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EWL

FEATURE ARTICLE

U.S. SUPREME COURT RULES MAJOR QUESTIONS DOCTRINE PROHIBITS BROAD DELEGATION OF CONGRESSIONAL AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS SYSTEMS

By Deborah Quick and Lucille Flinchbaugh

The United States Supreme Court has considered whether the "best system of emission reduction" identified by the U.S. Environmental Protection Agency (EPA) in its Clean Power Plan (Plan) was within the authority granted to the EPA by § 111(d) of the federal Clean Air Act (CAA or Act). Analyzing the question under the "major questions doctrine," the Court concluded that the emissions shifting building blocks of the Plan lacked any clear congressional authorization, and therefore exceeded the EPA's regulatory authority under the Act. [*West Virginia v. Environmental Protection Agency*, ___U.S.___, 142 S.Ct. 2487 (2022).] While the topic of the Court's decision was the federal Clean Air Act, it doesn't take too much imagination to see its *potential* application to other federal statutes overseen by EPA also, such as the Clean Water Act, Resource Conservation and Recovery Act, Safe Drinking Water Act and Comprehensive Environmental Response, Compensation and Liability Act—hence its inclusion in this reporter.

Background

In 2015, the EPA promulgated the Plan, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. *West Virginia*, 142 S. Ct. at 2592. The EPA cited the scarcely utilized Section 111 of the Act as its source of authority, which directs the EPA to: (1) determine, considering various factors, the best system of emission reduction which has been adequately demonstrated, (2) ascertain the degree of emission limitation achievable through the application of that system, and (3) impose an emissions limit on new stationary sources that reflects that amount. 42 U.S.C. §7411(a)(1); *see also* 80 Fed. Reg. 64510, 64538 (Oct. 23, 2015); *West Virginia*, 142 S. Ct. at 2601. Under this provision, the States have authority to set the enforceable rules restricting emissions from sources within their borders, while the EPA decides the amount of pollution reduction that must ultimately be achieved. *Id.* at 2601–02. That standard may be different for new and existing plants, but in either case, it must reflect the "best system of emission reduction" or "BSER" that the EPA has determined to be "adequately demonstrated" for the category. §§7411(a)(1), (b)(1), (d). 142 S. Ct. at 2602.

In its Plan, the EPA determined that the BSER for existing coal-fired power plants included three types of measures which the EPA called "building blocks." *Id.* at 2602–03; *see* 80 Fed. Reg. 64662, 64667 (Oct. 23, 2015). The first building block consisted of "heat rate improvements" that coal-fired plants could undertake to burn coal more efficiently. 142 S. Ct. at 2693; 80 Fed. Reg. at 64727. This type of source-specific, efficiency improving measure was similar to those that the EPA had previously identified as the BSER in other Section 111 rules. However, in this case, the EPA determined that this measure would lead to only small emission reductions because coal-fired power plants were already operating near optimum efficiency. 142 S. Ct. at 2603; 80 Fed. Reg. at 64727. The EPA explained, in order to control carbon dioxide from affected plants at levels necessary to mitigate the dangers presented by climate change, it could not base the emissions limit on measures that only improve power plant efficiency. 142 S. Ct. at 2611; 80 Fed. Reg. at 64728.

As such, the EPA included two additional building blocks in its Plan. The second building block would shift electricity production from existing coal-fired power plants to natural-gas-fired plants (*Id.*) and the third building block would shift from both coal- and gas-fired plants to new low- or zero-carbon generating

capacity, mainly wind and solar. *Id.* at 64729, 64748; 142 S. Ct. at 2603. In other words, both measures would involve what the EPA called "generation shifting from higher-emitting to lower-emitting" producers of electricity as a means of reducing carbon emissions. *Id.*; 80 Fed. Reg. at 64728. The EPA explained that such methods for implementing this shift may include reducing the plant's own production of electricity, building a new natural gas plant, wind farm, or solar installation, investing in an existing facility, or purchasing emissions allowances. *Id.* at 64731–32; 142 S. Ct. at 2603.

In determining "the degree of emission limitation achievable through the application" of the system, as required under the Act, the EPA settled on what it regarded as a "reasonable" amount of shift, projecting that by 2030, it would be feasible to have coal provide 27 percent of national electricity generation, down from 38 percent in 2014. 80 Fed. Reg. at 64665, 64694; 142 S. Ct. at 2604. From these projections, the EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of these three methods of generation shifting discussed above. *Id.*

Following a stay on the Plan in 2016, the EPA repealed the Plan in 2019 following a change in administration, concluding that the EPA had exceeded its own jurisdiction under the Act. *Id.* On January 19, 2021, the D.C. Circuit reviewed the EPA's actions and determined that the EPA had misunderstood the scope of its authority under the Act. The court vacated the EPA's repeal of the Plan and remanded to the EPA for further consideration. *Id.* at 2605–06 (citing *Am. Lung Ass'n v. EPA*, 985 F. 3d 914, 995 (D.D.C. 2021, *rev'd and remanded by West Virginia*, 142 S. Ct. 2587). The court's decision was followed by another change in administration, and the EPA moved the court to partially stay its mandate. 142 S. Ct. at 2606. Westmoreland Mining Holdings LLC., North American Coal Corporation, and the States filed petitions for certiorari defending the repeal of the Plan. *Id.*

The Supreme Court's Decision–Majority Opinion

The Court explained that the main issue under consideration in this case was whether restructuring the nation's overall mix of electricity generation, to transition from 38 percent coal to 27 percent coal by 2030, can be the within the meaning of Section 111. *Id.* at 2595. In analyzing this issue, the Court looked to a variety of cases where agencies were found to have exceeded their regulatory power because, under the circumstances, common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue, made it very unlikely that Congress had actually intended to do so. *Id.* at 2609. The Court explained that extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]," *Whitman v. Am. Trucking Ass'ns*, 531 U. S. 457, 468 (2001), and the Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Ass'n v. FCC*, 855 F. 3d 381, 419 (D. D.C. 2017); 142 S. Ct. at 2609. Accordingly, the Court determined that this question must be analyzed under the body of law known as the "major questions doctrine." *Id.*

The Major Questions Doctrine

In arguing that Section 111(d) empowered it to substantially restructure the American energy market, the EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air Regul. Grp. v. EPA*, 573 U. S. 302, 324 (2014). 142 S. Ct. at 2610. Prior to 2015, the EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, but it had never previously devised a cap by looking to a "system" that would reduce pollution simply by shifting polluting activity from dirtier to cleaner sources. 80 Fed. Reg. at 64726. 142 S. Ct. at 2610. Under its prior view of Section 111, the EPA's role was limited to ensuring the efficient pollution performance of each individual regulated source, and if a source was already operating at that level, there was nothing more for the EPA to do. *Id.* at 2612.

In contrast, the Court argued that under the Plan, the EPA was able to demand much greater reductions in emissions based on its own policy judgment that coal should make up a much smaller share of national electricity generation. *Id.* The EPA would be able to decide, for instance:

> . . .how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably 'exorbitant.' *Id.*

The Court asserted that under this view, the EPA could go even further, perhaps forcing coal plants to "cease making power altogether." *Id.* The Court explained that Congress:

> . . .certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. . .[and and the]. . .last place one would expect to find it is in the previously little-used backwater of Section 111(d). *Id.* at 2613.

As such, the Court determined it would be highly unlikely that Congress intended to leave to agency discretion the decision of how much coal-based generation there should be over the coming decades.

Under the major questions doctrine, to overcome the Court's skepticism, the Government must point to "clear congressional authorization" to support its assertion of regulatory power. *Utility Air*, 573 U. S., at 324. 142 S. Ct. at 2614. The Government looked to other provisions of the Act for support, such as where the word "system" or similar words to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution are used, such as in the Acid Rain program or Section 110 of the NAAQS program. *Id.* at 2614–15. However, the Court rejected the Government's argument, differentiating these sections and finding that the references to "system" in other provisions do not equate to the kind of "system of emission reduction" referred to in Section 111. *Id.* at 2615. The Court concluded that these provisions do not provide adequate support to make a finding of clear congressional authorization. *Id.* at 2615–16. Notably, however, the Court refused to answer the question of whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. *Id.* at 2616.

In total, the Court determined that while capping carbon emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day," based on the language of the statute and the lack of any other clear congressional directive, it is not plausible that Congress intended to give the EPA the authority to adopt a regulatory scheme of such magnitude in Section 111(d). The Court reversed the D.C. Circuit's decision and remanded for further proceedings.

The Concurrence

Justice Gorsuch's concurrence, joined by Justice Alito, builds on Gorsuch's prior opinions in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (dissenting) and *Nat'l Fed. of Ind. Bus. v. OSHA*, 595 U.S. ___ (2022) (concurrence) (*NFIB*), in which Gorsuch has argued for an expansive application of the major questions doctrine.

In *Gundy*, Gorsuch traced the asserted deterioration of the "intelligible principle" doctrine by which courts determine "whether Congress has unconstitutionally divested itself of its legislative responsibilities." *Gundy* (Gorsuch, dissenting), Slip Op. at 15, quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("[A] statute 'lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform' satisfies the separation of powers."). Gorsuch identifies the "traditional" separation of powers test as providing that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details." *Gundy* (Gorsuch, dissenting), Slip Op. at 10 (citing *Wayman v. Southard*, 10 Wheat. 1, 46 (1825). Subsequent cases were consistent with the:

> . . .theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed. *Gundy* (Gorsuch, dissenting), Slip Op. at 11 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, beginning in the 1940s, according to Gorsuch, the intelligible principle doctrine "mutated" far from its origins in the constitutional principle of separation of powers into a toothless box-ticking exercise, so that it was relied on "to permit delega-

tions of legislative power that on any other conceivable account should be held unconstitutional." *Gundy* (Gorsuch, dissenting), Slip Op. at 17.

In both *Gundy* and *NFIB*, Gorsuch proposed utilizing the major questions doctrine as a corrective to shore up the intelligible principle doctrine where an agency relies on a "statutory gap" concerning "a question of deep 'economic and political significance' that is central to the statutory scheme." *Gundy* Gorsuch, dissenting), Slip Op. at 20 (quoting *King v. Burwell*, 576 U.S. ___, ___ (Slip Op. at 8). In *NFIB*, Gorsuch concurrent champions the major questions doctrine as "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power," in contrast with the nondelegation doctrine's rule "preventing Congress from intentionally delegating its legislative powers to unelected officials." *NFIB* (Gorsuch, concurring), Slip Op. at 5.

In *West Virginia*, Gorsuch cited to his opinions *Gundy* and *NFIB* and then articulated his understanding of the "good deal of guidance" provided by prior opinions of the Courts on application of the major questions doctrine. *West Virgina v. EPA* (Gorsuch, concurring), Slip Op. at 9. The doctrine is to be applied when:

> . . .an agency claims the power to resolve a matter of 'great political significance,' or end an 'earnest and profound debate across the country.'

Further, the major question doctrine requires:

> . . .that an agency. . .point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy.' *Id*. at 10.

And the doctrine "may apply when an agency seeks to 'intrud[e] into an area that is a particular domain of state law." *Id*. at 11. This list of "triggers" for application of the major questions doctrine is, per Gorsuch, not exclusive, but in any event are all present when considering the constitutionality of the Plan. A history of Congressional failure to regulate greenhouse gas emissions from coal-fired plants, the dominance of the electricity sector in the national economy, and that the regulation of utilities is a matter traditionally left to the states, all support, in Gorsuch's view, application of the doctrine here.

The Dissent's Argument

Justice Kagan's dissent, joined by Justices Breyer and Sotamayor, relies on traditional principles of statutory interpretation and points to the purposefully broad delegation of authority in the Act allowing EPA to define a "system," characterizing this grant of broad authority as typical, but noting that while broad the delegation is not vague:

> Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there. *West Virginia v. EPA* (Kagan, dissenting), Slip Op. at 8 (internal citations omitted).

The dissent also notes that the Court has previously described cap and trade schemes to regulate acid rain and greenhouse gases as "systems," in the course of affirming their constitutionality. *Id*. at 9.

The dissent argues that the Court's statutory interpretation precedents have typically found an impermissible delegation of legislative authority "an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience," and where "the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress' broader design."

> In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design. *Id*. at 15.

Criticizing the majority and concurrence for their reliance on the major question doctrine, the dissent argues that Congress appropriately relies on delegation to expert agencies in order to implement complex policies across an advanced industrial economy in a rapidly evolving world. Congress, in the dissent's view, appropriately looks to expert agencies staffed with "people with greater expertise and experience" to implement broad policy goals, including "to keep regulatory schemes working over time." *Id.* at 30.

The Inflation Reduction Act

In mid-August, Congress passed and President Biden signed the Inflation Reduction Act of 2022. The Act defines various greenhouse gases as pollutants under the Clean Air Act in the course of authorizing numerous subsidies and incentive programs to support moving away from reliance on fossil fuels. Widespread commentary to the contrary, nothing in the Inflation Reduction Act nullified the Court's central holding in *West Virginia v. EPA* that Congress cannot delegate to EPA the authority to mandate generation shifting away from fossil fuels.

It remains to be seen whether the Inflation Reduction Act's minute specification of numerous, specific subsidy and incentive programs will illustrate or undercut Justice Kagan's observation of the necessity for Congress to delegate broad and continuing authority to expert agencies in order to meet evolving challenges with appropriately evolving regulations.

Conclusion and Implications

The Court's embrace of the major questions doctrine as a robust constraint of Congressional delegation raises questions as to whether the Securities and Exchange Commission's proposed climate-related disclosure rules are at risk (see https://corpgov.law.harvard.edu/2022/08/03/west-virginia-v-epa-casts-a-shadow-over-secs-proposed-climate-related-disclosure-rule/), and further afield casts doubt on evolving agency regulation in numerous technical fields not related to climate change, such as healthcare (see https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/).

The Inflation Reduction Act—adopted on a party-line vote in the House of Representatives—illustrates the path forward for federal regulation: minute, specific and explicit direction to agencies to implement detailed legislatively-mandated programs. The disadvantages of this approach include that it requires an enormous expenditure of political capital, is vulnerable to repeated reversals on the House's two-year election cycle, and cannot be expected to keep pace with the pace of social, economic and scientific change that is an inevitable consequence of a modern, advanced economy. Individual states, meanwhile, may choose to delegate broadly to expert agencies and thereby exceed the federal regulatory threshold, perpetuating a patchwork approach.

Climate change is the paradigmatic collective action problem writ a global scale. *West Virginia v. EPA* throws into stark relief the question of whether there is a constitutionally sound and politically viable path to collective action sufficient to meet the demands of moment?

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WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we report on an important decision out of the California Supreme Court addressing the scope and role the state's NEPA-like statue, the California Environmental Quality Act, in light of the Federal Power Act. Since so much electrical generation in the state is hydro-related, this becomes a very important decision.

We also report on the New Mexico Water Quality Control Commission which is approving Outstanding National Resource Waters designations for much of the state.

California Supreme Court Holds CEQA Not Categorically Preempted by Federal Power Act

County of Butte v. Department of Water Resources, et al., ___Cal.5th___, Case No. S258574 (Cal. Aug. 25, 2022).

On August 1 [published August 25], the California Supreme Court held that the Federal Power Act preempted the California Environmental Quality Act (CEQA) challenges to a settlement agreement between the California Department of Water Resources (DWR) and the Federal Energy Regulatory Commission (FERC) developed in response to DWR's application to renew its license to operate Oroville Dam facilities. However, the Court remanded for further proceedings questions of the sufficiency of DWR's environmental review that were not within the purview of FERC's licensing jurisdiction.

Background

The Federal Energy Regulatory Commission is responsible for licensing the operations of dams, reservoirs, and hydroelectric power plants. The California Department of Water Resources obtained a license to operate facilities related to the Oroville Dam (Facilities) in 1957 for a 50-year period. DWR has operated the Facilities under an annual, interim license since 2007, when its 50-year license expired. California requires public entities seeking licensing of state-owned and state-operated hydroelectric projects to conduct environmental review under CEQA.

For purposes of DWR's relicensing process, FERC regulations provided two options: the traditional licensing process or an alternative licensing process. FERC approved DWR's request to use the alternative process in 2001. The alterative process is a voluntary procedure designed to achieve consensus among interested parties on the terms of the FERC license before the licensing application is submitted. The ALP involves a series of hearings, consultations, and negotiations to identify areas of concern and disagreement among the stakeholders regarding the license terms and to resolve those differences. In effect, the alternative process combines the traditional licensing procedure with the environmental review process under the National Environmental Policy Act (NEPA), procedures required under the federal Clean Water Act, and other statutes. The goal of the alternative process is for the participants to develop and execute a settlement agreement that reflects the terms of a proposed license that becomes the core of the license application.

DWR and other interested parties, including petitioners Butte and Plumas counties, engaged in hearings and consultations over a three year period and began negotiating an agreement in 2004. However, the Counties refused to sign the settlement agreement. DWR submitted the settlement agreement and a draft preliminary environmental assessment required under NEPA as its license renewal application. FERC prepared an environmental impact statement (EIS) under NEPA based in part on DWR's draft environmental assessment for the renewal. DWR also prepared various documents and submissions following its renewal application.

In 2005, DWR submitted a certificate from the State Water Resources Control Board (Water Board) that the Facilities would comply with state and federal water quality laws. In 2007, DWR issued an Environmental Impact Report (EIR) under CEQA. The EIR characterized the project under CEQA review as implementation of the settlement agreement, which would allow "the continued operation and maintenance of the Oroville Facilities for electric power

generation." According to the EIR, DWR undertook CEQA procedures because: (1) the Water Board required preparation and certification of an EIR as part of DWR's application for certification under the Clean Water Act and (2) the CEQA process could inform DWR's decision whether to accept the license containing the terms of either the settlement agreement or the alternative proposed by FERC staff, both of which were analyzed in the EIR.

After receiving and responding to public comment on the draft EIR, DWR finalized the EIR and issued a notice of determination in July 2008. The notice contained findings that the adoption of mitigation measures was required for approval of the project but that the project, so mitigated, would not have a significant effect on the environment. Consequently, "as conditions of project approval," DWR adopted a six-page slate of mitigation measures "that will be implemented by DWR" and a mitigation monitoring program to ensure that implementation. The mitigation measures adopted by DWR addressed the Facilities' impacts on wildlife resources, botanical resources, noise, air quality, public health and safety, and geology, soils, and paleontological resources. In general terms, the mitigation measures require DWR to operate the Facilities and to conduct any construction activities associated with the Facilities in a safe and environmentally sensitive manner.

The Counties filed petitions for writ of mandate challenging DWR's compliance with CEQA regarding the relicensing, and the cases were consolidated. The California Court of Appeal held that the Counties' actions were preempted to the extent they challenged the settlement agreement over which FERC has exclusive jurisdiction and were premature to the extent they challenged the Water Board's certification, which had not issued at the time the actions were filed. The Court directed the Court of Appeal to reconsider its decision in light of a recent case, Eel River, and the Court of Appeal reached the same conclusions on remand. The Counties petitioned for a writ of certiorari.

The Supreme Court's Decision

The Court considered a single question on review: Whether the FPA preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in pursuing relicensing of a hydroelectric dam. Under federal law, there are three types of preemption: field preemption, conflict preemption, and express preemption. Generally, a state law is preempted when it conflicts with a federal law regardless of the type of preemption at issue.

Here, the Court held that the Counties' CEQA challenges were barred by the preemption doctrine to the extent they sought to unwind the terms of the settlement agreement DWR and other interested parties reached with FERC under the alternative process—an outcome the Counties acknowledged was appropriate. However, the Court also held that the FPA did not preempt CEQA's application to DWR's implementation of the settlement agreement, for which DWR prepared an EIR and which the Counties challenged.

In reaching its decision, the Court reasoned that CEQA was not preempted by the FPA because an EIR prepared under CEQA could inform the state agency concerning actions that do not encroach on FERC's federal jurisdiction. For instance, according to the Court, DWR could conduct CEQA review to "assess its options going forward," which the Court determined were not incompatible with federal authority in part because DWR was not obligated to accept the terms of a license based on the settlement agreement. DWR could also implement mitigation measures the Court surmised were outside FERC's jurisdiction. In other words, the Court reasoned that CEQA could "inform the public entity's decision-making without encroaching on FERC's ultimate licensing authority."

The Court also reasoned that the savings clause in the FPA is not limited to state-based water rights. The FPA's savings clause, Section 27, provides as follows:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The Court reasoned that the FPA does not say that only state water rights are reserved from federal jurisdiction, *i.e.* remain subject to state jurisdiction, and thus it is not "unmistakably clear" that Congress intended to preempt a state's environmental review of its own project.

Analysis under the *Eel River* Decision

The Court relied on its prior ruling in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, where it found an explicit and broad preemption clause "insufficiently clear" to overcome the presumption that Congress did not intend to preempt the state's internal decision-making under CEQA.

The Dissent

Justice Cantil-Sakauye filed a dissenting opinion. She opined that the FPA preempts application of CEQA because: (1) the doctrine of preemption is considerably broader than applied by the majority and grants only a the narrow exception for state regulation via the FPA's savings provision for state-based water rights; (2) DWR's CEQA analysis duplicates that of the EIS prepared by FERC regarding the settlement agreement and the draft environmental assessment DWR was required to submit with its renewal application; and (3) CEQA imposes a mandatory mitigation measure and mitigation measure compliance program that obstructs FERC's regulatory authority over hydropower. Taken together, Justice Cantil-Sakauye opined that CEQA was preempted by the FPA.

Conclusion and Implications

The Supreme Court's holding suggests that CEQA may apply in instances deemed to fall outside the purview of a federal hydropower license and the FPA. As indicated in the dissenting opinion, additional CEQA analysis pertaining to the effects of FERC-issued licenses may delay hydropower projects for many years, although it remains to be seen whether the decision will have that consequence. The Court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/S258574.PDF.
(Miles Krieger, Steve Anderson)

New Mexico Water Quality Control Commission Issues National Resource Water Designations for Northern New Mexico Rivers and Streams

On July 12, 2022, the New Mexico Water Quality Control Commission held a meeting in which they approved Outstanding National Resource Waters (ONRW) designations for sections of the Upper Pecos, Rio Grande, Rio Hondo, Jemez River, San Antonio Creek and Redondo Creek in Northern New Mexico. An ONRW designation is significant, as it provides the highest level of water quality protection afforded by federal law through the Clean Water Act. 40 CFR 131.12(a)(3).

Background

The New Mexico Water Quality Commission has the authority to designate water bodies as ONRW pursuant to the federal Clean Water Act. Originally known as the Federal Water Pollution Control Act of 1948, this act was the first major law to address water pollution in the United States. As public awareness and concern for controlling and mitigating water pollution increased throughout the states, Congress swept into action and amended the act in 1972. After the 1972 Amendments, the law became what we now know as the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*. (1972) (as amended). One of the major and most important amendments was the establishment of the current structure for regulating pollutant discharges into the waters of the United States.

Although the Clean Water Act provides states discretion in choosing their statewide antidegradation policies, it also provides a floor standard to ensure some protection and preservation. Pursuant to 40 C.F.R. § 131.12, the New Mexico Water Quality Control Commission approved ONRW designations for sections of the Upper Pecos, Rio Grande, Rio Hondo, Jemez River, San Antonio Creek and Redondo Creek. The Antidegradation and Implementation Methods portion of the relevant regulation states:

> The State shall develop and adopt a statewide antidegradation policy. The antidegradation policy shall, at a minimum, be consistent with the following: Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected. 40 C.F.R. § 131.12(a)(B)

The Water Quality Control Commission

The New Mexico Water Quality Control Commission is the state's water pollution control agency for all purposes of the New Mexico Water Quality

Act, the federal Clean Water Act and Federal Safe Drinking Water Act. The Commission is established by statute under NMSA 1978, Section 74-6-3. The Commission consists of fourteen positions or members, and of the 14 seats, ten seats are designees of governmental agencies and four are appointed by the Governor. Pursuant to NMSA 1978, § 74-6-3, the Commission consists of:

> . . .the secretary of environment or staff designee, the secretary of health or staff designee, the director of the department of game and fish or staff designee, the state engineer or staff designee, the chair of the oil conservation commission or staff designee, the director of the state parks division of the energy, minerals and natural resources department or staff designee, the director of the department of agriculture or staff designee, the chair of the soil and water conservation commission or a soil and water conservation district supervisor designated by the chair, the director of the bureau of geology and mineral resources at the New Mexico institute of mining and technology or staff designee, a municipal or county government representative, and four representatives of the public to be appointed by the governor for terms of four years. Additionally, at least one member appointed by the governor shall be a member of a New Mexico Indian tribe or pueblo. NMSA 1978, § 74-6-3.

Designation of a Water Body as an Outstanding National Resource Water[s]

This Commission has powers delegated to it by the CWA. The designation of a water body as an ONRW does not change or restrict uses, but it has a salutary effect. Land-use activities in existence at the time an ONRW is designated are not affected so long as they are allowed by state or federal law, controlled by best management practices, and do not result in new or increased discharges of contaminants to the ONRW. Examples of activities that are permitted to occur near designated ONRWs include recreational activities, grazing, acequia operation, maintenance and repair. Designation as an ONRW does not restrict uses or access, but simply ensures protection for water deemed to be worthy of ONRW designation. For waters to be eligible for ONRW designation – they must be part of a national or state park, wildlife refuge or wilderness areas, special trout waters, waters with exceptional recreational or ecological significance, and high-quality waters that have not been significantly modified by human activities.

Any person or agency can nominate a surface water for designation as an ONRW by filing a petition with the New Mexico Water Quality Control Commission. An ONRW is proposed for designation by filing a petition with the Water Quality Control Commission (WQCC) in accordance with the requirements under 20.6.4.9.B NMAC. Designation of a river or stream as an ONRW is very important for communities if their economy depends on recreational uses of local resources. For example, Jemez Pueblo attracts many visitors and tourists because of the nearby recreational activities available for New Mexicans to enjoy. Ensuring the long-term protection of the Jemez River, for example, is a way to strive towards protecting local small businesses and the local economy. It is anticipated that there will be other designations in the future.

U.S. Senate Bill 3129

As water becomes increasingly scarce in the Southwest amid record breaking dry conditions, attempts to preserve existing water resources will likely increase. Both of New Mexico's United States Senators have stated that this is the case. On November 2, 2021, Senators Heinrich and Lujan introduced U.S. Senate Bill 3129, the M.H. Dutch Salmon Greater Gila Wild and Scenic River Act, to the United States Senate. The Proposed Act would amend the Wild and Scenic Rivers Act to designate certain segments of the Gila River in Southwestern New Mexico as components of the National Wild and Scenic Rivers System. As of July 21, 2022 the bill has passed the Senate Committee on Energy and Natural Resources been ordered to be reported out with an amendment in a favorable manner.

Conclusion and Implications

As the Colorado River and other western rivers continue to struggle due to the ongoing drought crisis, rivers and streams across New Mexico and the rest of the Southwest are likely to see an increase in protections from governments at both the state and federal level. Seeking to designate certain rivers

and streams within national or state parks, wildlife refuges, or water bodies with high recreational significance is one method to protect natural resources for generations to come, while simultaneously ensuring the survival of small local economies that depend on recreational visitors and tourists.
(Christina J. Bruff, James Grieco, J.B.)

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

•July 6, 2022—EPA announced a settlement with Western Timber Products, Inc of Coeur d' Alene, Idaho under which the company has agreed to pay a $222,400 penalty for Clean Water Act violations. During inspections in May 2019 and January 2021, EPA found the company failed to obtain the required Clean Water Act permits for timber processing facilities it operates in Council and Weiser, Idaho. The Council facility discharged both wastewater and stormwater without a permit and the Weiser facility discharged stormwater without a permit.

•July 6, 2022—EPA ordered the Cliff Corp. and Grupo Caribe, LLC to stop discharges of stormwater and runoff coming from the Cliff Villas Hotel and Country Club construction project in Aguadilla, Puerto Rico, from flowing into the Atlantic Ocean. EPA concluded that the developers began work at the site and discharged pollutants into the Atlantic Ocean without the required Clean Water Act permit authorization. EPA has required the Cliff Corp. and Grupo Caribe LLC to submit an action plan within 30 days of the receipt of the order and take steps to come into compliance and properly control discharges from the site. The EPA order also requires the Cliff Corp. and Grupo Caribe LLC to provide monthly reports to the EPA describing the status and progress of the actions taken to comply with the provisions of the order.

•July 11, 2022—EPA announced a settlement with Trager Limestone LLC, which operates the Nettleton Limestone Quarry in Caldwell County, Missouri, under which the company will pay a $210,000 civil penalty and perform watershed restoration at a cost of over $300,000. According to EPA, Trager Limestone filled in approximately 935 feet of Kettle Creek without first obtaining a required CWA permit. The impacted area contains a wide variety of fish species and EPA alleged that Trager Limestone's activity resulted in loss of habitat. As part of the settlement Trager Limestone agreed to pay the civil penalty; develop an oil spill prevention plan; restore 1,012 feet of Kettle Creek; and plant trees and perform other restorative work intended to enhance watershed protection on approximately 4.7 acres of quarry property.

•July 14, 2022—EPA ordered the Kanaan Corporation to comply with critical Clean Water Act permitting and pollution reduction measures in order to address discharges of stormwater from a 19-acre site in Aguadilla, Puerto Rico, where Kanaan is building a commercial center. An EPA inspection earlier this year found that Kanaan lacked the proper Clean Water Act permits for discharges of stormwater from a site associated with the construction of the proposed Plaza Noroeste Shopping Mall on PR-2 Road in the Corrales Ward of Aguadilla. Kanaan has been discharging polluted stormwater from the site into a sewer system owned and operated by the Puerto Rico Department of Transportation and Public Works, which is connected to a creek that flows to the Culebrinas River and ultimately into the Atlantic Ocean. EPA has ordered Kanaan to develop a plan to fully implement erosion and sediments controls for the site in Aguadilla and apply for a new permit under the Clean Water Act's National Pollutant Discharge Elimination System. EPA's order also requires Kanaan to stabilize certain areas at the site and control the spread of dust.

•August 10, 2022—EPA announced a settlement with Carson City Public Works (Carson City) for violating provisions of the Clean Water Act pretreatment program at its wastewater treatment plant in

Carson City, Nevada. Carson City's pretreatment program, which is federally mandated and EPA-approved, serves to protect the city's residents and infrastructure, workers' health, and the water quality of the Carson River from industrial wastewater discharges. During September 2020, EPA conducted an audit of Carson City's pretreatment program. EPA found deficiencies in the pretreatment program's legal authority, enforcement response plan, interlocal agreement, and industrial user compliance tracking. The settlement resolves those deficiencies.

•August 11, 2022—EPA announced a Federal Facility Compliance Agreement with the U.S. Marine Corps to make improvements related to stormwater discharges at the Marine Corps Base Hawaii (MCBH) located on the Mokapu Peninsula of Kaneohe, Oahu. The stormwater system at issue in this agreement is regulated by the Hawai'i Department of Health (DOH) under a National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System permit, as authorized under the Clean Water Act. In 2020, EPA and Hawai'i DOH conducted an audit of MCBH's compliance with its NPDES permit and found the facility exceeded discharge limits and failed to submit all discharge monitoring data required by the permit. The Agreement will require MCBH to, among other things, carry out a plan to prioritize stormwater outfalls for screening to effectively reduce trash discharges; evaluate appropriate projects to include systems that use or mimic natural processes that result in better stormwater management and natural areas that provide habitat, flood protection, and cleaner water; and develop a Construction Best Management Practices Field Manual to establish consistency in implementation and construction project oversight.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•June 23, 2022—EPA announced a settlement with the U.S. Air Force under which the Air Force has agreed to pay a $206,811 penalty for hazardous waste storage and handling violations at the Eareckson Air Station on Shemya Island in Alaska. EPA found that the Air Force improperly stored more than a ton of hazardous paints, hydrochloric acid, methyl ethyl ketone, and oxidizers, and more than 25 tons of hazardous waste fuel and oil. These wastes were stored for years longer than allowed under the Resource Conservation and Recovery Act. The agency also determined the Air Force failed to properly manage its universal waste, including batteries, lamps, and aerosol cans. In addition to paying the $206,811 penalty, the Air Force also agreed to ship off-site and properly dispose of approximately 55,000 pounds of hazardous waste by the end of June 2022, improve its hazardous waste and universal waste management practices, and appropriately close the area where hazardous waste was improperly stored.

•July 5, 2022—EPA announced a CAFO with EaglePicher Technologies, LLC, a privately-held Delaware company with a manufacturing facility in E. Greenwich, settling alleged violations of the federal Resource Conservation and Recovery Act and federally-enforceable Rhode Island hazardous waste regulations. Based on a state inspection of the facility, EPA alleged that EaglePicher accumulated hazardous waste in a storage tank for greater than 90 days, failed to segregate containers of incompatible wastes, failed to properly label containers, and failed to label and track accumulation times for universal wastes. EaglePicher certified that the facility has corrected its RCRA violations and has established new RCRA compliance procedures. The company also agreed to pay a settlement penalty of $108,810.

•July 14, 2022—EPA, the Justice Department, and the Louisiana Department of Environmental Quality (LDEQ) announced a settlement with PCS Nitrogen Fertilizer, L.P. (PCS Nitrogen), to remedy hazardous waste issues at its former fertilizer manufacturing facility in Geismar, Louisiana. The settlement resolves alleged violations of the Resource Conservation and Recovery Act (RCRA) at the facility, including that PCS Nitrogen failed to properly identify and manage certain waste streams as hazardous wastes. These corrosive (acidic) hazardous wastes were illegally mixed with process wastewater and phosphogypsum from phosphoric acid production. The resulting mixture of wastes was disposed of in surface impoundments. The settlement requires PCS Nitrogen to treat over 1 billion pounds of acidic hazardous process wastewater over the next several years. The acidic hazardous process wastewaters will be contained in the phosphogypsum stack system and then treated in the newly

constructed water treatment plant. The settlement also regulates the long-term closure of PCS Nitrogen's phosphogypsum stacks and surface impoundments for over 50 years and requires PCS Nitrogen to ensure that financial resources will be available for environmentally sound closure of the facility. PCS Nitrogen will provide over $84 million of financial assurance to secure the full cost of closure and pay a civil penalty of $1,510,023.

•August 4, 2022—EPA ordered Wilson's Pest Control to stop the sale and distribution of ten unregistered and misbranded pesticides that EPA says are noncompliant with federal law and may represent a danger to consumers. On June 15, 2022, EPA inspectors discovered unlabeled, plastic zip-top baggies of rodent bait products and other improperly repackaged and mislabeled rodenticides offered for sale at Wilson's Pest Control's location at 2400 Grand Boulevard, St. Louis.

•August 9, 2022—EPA announced a settlement with Lighting Resources, LLC, a generator and commercial storer of polychlorinated biphenyls (PCBs), for violations of the Toxic Substances Control Act (TSCA) at its E. Victory Street facility in Phoenix, Arizona. The company will pay $68,290 in civil penalties. Based on a February 2020 inspection at the facility, EPA found that Lighting Resources had failed to comply with marking, dating, notification, and manifesting requirements for PCB waste. EPA also found that the company used areas in the facility that were contaminated with PCBs that it had not decontaminated prior to use. Finally, EPA found that Lighting Resources accepted unauthorized PCB liquid waste and stored excess PCB waste.

•August 9, 2022—EPA and DOJ announced an interim settlement order that requires the Municipality of Toa Alta to take a series of immediate actions to address serious issues at its landfill. The order, which has been approved by a federal judge, requires several immediate actions by the Municipality to address urgent human health and environmental concerns at the landfill. Notably, the order would require Toa Alta to stop receiving waste, cover exposed areas of the landfill and put plans into place to manage stormwater and leachate (contaminated liquid flowing from the landfill). The Municipality of Toa Alta has been operating its solid waste landfill since 1966. A majority of the landfill does not have a bottom protective liner and therefore is considered to be an "open dump." Regulations require that all open dumps be closed by 1998 and that all landfills be appropriately operated, including daily and intermediate cover, leachate collection, and landfill gas and stormwater controls. In February 2021, DOJ filed a complaint in the federal court against Toa Alta on behalf of EPA, claiming that the conditions at the landfill constitute an "imminent and substantial endangerment." In July 2021, DOJ filed a request that the court issue an order requiring Toa Alta to address various urgent problems at the landfill immediately. In September 2021, DNER filed an administrative complaint against Toa Alta. Finally, in October 2021, DNER announced a plan to address the "open dumps" in Puerto Rico, including Toa Alta. The Municipality has since informed EPA and DOJ that it has stopped disposing waste at the landfill as of April 2022, and as of June continues to take action to meet the terms of the proposed preliminary injunction order in advance of the official filing of the order with the Court.

Indictments, Sanctions, and Sentencing

•August 9, 2022—New Trade Ship Management S.A. (New Trade), a vessel operating company, and vessel Chief Engineer Dennis Plasabas pleaded guilty in San Diego, California, for maintaining false and incomplete records relating to the discharge of oily bilge water from the bulk carrier vessel Longshore. New Trade and Plasabas admitted that oily bilge water was illegally dumped from the Longshore directly into the ocean without being properly processed through required pollution prevention equipment. The defendants also admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law. Additionally, in order to create a false and misleading electronic record as if the pollution prevention equipment had been properly used, Plasabas directed lower-ranking crew members to pump clean sea water into the vessel's bilge holding tank in the same quantity as the amount of oily bilge water that he had ordered transferred to the sewage tank. Plasabas then processed the clean sea water through the vessel's pollution prevention equipment as if it was oily bilge water in order to make

it appear that the pollution prevention equipment was being properly used when in fact it was not. The electronic records indicate that approximately 9,600 gallons of clean sea water were run through the pollution prevention equipment.
(Andre Monette)

LAWSUITS FILED OR PENDING

D.C. CIRCUIT DISMISSES ENVIRONMENTAL INTEREST GROUPS' LAWSUIT CHALLENGING U.S. EPA'S APPROVAL OF OKLAHOMA'S COAL ASH PLAN UNDER RCRA

On July 26, 2022, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit dismissed plaintiffs'—Waterkeeper Alliance, Local Environmental Action Demanded Agency, and Sierra Club—lawsuit challenging the U.S. Environmental Protection Agency (EPA)'s approval of Oklahoma's permitting program for coal ash facilities finding plaintiffs lacked standing. [*Waterkeeper Alliance, Inc. et al., v. Regan*, 41 F.4th 654 (D.C. Cir. 2022).]

Background

The Resource Conservation and Recovery Act (RCRA, 42 U.S.C. § 6901 et seq.), is the federal environmental law that creates a framework for managing hazardous and non-hazardous solid waste. Subtitle D of RCRA contains the provisions for non-hazardous waste requirements. In 2015, under the authority of Subtitle D, EPA adopted a rule for regulation of coal ash as non-hazardous waste (2015 Rule). The 2015 Rule established guidelines for building, maintaining, and monitoring coal ash disposal sites. By a statutory amendment, one year later, Congress passed the Water Infrastructure Improvements for the Nation Act (Improvements Act), which amended RCRA to specifically address coal ash disposal units and incorporated the 2015 Rule by reference. (See, 42 U.S.C. § 6945(d).) Under the amended Subtitle D, individual states can choose to develop their own permitting programs for in-state coal ash disposal units within their borders or submit to federal regulation. (Id. At § 6945(d)(1), (d)(2).) If a state chooses to develop and implement its own program, the program must be equal to or more stringent than the federal standards, and approved by the EPA Administrator. (See id. at § 6945(d)(1).)

Notably, RCRA also contains a provision requiring EPA to provide for public participation in the development, revision, implementation, and enforcement of RCRA programs. (Id. at § 6974(b).) RCRA also provides a citizen suit provision, allowing any person to commence a civil suit for violations of RCRA as well as the EPA Administrator for failure to perform a nondiscretionary duty imposed by RCRA. (Id. at § 6972(a)(2).)

Oklahoma's Coal Ash Disposal Unit Permitting Program

Shortly after Subtitle D was amended by Congress, Oklahoma submitted a coal ash disposal unit permitting program (Oklahoma Program) to EPA for approval. Pertinently, the Oklahoma Program created a tiered system of actions, which allows for varying levels of public participation. For example, actions in the lowest tier (Tier I) provide for the fewest or no opportunities for public comment, whereas those in the highest tier (Tier III) afford the greatest opportunities for public participation, such as public meeting and comment and for administrative hearings.

A second aspect of the Oklahoma Program is the permitting scheme grants permits for the "life" of a unit, or until the facility stops operations. The "life" permits are required to comply with state laws and rules as existing on the date of the permit application, or as afterwards changed. Practically, this means that a permit may need to be modified or re-issued if the state laws or rules change, but the Oklahoma Program is not tied to changes in federal standards.

In January 2018, EPA provided notice of intent to approve the Oklahoma Program. Plaintiffs submitted comments opposing the approval. As relevant here, the comments focused on: (1) that EPA must fulfill its obligation under RCRA's public participation provision before approving the Oklahoma Program; (2) that the Oklahoma Program did not provide sufficient opportunities for public participation in Tier I actions; and (3) that the "life" permits were not at least as protective as federal standards. Despite the comments, EPA approved the Oklahoma Program in June 2018, and Oklahoma passed its own regulations to begin implementing the Oklahoma Program under the state law.

Plaintiffs Suit Against EPA

After EPA approved the Oklahoma Program, plaintiffs sued the EPA Administrator in the U.S. District Court for the D.C. District, alleging seven claims—six of which were before the D.C. Circuit on appeal. The District Court analyzed each of those six claims. The first cause of action (Citizen Suit Claim) alleged that RCRA's public participation provision imposed a nondiscretionary duty on the EPA Administration to regulate public participation in state coal ash programs.

The remaining causes of action were based on the Administrative Procedure Act (APA). The second cause of action (Guidelines Claim) similarly alleged that EPA's approval was premature since public participation guidelines for state permitting programs were not yet promulgated. The third cause of action (Tier I Claim) challenged the Oklahoma Program's Tier I public participation opportunities. The fourth cause of action (Lifetime Permits Claim) alleged that lifetimes permits do not allow for compliance with standards at least as protective as the federal 2015 Rule. The sixth and seventh causes of action (Comment Claims) related to allegations that EPA failed to adequately respond to plaintiffs' comments.

The D.C. Circuit's Decision

Plaintiffs' Failed to Demonstrate Standing for Any Cause of Action Raised on Appeal

Ultimately, the D.C. Circuit did not reach the merits of any of plaintiffs' six causes of action on appeal because the court found that plaintiffs lacked standing for each claim. While EPA did not challenge plaintiffs' standing, the D.C. Circuit characterized the analysis as "an independent obligation to assure ourselves of jurisdiction." Plaintiffs bear the burden of establishing the elements of standing— injury, causation, and redressability—in addition to the elements of organizational standing: (a) members having standing to sue in their own right; (b) the interests seeking protection are germane to the organization's purpose; and (c) neither the claim asserted nor relief requested requires individual member participation.

The D.C. Circuit analyzed each of the six causes of action on appeal for standing. With respect to the Citizen Suit Claim, the court compared plaintiffs' alleged injuries—i.e. lack of participation in the Oklahoma Program—to the requested relief—i.e. an order to direct the EPA Administrator to issue minimum guidelines for public participation in state permitting programs. The court reasoned that even if such an order was granted, there is no RCRA provision that would in fact bring about change in the Oklahoma Program, rather the agency would have to issue guidelines that may or may not cease the alleged injurious conduct. Plaintiffs thus failed to meet the redressability element of standing on the Citizen Suit Claim.

The Guidelines and Tier 1 Claims also failed on redressability grounds. The relief requested with respect to those claims was an order of vacatur of EPA's approval of the Oklahoma Program. The Court could not reconcile the effect of such vacatur with plaintiffs' alleged injuries. Even if the D.C. Circuit vacated EPA's approval of the Oklahoma Program, the default regulatory regime that Oklahoma would revert to is the federal 2015 Rule, as EPA had not adopted a federal permitting program for nonparticipating states as of the date of this opinion. It was undisputed that the 2015 Rule afforded even fewer opportunities for public participation than the Oklahoma Program. Thus, if plaintiffs' injury is limited participation, an order vacating approval of the Oklahoma Program, which would in effect submit Oklahoma to the federal regulatory oversight would not redress the injury of participatory opportunity.

Lifetime Claims

With respect to the Lifetime Permits Claim, the D.C. Circuit concluded that plaintiffs failed to demonstrate an imminent injury. Instead of being premised on a present injury, Plaintiffs' claim relied on the threat of a future injury and if the federal standards become stricter than the Oklahoma Program's standards. The D.C. Circuit reasoned that without concrete plans or any additional specification of when the injury might occur, plaintiffs did not establish standing.

Permit Claims

Finally, for the Comment Claims, the D.C. Circuit described the two causal chain "links" that must be alleged to bring a claim on a procedural right. The first link is between the procedural misstep and the agency action that invaded plaintiffs' concrete interest. The second link connects the particularized

injury plaintiffs suffered to the agency action that implicated the procedural requirement in question. Here, plaintiffs failed to establish the second link because the comments regarding public participation were not traceable to EPA's approval of the Oklahoma Program and the comments regarding lifetime permits were not imminent.

Conclusion and Implications

The entire basis for the D.C. Circuit Court of Appeals' decision was the analysis of the elements of standing. It is significant that neither EPA nor the Intervenors contested standing on appeal and yet this was the crucial reasoning for the opinion. Thus, Waterkeeper Alliance reminds litigants on both sides that the threshold elements of standing are critical. (Alexandra Lizano and Hina Gupta)

UNITED STATES FILES SUIT AGAINST IDAHO AND THE IDAHO DEPARTMENT OF WATER RESOURCES OVER STOCKWATER RIGHTS

On June 2, 2022, the United States filed suit against the State of Idaho and the Idaho Department of Water Resources (Department) in the U.S. District Court (Dist. of Idaho; Case No. 1:22-CV-236-DKG) seeking to halt water right forfeiture proceedings initiated by the Department against 57 federally-owned stockwater rights appurtenant to federal grazing allotments. The current suit is the latest in a long-smoldering dispute between the state, ranchers, and the federal government under the Idaho Supreme Court's 2007 decision in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007).

Background

The water rights issue is fairly simple. Prior to implementation of Idaho's now-mandatory administrative water right permit and license application process (1971 for surface water), the so-called "constitutional" (or "beneficial use") method of appropriation required the satisfaction of two elements to own and perfect a water right: (a) diversion from a natural source; and (b) application of the water diverted to a recognized beneficial use. In terms of stockwater use, livestock drinking from a stream or spring satisfies the diversion from a natural source requirement, and livestock watering is a recognized beneficial use of water under Idaho law. However, the difficulty for the United States on federal grazing allotments is that outside of relatively rare occasions, the grazing permittee, not the federal government, perfected the various stockwater rights because the animals performing the beneficial use were (and remain today) privately owned. In sum, the United States typically does not run cattle capable of perfecting stockwater rights, therefore the United States does not (or should not) own the stockwater rights in its name.

The problem, however, is that the United States participated in Idaho's comprehensive Snake River Basin Adjudication (a McCarran amendment-compliant general stream adjudication), and claimed and received many thousands of decreed water rights early on before the issue of animal ownership-related beneficial use was raised and litigated to the ultimate conclusion of the Idaho Supreme Court.

The *Joyce Livestock Company* Decision

The core holding of the *Joyce* Court in the context of federal grazing allotments concluded that:

> . . .[u]nder Idaho law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting at [an] agent of the [land]owner in obtaining the water right. *Joyce Livestock Co.*, 144 Idaho at 18, 156 P.3d at 519.

Subsequent Legislation

Between 2017 and 2022, the Idaho Legislature enacted various stockwater-related pieces of legislation, including Senate Bills 608, 1111, and 1305, and House Bills 592, 608, and 718. In short, the enactments provided that no federal agency could perfect and own stockwater rights absent agency ownership of the livestock; they prohibited federal grazing permittees from unwittingly being used as agents of the government for purposes of obtaining and per-

fecting stockwater rights; they made the stockwater rights appurtenant to the private land (the so-called "base property") of the grazing allotment permittee at the time of perfection (rather than the allotment place of use); they require evidence of an express and intended agency relationship to make use of the *Joyce* agency defense (implied agency theories seemingly are not available to argue); and they require the Director of the Department to compile a list of federal water rights susceptible to forfeiture under the new laws and to issue show cause orders to the United States regarding the same.

The Current Federal Litigation

Not surprisingly, the federal government describes the above-referenced statutory enactments as special legislation narrowly targeting water rights decreed to the United States. The federal government asserts that the enactments "pose a threat to the congressionally authorized federal grazing program" in Idaho.

The complaint alleges that the Idaho legislation is void and invalid both facially (in some instances) and as applied against the United States for failure to comply with the United States Constitution, the Idaho Constitution, and principles of sovereign immunity. More specifically, the United States alleges that the Idaho statutory enactments violate the Supremacy Clause and are illegally discriminatory under the federal Constitution; violate the Property Clause of the federal Constitution; violate the Contract Clause of the federal Constitution; and violate the Retroactivity Clause of the Idaho Constitution.

Ultimately, the United States requests that the federal district court declare that various of the pertinent Idaho statutes are invalid as applied against the United States; invalid on their face; and asks the court to enjoin application of the same against the United States and its agencies in the existing show cause proceedings and any future attempts. The State of Idaho and the Department filed their collective answer to the complaint on June 24, 2022, and the Idaho Legislature is seeking intervention as a party to the case as well, but that intervention motion has yet to be decided.

Conclusion and Implications

The federal water right ownership question has been a contentious one over the years in Idaho. In the irrigation context involving federal storage reservoirs in the state, the Idaho Supreme Court determined in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) that the federal government was the nominal legal-title owner of the storage water rights only. It held that the various water user entities and their patrons (landowners and shareholders) were the ones who ultimately put the water to beneficial use and who, therefore, own equitable title to the storage water rights—more than a mere contractual entitlement. Consequently, on a water right ownership basis alone, the federal government cannot unilaterally alter or use the federal storage water rights to the detriment of the water users. Whether the federal district court reaches a similar result regarding the stockwater right ownership question remains to be seen, as does the validity of the various Idaho statutes speaking to the issue.
(Andrew J. Waldera)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT UPHOLDS EIS AND COMPREHENSIVE CONSERVATION PLAN FOR TWO NATIONAL WILDLIFE REFUGES

Audubon Society of Portland v. Haaland, 40 F.4th 917 (9th Cir. 2022).

The Audubon Society of Portland sued the U.S. Fish and Wildlife Service (FWS or Service), alleging the service's Record of Decision (ROD) adopting a combined Environmental Impact Statement (EIS) and Comprehensive Conservation Plan for two national wildlife refuges violated the Kuchel Act, National Wildlife Refuge System Improvement Act, Administrative Procedure Act, National Environmental Policy Act, and the Clean Water Act. The U.S. District Court, adopting the report and recommendation of the Magistrate Judge, granted summary judgment in favor of the FWS, and the Audubon Society appealed. The Ninth Circuit Court of Appeals in turn affirmed, finding that the FWS had not violated any of the various statutory regimes.

Factual and Procedural Background

In January 2017, the Service issued a ROD adopting a combined EIS and Comprehensive Conservation Plan (EIS/CCP) for five of the six refuges in the Klamath Basin National Wildlife Refuge Complex in southern Oregon and northern California. In its combined EIS/CCP, the Service considered three agricultural habitat management alternatives for the Tule Lake Refuge and four alternatives for the Lower Klamath Refuge. In both instances, the FWS adopted what was analyzed as "Alternative C," which in each case continued many of the agricultural management strategies that already were in place, with some attendant changes.

This case was one of four consolidated appeals from a U.S. District Court decision that rejected various challenges. Here, the Audubon Society of Portland claimed the EIS/CCP violated the Kuchel Act of 1964, the National Wildlife Refuge System Improvement Act as amended by the Refuge Improvement Act (Refuge Act), the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) with respect to the Tule Lake and Lower Klamath Refuges. Briefly, it claimed the EIS/CCP: violated the Refuge Act because it failed to provide sufficient water for the Lower Klamath Refuge; violated the Kuchel Act, the Refuge Act, and the APA because it did not prioritize the preservation of wildlife habitat over agricultural uses of leased agricultural land in the refuges; violated the Refuge Act because it delegated day-to-day administrative responsibilities to the Bureau of Reclamation; and violated NEPA because it did not adequately evaluate an alternative that would reduce the acreage of lease land in the Tule Lake and Lower Klamath Refuges

The U.S. District Court, adopting the report and recommendation of the Magistrate Judge, granted summary judgment to the Service. The Audubon Society in turn appealed.

The Ninth Circuit's Decision

On appeal, the Audubon Society did not pursue its argument that the EIS/CCP violated the CWA, however, it continued to pursue its other claims. The Ninth Circuit addressed each.

Failure to Provide Sufficient Water for the Lower Klamath Refuge

The Ninth Circuit first considered the claim that the FWS failed to provide sufficient water for habitat needs in the Lower Klamath Refuge, in violation of the Refuge Act. While the Ninth Circuit sympathized with Audubon Society's concerns that the water available for the Lower Klamath Refuge was inadequate to serve the habitat purposes of the Refuge, the Ninth Circuit ultimately was satisfied on the record (particularly given the constraints on the Service, whose ability to provide water was severely limited) that the EIS/CCP fulfilled the Service's obligations under the Refuge Act to:

> . . .assist in the maintenance of adequate water quantity . . . to fulfill the mission of the [Refuge]

System and the purposes of each refuge. . .[and to]. . .acquire, under State law, water rights that are needed for refuge purposes.

Continuation of Present Pattern of Agricultural Leasing in the Tule Lake and Lower Klamath Refuges

The Ninth Circuit next considered the argument that the EIS/CCP's continuation of the present pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges violated the Kuchel Act and the Refuge Act and was arbitrary and capricious in violation of the APA. The primary contention was that the EIS/CCP authorized an improper mix of agricultural land and natural habitat land and, effectively, prioritized commercial agricultural crops over natural foods and wetland habitats. The Ninth Circuit found the FWS had considered these arguments and that, as the reviewing court, nothing authorized it to make different choices. The Ninth Circuit concluded that the balance struck by the EIS/CCP was consistent with the various statutes.

Delegation to the U.S. Bureau of Reclamation

The Ninth Circuit next addressed the claim that the EIS/CCP improperly authorized the Bureau of Reclamation to administer lease land in the Tule Lake and Lower Klamath Refuges in violation of the Refuge Act. The Ninth Circuit disagreed, finding the U.S. Bureau of Reclamation's responsibilities under the EIS/CCP were not "administration" within the meaning of the Refuge Act's anti-delegation provision. Here, the Bureau was assigned specified management functions and was, in all respects, subject to the supervision and approval of the Service.

Failure to Consider a Reduced-Agriculture Alternative

Finally, the Ninth Circuit considered the claim that the lack of a reduced-agriculture alternative violated NEPA. The Ninth Circuit again disagreed, finding the Service sufficiently considered whether to reduce the acreage devoted to lease-land farming and explained why it did not list such reduction as an alternative in the EIS/CCP. The Ninth Circuit also found that, to the extent the current pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges was consistent with proper waterfowl management in those refuges, the Kuchel and Refuge Acts directed the FWS to continue that pattern of leasing. The Ninth Circuit generally recognized the constraints on the Service and deferred to the Ninth Circuit's reasoned explanations.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding various statutory regimes regarding the management of National Wildlife Refuges. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/18/20-35508.pdf.
(James Purvis)

NINTH CIRCUIT REVISITS THE MEANING OF 'TRANSPORTATION' UNDER THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT

California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. July 1, 2022).

On July 1, 2022, the Ninth Circuit Court of Appeal filed a new, superseding opinion in the case of *California River Watch v. City of Vacaville*, revisiting its prior opinion from September of 2021 where the Court of Appeals previously held that the City of Vacaville (City) could potentially be held liable for transporting hexavalent chromium through its water supply due to the contaminant's presence in the City's groundwater source. With this newly filed opinion, however, the Ninth Circuit took the opportunity to reconsider the meaning of "transportation" for liability purposes under the federal Resource Conservation and Recovery Act (RCRA) and provide closure on the ultimate question of whether the City could be

liable for transporting solid wastes incidental to its delivery of drinking water.

Background: *Vacaville I*

In the original complaint, California River Watch (River Watch) claimed that the City's water wells were contaminated with hexavalent chromium (also known as Chrom-6), a carcinogen known to cause significant health risks. The complaint further alleged that the City's delivery of such waters contaminated with Chrom-6 created an imminent and substantial endangerment to human health and the environment in violation of RCRA. The district court ultimately granted summary judgment in favor of the City, stating that the City's water deliveries did not qualify as discarding solid waste under RCRA. On appeal, however, the Ninth Circuit shifted the debate to focus on another question – whether the City's water deliveries constituted "transportation" under RCRA.

The Ninth Circuit's Decision

Reconsidering the meaning of 'Transportation:' *Vacaville II*

With the appeal shifting focus to consider whether the City's water deliveries constituted "transportation" under RCRA, the panel for the Ninth Circuit first discussed that in order to establish liability under RCRA, three elements must be satisfied: (1) that the defendant has contributed to the past or is contributing to the present handling, treatment, transportation, or disposal of certain material; (2) that this material constitutes "solid waste" under RCRA; and (3) that the solid waste may present an imminent and substantial endangerment to health or the environment. Although the district court ruled in favor of the City on the grounds that RCRA's "fundamental requirement that the contaminant be 'discarded'" was not satisfied, the panel for the Ninth Circuit held that River Watch did in fact create a triable issue on whether the Chrom-6 constitutes "discarded material" and therefore meeting RCRA's definition of "solid waste."

River Watch further argued that the City should be liable because it physically moved the waste—that waste being the water contaminated with Chrom-6—by pumping it through its water supply system. On this point, however, the panel for the Ninth Circuit concluded that:

> RCRA's context makes clear that mere conveyance of hazardous waste cannot constitute 'transportation' under the endangerment provision [of RCRA].

Citing to numerous examples of how the term "transport" is used throughout the text of RCRA, the panel for the Ninth Circuit explained that "transportation refers to the specific task of moving waste in connection with the waste disposal process." The panel further explained that the court has previously held that "disposal" as used in the endangerment provisions for citizen suits requires a defendant to be actively involved in the waste disposal process to be liable under RCRA. Accordingly, the panel concluded that the best reading of RCRA is that the term "transportation" must also have a direct connection to the waste disposal process such as through the shipping of waste to hazardous waste treatment, storage, or disposal facilities.

Ultimately, the panel for the Ninth Circuit concluded that the City did not have the direct connection to the waste disposal process that it determined is necessary to be held liable for "transportation" under RCRA and affirmed the district court's grant of summary judgment for the City.

Conclusion and Implications

When the original complaint was filed, the potential for the case to have significant impact on water suppliers throughout the state was huge. With the final opinion coming down in early July, that was certainly proven to be true. Although the inverse of this story might have proven to be more groundbreaking news, the Ninth Circuit's opinion in *California River Watch v. City of Vacaville* provided clarification of the term "transportation" as used in RCRA that will almost certainly restrict citizen suits to some extent moving forward. By limiting the use of transportation to a specific process—*i.e.* the waste disposal process—the Court of Appeals has pulled back the reins on the liberal (even if laymen) interpretation of the term that River Watch had fought for in this case. The Ninth Circuit's 2022 opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/01/20-16605.pdf.
(Wesley A. Miliband, Kristopher T. Strouse)

D.C. CIRCUIT UPHOLDS FERC'S APPROVAL OF ADELPHIA PIPELINE ACQUISITION UNDER NEPA

Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, ___F.4th___, Case No. 20-1206 (D.C. Cir. Aug. 2, 2022).

On August 2, 2022, the United States Court of Appeals for the D.C. Circuit upheld the Federal Energy Regulatory Commission's (FERC or Commission) approval of the acquisition of a natural gas pipeline located in Pennsylvania and Delaware. In *Delaware Riverkeeper Network v. FERC,* the Court of Appeals dismissed several claims brought by petitioners arguing that the environmental review performed for the project was inadequate under the National Environmental Policy Act (NEPA). The dismissed challenges included claims that the analysis of upstream, downstream and greenhouse gas impacts were deficient.

Background

Adelphia Gateway, LLC (Adelphia) applied to FERC for a certificate of public convenience and necessity to acquire an existing natural gas pipeline system located in Pennsylvania and Delaware. In addition, it sought FERC authorization to construct two lateral pipeline segments, connected to the existing pipeline and to construct facilities necessary to operate the pipeline, including a compressor station. FERC prepared an Environmental Assessment (EA) to analyze the pipeline acquisition's environmental effects under NEPA, including the effects of the project on greenhouse gases, air quality, noise and residential properties near the project. The EA found that the project would lead to global increases in greenhouse gases but declined to calculate upstream or downstream greenhouse gas emissions because it found that any impacts were not reasonably foreseeable. Based on the EA conclusion that the project would have no significant impact on the environment, FERC approved the project.

The D.C. Circuit's Decision

Delaware Riverkeeper challenged the FERC's approval of the pipeline acquisition by Adelphia alleging it violated NEPA. Riverkeeper argued that the EA was deficient in its analysis of the upstream and downstream impacts of the pipeline, the downstream impacts on climate change, the cumulative impacts of the pipeline, and the impacts of the proposed compressor station.

First, the Court of Appeals examined the FERC's conclusion in the EA that upstream impacts of the pipeline, including possible increases in drilling of new natural gas wells, were not reasonably foreseeable and therefore, were not addressed. The EA noted that the project would receive gas from another interstate pipeline and that there was no evidence that additional wells would be drilled as a result of the project. That court upheld the EA's conclusions regarding upstream impacts, finding no evidence in the record that would have helped FERC consider the number of new wells that may be drilled, and finding that the petitioners did not point to any evidence questioning this finding.

Next, the court examined FERC's approach to the pipeline's downstream impacts. FERC analyzed the downstream emission impacts resulting from the use of much of the gas that would be delivered by the pipeline. However, FERC declined to analyze emissions from gas that would be delivered from the pipeline to the Zone South system. The EA concluded that because this Zone South gas would be further transported on the interstate grid, the final use of the gas was not foreseeable. The court found that FERC's analysis of downstream impacts was sound, based on the information that was available to the Commission. Petitioners argued that FERC should have requested Adelphia provide additional information on downstream users; however, the Court of Appeals dismissed this argument finding petitioners did not raise this issue in front of the Commission.

On the issue of the potential impacts of the project's greenhouse gas emissions on climate change, FERC concluded in the EA that there was no scientifically-accepted methodology available to correlate specific amounts of greenhouse emissions to discrete changes in the human environment. In addition, FERC rejected the Social Cost of Carbon methodology for assessing climate change impacts. Delaware Riverkeeper argued that the FERC was required to use the Social Cost of Carbon by NEPA regula-

tions. Petitioners cited the requirement at 40 C.F.R. 1502.21(c)(4) which provides that where information is not available to perform an analysis regarding reasonably foreseeable impacts in an Environmental Impact Statement (EIS), an agency shall use generally accepted theoretical approaches or research methods. The court dismissed this argument, however, finding again that petitioners had failed to sufficiently raise this issue in front of FERC. Specifically, the court found that petitioners failed to raise the issue that FERC should have used the Social Cost of Carbon in an EA when the regulation cited provides that generally accepted theoretical approaches or research methods shall be used in the more rigorous EIS approach.

To round out its opinion, the court upheld FERC's analysis of the potential impacts of the proposed compressor station and noted that any potential errors resulting from FERC's failure to consider the cumulative impacts associated with the PennEast Pipeline were rendered moot by the cancellation of that project. The court also dismissed several claims unrelated to NEPA.

Conclusion and Implications

The D.C. Circuit Court of Appeals dismissed all claims brought by petitioners that FERC's environmental review of potential upstream and downstream impacts of a pipeline, as well as the impacts on climate change, was insufficient. However, because the petitioners failed to exhaust administrative remedies on several key topics during the administrative proceedings, the issues of whether FERC or another agency must solicit additional information from pipeline operators to determine the end use of the natural gas and whether agencies must use the Social Cost of Carbon to determine impacts on climate change from increases to greenhouse gas emissions were not resolved by this case. The D.C. Circuit's opinion is available online at: https://www.leagle.com/decision/infco20220802127.
(Darrin Gambelin)

FEDERAL CIRCUIT RECOGNIZES COGNIZABLE PROPERTY INTEREST IN FLOWAGE EASEMENT FOR PROPERTIES FLOODED IN HURRICANE HARVEY

Milton v. United States, 36 F.4th 1154 (Fed. Cir. 2022).

The United States Court of Appeals for the Federal Circuit recently reversed and remanded a decision by the Court of Federal Claims concerning property owners' interests in perfect flood control. The court held that the owners had a cognizable property interest in a flowage easement and defenses and exceptions do not negate this interest.

Factual and Procedural Background

In 1929 and 1935, Congress authorized the U.S. Army Corps of Engineers (Corps) to construct the Barker Dam and Addicks Dam on Buffalo Bayou in the City of Houston. By 1963, each dam held a large reservoir and had five gated outflowing conduits. The Corps adopted the Addicks and Barker Reservoirs Water Control Manual (Manual) in 2012. The Manual provides that if an inch of rain falls within a 24- hour period or if downstream flooding is expected, the Corps must close the dams' floodgates. If water in the reservoirs reaches set heights—101 feet behind Addicks Dam or 95.7 feet behind Barker Dam—a surcharge regulation kicks in. At this point, the Corps must monitor whether the inflow will continue to cause the reservoirs to rise. If inflow and pool elevation conditions dictate, the Corps releases water from the reservoir according to a set schedule. At the beginning of 2017, such induced surcharges had never been made.

On August 25, 2017, Hurricane Harvey poured more than thirty inches of water onto the city in four days. The conditions for the induced surcharge regulations were met. The Corps released up to 8,000 cubic feet per second of water from behind the dams. The following day, it increased the release to 12,000 cubic feet per second. On August 30, it again increased the release to 13,000 cubic feet per second, a rate the Corps maintained until September 4.

Substantial downstream flooding followed. Some properties were flooded for more than eleven days and some were flooded at a maximum depth greater than eight feet above the first finished floor. Hundreds of property owners filed complaints in the Court of Federal Claim alleging that the flooding constituted an uncompensated, physical taking of their property by the Government. The Court of Federal Claims joined all these cases into a Master Docket and split them into an Upstream Sub-Docket—for properties upstream of the dams—and a Downstream Sub-Docket—for properties downstream of the dams.

In this Downstream Sub-Docket, the Court of Federal Claims granted the Government's motions to dismiss and for summary judgment, holding that the property owners did not articulate a cognizable property interest that the Government could take because "neither Texas law nor federal law creates a protected property interest in perfect flood control in the face of an Act of God." The court further wrote that the U.S. Supreme Court has routinely held that the government cannot be held liable under the Fifth Amendment for property damages caused by events outside of the governments control. Property owners appealed this ruling.

The Federal Circuit Court's Decision

Immunity-Tucker Act

The appellate court first considered whether the Government was immune from suits alleging takings based on its flood control measures under the Flood Control Act. Congress enacted the Flood Control Act to ensure sovereign immunity would protect the Government from any liability associated with flood control. However, the court found that immunity did not exist because the Tucker Act grants the Court of Federal Claims jurisdiction over—and waived sovereign immunity from—any claim against the United States founded either upon the Constitution, or for liquidated or unliquidated damages in cases not sounding in tort. The court determined that there was no evidence in the text or legislative history of the Flood Control Act that Congress had withdrawn the Tucker Act grant of jurisdiction. Therefore, immunity does not exist.

Cognizable Property Interest

The court next considered whether Appellants identified a cognizable property interest in flowage easements. The Fifth Amendment forbids the government from taking private property for public use, without just compensation. Courts must evaluate two prongs in determining whether a government action constitutes a taking. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was taken.

In analyzing the first prong, the court looked to Texas courts which recognized that property owners have interests in flowage easements under Texas Law. The Government argued that Texas law recognizes all property is held subject to the valid exercise of the police power by the government to provide for public health and safety, and that flood control is a such an exercise of the police power. The court rejected this argument based on a holding by the Texas Supreme Court which expressly tying this exercise of police power to the abatement of nuisances.

The Government also cited other cases it asserted rejected claims for taking from the controlled release of water from reservoirs in response to unprecedented rainfall consisted with the Government's understanding of the scope of the police power. However, the court distinguished each case because each concluded that plaintiffs had failed to present sufficient evidence that water released from the relevant dam flooded their property, it did not turn on whether the plaintiffs had a cognizable property interest.

Finally, the Government insisted that Appellants did not have a cognizable property interest because Hurricane Harvey was an Act of God. The court disagreed, stating that Acts of God relate to whether a taking has occurred, not whether a party has a cognizable property interest.

For the second prong, the court declined to grant summary judgment for either party and remanded the case to the Court of Federal Claims. The court directed the lower court to consider: (1) whether Appellants have shown that a temporary taking occurred under the test applicable to the flooding cases; (2) whether Appellants have established causation when considering the impact of the entirety of government actions that address the relevant risk; and (3) wheth-

er the Government can invoke the necessity doctrine as a defense.

Conclusion and Implications

This case relies on state law to recognize that property owners in Texas have a cognizable property interest in flowage easements and that the Government is not immune from these issues. This case also provides reasoning that defenses and exceptions, such as "acts of God" and necessity, do not negate a cognizable property interest. The court's opinion is available online at: https://fedcircuitblog.com/wp-content/uploads/2022/01/21-1131-Milton-v.-US-Opinion.pdf. (Helen Byrens, Rebecca Andrews)

FOURTH CIRCUIT ALLOWS CLEAN WATER ACT CITIZEN SUIT TO PROCEED DESPITE ONGOING PROCEEDINGS AT THE STATE LEVEL

Naturaland Trust, et al. v. Dakota Finance, et al., 41 F.4th 342 (4th Cir. July 20, 2022).

The United States Court of Appeals for the Fourth Circuit recently added to a growing trend of appellate rulings clarifying when citizen suit enforcement cases can be filed under the federal Clean Water Act. The rule determines whether a state's issuance of a notice of violation bars a citizen suit as "diligent prosecution."

Factual and Procedural Background

The federal Clean Water Act (CWA) contains a citizen-suit provision that allows citizens to sue polluters in federal court. CWA also precludes a polluter from being subject to penalties in federal court if a state has "commences and is diligently prosecuting an action under a state law comparable" to the federal scheme for assessing civil penalties.

Here, Dakota Finance LLC operates Arabella Farm, a farm with an orchard and vineyard, doubling as an event barn for special events. Arabella Farm is bounded by three bodies of water –Clearwater Branch, Peach Orchard Branch, and an unnamed tributary of the Eastatoe River. In 2017, Dakota Finance began to clear 20 acres of land to create Arabella Farm. The process altered the steep mountain landscape and exposed the underlying soil. Typically, such extensive land disturbance would require a permit under CWA. Arabella Farm claimed it was not required to obtain a permit because its work fell within an agricultural exemption to CWA. Notably, Dakota Finance did not install sediment or stormwater control measures, which resulted in significant discharges of sediment-laden stormwater.

In April 2019, the South Carolina Department of Health and Environmental Control (Department) conducted an inspection to evaluate Arabella Farm's compliance with the National Pollutant Discharge Elimination System program. Subsequent site inspections revealed inadequate stormwater controls, significant erosion, and off-site impacts.

In August 2019, the Department sent a letter advising Arabella Farm that it was required to obtain an NPDES permit and instructed the farm:

> . . .to cease and desist any activity at the [s]ite other than the installation and maintenance of storm water, sediment and erosion control measures as directed by its design engineer.

In September 2019, the Department sent Arabella Farm a "Notice of Alleged Violation/Notice of Enforcement Conference" and informed the farm of a voluntary "informal" enforcement conference scheduled for the end of that month.

In November of the same year, Naturaland Trust and Trout Unlimited (appellants)—non-profit organizations dedicated to conserving land, water, and natural resources—sent a notice of intent to sue letter to Arabella Farm and its owners. The letter detailed various CWA violations. Sixty days later, appellants sued in federal court, seeking an injunction and civil penalties.

A month after appellants filed their complaint, Arabella Farm and the Department entered into a consent order. The order imposed a $6,000 penalty and required Arabella Farm to obtain an NPDES permit, submit a stormwater plan and site stabilization

plan, and conduct a stream assessment.

The U.S. District Court dismissed appellants' complaint because, as relevant here, the court concluded that it lacked subject matter jurisdiction over appellants' CWA claims because the Department had commenced and was diligently prosecuting an action for the same violations.

The Fourth Circuit's Decision

The threshold issue is whether a state agency's notice of an alleged violation for failure to obtain a permit commences "diligent prosecution" by a state. CWA contains a judicial proceeding bar that precludes private action if a state or the Environmental Protection Agency is diligently prosecuting a civil or criminal case in court.

First, the court noted that the diligent prosecution bar does not implicate a court's jurisdiction because there was no "clear indication that Congress" wanted the rule to be jurisdictional. Here, the diligent prosecution bar was not clearly labeled "jurisdictional" and was not located in a "jurisdiction-granting provision.") Instead, the court noted, it merely prohibited certain violations from being the subject of a civil penalty action.

Second, the court turned to the text of CWA. CWA provides that the diligent prosecution bar is triggered by the state's "commence[ment]" of "an action under a state law" that is "comparable to" the federal statute addressing "administrative penalties" that the government may assess for violations. By contrast, CWA reads that the diligent prosecution bar "shall not apply" to citizen suits "filed prior to commencement of" such an action.

Here, the court found that the Department's notice of violation did not commence an "action" against Arabella Farms under CWA. The court noted that the notice of violation invited Arabella Farm to an informal, voluntary, private conference to discuss allegedly unauthorized discharges. The notice did not mention penalties or sanctions that would flow from the failure to attend the conference.

The court also reviewed how other Circuit Courts determine whether the diligent prosecution bar precludes a particular suit and noted that the availability of public participation and judicial review of the state action are important to determining whether an action under state law is comparable to an action under the CWA. Here, public participation and judicial review were not available to Arabella Farm until after the issuance of the Department's consent order. Therefore, the comparable features were not yet available at the time the suit was filed because no comparable action had yet commenced.

The Court of Appeals reversed the U.S. District Court's judgment and remanded for further proceedings consistent with the ruling.

Conclusion and Implications

This case adds to recent appellate rulings clarifying when citizen suit cases under the Clean Water Act may proceed and when a state is already "diligently" prosecuting a violation. The growing consensus among circuit courts is to consider whether the comparable state law provides opportunities for public participation and judicial review. The court's opinion is available online at: https://casetext.com/case/naturaland-tr-v-dakota-fin.
(Marco Ornelas Lopez, Rebecca Andrews)

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