Volume 26, Number 10
August/September 2022

WESTERN WATER LAW™

& POLICY REPORTER

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WWL

FEATURE ARTICLE

CALIFORNIA SUPREME COURT HOLDS FEDERAL POWER ACT DOES NOT PREEMPT APPLICATION OF CEQA TO STATE'S AUTHORITY OVER DAM LICENSING

By Bridget McDonald

On August 1, 2022, the California Supreme Court issued its highly anticipated decision in *County of Butte v. Department of Water Resources*. In a 5-2 opinion, a divided court held that the Federal Power Act (FPA) does not entirely preempt the California Environmental Quality Act's (CEQA) application to the state's participation, as an applicant, in the FPA's licensing process for hydroelectric facilities. The Court agreed, however, that CEQA could not be used to challenge a settlement agreement prepared by the Department of Water Resources (DWR) as part of FPA proceedings conducted by the Federal Energy Regulatory Commission (FERC). Finally, the Court also held that claims challenging the sufficiency of an Environmental Impact Report (EIR) that DWR prepared pursuant to that agreement were not preempted because DWR's CEQA decisions concerned matters outside of FERC's jurisdiction. [*County of Butte v. Department of Water Resources*, ___Cal.5th___, Case No. C071785 (Cal. Aug. 1, 2022).]

Statutory Background

The Federal Power Act

The Federal Power Act facilitates development of the nation's hydropower resources, in part by removing state-imposed roadblocks to such development. Under the FPA, the construction and operation of a dam or hydroelectric power plant requires a license from the Federal Energy Regulatory Commission. A FERC license must provide for, among other things, adequate protection, mitigation, and enhancement of fish and wildlife, and for other beneficial public uses, such as irrigation, flood control, water supply, recreational, and other purposes. The FPA expressly grants FERC authority to require any project be modified before approval.

Federal Preemption

The Supremacy Clause of the U.S. Constitution provides that federal law is "the supreme Law of the Land." Congress may explicitly or implicitly preempt (*i.e.*, invalidate) a state law through federal legislation. Three types of preemption could preclude the effect of a state law: "conflict," "express," and "field" preemption. As relevant here, "conflict" preemption exists when compliance with both state and federal law is impossible, or where state law stands as an obstacle to achieving compliance with federal law. To prove a conflict exists, the challenging party must present proof that Congress had particular purposes and objectives in mind, such that leaving the state law in place would compromise those objectives. The inquiry is narrowly focused on whether the conflict is "irreconcilable"—hypothetical or potential conflicts are insufficient to warrant preemption.

Factual and Procedural Background

The California Department of Water Resources operates the Oroville Facilities—a collection of public works projects and hydroelectric facilities in Butte County. FERC issued DWR a license to operate the facilities in 1957. In anticipation of the license's expiration in 2007, DWR began the license application process under the FPA in October 1999.

At the time DWR undertook the relicensing pro-

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cess, FERC regulations allowed applicants to purpose the traditional licensing process or an "alternative licenses process" (ALP)—a voluntary procedure designed to achieve consensus among interested parties before the application is submitted. The ALP requires stakeholders with an interest in the project's operation to cooperate in a series of hearings, consultations, and negotiations, in order to identify and resolve areas of concern regarding the terms of the license. The process also combines the consultation and environmental review process required by the National Environmental Policy Act (NEPA), as well as the administrative processes associated with the federal Clean Water Act (CWA) and other applicable federal statutes. Ideally, ALP participants conclude the process by entering into a settlement agreement that reflects the terms of the proposed license. That agreement becomes the centerpiece of the license application and serves as the basis for FERC's "orderly and expeditious review" in settling the terms of the license.

DWR elected to purse the ALP. FERC approved DWR's request in January 2001. The ALP process consumed the next five years. ALP participants included representatives from 39 organizations, including federal and state agencies, government entities, Native American tribes, water agencies, and nongovernmental organizations. In September 2001, DWR issued a document combining a CEQA notice of preparation (NOP) and a NEPA "scoping document," which sought comments on the scope of a preliminary draft environmental assessment (PDEA)—a document mandated by the ALP. DWR issued the PDEA for the Facilities in January 2005. Partially relying on the PDEA, FERC issued a draft environmental impact statement (EIS) in September 2006. And from April 2004 to March 2006, the ALP participants negotiated and ultimately signed a settlement agreement. The Counties of Butte and Plumas declined to sign the agreement because they were dissatisfied with its terms.

In May 2007, DWR issued a draft EIR that considered the same project and alternatives that FERC considered in its draft EIS. The EIR characterized the project under review as "implementation of the settlement agreement," which would allow "the continued operation and maintenance of the Oroville Facilities for electric power generation." DWR undertook CEQA procedures because the State Water Resources Control Board (Water Board) required preparation and certification of an EIR under the Clean Water Act, and the CEQA process could inform whether DWR would accept the license of the terms of the settlement agreement, or the alternative proposed by FERC in the EIS (both of which were analyzed in the EIR). DWR issued a NOD approving the EIR in July 2008; and the Water Board certified the Project's compliance under the CWA in December 2010.

At the Trial Court

In August 2008, the Counties of Butte and Plumas (Counties) filed separate petitions for writ of mandate challenging DWR's compliance with CEQA in connection with the relicensing. The Counties raised similar claims regarding the adequacy of the EIR's project description, analysis of environmental impacts and alternatives, and its adoption of feasible mitigation measures. In May 2012, after consolidating the two cases, the trial court rejected the Counties' claims and found the EIR complied with CEQA. The Counties appealed.

Initial Review by the Court of Appeal and California Supreme Court

On appeal, the Third District Court of Appeal declined to reach the merits of the Counties' CEQA claims. Instead, the court held the Counties' actions were preempted because FERC had exclusive jurisdiction over the settlement agreement. The court also deemed the claims premature to the extent they challenged the Water Board's certification, which had not been filed yet.

The Counties petitioned the California Supreme Court for review, which the Court granted in 2019. The Court subsequently transferred the matter back to the Third District for reconsideration in light of the Supreme Court's decision in *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017) (*Friends of the Eel River*). The Court in *Friends of the Eel River* held that the Interstate Commerce Commission Termination Act (ICCTA) did not preempt a state railroad authority's application of CEQA to its own rail project, for such application "operates as a form of self-government" because the agency is, in effect, regulating itself.

Following the Supreme Court's remand, the Third District Court of Appeal considered the *Friends of*

the Eel River ruling, and ultimately reached the same conclusion: the FPA preempts the Counties' challenge to the environmental sufficiency of the settlement agreement. Because FERC has sole jurisdiction over disputes concerning the licensing process, an injunction would be akin to prohibited "veto power." In light of this preemption, the Third District maintained the FPA preempted the Counties' CEQA challenges to the sufficiency of the EIR.

The California Supreme Court's Decision

The California Supreme Court, again, granted the Counties' petition for review to determine: (1) whether the FPA fully preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in relicensing a hydroelectric dam; and (2) whether the FPA preempts challenges in state court to an EIR prepared under CEQA to comply with the CWA. The Court concluded the second issue was not properly presented and thus declined to address it.

Turning to the first issue, the Court agreed with the Court of Appeal that the Counties' claims were preempted by the FPA to the extent they attempted to "unwind the terms of the settlement agreement reached through a carefully established federal process and seek to enjoin DWR from operating the Oroville Facilities under the proposed license." As to the Counties' claim against the EIR, the Court rejected the Third District's finding that those were also preempt, instead concluding that nothing "in the FPA suggests Congress intended to interfere with the way the state as owner makes these or other decisions concerning matters outside FERC's jurisdiction or compatible with FERC's exclusive licensing authority."

The FPA Does Not Categorically Preempt CEQA

To consider whether Congress intended for the FPA to categorically preempt CEQA, the Court applied a presumption that "protects against undue federal incursions into the internal, sovereign concerns of the states." In the absence of unmistakably clear language, the Court would presume that Congress did not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the constitutional balance of state and federal powers, or intend to preempt a state's propriety arrangements in the marketplace, absent evidence of such a directive.

Here, the FPA's Savings Clause does not evince an "unmistakably clear" intent by Congress to preempt California's environmental review of its own project, as opposed to its regulation of a private entity. The issue here rests on whether Congress intended to preclude the state from trying to govern *itself*—therefore, it would be contrary to the "strong presumption against preemption" to assume the existence and/or scope of preemption based on statutory silence. In particular, neither the FPA's legislative history nor its language suggests that Congress intended it to be one of the "rare cases" where it has "legislative so comprehensively" that it "leaves no room for supplementary state legislation" on the issues at bar.

The fact that the FPA has a significant preemptive sweep says nothing about congressional intent to prohibit state action that is non-regulatory. Instead, CEQA operates as a form of self-government, therefore, application of CEQA to the public entity charged with developing state property is not classic "regulatory behavior," especially when there is no encroachment on the regulatory domain of federal authority or inconsistency with federal law. Rather, application of CEQA here constitutes self-governance on the part of a sovereign state and owner.

But the FPA Does Preempt CEQA Claims Against DWR and FERC's Settlement Agreement

Although the FPA does not *categorically* preempt CEQA, that does not mean that *no* applications of CEQA are preempted. To the contrary, CEQA—in this instance—cannot be used to challenge the terms of the settlement agreement.

The overriding purpose of the FPA is to facilitate the development of the nation's hydropower resources by centralizing regulatory authority in the federal government to remove obstacles posed by state regulation. Therefore, a CEQA challenge to the terms of the agreement would raise preemption concerns to the extent the action would interfere with the federal process prescribed by the ALP or with FERC's jurisdiction over those proceedings. Were the Court to enjoin DWR from executing the terms of the agreement, the injunction would stand as a direct obstacle to accomplishing Congress' objective of vesting exclusive licensing authority in FERC.

The FPA Does Not, However, Preempt CEQA Review of DWR's EIR

While the Court of Appeal correctly held the FPA preempted the Counties' challenge to the environmental sufficiency of the *settlement agreement*, the appellate court erred in also finding the FPA preempted the Counties' CEQA challenge to the environmental sufficiency of the *EIR*.

Here, the EIR explained that the project subject to CEQA was the implementation of the settlement agreement. It therefore analyzed the environmental impact of the settlement agreement, as well as the alternative FERC identified in the related EIS. At this stage, review of DWR's EIR would not interfere with FERC's jurisdiction or its exclusive licensing authority. Federal law expressly allows applicants to amend their license application or seek reconsideration once FERC has issued a license. There is no federal law that limits an applicant's ability to analyze its options or the proposed terms of the license before doing so. Accordingly, DWR can undertake CEQA review, including permitting challenges to the EIR it prepares as part of that review, in order to assess its options going forward. Nothing about DWR's use of CEQA is incompatible with the FPA or FERC's authority.

Moreover, any preemption concerns related to DWR's ability to adopt additional mitigation measures in the EIR are premature. At this stage, the Counties challenge only the sufficiency of the EIR. They do not ask the Court to impose or enforce any mitigation measures, much less any that are contrary to federal authority. Therefore, a CEQA challenge to DWR's EIR is not inherently impermissible, nor is it clear that any mitigation measures will conflict with the terms of the license that FERC ultimately issues. If anything, federal law provides avenues for DWR to employ the mitigation measures identified in the EIR. If FERC concludes those measures interfere with the agency's federal authority, it has the discretion to dictate the scope and extent of those measures in the license it issues.

For these reasons, the majority affirmed the Third District Court of Appeal's ruling that the Counties could not challenge the environmental sufficiency of the settlement agreement or seek to unwind it, for doing so would pose an unnecessary obstacle to the exclusive authority Congress granted to FERC. That rationale does not, however, extend to the Counties' challenge to the environmental sufficiency of the EIR, insofar as a compliant EIR can still inform the state agency concerning actions that do not encroach on FERC's jurisdiction. Nothing precludes courts from considering a challenge to the sufficiency of an EIR in these circumstances and ordering the agency, such as DWR, to reconsider its analysis.

The Concurring and Dissenting Opinion

The Chief Justice of the Court, who also authored the *Friends of the Eel River* opinion, concurred, and dissented. The Chief Justice agreed that any CEQA challenge to FERC's licensing process, including the settlement agreement, was preempted. The Chief Justice disagreed, however, that broader CEQA challenges were not similarly preempted.

The dissenting opinion reasoned that, in addition to "field" and "conflict" preemption, state law that presents an obstacle to the purposes and objectives of federal law would be similarly preempted. Here, CEQA presents an obstacle to the FPA given standing federal precedent and the statute's "savings clause." The FPA's licensing process notably includes "CEQA-equivalents" via the ALP and NEPA, but does not contemplate the delays created by state court review of CEQA litigation.

Moreover, CEQA is subject to "field" preemption because CEQA does not involve state regulation of water rights. While federal FPA preemption cases addressed state-operated projects, the concept of "field" preemption is broad enough preempt all state regulation, regardless of who the operator is.

With respect to the *Friends of the Eel River* decision, the dissent explained that the opinion portrayed an example of "self-governance" when it held CEQA was exempt from ICCTA preemption. Because the ICCTA sought to deregulate railroads, and thus allow greater "self-governance" by railroad operators, the state's voluntary compliance with CEQA was not preempted. In contrast here, the FPA's purpose and objectives is to vest exclusive regulation of hydroelectric facilities to FERC and to exclude all state regulation, with the exception of water rights. Unlike the ICCTA, the language of the FPA made it "unmistakably clear" that *all* state regulation of hydroelectricity facilities (except regulation of water rights) is preempted.

Finally, the dissent noted that the majority's "partial preemption" determination was unworkable. Finding DWR's CEQA compliance deficient would

still not impact FERC's decision to issue a license. Instead, forcing DWR to perform additional analyses, or consider additional mitigation or alternatives, would be an impractical paper-generating exercise. As the majority acknowledged, FERC retains complete discretion to deny or alter the terms of a license, regardless of whether those changes are necessary to comply with CEQA. Therefore, requiring CEQA compliance would merely be redundant given the environmental studies FERC performed pursuant to NEPA.

Post-Script

On August 24, 2022, the Supreme Court modified its opinion following a letter signed by numerous CEQA practitioners, which asked the court to correct an erroneous statement in its opinion about the topics an EIR is required to discuss. The Court's opinion previously stated that an EIR was required to discuss the "economic and social effects of [a] project." Following the practitioners' letter, the Court corrected the opinion to remove this phrase from its list of mandatory EIR discussions, but noted that an EIR may—but is not generally required to—discuss such topics.

Conclusion and Implications

The Supreme Court's long-awaited, but divided decision, clarifies the scope of CEQA and its concurrent relationship to federal environmental statutes. Here, the Court demonstrated that federal preemption must be explicit. Absent unmistakably clear language from Congress, federal statutes should not interfere with a state government's right to self-govern—particularly in matters concerning environmental protection. However, the scope of state regulation is not unlimited. Where such regulation would interfere with jurisdiction plainly vested in federal agencies, a state statute cannot serve as an obstacle thereto.

The Supreme Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S258574.PDF.

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LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL WOULD REQUIRE GROUNDWATER SUSTAINABILITY AGENCY INVOLVEMENT IN LOCAL AGENCY WELL APPROVAL PROCESS

On March 28, 2022, Governor Gavin Newsom signed Executive Order N-7-22, prescribing emergency actions to address California's ongoing drought conditions. Among other things, N-7-22 prohibits cities, counties, and other public agencies from approving the construction or alteration of a groundwater well that is subject to the Sustainable Groundwater Management Act (SGMA) (Wat. Code, § 10720 *et seq.*) without written verification from their local Groundwater Sustainability Agency (GSA) that extraction from the proposed well would not be inconsistent with the basin's Groundwater Sustainability Plan (GSP). Citing a need for longer-term protection of communities that depend on groundwater, Assembly Bill (AB) 2201 would make the GSA verification process for new well applications permanent, require each well applicant to supply an engineer's report on the risk of interference with other wells, and create a 30-day public comment period before an application can be approved.

Background

In 1968, the California Department of Water Resources (DWR) adopted statewide minimum technical standards for the construction, alteration, and removal of groundwater wells in Bulletin 74 (last updated in 1991), to protect against contamination of nearby water resources. Since then, counties, cities, and other local permitting authorities have frequently approved well applications upon a ministerial finding of compliance with Bulletin 74's construction standards, without analyzing the impact extractions from the proposed wells may have on groundwater levels or other users within the basin.

When the Legislature enacted SGMA in 2014, it called for the creation of local GSAs to oversee and regulate groundwater extraction through the development and implementation of GSPs, as a means to improve statewide groundwater sustainability and avoid undesirable results such as overdraft, seawater intrusion, and land subsidence. GSPs are required for all medium- and high-priority basins in California, which account for approximately 96 percent of the state's groundwater use and about 88 percent of the population served by groundwater. A GSA has the authority to regulate various aspects of groundwater extraction within its jurisdiction, including certain requirements on new groundwater wells. (Water Code, § 10726.4(a)(1).) However, the approval of construction and modification of wells has remained within the existing purview of counties and other permitting authorities. (Wat. Code, § 10726.4(b).)

Under the Governor's Executive Order, a local permitting authority may not approve an application to construct or alter a groundwater well before obtaining written verification from the local GSA that extraction from the proposed well would not be inconsistent with the basin's GSP and would not decrease the likelihood of achieving identified sustainability goals, for as long as the drought state of emergency remains in place. (Executive Order N-7-22, ¶ 9(a).) The permitting authority must separately find that extraction from the well would not interfere with existing wells or cause subsidence that would damage nearby infrastructure. (*Id.* at subd.(b).)

Assembly Bill 2201

AB 2201 seeks to extend the permitting provisions of the Executive Order indefinitely by amending SGMA to require that every well application be forwarded to the GSA for review and written verification before a well permit is issued. When it was introduced, AB 2201 also mandated that every well permit application be supplemented with a written report by a licensed professional that "concludes that the extraction by the proposed well is not likely to interfere" with nearby wells or cause damaging subsidence. That provision has been revised in the course of legislative committee amendments so that the report need only "indicate" that well pumping is unlikely to

cause a substantial water level decline in a localized area. Lastly, the permitting agency must post the well application on its internet website for at least 30 days and consider public comments before it can issue a permit.

Similar to Executive Order N-7-22, AB 2201 provides exceptions for wells that provide less than two acre-feet of water annually for domestic use, or for wells used by a public water supply system or state small water system. AB 2201 would also not apply to permits for wells within adjudicated basins, which are generally excluded from SGMA requirements.

Conclusion and Implications

Several months after the issuance of Executive Order N-7-22, many local permitting authorities and GSAs are still in the process of developing and implementing procedures and funding mechanisms for consistency verification of well applications. While AB 2201 partially mirrors the current requirements of the Executive Order, its applicability beyond the current drought emergency would be a significant change to well permitting in California. Supporters argue the bill is necessary to link SGMA's statewide sustainability concepts to local approvals, while others warn that the public comment process and potential for triggering review under the California Environmental Quality Act could result in infeasible costs and delays.

The text and current status of AB 2201 are online available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2201. (Austin C. Cho, Meredith Nikkel)

Editor's Note: As this article went to press, the fate of AB 2201 was in question.

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES PUBLIC COMMENT PERIOD OPENS FOR RESUBMITTED GROUNDWATER SUSTAINABILITY PLANS DEEMED INCOMPLETE

In January 2022, the California Department of Water Resources (DWR) completed its review of the first wave of Groundwater Sustainability Plans (GSP) submitted by local Groundwater Sustainability Agencies (GSAs). Under the Sustainable Groundwater Management Act (SGMA), DWR is required to evaluate whether each GSP substantially complies with that law and the DWR GSP emergency regulations to achieve the GSP's sustainability goal for the basin. DWR deemed nearly all submitted GSPs to be incomplete and requiring immediate corrections. Those GSAs were required to submit revised GSPs to DWR by July 2022. The revised GSPs are now available for review and public comment, prior to DWR making final determinations of GSP adequacy and completeness.

Background

GSPs deemed "incomplete" were required to be corrected and resubmitted to DWR within 180 days. In late July 2022, eight GSPs were resubmitted for review. The 60-day public comment period for resubmitted GSPs ends September 30, 2022. Once DWR reviews the resubmitted GSPs, it will issue final determinations for each GSP finding them either "complete" or "inadequate." If a GSP receives an "inadequate" determination, the California State Water Resources Control Board (SWRCB) may intervene and impose an interim plan to directly manage the basin, including imposing substantial fees.

Incomplete Determinations

The summary below identifies the eight basins that received an incomplete designation and summarizes DWR's primary basis for that determination:

•Eastern San Joaquin
Insufficiently defined sustainable management criteria ("SMC") for the chronic lowering of groundwater levels.
Insufficient information to support the use of the chronic lowering of groundwater level SMCs and representative monitoring network as a proxy for land subsidence.

•Merced
Insufficient justification for identifying undesirable results for chronic lowering of groundwater levels, subsidence, and depletion of interconnected surface waters only occurring in consecutive non-dry water year types.
Insufficiently defined SMC for chronic lowering of groundwater levels.
Insufficiently defined SMC for land subsidence.

•Chowchilla
Insufficiently defined SMC
Insufficiently demonstrated that interconnected surface water or undesirable results related to depletions of interconnected surface water are not present and are not likely to occur in the Subbasin.

•Kings
Insufficient SMC for chronic lowering of groundwater levels.
Insufficient minimum thresholds and measurable objectives for land subsidence.
Inconsistently identified interconnected surface water systems, and insufficiently identified the location, quantity, and timing of depletions of those systems due to groundwater use.
Insufficiently defined SMC for the depletions of interconnected surface water.
Insufficient information to support the selection of degraded water quality SMC.

•Kaweah
Insufficiently defined SMC for chronic lowering of groundwater levels.
Insufficiently defined SMC, including undesirable results, minimum thresholds, and measurable

objectives, for land subsidence.
Insufficiently and inconsistently characterized interconnected surface water and insufficiently defined SMC for the depletion of those interconnected surface waters.

•Tulare Lake
Insufficiently defined undesirable results or SMC for groundwater levels.
Insufficiently defined undesirable results or SMC for subsidence.
Insufficiently identified SMC for degraded water quality.

•Tule
Insufficiently defined undesirable results or unsatisfactory minimum thresholds and measurable objectives for groundwater levels
Insufficiently defined undesirable results or unsatisfactory minimum thresholds and measurable objectives for land subsidence.
Insufficient information to justify the proposed SMC for degraded water quality.

•Kern County
Inconsistent undesirable results for the entire basin.
Unsatisfactory SMC for the basin's chronic lowering of groundwater levels.
Unsatisfactory land subsidence SMC.

Trends

As described above, many of the deficiencies centered on a failure to sufficiently identify, define and justify sustainable management criteria. SGMA allows GSPs to identify data gaps and identify a plan to fill them. However, the establishment of SMCs is considered foundational to defining and managing local groundwater basins. Resubmitted GSPs are required to address the SMC issues and other deficiencies, which could result in the introduction of new or different GSA projects and management actions.

Public Comment

The revised GSPs are now posted on the DWR SGMA Portal for public review and comment. While DWR will not respond to public comments directly, it will consider those comments during its evaluation of the resubmitted GSPs. Public comments are submitted via the SGMA portal at https://sgma.water.ca.gov/portal/gsp/all. A SGMA Portal account is not required to submit public comments.

Conclusion and Implications

To date, the Department of Water Resources has only deemed a handful of GSPs complete: Santa Cruz Mid-County, North Yuba, South Yuba, Indian Wells Valley, 180/400 Foot Aquifer, Oxnard, Pleasant Valley, and Las Posas. Even for most of those GSPs deemed complete, DWR identified important issues to be addressed in the GSP five-year updates, or sooner. DWR's timeline to review the revised GSPs and make its final determinations is not defined by SGMA, and DWR has not indicated a projected timeframe. SGMA does, however, authorize GSAs to implement their GSPs pending DWR review, which can complicate basin management in basins where significant or controversial projects and management actions are proposed.
(Byrin Romney, Derek Hoffman)

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 fourteen 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.)

WASHINGTON STATE DEPARTMENT OF ECOLOGY BEGINS RULEMAKING FOR THE PASCO BASIN

The U.S. Bureau of Reclamation's (Bureau) Columbia Basin Project (CBP) extends from Grand Coulee Dam to the confluence of the Snake and Columbia Rivers and includes portions of Lincoln, Adams, Grant, and Franklin Counties in Washington State. The CBP delivers water from the Columbia River to about 680,000 acres on the Columbia Plateau through a large complex of canals, reservoirs, pipes, drains, and wasteways. [Bloodworth, Gina; James White (2008). "The Columbia Basin Project: Seventy-Five Years Later." Yearbook of the Association of Pacific Coast Geographers. 70 (Annual 2008): 96–111. doi:10.1353/pcg.0.0006.] The CBP began in 1933 with the allocation of funds for Grand Coulee Dam and was authorized by the United States Congress in 1943; when finished, Grand Coulee was the world's largest dam, and today CBP remains the largest water reclamation project in the United States. ["Project details - Columbia Basin Project." United States Bureau of Reclamation. http://www.usbr.gov/projects/Project.jsp?proj_Name=Columbia%20Basin%20Project/ August 23, 2022.]

The CBP includes over 300 miles of main surface water canals, 2,000 miles of laterals, and 3,500 miles of wasteways and drains. CBP provides water to landowners through its contracts with the Quincy Columbia Basin Irrigation District, the East Columbia Basin Irrigation District, and the South Columbia Basin Irrigation District. [Columbia Basin Development League at: www.cbdl.org/about/our-partners/irrigation-districts/ Visited 23 August 2022.]

The Bureau groundwater (water from CBP activities), while managed in coordination with the Washington State Department of Ecology (Ecology), remains a property interest of the Bureau. [Straub, Katlyn. Columbia Basin Development League. Pasco Basin Groundwater Issue Moves Ahead Following 2021 Legislative Session.] In response to the increase

in groundwater from irrigation use return flows, in 1967, Ecology adopted an interim management rule for groundwater within the CBP. Chapter 508-14 WAC. The rule was intended to be an interim policy for managing the groundwater within the CBP until Ecology adopted specific management areas.

Background

In 2002, the Washington State Legislature provided Ecology with the authority to enter into agreements with the United States relating to the allocation of groundwater within the CBP. RCW 89.12.170. An agreement between the Bureau and Ecology must be consistent with the intent of the CBP, federal and state laws. Ecology can only issue a new groundwater use authorization within the CBP if it determines that the new use will not impair existing rights, project operations, or harm the public interest. Any new groundwater use authorized by Ecology under the Ecology-Reclamation agreements require the user to also obtain a license or contract with the Bureau. Ecology and the Bureau have worked together to address water resource issues in parts of the CBP. Specifically, in the Quincy Groundwater subarea (Chapter 173-124 WAC, Chapter 173-134A WAC) and Odessa Groundwater Subarea (Chapter 173-128A WAC, Chapter 173-130A WAC).

The Pasco Basin is located within the Columbia River Plateau of Southeastern Washington. Although groundwater withdrawals have increased since the 1950s, surface-water irrigation systems supply most of the agricultural water demand in the Pasco Basin. [Hydrogeologic Assessment Report City of Pasco Process Wastewater Reuse Facility. April 2018.] Irrigation return flow and canal leakage from the CBP's delivery of diverted water has resulted in a significant increase in artificial groundwater in the Pasco Basin. This increase in groundwater causes various problems, such as landslides, septic system failures, and loss of agricultural lands because of ponding. [Bauer, H.H., and A.J. Hansen. 2000. Hydrology of the Columbia Plateau Regional Aquifer System, Washington, Oregon, and Idaho. U.S. Geological Survey Water Resources Investigations Report 96-4106.] In 2016, the USGS published a study whereby it estimated the volume of groundwater in the Pasco Basin Subarea increased by 6.8-million acre-feet since the start of the CBP. [Heywood, C.E., Kahle, S.C., Olsen, T.D., Patterson, J.D., and Burns, Erick, 2016, Simulation of groundwater storage changes in the eastern Pasco Basin, Washington: U.S. Geological Survey Scientific Investigations Report 2016–5026, 44 p., 1 pl., http://dx.doi.org/10.3133/sir20165026]

Substitute Senate Bill 5230

In May 2021, the Washington Legislature passed Substitute Senate Bill 5230 (SSB 5230) amending RCW 89.12.170 to provide additional clarification of Ecology's authority to enter into agreements with the United States to manage groundwater resources. Under SSB 5230, Ecology is authorized to undertake a multi-step approach to establishing a groundwater rule for the Pasco Basin. Before entering into an agreement with the Bureau, Ecology shall establish a groundwater area or subarea under RCW 90.44.130. SSB 5230 states that:

> Agreements for the allocation of groundwater that exist as a result of the Columbia Basin project fulfill the requirements of RCW 90.44.130 for determinations of the availability of public groundwater. Sec. 1.

Conclusion and Implications

On July 12, 2022, Ecology issued a CR-101 Preproposal Statement of Inquiry announcing its plan to prepare a new rule for the Pasco Subbasin. This is Ecology's first step in the public process for developing an administrative rule. RCW 34.05.310. The new rule, under Chapter 173-135 WAC will repeal the existing interim management rule, Chapter 508-14 WAC, and develop a framework for administration of groundwater in the basin. Ecology is now working to define the Pasco Basin groundwater area or subarea. The Bureau and Ecology are also developing a framework for managing and authorizing groundwater uses in the Pasco Basin. The Pasco Groundwater Rule is expected to be completed and effective in late 2025. [Dept. of Ecology. New efforts underway to improve groundwater management in the Paco Basin. ecology.wa.gov/About-us/Who-we-are/News/2022/July-13-Pasco-Basin-groundwater-rulemaking Visited 8/24/202.] Completion of the rule will help address uncertainty for current and future groundwater uses in the Pasco Basin.
(Jessica Kuchan)

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

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 perfecting 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)

ENVIRONMENTAL ORGANIZATIONS FILE LAWSUIT CHALLENGING THE NATIONAL MARINE FISHERIES SERVICE'S APPROVALS OF ENHANCEMENT OF SURVIVAL PERMITS FOR SHASTA RIVER LANDOWNERS

On June 15, 2022, the Environmental Protection Information Center and Friends of Shasta River (collectively: plaintiffs) filed a complaint alleging that the National Marine Fisheries Service (NMFS) unlawfully issued four categories of documents related to the Shasta River and the Southern Oregon and Northern California Coast (SONCC) coho salmon:

> (1) 14 Enhancement of Survival Permits (ESPs); (2) a Biological Opinion; (3) an incidental take statement; and (3) an Environmental Assessment. (*Environmental Protection Information Ctr., et al. v. van Atta, et al.*, Case No. 3:22-cv-03520-JSC, N.D. Cal. [complaint].)

In the documents, NMFS analyzed the issuance of the ESPs, which allow for incidental take of the SONCC coho salmon during specified conservation and agricultural activities. NMFS concluded that the actions would not jeopardize the species or adversely impact its habitat. Plaintiffs disagree.

Background

Shasta River flows for 58 miles in Siskiyou County, California, before it meets the Klamath River. The Shasta River Basin is spawning ground for the SONCC coho salmon. The SONCC coho salmon are federally-protected as threatened with extinction under the Endangered Species Act (ESA). The

SONCC coho salmon require sufficient cold water to support spawning and passage back to the ocean. The agricultural activities of landowners on the Shasta River involve diversion of water that contributes to the SONCC coho salmon habitat.

Under Section 10 of the ESA, NMFS may issue an ESP to non-federal landowners who participate in voluntary agreements to take actions to benefit species and in exchange receive assurances that the landowners will not be subject to additional regulatory restrictions as a result of their conservation actions. NMFS may issue such permits only after finding that each permit was applied for in good faith, that granting the permit would not be to the disadvantage of the listed species, that the proposed activities would benefit the recovery or the enhancement of survival of the species, and that the terms and conditions of the permits are consistent with the purposes and policy set forth in the ESA. (ESA § 10(a)(1)(A); 50 C.F.R. § 222.308.)

In 2019, NOAA proposed a Template Safe Harbor Agreement (Agreement) and Site Plan Agreements for 14 landowners in the Shasta Valley. The Agreement:

> . . .establishes the general requirements for [NMFS] . . . to issue [ESPs] to non-federal landowners in the Shasta River Basin.

The Agreement allows the recipients of the ESPs to incidentally take listed species via land and water management activities meant to conserve the SONCC coho salmon, enhance their survival, and assist in their recovery.

On July 28, 2020, NMFS initiated intra-agency consultation to assess the potential effects of entering into the Agreement and Site Plan Agreements, and issuing the ESPs. NMFS issued a Memorandum, which included a Biological Opinion and an Incidental Take Assessment evaluating those effects. The Biological Opinion analyses of critical habitat include in the baseline current diversions and inputs. In stream flow, for example, the baseline includes the operation of the Dwinnell Dam and diversions and spring inputs. The Biological Opinion defines the relevant action area as consisting of:

> . . .[t]he Enrolled Properties . . . adjacent to the Shasta River, Parks Creek, or Big Springs Creek, and primarily managed for agricultural production and rural residences.

The Memorandum found that the proposed actions would neither jeopardize the SONCC coho salmon nor result in adverse impacts to their habitat.

Similarly, in its Environmental Assessment, NMFS reviewed a no action alternative to issuing the ESPs. NMFS concluded that issuing the ESPs would:

> . . .protect and enhance aquatic and riparian habitat through implementation of [the Agreement's Beneficial Management Activities], including barrier removals, instream flow enhancement strategies, and physical habitat enhancements for the conservation of the SONCC coho salmon in the Covered Area.

Therefore, NMFS made a finding of no significant impact for approval of the ESPs.

On August 10, 2021, NMFS issued the 14 ESPs, each with 20-year terms, subject to the conditions of the Agreement, NOAA's Safe Harbor Policy, and the Permittees' relevant Site Plan Agreements. The ESPs exempted the Permittees' activities from the "take" provisions of Section 9 of the ESA, including the "routine agricultural activities."

On June 15, 2022, plaintiffs sued NMFS and other federal defendants (Federal Defendants) in the U.S. District Court, San Francisco Division of the Northern District of California alleging violations of the ESA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).

The Claims

In the complaint, plaintiffs argue that the Biological Opinion is unlawful under the ESA for multiple reasons: (1) the environmental baseline improperly "includes the permittees' existing and ongoing water diversions and deliveries"; (2) the action area is improperly limited to the Shasta River Basin's area "at the farthest downstream portion of the "properties"; (3) the Biological Opinion does not use the best available science related to, among other matters, river flows; (4) the Biological Opinion relies on improper and uncertain mitigation measures to make a no-jeopardy determination; and (5) the Biological Opinion incorrectly—as a factual and a legal mat-

ter—concludes that the routine agricultural activities will not jeopardize the continued existence of the SONCC coho salmon, or destroy or adversely modify their habitat. (Complaint at ¶¶ 113-118 .)

Plaintiffs also argue that NMFS violated NEPA for a number of reasons. First, plaintiffs assert that NMFS' Environmental Assessment "fails to include 'high quality' information and '[a]ccurate scientific analysis' as required by NEPA[,] 40 C.F.R. § 15001, subd. (b)," and fails to take the required "hard look" at the effects of NMFS' approvals of the landowner activities. (Complaint at ¶ 125.) Plaintiffs also contend that NMFS violated NEPA by not analyzing an alternative involving issuance of an incidental take permit instead of an ESP and by preparing a "Finding of No Significant Impact." (*Id.* at ¶¶ 125, 126.) Finally, plaintiffs argue that NMFS' approvals are arbitrary and capricious and an abuse of discretion in violation of the APA, 5 U.S.C. §§ 704, 706, subd. (2)(A).

Conclusion and Implications

Plaintiffs request rescission of the Biological Opinion and the Environmental Assessment, and ask the court to require NMFS to prepare an adequate environmental impact statement under NEPA. It remains to be seen how the Federal Defendants will respond to the complaint as no responsive pleading had been filed as of August 25, 2022.
(Tiffanie A. Ellis, Meredith Nikkel)

JUDICIAL DEVELOPMENTS

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)

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 inspec-

tions 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 reversed the 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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