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CALIFORNIA WATER™

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CALIFORNIA WATER NEWS

ARROWHEAD MOUNTAIN SPRING WATER CHALLENGES DRAFT CEASE AND DESIST ORDER ISSUED BY CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

Despite a long history of extracting and bottling water from the San Bernardino Mountains as Arrowhead Brand Mountain Spring Water, California authorities, spurred on by public scrutiny, are now investigating the validity of water rights associated with the operation. In a 2021 Report of Investigation and draft Cease and Desist Order, the State Water Resources Control Board (SWRCB) Division of Water Rights determined that a substantial portion of the diversions may have been without a sufficient underlying right. Recently, additional hearings commenced before the SWRCB's Administrative Hearings Office in which the Cease and Desist Order is being challenged and that could significantly affect the future of the operation.

Background

For over a century, BlueTriton Brands and its predecessors, including Nestlé Waters North America (collectively referred to as Nestlé), have bottled water from Strawberry Canyon in the San Bernardino National Forest under the Arrowhead label. The infrastructure for extraction and transmission currently consists of 13 points of diversion: three spring tunnels and ten horizontal boreholes. In recent years, public scrutiny has grown and prompted further investigation the National Forest Service and the SWRCB.

According to information published by Nestlé, Nestlé bottled approximately 19.64 acre-feet (AF) from Strawberry Canyon in 2020, 31.92 AF in 2019, and 51.56 AF in 2018 but does not hold SWRCB appropriative permits or licenses for diversion and use of water from Strawberry Canyon and has not filed not filed any Statements of Diversion and Use. Amid ongoing litigation and controversy, in 2018, the National Forest Service granted Nestlé a new three year special use permit, with two discretionary one-year extensions, authorizing continued use of federal lands for the water extraction operation.

In 2021, Nestlé began operating under the new corporate name BlueTriton Brands after being acquired by other companies.

The State Water Board Investigation

In 2015 the SWRCB, Division of Water Rights (Division) received eight complaints and one online petition against Nestlé's water bottling operation, which collectively alleged improper diversions of water without a valid basis of right, unreasonable use of water, injury to public trust resources, and incorrect or missing reporting. Following an initial investigation, the Division published a report in 2017. As a result of public comments on that report, the Division conducted a further investigation and published a revised Report of Investigation in 2021 (2021 Report).

The lengthy 2021 Report concludes that, among other findings: 1) Nestlé lacks riparian rights; 2) based on a 1909 historical contract to appropriate, Nestlé may claim an appropriative right of up to 7.26 acre-feet annually under a pre-1914 claim; 3) Nestlé likely has a valid claim to appropriate percolating groundwater from seven of the ten boreholes, though the amount is not yet quantified; and 4) Nestle's diversions and use of water greater than 7.26 acre-feet annually from the three spring tunnels and seven of the boreholes is an unauthorized diversion and is subject to the permitting authority of the SWRCB.

The Draft Cease and Desist Order

California Water Code § 1831(d) states, in part, that the SWRCB may issue a cease and desist order when it determines that any person is diverting or using water without authorization in violation of Water Code §1052. Accordingly, the Division issued a draft Cease and Desist Order (Draft Order) that would require Nestlé to, among other things, immediately cease all unauthorized diversions, update ownership of groundwater extraction recordations,

file a Statement of Water Diversion and Use and conduct further analysis to more precisely determine the amount of water at all points of diversion that surfaced naturally as a spring and is therefore subject to the permitting authority of the SWRCB. Failure to comply with the order will result in a maximum civil penalty of $1,000 per day for non-drought years and $10,000 per day for drought years.

Further Decisions and Action

Nestlé is challenging the Draft Order and requested a hearing on the matter. Hearings before the SWRCB's Administrative Hearings Office commenced on January 10, 2022 and continued through January 14, 2022. After a site visit on January 26 and 27, public hearings resumed on January 31 through February 2, 2022. Rebuttal hearings were scheduled to take place in mid-to-late February and could continue through March. Once the hearing officer rules on the Draft Order, the matter will go before the SWRCB for a final decision, which could occur sometime later this year.

In the meantime, the SWRCB has observed that Nestlé is not precluded from applying for a water right permit consistent with rights Nestle claims pursuant to a 1931 stipulated judgment in a San Bernardino Superior Court case, *Del Rosa Mutual Water Company v. D.J. Carpenter, et al.* The SWRCB warns, however, that because the Santa Ana River Watershed (within which Strawberry Canyon is located) was declared fully-appropriated in 1964, water availability is uncertain and further determinations would be necessary during the water right permitting process.

Conclusion and Implications

Following the issuance of the Draft Order, Nestlé faces much greater scrutiny and potential regulation of its water diversions from Strawberry Canyon and associated groundwater supplies. On the other hand, Nestle's many decades of diversions and water use, as well as certain historical records supporting aspects of those uses, may provide substantial support for Nestle to challenge the Draft Order and continue its multi-generational operation.
(Byrin Romney, Derek Hoffman)

TURLOCK IRRIGATION DISTRICT RECEIVES FUNDING FOR SOLAR PANEL COVERED CANALS PILOT PROGRAM

In an innovative effort to combine water conservation with energy generation, the Turlock Irrigation District (TID) is now set to move forward with its solar panel covered canals program, Project Nexus, with the help of $20 million awarded by the Department of Water Resources in early February. Allocated by Governor Gavin Newsom and the California Legislature through the state's 2021-2022 budget, the $20 million will go towards TID's pilot program that seeks to showcase the benefits that will come from using solar energy generation equipment to cover its water supply canals.

Project Nexus

Stemming from the study performed last year by the University of California, Merced and Santa Cruz, Project Nexus plans to utilize solar panel canopies over various sections of TID's irrigation canals, providing an upgrade for the water conveyance systems already in place and additional solar energy generation in furtherance of the state's renewable energy portfolio.

The UC study estimated that by covering all of the Central Valley's 4,000 or so miles of canals, the state could get roughly halfway to its 2030 goal for clean energy. After the study was released, Governor Newsom proposed the $20 million for a pilot program in the State's 2021-2022 budget. As the program was realized, TID and the Department of Water Resources, along with the University of California, Merced and development firm Solar AquaGrid, partnered together and were able to polish the plan into what it is now.

Project Nexus, aptly named for the water-energy nexus the plan builds upon, is designed to function as a proof of concept and will be used to further study the solar over canal system's design, its deployment, and the benefits that this duet can bring to the Cen-

tral Valley and California as a whole. The Project's solar panels are only expected to generate a combined 5 megawatts, not even 1 percent of the typical peak demand of the TID's 103,000 customers, but the aim is that if the system can prove itself as a significant infrastructural upgrade then it can be used as a model for the rest of the Central Valley.

The solar panel canopies of Project Nexus are currently planned for two different test sites. One of these sites is slated to cover about 500 feet of the Main Canal near Hawkins Road, about five miles east of Hickman, where the canal is 110 feet wide. The other site is set to cover about 1.5 miles of the Ceres Main Canal and Upper Lateral 3, located about three miles west of Keyes. Here the canals here are much smaller than the Main Canal at only 20 to 25 feet wide.

TID's expectation for the Project is that the solar shading over canals will provide numerous benefits, including reduced water evaporation, water quality improvements, reduced canal maintenance, renewable electricity generation, and air quality improvements, among others. Furthermore, the Project partners anticipate adding energy storage capabilities to support the local electric grid when solar generation is suboptimal.

TID's Board President, Michael Frantz offered his view of the pilot project as follows:

> In our 135-year history, we've always pursued innovative projects that benefit TID water and power customers. . . .There will always be reasons to say 'no' to projects like this, but as the first public irrigation district in California, we aren't afraid to chart a new path with pilot projects that have potential to meet our water and energy sustainability goals.

On top of the advances in both renewable energy and water conservation TID will bring to its service area, the overall concept of solar panels over canals will likely be of significant interest statewide. Implementing this idea elsewhere along irrigation canals would have massive benefits related to efficiency, cost, air-quality, and ecological impacts. The UC study showed that covering all of the roughly 4,000 miles of public water delivery system infrastructure in California with solar panels would have significant water, energy and cost savings for the state. Specifically, the study showed a savings of up to 63 billion gallons of water per year (about 232,000 acre-feet). The study also showed that a statewide solar canopy system would generate 13 gigawatts of solar power or about one sixth of the state's current installed capacity. As such, Project Nexus is a way to test these conceptual projections at a much smaller scale.

Moreover, putting solar panels over water rather than land can help cool the panels, making them operate more efficiently. Because solar cells become less efficient as they heat up, the water's cooling effect can increase their conversion ability. Putting solar panels over canals rather than on land can also save money and time spent on permitting processes and allows operators to double up on the land use of these canals by combining infrastructure for electrical energy generation with preexisting water conveyance systems. Additionally, by covering otherwise exposed waterways from direct sunlight, the panels can not only reduce evaporation, but can also work as a preventative measure against the growth of aquatic weeds, further reducing maintenance cost.

Conclusion and Implications

TID's Project Nexus should be a highly anticipated development over the next decade and could have a trailblazing effect on water conveyance infrastructure moving forward has the promise to be a perfect display of innovative and ambitious solutions to several of the major issues California faces today from water supply to renewable energy generation and even land use. While the true benefits of the Project will only be seen once up and running which isn't set to occur until 2024, Project Nexus is an incredible step towards the kind of utopian infrastructure Californians have waiting for. For more information, *see:* https://www.tid.org/wp-content/uploads/2022/02/TID-ProjectNexus-PressRelease_final.pdf; and https://snri.ucmerced.edu/news/2022/solar-paneled-canals-getting-test-run-san-joaquin-valley.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA'S LEGISLATIVE ANALYST'S OFFICE RECOMMENDS GOVERNOR'S WATER AND DROUGHT RESPONSE PROPOSAL INCLUDE MORE FUNDING FOR GROUNDWATER RECHARGE

The Legislative Analyst's Office (LAO), the California Legislature's nonpartisan fiscal and policy advisor, recently released its analysis of Governor Newsom's proposed funding plan for drought response activities in the 2022-23 budget (Proposal). The LAO recommended changes in the priorities of the funding package, including greater emphasis on groundwater recharge and storage and immediate drought response, if necessary.

Background

In the Drought and Water Resilience Packages approved in July and September 2021, the Governor and the Legislature agreed to spend $4.6 billion over three years for water activities. Approximately $3.3 billion of that funding is focused on water supply and reliability, drinking water, and flood control, and approximately $1.2 billion will fund initiatives related to water quality and ecosystem restoration. These initiatives largely focus on long-term planning and preparedness. The Legislature's plan also included $137 million for immediate drought response in the summer and fall of 2021, but did not allocate funds for those activities in 2022-24.

The Governor's Proposal

Consistent with the 2021 Drought and Water Resilience Packages, the Governor's Proposal for 2022-23 contained $880 million for predetermined water-related initiatives. The Proposal also included an additional $750 million for projects categorized as "drought response activities." However, of that amount, only $65 million is allocated for immediate drought response. Further, $200 million is allocated to water conservation; $150 million is allocated to water storage and reliability; and, $85 million is allocated to land management and habitat enhancement. Another $250 million is unallocated until later in this water year when further information regarding the year's precipitation and snowpack is available.

The LAO's Analysis of the Proposal

The LAO analysis recognized the importance of funding water related activities including longer-term drought resilience, particularly given the severe statewide drought conditions in 2021 and variable precipitation patterns. However, the LAO noted that the Legislature has already made significant investments into long-term drought resilience and long-range planning. The LAO posited that state and local agencies are likely to be busy administering previously allocated funding, which generally represents a significant increase in their budgets, and that they may not have capacity at this time to effectively apply additional funds to those initiatives. Moreover, the LAO observed, at this point in the year it is not yet known whether drought conditions in 2022 will require more allocated funds for immediate drought response.

The LAO questioned whether the Proposal's heavily weighted funding allocation for water conservation is the most effective use of state funding. The LAO noted that California has already significantly reduced urban water use and that it may not be reasonable or cost-effective to expect further reductions. The LAO further asserted that urban water use represents a comparatively small proportion of the state's overall water use, and that the water conservation and water budget legislation enacted in 2018 is still in the early phases of implementation.

The LAO further stated that the Proposal's $30 million allocation for Sustainable Groundwater Management Act (SGMA) groundwater recharge initiatives is insufficient. The LAO pointed to the hydrological trend towards lower snowpack, prolonged dry periods, and occasional heavy, wet storms that contribute to flooding and observed that in such conditions, efforts to trap water during storms and direct it to aquifer recharge, where it will remain available during later dry spells, can offer significant benefits. Such projects can also have the benefit of reducing the flood risk of heavy, wet storms.

The Proposal calls for continued funding of the Department of Conservation's (DOC) multi-benefit land repurposing program, in the amount of $40 million. The goals of this project are to reduce groundwater use, repurpose irrigated agricultural land to less water-intensive uses, and provide wildlife habitat. However, DOC is still in the initial processes of designing and implementing the program, so information related to the type and number of projects that be eligible for funding remains unknown. The LAO observed this program must first be put into operation in order to evaluate whether additional funding will be warranted.

LAO's Recommendations to the Legislature

In light of its above analysis, the LAO recommended that the Legislature delay adopting spending legislation based upon the Proposal until this year's hydrological conditions are better known, and that it considers spending a lower amount on long-range planning given the recent, significant investments made in those areas. The LAO also recommended modifying the Proposal to focus more on groundwater recharge and storage projects and less on water conservation. The LAO also proposed that any decision regarding additional funding for the multi-benefit land repurposing program wait at least another year.

Conclusion and Implications

With respect to the 2022-2023 budget, one thing is clear: Governor Newsom, the Legislature and the Legislative Analyst's Office appear aligned in that hundreds of millions of dollars should be allocated to water related initiatives. The present focus is how those funds should be allocated, in light of progress made on conservation efforts and potentially looming drought conditions that may warrant more immediate spending. The Legislature has until June 15, 2022, to make those final decisions.
(Jaclyn Kawagoe, Derek Hoffman)

PROPOSED CALIFORNIA BILL WOULD PROHIBIT SEABED MINING OF PRECIOUS METALS IN THE STATE'S COASTAL WATERS

Computers have come a long way over the last 50 years, and nowadays if you were to stop any American on the street odds are they would have a computer on them in one form or another. Likewise, pretty much every car you pass on your morning commute is running thanks in part to a computer. But like all finite resources, the issues in maintaining a steady supply of precious metals to craft these brilliant machines has become more and more of an issue as the years go by and manufacturers continue to search for ways to keep the metals coming. One relatively new concept in harvesting precious metals is seabed mining, but a new California bill is seeking to prevent such operations from coming to California's coastline.

Assembly Bill 1832: The California Seabed Mining Prevention Act

In early February 2022, California Assemblywoman Luz Rivas (D – San Fernando Valley) introduced Assembly Bill (AB) 1832) (Bill), dubbed the California Seabed Mining Prevention Act, a bill which would proactively prohibit mining from taking place in roughly 2,500 square miles of California waters that aren't currently protected. California's neighbors to the north, Oregon and Washington, already have laws in place that prohibit such seabed mining.

Specifically, the Bill takes issue with seabed mineral mining as inconsistent with the public trust by posing an "unacceptably high risk of damage and disruption to the marine environment of the state." The Bill also draws attention to importance of our state's marine waters, describing the rich and diverse ecosystems present along the coast and how these ecosystems are critical to the state's commercial fishing, recreational fishing, and tourism industries.

Another concern of the proposed legislation is the largely speculative impact these operations might have on marine environments. For example, the machinery required for such operations could have seriously destructive impacts on many of the surrounding communities of marine life. Furthermore, these operations could kick up large sediment clouds capable of traveling long distances and smother or otherwise negatively impact the feeding and reproduction of

marine life. These sediment plumes and the noise generated by such operations could also negatively impact whales, dolphins, and other marine mammals throughout the region. On top of all the potential environmental concerns, these mining operations could also negatively impact the scenic value of the state's beaches, tide pools, and rocky reaches that Californians and tourists alike enjoy on a daily basis.

The Legislatures of both Oregon and Washington have passed legislation that prohibits seabed mining in their state waters, with Oregon's law dating back to 1991 and Washington joining just last year, so the proposed Bill in California is far from unprecedented. In fact, protections against seabed mining have gained popularity on a global scale with the European Parliament adopting a resolution in support of a moratorium on seabed mining in June of 2021.

Seabed Mining in California Waters

The technology and industry of seabed mining is still in its early stages, but these operations have already begun in several regions around the world, including waters off the coast of Namibia, Papua New Guinea, Japan and South Korea. While California waters have yet to host these seabed mining operations, the California Legislature can still utilize this opportunity to preemptively weigh in on the impacts of seabed mining before any negative impacts are realized.

As the Bill advocates, a prohibition on seabed mining would prevent potentially disastrous impacts on marine environments and it would likely do so without much impact on precious metal supplies. In the words of the Bill itself:

> California state waters do not represent a marketable source for battery metals, the emerging justification for extraction interest at the seafloor globally.

Even so, seabed mining operations in California could still provide meaningful supplies for other uses and would likely pop up along the coast in one of two areas: the North Coast for its caches of gold, titanium, and other precious and semiprecious metals and the South Coast for phosphorites.

The leasing authority for California's tidelands and submerged lands is generally held by the State Lands Commission, unless the California Legislature has granted such lands to local governments to manage on behalf of the state. At the state level, California is currently required to accept applications for hard mineral exploration and extraction leases along its coast, and to consider those applications on a case-by-case basis, so at this point seabed mining is at least a possibility in the state even if the industry has yet to come to California waters. The proposed Bill would nip that industry in the bud before it has the chance to take off.

Conclusion and Implications

While the aim of the bill is designed to protect the state's marine environment, it will undoubtedly face heavy opposition as it progresses as it poses a hard barrier to entry in the state for an industry permeated by future supply problems. Exacerbating the issue is the skyrocketing demand for computer electronics and electric vehicles over the last two decades and manufacturers will be hard pressed to keep pace. In order to do so, large deposits of metals and minerals will need to be sourced and a block on such a source is guaranteed to cause controversy, regardless of how well-intentioned the Bill may be. For the history and full current text of the bill, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1832.

(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION SPENDING PLAN TARGETS WESTERN WATER INFRASTRUCTURE

In January 2022, the United States Bureau of Reclamation (Bureau) submitted its initial spending plan for Western water-related infrastructure, programs, and activities following passage of the Bipartisan Infrastructure Law signed by President Biden on November 15, 2021. The Plan and the Bureau 2022 budget request allocate funding for various categories of projects, including dam and water conveyance facility improvements, water recycling and desalination activities, and habitat conservation in California and the lower Colorado River Basin.

Background

The Bureau was established in 1902 and manages and develops water resources in the western United States. The Bureau is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial uses. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

Under the Bipartisan Infrastructure Law of 2021 (Infrastructure Law), the Department of the Interior (of which the Bureau is a subpart) will receive $30.6 billion over five years. The Infrastructure Law provides a total of $8.3 billion under Title IX (Western Water Infrastructure) to the Bureau for Western programs and activities. An initial $1.66 billion is allocated to the Bureau in fiscal-year (FY) 2022, and the Bureau has submitted an initial spending plan (Plan) for that funding, with allocations by project and location identified and updated monthly as funding selections are made for various funding categories. The total appropriation of $8.3 billion, provided in increments over five years, will be different annually, with higher percentages of allocations made in the first year's Plan based on shorter term capability of a given program, efficiency (including potential cost savings), and whether a program is ready for administration.

Key Priorities Identified

The Bureau has adopted four key priorities with respect to its Plan: 1) increase water reliability and resilience; 2) support racial and economic equity; 3) modernize infrastructure; and 4) enhance water conservation, ecosystem, and climate resilience. Under the Plan, the Bureau will consider a potential project's ability to effectively address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate environmental impacts of projects. Accordingly, the Bureau will generally give priority to projects that complete or advance infrastructure development, make significant progress toward species recovery and protection, maximize and stabilize the water supply benefits to a given basin, and enhancing regional and local economic development as well as advance tribal settlements.

A Closer Look at the Plan

The Bureau's Plan would provide funding for a wide variety of Western water projects, programs, and activities. For instance, the Plan would provide $250 million for implementation of the lower Colorado River Basin Drought Contingency Plan and may be used for projects to establish or conserve recurring Colorado River water that contributes to supplies in Lake Mead and other Colorado River water reservoirs in the Lower Colorado River Basin, or to improve the long-term efficiency of operations in the Lower Colorado River Basin. The Bureau intends to allocate $50 million of Infrastructure Law funding to combatting the impacts of climate change, per a Memorandum of Agreement to invest up to $200 million in projects over the next two years to reduce the risk of Lake Mead falling to critically low elevations in the coming months and years (known as the 500 Plus Plan). To supplement these investments, the Department of

Interior signed various water conservation agreements with the Colorado River Indian Tribes and the Gila River Indian Community designed to help stabilize the elevation of Lake Mead.

The Bureau's FY 2022 proposed budget also includes $56.5 million for the Central Valley Project Restoration Fund, and $33 million for California Bay-Delta restoration activities focused on improving the Bay-Delta ecosystem and on improved water management and supplies. The Bureau's budget is intended to support the goals of environmental restoration and improved water supply reliability by providing $1.7 million for a renewed Federal-State partnership, $2.3 million for water supply and use, and $29.0 million for habitat restoration.

The Bureau's Plan also provides for significant investment in water and groundwater storage and conveyance projects to increase water supply via construction of water storage or conveyance infrastructure or by providing technical assistance to non-federal entities ($1.05 billion); aging infrastructure to support, among other things, developing and resolving significant reserved and transferred works failures that prevented delivery of water for irrigation ($3.1 billion); rural water projects, including developing municipal and industrial water supply projects ($1 billion); water recycling and reuse projects ($550 million) and "large scale" water recycling and reuse projects ($450 million) to promote greater water reliability and contribute to the resiliency of water supply issues; water desalination ($250 million); safety of dams to ensure Bureau dams do not present unacceptable risk to people, property, and the environment ($500 million); WaterSMART grants to provide adequate and safe water supplies that are fundamental to the health, economy, and security of the country ($300 million); watershed management projects ($100 million); aquatic ecosystem restoration and protection ($250 million); multi-benefit watershed health improvement ($100 million); and endangered species recovery and conservation programs in the Colorado River Basin ($50 million).

Conclusion and Implications

The Infrastructure Law is touted as a once-in-a-generation investment in the Nation's critical infrastructure, including Western water infrastructure. While it remains to be seen to what extent the investment in Western water infrastructure will enhance water supply reliability for the region, the Bureau of Reclamation's Plan represents an important and informative step toward addressing persistent and complex water supply and allocation issues. The Initial Spending Plan is available online at: https://www.usbr.gov/bil/docs/spendplan-2022/Reclamation-BIL_Spend_Plan_2022.pdf.
(Miles Krieger, Steven Anderson)

U.S. ARMY CORPS OF ENGINEERS AND NOAA ENTER INTO JOINT MEMORANDUM REGARDING ESA CONSULTATIONS FOR EXISTING STRUCTURES

On January 5, 2022, the U.S. Army Corps of Engineers' (Corps) Civil Works Program and the National Oceanic and Atmospheric Administration (NOAA) signed an inter-departmental Memorandum of Understanding (MOU) aimed at streamlining the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA) Section 7 Consultation for projects involving existing structures, such as bulkheads and piers. In particular, the MOU seeks to resolve certain legal and policy issues regarding "how the agencies evaluate the effects of projects involving existing structures on listed species and designated critical habitat," while accounting for recent revisions to the ESA's implementing regulations. (Mem. Between the Dept. of the Army (Civ. Works) and NOAA, Jan. 5, 2022 (Corps/NOAA MOU.).)

Background

ESA Section 7 requires that federal agencies ensure any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species (collectively: special status species) or result in the destruction or adverse modification of designated critical

habitat of such species. (16 U.S.C. § 1536(a).) As part of this consultation process, federal agencies must identify the "environmental baseline" against which the action is evaluated. (50 C.F.R. § 402.02.) Federal agencies must then evaluate the "effects of the action" against that baseline to determine whether the proposed action may jeopardize the continued existence of a special status species or its designated habitat. (50 C.F.R. § 402.14(c)(1)(i), (c)(1)(iv), (c)(4).) Traditionally, confusion existed over what constituted an effect of the action and what could be included in the environmental baseline—in particular, for permits issued for proposed actions involving existing structures, which may include bulkheads, piers, bridge or other in-water infrastructure.

In 2018, the NOAA National Marine Fisheries Service (NMFS) West Coast Region issued guidance to assist NMFS biologists in discerning whether the future impacts of a structure were "effects of the action." Subsequently, on August 27, 2019, NMFS adopted a final rule updating Section 7 inter-departmental consultation regulations to clarify definitions and analyses pertinent to the consultation requirement. (*See,* 84 Fed.Reg. 44976 (Aug. 27, 2019).) The updated regulations simplify the definition of "effects of the action" by adopting a two-part test: an "effect of the action" is a consequence that would not occur "but for" the proposed action and that consequence is "reasonably certain to occur." (50 C.F.R. § 402.02.) A conclusion that a consequence is "reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available." (50 C.F.R. § 402.17.)

The updated consultation regulations also establish a standalone definition of "environmental baseline," as "[t]he consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify." (84 Fed.Reg 45016; 50 C.F.R. §402.2.) To this end, the preamble to the rule asserts that the extent of an agency's discretion should be used to determine whether consequences of an action are part of the environmental baseline, but the effects of the action are not limited to those over which a federal agency exerts legal authority or control. (84 Fed.Reg. 44978-79, 44990.)

The MOU

Under the Corps' Civil Works Program, the Corps plans, constructs, operates, and maintains a wide range of in-water facilities at the direction of Congress. The Corps is charged with authorizing such projects under appropriate permitting, which may include establishing a particular use for a structure without providing a date by which the project must be decommissioned. (*See* 33 C.F.R. § 325.6(a) - (b).) Such long-term infrastructure may require consistent maintenance and operation throughout its useable life. For instance, Corps' constructed civil works projects may implicate adjustments to fish passage facilities. (Corps/NOAA MOU at p. 4.) Generally, the Corps lacks discretion to cease the maintenance and operation of civil works projects that are congressionally authorized. Thus, the Corps interprets the new environmental baseline definition, set forth above, to include the future and ongoing effects of these existing structures' existences. (Corps/NOAA MOU at p. 5.)

Where maintenance of an existing structure implicates a new discharge, new structure, or work that affects navigable waters, the project proponent must obtain appropriate authorizations and permits from the Corps. (*See e.g.*, 33 C.F.R. §§ 322.3(a), 323.3(a).) The short-term effects that result from the Corps' discretionary approvals and permitting, such as construction impacts or the manner and timing of maintenance or operations, are included in the effects of the action. (Corps/NOAA MOU at p. 5.) Similarly, the Corps may not issue a Clean Water Action Section 404 permit for the discharge of dredged or fill material, if such authorization would jeopardize the continued existence of a threatened or endangered species and it must consider the effects of its decision on listed species and critical habitat. (*Ibid*; 33 C.F.R. §§ 320.4, 325.2(b)(5); 40 C.F.R. § 230.10(b)(3).)

In the MOU, NMFS agrees to defer to the Corps' interpretation of its discretion, as set forth above, on a project-by-project basis. (Corps/NOAA MOU at p. 5.) And the Corps commits to interpreting the scope of its discretion on a case-specific basis, by analyzing:

> . . .what consequences would not occur but for the action [*i.e.*, permit issuance] and are reasonably certain to occur." (*Id.* at p. 5, 6.)

In this analysis, the Corps will review, inter alia, the:

> . . .current condition of the [existing] structure, how long it would likely exist irrespective of the action, and how much of it is being replaced, repaired, or strengthened. (*Id.* at p. 6.)

The Corps will include these consequences, which stem from maintenance on or updates to an existing structure, as an effect of the action. (*Ibid.*)

Like the analyses of civil works projects, which involve minimal Corps' discretion, certain federal agencies also lack discretion to modify or cease maintenance or operation of an existing agency structure or facility. The Corps intends to consider this lack of discretion to define the "effects of the action" during the consultation process. Similarly, NMFS will defer to that federal agency's interpretation of its discretion following a project-specific analysis.

Conclusion and Implications

In sum, the MOU provides a clearer scope of consultation for Corps-issued permits authorizing maintenance or modification of existing structures, while establishing principles of interpretation for the revised ESA consultation regulations where Corps permitting is implicated. Establishing these principles is intended to facilitate timely project implementation through streamlined consultation. According to NOAA and the Corps, the MOU is also intended to allow for the expedited development of certain programmatic biological opinions and permitting for new projects that implicate the need for Corps authorization where existing structures are involved.
(Meghan Quinn, Tiffanie A. Ellis, Darrin Gambelin)

DEPARTMENT OF WATER RESOURCES DEEMS GROUNDWATER SUSTAINABILITY PLANS FOR 12 CRITICALLY OVERDRAFTED BASINS INCOMPLETE

On January 21 and 28, 2022, the California Department of Water Resources (DWR) issued assessments that Groundwater Sustainability Plans (GSPs) for 12 critically overdrafted basins are incomplete, giving the basins' respective Groundwater Sustainability Agencies (GSAs) 180 days to address the issues identified by DWR or risk state intervention in the management of the affected groundwater basins. DWR's assessments included the 31 GSPs for all ten of the critically overdrafted basins located in the San Joaquin Valley.

Background on SGMA Requirements for Review of GSPs

The Sustainable Groundwater Management Act (SGMA) was enacted in 2014 with the goal of ensuring the sustainability of groundwater in California. SGMA requires DWR to designate California groundwater basins and subbasins as either low, medium, or high priority. SGMA requires the formation of GSAs in high- and medium-priority basins to manage the sustainability of groundwater. Local agencies may also opt to form GSAs in low priority basins. DWR has identified 94 basins as high or medium priority. Among those, DWR has identified 21 basins as critically overdrafted basins. Of those, ten are subbasins in the San Joaquin Valley, as follows: the Eastern San Joaquin, Merced, Chowchilla, Delta-Mendota, Kings, Kaweah, Westside, Tulare Lake, Tule, and Kern County.

For basins designated as high or medium priority, the GSA for that basin has responsibility for preparing a GSP to identify and implement SGMA's sustainability goals within 20 years of the adoption of the GSP. A GSP is required to address six different indicators of sustainability" reduction of groundwater levels, reduction in groundwater storage, land subsidence, depletion of interconnected surface water, seawater intrusion, and degradation of water quality.

A number of subbasins have multiple GSAs and submitted multiple GSPs. For example, the Tule Subbasin includes six GSAs, and each GSA submitted its own GSP. A total of 31 GSAs govern the ten critically overdrafted subbasins in the San Joaquin Valley. GSAs in the same subbasin are required to coordinate in preparing their GSPs. GSAs for critically overdrafted basins were required to submit completed

GSPs to DWR for approval by January 31, 2020. GSPs for the remaining high- and medium-priority basins were required to be completed by January 31, 2022. Following a public comment period, DWR has two years to evaluate and assess each GSP. Starting in June 2021, DWR has been releasing assessments of GSPs on a rolling basis.

In November and December 2021, DWR issued letters notifying GSAs in the ten critically overdrafted subbasins located in the San Joaquin Valley that all of the GSPs submitted by the 31 GSAs that govern those subbbasins were deficient and that assessments identifying the deficiencies would be released in January 2022, upon which time the GSAs would have 180 days to correct the deficiencies. The GSAs for two other basins outside the San Joaquin Valley, the Cuyama Valley Basin and the Paso Robles Area Subbasin, also received similar letters.

On January 21, 2022, DWR released assessments that the GSPs for the Cuyama Valley Basin, the Paso Robles Area Subbasin, the Westside Subbasin, and the Delta-Mendota Subbasin could not be approved because the GSPs were incomplete. On January 28, 2022, DWR released similar assessments that GSPs could not be approved for the remaining eight San Joaquin Valley subbasins: Eastern San Joaquin, Merced, Chowchilla, Kings, Kaweah, Tulare Lake, Tule, and Kern County.

Identifying the Deficiencies

DWR issued particularized comments to each GSP identifying the deficiencies and proposing corrective actions. More generally, DWR noted that the ten San Joaquin Valley GSPs did not adequately set forth minimum thresholds for groundwater levels and subsidence, and thus could not adequately address the impacts of changing groundwater levels and subsidence. These deficiencies resulted in the GSPs providing inadequate analyses of the effects of groundwater level changes and subsidence on water quality, flood control, and water conveyance infrastructure. DWR also identified deficiencies with the coordination between GSAs within some of the subbasins. For example, DWR noted that the six GSPs for the Delta-Mendota Subbasin did not use the same data and methodologies.

The Corrective Process

Each of the 12 GSAs has 180 days to correct the deficiencies DWR has identified. DWR has offered to meet with each GSA to help the GSA understand and correct the deficiencies identified by DWR. Each GSA must determine whether it is necessary for the GSA to readopt the revised GSP based on the individual authority of each GSA to make revisions. Because SGMA requires a GSA to provide at least 90 days-notice before adopting a GSP, and each GSA has only 180 days to resubmit a revised GSP, DWR has advised the affected GSAs to promptly determine if the GSP should be readopted and notice the readoption early in the process.

Once each revised GSP is submitted, DWR will conduct further review to evaluate whether the plans are likely to achieve the sustainability goal for the basins.

Conclusion and Implications

Now that DWR has determined that the GSPs for 12 groundwater basins, including all ten critically overdrafted basins located in the San Joaquin Valley, are incomplete, the affected GSAs will have until July 2022 to remedy the issues identified by DWR. To date, DWR has only approved eight GSPs, and over 70 remain to be assessed by DWR.
(Brian Hamilton, Meredith Nikkel)

DEPARTMENT OF WATER RESOURCES ANNOUNCES STATE WATER PROJECT ALLOCATION INCREASES, BUT UNCERTAINTY CONTINUES

In January 2022, the California Department of Water Resources announced that State Water Project allocations would increase to 15 percent of requested supplies—a marked increase from allocations limited to critical health and safety needs set a month before. The increased allocation follows large precipitation events in December that allowed DWR to store more water in the San Luis Reservoir. Allocation amounts

are typically finalized in late spring once DWR has more information regarding snow pack and projected runoff.

Background

The State Water Project (SWP) is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. Water from rain and snowmelt is stored in SWP conservation facilities, such as Lake Oroville, before flowing through the Sacramento-San Joaquin Delta to SWP pumping and transportation facilities. According to the California Department of Water Resources (DWR), the SWP supplies water to more than 27 million people across California, and irrigates roughly 750,000 acres of farmland. The SWP was designed to deliver roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints.

DWR's increased allocation announcement follows large precipitation events in December 2021. On average, snowpack supplies about 30 percent of California's water needs in the form of runoff during the late spring and early summer months. For the first time, DWR will conduct aerial remote sensor-based surveys to determine snowpack in the Feather River watershed. As of January, snowpack was 113 percent of average and 58 percent of seasonal average. According to DWR, the next two months are typically the wettest, although conditions thus far in 2022 are drier than in December.

Snowpack and Runoff

Importantly, DWR measures the amount of water contained in snowpack, which provides a forecast of spring runoff that is used by a number of water stakeholders throughout the state. For instance, DWR's information is used by operators of flood control projects, including the SWP, the federally operated Central Valley Project, and local reservoir operators, to determine how much water can be stored in a reservoir while reserving space for predicted inflows. Water districts also use DWR's snowpack information to manage surface and groundwater storage, allocate available supply, plan water deliveries, and coordinate conjunctive use (surface/groundwater) operations. Public and private utilities use DWR information to determine what percentage of electrical energy generation will be hydropower.

Analysis of Water Allocations

The SWP is designed, among other purposes, to provide a consistent water supply to 29 public agencies, commonly known as SWP contractors. These contractors have entered into long-term water supply contracts with DWR for water allocations from the SWP and distribute SWP water to agricultural, residential, commercial, and industrial users. The long-term water supply contracts establish maximum amounts of SWP water that a contractor may request annually (known as Table A amounts), although the contracts also provide for situations where surplus water may be available. SWP contractors are contractually obligated to repay principal and interest on general obligation and revenue bonds used to pay for the SWP's initial construction and additional facilities. Contractors also pay for the maintenance and operation of SWP facilities. Recently, DWR filed an action seeking to validate certain financial amendments to the contracts, including extending the term of the existing contracts to 2085. The contracts are currently set to expire in 2035, although an evergreen provision in the contracts allows for continued water deliveries, and several contractors requested continued deliveries years ago before DWR filed its validation action. The trial court adjudicating the validation action ruled in favor of DWR in February, but it remains to be seen whether certain opposing parties will appeal the ruling.

According to DWR, allocations are based on conservative assumptions and may change depending on winter precipitation. In addition to being dependent on rain and snowpack, water supplies available for delivery through the SWP are affected by reservoir storage, pumping capacity of SWP facilities, and regulatory and environmental restrictions on SWP operations. At this time, as indicated by DWR's increased allocation for SWP deliveries, the majority of SWP contractors may receive 15 percent of their requests, circumscribed by their Table A amounts. This is a notable increase from December 2021, when DWR initially indicated that allocations would only be for critical health and safety needs. Although December

precipitation events prompted DWR to announce allocation increases, persistent dry conditions could affect how much SWP water is allocated by year's end.

Conclusion and Implications

Because the State Water Project deliveries are dependent on meteorological, hydrological, and environmental conditions affecting SWP facilities, it is uncertain whether SWP contractors will receive the percentages of their Table A amounts announced by the Department of Water Resources or whether the 2022 allocation will increase in the coming months. For more information on DWR's announcement on State Water Project Allocation Increases (Jan. 20, 2022), *see:* https://water.ca.gov/News/News-Releases/2022/Jan-21/December-Storms-Allow-for-Modest-Increase-in-Planned-State-Water-Project-Deliveries. (Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT GRANTS *CERTIORARI* IN *SACKETT,* PAVING THE WAY TO A DEFINITIVE TEST FOR DETERMINING WETLAND WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT

On January 24, 2022, the U.S. Supreme Court granted the petition for review of the *Sackett v. United States Environmental Protection Agency* decision to decide whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining when wetlands are navigable "waters of the United States" (WOTUS) under the federal Clean Water Act (CWA), 33 U.S.C. § 1362, subd. 7.

The grant of *certiorari* marks the latest action in a decades long debate over the standard that governs these crucial determinations. The U.S. Supreme Court last addressed the question in its famously fragmented opinion in *Rapanos v. United States*, (547 U.S. 715 (2006)), where a divided Court could not agree on a majority approach for determining wetland WOTUS. The lack of consensus in *Rapanos* resulted in a split of Circuit Courts of Appeals authority on whether Justice Scalia's plurality view of navigable waters or Justice Kennedy's "significant nexus" test is the proper application.

In *Sackett* the Ninth Circuit Court of Appeals considered whether a residential lot purchased by Chantell and Michael Sackett (Sacketts) contained wetlands subject to protection under the CWA. (*Sackett v. U.S. Environmental Protection Agency*, 8 F.4th 1075 (9th Cir. 2021).) The Ninth Circuit examined the myriad of regulatory WOTUS definitions and the opinions in *Rapanos*, and ultimately determined that the WOTUS definition in place at the time of the agency action controls the analysis, and that, pursuant to the court's own holding in *Northern California River Watch v. City of Healdsburg*, (496 F.3d 993 (9th Cir. 2007)), Justice Kennedy's significant nexus test was the controlling case law in the Circuit at that time. The Sacketts saw this decision as another inconsistency in defining and applying a WOTUS rule, and filed a petition for writ of *certiorari* requesting that the U.S.Supreme Court revisit *Rapanos* and determine the controlling test for wetland jurisdiction under the CWA. The U.S. Supreme Court granted the petition with petitioner and respondent briefs on the merits due on April 11, 2022 and June 10, 2022, respectively.

Regulatory and Judicial Background of WOTUS

Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1251, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas," and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1311 (a), 1362 (7).) Because the term "waters of the United States" is not defined within the four corners of the CWA, federal agencies have, by regulation and policy guidance, attempted to define the boundaries of what constitutes a WOTUS, including what constitutes a wetland WOTUS. Courts across the nation have then been conscripted, and sometimes struggled, to further identify the definitional limits of "waters of the United States," in specific controversies, which guides the scope of the federal government's regulatory jurisdiction under the CWA.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), (collectively: Agencies) have modified the WOTUS definition on several occasions, by rule and policy guidance. Upon initial enactment of the CWA, the Corps adopted the traditional judicial term for navigable waters—that the waters must be "navigable in fact." (39 Fed. Reg. 12115, 12119 (Apr. 3, 1974).) In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over "wetlands adjacent to traditional navigable waters." (U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Memorandum on Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in *Rapanos v. U.S.* (2008).) In 2015, under the Obama administration, the Agencies issued the Clean Water

Rule that amended WOTUS to include eight categories of jurisdictional waters, including non-adjacent wetlands and other non-navigable water bodies. (80 Fed. Reg. 37054 (June 29, 2015).) In 2019, under the Trump administration, the Agencies repealed the 2015 rule and restored the pre-2015 WOTUS definitions. (84 Fed. Reg. 56626 (Dec. 23, 2019).) Then, in 2020, the Agencies under the Trump administration issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250 (Apr. 21, 2020)), which narrowed the conditions upon which non-adjacent wetlands would be considered WOTUS, but was vacated in 2021 by a federal district court in Arizona (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021)), thereby prompting the Agencies' re-implementation of the pre-2015 WOTUS definitions. On December 7, 2021, the Agencies, under the Biden administration, published a proposed rule to revise the definition of WOTUS to include water as WOTUS when it "significantly affects" a downstream traditionally navigable water, interstate water, or territorial sea. (86 Fed. Reg. 69372.)

U.S. Supreme Court Decisions on WOTUS

Contemporaneous to the Agencies' iterations of the wetland WOTUS definition, the U.S. Supreme Court provided jurisprudence guiding the interpretation of WOTUS. In a 1985 decision, the Court held that wetlands actually abutting traditional navigable waterways were considered WOTUS. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).) In 2001, the Court held that WOTUS does not include "nonnavigable, isolated, intrastate waters" in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 (2001). Most recently, and most relevant to the issue before the Court now, in 2006, the Court issued its fragmented opinion in *Rapanos v. United States* holding that the CWA does not regulate all wetlands but failing to provide a majority approach to determining WOTUS jurisdiction. Justice Scalia, writing for the plurality, argued that wetlands that have a contiguous surface water connection to regulated waters "so that there is no clear demarcation between the two" are adjacent and may then be regulated as WOTUS. (574 U.S. at 742.) The concurring opinion, authored by Justice Kennedy, advanced a broader "significant nexus" test that would allow regulation of wetlands as WOTUS if wetlands:

> . . .alone or in combination with similarly situated lands. . . significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. (*Id.* at 780.)

Background in the *Sackett* Case

In 2004, near Idaho's Priest Lake, Michael and Chantell Sackett purchased a "soggy residential lot" which they planned to develop. In 2007, shortly after the Sacketts began placing sand and gravel to fill the lot, the EPA issued an administrative compliance order stating that the property contained wetlands subject to protection under the CWA. In 2008, the Sacketts brought suit against the EPA asserting that the agency's jurisdiction under the CWA did not encompass their property. Various aspects of the case had been slowly making their way through the federal courts and in 2021, the Ninth Circuit Court of Appeals considered whether the Sackett's Idaho property contained wetlands subject to CWA jurisdiction. The Sacketts argued that Scalia's reasoning from *Rapanos* is controlling, and that because their property does not have a continuous surface connection to a navigable water, it falls outside the scope of the EPA's authority under the CWA. The Ninth Circuit disagreed and ultimately upheld Kennedy's "significant nexus" test as the controlling authority in the Ninth Circuit, noting that the decision was not written on a blank slate but backed by a previous conclusion in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), holding Justice Kennedy's concurrence as the controlling law from *Rapanos*.

On September 22, 2021, the Sacketts submitted their petition for writ of *certiorari* to the U.S. Supreme Court requesting that the Court revisit its decision in *Rapanos* and decide if the plurality test for WOTUS authored by Justice Scalia is controlling under the CWA.

Conclusion and Implications

For over two decades, the term "waters of the United States" has whipsawed between broad and narrow definitions, changing as frequently as executive administrations, through both informal guidance

documents and formal notice-and-comment rulemaking. Moreover, the absence of majority guidance out of *Rapanos* has left lower courts divided over whether federal CWA jurisdiction exists over features like those on the Sackett's property and the best test for determining jurisdiction. The constant fluctuation has led the Sacketts to ask the Court to "chart a better course for the Clean Water Act by articulating a clear, easily administered, and constitutionally sound rule for wetlands jurisdiction." The U.S. Supreme Court's election to hear the case demonstrates there may be finality on the horizon for a significant area of environmental law that has long evaded clear definition.

(Nicole E. Granquist, Meghan Quinn, Jaycee L. Dean, Meredith Nikkel)

RECENT FEDERAL DECISIONS

DISTRICT COURT DENIES MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL ON THE MEANING OF 'WATERS OF THE UNITED STATES'

United States v. Mashni, ___F.Supp.4th___, Case No. 2:18-CV-2288-DCN (D. S.C. Jan. 19, 2022).

The United States District Court for the District of South Carolina recently rejected a motion to certify an interlocutory appeal that would address the meaning of "waters of the United States." (WOTUS) The District court found there was no substantial ground for difference of opinion regarding the meaning of "waters of the United States," and that allowing an interlocutory appeal would not materially advance the litigation. It concluded that the legal standard for certifying an order for interlocutory appeal was not met.

Factual and Procedural Background

On August 17, 2018, the United States filed a complaint pursuant to §§ 301, 309, and 404 of the Clean Water Act to obtain injunctive relief and impose civil penalties against Paul Edward Mashni and other corporate defendants. Mashni owned two multi-parcel sites on John's Island, South Carolina, near the Stono and Kiawah Rivers. According to the government, the corporate defendants were entities involved in the development projects, each of which was owned and operated by Mashni. The government alleged that in preparing the sites for construction, defendants violated the federal Clean Water Act by discharging pollutants into the Kiawah and Stono watersheds and redistributing soil to fill federally protected waters.

The Clean Water Act applies to "navigable waters," defined as "waters of the United States." Effective June 2020, the United States Army Corps of Engineers and the U.S. Environmental Protection Agency promulgated the "Navigable Waters Protection Rule" (NWPR), which provided a new, narrower regulatory definition for "waters of the United States" than the definition in the 1986 Regulations.

On July 1, 2021, the court entered an order denying defendants' motion for partial summary judgment and motion for judgment on the pleadings (July Order). In the July Order, the issue was whether the government's suit should be governed by the 1986 definition of waters of the United States —the law at the time of the government's claim—or whether the NWPR's definition—which was still in effect at the time of the July Order—should be retroactively applied. The court concluded that the language contained within the rule "manifests an undeniable directive for the NWPR to apply prospectively."

After the July Order, a separate court order, executive order, and federal rulemaking process indicated the *vacatur* of the NWPR and reissuance of the regulatory definition of "waters of the United States." On July 19, 2021, defendants filed a motion for certification of an interlocutory appeal, seeking the court's leave to appeal the July Order's findings on the meaning of "waters of the United States."

The District Court's Decision

In order for the federal District Court to certify an interlocutory order for appeal, three criteria must be met. The order at issue must present: 1) a controlling question of law, 2) over which there is a substantial ground for difference of opinion, and 3) an immediate appeal will materially advance the ultimate termination of the litigation. The court addressed each prong and concluded that none of the three prerequisites for certification of the definitional question were met and denied the motion for interlocutory appeal.

A Controlling Question of Law

To be a "controlling" question of law, the issue must be one of law the appellate court can review *de novo*. It must be controlling in the sense of resolving a significant portion of the case. It must be efficient to have the appellate court resolve the issue now, in a piecemeal fashion, rather than waiting until the other issues are ready to be reviewed.

The court conceded that the question of which definition of 'waters of the United States' is applicable in this case was a pure question of law, but resolution was not completely dispositive of the litigation. The court explained that the government alleged a violation of the CWA regardless of which WOTUS definition applied. Therefore, the first prong for certification was not met because there was no completely dispositive controlling question of law.

Substantial Ground for Difference of Opinion

The court likewise found that the second prong for certification—substantial ground for difference of opinion—was not satisfied. Courts have traditionally found a substantial ground for difference of opinion exists where circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.

Defendants asserted that there was no controlling authority in the Circuit on the question of whether the 2020 rule applied and that this case presented an issue of first impression in the circuit. The District Court disagreed and indicated that defendants' argument ran directly contrary to caselaw indicating that the mere existence of a question of first impression is an insufficient basis for interlocutory appeal. The court added that there was no dispute among the circuits on the question of whether the NWPR definition applied, because the NWPR did not suggest retroactive application. The court concluded that defendants failed to prove there was a more novel or difficult question beyond the court's purview.

Material Advancement of the Ultimate Termination of Litigation

Finally, the court briefly considered whether an immediate appeal of the July Order would materially advance the ultimate termination of the litigation. As the court explained, interlocutory appeal would only prolong the litigation on the issue of whether new legislation may be retroactively applied and also what regulation is supposed to be retroactively applied.

Conclusion and Implications

Despite the significant uncertainty regarding the scope and meaning of the CWA jurisdictional term "waters of the United States," litigants may not be able to obtain review of an interlocutory order that relies on a pre-2015 regulatory definition of the term. The court's opinion is available online at: https://casetext.com/case/united-states-v-mashni.
(Tiffany Michou, Rebecca Andrews)

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