Volume 17, Number 1
February 2022

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California Corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster.
Eastern Water Law & Policy Reporter is a trademark of Argent Communications Group.

EWL

EASTERN WATER NEWS

SORTING OUT THE 'EXTENSIVE BENEFITS' FROM FEDERAL INFRASTRUCTURE INVESTMENT AND JOBS ACT

With the United States as a whole still looking for ways to springboard out of the COVID era, Congress was able to assemble and pass a once-in-a-generation bipartisan infrastructure bill. Aptly named the Infrastructure Investment and Jobs Act [HR 3684], the bill was signed into law on November 15. The $1.2 trillion bill puts into motion historic federal investments for the nation's physical and cybersecurity infrastructure and aspires to create 2 million jobs per year over the course of a decade in doing so.

The need for such improvement in California, for example, is clear and the Infrastructure Investment and Jobs Act could address many problems throughout the Golden State. Infrastructure in California has suffered from a systemic lack of investment. Moreover, the state was recently given a grade of C- on its infrastructure report card, according to the American Society of Civil Engineers:

> The state has made progress in recent years to close the infrastructure investment gap, but much work remains to prepare the infrastructure to support the state's economy and preserve Californians quality of life. . . . Much of California's infrastructure needs significant investments to reverse the decades of underinvestment and help the built systems withstand climate change. Ports, for example, are presently in satisfactory condition, but require approximately $10.7 billion over the next 10 years to protect themselves against the impacts of earthquakes and sea-level rise. Dams and levees are increasingly providing protection against extreme precipitation whiplash, but many of these structures are aging and past their design lives. (*See:* https://infrastructurereportcard.org/asce-gives-california-infrastructure-a-c/)

While many sections of the new legislation simply authorize Congress to appropriate funding for fiscal years 2022 through 2026 for both current and newly created programs, other sections of the bill provide supplemental appropriations over that time period for many of the programs in the bill, above and beyond funding normally provided to such programs in Congress's annual spending bills.

An Upgrade to State Water Resilience

With historic drought conditions ravaging the state over the last decade, the Infrastructure Investment and Jobs Act prioritizes water resilience for California.

In terms of water storage improvements, California will receive more than $1.5 billion in funding. Of this, over $1 billion will be utilized to improve water storage in California, potentially benefitting storage enhancement projects such as the B.F. Sisk Dam, Sites Reservoir, Los Vaqueros Reservoir, and Del Puerto Canyon Reservoir expansions. As for the remainder, an additional $500 million has been appropriated for repairs to aging dams, such as the San Luis Reservoir.

In furtherance of increasing California's water supply sustainability and resilience is an additional $250 million in funding, which will be directed to the state to bolster water desalination, a critical innovation needed to increase our supply as California deals with cycles of drought.

Among the chief concerns addressed in the bill's appropriations, there is also heavy investment in drinking water infrastructure. In response to the nationwide crisis regarding the lack of safe drinking water, California can expect to receive $3.5 billion over the next five years to improve its water infrastructure across the state and to ensure that clean, safe drinking water is available in all Californian communities.

Federal Level Appropriations

At the federal level, several other major appropriations are laid out in the Infrastructure Improvement and Jobs Act. Notably, $1.15 billion has been appropriated for surface and groundwater storage, and water conveyance projects, with $100 million reserved

for small surface and groundwater storage projects. Another $1 billion has also been appropriated for Water Recycling including $450 million for a new large water recycling project grant program authorized via the act. On the Colorado River side of the state, the federal appropriations have also included $300 million for the implementation of the Colorado River Drought Contingency Plan, as well as an additional $50 million for Colorado River Endangered Species Recovery and Conservation Programs.

Conclusion and Implications

With the new year well under way, the provision of funds has already begun and will continue over the course of the next five years. With the proper utilization of these funds, Californians can look forward to seeing advances in the state's water resilience in addition to other critical management areas of the state as a whole such as air quality, transportation, and wildfire management. While achieving the goal of modernizing the state's infrastructure has been a slow and ongoing process, the Infrastructure Investment and Jobs Act will provide an opportunity to boost this effort and bring statewide infrastructure up to twenty-first century standards. The Infrastructure Investment and Jobs Act's full text and history is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684.
(Wesley A. Miliband, Kristopher T. Strouse)

NEWS FROM THE WEST

In the February 2022 issue of News from the West we cover an important decision out of the Colorado Supreme Court clarifying and strengthening the jurisdictional reach of the state's Water Courts. We also cover the ongoing efforts by the Lower Basin States of the Colorado River to continue voluntary efforts to cooperate in their use of the river's water in light of ongoing drought in the West. In this case, our focus is on the State of Arizona.

Colorado Supreme Court Affirms Water Court's Jurisdiction over Dispute Involving Land Developer's Alleged Ditch Modifications

Glover v. Serratoga Falls LLC,
2021 CO 77 (Colo. 2021).

On November 15, 2021, the Colorado Supreme Court upheld the Division 1 Water Court's decision in a ditch modification case that spiraled into complex litigation challenging the Water Court's subject matter jurisdiction and notice requirements, ultimately resulting in attorney fee awards at both the trial and appellate level. In the opinion, the Colorado Supreme Court clarified the scope of the Water Court's subject matter jurisdiction while further strengthening its stance on several ancillary matters.

Background and Procedural History

In 2014, Resource Land Holdings LLC and Serratoga Falls LLC (collectively: Serratoga) began a residential development project near Timnath, Colorado. An open ditch owned by Robert Glover and Gerald Kiefer (collectively: Glover) crossed the Serratoga property, so Serratoga began negotiations to pipe the ditch (KG Lateral) as part of its development plans.

Meanwhile, Serratoga installed several subdrains on its property during the project. Glover owned rights in the Paige Brothers Seepage Ditch and Paige Brother Reservoir and later claimed the new subdrains injured Glover's water rights. During construction adjacent to the KG Lateral, a portion of the ditch collapsed and Serratoga quickly repaired the damage.

The negotiations on the KG Lateral piping continued unsuccessfully for several years, at which point Glover's attorney suggested Serratoga file a *St. Jude's* declaratory judgment action. In Colorado, ditch easement modifications are governed by *Roaring Fork Club L.P. v. St. Jude's Company*, 36 P.3d 1229 (Colo. 2001) [*St. Jude's*]. That case adopted the "accommodation doctrine" in Colorado and held that a property owner burdened by a ditch easement may not unilaterally move or alter the easement without first obtaining the easement owner's consent or a court order allowing the alteration. If the burdened property owner

cannot obtain the ditch owner's consent, they may file what is now known as a *St. Jude's* action to seek a declaratory judgment, typically from a district court. Courts should allow the proposed modification if the alteration 1) does not significantly lessen the utility of the easement, 2) increase the burdens on the: easement owner in its use and enjoyment, or 3) frustrate the purpose for which the easement was created. *Id.* at 1237. This three-party test that the Colorado Supreme Court adopted comes from the *Restatement (Third) of Property (Servitudes)* § 4.8(3).

Before the Water Court

However, before Serratoga could file its complaint under *St. Jude's,* Glover filed its own civil complaint in the Division 1 Water Court alleging numerous claims, including trespass to a water right, unilateral alternation of a ditch easement, nuisance, and several other tort and statutory claims. In its answer to the Complaint, Serratoga counterclaimed for a *St. Jude's* declaratory judgment. Upon Serratoga's motion, the Water Court dismissed seven of Glover's claims finding them "speculative and devoid of any factual support."

At trial, Serratoga moved for dismissal after Glover's case in chief. The Water Court then dismissed Glover's claims for trespass to water right and other tort claims, leaving only claims for special damages and declaratory relief to determine the scope of Glover's ditch easement in the KG Lateral and whether Serratoga's proposed modifications satisfied the *St. Jude's* test. In a rare move, the Water Court issued an oral ruling after trial, finding in favor of Serratoga on all counts and finding Glover and its attorney jointly and severally liable for statutory attorney fees for the dismissed claims.

Glover's Post-Trial Motions

After trial, Glover filed C.R.C.P. 59 and 60 motions. In the Rule 59 motion, Glover asked the court to make further findings related to the trespass to water rights claims and clarify the findings related to the award of attorney fees. In the Rule 60 motion, Glover asserted, for the first time, that the Water Court lacked subject matter jurisdiction because none of the claims involved "water matters" within the Water Court's exclusive jurisdiction. The Water Court denied both motions, ruling that it had already made "detailed findings" and that the non-water claims were "inextricably intertwined" with the water matters within the Water Court's jurisdiction. Glover then appealed to the Colorado Supreme Court.

The Colorado Supreme Court's Decision

On appeal, the Colorado Supreme Court considered three principal issues: 1) whether the Water Court had subject matter jurisdiction over the claims, 2) whether the Water Court correctly dismissed on the merits, and 3) whether the Water Court abused its discretion awarding attorney fees.

Water Court Subject Matter Jurisdiction

In Colorado, Water Courts "retain jurisdiction over all water matters." *Kobobel v. Colo. Dep. of Nat. Res.*, 249 P.3d 1127, 1132 (Colo. 2011). Whether a claim constitutes a water matter then turns on the distinction between "actions involving the use of water and those involving the ownership of a water right." *Id.* The Colorado Supreme Court has previously held that actions involving the use of water include applications for water rights decrees, plans for augmentation, changes of decreed water rights, and matters concerning the scope of decreed water rights, such as abandonment and adverse possession. *Allen v. State*, 433 P.3d 581, 584 (Colo. 2019). Claims 1, 4, and 5 of Glover's complaint included requests to determine the quality, quantity, and timing of flows in the KG Lateral, and the right to use water associated with decrees in the Paige Brothers Seepage Ditches and Reservoir. The Supreme Court found those claims were all "water matters" squarely within the Water Court's jurisdiction.

The Supreme Court then addressed the well-established doctrine of Water Court "ancillary jurisdiction." This doctrine allows Water Courts to decide non-water matter claims (such as trespass or damage claims) when those issues are:

> . . .interrelated with the use of water or…directly affect the outcome of water matters within the exclusive jurisdiction of the Water Court. *Kobobel*, 249 P.3d at 1132.

Here, the Supreme Court concluded that because the Water Court properly exercised jurisdiction over the three water matter claims, the court's ancillary

jurisdiction extended over the water-related tort and statutory claims.

Importantly, the Court then further clarified Water Court jurisdiction over *St. Jude's* cases, stating:

> . . .when a [*St. Jude's*] dispute requires initial determinations as to the scope of a decreed water right or any other water matters as a precursor to ensuring that the same quantity, quality, and timing is provided, then the dispute falls within the exclusive jurisdiction of the Water Court.

This finding confirmed that, although *St. Jude's* cases are typically brought in state District Court, there are certain circumstances where a preliminary water matter determination is necessary for the Water Court to decide. In those cases, the Water Court properly has jurisdiction over both the water matter claims and the ancillary claims, including the *St. Jude's* analysis.

Resume Notice in Colorado

The second part of the Supreme Court's review of Water Court jurisdiction focused on "resume notice." In Colorado, the applicant in a Water Court case is typically required by statute to publish notice of the application in local newspapers. The purpose of the resume notice is to alert potentially interested parties within the same stream system of activity on the stream. In some circumstances, such as a *St. Jude's* declaratory judgment between specifically named parties, personal service is appropriate and resume notice is not required. *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1235 (Colo. 2011). Here, Glover argued—for the first time on appeal—that the case should have been published under resume notice procedures, and because it was not, the Water Court lacked jurisdiction. The Supreme Court ruled that this case, and *St. Jude's* cases more broadly, are "precisely the type of water matter for which personal service is appropriate, rather than resume notice."

Water Court Decision on the Merits

The Supreme Court confirmed the Water Court correctly dismissed Glover's claim for trespass to its water right because Serratoga did not "unilaterally alter" the KG Lateral. Glover argued that Serratoga's damage to the KG Lateral, and subsequent repair, constituted intentional "self-help" intended to move or alter Glover's ditch easement. However, the evidence at trial showed that Serratoga promptly repaired the KG Lateral "in its existing location…to the same capacity and dimensions." The Court reiterated that a non-exclusive easement does not prevent the burdened property owner from using its property altogether. Serratoga was within its rights to begin construction work adjacent to the ditch. The Court did not view the prompt repair of a damaged ditch to the same capacity and manner as a unilateral ditch modification under *St. Jude's*.

Additionally, the Supreme Court upheld the Water Court's denial of Glover's claim regarding the subdrain installation. Evidence at trial showed the Paige Brothers Reservoir "continued to fill to capacity" even after installing the subdrains. Thus, Glover could not claim trespass to water rights without first showing that Serratoga interfered with the water rights.

Attorney Fees

The Supreme Court upheld the Water Court's award of attorney fees for all the dismissed claims. In the Court's view, under no theory of law could unintentional damage and prompt repair of a ditch constitute a unilateral ditch alteration. Thus, the Court affirmed that Glover's trespass claim lacked substantial justification. The claim related to the subdrain interference was similarly without justification because Glover presented no evidence of injury to its water rights.

Finally, the Court awarded appellate attorney fees against Glover for, among other reasons, pursuing claims on appeal that the Water Court pointed out lacked any evidence or support at multiple points during the earlier proceedings. Additionally, the Court ruled that Glover's new argument regarding a lack of resume notice was frivolous because it disregarded well-established principles of Colorado water law.

Conclusion and Implications

In sum, although this case did not necessarily make new law in Colorado, it is informative for the Court's resounding affirmation of several established principles. A Water Court's jurisdiction is limited to water matters but may encompass sufficiently related ancillary issues, including a *St. Jude's* review when the

analysis first requires determinations as to the scope of a decreed water right. The Supreme Court confirmed resume notice is not required for Water Court matters explicitly between two named parties, including *St. Jude's* declaratory judgment actions. Additionally, the Supreme Court determined that accidental damage to a ditch, followed by prompt restoration, is not a unilateral ditch modification under *St. Jude's*.

Lastly, the award of attorney fees, both at the Water Court level and again at the Supreme Court, further solidifies established principles of Colorado water law. Above all, the *Glover* decision stands out as a cautionary tale for parties considering overly-aggressive litigation strategies. The Supreme Court's slip opinon is available online at: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2020/20SA278.pdf.
(Jason Groves, John Sittler)

Arizona Takes Steps under Colorado River Plan to Support Lake Mead Levels

In December 2021, water agencies from California, Arizona, and Nevada, as well as the U.S. Bureau of Reclamation, executed a memorandum of understanding (MOU) to increase the amount of water stored in Lake Mead on the Colorado River by 500,00 acre-feet in both 2022 and 2023. In support of the so-called "500 + Plan," the MOU provides for a funding commitment from non-federal and federal parties totaling $200 million to participate in additional water projects that will result in a minimum of 1,000,000 acre-feet of water in Lake Mead by 2023. (*See:* 32 *Cal Water L & P'lcy* Rptr 88 (Jan. 2021).) The MOU contemplates semi-annual consultations among the parties to consider changing hydrological conditions within the Colorado River basin. Arizona recently took initial steps to meet target reductions in consumptive use through compensated conservation agreements with several tribal and irrigation district entities.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation (Reclamation). The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In response, Reclamation, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

In 2014, to support maintaining the elevation of Lake Mead, Reclamation and certain other lower and upper basin state participants funded a pilot system conservation program to reduce diversions from the Colorado River system through the voluntary, compensated, and temporary use reductions. Also, that year, lower basin parties agreed to generate protection volumes through conservation measures to support Lake Mead elevations.

In 2019, the parties entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Impor-

tantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and Reclamation must consult and determine what additional measures will be taken by the Bureau of Reclamation and the lower basin states if lake levels are forecast to be at or below 1,030 feet during the succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. Reclamation makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, Bureau of Reclamation releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

As a result of the programs and agreements between the various parties, approximately 4.0 million acre-feet has been added to Lake Mead over the years, resulting in a 50-foot increase in Lake Mead's elevation at the end of 2020 than would have otherwise occurred. Despite the substantial efforts of the parties, Lake Mead levels are projected to continue to decline. Reclamation's August 2021 24-Month Study projected Lake Mead's elevation would be below 1,075 feet on January 1, 2022, and as provided for in the 2007 Interim Guidelines, a shortage declaration limiting deliveries of Colorado River water to Arizona and Nevada is in effect for 2022. In addition, the August 2021 24-Month Study projected Lake Mead would fall below 1,030 feet in July of 2023—a projection that remained unchanged in the September and October 2021 24-Month studies using the minimum probable inflow. Accordingly, the parties entered into discussions and formed technical working groups to determine how to protect against lake level declines to 1,020 feet or below, arriving at the conclusion that a minimum of 500,000 acre-feet would need to be conserved each year to support lake levels from dropping to 1,020 feet. This amount was memorialized in the MOU.

Memorandum of Understanding

At its core, the MOU provides that the parties will work together to establish appropriate means and methods to identify, consider, select, fund, administer, and validate additional water projects, with the key considerations being the total quantity of additional water that can be created in support of Lake Mead elevations, the cost of such water quantities, and the timing of implementation of any projects for additional water. The MOU defines "additional water" to mean water remaining in Lake Mead that is either 1) not attributable to shortage volumes under the 2007 Guidelines or any DCP contributions required in the LBOps; or 2) a net positive change in Intentionally Created Surplus (ICS) behavior assumed in the Bureau of Reclamation's June 2021, 24-month study Most Probable projection. ICS water is water that is made available by extraordinary conservation efforts, such as land fallowing. In short, "additional water" is water that is not the result of existing efforts or requirements under the 2007 Guidelines, the DCP, or the LBOps, The MOU expressly does not obligate any party to any specific contribution of funds or otherwise support any particular additional water project.

In the MOU, the parties agreed to fund participation in additional water projects up to $100 million. Additionally, target amounts of conserved water from the parties to meet the 500,000 acre-foot minimum in 2022 are as follows: 223,000 acre-feet from Arizona, 215,000 acre-feet from California, and 62,000 acre-feet from the Bureau of Reclamation. According to the Central Arizona Water Conservation District (CAWCD), which operates the Central Arizona Project (CAP) that diverts Colorado River water for delivery to urban and agricultural users in the center and south of the state, 193,000 acre-feet of Arizona's 223,000 acre-feet target would come from CAP users, and the remaining 93,000 would come from on-river users, including tribal entities.

Arizona Takes Initial Step

Arizona recently took the initial step of issuing letters of intent to negotiate compensated conservation agreements with various tribes and irrigation districts located along the Colorado River, including the Colorado River Indian Tribes, Mohave Valley Irrigation and Drainage District, Wellton Mohawk Irrigation and Drainage District, and Yuma Mesa Irrigation and Drainage District. These agreements would, in effect, compensate on-river and Central Arizona Project users for reducing the amount of water each entity consumptively uses, as well as reduce historical consumptive use, totaling between 50,000 and 60,000 acre-feet. According to CAWCD, key terms of the

agreements would provide that the agreements are voluntary and temporary, compensated (at $261.60 per acre foot in 2022 and $268.80 per acre foot in 2023), and reductions in water use must be made against recent historical consumptive use. To date, agreements have not yet been reached.

Conclusion and Implications

The 500 + Plan is designed to achieve the short-term objective of keeping Lake Mead levels above 1,020 feet. It remains to be seen whether the plan will achieve that goal, and whether such efforts will be renewed in the future or if additional measures become necessary to support Lake Mead elevation levels. The Central Arizona Water Conservation District, Agenda Item 7a, 7b, is available *at*: https://civicclerk.blob.core.windows.net/stream/CAPAZ/c2a2d547-e73b-4001-b2df-62bd75d6b649.pdf?sv=2015-12-11&sr=b&sig=bqUiOGCSYyyEfctONWK7rHRPdZB%2F8c3T8S0yupenb54%3D&st=2022-01-19T22%3A28%3A27Z&se=2023-01-19T22%3A33%3A27Z&sp=r&rscc=no-cache&rsct=application%2Fpdf.
(Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

GREAT LAKES, COASTAL BEACHES, AND CERTAIN COASTAL WATERS FURTHER PROTECTED BY NEW FEDERAL PIPELINE RULE

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) published a new pipeline safety interim final rule (Rule) on December 27, 2021 that increases environmental protections to the Great Lakes, coastal beaches, and certain coastal waters. (86 Fed. Reg. 73173.) The Rule implements mandates from the Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016, as amended by the PIPES Act of 2020. Specifically, the Rule designates the three categories above as "Unusually Sensitive Areas" (USAs) and requires stricter pipeline Integrity Management Programs (IMPs) for nearby hazardous liquid pipelines in order to decrease spills. These more rigorous IMPs will implement measures like increasing standards for inspections, repairs, and safety protocols, as well as analyzing serious threats like corrosion.

Background

PHMSA's pipeline regulations set the safety requirements for pipelines that carry hazardous liquids, including crude oil and carbon dioxide. (49 C.F.R. § 195.) The regulations include enhanced requirements for pipelines in High Consequence Areas (HCAs) or in areas where a release could impact an HCA. Specifically, pipelines in or affecting HCAs are required to implement an IMP. HCAs are defined to include commercially navigable waterways, high population areas, other populated areas, and USAs. USAs were further defined as USA drinking water resources and USA ecological resources.

In the PIPES Act of 2016, Congress ordered PHMSA to include the Great Lakes, coastal beaches, and certain coastal waters as USAs. In the PIPES Act of 2020:

> Congress clarified that 'certain coastal waters' means the territorial sea of the United States, the Great Lakes, and marine and estuarine waters up to the head of tidal influence.

The Interim Final Rule Defining Unusually Sensitive Areas

In the December 27, 2021 interim final rule (IFR), PHMSA adopts the new USA definition as ordered by Congress in the PIPES Act of 2020. Thus, operators of hazardous liquid pipelines located in areas where a release may impact a territorial sea of the United States, the Great Lakes, and marine coastal estuaries must adopt an IMP. In addition, operators of onshore hazardous liquid pipelines submerged more than 150 feet below the surface of water that could affect an HCA must also comply with the more stringent requirements for submerged pipelines. Overall, an estimated 2,905 additional miles of hazardous liquid pipelines, largely in states along the Gulf of Mexico, will be covered under the Rule:

> This estimate reflects segments located within 1/4 mile of any of the newly defined USAs but are not located within 1/4 mile of the location of existing HCAs. . . . Based on this analysis, PHMSA anticipates that most affected operators have an existing IM program and will be able to extend that plan to include the newly covered segments. (86 Fed. Reg. 73181.)

Hazardous liquid IMP requirements work to lower the risks if a pipeline spill were to occur where it would have significant consequences. The ramifications of a pipeline spill can be extremely serious, as:

> . . .[a]ny release of petroleum, petroleum products, or other hazardous liquids can adversely affect human health and safety, threaten wildlife and habitats, impede commercial navigation, or damage personal or commercial property. Spills into bodies of water present increased risk because the water and water currents act as conveyances to increase the spread of the spill. . . . Major oil spills within the Great Lakes, shorelines, or coastal waters would have extreme, negative, and persistent impacts on shoreline

> ecology, benthic communities at the base of the ecosystem, fisheries, human health, and the economy of coastal communities. (86 Fed. Reg. 73177.).

"The Great Lakes are more than an economic engine and ecological treasure for Michigan—they provide drinking water for over 40 million people and are simply part of who we are as Michiganders," said Michigan Senator Gary Peters, a member of the Senate Commerce, Science, and Transportation Committee:

> We know a pipeline spill in the Great Lakes would be catastrophic. That's why I applaud PHMSA for formally implementing my provision subjecting the Great Lakes to higher standards for pipeline operators.

The comment period for the Rule ends on February 25, 2022, which is also its effective date. An IFR, such as this one, is a rule published without first receiving public comment, upon an agency finding cause to issue a final regulation:

> The Administrative Procedure Act (APA, 5 U.S.C. 551 *et seq.*) permits an agency to issue a final rule without first publishing a proposed rule for public comment when it demonstrates 'good cause' that notice and comment is 'impracticable, unnecessary, or contrary to the public interest.' 5 U.S.C. 552 (b)(3)(B). This exception is narrow, and PHMSA [proceeded] with an IFR only in light of the specific instructions from Congress in the PIPES Act of 2020 that render comment both unnecessary and impracticable. (86 Fed. Reg. 73176.)

While the Rule states the number of disasters it will prevent is unknowable, it lists past spills in the areas meant to be protected by the Rule, including a 2018 anchor strike that dented Enbridge Energy's Line 5 pipeline in Michigan.

Conclusion and Implications

The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration's Rule that increases environmental protections to the Great Lakes, coastal beaches, and marine coastal waters recognizes the potential impacts that the release of a hazardous liquid could cause in such high consequence environments. "The Great Lakes and our coastal waters are natural treasures that deserve our most stringent protections," said Tristan Brown, the PHMSA Deputy Administrator. "This rule strengthens and expands pipeline safety efforts in these sensitive areas." The stricter pipeline IMPs to nearby hazardous liquid pipelines required by the Rule will assist to decrease spills in a variety of ways. While the estimated 2,905 additional miles of hazardous liquid pipelines affected by this Rule is not a small change, it appears that most affected operators already implement IMPs and should be able to extend these programs to the newly affected lines.

Although many are excited by the Rule's environmental potential, it may be cause for concern for corporations that operate pipelines effected by the Rule, like Enbridge Energy, a Canadian company. Enbridge Energy's Line 5 pipeline transports roughly 23 million gallons a day of crude oil and natural gas liquids between Wisconsin and Ontario. Line 5 is effected by the Rule and Enbridge states its goal is to protect the Great Lakes while also safely delivering energy to the region, and the pipeline's integrity management program meets the new requirements put in place by the Rule. Line 5 is also the subject of a lengthy legal battle in which a Michigan lawsuit currently seeks to shut down the pipeline. While corporations like Enbridge may find this Rule to be an obstacle, and some environmentalists find there is still a fight to be had in this pipeline arena, overall, the Rule is an additional step to ensure the protection of the Great Lakes, coastal beaches, and marine coastal waters. (Megan Unger, Darrin Gambelin)

U.S. ARMY CORPS OF ENGINEERS REISSUE AND MODIFY NEW CLEAN WATER ACT SECTION 404 NATIONWIDE PERMITS

On December 27, 2021, the United States Army Corps of Engineers (Corps) finalized 40 nationwide permits and issued a new nationwide permit for water reclamation and reuse facilities. The 40 newly finalized nationwide permits follow 12 that were reissued and four new nationwide permits that were finalized in January 2021. The nationwide permits will go into effect on February 25, 2022 and all of the current nationwide permits will expire March 14, 2026. [U.S. Army Corps of Engineers, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73,522 (December 27, 2021).]

Factual and Procedural Background

Nationwide permits are general permits under Section 404 of the federal Clean Water Act authorizing placement of dredge or fill material into waters of the United States for recurring types of projects that have only minimal individual and cumulative adverse environmental effects. They also authorize activities that require Corps permits under Section 10 of the Rivers and Harbors Act of 1899, which regulates the placement of any structure in or over a navigable "water of the United States." Section 404(e) of the Clean Water Act authorizes the Corps to issue nationwide or regional general permits for up to five years for activities that are similar in nature and have minimal individual and cumulative adverse environmental effects. The Corps has issued nationwide permits at regular intervals since 1977.

Nationwide Permits expedite permitting and reviews for the projects that they cover by allowing an applicant to avoid the requirement for an individual Section 404 or Section 10 permit and the associated reviews under the National Environmental Policy Act (NEPA). Nationwide permits are used to authorize approximately 70,000 projects in a typical year. The Corps stated that the newly finalized Nationwide Permits support effective implementation of the recently passed bipartisan Infrastructure Investment and Jobs Act by providing infrastructure permit decisions with minimal delay and paperwork.

More on the Army Corps' Recent Actions

The Corps released a proposed rule in September 2020 to reissue the nationwide permits issued in 2017. In January 2021, the Corps published a final rule which reissued 12 nationwide permits, finalized four new nationwide permits, and made some adjustments to the general conditions and definitions for the nationwide permit program.

Reissuance of the 2017 Nationwide Permits

During the process of reissuance, the Corps made a relatively small number of changes to the 2017 permits. One of the most significant changes, which drew criticism from environmental groups, removed a 300-linear-foot limit for losses of streambed from ten nationwide permits that were finalized in January 2021, during the closing days of the Trump administration:

- *Nationwide Permit 21*, Surface Coal Mining; *Nationwide Permit 29*, Residential Developments; *Nationwide Permit 39*, Commercial and Institutional Developments; *Nationwide Permit 40*, Agricultural Activities; *Nationwide Permit 42*, Recreational Facilities; *Nationwide Permit 43*, Stormwater Management Facilities; *Nationwide Permit 44*, Mining Activities; *Nationwide Permit 50*, Underground Coal Mining; *Nationwide Permit 51*, Land Based Renewable Energy Generation Facilities; and *Nationwide Permit 52*, Water-Based Renewable Energy Generation Pilot Projects.

The Corps also took steps to expand three additional 2017 permits:

- *Nationwide Permit 27*, Aquatic restoration, enhancement, and establishment activities: The Corps added "releasing sediment from reservoirs to restore or sustain downstream habitat" and "coral restoration or relocation" to the list of examples of activities authorized by the permit;

- *Nationwide Permit 41*, Reshaping existing drainage ditches: The Corps expanded the nationwide

permit to include reshaping of existing irrigation districts;

•*Nationwide Permit 48,* Commercial shellfish mariculture activities: The new permit changes its name from "aquaculture" to "mariculture" to more precisely reflect that it permits activities in coastal waters. It also removes a prior prohibition against new commercial shellfish mariculture activities directly affecting more than 1/2-acre of submerged aquatic vegetation.

New Nationwide Permits Issued in January 2021

In January 2021, the Corps also promulgated four new nationwide permits, described below:

•*Nationwide Permit 55*, Seaweed mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of seaweed mariculture activities and also allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 56*, Finfish mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of finfish mariculture activities. Similar to Nationwide Permit 55, this permit allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 57*, Electric utility line and telecommunications activities: this new permit allows activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States. These activities were previously covered by Nationwide Permit 12, which also permits oil and natural gas pipelines, but which was enjoined from use for a period in 2020 in litigation challenging the Keystone XL pipeline. By creating a separate nationwide permit for electric utility lines and telecommunications lines, the Corps will allow these projects to avoid oil and gas pipeline litigation impacts;

•*Nationwide Permit 58*, Utility lines for water and other non-hydrocarbon substances: this new permit allows activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. The new permit also allows associated utility line facilities, such as substations, access roads, and foundations for above-ground utility lines, in waters of the United States. These activities were previously covered by Nationwide Permit 12. Creating a separate nationwide permit for water utility activities avoids potential impacts from challenges to oil and gas pipelines, and also removes conditions that were focused on other types of pipelines or utilities.

New Nationwide Permit Issued in December 2021

In December 2021, the Corps reissued the remaining 40 nationwide permits and finalized a fifth new nationwide permit:

•*Nationwide Permit 59*, Water reclamation and reuse facilities: this new nationwide permit will help expedite and provide clarity for smaller water recycling, reuse, and groundwater recharge projects. The Corps limited its scope to projects that impact less than one half of an acre of waters, which will preclude its use for medium or large scale water recycling or recharge projects.

In its discussion of the new Nationwide Permit, the Corps cited the climate resilience and conservation benefits of water reclamation and reuse projects:

> Water reclamation and reuse facilities can be an important tool for adapting to the effects of climate change, such as changes in precipitation patterns that may affect water availability in areas of the country. Water reclamation and reuse facilities help conserve water, which may be beneficial as water availability changes or increases in water demand occur.

In response to comments filed by public water agencies and their representatives, the final rule's preamble includes language stating that the Corps will not consider the source of water when applying nationwide permits to water reclamation or reuse projects. It states:

> For water reclamation and reuse facilities, the Corps regulates discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of those facilities. In general, the Corps does not have the authority to regulate the operation of these facilities after they are constructed, expanded, or maintained through discharges of dredged or fill material into waters of the United States authorized by this nationwide permit. The Corps does not have the authority to regulate releases of water to recharge or replenish groundwater, to regulate the mixing of water from various sources, or to regulate the movement of water between watersheds.

This language clarifies that the Corps does not plan to withhold or condition this new nationwide permit in response to concerns about the water that will be used for the project – such as imported or recycled water.

Conclusion and Implications

The U.S. Army Corps of Engineers' new nationwide permit for water reclamation and reuse projects will expedite groundwater recharge projects that impact less than one-half an acre of waters or wetlands. The new permit and its discussion also demonstrate that the Biden administration views water recharge, reuse, and recycling as important tools for increasing water reliability and adapting to the impacts of climate change. The reissuance of existing nationwide permits provides continuity until March 2026 for a program that expedites permitting for infrastructure and other projects that have minor impacts on waters and wetlands regulated under the Clean Water Act. For more information on the general permits, *see:* https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits.
(Lowry Crook, Ana Schwab, Rebecca Andrews)

U.S. BUREAU OF RECLAMATION WITHDRAWS TEMPORARY URGENCY CHANGE PETITION TO MODIFY FLOW AND WATER QUALITY REQUIREMENTS FOR STATE AND FEDERAL WATER PROJECTS

On December 1, 2021, the U.S. Bureau of Reclamation (Bureau) and California Department of Water Resources (DWR) filed a Temporary Urgency Change Petition (TUCP) with the State Water Resources Control Board (SWRCB or State Board). An order approving the TUCP would have modified certain terms and conditions of the federal Central Valley Project (CVP) and State Water Project (SWP) water rights permits and licenses, effective from February 1 through April 30, 2022. However, due to improved storage conditions over the past several weeks, the Bureau and DWR withdrew the TUCP on January 18, 2022.

Background

Water Right Decision 1641 (D-1641) was issued by the SWRCB on December 29, 1999 and amended March 15, 2000. D-1641 amended the water right licenses and permits for the SWP and CVP (collectively: Projects), to require them to meet specified water quality objectives set forth in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). DWR (which operates the SWP) and the Bureau (which operates the CVP) work in coordination to operate the projects to meet the terms in D-1641.

California experienced extremely dry conditions for two consecutive years from 2020 to 2021. On May 10, 2021, Governor Newsom issued an emergency proclamation based on drought conditions in the Bay-Delta and other watersheds, stating that the continuation of extremely dry conditions had resulted in scarce water supply. The emergency proclamation included a directive that:

> . . .[t]o ensure adequate, minimal water supplies. . .[the State Board]. . .shall consider modifying requirements for reservoir releases or diversion limitations—including where existing requirements were established to implement a water quality control plan—to conserve water upstream[.]

On May 17, 2021, the Bureau and DWR submitted a Temporary Urgency Change Petition to the SWRCB requesting modification of certain requirements of D-1641. In general, temporary urgency change orders issued by the SWRCB enable water right holders to temporarily deviate from the terms of their existing water rights in order to provide relief from drought conditions. Temporary urgency change orders last up to 180 days and are renewable. On June 1, 2021, the State Board conditionally approved the TUCP for the period of June 1, 2021 through August 15, 2021.

Throughout the spring, summer, and fall of 2021, warm and dry conditions persisted and DWR and the Bureau continued to take actions to conserve water and to reduce impacts to fish and wildlife and other instream uses. Nonetheless, on October 1, 2021, the CVP and SWP began Water Year 2022 with a combined carryover storage of about 2.0 million acre-feet (MAF)—less than half of the combined storage at the beginning of Water Year 2021.

The 2022 Temporary Urgency Change Petition

On December 1, 2021, the Bureau and DWR jointly submitted a TUCP for February 1 through April 30, 2022. The TUCP requested that the State Board modify certain requirements set forth in D-1641, because the continuation of extremely dry conditions in the Delta and other watersheds had left the Projects in a "precarious state" and modifications were needed to conserve upstream storage at all CVP and SWP reservoirs should dry conditions persist into 2022. Approval of the TUCP would have relaxed certain water quality standards set forth under D-1641, specifically: 1) required Delta outflow levels depending on conditions and forecasts; 2) allowable exports when unmodified D-1641 Delta outflow requirements are not met; 3) required San Joaquin River flow requirements; and (4) required Delta Cross Channel Gate closure requirements.

In support of the TUCP, the Bureau and DWR prepared a Biological Review in compliance with the Porter-Cologne Water Quality Control Act (Division 7 of the California Water Code). The Bureau and DWR also met with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the California Department of Fish and Wildlife, and the SWRCB, to discuss the TUCP Biological Review outline and analyses methodology. In early January, the SWRCB accepted public comments on the TUCP and held a workshop to receive additional oral public comments.

On January 18, 2022, the Bureau and DWR formally withdrew the TUCP. In a letter to the Executive Director of the SWRCB, the Bureau and DWR state that October and December hydrology showed a marked improvement from 2021 conditions, and storage conditions improved at Oroville and Folsom reservoirs. Indeed, the Bureau reported that Folsom Reservoir is currently in flood operation status. Although Shasta and Trinity reservoirs continue to be relatively low, forecasted conditions for 2022 do not suggest that the TUCP would benefit storage at Shasta or Trinity. Using conservative hydrologic assumptions from the January runoff forecast, the Bureau and DWR do not expect that Shasta and Trinity reservoirs will be relied upon for meeting Delta outflow and/or salinity requirements in the February through April period due to the expected higher releases from Folsom and Oroville reservoirs and/or additional statewide runoff in general. Accordingly, the Bureau and DWR no longer believe there is an urgent need for the modifications requested in the TUCP for February through April 2022.

Conclusion and Implications

The Bureau of Reclamation and Department of Water Resources continue to conduct operational studies and plan for the resumption of dry conditions. If dry conditions occur, modifications may be necessary to protect upstream storage levels and a separate petition will be filed at that time. The full text of the December 1, 2021 TUCP can be found at: Temporary Urgency Change Petition Regarding Delta Water Quality (December 1, 2021) (ca.gov). The full text of the January 18, 2022 Withdrawal Letter can be found at: 20220118_dwr-usbr-letter_tucp-withdrawal.pdf (ca.gov).

(Holly E. Tokar, Meredith Nikkel)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•December 21, 2021 - The United States and Commonwealth of Pennsylvania, Department of Environmental Protection (DEP), filed a civil lawsuit against the Bucks County Water and Sewer Authority (Authority), alleging violations of the federal Clean Water Act and Pennsylvania Clean Steams Law. The violations primarily consist of sanitary sewer overflows—typically in the form of wastewater overflowing from manholes—and operation and maintenance violations under its state-issued permits. At the same time the civil suit was filed, the United States and Commonwealth of Pennsylvania also filed a proposed consent decree that would resolve the lawsuit subject to the district court's approval. The Authority will pay a $450,000 penalty and will be obligated to devote substantial resources to evaluate and upgrade its sewer systems as part of the decree. The Authority owns and operates hundreds of miles of sewer pipes and associated treatment plants and wastewater collection and conveyance systems, largely situated in Bucks County. The Authority's service areas have historically suffered from sanitary sewer overflows, including over 100 that have occurred in Plumstead Township since 2014. In that timeframe, multiple overflows have also occurred in Bensalem, Richland, Doylestown Borough, Middletown, Upper Dublin and New Hope/Solebury. Along with the financial penalty, the Authority has agreed to evaluate its collection system and adopt extensive measures to ensure compliance with the federal and state requirements. These include monitoring water flow; modelling the collection system; conducting inflow and infiltration evaluations; identifying and remedying hydraulic capacity limitations; addressing illegal sewer connections; and improving its overall operation and maintenance program.

•December 28, 2021 - EPA has issued three emergency orders under the Safe Drinking Water Act to different mobile home park public water systems located on the Torres Martinez Desert Cahuilla Indian Tribe's Reservation in California. The orders require the owners of Mora Mobile Home Park, Valladares Mobile Home Park, and Toledo Mobile Home Park to comply with federal drinking water requirements and to identify and correct problems with their drinking water systems that present a danger to residents. Under the terms of the agency's emergency orders, the owners of the Mora Mobile Home Park, Valladares Mobile Home Park, and Toledo Mobile Home Park water systems are required to: 1) Inform all residents of EPA's sampling that identified high levels of arsenic in the systems' drinking water and instruct all residents to immediately stop consuming the drinking water; 2) Provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; 3) Submit a long-term compliance plan for EPA approval; and 4) Properly monitor the systems' water and report findings to the EPA.

•January 6, 2022—EPA announced that Gardner-Gibson, Inc. has paid a $650,000 penalty to resolve violations of the federal Clean Water Act related to the release of 60,000 gallons of hot, liquid asphalt from its Gardner-Fields, Inc. facility in Tacoma. Washington. EPA cited the company for the release of petroleum products and for significant violations of the Clean Water Act's Spill Prevention, Control, and Countermeasures requirements discovered during follow-up inspections at the facility. The $650,000 penalty was deposited into the Oil Spill Liability Trust Fund, a fund used by federal agencies to respond to discharges of oil and hazardous substances. The requirements apply to all facilities where a potential spill could reach waters of the United States and that

maintain above-ground oil storage capacity of greater than 1,320 gallons of oil or total below-ground storage capacity of greater than 42,000 gallons of oil. When EPA inspected the facility, total storage capacity was 4,234,275 gallons.

•January 12, 2022 - West Penn Power of Greensburg, Pennsylvania will pay a $610,000 penalty under a settlement to resolve water discharge violations at two coal ash impoundment landfills in southwestern Pennsylvania. According to the settlement, West Penn Power exceeded boron limits in discharges from the Mingo Landfill in Union Township, Washington County, and Springdale Landfill in Frazer Township, Allegheny County. Along with the penalty, the consent decree with EPA and PADEP requires West Penn Power to construct new gravity pipelines to new outfall locations in a new receiving waters for each landfill (Peters Creek for the Mingo pipeline and the Allegheny River for the Springdale pipeline). West Penn will also be required to collect data on instream boron levels in Peters Creek. The settlement addresses alleged violations of the federal Clean Water Act and Pennsylvania Clean Streams Law that threaten to degrade receiving streams, impact public health, and harm aquatic life.

•January 18, 2022—EPA is recognizing Lebanon, New Hampshire for completely eliminating all of its Combined Sewer Overflow (CSO) outfalls, therefore eliminating the need for the Consent Decree established between EPA and the City in 2009. CSO outfalls discharge a combination of wastewater and stormwater to nearby surface waters when the combined sewer system does not have the capacity to transmit all the flow of wastewater and stormwater to the treatment plant. On November 19, 2021, the U.S. District Court for the District of New Hampshire terminated the Consent Decree between the United States, the State of New Hampshire, and the City of Lebanon because the City satisfied the prerequisites for termination by eliminating all its CSO outfalls.

•January 19, 2022—EPA and Barber Valley Development, Inc. have settled a case the agency brought after the company illegally discharged sand, gravel, and rocks into wetlands adjacent to Council Spring Creek in Boise. In EPA orders issued in May and June 2021, EPA alleged the company failed to apply to the U.S. Army Corps of Engineers for a Clean Water Act permit for flood control work it was conducting on a transmission line corridor owned by Idaho Power. Council Spring Creek and its wetlands are connected to and provide flows to the Boise River. Barber Valley agreed to remove the unauthorized fill material, restore the site, and enhance important forested wetland habitat adjacent to the Boise River and Alta Harris Creek, and to pay a $7500 penalty. This work will support diverse and abundant wildlife, such as raptors, small mammals, deer, coyote, elk, and possibly the endangered yellow-billed cuckoo which may use the Snake River Valley for breeding purposes. The restoration work at the site and at the forested wetland will be completed by December 2022.

Indictments, Sanctions, and Sentencing

•December 22, 2021 - Taylor Energy Company LLC (Taylor Energy), a Louisiana oil and gas company, has agreed to turn over all its remaining assets to the United States upon liquidation to resolve its liability for the oil spill at its former Gulf of Mexico offshore oil production facility—the source of the longest-running oil spill in U.S. history, ongoing since 2004. Under the proposed consent decree, Taylor Energy will transfer to the Department of the Interior (DOI) a $432 million trust fund dedicated to plugging the subsea oil wells, permanently decommissioning the facility, and remediating contaminated soil. The consent decree further requires Taylor Energy to pay over $43 million for civil penalties, removal costs and natural resource damages (NRD). The State of Louisiana is a co-trustee for natural resources impacted by the spill and the NRD money is a joint recovery by the federal and state trustees. Under the settlement, Taylor Energy will pay over $43 million—all of the company's available remaining assets—allocated as follows: $15 million as a civil penalty, $16.5 million for NRD, and over $12 million for Coast Guard removal costs. Likewise, Taylor Energy may not interfere in any way with the Coast Guard's oil containment and removal actions. Taylor Energy will turn over to DOI and the Coast Guard all documents (including data, studies, reports, etc.) relating to the site to assist in the decommissioning and response efforts. The settlement also requires the company to dismiss three lawsuits it filed against

the United States, including two cases in the Eastern District of Louisiana.

•January 11, 2022 - Princess Cruise Lines Ltd. (Princess) has pleaded guilty to a second violation of probation imposed as a result of its 2017 criminal conviction for environmental crimes because it failed to establish and maintain an independent internal investigative office. Under the terms of a plea agreement, Princess was ordered to pay an additional $1 million criminal fine and required to undertake remedial measures to ensure that it and its parent Carnival Cruise Lines & plc establish and maintain the independent internal investigative office known as the Incident Analysis Group (IAG). Princess was convicted and sentenced in April 2017 and fined $40 million after pleading guilty to felony charges stemming from its deliberate dumping of oil-contaminated waste from one of its vessels and intentional acts to cover it up. Beginning with the first year of probation, there have been repeated findings that the Company's internal investigation program was and is inadequate. In November 2021, the Office of Probation issued a petition to revoke probation after adverse findings by the CAM and TPA. Failure to meet deadlines in the plea agreement will initially subject the defendant to fines of $100,000 per day, and $500,000 per day after ten days.
(Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT GRANTS CLEAN WATER ACT PETITION FOR REVIEW AND REMANDS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

Food & Water Watch v. U.S. Environmental Protection Agency, 20 F.4th 506 (9th Cir. 2021).

The U.S. Court of Appeals for the Ninth Circuit recently granted a petition to review a National Pollutant Discharge Elimination System (NPDES) permit (Permit) issued by the U.S. Environmental Protection Agency (EPA) to govern Concentrated Animal Feeding Operations (CAFOs) in Idaho under the federal Clean Water Act (CWA). The Court of Appeals determined the Permit was arbitrary, capricious, and in violation of the law, and remanded the Permit to the EPA.

Factual and Procedural Background

On May 13, 2020, EPA issued a general NPDES permit for CAFOs in Idaho, with an effective date of June 15, 2020. The Permit was based on findings that improper management of CAFO waste had resulted in serious water quality issues in Idaho. The Permit prohibited discharges from production areas unless they were designed, constructed, operated and maintained to contain all manure, litter, process wastewater and the runoff and direct precipitation from the 25-year, 24-hour storm event for the location of the CAFO. It required CAFOs to perform daily inspections of the production areas. The Permit also prohibited all discharges from land application areas during dry weather. Dry weather discharges from land application areas were known to occur during irrigation of fertilized CAFO fields. The Permit, however, contained no monitoring provisions for dry weather discharges from land-application areas.

Petitioners Food & Water Watch and Snake River Waterkeeper argued that issuance of the Permit was arbitrary, capricious, and in violation of the law because it did not require monitoring that would ensure detection of unpermitted discharges, and thus lacked sufficient monitoring provisions necessary to ensure compliance with its discharge limitations. EPA argued the monitoring provisions were sufficient, and that the petition was untimely.

The Court of Appeals' Decision

Timeliness

The court first considered and rejected EPA's argument that the petition was untimely. EPA argued the petition was untimely because the Permit and incorporated existing regulations adopted in 2003, and thus the petition needed to be brought within 120 days of that rule's issuance. The court disagreed, holding that the petitioners were challenging the monitoring requirements of the Permit itself, and not any provision of the 2003 rule. The petition was determined to be timely.

Production Areas

The court next considered whether the Permit contained sufficient monitoring provisions for discharges from production areas. Permits must assure compliance with permit limitations by including requirements to monitor the:

> . . .mass (or other measurement specified in the permit) for each pollutant limited in the permit, the volume of effluent discharged from each outfall, and other measurements as appropriate.

EPA argued the Permit contained sufficient monitoring requirements to ensure compliance, and that the court must defer to its expertise.

The court reasoned that the Permit's inspections requirements were sufficient to ensure compliance with the limitation on above-ground discharges from production areas. However, the court found that the Permit contained no monitoring provisions for underground discharges from production areas, despite the record before the EPA showing that leaky containment structures are sources of groundwater pollution and groundwater flow from agriculture is a primary

contributor of nitrate in surface water. The court noted that the EPA had rejected a proposal to include a requirement to monitor underground discharges in the 2003 rule because it believed that site-specific variables meant that requirements in local permits, rather than uniform national requirements, were the best means to address underground discharges. The court concluded there was no way to ensure that production areas complied with the Permit's prohibition on underground discharges because the Permit failed to include a requirement that CAFOs monitor waste containment structures for underground discharges. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they were in compliance with the Permit.

Land-Application Areas

Finally, the court considered whether the Permit contained sufficient monitoring provisions for land application areas. The record before EPA showed that such discharges can occur during irrigation of fertilized CAFO fields. The court noted that the Permit assumed irrigation-produced runoff of pollutants would never occur from land application areas because the Permit required CAFOs to implement a nutrient management plan providing for the application of manure, litter, and process wastewater at agronomic rates. The court found that the record did not support this assumption, and concluded that, without monitoring, there was no way to ensure a CAFO complied with the Permit's dry weather zero-discharge requirement for land application areas. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they are in compliance with the Permit.

Conclusion and Implications

The Ninth Circuit Court of Appeals granted the petition and remanded the Permit to the EPA for further proceedings, holding that the issuance of the Permit was arbitrary, capricious, and a violation of law because the Permit did not require monitoring of underground discharges from production areas and dry weather discharges from land-application areas that would ensure compliance with its effluent limitations. This case demonstrates that NPDES permits must contain monitoring provisions sufficient to ensure compliance with their terms. Where a permit contains no requirements to monitor discharges expressly prohibited by the permit, and the record before the EPA shows that such discharges occur and cause pollutants to enter waters of the United States, the issuance of the permit will likely be found to be arbitrary, capricious, and in violation of law. The court's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/12/16/20-71554.pdf. (David Lloyd, Rebecca Andrews)

NINTH CIRCUIT REVERSES DENIAL OF COMPANY'S REQUEST TO INTERVENE BY RIGHT IN CHALLENGE TO BLM'S ISSUANCE OF OIL LEASES

Western Watersheds Project v. Haaland, ___F.4th___, Case. No. 20-35780 (9th Cir. Jan. 5, 2022).

A three judge panel of the Ninth Circuit Court of Appeals reversed and remanded a decision by the U.S. District Court for the District Wyoming to deny an energy company's motion to intervene by right under Federal Rule of Civil Procedure Rule 24 (a). The litigation at issue involved an effort to invalidate oil leases issued under the Trump administration that plaintiffs argued violated an Obama-era policy disfavoring the issuance of such leases in sage-grouse habitat. The Ninth Circuit rejected the District Court's conclusions that the energy company's motion to intervene was untimely and that the company's interests would be adequately represented by existing parties, namely a trade association representing approximately 300 similar energy companies in the action. The case provides a helpful analysis in the land sue context of the factors involved in determining whether to grant a motion to intervene as of right under Rule 24 (a).

Factual and Procedural Background

In 2010 the U.S. Fish and Wildlife Service (FWS) also concluded that the greater sage-grouse warranted protection under the federal Endangered Species Act. A related policy required the Bureau of Land Management (BLM) to prioritize oil and gas leasing outside of sage-grouse habitats. After the 2016 presidential election, the federal government's land-use policies shifted. Under the new administration, the BLM accelerated oil and gas leasing on ecologically significant habitats, including those identified as sage-grouse habitat. Pursuant to these changed policies, the BLM auctioned oil and gas leases in Wyoming in March of 2018. Appellant, a national energy company, was the high bidder on seven leases for which it paid over $8.4 million.

Appellees, two environmental organizations sued BLM in 2018 to challenge the oil and gas leases in identified sage-grouse habitats. All-told, appellees challenged over 2,200 leases covering more than 2.39 million acres across multiple states.

After appellees filed their complaint, a regional trade association representing more than 300 member companies, including appellant, moved to intervene as defendant. The District Court granted the trade association's motion to intervene along with a similar motion filed by the State of Wyoming.

In December of 2018, the District Court issued a case management order dividing the litigation into discrete phases based on specific lease sales. In "Phase One" the District Court agreed to consider appellees' challenge to a subset of lease sales, including the leases acquired by appellant in 2018, and found that BLM improperly restricted public involvement in Phase One lease sales. As a result, the District Court issued a vacatur vacating these sales, but stayed its vacatur pending appeal.

The Motion to Intervene

A little over two weeks after the District Court issued its stay, appellant moved to intervene for the purpose of appealing the Phase One decision, and participating in any subsequent phases in which its remaining leases were to be considered.

The District Court denied appellant's motion to intervene in the Phase One or other stages. The District Court concluded that appellant was not a required party under Rule 19 of the Federal Rules of Civil Procedure because its "interests were adequately represented by an existing party in the suit" namely the trade association. The court also concluded that appellant was not entitled to intervene as of right under Rule 24(a) because appellant was adequately represented by an existing party, and that its request for intervention was untimely for three reasons: 1) Phase One was nearly complete, 2) appellant's involvement would introduce new arguments and issues on appeal thus prejudicing existing parties, and 3) appellant was supposedly aware of the lawsuit and appellees' effort to vacate the Phase One leases but waited years to move to intervene.

Intervention under Rule 24(a)

The Ninth Circuit's Decision

The Ninth Circuit began by noting that a non-party is entitled to "intervene as of right" under Rule 24(a) when it: 1) timely moves to intervene, 2) has a significant protectable interest related to the subject of the action, 3) may have that interest impaired by the disposition of the action, and 4) will not be adequately represented by existing parties to the action. An applicant seeking intervention bears the burden of showing these four elements are met, however a Circuit Court interprets such requirements "broadly in favor of intervention.)" The court's decision focused on the timeliness and adequate representation by existing parties factors.

Timeliness

Regarding timeliness, the court first analyzed the stage of proceedings at which point appellant sought to intervene. On this point the court recognized that although "delay can strongly weigh against intervention… the mere lapse of time, without more, is not necessarily a bar to intervention." The general rule is that a post judgment motion to intervene is timely if filed within the time allowed for filing an appeal. Appellant filed its motion for intervention within the time to file a notice of appeal from the Phase One decision, and for that reason the court found that appellant's delay in filing a motion to intervene did not weigh against intervention into Phase One. Regarding the timeliness of appellant's motion to intervene in the remaining phases of litigation, the court found that the length of appellant's delay did not preclude intervention.

The court also looked to the prejudice that intervention by appellant would cause to existing parties, which is "the most important consideration in deciding whether a motion for intervention is untimely." With respect to Phase One, the court rejected the District Court's conclusion that appellees would face prejudice because intervention may require "additional briefing on appeal, including possible additional arguments not presented to or ruled upon by the District Court." The court noted:

> . . .that is a poor reason to deny intervention, given the possibility that [appellant]'s additional arguments could prove persuasive. That [appellant] might raise new, legitimate arguments is a reason to grant intervention, not deny it.

Regarding the subsequent phases, the court similarly found that the parties in the litigation would not suffer sufficient prejudice to warrant denial of intervention.

The court also considered the "length of, and explanation for, any delay in seeking intervention." Here, the Court of Appeals rejected the District Court's conclusion that appellant was aware of the lawsuit and that its leases were at issue from the date that the litigation was filed. The court highlighted uncontested evidence in the record, that the District Court apparently overlooked, indicating that appellant had no idea that its leases were involved in the instant litigation. The court recognized that although appellant intervened two years after the litigation had begun, it's motion to intervene actually came just three months after appellant discovered that its leases were involved in the litigation.

The Court of Appeals concluded under the totality of the circumstances that the District Court abused its discretion in finding that appellant's motion for intervention was untimely.

Adequacy of Representation

Under Rule 24 (a), an intervening party must show that its "interests will not be adequately represented by existing parties." The burden in making this showing of inadequate representation "is minimal and satisfied if the appellant can demonstrate that representation of its interest may be inadequate." To evaluate adequacy of representation, courts look to three factors: 1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments, 2) whether the present party is capable and willing to make such arguments, and 3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

The court conceded that appellant and the existing trade association party both had the objective of upholding BLM's lease sales. This gave rise to a presumption that existing parties adequately represented appellant. To rebut this presumption appellant needed to make a "compelling showing" of inadequate representation. The court concluded that appellant had made this showing. First, the trade association party did not seek to raise several colorable arguments that appellant sought to raise. The trade association was also only given ten pages for its Phase One merits brief, despite the fact that there were 932 leases at issue. As a result, the court concluded that the trade association could not adequately represent the more specific interests that the appellant wanted to raise in the action. Appellant, as a party with legally protected contract rights with the federal government, would offer a necessary element to the proceeding that other parties would neglect. Here, appellant had a substantial due process interest in the outcome of the litigation by virtue of its contract with the BLM. Although the trade association intervened with the express purpose of representing companies like the appellant, it was charged with representing 300 such companies engaged in all aspects of oil and gas production. It is possible that appellant's more narrow interests would differ from those of the trade association.

The Court of Appeals concluded that appellant had satisfied the requirements for intervention as of right under Rule 24(a), and reversed and remanded the District Court's decision.

Conclusion and Implications

The *Western Watersheds Project* case provides a helpful overview of the factors involved in determining whether a party is entitled to intervene in a federal action as of right under Rule 24(a). A copy of the court's opinion can be found online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/01/05/20-35780.pdf.
(Travis Brooks)

PFAS SUITS MULTIPLY FOR MANUFACTURERS AS EPA BEGINS MORE ACTIVE ATTENTION TO TESTING

Suez Water New York Inc. v. E.I. DuPont De Nemours and Company, ___F.Supp.4th___, Case No. 1:20-cv-10731 (S.D. NY Jan. 4, 2022).

On the heels of news that the U.S. Environmental Protection Agency (EPA) is considering regulatory steps that will govern PFAS and has ordered PFAS testing, lawsuits in New York and New Jersey against DuPont companies have come down, with mixed results.

The District Court's Decision in New York

In a U.S District Court [for the Southern District of New York], the Suez water management company sued the four DuPont related entities in December 2020, claiming that as manufacturers of PFAS products, including the coating for Teflon® and the fibers for Tyvek®, they had contaminated its water sources for decades and that they should pay for the management company's upgrades to its five water treatment plants in New York. PFAS generally refers to per- and poly-fluoroalkyl substances. The claims filed sounded in public and private nuisance, and also in negligence.

Judge Lewis Liman's order is a detailed discourse on the causes of action alleged by Suez against the DuPont entities. It provides a thoughtful rationale why original chemical manufacturers are not liable for injuries resulting from the use or disposal of their products without some conscious involvement or control over that harmful use or disposal.

Causation

The opinion starts with a discussion of the concept of causation, which is required to be proven whether the tort claimed is common law nuisance, trespass or product liability.

While Judge Liman criticized Suez's claims against the chemical companies being filed under New York jurisdiction as "barely" meeting requirements, he did agree with the management company that the chemical companies do have enough presence in the state to be sued there. According to the 2020 complaint, the chemical companies had a legal presence in New York.

However, the court was critical of the bare bones nature of allegations the defendants contaminated the environment in New York and caused damages in the form of treatment costs being incurred by the plaintiff water company.

Nuisance

As to both public and private nuisance theory, the judge cites to major PCB and asbestos litigation cases for holding that a manufacturer cannot be responsible legally for all uses put to its product by third-party buyers who wind up allowing the product to enter commerce in ways that do cause harm to persons or property. Even more pointedly, DuPont entities as manufacturers were in no way "causing" illegal entry or insult to property such as to create a "trespass."

Product Liability

Similarly, the court reviewed alleged product liability theories put forth in the complaint. It held that the manufacture of the PFA products was not, in and of itself, ultrahazardous activity. Even if the PFAS were viewed as themselves "ultrahazardous." their sale in commerce did not give rise to a tort of ultrahazardous activity, because that tort is restricted to inherently dangerous use of land, such as making explosives. Cf. *Suez Water N.Y.*

Same Case, Different Federal Court

The New York federal judge's opinion seems to clash with that of a counterpart suit in New Jersey where the claim was allowed to proceed against the same chemical companies. In her order, U.S. District Judge Madeline Cox Arleo is reported to have found that Suez had sufficiently alleged injuries resulting from contamination to support a public nuisance claim. As to Suez's claims of successor jurisdiction, however, Judge Arleo found there was not enough on the record to decide the issue and ordered jurisdictional discovery.

Regulating PFAS

Meantime, on the regulatory front respecting PFAS, the Biden administraton made an announce-

ment on October 18, 2021 of a multi-faceted, multi-agency approach to PFA controls. In addition, the Biden administration EPA has reversed a denial of a petition for testing by Chemours, one of the DuPont companies sued by Suez, of some 54 PFAS that the Trump administration denied as it left office. Petitioners sought reconsideration. On Tuesday, December 28, 2021, Dr. Michal Freedhoff, Assistant Administrator, EPA Office of Chemical Safety and Pollution Prevention, penned a 29-page letter granting approval of the petition to test a total 39 of the 54 PFAS requested. (https://www.epa.gov/newsreleases/epa-grants-petition-order-testing-human-health-hazards-pfas)

Dr. Freedhoff has summarized the major points in in her letter as follows:

•Near-Term Testing Covers 30 of 54 Petition Chemicals – Under the testing strategy, EPA's first test orders for 24 data-poor categories of PFAS will provide data that cover 30 of the 54 petition chemicals. Seven orders will be issued specifically for petition chemicals, which are in categories that also include 14 additional PFAS identified in the petition. Four orders will be issued for non-petition chemicals, which are in categories that include nine additional PFAS identified in the petition. The initial test orders will include animal tests that measure most of the specific human health related toxicity endpoints identified as a concern by the petitioners (e.g., systemic, reproductive, developmental, thyroid, and immunological toxicity). Subsequent tiers of testing that will be specified in the initial test orders may include additional endpoints (e.g., cancer), depending on the results of the initial tiers of tests and consistent with the TSCA statutory requirement regarding tiered testing.

•Subsequent Testing May Cover Nine of 54 Petition Chemicals – An additional nine PFAS identified in the petition belong to one other category included in the Testing Strategy. EPA is conducting more in-depth analyses of the sufficiency of the existing data, which will inform later phases of testing.

•Mixtures Studies – EPA is planning to address PFAS mixtures with component-based approaches wherein the toxicity of the product is determined or predicted from the toxicity of individual chemical substances that comprise the mixture, an approach which is consistent with the current state-of-science on PFAS. EPA is proceeding with development and peer review of such methods as specifically applied to PFAS.

•Human Studies – EPA is contributing to and reviewing numerous existing ongoing human studies, including studies on potentially exposed workers and communities in North Carolina, and is evaluating how to further advance and expand on these efforts.

•Analytical Standards – EPA does not believe it is appropriate to require the development or submission of analytical standards with the initial test orders that will be issued under the Testing Strategy and lacks the ability to order the submission of all analytical standards in the manner requested. Nonetheless, EPA has requested comment on whether to require the submission of existing analytical methods for PFAS under a separate rulemaking proceeding the Agency expects to finalize next year.

Conclusion and Implications

If the testing of the PFAS turns up data or information that affects understanding of the safety or toxicity of some of these specific products, one can foresee future legal battles over the details of the chemistry and whether continued sale or particular use of one or more of them could give rise to tort liability of some sort as to specific kinds of future sales, irrespective of the holding by Judge Liman in New York. For that matter, some form of amended and more particular pleading might succeed in permitting a tort case against DuPont or other manufacturers to proceed. The opinion of the court for the S.D. of New York in *Suez Water New York Inc. v. E.I. DuPont De Nemours and Company,* is available online at: https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvomarwzvd/8efa68af-72c8-4700-be9b-70ddedd436dw49.pdf.
(Harvey M. Sheldon)

Eastern Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108