Maui* Decision

Applying *County of Maui v. Hawaii Wildlife Fund*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1462, 1473, 206 L.Ed.2d 640 (2020), the Court of Appeals rejected PRIDCO's argument that EPA was required to identify the specific source of the contamination. In *County of Maui* the Supreme Court explained that:

...in the context of groundwater pollution under the Clean Water Act, that 'the specific meaning of the word 'from' necessarily draws its meaning from context.'

As applied here, undisputed evidence established the presence of the contaminants in the groundwater at the Property, and that they had migrated into

Maunabo Well #1 and in the tap water of municipal water customers supplied by Well #1:

Because groundwater flows and is not static, the hazardous substances have migrated 'from' the groundwater in the facility, to the groundwater in the environment, constituting a release.

EPA was not required to establish soil contamination at the Property from which the groundwater contamination occurred.

### Conclusion and Implications

The elements to establish strict liability of property owners for groundwater contamination continues to be clarified by the Courts of Appeal in the aftermath of *County of Maui*. Here, a clear chain of chemical evidence was sufficient to establish responsible party liability in the absence of any identification of a specific industrial process or release location. The Court of Appeals' opinion is available online at: <http://media.ca1.uscourts.gov/pdf/opinions/19-1874P-01A.pdf>. (Deborah Quick)

## NINTH CIRCUIT FINDS THE CLEAN WATER ACT ALLOWS EPA TO CONSIDER ECONOMIC COMPLIANCE COSTS IN APPROVING WATER QUALITY STANDARDS AND VARIANCES

*Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency et al.*, 15 F.3d 966 (9th Cir. 2021).

The Ninth Circuit, on October 6, 2021, recently affirmed in part and reversed in part the judgment of the U.S. District Court for Montana, which concluded that: 1) the U.S. Environmental Protection Agency (EPA) reasonably interpreted the federal Clean Water Act (CWA) as allowing EPA to consider the economic impact associated with mandating compliance with the CWA's base water quality standards (affirmed); and 2) that EPA's 2017 approval of a 17-year variance (2017 Variance) from base CWA standards, as requested by the State of Montana, was arbitrary and capricious (reversed).

At issue on appeal was whether the District Court erred in 1) rejecting the plaintiff's claim that EPA violated the Administrative Procedure Act (APA) by considering compliance costs when granting the

2017 Variance; and 2) ordering that the grant of the 2017 Variance be partially vacated because it did not require compliance with "the highest attainable condition at the outset of the term" and with "Montana's base water quality standards by the end of the term."

### Factual and Procedural Background

In 2017, Montana requested EPA approval of the 2017 Variance. The 2017 Variance would apply to 36 municipal wastewater treatment facilities for up to 17 years and would permit covered facilities to release into "wadeable streams" levels of nitrogen and phosphorous otherwise forbidden under the state's base water quality standards. In its application, Montana submitted evidence that achieving compliance with state base standards would necessitate the adoption



of reverse osmosis technology at each facility, at high economic cost. Montana claimed that adopting this technology “would result in substantial and widespread economic and social impact on the surrounding communities.”

EPA’s regulations authorize states to seek a variance from base water quality standards where compliance can be shown to be infeasible. In evaluating whether a state’s compliance with base water quality standards is feasible, EPA’s regulations permit it to consider, among other things, whether compliance with state standards “would result in substantial and widespread economic and social impact.” Even then, a variance must set interim limits that “represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the variance,” and may only last “as long as necessary to achieve the highest attainable condition.” Prior to Montana’s application, EPA had issued guidance that a substantial economic impact existed when the average annual cost per household of achieving compliance exceeded 2 percent of the median household income in the affected community.

EPA determined compliance would impose such costs on the local Montana communities and granted the 2017 Variance. It concluded that the 2017 Variance’s interim limits were the highest attainable condition for each of the 36 facilities, and its 17-year term was no longer than necessary to achieve such conditions.

## At the U.S. District Court

Plaintiff Upper Missouri Waterkeeper initiated suit against EPA, alleging the CWA prohibited EPA from taking economic compliance costs into account when considering a variance request.

The District Court ruled against the plaintiff on this claim, noting that EPA’s interpretation of the CWA—that it was permitted to take the economic costs associated with attaining compliance into account—was reasonable. However, the court took issue with the 2017 Variance’s 17-year term, deeming it “arbitrary and capricious” because it did not require compliance 1) “with the highest attainable condition at the outset of the term” and 2) “with Montana’s base water quality standards by the end of the term.” The court entered a summary judgment order of a partial *vacatur* of the 2017 Variance’s approval.

On appeal, the plaintiff sought reversal of the lower court’s rejection of its Administrative Procedure Act claim. EPA (joined by intervenor-defendants) sought reversal of the order partially vacating its approval of the 2017 Variance.

## The Ninth Circuit’s Decision

### Administrative Procedure Act Challenge

EPA based its authority to consider compliance costs on its interpretation of 33 U.S.C. § 1313(c)(2) (A) (Provision). The Provision sets out factors to be considered in establishing water quality standards, but not in granting variances. The plaintiff alleged the Provision, which failed to expressly include compliance costs as one of the factors to be considered, provided EPA no authority to consider such costs when evaluating a variance. EPA’s regulations interpret the Provision as requiring states to adopt water quality standards that protect identified “beneficial uses” unless a state can show, through a use attainability analysis, that attainment of the water quality necessary to support an identified beneficial use is not feasible for one of several reasons, including that the controls necessary to protect those uses would result in substantial and widespread economic and social impact.

EPA’s variance regulation built on this same framework, by first recognizing that states may decline to designate a use or remove a previously designated use by conducting a use attainability analysis and making the required showing that attainment of such a use is not feasible. If approved, that action would remove the designated use and associated water quality criteria from the water quality standard as applied to all dischargers and all pollutants. EPA next reasoned that the variance procedure was an environmentally preferable tool over changing a designated use, because variances retain designated use protection for all pollutants as they apply to all sources with the exception of those specified in the variance.”

Satisfied that the Provision was relevant to the grant of variances generally, the court employed the *Chevron* two-step analytical framework to consider whether to defer to EPA’s interpretation of the Provision here.



### **Chevron Analysis: Step One**

As a preliminary step, the *Chevron* analysis asked the court to consider whether Congress had “directly spoken to the precise question at issue.” Concluding at the outset that Congress remained silent on the precise issue of whether compliance costs could be considered, the Ninth Circuit determined that nothing in the text of the Provision or the wider CWA expressed an intent by Congress to foreclose EPA from considering such costs. Rather, it held that:

Congress’ silence as to costs in [the Provision] can be understood ‘to convey nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to what degree.’

This step having been satisfied, the appellate court proceeded to step two.

### **Chevron Analysis: Step Two**

The Ninth Circuit next considered whether EPA’s interpretation of the Provision was “based on a permissible construction of the statute.” The court concluded EPA’s interpretation was appropriate for two reasons. First, the court reasoned that the Provision stated that water quality standards must protect the public welfare, and that term could reasonably be understood to encompass consideration of whether compliance costs would cause substantial and widespread economic and social impact. Second, the court reasoned EPA had reasonably construed the Provision’s requirement that water quality standards “serve the purposes of this chapter” as incorporating the purposes referred to in the CWA’s overall statement of its purpose.

The Ninth Circuit ultimately concluded, based on its *Chevron* analysis, that EPA reasonably interpreted the CWA as authorizing it to consider economic compliance costs in granting variance requests.

### **The District Court’s Order Partially Vacating the 2017 Variance**

Turning next to the District Court’s order partially vacating the 2017 Variance, the Ninth Circuit examined the lower court’s two-pronged justification that the 2017 Variance 1) did not “require compliance

with the highest attainable condition at the outset of the term,” and 2) did not “require compliance with Montana’s base water quality standards by the end of the term.” The appellate court reversed the District Court on both grounds.

On the first ground, observing that while the CWA provides “that the highest attainable condition specified in the variance shall apply through (or during) the variance’s term,” the Ninth Circuit held that the applicable provisions “do not state that an individual discharger must be in compliance with the highest attainable condition on day one.” Rather, the court noted, EPA’s variance regulation unambiguously provides that compliance with the highest attainable condition is not required at the outset. Ultimately, the court concluded that the purpose of a variance is to provide the time needed to achieve the attainable interim standard, and therefore that compliance with the highest attainable condition is required by the end of the variance’s term, not at the beginning.

On the second ground, the Ninth Circuit concluded that the District Court had not based its rationale on any portion of EPA’s variance regulation. While the plaintiff argued that permitting states to receive variances without mandating compliance by their end would free such states “to postpone compliance with the base standards indefinitely by securing one variance after another,” the appellate court found this reasoning unconvincing. The Ninth Circuit noted that if, at the conclusion of a variance’s term, compliance has become feasible, another variance could be granted. Further, it observed that the variance process set interim requirements that ensure incremental attainment of the base standards.

The Ninth Circuit affirmed the District Court’s summary judgment order in part and reversed it in part, remanding the matter to the trial court with instructions to grant summary judgment to EPA in full.

### **Conclusion and Implications**

This case sees the Ninth Circuit apply the *Chevron* two-step framework to uphold EPA’s regulatory interpretation of the CWA—that economic costs may properly be considered in evaluating a variance from the CWA’s water quality standards. The court’s opinion is available online at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/10/06/19-35898.pdf>. (Carl Jones, Rebecca Andrews)

## DISTRICT COURT HOLDS WET AND DRY SEASON INSPECTIONS ARE NOT DUPLICATIVE IN CLEAN WATER ACT CITIZEN SUIT CASES REGARDING STORMWATER DISCHARGES

*California Open Lands v. Butte County Department of Public Works, et al.*,  
\_\_\_F.Supp.4th\_\_\_, Case No. 2:20-CV-0123-KJM-DMC (E.D. Cal. Oct. 27, 2021).

The U.S. District Court for the Eastern District of California recently issued an order compelling the Butte County Department of Public Works to allow a wet season inspection in addition to a previous dry season inspection of a facility allegedly discharging into navigable waters in violation of the federal Clean Water Act (CWA). This order confirms that separate inspections conducted during the wet season and dry season are not duplicative and that it is improper to rely on an agency's assertions regarding compliance when the compliance itself is in contention.

### Factual and Procedural Background

The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas." To help enforce these rules, the Clean Water Act contains a citizen's enforcement provision which allows citizens, in relevant part, to bring a civil action against an entity who is allegedly in violation of an effluent standard.

In January 2020, California Open Lands filed a lawsuit challenging Butte County Department of Public Works' (County) compliance with the Clean Water Act at the Neal Road Recycling and Waste Facility (Facility). Specifically, California Open Lands alleged violations of California's General Industrial Permit for storm water discharges associated with industrial activities by allowing landfill leachate to come in contact with stormwater and discharge from the Facility into the Sacramento River and the Sacramento-San Joaquin Delta.

On October 23, 2020, California Open Lands served the County with a request for inspection of land and property to give them the ability to inspect, photograph, and sample areas of the Facility during three rain events pursuant to Federal Rule of Civil Procedure 34. The County objected to this request on December 3, 2020.

Between December 3, 2020 and the briefing for this motion to compel, California Open Lands and the County attempted to settle the case on four separate occasions. The parties were not able to come to an agreement regarding settlement. As a result, the parties resumed active litigation and resumed the dispute regarding the wet season inspection. California Open Lands filed a motion to compel the wet weather site inspection.

The County objected on the grounds that the wet weather inspection was not proportional to the needs of the case, the inspection was not necessary, and the inspection would cause health and safety risks. Prior to briefing on the motion to compel the wet weather inspection, the California Open Lands inspected the Facility during the dry season with the County's permission. The County did not raise any of the objections presented in the wet weather inspection request against the dry weather request.

### The District Court's Decision

#### Proportionality

The U.S. District Court first considered if the County's objection regarding proportionality was proper. California Open Lands argued the proportionality objection was an improper boilerplate objection. The County contended the wet weather inspection was a fishing expedition. The court agreed with California Open Land and determined that this was an improper boilerplate objection, reasoning the County did not explain why the inspection was not proportional to the needs of the case. California Open Lands alleged violations of state and federal law with respect to stormwater which mostly occurs during wet weather conditions. The court reasoned that a wet weather inspection was proportional to the need to inspect the Facility during wet weather when stormwater was present. Therefore, the court overruled the proportionality objection.

### **Necessity of an Inspection**

Next, the court considered whether the inspection was necessary. The County argued a wet weather inspection was not necessary because the County was in compliance with the Permit. California Open Lands contended this objection was absurd. The court determined the inspection was necessary because the complaint involved allegations of illegal discharges in stormwater in violation of state and federal law. Because the inspection of the Facility during a wet season event would allow California Open Lands to discover facts related to the allegations, the inspection was necessary. Additionally, the court found the County's assertion that the inspection was not necessary because the County was in compliance with the Permit was improper because this was a disputed fact. The court overruled the County's necessity objection.

### **Health and Safety Risks**

Finally, the court considered whether health and safety risks warranted preventing the wet weather inspection. The County argued a wet weather inspec-

tion would risk the safety of Facility workers and those conducting the inspection due to large equipment operations at the Facility. The court determined the County did not properly explain why the health and safety risk should prevent an inspection, especially after the dry weather inspection was conducted without incident. Because the County did not explain how the risk created by the inspection was different in the wet season versus the dry season, the court overruled the County's objection.

### **Conclusion and Implications**

Although this order is not binding on other courts, it highlights the reasonableness of citizens seeking wet weather site inspections under Federal Rule of Civil Procedure 34 in a Clean Water Act citizen suit alleging stormwater discharge violations and the need for reasonable and well-articulated objections to such an inspection request. The court's opinion is available online at: <https://www.leagle.com/decision/infdco20211028797#>.

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