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EASTERN WATER LAW™

& POLICY REPORTER

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EASTERN WATER NEWS

CALIFORNIA IRRIGATION DISTRICT RECEIVES STATE 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 Central 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 to 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)

NEWS FROM THE WEST

In this month's News from the West we focus on water rights administration in the States of Nevada and Washington. In Nevada the State Engineer modified procedures for groundwater appropriations in the presence of an endangered species. In Washington State, the Department of Ecology is seeking comment regarding plans to modify water banking regulation.

Nevada State Engineer Amends Procedures for Managing Groundwater Appropriations to Protect Endangered Devils Hole Pupfish

On January 13, 2022, the Nevada State Engineer issued Interim Order #1330, which amends the procedures by which the Division of Water Resources will review applications to appropriate or change existing groundwater rights within the Amargosa Desert Hydrographic Basin (230) in southern Nevada. The purpose of Order #1330 is to use information obtained from the U.S. Geological Survey's Death Valley Regional Flow System model to manage groundwater appropriations in a way that prevents further declines in the water level of Devils Hole, a federal reservation that is home to an endangered pupfish.

The Devils Hole Pupfish

The Devils Hole pupfish is an iridescent blue inch-long fish whose only natural habitat is the 93-degree water of Devils Hole, a water-filled cavern in the Mojave Desert near Death Valley National Park. It is one of the world's rarest fish species and was listed as endangered in 1967.

In the 1970s through the 1990s, scientists counted about 200 Devils Hole pupfish in the annual spring season surveys. Numbers declined dramatically starting in the late 1990s, with less than 40 fish counted in the spring seasons of 2006, 2007, and 2013. In 2019, the population reached 136 observable fish, which was the highest count recorded since 2003.

Although the surface of the Devils Hole pool is small, it is over 500 feet deep. Its waters are hydrolog-

ically connected to groundwater, and its water level is affected by groundwater pumping in both Nevada and California.

Federal Reserved Water Rights for Devils Hole

Devils Hole was reserved as a national monument by a 1952 Presidential Proclamation issued under the American Antiquities Preservation Act. In 1968, nearby ranchers began pumping groundwater, which reduced the water level in Devils Hole and threatened the survival of the pupfish. The Nevada State Engineer approved permits for the groundwater appropriation.

The United States filed suit in U.S. District Court to limit the ranchers' well pumping. The District Court permanently enjoined pumping that would lower the water in Devils Hole below a level necessary to preserve the fish, which the court established as 2.7 feet below a copper washer reference point. The court held that in establishing Devils Hole as a national monument, the United States reserved appurtenant, unappropriated waters necessary to satisfy the purpose of the reservation, including preservation of the pool and its fish. The Ninth Circuit Court of Appeals affirmed.

The Supreme Court accepted *certiorari* and agreed, holding that when creating the federal reservation, the United States impliedly reserved sufficient water to fulfill the its purpose. *Cappaert v. United States*, 426 U.S. 128 (1976). To maintain sufficient water in the pool for preserving and protecting the fish, the Court held that the federal reserved right took priority over the subsequently appropriated state law groundwater rights.

The Death Valley Regional Flow System

The State Engineer manages the state's groundwater by hydrographic basins. Devils Hole is located within the Amargosa Desert Hydrographic Basin. On September 5- 6, 2007, the State Engineer held an administrative hearing to receive evidence and testimony regarding the potential impacts of regional pumping on existing water rights, particularly the federally reserved water right at Devils Hole. The evidence indicated that Devils Hole's water level was only 0.6 to 0.7 feet above the threshold level mandated by the U.S. District Court. On January 12, 2018, the State Engineer issued Order No. 1197A, which restricted the appropriation and movement of water within the Amargosa Desert Hydrographic Basin near Devils Hole.The Amargosa Desert Hydrographic Basin lies within what is known as the Death Valley Regional Flow System, a carbonate aquifer that transmits underflow of groundwater across surface topographical divides. The flow system encompasses six hydrographic basins and is recharged by precipitation from mountainous areas and groundwater underflow.

In 2020, the U.S. Geological Survey developed a peer-reviewed numerical groundwater flow model of the Death Valley Regional Flow System, which incorporates available geologic and hydrologic data to estimate aquifer properties throughout the region. The State Engineer identified the USGS model as the best currently available science to evaluate potential effects of pumping on groundwater levels.

Order #1330

In Order #1330, the State Engineer ordered that any applications to appropriate additional underground water within Amargosa Desert will be denied outright. Applications to change existing rights will undergo extra scrutiny above the basic statutory requirements using the U.S. Geological Survey model.

Specifically, the State Engineer ordered that all applications to change the point of diversion of an existing underground right within Amargosa Desert will be evaluated using the USGS model. In addition to meeting the statutory criteria, a change will only be approved if the model shows it will cause no net increase in water level decline at Devils Hole over a subsequent fifty-year period. Beyond the U.S. Geological Survey model:

> . . .[t]he State Engineer, in his discretion, may conduct additional analysis and require additional information to assure that any application to change an existing right does not result in an increased impact to the water level at Devils Hole.

Order #1330 is being implemented on an interim basis while the State Engineer obtains public input. Specifically, the State Engineer will hold a hearing in May 2022 to take public comment on: 1) his use of the USGS model in the manner specified in Order #1330; 2) whether the model could be used in hydrographic basins within the regional flow system

other than Amargosa Desert; and 3) whether there are further management considerations within the regional flow system that the State Engineer should take into account.

According to Order #1330, the State Engineer's intent "is to provide the needed flexibility for water right holders without causing additional water level decline above what is predicted for the existing base right." Order #1330 anticipates that "[o]ver time these procedures will result in a reduced potential for water level declines at Devils Hole due to groundwater use.

The State Engineer left open the possibility of adopting "further management measures necessary to address water level impacts to Devils Hole or to address conflict with senior rights."

Conclusion and Implications

Using the U.S. Geological Survey model as a management tool within the entire regional flow system could bring additional benefits to Devils Hole if the State Engineer decides to manage the six groundwater basins encompassed by the flow system as one hydrologic unit. Currently, the point of diversion of a groundwater right may only be moved to a location within the same hydrographic basin as the base right. If the State Engineer allows a point of diversion to be moved anywhere within the regional flow system, including outside the geographic boundaries of Amargosa Desert Hydrographic Basin, so long as there is no net detrimental effect to the Devils Hole water level, groundwater rights would be more fungible. The result could be that points of diversion are moved further from Devils Hole. Groundwater users and the pupfish could both end up benefitting. Order # 1330 is available online at http://images.water.nv.gov/images/orders/1330o.pdf.
(Debbie Leonard)

Washington State Regulatory Update: Department of Ecology continues to Wrestle with Water Banking

The Water Resources Program Guidance

The Washington State Department of Ecology (Ecology) has drafted Water Resources Program Guidance on Administering the Trust Water Rights Program, Publication 22-11-012 and is soliciting public comments. In addition, Ecology has incorporated comments on its Draft Policy and Interpretive Statement for Administration of Statewide Trust Water Rights Program, and is soliciting a second round of public comments.

Following up on last fall's efforts at drafting a "Policy and Interpretive Statement," the agency is now out with Program Guidance on the same topic. Policy statements are used to guide and ensure consistency in the administration of laws and regulations. Guidance documents are used to advise agency staff on how to carry out a procedure or action. In addition, the agency is reissuing the Policy and Interpretive Statement for a second round of comments.

The Guidance document seeks to reconcile the evolution of the Trust Water Rights Program found in Revised Code Chapter 90.42. The Trust Water Rights Program was established statewide in 1994 to allow developed water rights to be "placed in trust," to protect those water rights from relinquishment. The original design was to benefit instream flows for fish and other resources affected by out of stream diversions, and to counter the general tenets of the prior appropriation doctrine as it had developed in Washington which was perceived as a disincentivizing water conservation. Over time, the Trust Water Rights Program expanded to allow "Water Banking." Water Banking was first recognized by statute in 2003 to "provide an effective means to facilitate the voluntary transfer of water rights .. and to achieve a variety of water resource management objectives" through application of the Trust Water Rights Program including drought response, voluntary streamflow enhancement, water mitigation and future water supplies.

Processing Different Types of Trust Water Rights

Chief among the provisions on the Guidance document are provision on how Ecology is to process different types of trust water rights including donations, short-term leases, and long term leases and purchases. The statute has evolved through multiple statutory revisions and doesn't clearly delineate the different standards for each of these, but rather provides stray references to each throughout. Additionally, the Guidance document provides clear guidance for the first time in the steps necessary to establish a water bank. These steps include prior consultation tithe agency before making the official request, clarity

that a formal request to establish is a water bank is required (including a new required form), a timeline for when Ecology is to negotiate a water banking agreement (simultaneous with the mitigation change approval process), and the ultimate creation and management of water banks. Prior to the Guidance, each regional office and each bank with a regional office seemed to follow slightly (or radically) different pathways. Adoption of the Guidance document should serve to bring consistency. Additionally, the Guidance document provides example documents and a lengthy appendix for quantification of trust water rights.

Conclusion and Implications

Through adoption of the Guidance document, Ecology is taking control of the process is ways it has not done before. For instance, the Guidance document very clearly states that "Ecology will provide the first draft of the agreement" and in several places makes clear that water banking arrangements are within Ecology's discretion and therefore cannot be appealed to the Pollution Control Hearings Board as an administrative decision.

Comments on these Trust Water Rights documents are due to the Washington Department of Ecology by Monday, March 28, at 11:59 pm. Drafts can be found at: https://apps.ecology.wa.gov/publications/SummaryPages/2211012.html.
(Jamie Morin)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS AND NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION 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 the Nat. Oceanic and Atmospheric Admin., 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)

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

•January 27, 2022—EPA has taken enforcement actions against Hale Kauai Limited and Halona Pacific LLC to close two illegal, pollution-causing large capacity cesspools on the islands of Kauai and Oahu. EPA will collect a total of $110,000 in fines. In 2005, EPA banned water polluting large capacity cesspools under the Safe Drinking Water Act. In August 2020, EPA requested information about wastewater disposal at the Hale Kauai property. In March 2021, EPA requested similar information at the Halona Pacific property. The agency determined that a single cesspool operating at each property met the federal criteria to qualify as an illegal large capacity cesspool by being able to serve 20 or more people in a day. The Hale Kauai property operates as Hardware Hawaii, a neighborhood hardware store located in Kauai's Koloa area. Under this enforcement action, Hale Kauai Limited will pay a $40,000 fine, backfill the illegal cesspool, and install a state-approved septic system by March 15, 2023. Under this enforcement action, Halona Pacific LLC will pay a $70,000 fine, backfill the illegal cesspool, and install a state-approved septic system by January 31, 2023.

•February 8, 2022—EPA announced a settlement with Edward Lynn Brown, owner of an almond orchard near Merced, California, for violations of the federal Clean Water Act that impacted more than two acres of rare vernal pool wetlands . The settlement requires Brown to pay $212,000 in civil penalties and restore and preserve 15 acres of wetland habitat. Inspectors determined that earth-moving activities by Brown had discharged fill material into waters that flow into the San Joaquin River. This work had been undertaken without obtaining a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers. Brown's earth-moving activities from 2016 to 2020 involved building a retention basin and access roads and planting a new almond orchard. The impacts from these activities resulted in the degradation of over two acres of vernal pool wetlands adjacent to Parkinson Creek, a tributary of the San Joaquin River that bisects the ranch.

•February 14, 2022—Cliffs Burns Harbor (Cleveland-Cliffs) has agreed to resolve alleged violations of the Clean Water Act (CWA) and other laws, for an August 2019 discharge of ammonia and cyanide-laden wastewater into the East Branch of the Little Calumet River. The discharge, which led to fish kills in the river, also caused beach closures along the Indiana Dunes National Lakeshore. Cleveland-Cliffs is undertaking substantial measures to improve its wastewater system at its steel manufacturing and finishing facility in Burns Harbor, Indiana. The complaint filed with the settlement alleges that Cleveland-Cliffs exceeded discharge pollution limits for cyanide and ammonia; failed to properly report those cyanide and ammonia releases under the Emergency Planning and Community Right-to-Know Act (EPCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and violated other Clean Water Act and permit terms. The settlement agreement, which is memorialized in a consent decree lodged in federal District Court in the Northern District of Indiana, requires Cleveland-Cliffs to pay $3 million as a civil penalty and to reimburse the EPA and the State of Indiana for response costs incurred as a result of an August 2019 discharge of wastewater containing ammonia and cyanide into a river that flows into Lake Michigan. Cleveland-Cliffs will also resolve allegations under EPCRA and CERCLA by implementing a protocol to notify relevant state and local groups about any future spills of cyanide from its Burns Harbor facility. Under the consent decree,

Cleveland-Cliffs will construct and operate a new ammonia treatment system at the blast furnaces, implement a new procedure for managing and treating once-through water during emergency situations, and follow enhanced preventive maintenance, operation and sampling requirements for the facility. These measures are designed to fix conditions at the facility that gave rise to the August 2019 spill, furthering compliance with the CWA and analogous state laws.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•January 21, 2022—EPA, the Justice Department, the Department of Interior, the Department of Agriculture (USDA) and the State of Colorado announced a settlement with Sunnyside Gold Corporation and its Canadian parent company Kinross Gold Corporation resolving federal and state liability related to the Bonita Peak Mining District Superfund site, which includes the Gold King Mine and many other abandoned mines near Silverton, Colorado. If entered by the court, this agreement provides for the continued cleanup of mining-related contamination within the Upper Animas Watershed and will protect public health and the environment by improving water quality, stabilizing mine source areas, and minimizing unplanned releases. Under the agreement, Sunnyside Gold Corporation and Kinross Gold Corporation will together pay $45 million to the United States and State of Colorado and the United States will dismiss its claims against Sunnyside Gold Corporation and Kinross Gold Corporation. The United States will also contribute $45 million to the continuing cleanup at the Bonita Peak Mining District Superfund site and Sunnyside Gold Corporation and Kinross Gold Corporation will dismiss its claims against the United States. Recent interim cleanup work at the site, including efforts to stabilize mine waste and reduce contaminant releases to surface waters from source areas, have improved environmental conditions and will inform the development of future cleanup remedies for the entire site under an adaptive management framework. EPA has already spent over $75 million on cleanup work at the site and expects to continue significant work at the site in the coming years.

•February 2, 2022—Three companies operating in New England have reported publicly on their use of certain chemicals, creating a safer environment for the public, because of investigations and enforcement actions taken by the U.S. Environmental Protection Agency (EPA). The companies are in Bristol, Connecticut, Norwood, Massachusetts and Providence, Rhode Island. EPA alleged that CertainTeed LLC, in Norwood, Mass., owned by the French company Saint-Gobain, failed to timely file TRI reports for zinc compounds and chromium compounds for reporting years 2017, 2018, and 2019. Following EPA's notification about the alleged violations, CertainTeed LLC filed the required information. CertainTeed LLC has agreed to pay a settlement penalty of $104,572. EPA alleged that Manchester Street, LLC, operating in Providence, R.I., failed to timely file TRI reports for ammonia for reporting years 2018 and 2019. Following EPA's notification about the alleged violations, Manchester Street, LLC filed the required information. Manchester Street, LLC has agreed to pay a settlement penalty of $11,707. Manchester Street, LLC's Rhode Island facility is located in an environmental justice area. EPA alleged that Clean Harbors of Connecticut, Inc., operating in Bristol, Conn., failed to timely file TRI reports for zinc compounds and nitrate compounds manufactured at the company's Bristol waste treatment facility in calendar years 2017, 2018, and 2019. Following EPA's notification about the alleged violations, Clean Harbors of Connecticut, Inc. filed all six of its overdue reports. Clean Harbors of Connecticut, Inc. has agreed to pay a settlement penalty of $30,688.

Indictments, Sanctions, and Sentencing

•February 9, 2022—A federal grand jury in Bowling Green, Kentucky, issued an indictment charging Columbia resident Joshua M. Franklin, 32, with violating the Clean Water Act. The charge stems from a 2018 discharge of oil and brine water into Adair County creeks. Franklin was an operator at an oil lease tank battery in Columbia. His duties included ensuring that brine water, a waste product from oil production, was separated from the oil before it was delivered to customers. The indictment alleges that on Aug. 22, 2018, the oil/water separator at the site used to remove brine water was not functioning. Instead, to remove the brine water, Franklin attached a conduit to the bottom of the oil tank and placed the open end of the conduit yards from a nearby creek. Franklin opened the tank valve, allowing a mixture of

brine water and oil to discharge from the tank. With the valve still open, Franklin left the site. As a result, approximately 100 barrels (about 4,000 gallons) of the oily mixture discharged into a nearby creek and eventually flowed into connecting tributaries. EPA and the Kentucky Department of Environmental Protection conducted the investigation. The maximum penalty under the Clean Water Act is three years' imprisonment and a fine of $250,000. A court may also impose a restitution payment for the costs of the cleanup.
(Andre Monette)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT GRANTS *CERTIORARI* IN *SACKETT* PAVING THE WAY TO A DEFINITIVE TEAST 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)

JUDICIAL DEVELOPMENTS

FOURTH CIRCUIT VACATES U.S. FISH AND WILDLIFE SERVICE'S 2020 BIOLOGICAL OPINION FOR NATURAL GAS PIPELINE

Appalachian Voices, et. al. v. U.S. Department of the Interior, ___F.4th___, Case No. 20-2159 (4th Cir. Feb. 3, 2022).

On February 3, 2022, the United States Court of Appeals for the Fourth Circuit held that the analysis conducted by the United States Fish and Wildlife Service (FWS) in its 2020 Biological Opinion and Incidental Take Statement for the Mountain Valley Pipeline project (Project) was arbitrary and capricious. More specifically, the court concluded that the FWS failed to adequately consider the Project's impacts on two species of endangered fish, the Roanoke logperch (logperch) and the candy darter (darter) within the action area, and relied on post hoc rationalizations. The court vacated the FWS 2020 Biological Opinion and Incidental Take Statement and remanded for further proceedings. The FWS must now reassess the impacts to the two species in the Project's action area.

The Endangered Species Act

The Endangered Species Act of 1973 (ESA) requires federal agencies, in consultation with the FWS, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species. During the consultation, the FWS must prepare a Biological Opinion on whether that action, in light of the relevant environmental context, is likely to jeopardize the continued existence of the species. The ESA requires the FWS to formulate its Biological Opinion in three primary steps: First, the FWS must review all relevant information provided by the action agency or otherwise available; second, the FWS must evaluate, in part, the environmental baseline of the listed species and the cumulative effects of non-federal action; and third, the FWS must incorporate its environmental-baseline and cumulative-effects findings into its jeopardy determinations for the listed species. If the FWS determines that the agency action is not likely to jeopardize a listed species but is reasonably certain to lead to an "incidental take" of that species, it must provide the agency with an Incidental Take Statement.

The ESA does not specify a standard of review, but the Administrative Procedure Act requires a reviewing court to:

> . . .hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Review under this standard is highly deferential but requires a reviewing court to analyze whether the agency's decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment. In determining whether such an error was made, the reviewing court may look only to the agency's contemporaneous justifications for its actions and may not accept post hoc rationalizations for agency action.

The FERC and FWS Actions

The Federal Energy Regulatory Commission (FERC) authorized the construction of the Project on October 13, 2017. The Project is a 42-inch diameter, 304-mile natural gas pipeline stretching from West Virginia to Virginia. Because the Project could impact listed species, FERC consulted with the FWS for preparation of a Biological Opinion. The FWS then submitted its 2017 Biological Opinion and Incidental Take Permit, which concluded that the Project was not likely to jeopardize the listed species the FWS examined.

The Fourth Circuits 2018 Decision and the 2020 Biological Opinion

On July 27, 2018, the Fourth Circuit found the U.S. Forest Service violated the National Environ-

mental Policy Act (NEPA) when it adopted FERC's Environmental Impact Statement (EIS) for the Project. In relevant part, the Fourth Circuit held that the U.S. Forest Service arbitrarily adopted FERC's flawed sedimentation analysis when assessing impacts to the Jefferson National Forest. A few months later, a U.S. Geological Survey scientist sent comments to the FWS, stating that its analysis of the Project's impacts on the logperch in its 2017 Biological Opinion was based on the same arbitrary assumptions. The scientist also identified several analytical flaws that significantly underestimated the potential impacts of the Project on the logperch.

Around the same time, the FWS published a final rule listing the darter as endangered. The court subsequently issued an order staying the 2017 Biological Opinion.

FERC reinitiated consultation for the Project with the FWS. On September 4, 2020, the FWS issued a new Biological Opinion (2020 BiOp) and Incidental Take Statement. The FWS determined that the Project was likely to adversely affect five listed species: a shrub called the Virginia spiraea, the logperch, the darter, the Indiana bat, and the northern long-eared bat. However, the agency ultimately found that the Project was unlikely to jeopardize these five species.

The Fourth Circuit's Decision

Alleged Failure to Adequately Analyze Environmental Baseline for Endangered Species

A collection of environmental nonprofit organizations petitioned the Fourth Circuit to review the 2020 BiOp and alleged, among other things, that the FWS failed to adequately analyze the environmental context for two species of endangered fish: the logperch and the darter. Specifically, the petitioners alleged that the FWS failed to adequately evaluate the environmental baseline and the cumulative effects of non-Federal activities within the action area for the two species and failed to incorporate these findings into its jeopardy determinations. Petitioners also alleged that the FWS failed to adequately consider climate change in its analysis.

The Fourth Circuit agreed with the petitioners that the FWS failed to adequately conduct its jeopardy analysis of the two species and instead relied on post hoc rationalizations. The court stated that while the 2020 BiOp described the range-wide conditions and population-level threats for the logperch and the darter, it failed to sufficiently evaluate the environmental baseline for the two species within the Project's action area itself. Additionally, the court found that the 2020 BiOp failed to analyze several stressors in the administrative record. The FWS challenged the court's analysis stating, in relevant part, that since it incorporated the results of two population and risk-projection models—one for the logperch and one for the darter—into the 2020 BiOp, it necessarily accounted for *all* potential past and ongoing stressors in the action area. The court disagreed with the FWS and explained that the FWS did not mention its reliance on these statistical models to evaluate the environmental baseline in the administrative record and its subsequent litigation reasoning was an impermissible post hoc rationalization. Additionally, the court stated that even if the FWS relied on these models, such reliance was unpersuasive because the models did not specifically focus on the action areas and the FWS did not explain why it believed these models reflect conditions within the action area.

Alleged Failure to Analyze for Cumulative Impacts to Species

Separately, the petitioners challenged the 2020 BiOp's analysis of the cumulative effects impacting the logperch and the darter. The court agreed, noting that the FWS failed to analyze non-Federal activities previously flagged in FERC's 2017 Environmental Impact Statement and included in the administrative record, including oil and gas extraction, mining, logging, water withdrawals, agricultural activities, road improvement, urbanization, and anthropogenic discharges. The court noted that none of these future impacts were expressly addressed in the 2020 BiOp or in the documents that the FWS relied on. In response, the FWS put forth the same argument above, stating that these future impacts were implicitly evaluated when the agency incorporated the logperch and darter models' projections. The court similarly rejected this argument as a post hoc rationalization.

Alleged Failure to Analyze Impacts of Climate Change

Lastly, the petitioners challenged the 2020 BiOp's analysis of the effects of climate change as part of the

environmental-baseline analysis. The court found that the FWS never explained in the 2020 BiOp that it was relying on these models to account for the effects of climate change and its claim that it implicitly accounted for it was an impermissible post hoc rationalization.

The court found it unnecessary to analyze the FWS' no-jeopardy conclusion in step three of the 2020 BiOp analysis because it concluded that the FWS arbitrarily evaluated the Project's environmental context at step two.

Conclusion and Implications

The court vacated the FWS 2020 Biological Opinion and Incidental Take Statement and remanded for further proceedings. On remand, the court directed the FWS to reassess the impacts to the two species and to ensure that it analyzes the Project against the aggregate effects of everything that has led to the species' current status and, for non-federal activities, those things reasonably certain to affect the species in the future. Factors relied on for this analysis should be included in the administrative record and the agency must not rely on post hoc justifications. The Fourth Circuit's opinion is available online at: https://www.ca4.uscourts.gov/Opinions/202159.P.pdf.
(Nirvesh Sikand, Darrin Gambelin)

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 of America 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)

FEDERAL CLAIMS COURT DETERMINES FEDERAL GOVERNMENT IS NOT REQUIRED TO PAY LOCAL FEES TO ABATE WATER POLLUTION

City of Wilmington v. United States, ___F.Supp.4th___, Case No. 16-1619C (Fed. Cl. Jan. 26, 2022).

The Court of Federal Claims recently determined the federal government was not required to pay local charges for water pollution abatement activities under the federal Clean Water Act because the charge was not based on the proportionate contribution of the property to storm water pollution.

Factual and Procedural Background

The U.S. Army Corp of Engineers (the government) owns five properties in Wilmington, Delaware (Properties). The Clear Water Act requires federal property owners to comply with local water pollution laws, including requirements to pay reasonable service charges imposed by local governments to recover costs of storm water management. In 2007, the City of Wilmington, Delaware (City) implemented a charge on the owners of all properties within its corporate boundaries to recover the costs "related to all aspects of storm water management," including capital improvements, flooding mitigation, and watershed planning.

In 2021, the City filed the operative complaint seeking to recover service charges for the control and abatement of water pollution against the Properties for a time period from January 4, 2011 to the present. The City claimed that the government owed $2,577,686.82 in principal charges and $3,360,441.32 in interest for storm water fees assessed to the government's Properties for the approximate ten-year period.

The City offers a limited appeal process for storm water charges in which an owner can file a fee adjustment request if they believe there was an error in calculation, the assigned storm water class, the assigned tier, and the eligibility for credit. The appeal process applies only to future charges and provide no adjustment to prior billing periods. Further, an owner must pay all fees before the City will consider an appeal. The government did not pay the storm water charges or associated interest, nor did it appeal the charges assigned via the City's appeal process.

On April 20, 2021, following the close of Wilmington's case-in-chief, the court suspended trial to permit the government to file a motion for judgment on partial findings pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims.

The Court of Federal Claims' Decision

The government first argued that the City did not demonstrate the storm water charges it assessed against the government Properties were "reasonable services charges" under the Clean Water Act. A "reasonable service charge" is defined as: 1) "any reasonable nondiscriminatory fee, charge, or assessment" that is 2) "based on some fair approximation of the proportionate contribution of the property or facility to storm water pollution (in terms of quantities of pollutants, or volume or rate of storm water discharge or runoff from the property or facility)" and 3) is "used to pay or reimburse the costs associated with any storm water management program."

The court reasoned that the statutory phrase "proportionate contribution of the property or facility to storm water pollution" required some link between the charges the City sought to impose and the Properties' storm water pollution relative to total pollution. To establish charges, the City relied upon county tax records and runoff coefficients. The court, however, found that the City did not present any evidence linking the Properties to any particular amount of storm water pollution, nor did the tax record categories and runoff coefficients yield a fair approximation for computing the charge. Because the "specific physical characteristics" of the Properties were not taken into account and the coefficients may not reflect the percentage of a particular property generating runoff, the court held the government was not liable for these charges.

The court next addressed whether the government was required to follow the City's fee adjustment process. The City argued that the government could not contest the City's storm water charges because the government did not challenge the charges through the City's appeal process. The court, however, was unpersuaded. In particular, the court reasoned that the City's administrative appeal process was permissive and was not a substantive "requirement" relating

to the control or abatement of water pollution which the Clean Water Act requires federal property owners to follow. Further, the appeal process authorized only the appeal of future charges, after all assessed fees—no matter how unreasonable—have been paid. The appeal process did not provide retroactive adjustment of past charges, which were at issue in the present case.

Finally, the court considered the City's claim that the government owed interest accrued due to the government's refusal to pay the City's outstanding storm water charges. The government argued that the Clean Water Act section requiring compliance with water pollution control and abatement requirements did not waive sovereign immunity to recover interest. Here, the court declined to address the government's argument as because it raised a "thorny issue of first impression." Instead, the court reasoned that federal law only authorized the court to award interest "under a contract or an Act of Congress expressly providing for payment thereof." In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. Because the Clean Water Act section at issue contained no such express Congressional consent, the court held that the government would not be liable for interest, even if it were entitled to the principal charges.

Conclusion and Implications

This case is a reminder that a local agency must be cautious in crafting local water pollution fees pursuant to the Clean Water Act. As seen above, the federal government will only be liable for reasonable service charges linked to the physical characteristics of the federal property. Additionally, the United States cannot be liable for interest accrued on unpaid charges. This case is also informative for local agencies in a state that imposes similar proportionality requirements for fees imposed on all payers, such as California. The court's opinion is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv1691-124-0.
(Megan Kilmer, Rebecca Andrews)

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