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WWL

FEATURE ARTICLE

SOUTHWESTERN IDAHO IRRIGATION DISTRICTS RESPOND TO FEMA PUBLIC COMMENT SOLICITATION REGARDING NATIONAL FLOOD INSURANCE PROGRAM REGULATIONS

By Andrew J. Waldera

Idaho's Nampa & Meridian Irrigation District (NMID) and Pioneer Irrigation District (PID) (together: the Irrigation Districts) took the opportunity to respond to the Federal Emergency Management Agency's (FEMA) request for public comment concerning the agency's review of its National Flood Insurance Program (NFIP) implementing regulations under Docket: FEMA-2021-0024-0001 on January 27, 2022. FEMA's public comment solicitation broadly sought public information touching on almost all aspects of the NFIP, including whether current FEMA processes complied with the protection of listed species under the federal Endangered Species Act (ESA). NMID and PID responded to FEMA's ESA-related inquiries, and the agency's scoping question regarding whether its regulatory regime caused hardship or burden suggesting that some types of "development" or land uses in regulated floodplains should be exempted from NFIP overlay. Idaho irrigation entities, particularly in more populated southwestern Idaho, have long expressed frustration with regional FEMA directives impacting routine irrigation ditch and drain maintenance activities. This sensitivity was further heightened by FEMA's open-ended ESA-related inquiries.

FEMA's Consideration of Ditch Maintenance as Regulated 'Development' is Problematic, and Needlessly Burdensome

Continuing eligibility for NFIP assistance hinges upon the regulation and oversight of "development" within floodplains (which include the larger 100-year floodplain and the narrower floodway within it). While FEMA administers and enforces the NFIP from the national level, state participation requires local communities to adopt and enforce floodplain management ordinances through "local floodplain administrators" who are assisted and audited by the Idaho Department of Water Resources (IDWR)-embedded State Floodplain Coordinator. The local communities map local floodplains consistent with NFIP regulations, and then issue permits governing floodplain development activities consistent with the NFIP.

Though this regulatory hierarchy has been in place in Idaho, routine irrigation operation and maintenance activities taking place within mapped floodplains have not been regulated. This is because Idaho Code §§ 46-1021 and 46-1022 expressly exempt the operation, cleaning, maintenance or repair of irrigation facilities from the broader definition of the term "development" as used in 40 CFR § 60.3 under the NFIP. To assuage any federal preemption concerns at the time, FEMA participated in, and approved, the 2010 Idaho statutory amendment process that exempted routine irrigation operation and maintenance activities from typical floodplain "development" regulatory requirements.

The Challenge for Idaho Began in Earnest in 2018

But, in early 2018, and despite prior participation in and agreement with Idaho Code § 46-1021 and 46-1022 irrigation activities exemption language, FEMA contacted Idaho officials asserting conflict between Idaho Code and 40 CFR § 60.3. FEMA es-

sentially threatened to suspend Idaho eligibility under the NFIP unless the state worked with FEMA correct the conflict. Under gubernatorial mandate, IDWR and FEMA officials drafted and released a regulatory guidance document setting forth a stepped permitting regime outlining those irrigation facility-related operation and maintenance activities exempt from NFIP permitting requirements; those qualifying for a general permit (a General Irrigation Floodplain Development Permit or GIFD); and those requiring an individual permit. IDWR and FEMA further entered into Memorandum of Agreement in April 2019 concerning the implementation of local floodplain regulation with respect to irrigation-related activities consistent with the June 2018 joint guidance document.

The Burden of Participation in Permit Programs

Irrigation and drainage entities may be reluctant to participate in more permit programs than absolutely necessary. Additional paperwork and coordination meetings can overtax smaller entities that simply do not have the staff to keep up with program requirements.

Idaho irrigation and drainage entities are also irked by the fact that the public safety goals of the NFIP (minimizing flood risk and resulting flood damage) is already required of them under state law (*see, e.g.*, Idaho Code §§ 42-1202 through 42-1204) absent the need of an additional permitting program. Moreover, and as a basic practical matter, irrigation and drainage facility operations and maintenance promote the flow of water rather than the opposite which could cause flooding.

The Ten Day Rule

One of the most troublesome aspects of the NFIP guidance is the requirement that irrigation and drainage entities haul off canal and drain-dredged spoils within ten days of depositing the same on the facility banks. This is counterintuitive because building up the banks of irrigation and drainage facilities provides additional capacity making them less susceptible to flooding/overtopping. It is further unrealistic and problematic to haul spoils off because: (a) dredged materials are difficult to handle and remove until dry—a process taking much longer than ten days; and (b) few, if any, irrigation entities possess the fleet of dump trucks and personnel needed to haul dredged materials away contemporaneous with the dredging. Then, an entity is left to find a destination for the spoils. The budgetary implications of this requirement (whether in terms of equipment rentals and temporary personnel, or permanent staff and equipment) are staggering, especially for larger entities overseeing hundreds of miles of facilities.

Local FEMA officials have taken this approach despite the questionable application of the NFIP to ditch maintenance activities. The National Flood Insurance Act (NFIA) and the NFIP regulations impose permitting processes for "all proposed construction or other development," within the regulated Special Flood Hazard Area, with "development" defined in part as "any man-made change to improved and unimproved real estate." But, ditches are neither "improved real estate" (defined by the NFIA as real estate upon which a building is located), nor bare land (*i.e.*, "unimproved real estate") either.

In response to FEMA's comment solicitation, the Irrigation Districts drafted a series of proposed regulatory definitions and exemptions related to routine irrigation ditch maintenance for agency consideration. While not all irrigation ditch operation and maintenance activities would be exempt, most would, thereby easing the burdens and complications currently impacting Idaho irrigation entities under the NFIP.

The Irrigation Districts Also Discouraged Broader FEMA Reach Over ESA Issues

Similar to their attempts to scale back NFIP regulatory reach over irrigation ditch-related activities, NMID and PID likewise encouraged FEMA to tread lightly on ESA issues and to maintain its historically mostly "hands off" approach because FEMA is not the local land use jurisdiction issuing permits to development.

The Irrigation Districts disagree with the view of others that FEMA administration of the NFIP, an optional insurance program determining local community eligibility for a federal benefit (flood insurance rate subsidies), is an "action authorized, funded or carried out" by FEMA with any direct or indirect impacts to listed species or critical habitat designated under the ESA. At most, FEMA map revisions (review and approval of Conditional Letters of Map

Change—CLOMRs and CLOMR-Fs) may move closer to the "agency action" line, but even that interpretation is strained. FEMA is not a local land use jurisdiction; FEMA is not adopting local land use ordinances choosing to opt-in to the NFIP; FEMA is not issuing any land use permits authorizing development and construction; and FEMA is not inspecting, maintaining, and enforcing violations of any local land use ordinances or development permits issued under those ordinances.

Contrary arguments under the Community Rating System program (CRS) (by which local communities are awarded additional NFIP premium discounts for going above and beyond baseline regulations) fare no better according to the Irrigation Districts. The argument is that "natural and beneficial floodplain functions" under the CRS regulations must include the preservation of listed species and the perpetuation of their critical habitat when/where present in a regulated floodplain. But this argument ignores that participation in the CRS is optional, and that it is a decision made by the local community, not FEMA.

Just because FEMA makes an additional benefits program available does not make the program, in and of itself, an ESA-regulated federal "action." Just like FEMA does not "authorize, fund or carry out" the development of any piece of land in a floodplain, or permit or authorize the same, FEMA does not "authorize, fund or carry out" participation in the CRS. The action taken (or decision made) to participate, perform, and remain in the CRS program belongs solely to the local communities opting into the program and tailoring their local land use ordnances accordingly; FEMA does nothing of the sort.

Conclusion and Implications

It remains to be seen what, if any, proposed regulatory changes emerge from FEMA's public comment process. Clearly the Nampa & Meridian Irrigation District and Pioneer Irrigation District hope any changes favor less rather than more regulation.

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WESTERN WATER NEWS

WATER RIGHTS IMPLICATIONS OF NEW MEXICO'S PENDING IMPLEMENTATION OF CANNABIS REGULATION ACT

News stories continue to highlight the recent studies finding that the current western megadrought is the worst in 1,200 years. Reservoir water levels throughout the western states continue to precipitously drop. The strength of river flows is down, contributing to ongoing aquifer depletions. Notwithstanding late 2021 snowstorms, unseasonably warm, dry weather in many parts of the West in early 2022 has resulted in dropping snowpack levels to below average. It is against this drought ridden backdrop that New Mexico is poised to break into the adult-use cannabis market.

Historically, New Mexico's temperate weather has supported a long growing season. Since the early 20th century in New Mexico, water-based transactions have formed the basis of much of the state's economy from farming, ranching, chile production, mining, oil and gas and fracking. Recreational cannabis producers represent the latest competition for access to water rights and adequate water supply. Under the newly enacted Cannabis Regulation Act (CRA), NMSA 1978, § 26-2C-1 *et seq.* (2021), applications require potential licensees to demonstrate they have the legal right to use water for farming operations. However, a bill approved February 14, 2022 by the New Mexico Senate aims to amend the water rights language in the act. The amendment could allow New Mexico to revoke a cannabis license if a licensee is using water to which it does not have a legal right. SB 100, 55th Leg. 2nd Sess. (N.M. 2022). However, SB 100 had stalled in the House Judiciary Committee when the 2022 Legislative Session ended on February 17, 2022.

Background

In 1978, New Mexico became the first state in the country to enact a medical cannabis law and allowed for the use of cannabis through a research program approved by the Food and Drug Administration. *See*, NMSA 1978, § 26-2A-1 through 26-2A-7 (Controlled Substances Therapeutic Research Act). Later, in 2007, New Mexico legalized the use of cannabis with a physician's recommendation for treatment of certain medical conditions such as HIV/AIDS, cancer, glaucoma, multiple sclerosis, and epilepsy. *See*, NMSA 1978, § 26-2B-1 through 26-2B-10 (the Lynn and Erin Compassionate Use Act). New Mexico's Regulation and Licensing Department's Cannabis Control Division administers both Acts. New Mexico's Regulation and Licensing Department's standard for medical cannabis requires producers to use potable water in the production of their grow operations. In 2021, New Mexico passed the Cannabis Regulation Act. The act allows New Mexicans to grow six mature cannabis plants per household. NMSA 1978, § 26-2C-25(A) (2021). And, no later than April 1, 2022, New Mexicans who are 21 years or older will be able to purchase "two ounces of cannabis, 16 grams of cannabis extract and 800 milligrams of edible cannabis at one time." NMSA 1978, § 26-2(C)-3(B)(a) (2021).

All of this new business growth will, of course, require a state approved water permit, license or source. While non-potable water may be used for adult-recreational grow operations under the Cannabis Regulation Act, the intersection between the growing standards, and by extension, the water requirements, for cannabis for medicinal use and cannabis for recreational use will present interesting issues as the industry takes hold in New Mexico.

Emerging Issues: Water and Cannabis

Emerging issues include whether water quality standards under applications for a grower's license apply. Rural cannabis growers typically use well water or water from a surface irrigation source. Under the current 2021 Cannabis Regulation Act water law, these water sources must be permitted through the Office of the State Engineer. Without valid water rights, rural producers must purchase or lease water rights. Growers in New Mexico's urban areas have the option of accessing municipal water supplies. These costs could cut into initial start-up costs and future

profit margins. For many, the water requirements are cost prohibitive to seeking to establish a cannabis grow operation.

For rural producers, potential grow operation licensees are required to provide proof of water rights. New Mexico's Cannabis Regulation Act requires that an initial application include:

> . . .documentation from the Office of the State Engineer showing that the applicant has a valid and existing water right, or a permit to develop a water right, for irrigation purposes for outdoor cultivation, or a commercial purpose for indoor cultivation at the proposed place of use of the cannabis establishment. 16.8.2.22 (A)(3)(b) NMAC.

This documentation may include: 1) a State Engineer permit or license in good standing; 2) a subfile order or decree issued by a water rights adjudication court; 3) the findings of an Office of the State Engineer hydrographic survey; or 4) other documentation the Office of the State Engineer deems in writing acceptable. *Id.* at (b)(i) – (iv).

In New Mexico, recreational use "grow" operations face challenging circumstances, including over-appropriated or closed water basins, legal restrictions on the transfer and lease of water rights and ongoing megadrought conditions. New Mexico's Cannabis Regulation Act is the latest legislation poised to debut in New Mexico's high desert, low-water climate. New Mexico has a century plus old legal framework for allocating water in low water times.

In New Mexico, the Office of the State Engineer is the agency responsible for supervising the apportionment of water within the state. *See,* NMSA 1978, § 72-2-9 (1941). The state controls water use because it does not part with ownership, allowing only a usufructuary right to the water. *See, Jicarilla Apache Tribe v. United States*, 657 F. 2d 1126, 1133 (10th Cir. 1981). As in most western states, in New Mexico, beneficial use is the basis, the measure, and the limit to the right to the use of the state's waters. N.M. Const. art. XVI, §§ 1-3; NMSA 1978, § 72-12-2 (1941). Priority in time gives the better right. NMSA 1978, § 72-12-1 (1941). Appropriations of water are thus measured by beneficial use and, no matter how early the priority date of the appropriation, water users are not entitled to receive more than is necessary for their actual use. In this way, waste is not tolerated in the system, as excessive diversions are not regarded as beneficial use—hence the "use it or lose it" rule of allocating water in low-water circumstances throughout the West.

Upon implementation of New Mexico's Cannabis Regulation Act, many hopeful growers will be in the market to acquire and/or transfer water rights. The provisions of New Mexico's Water Code concerning applications to transfer water include the State Engineer's review of conservation, impairment and public welfare. In addition, on applications for the transportation and use of public waters outside the state, the State Engineer shall consider both the water available to the state of New Mexico and whether there are shortages within the state. *See,* NMSA 1978, § 72-12B-1(C)(1)(3) (2019). The new legislation also includes water planning and conservation provisions. *Id.* at 1(D). In New Mexico, the obligation to conserve water is found in three areas of the law. First, the New Mexico Constitution allows one to acquire a water right only if water is placed to beneficial use. Using more than one reasonably needs is not beneficial use, it is waste. N.M. Const., art. XVI; *see also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981). Second, one cannot achieve a new appropriation of water or transfer a water right without proving their use is consistent with the conservation of water. NMSA 1978, § 72-5-23 (1985).

Conclusion and Implications

New Mexico is the latest of the western states to legalize cannabis for grower's and for recreational use over the last four years. New Mexico is now in the earliest stages of beginning to contend with how legislation intended to allow for and control cannabis growth and production in the state and legislation meant to allow both grower's and recreational use affects requisite water consumption requirements amidst limited water resources. Experts agree how much water this new industry requires remains unknown. However, eestern water codes, over-appropriated basins, and limits on transfers, coupled with ongoing crippling drought conditions continue to put their historic stamp on the accessibility of water for agricultural and commercial uses.
(Christana J. Bruff)

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 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)

REGULATORY DEVELOPMENTS

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 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)

CALIFORNIA DEPARTMENT OF WATER RESOURCES DEEMS GROUNDWATER SUSTAINABILITY PLANS FOR 12 CRITICALLY OVERDRAFTED BASINS INCOMPLETE AND REQUIRE REVISION

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.

Many GSPs Are Incomplete, Including those for all San Joaquin Valley Subbasins

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 subsid-

ence. 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)

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 hydrologically 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)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT GRANTS *CERTIORARI* TO REVISIT THE PROPER TEST FOR DETERMINING WHICH WETLANDS QUALIFY AS 'WATERS OF THE UNITED STATES' UNDER THE CLEAN WATER ACT

The U.S. Supreme Court granted *certiorari* for the second time in a long-running dispute involving whether a residential lot on which a couple (Sacketts) wish to build a home in the panhandle of Idaho contains wetlands that qualify as regulable "waters of the United States" (WOTUS) under the federal Clean Water Act (CWA). The U.S. Environmental Protection Agency (EPA) contends that the lot does contain WOTUS and therefore, that the Sacketts need a permit under Section 404 of the CWA prior to discharging any fill material into the area in question. The Sacketts disagree and filed a case challenging EPA's WOTUS determination that is now headed to the Supreme Court nearly 15 years since its inception in the District of Idaho. [*Sackett v. Environmental Protection Agency*, 142 S. Ct. 896, [Case No. 21-154], (Jan. 24, 2022).]

Factual Background

The Sacketts purchased a parcel in Bonner County, Idaho, in 2004 for the purpose of building a home. After obtaining the necessary building permits from the county, they began site work by spreading sand and gravel to create a stable grade. Shortly thereafter, EPA officials visited the site and ordered the Sacketts to cease such work based on their conclusion that the Sacketts had discharged fill material into wetlands that qualify as WOTUS subject to the jurisdiction of Section 401 of the CWA. EPA followed up by issuing an administrative Compliance Order pursuant to Section 309 of the Act that directed the Sacketts to remove the fill material from the site and restore it to its undisturbed condition in accordance with the agency's prescribed work plan.

Shortly thereafter, the Sacketts filed a civil action challenging the validity of the Compliance Order on the ground that the area on their property that EPA determined to be jurisdictional wetlands within the scope of its regulatory authority under the CWA do not qualify as such.

During this same period, after the Sacketts had purchased their property but before they had commenced ground-disturbing activities, the Supreme Court issued its opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), in which it addressed the definition of WOTUS. It actually was the third time in a span of about two decades in which the Court had occasion to wrestle with the proper scope of WOTUS. *See also, United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (unanimously holding determination of the U.S. Army Corps of Engineers (Corps) that wetlands not "navigable" in fact but that directly abutted traditional navigable waters qualified as WOTUS reflected a "permissible interpretation" of CWA); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*) (in 5-4 opinion, rejecting the Corps' extension of WOTUS jurisdiction to non-navigable and isolated intrastate waters notwithstanding their use as habitat by various migratory birds).

In *Rapanos*, the Court splintered even further on the question of the appropriate scope of WOTUS, issuing five separate opinions with just four votes in support of Justice Scalia's plurality opinion announcing the Court's judgment. 574 U.S. 715. That judgment vacated two Sixth Circuit Appeals Court opinions that had upheld the federal government's exercise of jurisdiction over wetlands near ditches or human-constructed drains that eventually fed into traditional navigable waters. *Id.* at 729 & 757. Justice Scalia's opinion set forth a WOTUS standard that encompasses only "those relatively permanent, standing or continuously flowing bodies of water forming geographic features" that are characterized in ordinary parlance as "streams, rivers, and lakes," as well as any wetlands "adjacent" to them in the sense that they share a continuous surface connection. *Id.* at 739 & 754 (internal quotation marks and citation omitted).

Justice Kennedy, on the other hand, authored a separate concurring opinion for himself in which he set forth a distinct WOTUS test based on what he

contended is a more faithful reading of how the Court handled the issue in *SWANCC*. *Id.* at 758-87. More specifically, in his concurring opinion Justice Kennedy espoused the notion that federal jurisdiction over wetlands as WOTUS "depends upon the existence of a significant nexus between the wetlands and navigable waters in the traditional sense." *Id.* at 779. Expounding on what would qualify as the requisite "significant nexus" in the context of the congressional purposes of the CWA, he stated that:

> . . .wetlands possess the requisite nexus, and thus come within the statutory phrase, 'navigable waters,' if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as 'navigable.' *Id.* at 780.

Round One of Litigation: The Justiciability and Ripeness of the Sacketts' Challenge

EPA responded to the Sacketts' Complaint by filing a motion to dismiss. The District Court granted the motion in reliance on the considerable amount of case law that had come down as of that time in which a broad cross-section of federal courts (including four Circuit Courts of Appeals) had unanimously determined that they lacked jurisdiction to review such an order unless and until EPA brought an action to enforce the order. *Sackett v. EPA*, 2008 WL 3286801, at **2-3 (Aug. 7, 2008), motion for reconsideration denied, 2008 WL 11348471 (Oct. 9, 2008). On appeal, the Ninth Circuit followed the lead of its four sister U.S. Circuit Courts and affirmed dismissal of the Sacketts' challenge. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

The Sacketts then filed and had granted a petition for a writ of *certiorari* to the U.S. Supreme Court for the first time in which they sought review of the justiciability issues on which their claims had been dismissed. 564 U.S. 1052 (2011). In a unanimous opinion, the Supreme Court reversed the lower courts' dismissal rulings, concluding that EPA's Compliance Order qualified as a "final agency action" for which no other adequate remedy at law exists and, therefore, was subject to judicial review under the Administrative Procedure Act (APA). 566 U.S. 120, 131 (2012). The Court also ruled that the CWA does not preclude such review. *Id.* On that basis, it reversed and remanded the case for further proceedings on the merits of the Sacketts' claims.

Round Two of Litigation: The Merits and Validity of EPA's 'WOTUS' Determination

On remand from the Supreme Court, the parties stipulated to a joint request to stay the litigation to allow them to pursue settlement discussions for some nine months. When those proved unsuccessful, the parties filed cross-motions for summary judgment on the merits of the Sacketts' claims. After more than three years following the completion of briefing, the District Court issued an Order granting summary judgment in favor of EPA across the board. *Sackett v. EPA*, 2019 WL 13026870 (D. Id. Mar. 31, 2019). For the most part, the court engaged in a fairly straightforward application of the definition of WOTUS that both agencies with regulatory authority over the matter (EPA and the Corps) had adopted during the 1980s, in light of the fact that application of the "Clean Water Rule" that they had promulgated in 2015 in part to amend the definition was then subject to a preliminary injunction in 28 states, including Idaho. *Id.* at *7 n.3. In applying this older regulatory definition, the Court made the following findings in upholding EPA's Compliance Order: 1) EPA's determination that the Sacketts' property contains wetlands was not arbitrary and capricious, *id.* at **8-9; 2) EPA's determination that the Sacketts' property is "adjacent to" (as that term is defined in the regulatory agencies' rules) the "traditional navigable water" of Priest Lake was reasonable, *id.* at **9-10; 3) EPA's determination that the Sacketts' property is also "adjacent to" an unnamed tributary separated from the property by a road that flows into Priest Lake, and that the property, the tributary and similarly situated wetlands in the general area have a "significant nexus" to Priest Lake as defined in Justice Kennedy's concurring opinion in *Rapanos* was not arbitrary or capricious, *id.* at ** 10-12. The District Court utilized Justice Kennedy's "significant nexus" WOTUS test in light of Ninth Circuit precedent addressing how the Supreme Court's various *Rapanos* opinions should be construed. *Id.* at 11 & n. 5.

On appeal, the Ninth Circuit first had to address whether the case had become moot given that EPA had withdrawn the Compliance Order it had issued to the Sacketts in March 2020, after they had already filed their opening appellate brief. *Sackett v. EPA*,

8 F.4th 1075, 1082-86 (9th Cir. 2021). The court fairly readily disposed of this jurisdictional argument, relying principally on the fact that, even though EPA had rescinded the Compliance Order directed at the Sacketts, it had not done likewise for the underlying WOTUS jurisdictional determination on which the order was based, leaving the agency free to issue another such order or take other further administrative action against the Sacketts in the future on the basis of that same determination. *Id.* at 1083-84.

Turning to the merits, the court initially rejected the Sacketts' principal argument that the controlling standard for defining the scope of WOTUS is the one Justice Scalia articulated in his plurality opinion in *Rapanos*. *Id.* at 1087-91. Instead, the Ninth Circuit ruled that its precedent compelled it to follow, and apply, Justice Kennedy's "significant nexus" test as articulated in his concurring opinion. *Id.* at 1091. Applying that standard, the court made rather quick work of analyzing whether EPA's underlying WOTUS jurisdictional determination applicable to the Sacketts' property was arbitrary or capricious within the meaning of the APA, and determined it was not. *Id.* at 1091-93.

Granting the Petition for Writ of *Certiorari*

The Sacketts then filed a petition for a writ of *certiorari* in the Supreme Court, presenting the question for consideration as: "Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the [CWA]"? On January 24, 2022, the Court granted the petition, but in so doing, stated that it was limited to the question of "whether the Ninth Circuit set forth the proper test for determining whether wetlands are [WOTUS] under the [CWA], 33 U.S.C. § 1362(7)"?

Conclusion and Implications

The Supreme Court's grant of *certiorari* in the Sacketts' case means that it is now poised to take its second turn at the plate in the lengthy saga, this time on the merits, as well as its fourth bite at the scope of the WOTUS "apple" that continues to elude an enduring or definitive resolution (or anything approximating it). Given this backdrop, this may well mean that the judicial branch, after having extended rather explicit invitations (or indeed, even implorations) to the Congress and regulatory agencies to refine and confirm the scope of WOTUS in a reasonable and straightforward manner, *see, e.g.*, *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring), will step into the gap and avail itself of the opportunity to issue a clarion definition of WOTUS itself.

This may particularly be the case given that, since the Court issued its all-over-the-map *Rapanos* opinion more than 15 years ago, the scope of WOTUS under the CWA has been the subject of repeated back-and-forth regulatory proposals and court challenges, all of which have occurred in the shadow and context of the uncertain rubric provided by Justice Scalia's and Justice Kennedy's competing visions for the federal regulatory scope of the CWA and their respective tests for defining just how far it extends to any particular site. All of this has of course left not just the Sacketts, but many others who own land they wish to develop or otherwise carry out improvements on that would affect wetlands or other areas that could qualify as WOTUS under any of the various potential standards in limbo about the extent to which such actions are permitted and under what conditions. If the Court opts not just to opine on whether the Ninth Circuit utilized the proper standard for WOTUS, but to provide its own formulation, they will have to wrestle with the tension that in many respects lies at the heart of the dilemma underlying such a task. That is to provide for sufficient flexibility to allow the agencies to effectively serve the purposes of the CWA and protect the integrity of the nation's waters to the extent the statutory language allows in applying it to highly variable sites, on the one hand, while also providing for clarity and a meaningful degree of certainty and workability for potentially regulated landowners, on the other.

The Sacketts' brief on the merits is currently due April 11, 2022, while respondents' brief is due June 10, 2022. This means that, although oral argument has not yet been set, it will very likely not occur until the Court's 2022-23 term, likely next fall.

The Supreme Court's Order granting *certiorari* is available at the following link: https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf. (Stephen Odell)

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 Ciruits 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)

FEDERAL CLAIMS COURT DETERMINES 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 "reason-

able 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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