

WESTERN WATER LAW™

& POLICY REPORTER

C O N T E N T S

FEATURE ARTICLE

U.S. District Court Vacates Trump-Era Section 401 Clean Water Act Certification Rules by Stephen J. Odell, Esq., Marten Law, LLP, Portland, Oregon 29

WESTERN WATER NEWS

Study Addresses Effects of Drought Intensity on Deep Groundwater Aquifers 33

LEGISLATIVE DEVELOPMENTS

Colorado General Assembly to Consider Bill to Penalize Investment Water Speculation 35

REGULATORY DEVELOPMENTS

EPA Releases Polyfluoroalkyl Substances Multi-Year Plan ‘Road Map’ 38

California Department of Water Resources Releases California’s Groundwater Update 2020 Final Report 41

Washington State Department of Ecology Issues \$304,000 in Civil Penalties to Irrigator 42

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions 44

Continued on next page

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JUDICIAL DEVELOPMENTS

Federal:

D.C. Circuit Finds Agency’s Expressed Intention to Readopt Regulations Following Withdrawal Is Not Sufficient to Avoid Mooting of Lawsuit 48
State of Alaska v. U.S. Department of Agriculture, ___F.4th___, Case No. 17-5260 (D.C. Cir. Nov. 16, 2021).

Ninth Circuit Finds the Clean Water Act Allows EPA to Consider Compliance Costs in Approving Water Quality Standards and Variances 50
Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency et al., 15 F.3d 966 (9th Cir. 2021).

First Circuit Finds Agency’s Express Intention to Readopt Regulations Following Withdrawal is Insufficient to Avoid Mooting a Groundwater Contamination Claim 52
United States v. Puerto Rico Industrial Development Company, ___F.4th___, Case No. 19-1874 (1st Cir. Nov. 17, 2021).

District Court Holds Wet and Dry Season Inspections Are Not Duplicative in Clean Water Act Citizen Suit Cases for Stormwater Discharges 55
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).

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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.

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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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WESTERN 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 California and 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: “Delayed response of groundwater to multi-year meteorological droughts in the absence of anthropogenic management,” 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)

LEGISLATIVE DEVELOPMENTS

COLORADO GENERAL ASSEMBLY TO CONSIDER BILL TO PENALIZE INVESTMENT WATER SPECULATION

The Colorado General Assembly will consider a bill during the 2022 legislative session prohibiting investment water speculation on irrigation water rights in mutual ditch companies. The Colorado Water Resources Review Committee voted to advance the bill in October on the heels of the August report from the Colorado Anti-Speculation Work Group. Although the bill has initially received bipartisan support, there is also strong opposition to the measure.

Background

The General Assembly created the Anti-Speculation Work Group in March 2020 in response to Senate Bill 20-48. The bill acknowledged a growing concern that buyers were purchasing senior water rights on Colorado's western slope with the primary goal to later sell or lease those rights for profit. The General Assembly tasked the Work Group with conducting a study on possible legislative responses to curb investment water speculation. The Work Group noted that many diverse interests throughout the state were concerned with this issue and how it could affect both water rights use and rural communities across Colorado.

The Work Group first defined "investment water speculation" as:

...the appropriation or purchase of water rights followed by the use of those water rights, where the appropriator or purchaser's primary purpose is profiting from increased values of the water in a subsequent transaction such as sale, lease, or non-diversion.

From that definition, the Work Group then evaluated 19 proposals aimed at limiting, disincentivizing, or outright prohibiting investment water speculation. Of those 19, the Work Group narrowed the list to the eight proposals it deemed the most practical and feasible. Although the Work Group never intended

to formally propose legislation, the final report concluded without reaching a consensus on the preferred measure to address investment water speculation. Instead, the Work Group—which comprised diverse interests from all of Colorado's major water user groups—offered the report as a tool for the General Assembly to further study investment water speculation in Colorado. In sum, all members of the group agreed that investment water speculation is a growing issue in the state, but could not reach agreement as to the best way to combat it. Despite the lack of consensus or any concrete suggestions from the Work Group, the Colorado Water Resources Review Committee drafted an anti-investment water speculation bill for consideration in the 2022 legislative session.

The Bill

The bill enters the General Assembly with bipartisan support from sponsors Sens. Kerry Donovan (D-Eagle County), Don Coram (R-Montrose County), and Rep. Karen McCormick (D-Boulder County). The bill's sponsors acknowledged the lack of consensus on the best method to curb investment water speculation, but believe that something needs to be done, and that negotiations on the current bill will provide an outcome that will achieve the goals of the Work Group while incorporating the concerns of various interests.

The bill defines investment water speculation slightly differently than the Work Group, clarifying the term to mean:

...the purchase of agricultural water rights that are represented by shares in a mutual ditch company in the state with the intent, at the time of purchase, to profit from an increase in the water's value in a subsequent transaction such as a sale or lease of the water or by receiving payment from another person for nonuse of all or a portion of the water subject to the water right.

‘Mutual Ditch Company’

The “mutual ditch company” qualifier is an important distinction from the Work Group’s definition. By specifically confining investment water speculation inquiries to ditch companies, the overall scope of the bill is greatly limited. That definition also addresses a concern raised in the Work Group that speculators could injure many ditch users by becoming majority owners in a ditch, and then selling that water. With less water in the ditch, remaining users might experience problems with delivery or maintenance. While less likely, there is also a fear that an investment group could become a “bully” or hostile shareholder within a ditch company and use its disproportionate stock share to influence ditch company operations and policy toward its own ends.

‘Investment Water Speculation’

The bill classifies a transaction as “investment water speculation” if the purchaser intends to profit by receiving payment for nonuse of all or a portion of the water rights. However, the bill clarifies that payment for nonuse is *not* speculation if it is received as part of a state or local government’s, municipal water provider’s, water conservancy district’s, or nonprofit organization’s established water conservation program; or as part of the CWCB instream flow program. This provision addresses a concern raised in the Work Group that potential anti-speculation legislation would inadvertently curtail beneficial water transfers.

Other Provisions

The bill also includes several exceptions that allow a “speculative” transaction to proceed. Likely to be the most common, the bill will not affect purchases by a municipal water provider or water conservancy district. Larger municipalities, particularly on Colorado’s front range, rely on purchasing western slope agricultural water rights to bolster their municipal water supplies on the eastern slope. Additionally, the bill excludes purchases of agricultural water rights by the Colorado Water Conservation Board (CWCB) or other state or nonprofit entities that purchase the rights for a public purpose.

Beginning January 1, 2023, a third party or the State Engineer’s Office (SEO) may file a complaint claiming that a proposed or completed sale of ditch company shares is speculative. The SEO will then in-

vestigate the transaction, including a review of documents pertinent to the transaction. The bill requires SEO to safeguard any trade secrets, financial records, and other confidential information uncovered as part of its review. No third party may access or review these documents. The SEO must conclude its investigation with a written determination within 35 days.

Possible Sanctions for Water Speculation

If the SEO determines the sale is investment water speculation, it may fine the purchaser up to \$10,000 and impose a two-year condition (from the date of the SEO decision) that any sale of the water rights is subject to SEO review and approval. A purchaser may only be subject to one action, regardless of the number of complaints filed. Alternatively, if the SEO determines the complaint is frivolous or filed only to harass the purchaser, the SEO may refer the matter to the Colorado Attorney General’s Office. The AG’s Office will then investigate and, if warranted, may file a civil action against the complainant seeking damages of up to \$1,000, plus attorney fees and costs, and a one-year ban on filing any additional investment water speculation complaints. The bill requires any fines collected to be earmarked for the CWCB’s Construction Fund.

The bill also includes a rebuttable presumption that a purchase is considered investment water speculation if it would result in any entity holding a minimum percentage of the water rights in a ditch company. Each ditch company will determine its minimum percentage and report its determination to the SEO by December 31, 2022. Ditch companies could review and revise that percentage in the future. On the other hand, prospective purchasers may rebut the presumption by presenting evidence to SEO’s satisfaction that they are bona fide purchasers and will use the rights purely for their own benefit.

Opposition to the Bill

On its face, the bill attempts to resolve competing concerns from the Work Group report. However, there is still staunch opposition, including from Rep. Marc Catlin (R-Montrose County), who is also on the board of the Colorado River Water Conservation District. Rep. Catlin was one of the two “no” votes when the Water Resources Review Committee approved the bill 8-2. Additionally, the Colorado

Farm Bureau, an influential voice in Colorado water policy, has indicated that it will wait until the bill is formally introduced before taking an official position. However, the Farm Bureau recently tipped its hand by releasing a comment letter that said investment water speculation is harmful but questioned whether this bill is the best solution. Specifically, the Farm Bureau raised concerns that the bill does not provide an exception for water rights transactions between agricultural water users, such as neighboring ranchers. A common thread among those concerned with the draft bill is that any change in the law will likely have unintended consequences.

Conclusion and Implications

Although the policy objective behind the bill is to “prohibit” investment water speculation, at best, the proposed legislation may disincentivize the practice. Nothing in the bill appears to prevent the practice outright (as considered in the Work Group report). Investors who stand to profit from water sales could simply choose to factor in the fines and two-year ban as the cost of doing business. At this early stage, it is unclear whether the bill in its current form will pass muster in the General Assembly, which begins its next legislative session on January 12, 2022. For more information on “Bill 2,” see: <https://www.documentcloud.org/documents/21096022-anti-spec-bill#document/p2/a2062201>.
(John Sittler, Jason Groves)

REGULATORY DEVELOPMENTS

EPA RELEASES POLYFLUOROALKYL SUBSTANCES MULTI-YEAR PLAN ‘ROAD MAP’

On October 18, 2021, the United States 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, and 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: regulatory; 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.

(Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES CALIFORNIA'S GROUNDWATER UPDATE 2020 FINAL REPORT

The California Department of Water Resources (DWR) recently issued the final version of California's Groundwater—Update 2020 (Report). The Report, commonly known as Bulletin 118, comprises the state's most current and complete compendium of data and information on groundwater resources and management. It is an invaluable resource for water managers, water users and other stakeholders.

Background

As stated by DWR, the Report builds on the past progress and state of knowledge, synthesizes the most recent data to close current gaps in knowledge, and focuses on statewide groundwater management and planning efforts. It is the latest report in a series of Bulletin 118 and other predecessor publications dating back as early as 1952. Update 2020 also summarizes implementation of the Sustainable Groundwater Management Act of 2014 (SGMA) and focuses on emerging topics including water markets and the impacts of climate change on groundwater. The Report is described as the start of a new platform for tracking statewide groundwater management to advance near term actions and long-term strategies for improved decision-making, management, education, and access.

Organization of Report

The Report includes several components, organized as follows:

- **Highlights.** This segment provides an overview of the Report including findings and recommendations to achieve sustainable groundwater management.
- **Statewide Report Chapters 1-6.** This segment provides a detailed report on groundwater conditions in California including a history of California's Groundwater reports (Bulletin 118 and its predecessors), economic value of groundwater, and groundwater management both before and after the enactment of the SGMA. It details the status of statewide groundwater monitoring, groundwater levels, change in storage, groundwater quality and land subsidence.
- **Regional Reports Chapter 7.** This segment is organized according to California's ten hydrologic regions. It summarizes regional land and water use, as well as sustainability indicators including groundwater levels, groundwater quality, land subsidence, seawater intrusion and surface water-groundwater interactions. It also lists and depicts all groundwater basins in each region together with their current designated SGMA Basin Prioritization level.
- **Appendices.** The Report includes multiple appendices that provide extensive supporting data for each of the respective Report chapters, including assumptions, methods, citations and references to related reports.
- **CalGW Live.** In addition to the written Report, DWR also released a companion web-based dashboard, entitled California's Groundwater Live (CalGW Live). As stated in DWR's recent press release, CalGW Live "leverages the California Natural Resources Agency's Open Data Platform to improve the timeliness of statewide groundwater information and make it easily accessible for water managers and the public. California's Groundwater Live is a dynamic platform with real-time data that will help generate greater awareness and improved understanding of groundwater to support more informed decisions over the long term." The platform synthesizes data submitted by local groundwater management agencies throughout the State, thereby enhancing the scope, scale and detail of information available.

Report Recommendations

The Report provides recommendations organized into several categories:

- **Advance Data Driven Decision-Making.** The Report emphasizes the importance of obtaining and maintaining reliable groundwater data and information and making that data widely available for decision-making and public engagement.

- **Maintain Momentum for Sustainability.** The Report indicates that the state will continue to enhance existing planning, technical, and financial assistance as part of statewide groundwater management efforts to assist local agencies in achieving their long-term goals of sustainable groundwater management.

- **Engage, Communicate and Educate.** The state will continue to promote and facilitate broad stakeholder engagement and to provide platforms such as CalGW Live to educate water managers, decision-makers and the public about groundwater and its importance.

- **Invest, Innovate and Incentivize.** The Report states that both financial and non-financial incentives will be necessary over the next two decades and beyond in order to support the development and implementation of projects throughout the State to achieve sustainability.

Conclusion and Implications

According to the Report, groundwater accounts for 41 percent of the state's total annual water supply on an average basis and as much as 58 percent of the total annual water supply in a critically dry year. Approximately 83 percent of Californians depend on groundwater for some portion of their water supply and many communities are entirely reliant on groundwater for all their water needs. The importance of sustainably managing those resources cannot be overstated. The Report provides both a broad and deep perspective on the state of groundwater conditions in California and recommendations for achieving and maintaining sustainability into the future. The Report and CalGW Live can be accessed at: <https://water.ca.gov/Programs/Groundwater-Management/Bulletin-118>. (Derek Hoffman)

WASHINGTON STATE DEPARTMENT OF ECOLOGY ISSUES \$304,000 IN CIVIL PENALTIES TO IRRIGATOR

On October 19, 2021, Washington State Department of Ecology (Ecology) issued an Order assessing \$304,000 in civil penalties to Frank Tieg, L.L.C. for violations of the Washington Water Code. *State of Washington, Department of Ecology, In the Matter of Compliance by Frank Tieg LLC [sp]* with Chapter 90.03 RCW, Notice of Penalty, Docket No. DE20797 (Oct. 19, 2021) (referred to herein as the Order). Ecology asserted that Frank Tieg, L.L.C. irrigated two 125-acre pivots during the 2021 irrigation season without a water right. Ecology also asserted that Frank Tieg, L.L.C. "proceeded to double crop the pivots with peas and sweet corn during an exceptional drought in a closed basin without a water right." Order, page 1. Ecology stated that the illegal water use threatened streamflows of the Columbia and Snake Rivers.

Ecology's Authority to Assess Civil Penalties

Under Washington's Water Code, the Department of Ecology has authority to assess civil penalties for violations of the Water Code. The Water

Code states that Ecology shall follow a sequence of enforcement measures before levying fines. Under RCW 90.03.605, when Ecology "determines that a violation has occurred or is about to occur, it shall first attempt to achieve voluntary compliance." RCW 90.03.605(1)(b). RCW 90.03.605 states that as part of Ecology's first response, it shall "offer information and technical assistance to the person . . ." If Ecology is unable to achieve compliance, it shall then:

. . . issue a notice of violation . . . or assess penalties . . . unless the noncompliance is corrected expeditiously or the department determines no impairment or harm. RCW 90.03.605(1)(c).

Under RCW 90.03.600, Ecology can assess civil penalties ranging from \$100 to \$5,000 per day for any violation. RCW 90.03.600 states that Ecology:

. . . [i]n determining the amount of a penalty to be levied . . . shall consider the seriousness of the violation, whether the violation is repeated

or continuous after notice of the violation is given, and whether any damage has occurred to the health or property of other persons.

The Role of the Pollution Control Hearings Board

The Pollution Control Hearings Board hears appeals of Ecology's Orders for civil penalties. RCW 43.27A.190 and 43.21B.110. In an appeal of a penalty, Ecology has the burden of proving that a party is liable for the civil penalty. WAC 371-08-485. Ecology will need to prove that the violation occurred and that the penalty was reasonable by a preponderance of the evidence. *Energy Northwest v. Ecology*, PCHB No. 08-052, pg. 21 (July 15, 2009); *Sparks et al v. Ecology*, PCHB No. 18-002c (Findings of Fact, June 27, 2019). In reviewing the reasonableness of a penalty levied by Ecology, the Pollution Control Hearings Board, considers three factors:

(1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken by the penalized party. *Sparks et al v. Ecology*, at pg. 24.

The Nature of the Alleged Violation

On August 4, 2021, Ecology submitted a technical assistance letter under RCW 90.03.605 to Frank Tieg, L.L.C.. Shortly thereafter, the parties began discussions on potential seasonal changes to address the issue. According to the Order, the parties considered the availability of other water rights for transfer to the property at issue and on farm measures for 2021. However, Ecology noted that the water use was not authorized prior to irrigation in 2021. Ecology's Order asserts that at a site visit in September, it confirmed that some of the water savings measures discussed were not implemented. Order at pg. 2.

Ecology assessed a civil penalty of \$2,000 per day for 152 days of illegal irrigation against Frank Tieg,

L.L.C. Ecology noted that Frank Tieg, L.L.C. was not eligible for an opportunity to correct under RCW 34.05.110 because the violation:

...posed a significant threat to the environment and caused serious harm to the public interest" and "were knowing and willful. Order, pg. 2

The Appeal to the Pollution Control Hearings Board

On November 12, 2021, Frank Tieg, L.L.C. filed an appeal of the penalty to the Pollution Control Hearings Board. The appeal asserts numerous allegations against Ecology. *Frank Tieg, L.L.C v. Ecology*, PCHB No. 21-074, Notice of Appeal (Nov. 12, 2021). Frank Tieg, L.L.C. asserts that Ecology did not follow the sequence of enforcement measures under RCW 90.03.605 before issuing the civil penalty. Frank Tieg, L.L.C. claims that Ecology has retroactively authorized water use in the past and that because it did not do so in this instance Ecology's actions have denied it of equal protection under the law. Frank Tieg, L.L.C. asserts that Ecology's actions to "immediately assess penalties" rather than providing for a retroactive authorization was arbitrary, capricious and contrary to law. Frank Tieg, L.L.C. also challenges the daily civil penalty rate as excessive because the Appellant was attempting to comply with the law, had mitigation water rights and there was "no immediate harm."

Conclusion and Implications

The matter is now pending before the Pollution Control Hearings Board and set for hearing in 2022 on Frank Tieg, L.L.C. claims that Ecology has retroactively authorized water use in the past and that because it did not do so in this instance Ecology's actions have denied it of equal protection under the law.

(Jessica Kuchan)

PENALTIES & SANCTIONS

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)

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)

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)

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 PRID-

CO’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)

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 comingle 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 water 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#>.

(Anya Kwan, Rebecca Andrews)

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