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EASTERN WATER LAW™

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EASTERN WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we report on drought declarations from the States of California and Utah—although it's painfully present throughout the West and additional state announcements of drought are certain in the coming weeks. We also report on a decision from the New Mexico Supreme Court Ruling finding the state's Game Commission's rule allowing landowners to restrict access to water flowing through private property unconstitutional.

California Governor Newsom Drought Executive Order—Aims to Increase Regional Water Conservation Efforts

California Governor Gavin Newsom's recently issued Executive Order N-7-22 (Executive Order) targets efforts to increase water conservation and bolster regional responses to the state's ongoing drought conditions.

Background

The Executive Order is the latest in a series of executive orders designed to reduce the impact of drought conditions in the state. Citing record-setting dry months in January and February, and third straight year of drought conditions, the Executive Order sets out a variety of new measures aimed at increasing conservation and drought resiliency throughout the state.

Water Shortage Contingency Plans

Governor Newsom directed the State Water Resources Control Board (State Board) to consider adopting emergency regulations related to urban water suppliers by May 25, 2022. For urban water suppliers that have submitted a water shortage contingency plan, these regulations would require suppliers to implement Level 2 response actions, which generally include actions responsive to water supply conditions being reduced by 20 percent. For suppliers that have not submitted a water shortage contingency plan, the State Board would establish Level 2 contingency plans based upon water shortage contingency plans submitted by other similar suppliers. The Executive Order also indicates that more stringent requirements should be expected if drought conditions persist throughout and beyond this year.

Non-Functional Turf

The Executive Order further directs the State Board to consider adopting regulations defining and banning irrigation of "non-functional turf." The Executive Order clarifies that these regulations would be aimed at decorative grass and would not apply to school fields, sports fields, and parks. The Governor's Office estimates that these regulations will result in annual water savings of several hundred thousand acre-feet.

Limitations on Certain New and Replacement Groundwater Wells

The Executive Order also seeks to limit the construction of new groundwater wells and the expansion of existing wells. Prior to issuing a permit for a new well or for alteration of an existing well, the responsible agency must determine that: 1) the proposal is not likely to interfere with existing wells nearby; and, 2) the proposal is not likely to adversely impact or damage nearby infrastructure. Additionally, the Executive Order imposes additional requirements for new or altered wells in a basin classified as medium- or high-priority under the Sustainable Groundwater Management Act (SGMA). Permits for new or altered wells in these areas will need to be accompanied by a written verification from the local Groundwater Sustainability Agency certifying that the proposed well would not be inconsistent with any applicable Groundwater Sustainability Plan (GSP) and would not decrease the likelihood of reaching a sustainability goal for the area covered by a GSP.

These limitations do not apply to permits issued to individual domestic users with wells that provide less than two acre-feet of groundwater per year, or to wells that will exclusively provide groundwater to public

water supply systems as defined in § 116275 of the Health and Safety Code.

Other Directives

The Executive Order also directs the California Department of Water Resources to take a number of steps to combat the impact of sustained drought. These include: 1) consulting with commercial, industrial, and intuitional sectors to develop strategies for improving water conservation, including direct technical assistance, financial assistance, and other approaches; 2) working with state agencies to address drinking water shortages in households or small communities where groundwater wells have failed due to drought conditions; and, 3) preparing for implementation of a pilot project to obtain and transfer water from other sources and transfer it to high need areas. The Governor also directs the State Board to increase investigations in to illegal diversions and wasteful or unreasonable use of water and bring applicable enforcement actions.

The Executive Order rolls back regulations that limit the transportation of water outside its basin of origin and encourages agencies to prioritize petitions and approvals for projects that improve conditions for anadromous fish or incorporate capturing high precipitation events for local storage or recharge.

The Governor directed all state agencies to submit proposals to mitigate the effects of severe drought by April 15, 2022. Agency responses to that directive were in process at the time of this writing.

Conclusion and Implications

The Executive Order, though broad, is less aggressive in implementing conservation measures than prior orders during the 2012-2016 drought period. It focuses primarily on urban water suppliers and regulations to be implemented at regional and local levels. Though it does not include mandatory individual water use restrictions on California residents, the Governor signaled to Californians that unless conditions dramatically improve, such restrictions can be expected in the future. The Executive Order is available online at: https://www.gov.ca.gov/wp-content/uploads/2022/03/March-2022-Drought-EO.pdf. (Scott Cooper, Derek Hoffman)

Utah Governor Cox Issues Drought Declaration

On April 22, 2022, based upon a recommendation from the Drought Review and Reporting Committee, Governor Spencer Cox issued a drought declaration (Declaration) for the entirety of the State of Utah. The executive order (2022-4) declared a state of emergency due to extensive and wide-reaching drought. The Declaration officially makes additional aid, assistance and relief available from State resources.

Background and General Information:

Utah has experienced extreme drought in eight of the last ten years and statewide snowpack going into this summer is 25 percent below normal. Water levels at a number of critical reservoirs are also historically low. These conditions, coupled with declared shortages on the Colorado River mean that water supply conditions are at record lows. The Declaration notes that nearly 100 percent of Utah is presently in severe drought, or worse. Likewise, the United States Department of Agriculture has listed all 29 counties under the Secretarial Disaster Designation for drought.

The Drought Declaration

Given the foregoing conditions, the Governor has declared a state of emergency in Utah for the second consecutive year. Governor Cox stated:

> We've had a very volatile water year, and unfortunately, recent spring storms are not enough to make up the shortage in our snowpack. . . .Once again, I call on all Utahns—households, farmers, businesses, governments and other groups—to carefully consider their needs and reduce their water use. We saved billions of gallons last year and we can do it again.

The Declaration by its own terms is set to expire after 30 days unless the state of emergency is extended by the Legislature. The Declaration triggers the activation of the Drought Response Committee, which includes representatives from the Governor's offices of Management and Budget and Economic Development; the departments of Environmental Quality, Agriculture and Food, and Community and

Economic Development; and the divisions of Water Resources, Emergency Management; Forestry, Fire and State Lands; and Wildlife Resources.

The Utah Code contains several provisions allowing State resources to be reallocated during times of emergency (the Disaster Response and Recovery Act (Act). Specifically, Utah Code § 53-2a-204(1)(a) authorizes the Governor to utilize all available resources of state government as reasonably necessary to cope with a state of emergency. Likewise, Utah Code § 53-2a-204(1)(b) authorizes the Governor to employ measures for the purpose of securing compliance with orders made pursuant to the Act; and give direction to state and local officers and agencies that are reasonable and necessary for the purpose of securing compliance with the provisions of the Code and with orders, rules and regulations made pursuant to the Act.

The Drought Response Committee is charged with implementing the state's Drought Response Plan, which requires the state to prepare for, respond to and recover from emergencies or disasters, with the primary objectives to save lives and protect public health and property.

More Details

This declaration activates the Drought Response Committee and triggers increased monitoring and reporting. It also allows drought-affected communities, agricultural producers and others to report unmet needs and work toward solutions. It also triggers implementation of the State's Drought Response Plan. The Drought Response Plan, adopted in 1993 and most recently revised in 2013, establishes the procedures for dealing with a drought. These procedures include evaluation of the risks, establishment of six separate task forces and requires a recommendation to the Governor. The six task forces are charged with examining the actual and potential impacts in six different areas: 1) Municipal Water and Sewer Systems; 2) Agriculture; 3) Commerce and Tourism; 4) Wildfire; 5) Wildlife; and 6) Economic. Additionally, other task forces may be organized as needed (*e.g.*, health or energy).

The task force's report to the Drought Response Committee, which determines which needs can be met by reallocation of existing resources. Those needs which cannot be met will be identified and sent to the Governor with recommendations. At that point the Governor will typically request federal assistance. These actions are coordinated through the Director of Natural Resources, who serves as the State Drought Coordinator. Ultimately, the purpose of the Declaration and the Drought Response Committee is to trigger enhanced coordination and focus on the issues arising from the drought.

Conclusion and Implications

The first efforts of the Drought Response Committee are being compiled and will likely be presented to the Governor soon. The Utah Legislature has not yet extended the drought declaration, but an extension is anticipated for the duration of the water year, which ends on September 31.

Utah and the West are facing unprecedented drought conditions this summer and conditions do not seem likely to improve in the near term. Utah's Drought Response has been swift and comprehensive. However, as drought conditions become more persistent additional steps may become necessary to ensure the impacts are mitigated. The Utah Legislature passed a record number of water related bills during the 2022 General Session and that is likely to be a trend that continues in the coming years.

A copy of this Declaration may be found at: https://drive.google.com/file/d/17RTW8PJ5HFTv3DA27j7PXGAA4hIc_Cbz/view. A copy of Utah's Drought Response Plan may be found at: https://water.utah.gov/wp-content/uploads/2020/04/Drought-Response-Plan.pdf. (Jonathan Clyde)

New Mexico Supreme Court Finds Game Commission Rule Allowing Landowners to Restrict Access to Water Flowing through Private Property Unconstitutional

Adobe Whitewater Club of New Mexico v. State Game Commission, Case No. S-1-SC-38195 (N.M. Sup. Ct. March 2, 2022).

On March 2, 2022, the New Mexico Supreme Court issued a unanimous ruling finding that the New Mexico Game Commission's rule allowing landowners to restrict access to water flowing through their private property is unconstitutional. The ruling is a victory for broad recreational rights such a flyfishing and kayaking. Ranchers and landowner groups

who supported the rule contended that it prevented trespassing and preserved sensitive streambeds. The Court heard oral arguments for an hour before taking 15 minutes to reach its unanimous ruling. The Court will issue an opinion detailing its reasoning for the ruling at a later date. The ruling, in effect, declares New Mexico river access a constitutional right.

Background

The New Mexico Game Commission promulgated Rule 19.31.22 NMAC, which provides a definition of "navigable in fact" to ascertain whether a waterway is navigable in New Mexico for the purpose of the Department of Game and Fish providing a private landowner a certification of non-navigable water. Such certification recognizes that within the landowner's private property is a segment of riverbed or streambed deemed non-navigable and closed to access without written permission of the landowner. Pursuant to the rule, "navigable in fact" is defined as follows:

That a watercourse is navigable in fact when it is was used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade or travel. A navigable-in-fact determination shall be made on a segment-to-segment basis.

Rule 19.31.22.7(F) NMAC

Generations of New Mexicans grew up freely accessing riverbanks for fishing and recreation. However, in 2014, New Mexico's then Attorney General issued a non-binding legal opinion that "walking, wading or standing in a stream bed is not trespassing." N.M. Att'y Gen. Op. 14-04. The Attorney General Opinion spurred many landowners and organizations to support legislation that would codify the Game and Fish regulation into law. In 2017, the Department of Game and Fish established a procedure under which landowners could apply to have segments of waterways abutting their land certified as "non-navigable," and thereby, closed to access without written permission from the landowner. The procedure was later adopted as a Game and Fish Regulation, effective January 22, 2018. 19.31.22.7(G) NMAC; 19.31.22.8(B)(4) NMAC.

In the summer of 2021, the New Mexico Game Commission held hearings on five pending applications from private landowners whose property abuts waterways seeking state certifications and signage that the waterway is non-navigable and closed to the public. The Court's ruling immediately voids all certificates previously approved under the Rule.

The New Mexico Supreme Court's Ruling

Whether the public has a right to fish or float on streams and other waterways that flow through private property has been an ongoing debate in the West for decades. The New Mexico Supreme Court joined the conclusions reached by other courts in recent years including Utah, Oregon and Montana. Montana allows wading access to the "high water mark" or the point to which the river flows at seasonal flood stages. Montana differs from New Mexico in that it does not have a monsoon season. New Mexico's monsoon season results in the creation of seasonal flow waterways.

The New Mexico Constitution states that "unappropriated water of every natural stream, perennial or torrential . . . belong to the public." N.M. Const. art. XVI, § 2. In 1907, New Mexico's Territorial Legislature declared that "[a]ll natural waters in streams and water courses . . . belong to the public." NMSA 1978, § 72-1-1 (1907).

In tandem with the public ownership of all waters in New Mexico is the debate over the manner in which the public can access those waters.

The Court heard oral arguments debating public stream access. Environmental advocates contended the Game and Fish regulation aimed at stopping trespassing on private land by making sections of water off limits to the public is unconstitutional. Proponents of the Game Commission Rule argued, inter alia, that having segments of New Mexico's waterways off-limits to the public prevents habitat damage. Many large ranch owners contend they have invested heavily in conservation efforts and habitat restoration initiatives in response to increased foot traffic to stream banks. They also argued that their private property rights trump public access over their lands.

Conclusion and Implications

This case highlights the important intersection of outdoor recreation, stream access and private property rights. The New Mexico Supreme Court's unanimous ruling declaring New Mexico river access a constitu-

tional right is a victory for recreational groups seeking to preserve public stream access. Although approximately seventy percent of New Mexico's waterways are located on public lands, the Court's ruling ensures the public's unfettered access to the remaining thirty percent of the state's waterways.

LEGISLATIVE DEVELOPMENTS

NEBRASKA LEGISLATURE PASSES BILL TO RESURRECT 120-YEAR-OLD SOUTH PLATTE CANAL WITHIN COLORADO FOR WATER DELIVERY TO NEBRASKA

The Nebraska General Assembly recently passed a series of bills reviving a century-old canal to divert water from the South Platte River near the Colorado-Nebraska state line. The canal, contemplated in the 1923 South Platte River Compact, could allow Nebraska to divert up to 500 c.f.s. throughout the non-irrigation season for storage in reservoirs and use throughout the year. However, the project's high price tag, as well as legal and logistical uncertainties surrounding the project leave significant gaps that Nebraska must fill before beginning construction.

Background

The South Platte River begins in the Mosquito Range before flowing east across the Colorado plains and crossing into Nebraska near Julesburg, Colorado. In the 1890s, Nebraska residents began construction on what became known as the Perkins County Canal to deliver South Platte water to Perkins County, Nebraska. The original canal began near Ovid, Colorado, slightly upstream from Julesburg. However, the project encountered a myriad of issues, primarily related to financing, and was eventually abandoned in 1895 after having only completed 16 of the planned 65 miles and not even reaching the state line. Residents of Perkins County eventually tapped into the Ogallala Aquifer and used groundwater supplies for their irrigation needs.

However, the 1923 South Platte River Compact (Compact) includes a provision allowing Nebraska to build the Perkins County Canal, provided it follows several restrictions in the Compact. Since the Compact's ratification, the Perkins County Canal was largely ignored for the next 100 years. There were two unsuccessful attempts to develop the canal in the 1980s, however those attempts were quickly ended in large part due to the project planners' refusal to comply with certain provisions in the federal Endangered Species Act.

In January 2022, Nebraska Governor Pete Ricketts announced plans to construct the Perkins County Canal and asked the general assembly for $500 million to finance the project. Colorado did not expect the announcement, and Governor Jared Polis has indicated to the press that he has yet to be in contact with Nebraska to discuss the details of the plan. In April 2022, the Nebraska General Assembly eventually passed a series of bills authorizing the Perkins County Canal Project and appropriating initial funds to begin planning and design work.

1923 South Platte River Compact

The 1923 South Platte River Compact allocates the river between Colorado and Nebraska. Critically, the Compact distinguishes the "Upper Section"—the headwaters to roughly the Morgan-Washington County line—and the "Lower Section" that runs the rest of the way to Nebraska. The Compact provides for an interstate measuring gage, located in the "Lower Section" at Julesburg and generally requires Colorado to deliver at least 120 c.f.s. to that gauge during the irrigation season, defined as April 1 to October 15.

Article VI of the Compact specifically references the Perkins County Canal and grants Nebraska the right to construct the canal "along or near the line of survey of the formerly proposed 'Perkins County Canal.'" Critically, the Compact contemplates that Nebraska may purchase land in Colorado for the canal or may acquire the necessary lands or easements through its eminent domain powers. The canal would then be entitled to divert up to 500 c.f.s. during the non-irrigation season, October 15-April 1, with an appropriation date of December 17, 1921. But the Perkins County Canal may not call out any present or future Colorado rights in the Upper Section, and the Compact prescribes a carveout of 35,000 acre-feet in the Lower Section to allow for future development within Colorado.

The Compact also provides that Article VI does not grant Nebraska, the canal operators, or users, any superior right to the South Platte during the irrigation season. Additionally, the canal diversions must not diminish the flow at Julesburg in such a way to injure senior Nebraska appropriators. After construction, Nebraska will have the right to regulate diversions into the canal for the purposes of protecting its rights, but Colorado also retains the right to regulate and control canal diversions to the extent necessary to protection Colorado appropriators and maintain flows at the Julesburg gauge.

Perkins County Canal Project Act

Although a recent study indicates that Colorado typically delivers more than 500 c.f.s. to Julesburg during the non-irrigation season, Nebraska cited the Colorado Water Plan and concerns about increasing water demands within Colorado as the motivation to resurrect the canal and appropriate diversions under the Compact. Nebraska claims that proposed projects in the South Platte basin could diminish river flows up to 90 percent. However, Colorado responded by noting that only 25 of the 282 proposed South Platte projects are in the Lower Division (*i.e.*, the canal cannot call or restrict Upper Division diversions) and that no projects are imminently planned. Additionally, according to Colorado officials, many of the proposed projects are non-consumptive and would have no, or a positive, impact on South Platte flows. Nevertheless, Nebraska Department of Natural Resources Director Tom Riley recently reported to the Omaha World-Herald, "we're not necessarily going to get any more [water], we just want to make sure we don't get any less."

To initiate the canal project, the Nebraska General Assembly passed the Perkins County Canal Project Act, LB-1015. The act grants the Nebraska DNR the authority to develop, construct, manage, and operate the Perkins County Canal, including the ability to acquire, exercise, and hold water rights, permits, easements, and property. A companion bill, LB-1012, creates the Perkins County Canal Project Fund to hold and manage the money necessary for the project, and allows Nebraska DNR to contract for an independent study to analyze the costs, timeline, alternatives, and impact of the Perkins County Canal Project on Nebraska water supplies, specifically drinking water in Lincoln and Omaha.

Lastly, a general appropriations bill, LB-1011, allocates an initial $53.5 million to the project for preliminary design work, engineering, permitting, and purchase options for lands in Colorado. This amount is significantly less than the $500 million that Nebraska estimated will be required to construct the canal. According to Governor Ricketts, that $500 million estimate is based on cost-adjusted estimates from the 1980s' attempts to build the canal. In his original proposal, Ricketts requested $400 million from Nebraska's cash reserves, and proposed an additional $100 million from the state's federal government pandemic relief funds.

Conclusion and Implications

Nebraska Governor Ricketts signed the Perkins County Canal Project Act on April 18, 2022 and is not expected to object to the canal-related portions of the appropriations bills. Colorado reports that it has reached out to Nebraska to discuss the project but does not yet know the specifics of the canal or any storage reservoirs slated to receive water diverted through the canal. It is expected that Nebraska's forthcoming study on canal costs, alternatives, and feasibility will shed more light on the state's plans and timeline. For now, Colorado officials say they are not necessarily opposed to the project, as it is described in the Compact, but would like the opportunity to work with Nebraska on a solution that is mutually beneficial to both states. Meanwhile, several Nebraska state senators also raised questions about the need for the canal, and whether the benefits will outweigh the half billion-dollar price tag. Regardless, Nebraska's push to bolster its water rights under the Compact in the face of increasing drought, and Colorado's hesitant response suggest that the devil will be in the details. The full text of LB- 1015 is available online at: https://nebraskalegislature.gov/FloorDocs/107/PDF/Intro/LB1015.pdf.

(John Sittler, Jason Groves)

REGULATORY DEVELOPMENTS

U.S. SECURITIES AND EXCHANGE COMMISSION PROPOSES RULE ON CLIMATE-RELATED DISCLOSURES

On March 21, 2022 the U.S. Securities and Exchange Commission (SEC) issued a Proposed Rule that would impose new standardized climate-related disclosure requirements on public companies under the Securities Act of 1933 and Securities Exchange Act of 1934.

The Proposed Rule adds sections to Regulation S-K (17 CFR § 229) and Regulation S-X (17 CFR § 210) that would require registrants to make climate-related disclosures in their registration statements and in periodic reports. Information regarding climate-related risks and associated metrics can have an impact on a public company's performance or position and may be of value to investors in making investment or voting decisions. Additionally, the SEC believes that more transparency and comparability in climate-related disclosures will foster competition. (Proposed Rule, p. 13.)

Background

Climate-related risks can pose significant financial risks to companies. Since the 1970s, the SEC has explored the need for disclosures related to material environmental issues. (Proposed Rule, p. 15). In 1982, the SEC adopted rules mandating disclosure of information related to litigation and other business costs that arose out of compliance with federal, state, and local environmental laws. Then in 2010, the SEC issued a guidance regarding when climate-related disclosures may be required under the existing reporting requirements. This guidance was in response to a rise in companies' voluntarily reporting climate-related information outside of their SEC filings. (Proposed Rule, p. 17.) As climate-related impacts and risks to businesses and the economy have grown, investors' demand for more detailed information about the effects of climate change and other climate-related risks have only increased. There are currently great inconsistencies in how companies disclose climate-related information. A central goal of this Proposed Rule is to address this issue by increasing consistency, comparability, and reliability of climate-related information for investors. (Proposed Rule, p. 21.)

Proposed Climate-Related Disclosure Framework

The Proposed Rule would require a registrant to disclose certain climate-related information, including information about its climate-related risks that are reasonably likely to have material impacts on its business or consolidated financial statements, and greenhouse gas (GHG) emissions metrics that could help investors assess those risks. A registrant may also disclose information about climate-related opportunities.

In particular, the Proposed Rule would require registrants to disclose information about:

> (1) the oversight and governance of climate-related risks by the registrant's board and management; (2) how any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term; (3) how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; (4) the impact of climate-related events and transition activities on the line items of a registrant's consolidated financial statements and the impacts on financial estimates, and assumptions used in the financial statements. (Proposed Rule, p. 42.)

Registrants that already analyze climate-related risks, have developed transition plans, or have publicly announced climate-related targets would have additional disclosure requirements regarding such activities. Specifically, these companies would be required to disclose:

(1) the registrant's process for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system; and (2) the registrant's climate-related targets or goals, and transition plan. (Proposed Rule, p. 42.)

Disclosure Requirements

Additionally, the Proposed Rule imposes disclosure requirements regarding GHG emissions. The Proposed Rule utilizes a standard developed by the GHG Protocol [https://ghgprotocol.org], which is the most widely-used global greenhouse gas accounting standard. (Proposed Rule, p. 38.) The GHG Protocol is a joint initiative of the World Resources Institute and World Business Council for Sustainable Development. The GHG Protocol standard classifies emissions by "Scopes." Scope 1 emissions are direct GHG emissions that occur from sources owned or controlled by the company. Scope 2 emissions are those primarily resulting from the generation of electricity purchased and consumed by the company. Scope 3 emissions are all other indirect emissions not accounted for in Scope 2 emissions, meaning they are a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company. Examples of Scope 3 emissions include emissions associated with the production and transportation of goods a registrant purchases from third parties, and employee commuting or business travel.

Under the proposed rule, a registrant would be required to disclose metrics regarding Scopes 1 and 2 GHG emissions. Scope 1 and Scope 2 emissions must be disclosed separately and include metrics that are: (1) disaggregated by constituent GHGs; (2) aggregated; and (3) in absolute and intensity terms. Registrants may also be required to disclose Scope 3 emissions if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions. (Proposed Rule, p. 42-43.)

Attestation Requirement

The proposed rule also includes an attestation requirement for accelerated filers and large accelerated filers with regard to GHG emissions. Such filers would be required to provide an attestation report covering, at a minimum, their Scope 1 and Scope 2 emissions. The attestation report must be from an independent attestation service provider. (Proposed Rule, p. 43-44.)

Other Accommodations to be Phased In

The Proposed Rule includes a phase-in period and other accommodations for complying with the proposed disclosure requirements. The phase-in period will have compliance dates dependent on the registrant's filer status. There would be an additional phase-in period for Scope 3 emissions disclosures and a safe harbor for Scope 3 emissions disclosures. (Proposed Rule, p. 46.)

Conclusion and Implications

The Proposed Rule seeks to provide investors with consistent, comparable, and reliable information regarding climate-related risks. The Proposed Rule is far reaching and public companies will need to develop plans to comply with the rule, if adopted as final. However, the climate disclosures rule will likely face hurdles before it is finalized and its final iteration may differ from the Proposed Rule. This is a significant rule and may take years to finalize and may be legally challenged when finalized. It is key that stakeholders understand the proposed requirements and provide the SEC with meaningful feedback in this early stage of the rulemaking process. Interested parties can submit comments on the Proposed Rule until May 20, 2022 on regulations.gov. The proposed rule is available online at: https://www.sec.gov/rules/proposed/2022/33-11042.pdf.
(Breana Inoshita, Hina Gupta)

FEDERAL ENERGY REGULATORY COMMISSION REVISES POLICY STATEMENT ON NATURAL GAS FACILITIES CERTIFICATION TO BOLSTER CONSIDERATION OF GHG IMPACTS AND ENVIRONMENTAL JUSTICE

On February 18, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Updated Policy Statement on the certification of new interstate natural gas facilities (Updated Policy) and a Draft Policy Statement Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (GHG Policy). The Updated Policy clarifies FERC's framework in weighing a Project's economic benefits against its impacts on the environment and environmental justice communities when making a determination of public convenience and necessity. The GHG Policy directs FERC's assessment of the impacts of natural gas infrastructure projects on climate change in its reviews under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). This certification followed two Notices of Inquiry seeking comments from members of the public and stakeholders on revisions to the Policy. FERC recently declared this Updated Policy a draft and is seeking additional public comment.

Background

FERC issues certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce pursuant to § 7 of the Natural Gas Act (NGA). (15 U.S.C. §717 *et seq.*) Section 7(e) of the NGA requires FERC to make a finding that the construction and operation of a proposed project "is or will be required by the present or future public convenience and necessity" before issuing a certificate to a qualified applicant.

In 1999, FERC issued a Policy Statement regarding issuance of public convenience and necessity stating its goals, which include to: (1) "appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain"; (2) "provide appropriate incentives for the optimal level of construction and efficient customer choices"; and (3) "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project." (1999 Policy Statement, 88 FERC at 61,737.)

Updated Policy Statement

In its Updated Policy, FERC maintains the same goals of the 1999 Policy Statement but it acknowledges the significant developments that have occurred since issuance of the 1999 Policy Statement that warrant revisions in the Updated Policy. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 2 (2022).) These developments include an increase in the available supply of gas from shale reserves due to development of domestic shale formations and new extraction technologies. This increased domestic supply has resulted in reduced prices and price volatility, and more proposals for natural gas transportation and export projects. The increase in domestic supply, however, has coincided with a concern from affected landowners and communities, Tribes, environmental organizations regarding the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities.

Federal Mandate to Focus on Environmental Justice and Equity

The Updated Policy also addresses the mandate for federal agencies to focus on environmental justice and equity arising from Executive Orders requiring agencies to identify and address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities of their actions.

Relevant Factors to Consider and Evidence

The 1999 Policy Statement set forth the policy to consider all relevant factors reflecting the need for the project, including, but not limited to precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected

demand with the amount of capacity currently serving the market. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 53.) However, in implementing the Updated Policy, FERC has relied almost exclusively on precedent agreements to establish project need. During the comment period, commentors argued that FERC should analyze additional factors, such as future markets, opportunity costs, federal and state public policies, and effects on competition. FERC agreed, finding that FERC should weigh other evidence in order to comply with the NGA and the APA. For instance, the Updated Policy includes applications to detail how the gas will ultimately be used and why the project is necessary to serve that use.

The Updated Policy also provides guidance on what type of evidence will be acceptable. Following the United States Court of Appeals for the District of Columbia's recent holding in *Environmental Defense Fund v. FERC* that "evidence of 'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement," under the Updated Policy, affiliate precedent agreements will be insufficient to demonstrate need.

Consideration of Adverse Effects

The Updated Policy Statement declares that FERC will consider adverse effects in its determination to consider whether to issue a certificate of public convenience and necessity. These interests include: 1) the interests of the applicant's existing customers; 2) the interests of existing pipelines and their captive customers; 3) environmental interests; and 4) the interests of landowners and surrounding communities, including environmental justice communities. The Policy grants the commission authority to deny an application based on adverse impacts to any of these interests. FERC's necessary finding that the project will serve the public interest is based on a consideration of all the benefits of a proposal balanced against the adverse impacts, including economic and environmental impacts. Where the 1999 Policy directed FERC to consider the economic impacts of a project before consideration of the environmental impacts, the Updated Policy directs concurrent consideration of environmental and economic impacts.

Dissenting Commissioners

Commissioners Danly and Christie dissented to the Updated Policy arguing that the new requirements would put an undue burden on approvals for natural gas pipelines resulting in significant increases in costs for pipeline operators and customers. (*Id.* at Dissent.)

Greenhouse Gas Policy

FERC also simultaneously adopted a GHG Policy. The GHG Policy requires FERC to quantify a project's reasonably foreseeable GHG emissions including emissions from construction, operation, and the downstream combustion of natural gas when FERC is conducting environmental review under NEPA. (Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, PL21-3-000 (2022) ¶28.) In 2016, FERC began to estimate GHG emissions on a more inclusive scale, including downstream combustion and upstream production. FERC then halted this practice in 2018 and several federal court decisions ensued. The GHG Policy implements decisions from federal courts holding FERC should gather information on downstream uses to determine whether downstream GHG emissions are a reasonably foreseeable effect of the project. (*Id.* at ¶¶11-14, citing *Sierra Club v. FERC* (2017) 867 F.3d 1357; *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019).)

Congress is Briefed

On March 3, 2022, FERC commissioners appeared before the Senate Committee on Energy and Natural Resources on Thursday to discuss the Updated Policy. At the hearing, Senator Joe Manchin, Chairman of the Senate Energy and Natural Resources Committee and Senator John Barrasso expressed their opposition to the Updated Policy based on concerns that the Updated Policy will have on the nation's energy independence, jobs, and energy reliability and cost. Chairman Richard Glick and Commissioners Janes Danly, Allison Clements, Mark C. Christie, and William L. Philips gave testimony regarding the Updated Policy. Commissioners Danly and Christie expressed their opposition for the Updated Policy while Commissioners Glick, Clements, and Philips expressed their support.

Public Comment

On March 24, 2022, FERC designated the Updated Policy and the GHG Policy draft policy statements and is seeking further public comment. (178 FERC ¶ 61,197.) The Update Policy and GHG Policy will not apply to pending project applications or applications filed before the Commission issues any final guidance in these dockets. The deadline to submit comments is April 25.

Conclusion and Implications

While the Updated Policy and GHG Policy seek to create greater balance in the consideration of greenhouse gas emissions impacts and environmental justice when FERC weighs public convenience and necessity, they have the potential to make certification of new interstate natural gas facilities more inconsistent and potentially more unlikely. This shift in policy represents the on-going tug-of-war between the competing priorities of reducing greenhouse gas emissions and maintaining energy security.
(Natalie Kirkish, Darrin Gambelin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•March 22, 2022—EPA has issued emergency orders under the Safe Drinking Water Act (SDWA) to four mobile home park water systems, requiring the mobile home park owners to comply with federal drinking water safety requirements and to identify and correct problems with their drinking water systems that present a danger to residents. The mobile home parks— Arellano Mobile Home Park, Castro Ranch, Gonzalez Mobile Home Park, and Sandoval Mobile Home Park—are all located on the Torres Martinez Desert Cahuilla Indians' Reservation in California. None of the water systems were previously registered with EPA and will now be required to comply with SDWA regulations. Under the terms of EPA's emergency orders, the owners of Arellano Mobile Home Park, Castro Ranch, Gonzalez Mobile Home Park, and Sandoval Mobile Home Park are required to provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; submit and implement an EPA-approved compliance plan to reduce arsenic below the MCL; and properly monitor the systems' water and report findings to EPA.

•March 31, 2022—EPA announced that GT Metals & Salvage LLC of Longview, Washington has agreed to pay a $50,300 penalty for repeated Clean Water Act violations. EPA found the company failed to comply with Washington's Industrial Stormwater General Permit EPA Website, which resulted in regular discharges of stormwater into ditches that eventually reach the Columbia River. Industrial stormwater from sites like GT Metals may include metals, polychlorinated biphenyls (PCBs), fuel oil, hydraulic oil, brake fluids, lead acid, and lead oxides. These pollutants and other debris can harm aquatic life and affect water quality. During inspections on February 2020, EPA found that the company failed to develop a Stormwater Pollution Prevention Plan (SWPPP); implement best management practices; conduct required sampling of discharges; conduct monthly visual inspections; and complete, submit, and maintain records.

Indictments, Sanctions, and Sentencing

•April 8, 2022—The Sanitary District of Highland, Indiana, and the Town of Griffith, Indiana, have agreed to construction projects and capital investments that will eliminate discharges of untreated sewage from their sewer systems into nearby water bodies, including the Little Calumet River. In two separate consent decrees, Highland and Griffith have each agreed to implement plans that will significantly increase the amount of wastewater they send to the neighboring town of Hammond for treatment and eliminate points in their sewer systems that overflow when their systems become overloaded. Together, the towns will spend about $100 million to improve their sewer systems. In addition, Highland will pay a civil penalty of $175,000 and Griffith will pay a civil penalty of $33,000. The two consent decrees would resolve the violations alleged in the underlying complaint filed by the United States and the state of Indiana, which alleges that Highland's sanitary sewage collection system overflowed on 257 days since 2012, resulting in discharges of untreated sewage into the Little Calumet River or a tributary to the river. The complaint also alleges that Griffith discharged sewage into a wetland adjacent to the Little Calumet River on 16 days since 2013. Finally, the complaint alleges that both Highland and Griffith failed to comply with previous orders by EPA to stop these illegal discharges. Under the proposed consent decrees, Highland and Griffith will also implement plans that will improve operations and maintenance

of their sewer system and ability to address and respond to any unforeseen sanitary sewer overflows in the future. Highland and Griffith will submit semi-annual progress reports to the United States and the state until all work has been completed and all of the reports and deliverables required will be available to the public on their municipal websites.
(Andre Monette)

JUDICIAL DEVELOPMENTS

NINTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF U.S. FISH AND WILDLIFE SERVICE, FINDING THE 'BARRED OWL REMOVAL EXPERIMENT' DID NOT VIOLATE NEPA

Friends of Animals v. United States Fish and Wildlife Service, 28 F.4th 19 (9th Cir. 2022).

On March 4, 2022 the Ninth Circuit affirmed summary judgment in favor of the U.S. Fish and Wildlife Service (FWS or the Service) in an action that challenged the Service's "barred owl removal experiment" under the federal Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). The court's panel held that the experiment, which would remove barred owls from the threatened northern spotted owl's habitat, would produce a "net conservation benefit," and that the Service was not required to issue a supplemental Environmental Impact Statement (EIS) because an earlier analysis adequately contemplated the experiment.

Factual and Procedural Background

The northern spotted owl is one of three subspecies that commonly resides in mature and old-growth forests in the Pacific Northwest and northern California. Due to its dwindling population, the owl is considered "threatened" under the ESA. Conversely, the unrelated barred owl is an abundant species native to eastern North America. Over the past century, the barred owl population has grown and expanded westward, in turn encroaching upon the spotted owl's habitat.

The FWS' 2011 Northern Spotted Owl Recovery Plan found that barred owls negatively impacted northern spotted owl survival and reproduction. Barred owls competed for food and nesting/roosting sites; at times, attacking their spotted owl brethren. As part of the agency's broader efforts to preserve spotted owl populations, the Recovery Plan charged FWS with designing and implementing large-scale control experiments to assess the effects of barred owl removal and spotted owl site occupancy, reproduction, and survival.

In 2013, FWS issued a Record of Decision (ROD) and EIS authorizing a "barred owl removal experiment." The experiment would lethally remove barred owls from certain areas to measure their environmental and demographic effect on spotted owls, including the effects on rates of occupancy, survival, reproduction, and population. The experiment designated four "study areas" across the spotted owl's range, including a 500,000-acre stretch along the Oregon Coast. Within that area, FWS designated "treatment areas," from which approximately 3,600 barred owls would be removed over four years. The EIS concluded that the experiment would have a negligible effect on the barred owl population, and only minor and short-term negative effects on spotted owls; with the overall experiment yielding a net positive benefit by providing FWS the data necessary to craft long-term recovery strategies for the spotted owl.

Enhancement of Survival Permits and Safe Harbor Agreements

The ESA generally prohibits the "take" of any threatened or endangered species. As an exception, ESA allows FWS to issue "Enhancement Survival Permits" (ESP), which authorize "take" for "scientific purposes or to enhance the propagation or survival of the affected species." FWS may issue these permits and implement their terms via "Safe Harbor Agreements" (SHA), which the agency concurrently enters into with non-federal landowners whose lands the agency seeks to use for conservation efforts. In doing so, FWS must find that the SHAs provide a "net conservation benefit" to the affected species by contributing to its recovery.

FWS issued ESPs and entered into SHAs with four non-federal landowners within the Oregon Coast study area. Each permittee allowed FWS to access their property to remove barred owls and agreed to support onsite surveys. In exchange, the permittees could continue harvesting timber in areas where no

spotted owls resided. The permits thus authorized incidental take only in "non-baseline" sites—*i.e.*, where no resident spotted owl had been observed within the last three to five years.

Biological Opinions and Environmental Impact Statements

FWS issued a series of Biological Opinions (BiOps) pursuant to ESA, which concluded the ESPs would not jeopardize the spotted owl or its critical habitat. Instead, the permits would confer an overall benefit based on the information gained from the experiment.

FWS also prepared an Environmental Assessment for each permit, pursuant to NEPA. The EAs made a Finding of No Significant Impact (FONSI) because the permits only authorized incidental take on non-baseline sites, which are unlikely to be recolonized by spotted owls unless barred owls are removed.

At the U.S. District Court

In June 2017, Friends of Animals (Friends) sued FWS challenging the ESPs and SHAs. Friends alleged FWS violated ESA by: 1) issuing a permit that failed to achieve a "net conservation benefit"; 2) failing to use the best biological and habitat information to form baseline conditions; and 3) failing to analyze the SHA's effect on critical habitat. Friends also alleged FWS violated NEPA because it: 1) failed to prepare a Supplemental EIS; and 2) failed to discuss the experiment and permits in a single EIS, as required for "connected actions."

The U.S. District Court in Oregon rejected each of these contentions and granted summary judgment in favor of FWS. Friends timely appealed.

The Ninth Circuit's Decision

A three-judge panel for the Ninth Circuit Court of Appeals affirmed the U.S. District Court and rejected Friends' renewed ESA and NEPA caims.

'Informational Benefits' Constitute 'Net Conservation Benefits' under the ESA

As to Friends' first contention, the court agreed with FWS that the "informational benefit" gleaned from the removal experiment constituted a "net conservation benefit" under ESA. ESA's regulations authorize FWS to enter into SHAs with non-federal landowners whose lands the agency wants to use for conservation efforts where the proposed actions are reasonably expected to provide a net conservation benefit to the affected species. Contrary to Friends' characterization, ESA's definition of "conservation" includes research activities aimed at collecting information, such as the efficacy of removing barred owls as a conservation strategy. Thus, by extension, "net conservation benefit" includes the informational and research benefits contemplated by the removal experiment. These benefits, in turn, indirectly aid the recovery of the northern spotted owl, as contemplated by the ESA.

FWS Reasonably Described Baseline Conditions Using Resident Owl Survey Data

The court rejected Friends' contention that FWS improperly defined the baseline sites that would not be subject to the permits' incidental take authorizations. For each SHA, FWS designated a site as "baseline" if a single spotted owl had been observed there between 2013 to 2015. By doing this, Friends claimed FWS determined the sites were "effectively abandoned," even though the agency's policy states that 3 to 5 years of survey data cannot establish site "abandonment." The Court of Appeals quickly debunked this, explaining that nowhere in the Safe Harbor Policy does it mention "abandonment" in its discussion of baseline conditions. Moreover, for each SHA, FWS determined that the baseline sites were "*unoccupied*," not "*abandoned*"—two wholly separate terms with differing requirements.

The court also rejected Friends' assertion that FWS needed to consider non-resident "floater" spotted owls in its baseline considerations. Here, FWS found floaters would likely not contribute to specie recovery because there was no evidence that they could successfully breed. Therefore, because the Safe Harbor Policy instructs FWS to be flexible, it was reasonable for FWS to set baseline sites based on the "resident" owls that are of primary concern.

FWS Adequately Analyzed the Small Critical Habitat Affected by the Oregon Permit

Friends objected to the BiOps for each permit, claiming they failed to analyze their overlap with critical habitat on state lands. The court rejected this,

noting that Friends failed to point to anything in the administrative record to show that FWS failed to analyze affected critical habitat. Rather, because the amount of critical habitat that would be destroyed was unknown, FWS took a conservative approach, which still concluded that less than 0.04 percent of spotted owl habitat would be destroyed.

Friends also argued the BiOps were arbitrary and capricious because they only analyzed one subset of designated critical habitat—nesting/roosting—and ignored impacts to others, such as foraging, transient, or colonization habitats. Contrary to Friends' claim, the court determined that the BiOps did analyze the permits' effects on those sub-habitats, and concluded they would not be appreciably reduced due to their scattered nature. Even absent this analysis, it would not have been arbitrary and capricious for FWS to only focus on nesting/roosting habitats because they are the most indicative in determining whether owls can support themselves.

A Supplemental EIS under NEPA Was Not Required

NEPA does not specifically identify when an agency must prepare and issue a supplemental EIS. Guidance from the Council on Environmental Quality explains that a supplemental EIS is required if the agency makes substantial changes to the proposed action that raise environmental concerns, or there are significant new circumstances that bear on the proposed action or its environmental impacts. A supplemental EIS is not required if the new alternative is a minor variation or qualitatively within the spectrum of one of those discussed in the original EIS.

Contrary to Friends' contention, FWS did not make "substantial changes" to the removal experiment by issuing ESPs and SHAs that authorized the incidental take of spotted owls. Rather, the permits were merely a "minor variation" of the broader experiment because, even in their absence, the experiment could still proceed without access to non-federal lands. The permits and SHAs were also "within the spectrum of alternatives" discussed in the 2013 EIS. Therefore, it would have been "incongruous" with NEPA to require FWS to proceed with the experiment until such specifics were fleshed out in a supplemental EIS.

Finally, FWS took the requisite "hard look" in determining that the permits were not environmentally significant. FWS prepared an EA for each permit and concluded an incidental take of spotted owls would occur only if the experiment increased the species' population in non-baseline areas. Because barred owls would resume displacing spotted owls after the experiment ended, spotted owl population gains would be temporary, therefore, the experiment's environmental effects would be the same with or without the permits.

A Single EIS Was Not Required under NEPA

Lastly, the Ninth Circuit held that the permits and experiment were not "connected actions" that required a single EIS. Friends argued that each permit and SHA depended on the experiment's informational benefit to satisfy the "net conservation benefit" requirement, therefore, FWS erred in analyzing the experiment separately.

Under NEPA, actions are considered "connected" if they "cannot or will not proceed unless other actions are taken previously or simultaneously," or if they are interdependent parts of a larger action on which they depend. If one project could be completed without the other, they have independent utility. Under this framework, the permits are not "connected" to the broader removal experiment because the experiment could proceed without the permits. Though the permits granted access to non-federal lands, such access was not "necessary" to complete the experiment; and any failure to access those lands would only delay, rather than inhibit, the overall experiment. Finally, the permits possess "independent utility" from each other because the issuance of one did not depend on the issuance of another. For these reasons, FWS did not have to assess their environmental impacts in a single EIS.

Conclusion and Implications

The Ninth Circuit Court of Appeals' opinion offers a straightforward analysis of basic Endangered Species Act and National Environmental Policy Act principles. As demonstrated by the barred owl removal experiment, an experiment designed to gain information about species survival can properly satisfy the "net conservation benefit" prescribed by ESA's "Safe Harbor Policy." In crafting these experiments, the agency may appropriately use survey data to distinguish between pre-existing "resident" species

vs. temporary "floaters" to establish baseline conditions. And while the agency may issue permits and Safe Harbor Agreements to access non-federal lands to carry out these experiments, those permits are not necessarily "connected," such that they would require a single or supplemental EIS under NEPA. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/03/04/21-35062.pdf.
(Bridget McDonald)

ELEVENTH CIRCUIT CLARIFIES PLEADING STANDARD FOR AESTHETIC INJURY UNDER THE CLEAN WATER ACT

Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, 26 F.4th 1235 (11th Cir. 2022).

The U.S. Court of Appeals for the Eleventh Circuit recently vacated a lower court's ruling denying standing to an environmental group petitioner. The court held that the petitioner's allegations were sufficient to establish and injury in fact and confer Article III standing.

Factual and Procedural Background

Sea Island Acquisition owns a half-acre parcel of land near Dunbar Creek in Glynn County, Georgia. The parcel is considered a wetland under the federal Clean Water Act (CWA). When Sea Island sought to fill that parcel with outside materials, the CWA required a Section 401 water quality certification from the State of Georgia and a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps).

In 2012, the Georgia Environmental Protection Division issued a conditional Section 401 water quality certification for all projects authorized by Nationwide Permit 39—the general permit that was issued to Sea Island for its project. On January 10, 2013, Sea Island submitted a pre-construction notification to the Corps for its plan to fill the wetland for the purpose of constructing a commercial building. On February 20, 2013, the Corps issued a preliminary jurisdictional determination determined that the parcel might be a wetland, and the Corps "verified authorization" of the proposed project for two years or until Nationwide Permit 39 was modified, reissued, or revoked.

Sea Island filled the wetland between February 20, 2013, and March 27, 2013, but did not erect or intend to erect any buildings or structures on the wetland. Sea Island led the Corps to believe it was constructing a commercial building on its wetlands when it only intended to landscape over the wetland with fill material.

Two environmental organizations, and Jane Fraser, sued Sea Island. The organizations are Georgia nonprofit corporations. Some of their members, including Fraser, reside in Glynn County near the wetland. Fraser was a 20-year resident of Glynn County who loved to the area because of the unique ecology and native habitat, wildlife, and vegetation. Fraser alleged that the fill of the wetland was the partial cause of a noticeable deterioration of the natural aesthetic beauty, water quality, and habitat of the area.

Sea Island moved to dismiss the amended complaint for lack of standing and for failure to state a claim upon which relief could be granted. Sea Island argued that the allegations did not establish that any of the parties had suffered an injury in fact. The U.S. District Court dismissed the complaint for lack of standing on the ground that the plaintiffs failed to allege an injury in fact.

The Eleventh Circuit's Decision

The threshold issue is whether plaintiffs suffered an injury in fact to confer standing under Article III of the U.S. Constitution. At the motion-to-dismiss stage, a court evaluates standing by determining whether the complaint clearly alleges facts demonstrating each element. An individual suffers an aesthetic injury when the person uses the affected area and is a person for whom the aesthetic value of the area will be lessened by the challenged activity. An individual can meet the burden of establishing that injury at the pleading stage by attesting to use of

the area affected by the alleged violations and that the person's aesthetic interests in the area have been harmed.

Sea Island put forward three arguments in defense of the dismissal. First, it argued that the U.S. District Court properly concluded Fraser did not allege that she visited the wetlands before the fill, only that she enjoyed the aesthetics of the wetland. Second, it argued that Fraser must have entered the wetland to have an aesthetic interest in it. Third, it argued that there is no interest in a wetland that is private property.

The Court of Appeals first noted that Fraser did specifically allege that she derived aesthetic pleasure from the wetland before the fill, and concluded that Fraser did not need to visit the wetland to derive the pleasure.

Second, the court noted that Fraser need not physically step foot on the wetland to have an aesthetic pleasure from it. Finally, the court held that even if the wetland was private property, Fraser alleged an aesthetic injury from the fill. Therefore, Fraser adequately alleged that an injury to aesthetic interests in the wetland from viewing the wetland, deriving aesthetic pleasure from its natural habitat and vegetation, and now deriving less pleasure from the fill of the wetland.

Injury

In analyzing whether plaintiffs' met their burden of establishing an injury, the court noted that Fraser "plausibly and clearly alleged a concrete injury" to aesthetic interest. The court highlighted the fact that Fraser gains aesthetic pleasure from viewing wetlands in their natural habitat. Fraser regularly visited the area to see the wetland. After the wetland was replaced with sodding, Fraser derived less pleasure from the wetland because the habitat and vegetation were unnatural. Thus, Fraser's injuries were sufficient at the pleading stage.

Conclusion and Implications

This case highlights the pleading requirements for environmental plaintiffs alleging an injury to aesthetic interests. It highlights that an individual member of an environmental organization alleges sufficient facts to withstand a motion to dismiss by alleging the individual viewed the wetland, derived aesthetic pleasure from its natural habitat and vegetation, and derives less pleasure from the altered site. https://scholar.google.com/scholar_case?case=10481156572434704205&hl=en&as_sdt=6&as_vis=1&oi=scholarr. (Marco Ornelas Lopez, Rebecca Andrews)

SIXTH CIRCUIT AFFIRMS DISMISSAL OF CLEAN WATER ACT CITIZEN SUIT AGAINST SEWER DISTRICT

South Side Quarry, LLC v. Louisville & Jefferson County Metro. Sewer District, 28 F.4th 684 (6th Cir. 2022).

The U.S. Court of Appeals for the Sixth Circuit recently affirmed a decision by the U.S. District Court to dismiss a quarry owner's federal Clean Water Act (CWA) claims against a sewer district for diverting flood flows into a quarry. The appellate court's decision explains the types of CWA violations that a plaintiff may bring a citizen suit to enforce, the procedural requirements a plaintiff must satisfy to successfully bring a CWA claim, and the differences between a discharge and a diversion.

Factual and Procedural Background

Under the CWA, a discharge of pollutants to navigable waters is prohibited, except as authorized by a permit issued in accordance with the CWA; without such a permit, a discharge is unlawful. The CWA allows states to issue permits under the CWA's National Pollutant Discharge Elimination System (NPDES). Kentucky issues NPDES permits for waters within the Commonwealth (KPDES permits). In limited circumstances, the CWA permits citizen suits to enforce violations of the CWA.

A body of water named Pond Creek drained into a large watershed in the Louisville area. The watershed had the potential to cause massive flooding issues, therefore the U.S. Army Corps of Engineers (Corps) undertook a plan to address the flooding by creating a separate channel for a tributary to Pond Creek, which

would divert the tributary's excess water into Vulcan Quarry. Vulcan Quarry would serve as a detention basin, and the Corps planned to build a pipe that would allow the water to from Vulcan Quarry to drain back into the tributary as the flooding subsided. The Corps partnered with a sewer district to complete the project, where the Corps designed and constructed the project, and the sewer district acquired necessary property rights, including a flowage easement affecting the whole quarry, and operated and maintained the system. For 12 years, until the plaintiff acquired Vulcan Quarry, the project diverted excess stormwater from the tributary into Vulcan Quarry without issue.

When plaintiff took ownership of Vulcan Quarry, it provided the sewer district with notice that the plaintiff intended to sue the sewer district under the CWA. The notice alleged the sewer district was discharging stormwater and pollutants into Vulcan Quarry in violation of the CWA's general prohibition on dumping pollutants into waters of the United States, the easement, a consent decree, and various permits. After providing such notice, Plaintiff sued the sewer district.

The sewer district filed a motion to dismiss for failure to state a claim; and the District Court granted the sewer district's motion. The District Court found that some of plaintiff's claims were time-barred under a five-year statute of limitations, and that plaintiff gave the sewer district insufficient notice for the other claims. Plaintiff appealed.

The Sixth Circuit's Decision

Adequacy of Pre-Suit Notice

The appellate court's decision turned on whether plaintiff satisfied the CWA's pre-suit notice requirement. The court noted that plaintiff's CWA claims appeared to be contradictory—most CWA claims alleged violations of existing regulations, permit, or property rights, while the remaining claims alleged the sewer district discharged without a KPDES permit.

The court first considered the adequacy of the pre-suit notice in relation to the CWA claims alleging violations of six existing regulations, permits, or property rights: 1) the sewer district's easement; 2) the sewer district and the Corps' construction permit; 3) a consent decree between the sewer district, the EPA, and the Kentucky Cabinet; 4) agreements about upstream point sources; 5) the CWA's general prohibition on the discharge of pollutants; and 6) the sewer district's various KPDES permits. The court determined the notice was inadequate as to each. As to the first four, the court determined the easement was not an "effluent standard or limitation" under the CWA; the construction permit was not a KPDES permit; the notice did not reference the consent decree, and plaintiff lacked standing to enforce the consent decree; and the notice did not identify the owners, tracts of land, location of polluting sources, or any applicable effluent limitations or standards that might apply to the agreements.

The court also ruled that the CWA's citizen-suit provision does not authorize citizen suits for violating the general prohibition against discharging without a permit when the alleged discharger possesses a permit. Finally, the court determined the pre-suit notice was inadequate because it failed to identify any specific standard, limitation or order in the sewer district's existing KPDES permits that were violated.

Waters Flowing Through Tributary and Quarry Were Not Meaningfully Distinct

The court next addressed plaintiff's claims that the sewer district was diverting water from the tributary into the quarry without a permit under the CWA. Plaintiff argued the diversion of water and pollutants from the tributary into the quarry was a discharge that required a KPDES permit, and that the sewer district was violating the CWA by discharging without a permit. The court disagreed, reasoning that the CWA only requires permits for "discharges," which are defined as "any addition of any pollutant to navigable waters from any point source." The court stated that when water simply flows from one portion of a body of water to another, rather than being removed from and then returned to the body of water, no discharge of pollutants occurs. The court then reasoned the waters flowing through the tributary and the quarry were not meaningfully distinct bodies of water: the diversion from the tributary into Vulcan Quarry was simply water moving from one portion of the body of water to another, and was not a discharge. In coming to this conclusion, the court relied on the Corps' plan for the project and a recent letter from the Corps that indicated the tributary and Vulcan Quarry were the

same body of water. As a result, the notice failed to allege any discharge under the CWA.

Even if District Bodies of Water, Water Transfer Rule Exemption Would Apply

Furthermore, the court opined that even if the tributary and the quarry were separate bodies of water, the sewer district still would not need a KPDES permit because of the EPA's Water Transfer Rule. The Water Transfer Rules exempts water transfers, defined as activities that convey or connect waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use, from the NPDES permitting system. The court indicated that the diversion of water from the tributary to the quarry fell within the rule, and therefore that the sewer district would not need a permit even if these were two separate bodies of water.

Therefore, the court affirmed the District Court's judgment and rejected plaintiff's claims.

Conclusion and Implications

This case serves as an important reminder that plaintiffs must give violators proper pre-notice suit, including indicating specific standards, limitations, or orders under the CWA alleged violated. Although a court is required to construe a complaint in the light most favorable to a plaintiff during a motion to dismiss, this decision serves as a reminder that a court may, nevertheless, carefully evaluate the alleged facts to determine whether they support a plausible inference of wrongdoing. The court's opinion is available online at: https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0047p-06.pdf.
(William Shepherd, Rebecca Andrews)

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