

WESTERN WATER LAW TM

& POLICY REPORTER

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WESTERN WATER NEWS

IDAHO MUNICIPAL WATER PROVIDER RELEASES PROJECTED WATER DEMAND STUDY FOCUSING ON MEETING FUTURE WATER SUPPLY NEEDS IN THE TREASURE VALLEY-BOISE CITY METROPOLITAN AREA

On May 26, 2022, Veolia Water Idaho, Inc. (formerly Suez Water Idaho, Inc.) (Veolia) released a report titled: *Treasure Valley Water-Supply Options to Meet Projected Municipal Demand (May 23, 2022)* (Report). Veolia is the primary provider of potable (municipal) water in the City of Boise and some neighboring areas—providing potable water in the most populous and fastest-growing region of the state (and the nation). The scope of the report is valley-wide—it does not focus solely upon Veolia’s service area.

In 2015, Treasure Valley municipal providers supplied approximately 110,000 acre-feet (AF) of potable water to their customers. Current Treasure Valley population is approximately 760,000 inhabitants—up from approximately 425,000 inhabitants in 2000. By 2065, Treasure Valley population is estimated to be 1.1 to 1.2 million. According to the Report, an additional 110,000 - 190,000 AF of municipal water will be needed to support this anticipated population growth.

The Report

The Report suggests a variety of options potentially available to meet this demand: pumping and importation of water from the Snake River; pumping-back of Boise River water from near its confluence with the Snake River; aquifer recharge with excess (flood) Boise River flows; construction of additional reservoir storage on the Boise River; increased groundwater development; municipal effluent reuse; and the potential “re-purposing” of existing Boise River surface water diversions currently used for irrigation supply purposes. The Report notes that none of the suggestions are perfect, and that a combination of them is likely the best path forward (*i.e.*, no single proposed solution, alone, is likely sufficient to meet the totality of the need for various reasons—source sustainability, regulatory, source quality, cost-effectiveness, among others).

The vast majority of the senior-most priority surface water rights and reservoir storage space on the Boise River is owned (or contracted in terms of storage) by irrigation water users and irrigation water delivery entities. Irrigation water users divert approximately 1.4 million acre-feet of Boise River surface water for the irrigation of approximately 325,000 acres annually.

Unused Water?

Thus, the question has long been asked: what happens to the water when farms become subdivisions—when irrigable ground is replaced by rooftops, roads, and other impermeable, unirrigated hardscapes? The presumed answer has been that the water must be going unused, available for “re-purposing” to other non-irrigation-related uses such as domestic, commercial, municipal, and industrial uses. Known by the irrigation entities as the “paved over” theory, the theoretical reallocation of agricultural irrigation water for other uses and to meet future supply demand has been a popular sound bite for years.

At first blush, the theory is at least intuitive—surely there must be some former irrigation water going unused in urbanizing areas. But this has not been the experience of Treasure Valley irrigation delivery entities (irrigation districts, canal companies and ditch companies). Instead, irrigation water use has remained steady, if not increased, in urbanizing areas forcing increasing need for supply rotation and complaints from residential users of supply shortages.

The first place one would expect to see unused irrigation water in urbanized settings would be in increasing surface water drain flows. But in many areas of the Treasure Valley, particularly the most urbanized, drain flows are decreasing. Pathways feeding drain flows include the baseflows provided by interception of the shallow groundwater table (fed by surface irrigation) and surface water/tailwater drainage flowing overland into the drains. But it seems

that the proliferation of residential sprinkler systems (as opposed to former agricultural flood irrigation) is decreasing percolation into the shallow groundwater table, and sprinkler systems are also minimizing over-land tailwater returns.

Given these phenomena, one would next expect increased surface water spills to the drains from residential pressurized irrigation pump stations (unused/unpumped water bypassed from urban pressurized irrigation pumpstations). In other words, if 20 acres or rooftops and impermeable surfaces use less water than 40 acres of farm fields, then that water should be going unused on the front end and spilled to the drains. But, again, drain flows are largely declining in most urbanized settings—so where is the water going?

Turf Grass Irrigation

For one thing, irrigation delivery entities are coming to realize that residential turf grass irrigation is a more intensive use of water than typical agricultural uses. Turf grass irrigation creates a different peak demand profile—residents want to irrigate from 6pm to 6am and they have a “light switch” (instant availability and instant on) mentality; residential users typically do not order water on and off ahead of time like agricultural users. This overlapping peak demand problem in the absence of regulation ponds leads to increased need for rotation because gravity irrigation delivery systems designed and constructed over a century ago lack the plumbing capacity to meet these changing use profiles. Instead, the gravity irrigation systems of the Treasure Valley were designed to serve agricultural uses and the rotation-type use inherent to differing cropping/planting patterns and cyclical harvests (a form of plumbing and water use balance created by the different varieties of crops planted—some water intensive like corn, and others not like grains and other forage subject to differing harvest times and cyclical cuttings).

Irrigation delivery entities are also coming to realize that turf grass proliferation brings a longer irrigation season demand—the “keeping up with the Joneses” desire for emerald green lawns and subdivision common areas beginning in early to mid-March and lasting through mid to late-October. This use profile stretches the irrigation season and water supplies because residential sprinkler systems are rarely throttled back in terms of water use—station/zone

times tend to remain constant from the beginning of the season to the end.

Residential water users also irrigate differently and less efficiently than agricultural users, which is counterintuitive given that sprinkler systems are, superficially, more efficient than flood irrigation systems. But, many residential users “set it and forget it”; they do not adjust their sprinkler systems when it rains. They also irrigate to the brown spot in the lawn increasing water application sprinkler system-wide rather than on a zone-by zone basis. Residential water users also water far less deeply—they water the first few inches of the soil profile on a daily basis rather than more infrequent, but deeper, watering. This shallower watering is a constant battle of trying to keep the upper reaches of the soil profile moist for the turf grass root zone—the portion of the soil profile that dries out the fastest in the wind and sun, as opposed to allowing water to migrate up from below as is achieved from deep watering.

The foregoing differences between agricultural water use and residential water use are not necessarily criticisms so much as they are facts that are increasingly having to be managed going forward. Whether one is irrigating a residential lot or a 1,000-acre farm, both customers want ample water delivered as safely and cost-effectively as possible no matter the changing use and demand profiles.

Conclusion and Implications

In sum, the “paved over” theory, while attractive and intuitive, is proving overly-simplistic upon deeper look. This is not to say that urbanization does not, or cannot, free up *any* water for potential “re-purposing,” but the quantities are certainly not a 1:1 ratio and other regulatory, legal and administrative hurdles remain from water rights and statutory apportionment of benefits perspectives going forward.

As the Report notes, there is no one, single solution or new source of water. There needs to be better and increasing dialogue across the board from all types of water users to meet anticipated future needs. Water in the West is becoming more-scarce and the growing Boise metropolitan area is increasingly competing with agriculture for that scarce resource. The Report emphasizes the challenges ahead.

(Andrew Waldera)

LEGISLATIVE DEVELOPMENTS

PROPOSED CALIFORNIA BILL AIMS TO SUPPORT FARMWORKERS IMPACTED BY DROUGHT

California proposed Senate Bill 1066 (SB 1066) seeks to provide economic aid to communities hit hardest by drought. It would allocate \$20 million to create and fund a California Farmworkers Drought Resilience Pilot Project. If the bill passes as introduced, eligible farmworkers could receive \$1,000 monthly cash payments.

Background

SB 1066 finds that ongoing drought conditions and water allocation cutbacks forced California farmers to fallow hundreds of thousands of acres of farmland in 2021, resulting in more than 8,000 lost jobs in the California agriculture industry. The bill is State Senator Melissa Hurtado's second attempt to provide funding to farmworkers after proposals last year to prioritize farmworkers were not included in the State's guaranteed basic income pilot program.

Senate Bill 1066

SB 1066 is designed to help sustain agricultural workers in impacted communities so they can remain in their communities and return to the fields if conditions improve. If passed, SB 1066 would establish a California Farmworkers Drought Resilience Pilot Project. It would direct the state Department of Social Services to provide cash assistance to eligible households to help meet their basic needs. The pilot project would commence on January 1, 2023 and continue for a period of three years. Households that meet specific criteria could receive supplemental payments of \$1,000 per month for three years.

Additionally, the supplemental payments would not be considered income for the purposes of determining eligibility to receive benefits for CALWORKS, CalFresh, the California Earned Income Tax Credit, Medi-Cal, or state and federal financial aid and college support programs. This means that receipt of supplemental payments would not impact a recipient's ability to qualify for other financial support programs.

Finally, the California Department of Social Services would be directed to conduct a longitudinal study of the pilot project to determine outcomes and evaluate whether the pilot project was successful in achieving its intended outcomes.

Program Eligibility

Only qualifying farmworker households would be eligible to receive the \$1,000 monthly payments. To qualify, a household must meet the following criteria: 1) at least one member of the household is a California resident; 2) at least one member of the household worked as a farmworker for the entire period of March 11, 2020 to January 1, 2022; 3) at least one member of the household is a farmworker at the time of consideration for, and throughout the duration of, the project; and 4) the household received benefits under either the CalFresh or California Food Assistance Programs for the entire period of March 11, 2020 to January 1, 2022, or would have been eligible for these benefits, but for the immigration status of one or more members of the household. The bill allows for brief periods of unemployment during the pilot project without losing eligibility if the unemployment is due to circumstances beyond the farmworker's control. Notably, SB 1066 would open up aid to all eligible farmworkers regardless of immigration status. Proponents of the bill assert that this is an important aspect to protect vulnerable agricultural workers who are integral to the industry.

Industry Support and Legislative Next Steps

SB 1066 has received support from certain industry groups, including the California Fresh Fruit Association. The bill recently passed out of the Senate Committee on Appropriations by a vote of five to two, after previously passing the Senate Committee on Human Services. As of the date of this writing, the bill awaited consideration and approval of the full Senate and Assembly before heading to Governor Newsom's desk for approval.

Conclusion and Implications

While SB 1066 will not solve California's ongoing drought, it acknowledges certain economic impacts and hardships caused by the drought. If passed in its current form, SB 1066 could provide economic support to the frontline farmworkers who have lost employment as fields lay fallow. However, no one can predict how long the drought will last, and some

assert that available funding should be prioritized for water transfer, storage and infrastructure projects to address long-term water supply needs. The bill is still in the early stages of the legislative process and additional amendments could change its ultimate impact. The bill can be tracked for progress and text changes here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1066. (Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

**EPA TAKES THREE MAJOR STEPS TOWARDS REGULATING
PFAS COMPOUNDS THROUGH THE CLEAN WATER ACT
NPDES PERMIT PROGRAM**

On April 28, 2022 the U.S. Environmental Protection Agency (EPA) announced three actions related to the regulation of the per- and polyfluoroalkyl substances (PFAS) through the federal Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* PFAS are a large group of man-made, persistent, and bio-accumulative chemicals that are used in consumer products and various industrial processes. To address the presence of these chemicals, the EPA has now: 1) issued a new draft testing method intended to detect PFAS in water; 2) adopted a policy to address PFAS through the CWA National Pollutant Discharge Elimination System (NPDES) program (33 U.S.C. § 1342); and 3) published national ambient water quality criteria, which is intended to protect aquatic life.

PFAS Testing Method

Since the adoption of the CWA, the EPA has developed and adopted a number of laboratory analytical methods for the analysis of the chemical, physical, and biological components of wastewater and other environmental samples required by the CWA. Once an analytical method is published in the code of federal regulations, that method is generally considered an “approved method” for use in evaluating and assessing NPDES permit compliance and enforcement actions. Currently, there are no EPA-approved methods for analyzing PFAS, leaving the regulated community to use “any suitable method” for analysis until a method has been developed and officially adopted by EPA.

Because the chemicals generally referred to as “PFAS” include numerous chemical compounds of varying compositions, the development of an analytical method for comprehensive PFAS analysis has been stymied. However, the EPA’s Office of Water collaborated with the Department of Defense (DOD), to develop draft Method 1633, which can detect 40 different PFAS compounds in wastewater, surface water, groundwater, soil, biosolids, sediment, land-

fill leachate, and fish tissue. Draft Method 1633 is ultimately intended for use in evaluating compliance with NPDES permit terms; however, use of this method is not yet required for CWA compliance monitoring, as the method is not yet final. Nonetheless, EPA is recommending use of draft Method 1633 while the agency works to adopt the method through the formal rulemaking process. Once formally adopted, use of Method 1633 will be required for compliance where PFAS sampling and analysis is necessary.

**Inclusion of PFAS Monitoring
in NPDES Permits**

On April 28, 2022, EPA also released a memo, which details how the agency will address discharges of PFAS compounds through EPA-issued NPDES permits. EPA anticipates NPDES permit terms pertinent to PFAS will include monitoring requirements and PFAS-specific best management practice (BMP) implementation requirements. Going forward, PFAS monitoring will generally be required for those industries that are known to discharge PFAS in association with their industrial processes, such as metal finishing, landfills, and airports, among others. Publicly owned treatment works (POTWs) may also be required to monitor for PFAS compounds, given that POTWs typically receive wastewater from a variety of PFAS-discharging entities, including households, given the prevalence of PFAS in consumer products. Where PFAS monitoring is required by an NPDES permit, EPA is suggesting use of draft Method 1633 for compound analysis. Moreover, if PFAS monitoring is required, such monitoring will pertain to all 40 compounds that can be detected by draft Method 1633, and will occur on at least a quarterly basis. The memo details suggested NPDES permit terms for each type of PFAS-discharging entity, as well as industry-specific recommended BMPs, which range from product substitutions to requiring the immediate clean-up of aqueous firefighting foams.

National Water Quality Criteria

On May 3, 2022, EPA published in the Federal Register draft national recommended aquatic life criteria for two PFAS compounds: 1) Perfluorooctane Sulfonate (PFOS); and 2) Perfluorooctanoic Acid (PFOA). (87 Fed. Reg. 26199.) Water Quality Criteria (referred to as “Water Quality Objectives” in California) are used to protect receiving water quality and aquatic organisms, and are typically incorporated into NPDES permits for that purpose.

Each draft criteria includes both acute and chronic criteria for fresh water, as well as a tissue-based concentration to protect aquatic life from potential bioaccumulation. Once the criteria are made final, states and tribes have the authority to adopt these criteria for use as water quality standards. Comments on the draft are due June 2, 2022.

Conclusion and Implications

Together, these three actions represent significant progress towards fulfilling the agency’s commitments under the Biden administration’s Plan to Combat PFAS Pollution (Biden PFAS Plan), which was initially adopted on October 18, 2021 and provided steps that eight federal agencies, including EPA should take over the coming years to accelerate federal efforts at combating PFAS pollution. Moreover, the three recent EPA actions further the Office of Water’s responsibilities under the EPA’s PFAS Strategic Roadmap, which was adopted concurrently with the Biden PFAS Plan. Once made final, the three actions together will have the effect of regulating PFAS nationwide under the Clean Water Act. (Meghan Quinn, Darrin Gambelin)

U.S. BUREAU OF RECLAMATION TO PROVIDE \$100 MILLION FOR B.F. SISK DAM IN CALIFORNIA

In April 2022, the U.S. Bureau of Reclamation (Bureau) announced \$100 million in modification funding for the B.F. Sisk Dam, which impounds San Luis Reservoir, a supplemental storage reservoir for the Central Valley Project and State Water Project. The funds were authorized by the Bipartisan Infrastructure Law and will be used to reduce risk to the dam posed by seismic activity.

Background

B.F. Sisk Dam is a 382-foot-tall earth-filled embankment located near Los Banos, California, in the Central Valley. The dam was completed in 1967 and provides supplemental irrigation storage for the federally owned Central Valley Project and municipal and industrial water for the California State Water Project. The dam impounds San Luis Reservoir and is commonly referred to as San Luis Dam (Dam). The reservoir has a total capacity of 2 million acre-feet and is a joint-use facility with the California Department of Water Resources (DWR) and the Bureau. Reservoir storage space is allocated 55 percent to the state and 45 percent to the federal government.

The Bureau operates in five regions in 17 western states. The Bureau is responsible for approximately

370 storage dams and dikes that form a significant part of the water resources infrastructure in the Western United States, including B.F. Sisk Dam. These dams are included in the Bureau’s safety of dams program (SOD Program). The SOD Program was established to ensure Bureau dams do not present unacceptable risks to people, property, and the environment.

The Bipartisan Infrastructure Law (BIL) of 2021 provides a total of \$8.3 billion related to Western water infrastructure for the Bureau and twelve programs and activities authorized by the BIL, including the SOD Program. The Bureau submitted an initial spending plan for fiscal year 2022 that allocates \$500 million to the SOD Program, with an initial allocation of \$100 million in 2022 and \$400 million after 2023. Several dam safety modification projects pertain to dams deemed to exceed federal guidelines for dam safety, including the B.F. Sisk Dam.

Safety of Dams Analysis for Need for Modifications

To determine whether a dam needs modification, the Bureau employs a “Safety of Dams Process” that involves four phases.

In the first phase, the Bureau conducts a “comprehensive review” every eight years, with a periodic facility review performed halfway through the comprehensive review cycle. In this way, substantive reviews are conducted every four years. Annual reviews are conducted in the remaining years. A comprehensive review examines a dam itself as well as construction reports, existing documentation, and observations that are compared with new information, new technology, and current dam engineering practices.

In the second phase, the Bureau conducts additional studies stemming from any recommendations made during the comprehensive review process. These studies include evaluations of foundation deposits for liquefaction (where the strength and stiff of soil is reduced due to seismic shaking during earthquakes), evaluation of structural components to withstand earthquakes, evaluation of new hydrologic information, and changes in the understanding of loading conditions (the overarching effects of seismic shaking during an earthquake).

Depending on its findings in the first and second phases, the Bureau may perform a corrective action study to explore ways to reduce risks to federally acceptable levels, including operational changes and modifications, with reference to existing constraints on the environmental and economic levels, among others. Alternatives may also be examined during this phase.

Finally, if necessary, modifications are designed to reduce the risk posed by a dam, including design data collection and evaluation of materials within the dam, foundation, and materials to be imported during construction. The modification is then bid-out and the contractor is overseen by the Bureau during the modification process.

In 2003, a Bureau facility review of the Dam identified seismic risks exceeding public safety guidelines. Following more than a decade of subsequent study and evaluation, DWR and the Bureau determined that modification of the Dam was necessary to remedy risks posed by the potential failure of the Dam due to an earthquake. Specifically, the Bureau found that there was an increase in the estimates of both the severity of ground shaking due to nearby earthquake faults, primarily the Ortigalita fault which crosses San Luis Reservoir, and the probability of a large event on that fault.

The Bureau also determined that modifications were necessary in light of new understandings regarding the properties of the Dam’s foundation materials and their ability to resist deformation when subjected to severe shaking. Similarly, advances in computer-based analysis methods more precisely demonstrated Dam behavior under seismic loading, *i.e.* the effects of seismic shaking on the Dam’s structure. As a result of its findings, the Bureau proposed raising the Dam crest by 12 feet and adding certain infrastructural features at the Dam itself and downstream, *e.g.*, stability berms, that would significantly reduce the risk to the Dam. The Bureau’s proposal followed extensive analysis in prior years related to potential modifications of the Dam. In 2019, DWR and the Bureau elected to proceed with the \$1.1 billion seismic upgrade. Capital costs include costs for facility studies and reviews, environmental and cultural evaluations and mitigation, design, contract procurement, and construction and construction oversight.

In addition to the safety of dams process for the B.F. Sisk Dam, the Bureau conducted environmental review of the proposed modifications and determined that dam improvements would not significantly affect public health or safety, would not violate federal, state, tribal, or local laws protecting the environment; would not affect Indian trust assets; would not disproportionately affect minorities or low-income populations and communities; and would not limit access to, and ceremonial uses of, Indian sacred sites on federal lands or significantly adversely affect the physical integrity of such sacred sites.

Conclusion and Implications

The Bureau’s announcement that \$100 million would be available for modifications of the B.F. Sisk Dam is an important step in securing reliable water supplies for municipal, industrial, and irrigation purposes, as well as protecting public health. It remains to be seen whether additional funding will be necessary and made available for the Dam moving forward. For more information see the Department of Interior’s Press Release, “Interior Department Invests \$100 Million in First Dam Safety Project Through President Biden’s Bipartisan Infrastructure Law,” <https://www.doi.gov/pressreleases/interior-department-invests-100-million-first-dam-safety-project-through-president>.

(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS EMERGENCY DROUGHT REGULATIONS PURSUANT TO EXECUTIVE ORDER

California continues to battle worsening drought conditions through regulations designed to reduce water use throughout the state. On May 24, 2022, the California State Water Resources Control Board (SWRCB) adopted emergency regulations to increase water conservation, ban wasteful water uses and prohibit the use of potable water to irrigate certain non-functional turf.

Background

The SWRCB recently published that in March 2022, urban retail water suppliers reported an average statewide water use that was nearly 19 percent *greater* than in March 2020, notwithstanding significant drought conditions. On March 28, 2022, California Governor Newsom signed Executive Order N-7-22 (Order). The Order directed the SWRCB to consider adopting an emergency regulation for urban water conservation by May 25th. The SWRCB proposed an emergency regulation in early May, and adopted the regulation on May 24th (Regulation).

Addition of Preliminary Water Supply and Demand Assessment

Pursuant to California Water Code § 10632.1, urban water suppliers must conduct an annual water supply and demand assessment and submit an annual water shortage assessment report to the California Department of Water Resources (DWR) by July 1st. The Regulation further requires urban water suppliers to submit a *preliminary* annual water supply and demand assessment to DWR by no later than June 1, 2022. DWR issued guidance and provided public workshops to assist urban water suppliers in meeting the preliminary and annual reporting requirements.

Demand Reduction Actions

As a part of their water shortage contingency plans (WSCP), urban water suppliers must identify demand reduction actions they will take in the event of a water shortage emergency. Demand reduction actions generally correspond to six standard water shortage levels outlined by the State and become increasingly

restrictive at each level. Level 2 actions are meant to address up to a 20 percent shortage of water supplies and often include measures such as limiting outdoor irrigation to certain days or hours, increasing patrolling to identify water waste, enforcing water-use prohibitions, and increasing communication about the importance of water conservation. The Regulation requires that all urban water suppliers that have submitted a WSCP to DWR to implement, at a minimum, their Level 2 demand reduction actions by June 10, 2022. The Regulation expressly states that it does not require urban water suppliers to implement moratoria on new residential water service connections.

Urban water suppliers that have not submitted a WSCP must, at a minimum, initiate a public outreach campaign for water conservation, adopt an ordinance limiting landscape irrigation to no more than two days per week, and adopt an ordinance banning wasteful and unreasonable water uses prohibited by California Code of Regulations Title 23 § 995. Section 995 defines wasteful and unreasonable water uses to include:

- Using potable water to irrigate outdoor landscapes in a manner causes water to flow onto adjacent property, non-irrigated areas, walkways, roadway, and parking lots;
- Using a hose to wash a vehicle without equipping the hose with a shut-off nozzle;
- Using potable water for washing hard surfaces such as sidewalks, driveways, buildings, structures, patios, and parking lots;
- Using potable water for street cleaning or construction site preparation purposes;
- Using potable water for decorative fountains or to fill decorative lakes and ponds;
- Watering turf or ornamental landscapes during and within 48 hours after measurable rainfall of at least one-fourth of an inch; and

- Using potable water to irrigate ornamental turf on public street medians.

Violation of these prohibitions is punishable by a fine of up to \$500 per day.

Prohibition of Irrigation of Certain Non-Functional Turf

California regulations define turf as a ground cover surface of mowed grass. The Regulation prohibits use of potable water for irrigation of “non-functional turf” at commercial, industrial, and institutional sites. It defines non-functional turf as “turf that is solely ornamental and not regularly used for human recreational purposes or for civic or community events.” It clarifies that non-functional turf does not include “sports fields and turf that is regularly used for human recreational purposes or for civic or community events.” The Regulation further clarifies that it does not prohibit use of potable water to the extent necessary to ensure the health of trees and other perennial non-turf plantings or to the extent necessary to address an immediate health and safety need. Violations of this Regulation could result in fines of up to \$500 per day, in addition to other potential civil or criminal penalties.

Implementation of Regulation

Some urban water suppliers had already imposed new restrictions on customers’ water use prior to the

adoption of the Regulation. The SWRCB reported that as of May 24th, approximately half of the state’s 436 water suppliers (both urban water retailers and wholesalers) had not yet activated Level 2 actions, and 36 had not submitted drought plans to DWR. As of the date of this writing, the Regulation remained subject to approval of the California Office of Administrative Law (OAL), which typically occurs within ten calendar days of submission by the SWRCB. The Regulation provides that the ban on non-functional turf becomes effective upon OAL approval and proposes that Level 2 requirements for urban water suppliers take effect on June 10, 2022.

Conclusion and Implications

The Regulation responds to worsening drought conditions ahead of another hot, dry California summer. The Regulation builds upon prior drought regulations and is more specifically directed at urban water suppliers and prohibiting irrigation of non-functional turf. The required preliminary supply and demand assessment signals the importance of tracking and reporting water use and projected use. The Regulation also increases reporting pressure on urban water suppliers that have not yet submitted drought plans to DWR. Information on the Regulation can be found on the SWRCB website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html. (Byrin Romney, Derek Hoffman)

OREGON WATER RESOURCES DEPARTMENT RELEASES STUDY TO GUIDE FUTURE GROUNDWATER PLANNING

On April 12, 2022, the Oregon Water Resources Department (OWRD) released a new groundwater basin study for southern Oregon which the agency will use as guideline for groundwater planning in the area.

The Harney Basin Joint Study

Background

The Oregon Water Resources Department and U.S. Geological Survey (USGS) released a new groundwater basin study for Harney Basin in south-

east Oregon. The investigation is the first comprehensive hydrologic study of the entire basin, containing historical and current data analyzed during a five-year study period. The study will inform groundwater planning and management in the basin.

Most people living in the Harney Basin rely on groundwater as their main source of drinking water. Groundwater is also used for agriculture, livestock, fish and wildlife and other uses. Since 2010, groundwater development has increased substantially in the 5,240 square-mile basin, mainly due to an expansion in crop irrigation.

As the demand for groundwater in the basin increased, groundwater levels declined. In 2016, this prompted OWRD to cease issuing groundwater permits for additional development. At the time, OWRD, USGS, and basin stakeholders agreed additional information about the groundwater-flow system was needed to fully understand the ability of the system to sustain existing uses and to accommodate additional development.

“This new study is a tool for understanding and managing the basin’s groundwater resources,” said OWRD Groundwater Section Manager, Justin Iverson:

With it, we have a refined understanding of the basin water budget and rates of groundwater declines in different portions of the basin. Unfortunately, the results of the study indicate that groundwater is over-allocated and that groundwater-level declines in some areas are worse than anticipated. In order to achieve reasonably stable groundwater levels, groundwater use needs to be reduced in the basin, particularly in areas experiencing the greatest decline. This study provides us with an excellent technical foundation on which to work in partnership with the basin stakeholders to build strategies to manage the basin’s groundwater resource sustainably.

Rates and Distribution of Groundwater Recharge and Discharge

The study includes the rates and distribution of groundwater recharge and discharge throughout the region. Groundwater discharge in the lowlands—more than half of which is pumped from wells—exceeds the estimated groundwater recharge to the lowlands by about 110,000 acre-feet/year. Smaller amounts are also consumed by native plants and discharged to streams and springs. This imbalance results in removal of groundwater from storage in the aquifer system, as evidenced by the large groundwater-level declines observed in the areas of greatest groundwater pumpage.

“Our groundwater study team compiled and analyzed a substantial amount of data including geologic maps, satellite imagery, climate, and streamflow and water-level measurements, water-level measure-

ments, geologic logs from hundreds of wells and water chemistry analyses to better understand the amount, source, and age of groundwater flowing through the basin,” said USGS Research Hydrologist and lead author investigator on the study, Stephen Gingerich:

With these efforts, we’ve greatly improved our knowledge of the groundwater system and how it’s affected by recent agricultural pumpage.

Three areas of the Harney Basin have experienced groundwater-level declines exceeding 40 feet compared to pre-development conditions: near the Weaver Spring/Dog Mountain area, in the northeastern floodplains along U.S. 20, and near the community of Crane. A small area of the basin has experienced groundwater-level declines more than 140 feet, and some shallow wells have gone dry. Areas of more modest groundwater-level decline (about 10 feet) were identified in the Virginia Valley area and the Silver Creek floodplain north of Riley. Smaller localized areas of groundwater-level decline have also formed around individual wells or groups of wells throughout the Harney Basin lowlands.

At the beginning of the study in 2016, the OWRD and Harney County Court convened the Harney Groundwater Study Advisory Committee, consisting of local residents, landowners, and business owners, as well as representatives from the Harney County Court, the U.S. Fish and Wildlife Service, the Burns Paiute Tribe, and The Nature Conservancy. From 2016 to 2019, the advisory committee met quarterly with the groundwater scientists to contribute local knowledge, comments, questions, suggestions, and assistance, and allowed access to property, wells, and springs for groundwater-level measurements and groundwater sample collection during the study.

Prior to release, the reports resulting from the study underwent a USGS tiered scientific peer review process, which included technical experts independent of the study.

Conclusion and Implications

The Oregon Water Resources Department and U.S. Geological Survey are planning to share the study results and answer questions at community meetings in late spring/early summer 2022. Meeting details are forthcoming. Following those meetings,

the department will continue engaging with residents, local partners, and Harney County's Community-Based Water Planning Collaborative on actions

to achieve reasonably stable groundwater levels. The full study is available online at: <https://pubs.er.usgs.gov/publication/sir20215103>.
(Robert Schuster)

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

•May 9, 2022—EPA and the City of Montebello, California have entered into an Administrative Order on Consent to assist the city in complying with its municipal stormwater sewer system permit. This action will help the city achieve compliance with the Federal Clean Water Act with respect to discharges of trash into the Los Angeles River. From August 25 through October 29, 2020, inspectors from EPA and the Los Angeles Regional Water Quality Control Board conducted an offsite compliance monitoring audit of the City's compliance with its Municipal Separate Storm Sewer System (MS4) Permit and found multiple violations of the Clean Water Act. EPA found the following violations:

The City had not complied with the final water quality-based outflow limits for trash under its Permit.

The City had not completed their Catch Basin Scoping Study or the Catch Basin Retrofit projects, both of which the City had declared it would complete under its response to the Notice of Violation issued by the Regional Board.

Three catch basins in the City were not equipped with full trash capture systems. Two of these three catch basins were not readily identifiable or included on the City's inventory.

EPA is requiring the facility to 1) submit a complete inventory of all catch basins that need full capture devices including those that either have partial or no trash capture devices; 2) submit a completion schedule to install full trash capture devices on all catch basins for EPA approval.

•May 18, 2022—EPA has reached settlements with five Massachusetts and New Hampshire construction companies for violations of stormwater regulations that serve to reduce pollution from construction runoff. Under the settlements, the five companies agreed to pay penalties and follow the terms of their permits for discharging stormwater. All construction sites one acre or larger, with the potential to discharge stormwater to surface waters, are required to obtain coverage under EPA's General Permit for Discharges from Construction Activities, comply with the terms of the permit, and thereby minimize sediment discharges. The recent enforcement actions include: GAIR, LLC agreed to pay a \$6,600 penalty for allegedly failing to renew permit coverage at the Jennings Road development in Charlton, Mass. The site also lacked complete erosion controls; Harbor Classic Homes, LLC agreed to pay a \$6,750 penalty for allegedly discharging sediment to a stream at the Laurel Hill Estates site in Lancaster, Massachusetts. The company had also paid a \$4,200 penalty to EPA in 2021 for failing to have permit coverage at a construction site in Lunenburg; Highfield Homes, LLC agreed to pay a \$4,800 penalty for allegedly failing to implement adequate erosion controls at the Highfield Commons site in Rochester, New Hampshire; Martelli Construction, Inc. agreed to pay a \$10,500 penalty for allegedly failing to adequately control erosion at the Greenwood II development site in Holden, Massachusetts. The company had also paid an \$8,400 penalty to EPA in 2019 for erosion control failures; U-Haul Co. of Western Massachusetts, has agreed to pay an \$18,000 penalty for allegedly failing to obtain permit coverage at a construction site in Lancaster. Due to a lack of erosion controls at the site, sediment runoff from this site impacted nearby wetlands.

Civil Enforcement Actions and Settlements— Chemical Regulation and Hazardous Waste

•April 22, 2022—EPA announced that the U.S. District Court in New Mexico approved a consent

decree settlement between EPA, the Justice Department, the Department of Interior (DOI), the Department of Agriculture (USDA), the State of Colorado, and Sunnyside Gold Corporation (Sunnyside) and its Canadian parent company Kinross Gold Corporation (Kinross) regarding the Bonita Peak Mining District Superfund Site (Site). EPA and the Justice Department previously announced the details of the proposed settlement on January 21. The settlement provides additional funding for the continued cleanup of mining-related contamination within the Upper Animas Watershed. The settlement also resolves certain federal liability related to the Site, which includes the Gold King Mine and other abandoned mines near Silverton, Colorado. Under the agreement, Sunnyside and Kinross will pay \$40,950,000 to the United States and \$4,050,000 to the Colorado Department of Public Health and the Environment. All money recovered by the United States will be placed in a special EPA account and used to fund future cleanup actions at the Site. The United States will also contribute \$45,000,000 to the ongoing cleanup of the Site. Under the agreement, Sunnyside is also relieved of its obligation to conduct investigation work at the Site, which will be taken over by EPA. Finally, the agreement grants the United States, the State of Colorado and other parties' access to property owned by Sunnyside for the purpose of conducting future cleanup actions. Resolution of these issues frees time and resources devoted to litigation and enables EPA, the State of Colorado, and partners to move forward and focus on the investigation and cleanup of the Site.

Indictments, Sanctions, and Sentencing

•May 5, 2022—Liquimar Tankers Management Services Inc. and Evridiki Navigation Inc. were sentenced after being convicted at trial on all charges, including violating the Act to Prevent Pollution from Ships, falsifying ships' documents, obstructing a U.S. Coast Guard inspection and making false statements to U.S. Coast Guard inspectors. U.S. District Court Judge Richard G. Andrews for the District of Delaware sentenced the corporations to a total of \$3 million criminal fine, and a five-year period of probation. Evridiki was fined \$2 million and Liquimar was fined \$1 million. On March 2019, the Evridiki was inspected by the Coast Guard in Big Stone Anchorage, within Delaware Bay after a delivery of crude oil.

The jury found that during the inspection, Liquimar, Evridiki and the ship's Chief Engineer, Nikolaos Vastardis, tried to deceive Coast Guard inspectors regarding the use of the ship's oily water separator (OWS) and oil content meter (OCM), a required pollution prevention device. Chief Engineer Vastardis used a hidden valve to trap fresh water inside the sample line so that the OCM sensor registered zero parts per million concentration of oil instead of what was really being discharged overboard.

•May 18, 2022—The Chief Engineer of a foreign flagged vessel pleaded guilty to two felony counts for deliberately discharging approximately 10,000 gallons of oil-contaminated bilge water overboard in U.S. waters off the coast of New Orleans last year and then trying to obstruct the Coast Guard's investigation of the spill. The illegal conduct was first reported to the Coast Guard by a crew member via social media. Kirill Kompaniets, a Russian national and the Chief Engineer of the ship, a commercial bulk carrier registered in the Marshall Islands, was charged with the illegal discharge in violation of the Act to Prevent Pollution from Ships. According to papers filed in court, repair operations were underway to correct a problem with the discharge of clean ballast water when a valve burst and the engine room flooded. The discharge into U.S. waters occurred while the ship was at an anchorage near the South West Passage off the Louisiana coast. The ship's required pollution prevention equipment—an oily-water separator and oil content monitor—were not used, and the discharge was not recorded in the Oil Record Book, a required ship log. Kompaniets was also charged with obstruction of justice based on various efforts to conceal the illegal discharge. In a joint factual statement filed in court with his guilty plea, Kompaniets admitted to the following acts of obstruction of justice: (1) making false statements to the Coast Guard that concealed the cause and nature of a hazardous condition, and concealing that the engine room of the vessel had flooded and that oil-contaminated bilge water had been discharged overboard; (2) destroying the computer alarm printouts for the period of the illegal discharge that were sought by the Coast Guard; (3) holding meetings with subordinate crew members and directing them to make false statements to the Coast Guard; (4) making a false Oil Record Book that failed to disclose the illegal discharge; (5) directing subor-

dinate engine room employees to delete all evidence from their cell phones in anticipation of the Coast Guard inspection; and (6) preparing a retaliatory

document accusing the whistleblower of poor performance as part of an effort to discredit him.
(Andre Monette)

JUDICIAL DEVELOPMENTS

FIRST CIRCUIT VACATES EN BANC HOLDING
TO LIMIT THE ‘DILIGENT PROSECUTION’ BAR
ON CITIZEN SUITS UNDER THE CLEAN WATER ACT

Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc., 32 F.4th 99 (1st Cir. 2022).

The First Circuit Court of Appeals recently vacated a prior *en banc* opinion to hold that the federal Clean Water Act’s “diligent prosecution bar” precludes a citizen suit that seeks to apply a civil penalty when a state is diligently prosecuting an administrative enforcement action. The diligent prosecution bar does not preclude a citizen suit that seeks declaratory and injunctive relief.

Factual and Procedural Background

Blackstone Headwaters Coalition (Blackstone) is a Massachusetts-based, non-profit environmental organization whose mission “is to restore and protect water quality and wildlife habitat in the Blackstone River.” In June 2013, the Massachusetts Department of Environmental Protection (MassDEP) issued a Unilateral Administrative Order (UAO) to Arboretum Village, LLC, which was involved in the development of Arboretum Village. The UAO alleged Arboretum Village violated the Massachusetts Clean Water Act and required Arboretum Village to pay an \$8,000 civil administrative penalty.

In May of 2016, Blackstone filed suit against Gallo Builders, and others involved in the development of the Arboretum Village project, in the U.S. District Court for the District of Massachusetts. Blackstone’s complaint set forth two counts. Count I alleged that Gallo Builders violated the Clean Water Act (CWA) by failing to obtain a Construction General Permit from the U.S. Environmental Protection Agency (EPA). Count II, central to the appeal, alleged a CWA violation for their failure to comply with provisions of the Construction General Permit that Arboretum Village obtained from the EPA due to “longstanding and habitual neglect of erosion and sediment control.” The complaint sought both declaratory and injunctive relief, as well as the application of civil penalties against the defendants.

At trial, the defendants moved for summary judgment on the grounds that the “diligent prosecution bar” in § 1319(g)(6)(A) of the Clean Water Act precludes “civil penalty actions” brought by either the federal government or by citizens, via citizen suits, when the action concerns a violation for which a state has commenced and is diligently prosecuting an action under a comparable state law. The District Court granted summary judgment in favor of defendant. Blackstone appealed, arguing that the diligent prosecution bar did not prevent its request for either declaratory or prospective injunctive relief, because the bar only applies to a citizen suit for civil penalties.

The First Circuit’s Decision

The threshold issue was whether the diligent prosecution bar precludes not only a citizen suit that seeks to apply a “civil penalty” to a defendant for an ongoing violation of the act, but also one that seeks to obtain declaratory or prospective injunctive relief from such a violation.

On appeal, Blackstone conceded that the diligent prosecution bar precludes a citizen suit that seeks a civil penalty for a violation of the Clean Water Act when the prerequisites for triggering that limitation on such a suit are satisfied. However, Blackstone argued that the bar has no application to a citizen suit for prospective injunctive and declaratory relief to redress an ongoing violation of the act because a citizen suit for such relief is not a “civil penalty action” within the meaning of the bar in § 1319(g)(6)(A) of the Clean Water Act.

First, the court noted that § 1319(g)(6)(A) provides that actions taken under the act “shall not be the subject of a civil penalty action.” At the time the act was enacted, the word “penalty” had a definition of:

... a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done.

Thus, the word “penalty” would not appear to encompass the kind of relief that a prospective injunction or a declaratory judgment provides. The court then reasoned that the words “civil penalty action” appear to serve no function other than to narrow the range of citizen suits, or “actions,” that the provision precludes.

Second, the court analyzed the term “civil penalty action” in the context of the whole statute. Section 1319(b) of the Clean Water Act authorizes EPA to “commence a civil action for appropriate relief, including a permanent or temporary injunction.” Section 1319(d) then separately authorizes a court to impose “civil penalties” in an action brought by the EPA. Thus, the court concluded, that with respect to the EPA’s enforcement authority, § 1319(g)(6)(A) treats an “action” to assess a “civil penalty” as an “action” that is distinct from a “civil action” that seeks an “injunction.”

Looking at the legislative history of CWA, the Court of Appeals found that Congress proposed text for a limitation on citizen suits that referred to a “civil penalty action” to address the potential for overlap between citizen enforcement and administrative penalties. The legislative history explained that the resulting limitation on civil penalty actions would not apply to an action seeking relief other than civil penalties.

Finally, the court held that § 1319(g)(6)(A) permits citizen suits for declaratory and prospective

injunctive relief when no governmental enforcement action in court is underway. In reaching this conclusion, the court rejected a prior *en banc* decision of the First Circuit Court of Appeal in *North and South Rivers Watershed Association, Inc. v. Town of Scituate*, which held that a citizen suit seeking declaratory and injunctive relief is barred when the state is diligently prosecuting an administrative enforcement action. The court reasoned that allowing a citizen suit for equitable relief to proceed even when the government has undertaken administrative enforcement action was the intent of Congress. Thus, a civil penalty action is not an action for declaratory or prospective injunctive relief for purposes of the diligent prosecution bar under the Clean Water Act.

Conclusion and Implications

With this decision, the First Circuit Court of Appeals not only changed a prior *en banc* opinion, it also articulated an existing split among the Circuit Courts. The Eighth Circuit embraces a position that applies the diligent prosecution bar broadly to prohibit citizen suits seeking injunctive relief. The Tenth Circuit Court of Appeals takes the narrower position embraced by the First Circuit Court in this decision. Other Circuits have not ruled on this issue.

This case highlights the limitations to civil penalty actions under the Clean Water Act. Ongoing government enforcement of the Clean Water Act, and the prosecution of an action, does not bar citizens from filing their own suit so long as the actions are for injunctive or declaratory relief. The court’s April 26, 2022 opinion is available online at: <http://media.ca1.uscourts.gov/pdf/opinions/19-2095P-01A.pdf>. (Marco Ornelas Lopez, Rebecca Andrews)

NINTH CIRCUIT RULES CLEAN WATER ACT WATER QUALITY OBJECTIVES ARE NOT DIRECTLY APPLICABLE TO NONPOINT SOURCE DISCHARGERS

Central Sierra Environmental Resource Center v. Stanislaus National Forest, 30 F.4th 929 (9th Cir. 2022).

The U.S. Court of Appeals for the Ninth Circuit recently granted a summary judgment affirming that the government had not been shown to have violated the permitting requirements or water quality objectives of the federal Clean Water Act (CWA).

Background

As an “authorized state,” California implements the state Porter-Cologne Water Quality Control Act (Porter-Cologne) in lieu of the CWA. The state acts

through the State Water Resources Control Board (State Water Board) and its nine Regional Water Quality Control Boards (Regional Boards) to issue permits, called Waste Discharge Requirements (WDRs) or waivers from the permitting requirements. In 1981, the State Water Board signed a Management Agency Agreement (MAA) with the United States Forest Service (Forest Service). The MAA formally recognized the state's designation of the Forest Service, pursuant to § 208(c) of the Clean Water Act, as the management agency for all activities on National Forest System lands, with responsibility to implement provisions of water quality management plans. In the MAA, the State Water Board agreed that the practices and procedures set forth in the Forest Service 208 Report constitute sound water quality protection and improvement on Forest Service lands, except with respect to certain enumerated issues. As to the enumerated issues, additional "Best Management Practices" (BMPs) were needed.

The Forest Service has issued permits allowing livestock grazing in three allotments within the Stanislaus National Forest that are at issue here—the Bell Meadow, Eagle Meadow, and Herring Creek Allotments (collectively: BEH Allotments). In March 2017, two environmental plaintiffs sued the Stanislaus National Forest, the Forest Service, and the then-Forest Service Supervisor in her official capacity (together: Government), claiming that the Government violated the CWA in two respects. First, plaintiffs alleged that the Government made new or modified discharges of waste without obtaining WDRs or a waiver of the WDR requirement. Second, plaintiffs alleged the Government's permits for livestock grazing on the BEH Allotments caused violations of state water quality standards for fecal coliform bacteria.

Plaintiffs' suit sought injunctive relief modifying the grazing arrangements in the BEH Allotments. As a result, the District Court allowed the holders of the relevant grazing permits, together with several interested organizations to intervene as defendants. After the parties filed cross-motions for summary judgment, the District Court granted summary judgment to the Government. After entry of final judgment, plaintiffs timely appealed.

The Ninth Circuit's Decision

The issue presented on appeal was whether the Government violated the CWA by discharging waste

without first obtaining either WDRs or a waiver. The court noted that the 1981 MAA specifically addressed the obligation to obtain WDRs or a waiver. The 1981 MAA provided that implementation of BMPs constituted compliance with the requirement to apply for and obtain WDRs. Thus, the court found the MAA to clearly establish that in lieu of filing reports and obtaining WDRs, the Forest Service can implement agreed-upon BMPs and the provisions of the MAA.

Plaintiffs asserted, however, that the State Water Board superseded the 1981 MAA in 2004, when it adopted the *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (2004 NPS Policy). The 2004 NPS Policy provided that all current and proposed nonpoint source discharges, such as discharges from grazing operations, must be regulated under WDRs, waivers of WDRs, or some combination of administrative tools. The court did not find the argument compelling as the 2004 NPS Policy expressly acknowledged management agency agreements, such as the MAA, as operative. Because of this, the court concluded that the plaintiffs failed to show that the Government violated the permitting requirements of the CWA and affirmed the District Court's grant of summary judgment on this issue.

The court next considered and rejected plaintiffs' argument that the Government violated the CWA by authorizing livestock grazing which caused runoff leading to fecal coliform levels in local waterways in excess of the relevant water quality objectives. The court found this argument failed because water quality objectives do not directly apply to individual dischargers. Instead, these objectives reflect standards that regulators must take into account in fashioning the requirements that do apply to dischargers, such as WDRs and waivers. The court noted that the plaintiffs had not cited any law that makes a discharger directly liable for violating a water quality objective that is not contained in applicable WDRs, waivers, or other regulatory tool.

For the foregoing reasons, the court found the Government had not been shown to have violated the CWA, and that the plaintiffs failed to contend that the Government violated any prohibition contained within a regulatory mechanism. The Court of Appeals affirmed the District Court's grant of summary judgment to the Government.

Conclusion and Implications

This case highlights the challenges to bringing a successful citizen suit against a nonpoint source discharger. It also serves as a reminder that water quality objectives are not directly applicable to discharg-

ers without an additional regulatory mechanism to implement the objective. The Ninth Circuit's opinion is available online at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/08/19-16711.pdf>. (Helen Byrens, Rebecca Andrews)

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 & 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 con-

ervation 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 district court and rejected Friends’ renewed ESA and NEPA claims.

‘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)

SIXTH CIRCUIT FINDS DECLARATORY JUDGMENT SUFFICIENT TO TRIGGER CERCLA STATUTE OF LIMITATIONS FOR CONTRIBUTION ACTIONS

Georgia-Pacific Consumer Products LP v. NCR Corporation,
___F.4th___, Case No. 18:1806 (6th Cir. Apr. 25, 2022).

When a bare-bones declaration judgment is entered with respect to a Superfund site allocating all of the responsibility for clean-up costs, but no clean-up costs have yet been incurred, does the statute of limitations begin to run for contribution actions against non-parties? The Sixth Circuit Court of Appeals holds that it does.

Background

In 1990, the U.S. Environmental Protection Agency (EPA) added the Kalamazoo River in Michigan (River) to the National Priorities List (NPL), “which identifies the most important Superfund sites” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. Ch. 103). Having served as the site for significant paper milling operations from the 1860s, the River suffered severe environmental degradation, with “researchers ... raising concerns over the paper industry’s environmental impact” beginning in the 1950s. That same decade, the river’s environmental problems worsened substantially when paper mills undertaking carbonless copy-paper recycling began releasing polychlorinated biphenyls (PCBs) into the river and surrounding land. PCBs produce a host of negative health effects, including possibly increasing exposed individual’s risk of cancer.

International Paper (IP), Weyerhaeuser, Georgia-Pacific (GP) and NCR Corporation (NCR) either manufactured paper, or are the successors to paper

manufacturers, with operations on the River.

In 1990, GP and two other paper manufacturers formed the Kalamazoo River Study Group (KRSG), which entered an Administrative Order on Consent (AOC) with Michigan requiring KRSG to perform a site-wide remedial investigation and feasibility study. KRSG next brought a cost-recovery action in 1995 pursuant to 42 U.S.C. § 107 seeking response costs from several firms that it alleged had released PCBs into the Kalamazoo River. Two of the named parties countersued and, following a District Court trial, a 1998 opinion found GP and the other KRSG members, and one defendant, liable for PCBs contamination. In 2001, the Sixth Circuit upheld a U.S. District Court order allocating *all* remediation costs to the members of the KRSG. The Circuit Court later affirmed a 2003 District Court judgment holding a non-KRSG defendant:

... liable for a small portion of the costs of investigating parts of the NPL site but wrote “that it would not be equitable to require [the non-KRSG defendant] to share in the remediation of the NPL Site.

GP nonetheless subsequently re-instituted litigation in 2010, first naming NCR and IP, and later adding Weyerhaeuser as a defendant. GP claimed IP and Weyerhaeuser were liable for contribution under 42 U.S.C. § 113(f) as successors to companies that

owned mills and discharged PCBs; NCR was sued under both 42 U.S.C. §§ 107 and 113 as an “arranger” for having allegedly arranged the disposal of PCBs “at the affected area.” The District Court rejected the statute of limitations defenses raised by IP, Weyerhaeuser and NCR, and apportioned liability to each defendant.

The Sixth Circuit’s Decision

As issue in the appeal was whether the 1998, the 2000 or the 2003 District Court judgments of liability against the KRSG members “started CERCLA’s statute of limitation to run for contribution claims.”

CERCLA’s § 107:

...permits a private party to recover from another the ‘necessary costs of response incurred by any other persons consistent with the national contingency plan.

Section 113 “creates a contribution right for any party sued under §§ 106 and 107,” where “contribution”:

...means the ‘tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault. *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 138 (2007) (quoting BLACK’S LAW DICTIONARY 353 (8th ed. 2004)).

The rights granted by §§ 107 and 113 are mutually exclusive:

...costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). *Alt. Rsch. Corp.*, 551 U.S. at 139-140 n. 6.

Cost recovery actions under § 107 are subject to a three-year limitation period “after completion of the removal action” or, for a remedial action, “within [six] years after initiation of physical on-site construction.” Section 113 contribution actions are subject to a

three-year limitations period from the date of a judgment in any CERCLA action for recovery of costs or damages or the date of various administrative orders related to settlements of such claims.

The Sixth Circuit has previously held that § 107 “likely provides a broader avenue of recovery, and has a longer limitation period than” section 113,” and that the U.S. Supreme Court having held that suits under section 113 may only be brought when the plaintiff can “demonstrate that certain preconditions [a]re met,” “[p]utting those two pieces together, we concluded that if a party *may* bring suit under § 113(f), it *must* do so.” *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014). Further, as the Circuit has previously observed:

...[t]he principal purpose of [CERCLA’s] limitations periods in this setting is to ensure that the responsible parties get to the bargaining-and clean-up- table sooner rather than later. *RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007).

Extending its reasoning in *RSR*, that “[r]ather than focus on *who* settled the cost-recovery action ... the status asks us to focus on *what* was settled” (*id.* at 557), the Sixth Circuit held that § 113’s statute of limitations “should bar an action against a nonparty beyond the statutory period.”

The court then turned to assessing the 1998 declaratory judgment to determine whether it triggered § 113’s limitations period. Focusing on the breadth of the responsibility assigned to the KRSG members, who were allocated one hundred percent of the clean-up costs, the court held that “[t]he 1998 declaratory judgment on liability ... started the contribution clock ticking.” While GP “did not yet have a bill in hand for response costs or damages,” the court analogized to its prior holding in *RSR*, where the judicial action defined the scope of “responsibility to pay for ‘as-yet-unfinished’ remedial work.”

Conclusion and Implications

This decision may have limited applicability based on its facts—here, KRSG members were assigned 100 percent of the liability for clean-up costs. However, even where less than all of the responsibility for costs is assigned, a bare bones declaratory judgment is no

less certain. The reasoning of this decisions is not therefore necessarily confined to its facts. The Sixth

Circuit’s opinion is available online at: <https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0080p-06.pdf>. (Deborah Quick)

JUDICIAL REVIEW OF WASHINGTON ADMINISTRATIVE PENALTY ORDERS— ECOLOGY MUST PROVIDE ‘WRITTEN TECHNICAL ASSISTANCE’ PRIOR TO ISSUING A CEASE-AND-DESIST ORDER

Fode v. Department of Ecology, Case No. 38130-7-III (Wash.Ct.App. May 12, 2022).

Recently we provided an overview of recent penalties issued for water use violations by the Washington State Department of Ecology. See, *26 West. Water L. & P’lcy Rptr.* 182 (May 2022). In our article we summarized the *Fode v. Department of Ecology* case, that at that time was pending before the Washington State Court of Appeals, Division III. On May 12, 2022, the court issued its opinion. *Fode v. Department of Ecology*, Case No. 38130-7-III, 2022 WL 1494597, at *3 (Wash.Ct.App. May 12, 2022). This article provides an overview of the decision and unsettled issues.

Background

By way of review, the issue for Mr. Fode was whether the Department of Ecology (Ecology) followed the proper statutory guidance under RCW 90.03.605 before issuing formal administrative orders and assessing penalties of \$618,000. *Id.*, at *2 (Wash. Ct.App. May 12, 2022). Under 90.03.600, Ecology may assess penalties for violations of the Water Code. Penalties imposed by Ecology in these actions are not minor, and may be assessed at Ecology’s discretion. Civil penalties may range from \$100 to \$5,000 per day, based on a variety of factors including whether the violation is repeated or continuous after notice of the violation is given, and whether any damage has occurred to other water users or to public resources. Under the Water Code, if a violation is, or is about to occur, Ecology is directed to first attempt to achieve voluntary compliance through “technical and educational information” assistance. RCW 90.03.605(1) (b). If after technical assistance, the non-compliance is not corrected “expeditiously” Ecology may issue a notice of violation or assess penalties. See RCW 90.03.605(1)(c).

Mr. Fode argued that RCW 90.03.605(1) requires Ecology to first issue a notice of violation, then a formal administrative order (such as a cease-and-desist order) before Ecology may impose any penalties. *Id.*, at *7. The Court of Appeals disagreed. The court held that while the statute does require Ecology:

. . .to provide *written technical assistance* prior to issuing a cease and desist order or penalties . . . Ecology is *not required to issue a cease and desist order* before imposing penalties. *Id.*, at *7 (emphasis added).

The Court of Appeals’ Decision

The Court of Appeals found that all three enforcement actions available under the statute are separated by “or” allowing for Ecology to undertake any, or all, of the actions in any order so long as they attempt to achieve voluntary compliance first. *Id.*, at *7.

Fode gives Washington water users some guidance, if not a cautionary understanding of Ecology’s authority to issue administrative orders and hefty fines to non-compliant water users across the state. The Court’s decision is consistent with Ecology’s handling of *Frank Tieg, LLC v. Ecology*. We previously reviewed the Frank Tieg, LLC penalty here (PCHB 21-074, filed Nov. 12, 2021, see, the December 2021 issue of *26 West. Water L. & P’lcy Rptr.* 42 (Dec. 2021). The *Fode* case also included some procedural matters whereby in Summer 2019, the PCHB issued findings of fact, conclusions of law, and an order affirming some penalties imposed against Fode by Ecology. The Pollution Control Hearings Board (PCHB) explained it had ruled in the summary judgment phase “that evidence as to technical assistance from Ecology prior

to issuance of the Cease and Desist Order was barred by *res judicata* on the grounds that it could have been raised in the earlier appeal of the Cease and Desist Order,” which had been dismissed as untimely. *Id.*, at *3. The court found this argument to be unpersuasive, finding that PCHB dismissed the appeals of orders on procedural grounds, not on the merits. However, the court did contend that Fode was prejudiced by the monetary penalties imposed against him, not by the cease and desist orders. *Id.*, at 6*.

As stated above, the Court found that Ecology must provide written technical assistance prior to issuing a cease and desist order; however, the opinion fails to elucidate what legally adequate technical assistance means. To this point, PCHB found that Mr. Fode had been provided sufficient technical assistance, reasoning that Fode was, “an experienced water user and was aware his continued irrigation violated the law.” *Id.*, at *3.

Conclusion and Implications

Looking forward, the lack of guidance regarding a definition of technical assistance could result in non-uniform application of what constitutes the fulfillment of this requirement. On Ecology’s website it states that the agency uses guidelines to “ensure consistency in the administration of laws and regulations.” See, <https://ecology.wa.gov/Regulations-Permits/Plans-policies/Water-rights-dam-safety-policies-procedures-guidan>.

Under policy guidance POL-2005 “Water Resources Enforcement,” Ecology provides that “Water Resources staff will encourage voluntary compliance through education and informal enforcement actions.” Educational and informal enforcement actions, however, are not defined.

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