Volume 17, Number 3
April 2022

# EASTERN WATER LAW™

## & POLICY REPORTER

C O N T E N T S

### WATER NEWS

Hydroelectric Project Future in Limbo in Wake of Pacific Gas and Electric Company's Announcement to Bring Project Back to Fully Operational Status . . . . . . . . . . 51

News from the West . . . . . . . . . . 52

### REGULATORY DEVELOPMENTS

Federal Energy Regulatory Commission Issues Draft Environmental Impact Statement for the Decommissioning of Four Klamath River Dams . . . . . . 56

### PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties and Sanctions . . . . . . . . . . 59

### LAWSUITS FILED OR PENDING

Florida's Water Law Management Challenged in Two Court Actions . . . . 60

### JUDICIAL DEVELOPMENTS

*Federal:*
Fifth Circuit Finds Biden Administration's Policy on Assessing Greenhouse Gas Costs in Rulemaking Should Go Forward Pending Appea . . . . . . . . . 62
*Louisiana v. Biden*, ___F.4th___, Case No. 22-30087 (5th Cir. Mar. 16, 2022).

District Court Upholds EPA's 'Reasonable Availability' Analysis in the Establishment of Clean Water Act 'No Discharge Zone' . . . . . . . . . . . . . . . 64
*American Waterways Operators v. Regan*, ___F.Supp.4th___, Case No. 18-CV-2933 (APM) (D. D.C. Feb. 14, 2022).

District Court Rejects Preliminary Injunction Against Hydroelectric Dams on the Kennebec River under the Federal Endangered Species Act . . . . . . 66
*Atlantic Salmon Federation U.S., et al. v. Merimil Limited Partnership, et al.*, ___F.Supp.4th___, Case No. 21-CV-00257-JDL (D. Me. Feb. 24, 2022).

*Continued on next page*

EXECUTIVE EDITOR

**Robert M. Schuster, Esq.**
Argent Communications Group
Auburn, California

EDITORIAL BOARD

**Rebecca Andrews, Esq.**
Best, Best & Krieger
San Diego, CA

**Andre Monette, Esq.**
Best Best & Krieger, LLP
Washington, D.C.

**Deborah Quick, Esq.**
Perkins Coie, LLP
San Francisco, CA

**Harvey M. Sheldon, Esq.**
Hinshaw & Culbertson
Ft. Lauderdle, FL

WWW.ARGENTCO.COM

EASTERN WATER LAW
& POLICY REPORTER

**District Court Finds Clean Water Act's Partial Waiver of Sovereign Immunity Did Not Impliedly Repeal Federal District Court's Jurisdiction over Enforcement Actions . . . . . . . . . . . . . . . . . . . . . 68**
*United States v. Bayley*, ___F.Supp.4th___, Case No. 3:20-cv-05867-DGE (W.D. Wash. Mar. 14, 2022).

Publisher's Note:

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

**WWW.ARGENTCO.COM**

Copyright © 2022 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to $250,000 and up to three years imprisonment, and statutory damages in civil court are up to $150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

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

EWL

## EASTERN WATER NEWS

# HYDROELECTRIC PROJECT FUTURE IN LIMBO IN WAKE OF PACIFIC GAS AND ELECTRIC COMPANY'S ANNOUNCEMENT TO BRING PROJECT BACK TO FULLY OPERATIONAL STATUS

Over the last few years, Pacific Gas and Electric Co. (PG&E) has been looking to offload the Potter Valley Project, located along the Eel River, due to its high cost of operation and relatively low yield. In a recent turn of events, however, PG&E announced that it will be moving forward with plans to bring the Potter Valley Project back to fully operational status, and has done so just one month before the Project's Federal Energy Regulatory Commission (FERC) license is set to expire.

### The Two-Basin Takeover

When PG&E initially decided to withdraw its application to relicense the Project back in 2019, the Two Basin Partnership was formed in the hopes of taking over the Project and reworking it in an environmentally and economically sound manner. The Partnership, made up of five local entities including Sonoma County Water Agency, Mendocino County Inland Water & Power Commission, Humboldt County, the Round Valley Indians Tribes, and California Trout, filed a proposal to acquire the Project in May 2020 with the intent to remove the Scott Dam and restore fish passage to hundreds of miles of historical habitat.

In September 2021, the Partnership requested an application extension for the FERC relicensing deadline to provide additional time to work out a water plan and to develop strategies for dam removal and restoration of the Eel and Russian river basins but the extension was denied. Although the Partnership continued to work towards a solution for the takeover of the Project, in early March the Partnership announced that it would be halting its effort to renew the license for the Project. According to its members, the Two-Basin Partnership was unable to come close to raising the estimated $12-18 million needed to conduct the studies required by various regulatory agencies and to file for re-licensing.

### The Future of the Project

With neither PG&E nor the Two-Basin Partnership willing and/or able to submit an application to have the Project relicensed, the current FERC license is set to expire on April 14, 2022.

When the license expires, FERC will issue PG&E an annual license and PG&E will continue to own and operate the Potter Valley Project under the existing license conditions until FERC either authorizes a transfer of the project to a new licensee "consistent with the current relicensing effort underway by the (notice of intent) parties" or issues a final license surrender and decommissioning order. In the meantime, PG&E's announcement that it would restore the Project back to fully operational status gives at least some indication as to the Project's future.

The Potter Valley powerhouse has been offline since July 2021 when PG&E discovered a blown transformer during a routine inspection. Complicating matters regarding the necessary repairs is PG&E's characterization of the Project, noting that it has been "non-economic" for years. In fact, this reasoning was a major factor for the company in its initial decision to bow out of the ongoing operational and maintenance costs. Despite this characterization, PG&E reportedly conducted an evaluation of whether to replace the transformer and concluded that it would be beneficial to proceed with the work necessary to return the powerhouse to full operational status and added that repairs could be completed in the next couple of years. PG&E is estimating that it will be able to recoup the costs of the repair within five years, during which time the company plans to continue operating under annual licenses from FERC.

### Conclusion and Implications

The Potter Valley Project serves as a significant water supply source for Mendocino and Sonoma counties water users. The Project's current FERC license requires PG&E to deliver approximately 58,000

acre-feet of water to the East Branch Russian River in a normal water year, and approximately 45,000 acre-feet in a dry water year which will continue consistent with license requirements. Since 2007, PG&E has also diverted an annual average of approximately 12,000 acre-feet of so-called "discretionary" water for electric generation to the Russian River when conditions at Lake Pillsbury allow. In total, this water averages about 30 percent of the 235,000 acre-feet that flows into Lake Mendocino annually.

So, while PG&E will like continue its operations of the Project business-as-usual for the time being, a permanent solution balancing the environmental needs of the Eel River and the water needs of Mendocino and Sonoma counties water users is still needed. Despite the Two-Basin Partnership's inability to raise sufficient funding in time for the relicensing deadline, the coalition has not expressed that it would be giving up on the endeavor entirely. If anything, the current indication is that the Partnership will continue to assess its options moving forward. Just looking back at this very same Project, PG&E operated under annual licenses for eleven years during the previous relicensing process, so the group will likely have plenty time to address any issues it still has. Even still, the future of the Potter Valley Project is very much uncertain, and only time will tell whether the Two-Basin Partnership will be able to continue its efforts with any success.
(Wesley A. Miliband & Kristopher T. Strouse)

## NEWS FROM THE WEST

In this month's News from the West we stay firmly planted in California, where like most of the western states, is experiencing unprecedented drought. The drought is causing federal and state water authorities to severely cut back water allocations from their respective water projects. We also see California authorities consideration of a salinity intrusion barrier barring brackish water from entering the state's all-important Delta water system due to drought.

### U.S. Bureau of Reclamation Declare Federal Central Valley Project Initial 2022 Allocations of Zero Percent for Irrigation—While the California Department of Water Resources Reduces State Water Project Allocations to Five Percent

In response to an historically dry end to the winter season and a seemingly unrelenting lack of precipitation, the U.S. Bureau of Reclamation (Bureau) recently announced initial allocations of zero percent for Central Valley Project (CVP) contractors for irrigation, and the California Department of Water Resources slashed initial State Water Project (SWP) allocations from 15 percent down to 5 percent.

#### Background

California's precipitation and runoff tend to be concentrated during the winter months and in the north of the state, while much of the water use and need, particularly for agriculture, occurs during the summer and in the central and southern portion of the State. The federal Central Valley Project and California State Water Project are large water infrastructure systems that were designed to store and transport water to mitigate this mismatch between supply and demand. CVP and SWP water is delivered to water agencies who have longstanding contracts for a certain volume of water each year. Due to variability of annual water supply, only a percentage of the contracted allocation amounts is typically delivered each year. Initial allocations are calculated based upon the amount of precipitation in the wet first half of the water year, which begins October 1.

#### Record Low Precipitation in January and February 2022

January and February of 2022 saw the lowest precipitation on record in California. This was particularly concerning as it affected many of the typically wetter northern parts of the state. Despite strong precipitation in December 2021, the shortfall in January and February 2022— normally the wettest months of the year—bodes ill for the remainder of this water year, indicating that California is currently-headed for a third consecutive year of drought. As of this writing, precipitation in March was insufficient to

make up for the dry start to 2022 or to bring rainfall and snowpack back to normal levels.

### Central Valley Project Initial Allocations

The CVP, which is managed by the Bureau, announced its initial allocations on February 23, 2022. In addition to the low precipitation in early 2022, The Bureau noted that the December storms did not fall evenly across headwater areas and that Lake Shasta, a major CVP reservoir, received only minimal recharge from December precipitation. Furthermore, CVP reservoirs were already low at the start of the water year due to a dry 2021.

Consequently, the Bureau has announced that CVP 2022 initial allocations for irrigation contractors both north-of-Delta and south-of-Delta are zero percent of contracted supplies. Municipal and industrial (M&I) contractors north-of-Delta serviced from the Sacramento River will receive only water for public health and safety, while M&I contractors serviced directly from the Delta and those south-of-Delta will receive 25 percent. Friant Division contractors are allocated 15 percent of their Class 1 supply and zero percent of their Class 2 supply.

### State Water Project Allocations Slashed

In December 2021, the California Department of Water Resources (DWR) announced an initial SWP allocation for health and safety water only, with no further deliveries, marking the first-ever SWP zero percent initial allocation. Previously, the lowest initial allocations were 5 percent in 2010 and 2014. After December rainfall, SWP allocations were raised to 15 percent; but, on March 18th, following the dry December and January, DWR slashed allocations to just 5 percent for almost all contractors. Following an analysis of precipitation through March, SWP allocations may be adjusted again. DWR typically announces its final allocations in April or May.

### Conclusion and Implications

The extremely low Central Valley Project and State Water Project allocations will, of course, present challenges for California water users who rely on those supplies. Both entities may still update the percentages in their final allocations, but this currently seems unlikely as the "wet" season is rapidly drawing to a close. Typically, in a low water year, water users would increase groundwater pumping to offset shortage of surface supplies. However, that option has become less reliable, more expensive—or both—in many areas as a result of recently adopted Groundwater Sustainability Plans and related management actions imposed by Groundwater Sustainability Agencies. Consequently, some water users may find themselves increasingly "squeezed" if they are unable to pump enough groundwater to offset the impacts of SWP and CVP shortfalls.
(Jaclyn Kawagoe, Derek Hoffman)

## California Department of Water Resources Begins Preparation of Environmental Impact Report For River Drought Salinity Barrier

On February 23, 2022, the California Department of Water Resources (DWR) published a Notice of Preparation of the Environmental Impact Report for the West False River Drought Salinity Barrier Project (Notice). As the "lead agency" under the California Environmental Quality Act (CEQA)[California's version of NEPA], DWR will prepare an Environmental Impact Report (EIR) to assess the potential environmental effects of the proposed project. The Notice is to solicit the views of interested persons, organizations, and agencies regarding the scope and content of the environmental information for the proposed project.

### Background

DWR has constructed a drought salinity barrier in the West False River in the past. Most recently, in mid-2021, DWR constructed a temporary emergency drought barrier in the West False River in response to worsening drought conditions and Governor Newsom's Emergency Drought Proclamation. According to DWR, the barrier helps:

> . . .slow the movement of saltwater into the central Delta and prevent contamination of water supplies for Delta agriculture and municipal supplies for millions of Californians. (Department of Water Resources, *Construction Begins on Emergency Drought Barrier in Sacramento-San Joaquin Delta* (June 3, 2021) available at: https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta)

DWR credits the temporary barrier's effectiveness during the 2012-2016 drought for "reducing the intrusion of salt water into the central and south Delta," as well as helping to "preserve fresh water supplies for future critical uses including drinking water and the environment." (Department of Water Resources, *Construction Begins on Emergency Drought Barrier in Sacramento-San Joaquin Delta* (June 3, 2021) available at: [https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta](https://water.ca.gov/News/News-Releases/2021/June-21/Emergency-Drought-Barrier-Construction-Delta))

## The Proposed Project

The proposed project consists of a temporary barrier and water quality monitoring stations. (Notice, at p. 1) The temporary barrier will be constructed in the West False River, approximately four-tenths of a mile east of the West False River's confluence with the San Joaquin River, within the Sacramento-San Joaquin River Delta. (*Id.*) DWR may install the temporary barrier:

> . . .up to two times between 2023 and 2032, including consecutive years, if drought conditions occur, for a period of up to 20 months. (*Id.*)

Concurrent with the next construction of the temporary barrier, DWR will install three new water quality monitoring stations in the Delta—one in Woodward Cut and two in Railroad Cut. (*Id.*) The water quality monitoring stations will be left in place after the barrier's removal, however. (*Id.* at p. 2)

The temporary barrier and water quality monitoring stations will be installed if DWR, in cooperation with other State and federal agencies, determines that drought conditions impact on State Water Project and Central Valley Project water storage such that the projected Delta outflow would be insufficient to control salinity intrusion in the Delta. (Notice, at p. 1) DWR believes the temporary barrier "would be an effective tool to protect the beneficial uses of the interior Sacramento-San Joaquin Delta water by reducing saltwater intrusion while preserving the use of critically needed reservoir water." (*Id.*) Indeed, the project's objective is to

> . . .minimize the impacts of salinity intrusion on the beneficial uses of water in the Delta, consistent with *The Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region: The Sacramento River Basin and the San Joaquin River Basin* (May 2018), during persistent drought conditions. (*Id.* at p. 2)

According to the Notice, the temporary barrier will be approximately 800 feet long, spanning the West False River from Jersey Island north to Bradford Island. (Notice, at p. 1) The temporary barrier will be constructed of approximately 84,000 cubic yards of embankment rock sourced from a commercially operated rock quarry in San Rafael, DWR's own Rio Vista stockpile in Solano County, or the Weber stockpile in San Joaquin County. (*Id.*)

If the drought conditions warrant leaving the temporary barrier in place for a subsequent year, DWR may cut a notch in the middle portion of the temporary barrier in January of the subsequent year to permit fish passage and vessel navigation through the West False River. (Notice, p. 1) The cut would then be filled as early as the first week of April. (*Id.*)

DWR anticipates some of the probable environmental effects to include:

- Decreased air quality during construction;

- Biological resources from potential effects to special-status species or their habitat, migratory fish species, and state or federally protected wetlands during construction and presence of the barrier in the West False River;

- Potential effects to archeological and historical sites and tribal cultural resources during construction;

- Hydrology and water quality from potential erosion, scour, siltation, and water quality effects during construction and presence of the barrier; and

- Recreation from presence of the barrier.

## Conclusion and Implications

Pursuant to CEQA, the Department of Water Resources circulated the Notice among the responsible and trustee agencies. The responsible and trustee agencies must provide DWR with specific details regarding the scope, significant environmental issues,

reasonable alternatives, and mitigation measures within the responsible or trustee agencies' area of statutory responsibility. DWR will consider these comments and measures in its Environmental Impact Report.

DWR circulated the notice for a 30-day period beginning Wednesday, February 23, 2022 and ending Friday, March 25, 2022, at which point written comments on the scope of the EIR were due. DWR will then consider all written comments received from interested persons, organizations, and agencies when preparing the forthcoming EIR.
(Nicolas Chapman, Meredith Nikkel)

## REGULATORY DEVELOPMENTS

### FEDERAL ENERGY REGULATORY COMMISSION ISSUES DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE DECOMMISSIONING OF FOUR KLAMATH RIVER DAMS

On February 25, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Environmental Impact Statement (DEIS) evaluating the effects of the surrender, decommissioning, and removal of four dams along the Klamath River in Klamath County in south-central Oregon and Siskiyou County in north-central California. The DEIS analyzes the effects of decommissioning the dams on consumptive water issues, flooding, aquatic biota, revegetation, dewatering, and recreation, among other matters. The DEIS recommends that the parties surrender their license and decommission the dams pursuant to the staff alternative, which includes mitigation measures and state- and federally- mandated conditions.

#### Background

The Lower Klamath Hydroelectric Project (Project) involves four hydroelectric facilities (dams) located on the Klamath River in Oregon and Northern California. They include J.C. Boyle (Oregon), Copco No. 1 (California), Copco No. 2 (California), and Iron Gate (California). (DEIS at 1-1; *In the Matter of WQC for Klamath River Renewal Corporation Lower Klamath Project License Surrender*, California State Water Resources Control Board WQC 202000408-025 at p. 5.) The Project spans over 390 acres of federal lands and an additional 5.75 acres for transmission line right-of-way. (DEIS at 1-1.) The dams "currently generate approximately 686,000 megawatt-hours (MWh) annually." (*Id.* at ES-xxxi.)

In 2004, PacifiCorp, the owner of the Project, applied to relicense the Project. (DEIS at 1-2.) In response thereto, FERC issued an environmental impact statement, which recommended a new license with considerable mandatory conditions and operation changes. (*Id.* at 12-3.) PacifiCorp concluded that such conditions were cost-prohibitive, and PacifiCorp, FERC, Tribes, and other interested parties began negotiations to decommission the Project. (*Ibid.*)

In 2010, 47 parties reached an initial settlement regarding the Project's license surrender. (DEIS at 1-3.) Six years later, in 2016, PacifiCorp, California, Oregon, the Department of the Interior, the National Marine Fisheries Service (NMFS), the Yurok Tribe, the Karuk Tribe, local governments, irrigators, and conservation and fishing groups, among other parties, reached an amended settlement, the Klamath Hydroelectric Settlement Agreement. (*Ibid*; Klamath River Renewal Corporation, "FERC Releases Draft Environmental Impact Statement for Klamath Dam Removal Project" (Feb. 25, 2022) [River Renewal Corporation Press Release], https://klamathrenewal.org/ferc-releases-draft-environmental-impact-statement-for-klamath-dam-removal-project/)

The Klamath Hydroelectric Settlement Agreement formed the Klamath River Renewal Corporation (River Renewal Corporation), a nonprofit organization, formed to take ownership of the dams. (River Renewal Corporation Press Release.) To this end, FERC approved an application for transfer of the Project from PacifiCorp to River Renewal Corporation, the State of Oregon, and the State of California. (DEIS at ES-xxx.) And in November 2020, River Renewal Corporation and PacifiCorp submitted an amended application to surrender the Project license and begin deconstruction and decommissioning of the Project. (*Ibid.*) As a result, FERC produced the DEIS in accordance with its obligations under the National Environmental Policy Act of 1969 (NEPA).

#### Summary of the DEIS

Pursuant to NEPA's requirements, the DEIS analyzes three alternatives: 1) River Renewal Corporation and PacifiCorp's proposed action as set forth in the surrender application; 2) the proposed action with Commission staff modifications; and 3) no action. (DEIS at 2-1.) The DEIS compares the alternatives' effects starting from a baseline of preserving the status quo, i.e., based on existing conditions at the time that the DEIS is developed. The DEIS analyzes the extensive tradeoffs affecting FERC's decision.

The action alternatives both involve the decommissioning and destruction of the dams and connected facilities. (DEIS at 2-1.) The action alternatives' objectives are to "[a]dvance the long-term restoration of the natural fish populations in the Klamath River Basin," improve the long-term water quality conditions, address the conditions causing high disease rates among Klamath River salmonids, and "[r]estore anadromous fish passage to viable habitat." (DEIS at 1-6.) The proposed action includes 16 environmental measure plans, each with various subparts. The more detailed plans pertain to reservoir drawdown and diversion, water quality monitoring and management, and aquatic resources. Under the water quality monitoring and management plan, the parties will have to work with the California State Water Resources Control Board (State Board) and the Oregon Department of Environmental Quality (Oregon DEQ) to address agencies' Water Quality Certifications' (WCQ) requirements and conditions. (*Id.* at 2-3-4.) The most extensive plan is the aquatic resources management plan, which corresponds with the action alternatives' objectives and provides plans for the following aquatic matters: spawning habitat, listed sucker salvage, fish presence monitoring, tributary mainstream connectivity, juvenile salmonid and Pacific Lamprey rescue and relocation, and the hatcheries management and operations. (DEIS at 2-15-16.)

Decommissioning and deconstructing the dams will result in permanent beneficial effects to, among other resources, water right transfers, water quality, and Tribal trust resources, in particular, aquatic and terrestrial resources. (DEIS at ES-lxiii-lxiv.) Most significantly, River Renewal Corporation's proposed alternative will improve aquatic resource habitat for the federally protected coho salmon, chinook salmon, steelhead, and Pacific lamprey, although the deconstruction also will result in short-term, significant, and unavoidable adverse effects. (DEIS at ES-lix-lx.) In addition, although the deconstruction of the hydropower facilities will result in a loss of renewable hydropower, PacifiCorp will offset the negative effects through a:

> . . .power mix at a rate that more than covers the loss from the baseline condition to comply with the California Renewable Portfolio Standard. (DEIS at ES-lxvii.)

## The Modified Action

FERC recommends that River Renewal Corporation and PacifiCorp implement the modified action. The modified action includes all of the proposed action's mitigation measures and plans, as well as the conditions set forth in California Water Board's and the Oregon DEQ's WQCs, and NMFS' and U.S. Fish and Wildlife Service's (FWS) [Biological Opinions'] (BiOps) requirements. (*Id.* at ES-xxxv.) The staff modifications prohibit any surface disturbance until the relevant parties complete all "consultations, final management plans, delineations, pre-drawdown mitigation measures, agreements, and wetland delineations." (DEIS at ES-xxxv.) The modifications also require that River Renewal Corporation: 1) adopt specified measures to minimize effects of deconstruction activities on air quality and purchase carbon offsets; 2) create measures in the California Slope Stability Monitoring Plan for the repair and replacement of structural damage to private properties abutting Copco No. 1 Reservoir, 3) develop measures for its translocation of freshwater mussels; 4) create an eagle conservation plan; 5) add criteria in its Terrestrial Wildlife Management Plans for "potential removal of structures containing bats between April 16 and August 31"; 6) prepare a supplemented Historic Properties Management Plan "to incorporate the pre- and post-drawdown requirements for cultural resources inspections, surveys, evaluations, mitigation, and management"; and 7) modify its Fire Management Plan, in coordination with the California Department of Forestry and Fire Protection, Oregon Department of Forestry, and the Fire Safe Council of Siskiyou County, to address issues raised by stakeholders. (DEIS at ES-xxxv-xxxvii.)

## The No Action Alternative

The no action alternative, were FERC to adopt it and if PacifiCorp or River Renewal Corporation intended to continue hydropower generation, would require proceeding with relicensing the Project. (DEIS at ES-xxxviii, 2-1.) Until relicensing proceedings finished, operations would continue with no changes. (*Id.* at ES-xxxviii.) Thus, the existing conditions would persist. However, the existing conditions and continued operation of the facilities would result in long-term, significant, adverse effects to, inter alia: 1) sediment transport; 2) special status plan species;

and 3) threatened and endangered species. (*Id.* at ES-x1ii-iii.) For example:

> . . .the no-action alternative would not address the water quality and disease issues which, when combined with the ongoing trend of increased temperatures, poses a substantial risk to the survival of one of the few remaining [chinook] salmon populations in California that still sustain important commercial, recreational, and Tribal fisheries. (DEIS at ES-xxxviii.)

The recommended course of action and the dams' deconstruction inevitably will lead to substantial changes in the ecosystem of the Klamath River. (*See*, DEIS at 2-22.) These changes will attempt to restore the ecosystem to the benefit of natural vegetation and fish populations, as well as water quality and terrestrial wildlife preferring upland habitats. However, the changes also will have significant adverse effects on flood management and habitat for wildlife that prefer reservoir habitats, and it will result in short-term less than significant adverse effects while deconstruction takes place and the vast changes resulting therefrom occur. As dam decommissioning and destruction becomes more commonplace, appealing to a variety of stakeholders and citizens, the Klamath River Project DEIS provides a resource for considerations and relevant tradeoffs in large scale decommissioning projects.

**Conclusion and Implications**

Comment period is set to end on April 18, 2022. Thereafter, FERC will consider the comments received and issue a final environmental impact statement. The final Environmental Impact Statement is expected in September 2022.
(Tiffanie Ellis, Meredith Nikkel)

PENALTIES & SANCTIONS

# RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

## Civil Enforcement Actions and Settlements—Water Quality

•March 1, 2022 - EPA has issued its final permit decision obligating the General Electric Company to perform a cleanup of the Rest of River portion of the GE-Pittsfield/Housatonic River Site. The Revised Final Permit is a significant step towards reducing PCBs in and around the river and will reduce risk of human exposure. After a robust public comment process, EPA issued the Revised Final Permit, outlining the cleanup plan for the Rest of River in Massachusetts and Connecticut, on December 16, 2020. EPA notified the General Electric Company of the Region's final permit decision, and the permit became effective and fully enforceable. The Revised Final Permit requires GE to clean up contamination in river sediment, banks, and floodplain soil that pose unacceptable risks to human health and to the environment. GE will excavate PCB contamination from 45 acres of floodplain and 300 acres of river sediment, resulting in removal of over one-million cubic yards of PCB-contaminated material. The cleanup is estimated to cost $576 million and will take approximately two to three years for initial design activities and 13 years for implementation.

•March 16, 2022 - Austin Powder Company, owner and operator of the Red Diamond explosives manufacturing plant located near McArthur, Ohio, has agreed to implement significant upgrades to that facility's wastewater treatment operations to resolve numerous Clean Water Act violations. It will also pay a civil penalty of $2.3 million. The complaint, filed contemporaneously with the settlement, alleges that since 2013 the facility has had hundreds of discharges of pollutants in violation of the effluent limitations in its permits and failed to fully comply with an earlier EPA Administrative Order on Consent which sought to resolve these concerns. Under the proposed settlement, Austin Powder will invest approximately $3 million to improve two of its wastewater treatment plants, including implementing comprehensive operation and maintenance plans. The company has already eliminated discharges from four other on-site plants and under the consent decree will eliminate discharges from a fifth plant. These improvements will be completed on or before Dec. 31.

## Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•March 4, 2022 - Northern Indiana Public Service Company (NIPSCO) will clean up soil contamination at individual residences within the Town of Pines Groundwater Plume Superfund site in Porter County, Indiana, at an estimated cost of $11.8 million to resolve federal and state Superfund liability. The complaint, filed simultaneously with the consent decree, alleges that the company is liable for the cleanup of coal ash from its power generation facility that it distributed as landscaping fill in the Town of Pines and its vicinity. The soils contaminated by coal ash contain hazardous substances including arsenic, thallium and lead. The consent decree requires NIPSCO to identify residential soil contamination above clean up levels from its disposal of coal ash, excavate the contaminated soils, and transport excavated contaminated soil to a licensed waste disposal facility. NIPSCO is also required to restore excavated and monitor residential drinking water wells, groundwater monitoring wells, surface water and sediments to ensure that the contamination has not migrated to those locations. The company will also reimburse EPA a large percentage of its past costs and pay all future costs incurred by EPA and the State of Indiana in overseeing the cleanup.
(Andre Monette)

LAWSUITS FILED OR PENDING

# FLORIDA'S WATER LAW MANAGEMENT CHALLENGED IN TWO COURT ACTIONS

Florida's state government programs involving water regulation and management are active targets of environmental groups. Two of the more prominent cases that currently are in court are highlighted here.

## Florida's Section 404 Permitting Program Under Active Judicial Scrutiny

The State of Florida's receipt of Section 404 Dredge and Fill permit authority under the federal Clean Water Act is under active scrutiny by a U.S. District Court in Washington, D.C. The state has had authority under that program since December 2020, when the U.S. Environmental Protection Agency (EPA), in the waning days of the Trump administration, granted Florida's extensive application to be the permitting authority of that program within the state. Florida was and is still only the third state in the country to have received delegation of the Section 404 authority. Given the extensive and extremely important surface waters within the state, the process of approval included two public hearings and there were over 3,000 comments received. The Florida Department of Environmental Protection (DEP) has since undertaken and granted dozens of permit applications, and many dozens more are in process of review.

### Background

Section 404 authority allows a state to issue the permits the U.S. Army Corps of Engineers (Corps) generally has control over in most of the nation. The other states with their own 404 programs are Michigan and New Jersey. They were adopted decades earlier than Florida's program.

When EPA undertook the decision on Florida's Section 404 program application, it announced the application and held a period allowing public comment. It published the approval decision in the Federal Register, and it declared the decision immediately effective, meaning that program control would transfer immediately on publication. The EPA believes it properly managed the process of program approval as an adjudicatory process under the federal Administrative Procedure Act (APA), rather than as a rulemaking.

### The Lawsuit

Several environmental groups filed suit against the approval in the spring of 2021. In addition to substantive disagreement over parts of the program's adequacy regarding endangered species, fish and wildlife protection and the definition of waters the state should be able to deal with under its program, there's an intriguing and somewhat politicized procedural question. [*Center for Biological Diversity v EPA*, Case 1:21-cv-00119-RDM (D. DC).]

The plaintiff organizations are fighting a motion to dismiss two of their counts that allege APA irregularity: 1) the failure to deem the Program approval a federal rulemaking, and 2) the allegedly wrongful failure to allow 30 days of public comment before the approval became effective in late 2020.

While the EPA has admitted that the plaintiffs are within the zone of interests that would be protected by the 30-day comment provision, they assert the issue is essentially mooted and injury in fact is not real, but is indefinite and speculative.

### The Court's Pending Decision

The EPA's ability and legality in deeming the state's application subject to adjudicative, but not rulemaking, decisional guidelines is currently under advisement with Judge Randolph D. Moss. If the District Court were to find the Section 404 program to have been improperly launched it will have to decide whether an appropriate remedy is to tell people currently under review to go talk to the Corps instead of the state, and will also face the issue of the legality of permits already granted. The judge has expressed some concern and skepticism to the parties that the grant of a temporary injunction is practical or workable, given the numerous applicants and permittees affected. The state and the EPA are seeking to con-

vince the court that the plaintiff organizations have no real standing, or substantive gripe, since their only rights were limited to the 30-day comment period deprivation, and that is mooted and mitigated by the actual adjudicatory comment opportunity.

### Piney Point Reservoir and State Court Proceedings

Meanwhile, back within the state itself, a state court has been presiding over efforts to close a 480 million-gallon wastewater and phosphogypsum waste stack reservoir called Piney Point, near Tampa Bay. The reservoir is engineered, lined, and originally held millions of tons of waste phosphogypsum in four basins. However, dredgings of soil and sediment have since been added. The very large former phosphate mining plant site had operated from the 1960s to the 1990s. The site was subsequently purchased by a company called HRK, that has since declared bankruptcy. Waste phosphogypsum is contained and stacked in piles that are allegedly susceptible to failure. The dredged spoil that has been added in quantity now complicates the process of final closure of the site, because of its nutrient rich nature. The State of Florida has stepped in since the bankruptcy was filed and tens of millions of dollars are being spent to close the site and assure its safety.

### Conclusion and Implications

Environmental groups have recently brought a new case alleging federal Clean Water Act violations by the owner and by the state itself. U. S. District Court in Tampa has before it the allegation that Florida has grossly mismanaged the site. They assert that the mismanagement led to the need to discharge more than 200 million gallons of wastewater into Tampa Bay in March 2021, causing the temporary evacuation of homes and spurring algal blooms as a consequence. Florida is vigorously denying the allegations and defending the closure process.
(Harvey M. Sheldon)

## JUDICIAL DEVELOPMENTS

# FIFTH CIRCUIT FINDS BIDEN ADMINISTRATION'S POLICY ON ASSESSING GREENHOUSE GAS COSTS IN RULEMAKING SHOULD GO FORWARD PENDING APPEAL

*Louisiana v. Biden*, ___F.4th___, Case No. 22-30087 (5th Cir. Mar. 16, 2022).

The Biden administration's policy on federal agency consideration of the impacts of greenhouse gas (GHG) emissions when carrying out cost-benefit analyses of regulations may be implemented pending resolution of an appeal in a challenge by state's alleging an impermissible increase in regulatory burdens. The Fifth Circuit Court of Appeals stayed an injunction prohibiting implementation of the Biden policy on the basis that the states are unlikely to succeed in establishing standing for their claims. The court also indicated its discomfort with the overbreadth of the injunction, which affirmatively required agencies to implement the Trump administration's policy for consideration of greenhouse gas impacts.

### Background

Consideration of the costs and benefits of regulations has been part of federal agencies' deliberations since the Nixon administration, and was mandated by President's Clinton's 1993 Executive Order 12866, which requires "the prepublication review process for economically significant regulations." Subsequent administrations have retained Executive Order 12866 "and strengthened it with additional directives or guidelines for regulatory analysis." The Office of Management and Budget issued Circulate A-4 in 2003 "to provide guidance to agencies on how to conduct the cost-benefit analysis implemented by EO 12866," although compliance with Circulate A-4 is not required.

In 2009, President Obama established the Interagency Working Group (IWG) "to develop a method for quantifying the costs and effects of [greenhouse gas] emissions." The intent was "[t]o encourage consistency in determining" "the Social Cost of Greenhouse Gases (SC-GHG)" for use by federal agencies when conducting cost-benefit analyses of proposed regulations. Agencies routinely include in their cost-benefit analyses the impact of GHG emissions, including by "quantif[ying] into dollar amounts per ton of gas emitted" the impacts of GHG emissions "on various factors like health, agriculture, and sea levels," expressed as the SC-GHG. The IWG issued its method for calculating the SC-GHG in 2010 and regulatory updated them by issuing estimates of SC-GHG up to and including in 2016.

President Trump's 2017 Executive Order 13783 dissolved the IWG and withdrew its method for quantifying the SC-GHG. EO 13783 nonetheless still envisioned that agencies would:

> . . .monetize the value of changes in greenhouse gas emissions resulting from regulations. . .[and that such calculations]. . .would be consistent with Circular A-4.

On taking office in January 2021, President Biden issued Executive Order 13990 reinstating the IWG, directing it to develop new estimates of SC-GHG for use by agencies, and to within 30 days to develop Interim Estimates that agencies would be required to use "when they conduct cost-benefit analyses for regulatory or other agency actions." In February 2021 the IWG issued Interim Estimates that were the 2016 estimates of SC-GHG, adjusted for inflation.

Ten states (Louisiana, Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia and Wyoming) sued in April 2021, challenging the Interim Estimates, and in February 2022 obtained an injunction from the district court enjoining federal agencies from using the Interim Estimates.

### The Fifth Circuit's Decision

The government defendants sought a stay of the injunction pending consideration of their appeal. The Circuit Court's analysis focused on the likelihood that the plaintiff states would prevail on the merits, specifically whether the states "made a strong showing

that [they are] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

### Article III Standing and Injury

Specifically, the court concluded that the states lack Article III standing because of their inability to demonstrate their claimed injury—"'increased regulatory burdens' that *may* result from the consideration of SC-GHG, and the Interim Estimates specifically"—meets the standard for an "injury in fact" set forth in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992):

> . . .an invasion of a legally protected interest which is (a) concrete and particularized … and (b) actual or imminent, not conjectural or hypothetical.

The court observed that "[t]he Interim Estimates on their own do nothing to the Plaintiff States," as their claims:

> . . .are premised *solely* on the broad use of the Interim Estimates. They do not challenge any specific regulation or other agency action.

Those claims "therefore amount to a generalized grievance of how the current administration is considering SC-GHG," the antithesis of a "concrete and particularized" injury. Per *Lujan*, a "challenge [to] a more generalized level of Government action" rather than to a "specifically identifiable Government violations of law" is "rarely if ever appropriate for federal-court adjudication." *Lujan*, 504 U.S. at 568.

### Causation and Redressability

Additionally, the court found that the states are unlikely to "meet their burden on causation and redressability." The gravamen of their complaint is that application of the Interim Estimates will impose "increased regulatory burdens." But those burdens:

> . . .appear untraceable because agencies consider a number of other factors in determining when, what, and how to regulate or take agency action (and Plaintiff states do not challenge a *specific* regulation or action).

Here, the Court of Appeals cited *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-413 (2013) for the proposition that:

> . . .redressability was absent because there was a number of other methods to inflict the same injury which were not challenged in the case.

### Irreparable Harm

Lastly, the broad scope of the District Court's injunction supported the Court of Appeals' finding that in the absence of a stay the defendants would be irreparably harmed. The injunction not only prohibited use of the Interim Estimates:

> . . .halt[ing] the President's directive to agencies in how to make agency decisions, *before* they even make those decisions. It also orders agencies to *comply* with a prior administration's internal guidance document that embodies a certain approach to regulatory analysis, even though that document was not mandated by any regulation or statue in the first place. The preliminary injunction sweeps broadly and prohibits reliance on § 5 of EO 13990, which creates the IWG, a group created to advise the President on policy questions in addition to creating the Interim Estimates. It is unclear how the Plaintiff States' qualms with the Interim Estimates justify halting the President's IWG. All of this effectively stops or delays agencies in considering SC-GHG in the manner the current administration has prioritized within the bounds of applicable law. The preliminary injunction's directive for the current administration to comply with prior administrations' policies on regulatory analysis absent a specific agency action to review also outside the authority of the federal courts.

Lastly, the court prioritized "the maintenance of the status quo," *i.e.*, continued use of the Interim Estimates that have been in place since February 2021. As "the claimed injury, increased regulatory burden, has yet to occur," the plaintiff states have yet to be harmed and they will not be harmed until a regulation:

> . . .is promulgated from the *actual* use of the Interim Estimates. . .[and the Court]. . .discern[ed] no obstacle to prevent the Plaintiff States from challenging a specific agency action in the manner provided by the APA.

### Conclusion and Implications

In addition to the defects in the plaintiff states' asserted standing, the Court of Appeals was clearly disturbed by the overbreadth of the injunction requested by the states and granted by the district court. Rather than confine itself to enjoining use the Interim Estimates, the trial court—presumably at the plaintiffs' invitation—commanded federal agencies to implement the Trump administration's non-mandatory method for considering the SC-GHG. This overreach clearly reinforced the court's comfort in issuing the stay.
(Deborah Quick)

## DISTRICT COURT UPHOLDS EPA'S 'REASONABLE AVAILABILITY' ANALYSIS IN THE ESTABLISHMENT OF WASHINGTON STATE CLEAN WATER ACT 'NO DISCHARGE ZONE'

*American Waterways Operators v. Regan*,
___F.Supp.4th___, Case No. 18-CV-2933 (APM) (D. D.C. Feb. 14, 2022).

The U.S. District Court for the District of Columbia recently upheld a U.S. Environmental Protection Agency (EPA) final determination under the federal Clean Water Act (CWA) against a facial challenge by petitioner trade association. EPA made a final determination under the CWA that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available in Puget Sound, such that the State of Washington could establish Puget Sound as a no-discharge zone (NDZ).

### Factual and Procedural Background

In 2016, the State of Washington started designating the Puget Sound as a "no-discharge zone" under the Clean Water Act, which would prohibit commercial and recreational vessels from discharging their sewage into the Puget Sound. As part of the designation, Washington petitioned EPA to make a determination as to the reasonable availability of adequate sewage-removal and sewage-treatment facilities in the Puget Sound. In 2017, EPA made the determination, allowing the Puget Sound NDZ to go into force.

The American Waterways Operators (AWO) challenged EPA's determination under the Administrative Procedure Act (APA). EPA voluntarily requested remand of its determination, and the court ordered EPA to redo its reasonable-availability determination as to certain issues, including considering compliance costs and assessing the reasonable availability of adequate treatment facilities. On remand, EPA requested information from plaintiffs and intervenors regarding average annual operating costs for plaintiff's member vessels in Puget Sound, pumpout locations and state regulation of pumpout facilities, and capacity of treatment facilities. Based on this new information and the prior record, EPA reaffirmed its reasonable-availability determination and concluded that Puget Sound has ample capacity to treat all of its vessel sewage, such that adequate treatment facilities are reasonably available in Puget Sound.

AWO again challenged EPA's determination under the APA, claiming EPA ignored retrofit costs, arbitrarily concluded the costs associated with using pumpout facilities were reasonable, and failed to provide any reasoned explanation as to its conclusions regarding the reasonable availability. Plaintiff further argued that EPA violated the court's prior order which required EPA to consider "all relevant factors," including the costs of accessing adequate facilities, which plaintiffs believed to include capital and upfront costs.

Plaintiffs filed a motion to enforce the first summary judgment order and a second motion for summary judgment, and EPA and intervenors filed cross-motions for summary judgment.

## The District Court's Decision

### The Motion to Enforce

AWO raised three arguments that EPA violated the court's prior order when EPA did not consider retrofit costs: first, the omission was directly contrary to the order; second, EPA's actions on remand violated the law-of-the-case doctrine and the rule of mandate; and third, waiver and estoppel doctrines preclude an argument that EPA did not need to consider retrofit costs.

The court first considered and rejected plaintiff's argument that EPA's failure to consider retrofit costs was directly contrary to the order. The court held that EPA did not violate the order because the order did not specify which costs the agency was required to consider – it only required EPA to consider costs relevant to reasonable availability of adequate removal and treatment facilities. The court stated that EPA was only required to consider costs relevant to the reasonable availability of disposal and treatment facilities, and not the costs of creating an NDZ as a whole. The court determined the terms "reasonably available" and "relevant" provided EPA with flexibility to determine which costs are relevant in the context of its determination.

Second, the court held that, the law-of-the-case doctrine and the rule of mandate did not did not require EPA to consider retrofit costs, because the prior order did address whether EPA had to consider these costs. The order directed EPA to assess relevant costs but left it to EPA to determine which costs were relevant.

Third, the court held waiver and judicial estoppel did not preclude EPA from making an argument regarding retrofit costs during the second summary judgment proceedings. The court determined EPA's request for remand in the original proceedings did not constitute a waiver of any arguments in the second summary judgment proceedings. Treating a request for remand as a waiver would force agencies in the future to raise or otherwise risk conceding merits arguments when seeking remand.

### Summary Judgment

In their second motion for summary judgment, plaintiffs asked the court to find that: 1) EPA's decision not to retrofit costs was based on an unreasonable interpretation of the CWA and violated the APA; 2) the cost analysis EPA conducted was arbitrary and capricious; and 3) EPA's reasonable-availability determination as to treatment facilities lacked reasoned decision-making. The court disagreed with each of the plaintiff's arguments.

### Retrofit Costs

The court determined EPA was not required to consider retrofit costs when making a reasonable availability determination. The court found that "availability," as used in the CWA, centers on whether attributes of the facilities themselves make them accessible or usable, not whether the user has the ability to use the facilities. The court concluded that retrofit costs are not attributable to the reasonable availability of treatment and disposal facilities, and thus not among the costs EPA must consider. The court found that although some vessels would need to incur retrofit costs to install tanks to hold sewage for transport to treatment and disposal facilities, these costs did not stem from the particular attributes of Puget Sound's pumpout facilities. Thus, while a state may consider such costs when establishing an NDZ, the court held that these costs were not relevant to EPA in determining whether there are reasonably available disposal and treatment facilities to service those retrofitted vessels.

### EPA's Cost Analysis

Plaintiff argued that EPA's cost evaluation was flawed because it: 1) did not consider how pumpout costs would affect vessels and operators, 2) reached conclusions contradicted by the evidence, and 3) relied on faulty evidence. The court disagreed, holding that EPA's consideration of costs and its explanation of its reasoning were adequate.

The court noted that standard for such review of EPA's "reasonably available" analysis is deferential to the agency and determined EPA's consideration of costs and reasoning were adequate. Here, EPA found the relevant costs for determining facilities' reasonable availability were: use costs, pumpout time costs, travel costs, and wait-time costs. EPA compared these costs to vessel revenues, and concluded that pumpout costs constituted a small fraction of vessel revenues such that pumpout facilities were reasonably available. The court found it was reasonable for EPA to

construct a methodology that assessed how facilities' availability affected the cost structure of vessels doing business in the Puget Sound overall, and it was not required to conduct a vessel-by-vessel analysis of their ability to absorb pumpout costs based on their actual margins. The court determined the record as a whole indicated that vessels can afford pumpout costs, and that while an incremental cost can be a small percentage of overall costs while still causing a vessel's margins to diminish past the point of viability, the record did not demonstrate that to be true in this instance.

The court next considered and rejected plaintiff's arguments, which claimed the publicly available revenue data EPA relied on was inaccurate, and that it was improper for EPA to rely estimates in the data rather than more detailed findings. The court noted that EPA invited stakeholders to submit information relevant to its consideration of costs on remand and that plaintiff had provided no evidence the publicly available revenue data was unreliable or inaccurate. The court then held that EPA's determination was not unreasonable on the basis of the data's level of specificity or reliance on public records for revenue estimates, and that its reliance on the data was not improper as imperfection alone in a dataset relied on by an agency does not amount to arbitrary decisionmaking.

### EPA's Analysis of Treatment Facilities

Finally, the court considered and rejected plaintiff's argument that EPA failed to engage in reasoned decisionmaking on the topic of the reasonable availability of sewage treatment facilities. The court noted that perfect availability of adequate treatment facilities is not required - only reasonable availability – and that EPA's determination considered the quantity of treatment facilities and their capacity, along with the frequency and impacts of overflows on treatment capacity, and explained how it analyzed those factors.

### Conclusion and Implications

This case affirms that EPA must consider costs relevant to the reasonable availability of disposal and treatment facilities when making a determination on a state's application for an NDZ, but qualifies it by providing that EPA need not consider the costs of creating an NDZ as a whole—only those that are attributable to the reasonable availability of treatment and disposal facilities. This is an important distinction, as it affirms EPA's discretion to determine which costs are relevant and the methodology for accounting for those costs, such that EPA is not required to consider costs which will directly arise from the establishment of an NDZ, such as retrofit costs, but which have no bearing on the accessibility of facilities. The court's lengthy opinion is available online at: https://casetext.com/case/the-am-waterways-operators-v-regan.
(David Lloyd, Rebecca Andrews)

## DISTRICT COURT REJECTS PRELIMINARY INJUNCTION AGAINST HYDROELECTRIC DAMS ON THE KENNEBEC RIVER UNDER THE FEDERAL ENDANGERED SPECIES ACT

*Atlantic Salmon Federation U.S., et al. v. Merimil Limited Partnership, et al.*,
___F.Supp.4th___, Case No. 21-CV-00257-JDL (D. Me. Feb. 24, 2022).

The U.S. District Court for the District of Maine recently denied a request for preliminary injunction by conservation groups seeking to require operators of hydroelectric dams on Maine's Kennebec River to make seasonal changes to dam operations to reduce unauthorized take of endangered Atlantic salmon.

### Factual and Procedural Background

The National Marine Fisheries Service (NMFS) has designated as endangered the Gulf of Maine Distinct Population Segment of salmon (Maine Salmon) under the federal Endangered Species Act. The

Endangered Species Act makes it unlawful to "take" species or distinct population segments of a species that are listed as endangered without authorization, such as by harming the protected fish or wildlife. Harm is defined as:

> . . .an act which actually kills or injures fish or wildlife. . .[and]. . .may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Conservation groups, Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine, commenced a citizen suit against the licensees of four hydroelectric dams on the Kennebec River, alleging unauthorized take of endangered Maine Salmon by the dam operators and licensees: Merimil Limited Partnership, Hydro-Kennebec LLC, Brookfield White Pine Hydro LLC, Brookfield Power US Asset Management LLC, and Brookfield Renewable US (Dam Operators). Plaintiffs alleged that the Dam Operators' incidental take authorization had expired such that the continued take of juvenile and adult salmon migrating upstream and downstream on the Kennebec River—and passing through the Lockwood, Hydro-Kennebec, Shawmut, and Weston hydroelectric facilities—violated the Endangered Species Act.

Plaintiffs requested a preliminary injunction mandating certain changes to dam operations for the purpose of increasing the number of Maine Salmon surviving migration on the Kennebec River. Plaintiffs requested that Dam Operators be required to increase water flows at certain facilities during particular seasons for Maine Salmon migration by running gates and spillways at maximum discharge and turning certain turbines off at specified intervals to allow for safe passage. After evaluating the parties' competing evidence, the court denied the plaintiffs' request for preliminary injunction principally because of insufficient evidence showing how the proposed operations changes would benefit Maine Salmon as an endangered population.

## The District Court's Decision

In deciding whether to grant the plaintiffs' requested preliminary injunction to stop the unlawful taking of endangered Maine Salmon, the District Court considered the following four elements: 1) likelihood of success on the merits; 2) irreparable harm in the absence of a preliminary injunction; 3) that the balance of equities tips in favor of the requester; and 4) that an injunction is in the public interest.

### Likelihood of Success on the Merits

First, the court evaluated the plaintiffs' likelihood of success on a theory of unlawful harm under the Endangered Species Act. In doing so, the court emphasized the need for evidence showing not just a probability of harm but actual injury to the endangered species or population segment. The court analyzed expert testimony and concluded there was sufficient evidence that the hydroelectric dams caused actual harm, and not just a probability of harm. Although the parties' experts reached different conclusions as to the precise mortality rate of Maine Salmon passing through each dam, the court found that the hydroelectric dams caused actual harm to Maine Salmon because even Dam Operators' expert concluded as many as 17 percent of juvenile salmon some adult salmon did not survive passage through the dams. Based on this evidence of mortality and the expiration of Dam Operators' incidental take authorization, the court held that the plaintiffs were likely to succeed on their claim that Dam Operators violated the Endangered Species Act by taking endangered Maine Salmon without authorization.

### Irreparable Harm

Next, the court considered whether there would be irreparable harm in the absence of a preliminary injunction. The court applied the rule that irreparable harm is not synonymous with harm to an individual and is something more than negligible harm to the species or population segment as a whole. In turn, the court considered whether the proposed injunction would prevent irreparable harm to Maine Salmon as an endangered population segment. The court acknowledged the plaintiffs presented some evidence showing that modifying dam operations would reduce the unauthorized take of Maine Salmon passing through the dams, *i.e.* would reduce harm to

individuals within the Maine Salmon population. But the court critiqued the plaintiffs' evidence as lacking specificity about how a reduction in take at the four dams would provide a benefit to Maine Salmon as a whole, including data and a rationale supporting each expert's interpretation of the data. Additionally, the court found the evidence insufficient to establish the efficacy of the proposed operational changes.

### Balancing of Equites and the Public Interest

Finally, the court considered the third and fourth factors: the balancing of equities and the public interest. The court observed that due to the very enactment of the Endangered Species Act, the balance of equities and public interest will often weigh heavily in favor of an injunction protecting a listed endangered species. Despite this observation, the court determined that the evidence was insufficient to support a conclusion that the preliminary injunction would benefit the public interest. The court reasoned that because it could not determine that the preliminary injunction would benefit Maine Salmon as a whole for the purpose of the irreparable harm inquiry, it similarly could not conclude without speculation that the injunction would be in the public interest.

### Conclusion and Implications

The court denied the plaintiffs' request for preliminary injunction. Although the court evaluated four criteria in reaching this decision, the dispositive issue common to several of the criteria was the lack of detailed evidence showing the proposed changes to dam operations would effectively prevent irreparable harm to Maine Salmon as a whole population segment.

This case highlights the importance of presenting detailed and specific expert testimony on the population-level impacts of proposed injunctive relief in a citizen suit under the Endangered Species Act. Courts may not view the particular harm or cause of mortality to an individual member of the species or population as identical to the cumulative harm to the endangered species or population as a whole. The court's ruling is available online at: https://casetext.com/case/atl-salmon-fedn-us-v-merimil-ltd-pship?q=1:21-CV-00257&PHONE_NUMBER_GROUP=P&sort=relevance&p=1&type=case.
(Megan Beshai, Rebecca Andrews)

## DISTRICT COURT FINDS CLEAN WATER ACT'S PARTIAL WAIVER OF SOVEREIGN IMMUNITY DID NOT IMPLIEDLY REPEAL FEDERAL DISTRICT COURT'S JURISDICTION OVER ENFORCEMENT ACTIONS

*United States v. Bayley*, ___F.Supp.4th___, Case No. 3:20-cv-05867-DGE (W.D. Wash. Mar. 14, 2022).

The U.S. District Court for the Western District of Washington State has held that by enacting a partial waiver of sovereign immunity as an amendment to the federal Clean Water Act (CWA), Congress did not impliedly repeal the general jurisdictional statute that allows the Department of Justice to bring enforcement actions in federal District Court. That partial waiver also did not require the Department of Justice to participate in local permitting procedures in order to establish standing to bring a Clean Water Act § 404 enforcement action on the basis of the permitted activity.

### Background

Philip Bayley obtained a permit from Mason County, Washington, for a "bulkhead construction project," but neglected to obtain a Section 404 permit pursuant to the Clean Water Act. The Department of Justice pursued an enforcement action against Bayley in District Court. Bayley sought to have the enforcement action dismissed on the basis, *inter alia*, that the federal government lacks jurisdiction to bring an enforcement action in District Court under the Act, and when dismissal was denied sought reconsideration of the jurisdictional issue.

### Enforcement Actions by the DOJ

When it brings enforcement actions against private parties under the Clean Water Act, the Department of Justice relies on 28 U.S.C. § 1345 to establish jurisdiction in federal District court:

> Except as otherwise provided by Act of Congress, the District Courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

When enforcement is sought against a federal agency, though, reliance on this generally-applicable jurisdictional provision runs up against the doctrine of sovereign immunity, which provides that:

> . . .where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free from regulation. *Hancock v. Train*, 426 U.S. 167, 179 (1979).

Thus, in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 227 (1976), the U.S. Supreme Court:

> . . .held that federal facilities were not subject to the permitting requirements under the Federal Water Pollution Control Act Amendments of 1972.

Congress promptly amended the Clean Water Act to add 33 U.S.C. § 1323(a), entitled "Compliance with pollution control requirements by Federal entities":

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution ... to the same extent as any nongovernmental entity[.]

Section 1323(a) acts as a limited waiver of sovereign immunity, subjecting federal agencies to enforcement for violations of the Clean Water Act, whether the act is being implemented by federal, state or local agencies.

### The District Court's Decision

#### Argument of 'Implied' Repeal of 28 U.S.C. Section 1345's Conferral of Jurisdiction

Bayley argued that by requiring federal agencies to "adhere" to state and local requirements, § 1323(a) "impliedly" repeals 28 U.S.C. § 1345's conferral of jurisdiction over enforcement action on federal District Court. Citing *United States v. Com. of Puerto Rico*, 721 F.2d 832, 840 (1st Cir. 1983), the District Court rejected this argument.

#### Argument of DOJ's 'Assumption of Jurisdiction' by Alleging Discharges in WOTUS

The court further rejected Bayley's related argument that the Department of Justice:

> . . .assumed jurisdiction over [Bayley's] private property by alleging that the discharges at issue occurred in the waters of the United States [WOTUS] and because the U.S. Army Corps of Engineers issued a stop work order to [Bayley].

This argument was made apparently in support of an argument that the Department of Justice was required to participate in the local Mason County permitting process and:

> Plaintiff to have objected to Mason County's determination that Mr. Bayley's proposed bulkhead repair did not have a probable significant adverse impact on the environment.

The court held that § 1323(a) or any other provision in the CWA "impose[s] limits or contingencies on [the Department of Justice's] standing to bring an action against" Bayley in federal District Court.

### Conclusion and Implications

Congress' dedication to cooperative federalism resulted in the Clean Water Act complex architecture by which significant implementation responsibilities are devolved to state, regional and local authorities. Section 1323(a) preserved the integrity of this system even as applied to federal agencies. However, it did not displace the generally-applicable grant of jurisdiction to federal District Courts to hear enforcement actions brought by the federal government.
(Deborah Quick)

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

CHANGE SERVICE REQUESTED

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