Volume 17, Number 9
November 2022

EASTERN WATER LAW™

& POLICY REPORTER

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

Publisher's Note:

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

WWW.ARGENTCO.COM

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

EWL

WATER NEWS

FEDERAL DRAFT WATER INFRASTRUCTURE BILL INTRODUCED WHICH AIMS TO IMPROVE LONG-TERM WATER SUPPLY AND REGULATORY RELIABILITY IN CALIFORNIA

On September 29, U.S. Representative David Valadao (CA-21) introduced House Resolution (HR) 9084 that would address funding and regulation of California's water storage infrastructure. Titled the Working to Advance Tangible and Effective Reforms (WATER) for California Act, HR 9084 is cosponsored by the entire California Republican delegation.

Background

The proposed legislation arrives amidst a historic drought roiling California. In a statement, Rep. Valadao introduced the bill in order to provide "water to the farmers, businesses, and rural communities" in the Central Valley, the state's agricultural hub, which Rep. Valadao represents [https://valadao.house.gov/news/documentsingle.aspx?DocumentID=446]. *See:* Faith Mabry, *Congressman Valadao Introduces Sweeping California Water Legislation*, Office of U.S. Congressman David G. Valadao (Sept. 29, 2022) [https://valadao/house.gov/news/documentsingle.aspx?DocumentID=446].

House Resolution 9084

The proposed legislation has three different areas of focus: operations, infrastructure, and allocations.

This bill's proposed changes to operations would require the management and long-term operations plans of the Central Valley Project (CVP) and State Water Project (SWP) to be consistent with the 2019 Biological Opinions (BiOps). (HR 9084, 117th Cong. § 104 (2022).) Issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, the 2019 BiOps determined that increased water diversions from the Bay-Delta would not jeopardize threatened or endangered species under the Endangered Species Act [https://wwd.ca.gov/wp-content/uploads/2021/05/about-the-2019-biological-opinions.pdf] and *see: About the 2019 Biological* Opinions, Westlands Water District (May, 2021), https://wwd.ca.gov/wp-content/uploads/2021/05/about-the-2019-biological-opinions.pdf.

If passed, provisions of the new bill would halt the current administration's attempt to revisit the findings of the 2019 BiOps following criticism from environmental groups [https://www.nrdc.org/experts/doug-obegi/trumps-bay-delta-biops-are-plan-extinction].

Regarding infrastructure, HR 9084 would make available funding to advance several water storage projects, including the Shasta Dam and Reservoir Enlargement Project. (HR 9084 at § 301.)

The bill would also require the Commissioner of the Bureau of Reclamation to develop a "water deficit report" that would include a list of infrastructure projects or actions to reduce projected water supply shortages. (*Id.*) Moreover, this bill would amend the 2018 Water Infrastructure Improvements for The Nation (WIIN) Act regarding eligible funding recipients. Current law permits only a state or public agency to receive federal funding for certain water-storage projects. (S 612, 114th Cong. § 4007 (2016).) This bill would expand the types of eligible entities to allow "any stakeholder" to receive federal funding. (HR 9084 at § 304.)

Lastly, the proposed bill addresses CVP water allocations. The bill aims to increase the water quantity that CVP stakeholders receive, because, as the statement from Rep. Valadao notes, the "South-of-Delta agricultural repayment and water service contractors have received zero percent of their allocation" for the past two years. The bill ties the minimum water quantity allocations of the CVP's agricultural water service contractors to a percentage of the contracted amount, with a majority of the provisions requiring "100 percent of the contract quantity" of water allocations to be provided. (HR\ 9084 at § 202.)

Conclusion and Implications

House Resolution 9084 is before the House Committee on Natural Resources. If passed, the bill could cement the substantial increases in the levels of water

diverted in the Bay-Delta initially authorized by the 2019 BiOps. Moreover, the bill would expand the list of eligible applicants for federal funding for certain water storage projects as well as generate additional data and administrative actions to increase California's water storage. Finally, the proposed legislation would protect the contractual expectations of CVP stakeholders from the fluctuating water allocations caused by California's historic drought. To track the status and text of the bill, *see:* https://valadao.house.gov/uploadedfiles/water_for_california_act_valada_044_xml.pdf.
(Miles Krieger, Steve Anderson)

NEWS FROM THE WEST

In this month's News from the West we first focus on a decision out of the Colorado Court of Appeals denying a city a permit to construct an 80-mile domestic water pipeline. The Court of Appeals found that the County Board that denied the permit acted within its broad authority under the state's "1041 review process." We also report on the impact on ongoing drought in the West in form a study by California's largest water "middleman" quasi-agency, the Metropolitan Water District of Southern California, which predicts a deficit of water for its constituent water providers form both the Colorado River and California's State Water Project.

Colorado Court of Appeals Upholds Larimer County Denial of Thornton Pipeline Project

City of Thornton v. Board of County Commissioners of Larimer County, Case No. 21CA0467 (Colo.App. Sept 1, 2022).

On September 1, 2022, the Colorado Court of Appeals upheld the Larimer County Board of County Commissioners' (BOCC) decision denying the City of Thornton a permit to construct an 80-mile domestic water pipeline. Although the Court of Appeals found that the BOCC exceeded its regulatory powers in several respects, it nevertheless affirmed the BOCC's ruling. This decision highlights the scope of Colorado counties' regulatory powers under the 1041 review process and confirms counties' wide-ranging authority to permit or deny large-scale domestic water infrastructure projects within their boundaries.

Background and Procedural History

A comprehensive background of Thornton's proposed water pipeline project previously appeared in the October 2021 edition of Western Water Law and Policy Reporter. *See, Colorado Update of Physical Water Transfers: Thornton Pipeline Project Moves Forward in Weld County, But Remains Stalled in Larimer County*, 25 W. Water L. & P'lcy Rptr. 303, 303-04 (Oct. 2021). To briefly recap, Thornton is a large suburb north of Denver, currently home to 140,000 residents. Thornton owns approximately 14,000 acre-feet per year of water rights decreed to divert from the Cache La Poudre River north of Fort Collins, Colorado.

From its diversion points, Thornton plans to construct an 80-mile long, 48-inch domestic water pipeline (the Thornton Water Project or TWP) to deliver the water. The proposed pipeline will cross Adams, Larimer, and Weld Counties and has faced significant opposition from local governments and special interest groups.

The Larimer County BOCC rejected Thornton's application in 2019 under its 1041 review powers. Briefly, the state's 1041 review process originated in 1974 when the Colorado General Assembly enacted House Bill 1041, allowing counties to develop "1041 regulations" to oversee various developmental activities. To trigger a 1041 review, a proposed project must involve "activities of state interest." Relevant here, one example of an activity of state interest includes site selection and construction of major new domestic water systems. Such projects then must align with the county's stated development and environmental goals to qualify for a permit. In this case, the BOCC's review focused on twelve criteria codified in the Larimer County Land Use Code to evaluate 1041 projects.

After the BOCC's denial, Thornton appealed to the Larimer County District Court under C.R.C.P. 106(a)(4), which focuses the court's review on whether the governmental body abused its discretion. The state District Court found that several of the BOCC's conclusions constituted an abuse of discre-

tion. But three concerns—criteria 1, 2, and 4—were supported by competent evidence. Because Thornton's application needed to satisfy all 12 criteria under the Larimer County 1041 review process, the court affirmed the BOCC's decision to deny the permit. Thornton then appealed to the Colorado Court of Appeals, which also focused on the BOCC's decision under C.R.C.P. 106(a)(4).

The Colorado Court of Appeals' Decision—Affirmation of Larimer County BOCC's Decision to Deny the Permit

A fatal flaw in Thornton's plan that was discussed throughout the court's opinion was Thornton's use of a "corridor approach" when siting the TWP. Under the corridor approach, Thornton designated a 500-foot-wide pathway in which it could locate the TWP. After several miles of the 500-foot corridor (principally through neighborhoods), the corridor expanded to one-quarter of a mile wide as it crossed rural Larimer County. Unfortunately for Thornton, it relied on the corridor approach at the suggestion of the Larimer County Planning Commission. However, both Thornton and the Planning Commission believed that the corridor approach would give Thornton flexibility in working with landowners and eventually locating easements for the TWP.

The Court of Appeals agreed with the BOCC's conclusion that the corridor's flexibility made the final location of the TWP uncertain and prevented the BOCC from adequately evaluating potential impacts. Thus, the Court of Appeals upheld the BOCC's denial of Thornton's application and agreed that, because the BOCC could not assess the specific impacts of the project, its finding that the proposal did not meet the 1041 standards was not an abuse of discretion.

Criterion #1: TWP Lacked Consistency with the Larimer County Master Plan

Larimer County's first criterion under a 1041-review requires a proposal to be "consistent with the master plan and applicable intergovernmental agreements affecting land use and development." The Larimer County Master Plan, like most Colorado counties' plans, is a useful, but complex document. The BOCC found that Thornton's application conflicted with six themes throughout the Master Plan. The BOCC did not specify why Thornton's plan was inconsistent with those themes but rather focused on Thornton's corridor approach. The Court of Appeals agreed and found that the lack of specificity "deprived the [BOCC] of the ability to assess the specific impacts to private property owners." *City of Thornton*, 21CA0467 at 19.

However, the court also held that the BOCC did abuse its discretion on two other matters under Criterion #1. First, the BOCC faulted Thornton for failing to analyze the "cumulative impacts of irrigated farmland turning to dryland" because of the TWP. The concern over "buy and dry," a process in which growing municipalities purchase senior agricultural water rights and then change the water rights for municipal use while leaving the ag land fallow, is widespread throughout Colorado. But the court held that such a consideration was beyond the BOCC's jurisdiction to regulate "siting and development" of domestic water pipelines under their 1041 review powers. More importantly, the court confirmed that:

> Colorado law prohibits such master plans from being used to 'supersede, abrogate, or otherwise impair…the right to beneficially use water pursuant to decrees.' *Id.* at 22 (quoting C.R.S. § 30-28-106(3)(a)(IV)(E)).

Because Thornton already possessed water rights decrees changing the water rights from irrigation to municipal use, the BOCC could not now consider the TWP's effects of utilizing those decreed rights in reviewing Thornton's application.

Second, the BOCC further took issue with the application because Thornton would likely have to use eminent domain to acquire rights-of-way for the TWP. According to the BOCC, eminent domain is "a process generally disfavored by landowners." *Id.* at 17. The court found this critique by the BOCC to be an abuse of discretion and cited to the Colorado Constitution Article 16, § 7, which guarantees municipalities "the right-of-way across public, private, and corporate lands…for the purpose of conveying water for domestic purposes…upon payment of just compensation." Colorado law further prohibits a local government from using its 1041 powers to "diminish the rights of owners of property as provided by the state constitution." C.R.S. § 24-65-106(1)(a). Thus, the Court of Appeals held that a county may not consider potential use of eminent domain during a 1041 review.

Criterion #2: TWP's Siting and Design Alternatives

The second criterion requires the applicant to present "reasonable siting and design alternatives" or explain why such alternatives do not exist. Again, the court generally agreed with the BOCC's finding that the corridor approach created too much ambiguity such that it prevented the BOCC from evaluating the impacts, and thus Thornton failed to provide reasonable citing alternatives. The Court of Appeals found that, because the corridors were so vague, that was sufficient to render the alternatives "unreasonable."

Similar to Criterion #1, the court found that the BOCC's analysis of Criterion #2 was in some ways too broad. During the initial review, the BOCC took issue with Thornton's failure to analyze the "Shields Street Concept." This plan, also called the Poudre River Alternative, would entail Thornton running its water through Fort Collins, and then diverting from the Poudre River at a point further downstream than initially contemplated. This option was supported by many special interest groups who would like to see more water left in the Poudre River for as long as possible. But Thornton rejected this plan because it claims this would significantly degrade the water quality and require additional treatment. The court found that requiring such an alternative exceeded the BOCC's regulatory power because it would diminish Thornton's water rights.

Criterion #4: TWP's Impacts on Natural Resources

The final criterion in the Larimer County Code analyzed by the Court of Appeals requires an applicant to provide that its proposal:

> . . .will not have a significant adverse affect [sic] on or will adequately mitigate significant adverse affects [sic] on the land or its natural resources.

The BOCC listed numerous reasons why Thornton did not meet this standard, before again falling back on the corridor issue, stating "the sheer size of the proposed 500 feet to ¼ mile wide corridor prevents the Board and private property owners from reasonably considering all impacts. This uncertainty is, in itself, a significant impact of this project."

The court agreed, finding that it did not matter whether any potential impacts would be temporary or permanent, but instead:

> . . .what matters is that the width of the corridor clouds the ability of the Board to analyze those impacts (or lack thereof). This opacity, in and of itself, is sufficient to qualify as a 'significant adverse [e]ffect. *City of Thornton*, 21CA0467 at 33.

Conclusion and Implications

This decision from the Court of Appeals highlights the difficulties certain Colorado municipal water providers face when planning, permitting and constructing large-scale domestic water projects through multiple jurisdictions. Colorado's 1041 review process generally grants counties wide latitude and discretion in their review. However, the Court of Appeals' opinion underscores that such discretion is not unlimited and a county's decisions must be strictly confined to the county's regulatory powers. A county cannot use the 1041 process to restrict rights previously vested under the Colorado Constitution or other statutory authority, such as a water right owner's ability to use their decreed water right, or to condemn a ditch or pipeline easement pursuant to the water right.

Thornton recently announced through a press release that it will not appeal this decision but will work toward "an agreed upon solution between Thornton and Larimer County." Any future piping in Larimer County will likely require a new application and 1041 approval from the Larimer County BOCC. The Court of Appeals decision made clear that Thornton must refine its pipeline plans and not rely on the corridor approach, as such a proposal is not detailed enough to survive 1041 review.

Thornton continues to construct the TWP outside Larimer County and hopes to complete the project in its entirety by 2025.
(John Sittler, Jason Groves)

Metropolitan Water District Projects 2023 Water Demands Will Exceed Available Supplies from the Colorado River and the California State Water Project

The Metropolitan Water District of Southern California (Metropolitan) supplies water to a substantial

region of southern Californians living and working in the Los Angeles and San Diego metropolitan areas. Metropolitan's 2023 water demand is projected to be approximately 1.71 million acre-feet (MAF). However, it projects supplies from the Colorado River and the California State Water Project (SWP) to be approximately 1.22 MAF, leaving a projected supply deficit of 483 thousand acre-feet (TAF) for 2023. Metropolitan is implementing conservation efforts to reduce projected demand and relying on water purchases and storage withdrawals to supplement supply.

Background

Metropolitan is responsible for supplying water to 26 public water agencies who then deliver water directly or indirectly to approximately 19 million people in southern California. Metropolitan's service territory includes areas within Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura counties. To meet the water demands of these communities, Metropolitan relies on local supplies but also primarily upon imported water from the Colorado River and the SWP. Both of these sources are now constrained by the continued, historic drought conditions in the Western States.

The Colorado River Supply

On a monthly basis, the U.S. Bureau of Reclamation (Bureau) publishes 24-Month Study Report presenting hydrological descriptions and projected operations for the Colorado River system reservoirs for the next two years. It is a key planning tool for states dependent upon Colorado River water. Based upon the data presented in the August update to the Bureau's 24-Month Study Report, the Bureau declared the first-ever level 2A shortage for the calendar year 2023. The Bureau reports indicate this means supplies delivered to Arizona, Nevada, and Mexico would be reduced by approximately 21 percent, 8 percent, and 7 percent respectively. Based upon current projections, the Bureau indicates supplies delivered to California would not be reduced. However, if drought conditions continue or worsen, supplies to California may be reduced in 2024. Metropolitan's supply from the Colorado River for 2023 is expected to be just under 1 MAF.

In June 2022, the Bureau Commissioner directed the Colorado River basin states to form a unified plan to supplement Colorado River reservoirs, such as Lake Mead and Lake Powell, with an additional 2-4 MAF in order to stabilize water levels. Though there were several meetings among the basin states, no unified plan was produced.

The State Water Project Supply

The SWP is a water storage and delivery system spanning two-thirds the length of California. It is operated by the California Department of Water Resources (DWR) and serves water to 27 million Californians and 750,000 acres of farmland. In March 2022, DWR substantially reduced SWP allocations. A portion of Metropolitan's northern-most water agencies have limited access to Colorado River water and are therefore more dependent upon SWP water.

In April of 2022, Metropolitan declared a Water Shortage Emergency for SWP dependent areas, requiring drastic water-use reductions. In June 2022, affected member agencies implemented mandatory local conservation measures. One such conservation measure is that outdoor watering is limited to one day per week. In November, if enough water is not conserved, outdoor watering could be prohibited entirely and volumetric limits may come into effect in December. The emergency water conservation programs are scheduled to continue through, at least, June 30, 2023. In addition, DWR is seeking to supplement SWP supplies by acquiring transfer supplies from users in the Central Valley. Metropolitan's supply from the SWP is expected to be about 250 TAF in 2023.

Drawing from Storage to Meet Demands

Metropolitan currently expects to end the calendar year with approximately 2.1 MAF of region-wide storage; 1.4 MAF from the Colorado River, 460 TAF from the SWP, and 290 TAF from in-region storage. At first glance, it appears there is enough stored water to satisfy the supply deficit. However, due to operational limits and expected Colorado River Drought Contingency Plan contributions, only a portion of this storage will be accessible in 2023. Metropolitan estimates that its maximum take capacity for stored water will be 410 TAF from the Colorado River, 86 TAF from the SWP, and all 290 TAF from in region storage. This adds up to 786 TAF which, from a region-wide perspective, will be sufficient to meet the current estimated supply deficit.

Conclusion and Implications

In the coming months it is expected that Metropolitan may ramp up its conservation efforts to further reduce water demands within its service territory. This is especially true for the northern-most water agencies that are dependent upon SWP water. It is also expected that DWR will look to purchase additional water supplies supplementing the SWP. (Byrin Romney, Derek Hoffman)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE PROPOSES NEW EAGLE RULE TO CREATE A GENERAL INCIDENTAL TAKE PERMIT PROCESS FOR POWER LINE INFRASTRUCTURE AND WIND-ENERGY PROJECTS

On September 30, 2022, the U.S. Fish and Wildlife Service (FWS) proposed new regulations related to the issuance of permits for eagle incidental take and eagle nest take. (*See* FWS, Permits for Incidental Take of Eagles and Eagle Nests, 87 Fed. Reg. 59,598 (Sept. 30, 2022).) The FWS' proposed rule includes the creation of a general permit option for qualifying power line infrastructure, wind-energy generation projects, and other activities that may disturb breeding bald eagles and bald eagle nests. The rule is the agency's latest attempt to revise implementation of the Bald and Golden Eagle Protection Act and increase both the efficiency and effectiveness of the incidental take permitting process while also increasing conservation efforts for eagles.

Background

The FWS is the federal agency tasked with the authority and responsibility to manage bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act). (16 U.S.C. § 668 *et seq.*) The Eagle Act prohibits the take, possession, and transportation of bald eagles and golden eagles except pursuant to federal regulations. The Eagle Act also authorizes the Department of the Interior (via FWS) to adopt regulations to allow the "taking" of eagles including when "necessary . . . for the protection of wildlife or of agricultural or other interests in any particular locality" provided that the taking is also compatible with the preservation of bald eagles and golden eagles. (16 U.S.C. § 668a.) For purposes of the Eagle Act, "take" means "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb;" and "transport" means:

> . . .ship, convey, carry, or transport by any means whatever, and deliver or receive or cause to be delivered or received for such shipment, conveyance, carriage, or transportation. (16 U.S.C. § 668c.)

The FWS established a permit process for the incidental take of eagles and eagle nests in 2009. Notably, the FWS took this action *after* bald eagles were delisted as endangered species and threatened wildlife under the federal Endangered Species Act.

In 2016, the FWS revised the permit process for the incidental take of eagles and eagle nests. Among other changes, the FWS extended the maximum tenure of permits for the incidental take of eagles from five to 30 years and imposed preconstruction monitoring requirements for wind-energy projects applying for incidental take permits.

Prior to the FWS' official publication of its latest rule, the FWS published an advance notice of proposed rulemaking to inform the public of changes the FWS was considering to help expedite the permit process for the incidental take of eagles. The FWS received almost 1,900 public comments on the advanced rulemaking. According to the FWS, many of the comments also expressed concerns with the efficiency of the current permitting process.

The 2022 Eagle Rule

The FWS' new proposed rule (2022 Eagle Rule) attempts to address some of the inefficiencies and delays associated with the current incidental take permitting process while also maintaining conservation efforts for bald eagles and golden eagles. More specifically, and consistent with the Eagle Act, the FWS has proposed new regulations authorizing take that is necessary for the protection of other interests in any particular locality. The regulations also include revised provisions for processing individual or project-specific permits and adds a general permit alternative for qualifying activities.

The FWS' general permit alternatives is intended for four main activities: (1) certain categories of bald eagle nest take (*e.g.*, emergency and health and safety); (2) certain activities that may cause bald eagle disturbance take (*e.g.*, construction and utility

line activities); (3) eagle incidental take associated with power-line infrastructure; and (4) eagle incidental take associated with certain wind-energy projects (*e.g.*, installation and operation of wind turbines in specific areas). Each general permit alternative outlines eligibility criteria and mitigation requirements to avoid, minimize and compensate for impacts to eagles. The general-permit applicants would self-identify eligibility and register with the FWS and provide the:

> . . .required application information and fees, as well as certify that they meet eligibility criteria and will implement permit conditions and reporting requirements.

The FWS' general permit rules also set forth certain conditions for power-line infrastructure and wind-energy projects. For example, general permits for power-line infrastructure will only be issued where new construction is "electrocution-safe" and there is both a reactive retrofit and proactive strategy to address high-risk poles when an eagle electrocution is discovered, and underlying applications must also consider eagle nesting, foraging, and roosting areas. Similarly, general permits for wind-energy projects must consider eagle abundance thresholds or data reflecting bald eagle and golden eagle populations and seasonal migrations or nesting habits.

Finally, it is worthwhile to point out that the FWS does not propose any changes to the current preservation standard or management objectives for bald eagle and golden eagle populations, which the FWS believes will continue to help promote conservation efforts for eagles. Indeed, FWS' rulemaking states that the current population size estimate for bald eagles for the conterminous United States is approximately 336,000. Data from 2019 estimated the population to be 316,708, which was a four-fold increase above previously published estimates for 2016. As for golden eagles, the estimated United States population is approximately 38,000, but the golden eagle take limit remains set at zero, unless there are offsets for compensatory mitigation.

The FWS will limit the general permits for incidental take to a maximum of five years, and a maximum of one year for disturbance take or nest removal. Any project that does not qualify for one of the proposed general permits would still be able to apply for a specific permit.

Conclusion and Implications

The Fish and Wildlife Service's 2022 Eagle Rule is expected to help increase efficiency and the effectiveness of the FWS' incidental take permit program under the Bald and Golden Eagle Protection Act, especially for projects related to power-line infrastructure and wind-energy projects. The FWS' current deadline to submit public comments is November 29, 2022. For more information see the Federal Register for the Rule at: https://www.federalregister.gov/documents/2022/09/30/2022-21025/permits-for-incidental-take-of-eagles-and-eagle-nests.
(Patrick Veasy, Hina Gupta)

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—Air Quality

•October 6, 2022—EPA and the Department of Justice announced a settlement with the Stony Brook Regional Sewerage Authority (SBRSA). The settlement was filed in the U.S. District Court for the District of New Jersey resolves violations of Clean Air Act and New Jersey Air Pollution Control Act regulations at SBRSA's wastewater treatment plant in Princeton, N.J. Under the proposed settlement, SBRSA will bring the facility into compliance with federal and state laws that protect clean air by reducing pollution from sewage sludge incinerators. SBRSA will also pay a $335,750 civil penalty. The State of New Jersey joined the federal government as a co-plaintiff in this case.

Civil Enforcement Actions and Settlements—Water Quality

•September 19, 2022—EPA issued Emergency Administrative Orders under the authority of the federal Safe Drinking Water Act to two mobile home parks located in the Eastern Coachella Valley on the Torres Martinez Desert Cahuilla Indians Tribe's Reservation in California. EPA discovered that the mobile home parks are serving residents drinking water with naturally occurring, elevated levels of arsenic that exceed federal standards. The Gamez Mobile Home Park and Desert Rose Mobile Home Park serve predominantly agricultural workers. The EPA emergency orders require the parks to provide safe alternative drinking water to residents, install treatment for arsenic, and comply with all federal regulatory requirements for water systems.

•September 27, 2022—EPA announced a cease-and-desist order issued to a New Strawn, Kansas, man and his excavating company directing them to cease dumping materials into wetlands adjacent to a tributary to the Neosho River. According to the order, Michael Skillman, who owns Victory Excavating LLC, placed debris into at least 3.7 acres of wetlands in violation of the federal Clean Water Act (CWA). The Agency says the illegal fill continued even after a cease-and-desist order was issued by the U.S. Army Corps of Engineers in October 2021. Skillman has a history of CWA violations, according to EPA. Last summer, he paid a $60,000 civil penalty to the federal government for the unauthorized placement of broken concrete into the Neosho River. The Compliance Order requires Skillman and Victory Excavating to remove the debris from the wetlands and submit a plan to restore the site. Failure to comply with the order could subject the parties to further enforcement, including penalties.

•October 6, 2022—EPA announced a settlement with Seaport Refining & Environmental, LLC, the owner and operator of a petroleum refinery in Redwood City, California, over claims of violations of the Clean Water Act and the Resource Conservation and Recovery Act. The refinery, which receives and processes waste fuel including gasoline, diesel and jet fuel, is located near Redwood Creek and First Slough, which flow to the San Francisco Bay and the Pacific Ocean. Seaport Refining produces approximately 2,200 pounds of hazardous waste per month. As a result of EPA's findings, the company will pay $127,192 in civil penalties and implement compliance tasks, including developing an air emission monitoring plan, submitting quarterly air emission monitoring results, and inspecting and repairing the facility's tanks.

•October 7, 2022—EPA issued an administrative order under its Clean Water Act authority to the East Chicago Sanitary District in East Chicago, Indiana, to stop an ongoing discharge of untreated wastewater

to the Grand Calumet River following the rupture of a major sewer line. The agency urges residents and visitors to the area to avoid contact with the river until further notice. On September 28, a semi-truck fell through a sinkhole and ruptured a 42-inch sewer pipe carrying raw wastewater to the East Chicago wastewater treatment plant. The incident caused raw sewage to flood the wastewater treatment plant site and Indianapolis Boulevard, which was temporarily blocked. Discharges are also flowing out of a combined sewer overflow point (located on the west side of the Cline Avenue frontage road) into the east branch of the Grand Calumet River at a rate of about 8 million gallons per day. EPA's order requires East Chicago Sanitary District (ECSD) to stop discharges of untreated sewage to the Grand Calumet River by October 11. ECSD will install bypass piping and begin repairs to the ruptured sewer pipe, which carries almost 80 percent of the system's wastewater to the treatment plant. EPA's order also requires ECSD to improve communication with the public by supplementing a public service advisory that was previously issued about the combined sewer overflow and posting results of daily sampling in the river online.

•October 11, 2022—EPA announced a settlement with the Asphalt Sales Company in Olathe, Kansas, under which the company will pay $82,798 in civil penalties and improve pollution controls to resolve alleged violations of the federal Clean Water Act. According to EPA, the company failed to adequately control stormwater runoff from its asphalt production and demolition landfill facility. EPA says these failures led to illegal discharges of pollutants into Cedar Creek.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 28, 2022—EPA announced a settlement with wholesale chemical distributor Univar Solutions USA Inc. over claims of improper management of hazardous waste at its facility in Commerce, California. The company has agreed to pay a $134,386 civil penalty. Univar is a large chemical company headquartered in Downers Grove, Illinois. Its facility in the city of Commerce engages in wholesale distribution of chemical raw materials, among other activities. The facility is classified as a large quantity generator of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). On May 6, 2021, EPA conducted an inspection at the Commerce facility as part of a national initiative focused on reducing hazardous air toxic emissions at hazardous waste facilities. Inspectors found the company violated federal RCRA regulations and California's hazardous waste air emission regulations.

•September 30, 2022—EPA announced a settlement with the Atlantic Richfield Company (AR) under which the company has agreed to complete its cleanup of the Anaconda Smelter Superfund Site (Site) in Deer Lodge County, Montana. The State of Montana, on behalf of the Department of Environmental Quality, is also a signatory to the consent decree that was filed in the U.S. District Court in Butte, Montana. Decades of copper smelting activity at the town of Anaconda polluted the soils in yards, commercial and industrial areas, pastures and open spaces throughout the 300-square-mile Anaconda Site. This pollution has in turn contributed to the contamination of creeks and other surface waters at the Site, as well as of alluvial and bedrock ground water. The closure of smelting operations in 1980 left large volumes of smelter slag, flue dust and hazardous rock tailings that have had to be secured through a variety of remediation methods. Under the settlement, AR—a subsidiary of British Petroleum—will complete numerous remedial activities that it has undertaken at the Anaconda Site pursuant to EPA administrative orders since the 1990s. Among other actions, AR will finish remediating residential yards in the towns of Anaconda and Opportunity, clean up soils in upland areas above Anaconda and eventually effect the closure of remaining slag piles at the Site. The estimated cost of the remaining Site work, including operation and maintenance activities intended to protect remediated lands over the long term, is $83.1 million. AR will pay $48 million to reimburse the EPA Superfund Program for EPA and Department of Justice response costs and will pay approximately $185,000 to the U.S. Forest Service for oversight of future remedial activities on Forest Service-administered lands at the Site.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS THAT NATIVE ALASKAN TRIBE HAS AN IMPLIED RIGHT TO FISH OFF THE TRIBE'S RESERVATION

Metlakatla Indian Community v. Dunleavy, 48 F.4th 963 (9th Cir. 2022).

In *Metlakatla Indian Community v. Dunleavy*, the United States Court of Appeals for the Ninth Circuit reversed the U.S. District Court of Alaska's order dismissing the Metlakatla Indian Community's (Community) suit against the State of Alaska for failure to state a claim. The Ninth Circuit panel found an 1891 federal law, and the U.S. Supreme Court's interpretation of that law, provides the Community with the right to fish in certain off-reservation waters, therefore the Community was not subject to Alaska's statutory "limited entry program" for regulating commercial fishing.

Background

The Ninth Circuit summarized the long history of the Community. The Community members are descendants of the Tsimshian people indigenous to the Pacific Northwest. Tsimshian fisherman historically followed fish runs along the coast and rivers of what is now British Columbia, fishing as far north as 50 miles from the Annette Islands in modern-day Alaska. In the mid-1800s, a group of Tsimshian people, joined by a missionary, "Father Duncan," established a coastal community in Metlakatla, British Columbia. There, they began a communal commercial fishing operation and established a cannery in the late 1800s. They also sought judicial recognition of their aboriginal territorial rights and attendant resource rights before the Canadian provincial court, but were denied. In response, the Metlakatlans authorized Father Duncan to travel to Washington D.C. to secure land for the Metlakatlans in what was then the Territory of Alaska.

In 1887, five Metlakatlans ventured to the Territory of Alaska in search of a new home, and selected the Annette Islands because of the islands' proximity to waters with abundant fish. Later that year, President Cleveland invited the remaining 823 Metlakatlans to join the five on the Annette Islands. The Metlakatlans established themselves on the Annette Islands, after which Congress passed the 1891 Act, recognizing the Community and establishing the Annette Islands as their reservation. After establishing the Community, the Metlakatlans continued to fish in their traditional fishing areas—both in the waters surrounding the reservation and in waters miles away—to supply a cannery that they established in 1891. Community members also relied on fishing for cultural and ceremonial practices.

In 1916, shortly before President Wilson proclaimed the waters 3,000 feet out from the Annette Islands part of the Community's reservation, non-Indians placed a fish trap 600 feet offshore. The United States sought and received an injunction to remove the trap in the Alaskan Territory District Court. The District Court found that in passing the 1891 Act, "Congress must be held to have known (what everyone else knew) that the Indians of Alaska are fisher folk and hunters and trappers, and largely, if not entirely, dependent for their livelihood upon the yield of such vocations." *U.S. v. Alaska Pac. Fisheries*, 5 Alaska 484, 486–81 (D. Alaska 1916). The U.S. Supreme Court affirmed, holding that the 1891 Act establishing the reservation granted the Community members an exclusive right to fish in the "fishing grounds" "adjacent" to the Annette Islands. *Alaska Pac. Fisheries v. U.S.*, 248 U.S. 78, at 89 (1918). The court did not, however, define the scope of these adjacent fishing grounds. The Community members continued to fish as they always had.

Fifteen years after Alaska gained statehood, Alaskans adopted a constitutional amendment that authorized Alaska to limit new entries to Alaskan commercial fisheries. Alaska instituted a "limited entry" program to regulate commercial fishing within its waters. Over time, changing conditions threatened the Community members' ability to fish. Migratory salmon routes shift, and sometimes these salmon are intercepted by state managed fisheries before they return to the communities' exclusive zone. Addi-

tionally, the Community members fish for herring, and when the herring leaves the Community's zone, Alaska's limited entry program restricts their access. The Community sued Alaska, seeking declaratory and injunctive relief against enforcement of Alaska's limited entry regulations preventing them from fishing in specific disputed areas. The U.S. District Court granted Alaska's motion to dismiss, holding that the 1891 Act did not reserve off-reservation fishing rights for the Community Members.

The Ninth Circuit's Decision

The Ninth Circuit panel reversed. Relying on the "Indian Canon of Construction" and the U.S. Supreme Court's decisions in *Winters v. United States* and *Alaskan Pacific Fisheries v. U.S.*, the court held that Congress impliedly granted the Community a non-exclusive right to fish in the disputed areas. A long line of Ninth Circuit case law provides that statutes that touch upon federal Indian law:

> . . .are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Metlakatla*, 48 F.4th at 970.

And, under *Winters*, the court will infer a right when the right supports a purpose for which the reservation was created. *Winters v. United States*, 207 U.S. 564, 574–77 (1908). Noting that the Supreme Court already determined that the 1891 Act included implied fishing rights in *Alaskan Pacific Fisheries v. U.S.*, the Ninth Circuit determined the scope of these implied rights. In doing so, the court considered the central purpose of the reservation in the light of the Community's history. The opinion discusses at length the contemporaneous historical records discussing the Metlakatlan's fishing tradition along the Pacific Northwest coastline, noting how Congress passed the 1891 Act fully expecting the Metlakatlans to continue to fish as they had "time immemorial," because "fishing was intended to satisfy the future as well as the present needs of the Community." *Metlakatla*, 48 F.4th at 967–70, 971–73 (internal citations and quotations omitted). The areas in which the Metlakatlans traditionally fished included off reservation waters, but Alaska's limited entry regulation restricted their access in certain areas. As such, the application of Alaska's limited entry regulation was incompatible with the 1891 Act, and the Ninth Circuit reversed and remanded the case to the District Court for further proceedings. *Id.* at 976.

Conclusion and Implications

The Ninth Circuit did not define the Community's non-exclusive right in geographic terms. Instead, the court's holding focused on the application of Alaska's limited entry program in specific disputed areas. The court also did note that going forward, any regulation by Alaska of off-reservation fishing by the Community must be consistent with such rights. As *Metlakatla* demonstrates, this will be a very fact-specific determination. The Ninth Circuit's opinion may be found online here: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/08/21-35185.pdf.
(Nico Chapman, Meredith Nikkel)

NINTH CIRCUIT AFFIRMS JUDGMENT FOR FISH AND WILDLIFE SERVICE BASED ON CLAIM PRECLUSION IN A CHALLENGE UNDER THE ENDANGERED SPECIES ACT

Save the Bull Trout v. Williams, ___F.4th___, Case No. 21-35480 (9th Cir. Sept. 28, 2022).

In a September 28, 2022 decision, the United States Court of Appeals for the Ninth Circuit affirmed the U.S. District Court in Montana's judgment in favor of the U.S. Fish and Wildlife Service (USFW) in a federal Endangered Species Act (ESA) action brought by plaintiff environmental groups. The court held that claim preclusion barred the claim, because plaintiffs had previously brought the same fundamental challenge in the U.S. District Court in Oregon, and the claim had been dismissed.

Statutory Background

The Endangered Species Act is a comprehensive statutory scheme intended to protect endangered and threatened species. The ESA requires the U.S. Fish and Wildlife Service to develop recovery plans for listed species within their jurisdiction. A recovery plan generally must describe management actions to achieve conservation and survival of the species, criteria for delisting species, and estimates of the time and costs required to achieve the plan's goals. The ESA contains a citizen-suit provision, which provides a private cause of action for a party seeking to enforce nondiscretionary duties established by the ESA.

Factual and Procedural Background

The Oregon Litigation

Pursuant to the ESA, USFW released the Bull Trout Recovery Plan (Plan) in 2015. The Plan focused on managing primary threats to the endangered bull trout populations across the United States. Two of the plaintiff environmental groups, Friends of the Wild Swan and Alliance for the Wild Rockies (collectively: Friends) brought suit in the District Court of Oregon to challenge the Plan under the ESA's citizen suit provision.

The Oregon District Court determined that Friends failed to state a claim for violation of a nondiscretionary duty. As a result, the court determined that it lacked jurisdiction over the citizen-suit claim. The court therefore dismissed the claim but granted Friends leave to amend. When Friends did not amend the complaint, the court entered judgment.

Friends appealed the dismissal to the Ninth Circuit, arguing for the first time that USFW had omitted required statutory elements from the Plan, constituting a failure to perform a nondiscretionary duty. The Ninth Circuit affirmed the dismissal without considering the merits of Friends' argument and noted that Friends had chosen to appeal instead of amending their complaint in the district court to include the new argument.

Friends filed a motion in the District Court under Federal Rules of Civil Procedure 60(b) and 15, seeking relief from the judgment and to amend the complaint. The court adopted the magistrate judge's recommendation to deny the motion and declined to affirm the magistrate judge's suggestion that Friends could replead their claims to survive a motion to dismiss and be heard on the merits. Friends did not appeal the court's denial of the motion to amend.

The Montana Litigation

Friends added Save the Bull Trout as a plaintiff and challenged the Plan in the U.S. District Court for Montana, again under the ESA's citizen-suit provision. USFW moved to dismiss based on claim preclusion, but the court concluded that the Oregon dismissal was not a final judgment on the merits, and thus declined USFW's motion. However, the court granted summary judgment on the merits in favor of USFW, and the plaintiffs appealed the judgment to the Ninth Circuit.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first held that the plaintiffs had standing to challenge the Plan. Because members of the plaintiff environmental groups demonstrated aesthetic, recreational, and conservation interests in bull trout, and because the ESA's procedures serve to protect those interests, the plaintiffs established that they had suffered a procedural injury caused by USFW. Additionally, the court concluded that the plaintiffs had met their burden of showing that the revisions to the Plan that they were seeking could influence USFW's bull trout conservation actions, thus redressing the plaintiffs' alleged harm.

Claim Preclusion

Contrary to the Montana District Court, the Ninth Circuit did not reach the merits of the new claims. Instead, the court held that the claim preclusion doctrine barred the plaintiffs' claim. First, the Court of Appeals explained that the litigation in both the Oregon and Montana District courts involved the same issue—whether USFW's Plan complied with the ESA. Although the plaintiffs added new claims alleging that USFW had violated a nondiscretionary duty, the court reasoned that the plaintiffs could have amended their complaint to include those claims in the Oregon litigation.

Second, the court found that the Oregon and Montana cases involved "identical parties or privies,"

because two of the three plaintiffs were parties to the Oregon litigation, and all three plaintiffs shared a common interest in wildlife and habitat conservation. Thus, the court determined that Save the Bull Trout was in privity with the plaintiffs who had been parties to the prior suit.

Finally, the court concluded that the suit in Oregon had ended with a final judgment on the merits. It explained that, for the purposes of claim preclusion, dismissal for failure to state a claim is a judgment on the merits. The court also noted that, although the plaintiffs could have amended the Oregon complaint to bring the new claims, they declined to do so and instead appealed the judgment. Thus, the Court of Appeals held that the plaintiffs were "not entitled to a do-over."

Conclusion and Implications

This opinion demonstrates that a U.S. District Court's determination that it does not have jurisdiction over a challenge brought under the ESA's citizen-suit provision due to lack of allegations of a failure to perform a nondiscretionary duty reaches the merits of the suit. In this case, determining whether the District Court had jurisdiction necessarily required consideration of the merits. Friends abandoned their suit after it was dismissed for failure to state a claim in the U.S. District of Oregon; this strategic decision ultimately prevented the plaintiffs from bringing additional related claims in the District of Montana. Thus, in affirming the district court judgment for USFW, the Ninth Circuit passed no judgment on the merits of the plaintiffs' new claims. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/21-35480.pdf.
(Bridget McDonald)

TENTH CIRCUIT REFUSES EXCLUSIVE JURISDICTION ON FERC-LICENSED PROJECT BECAUSE PETITION, INSTEAD, CHALLENGED THE CORPS' SECTION 404 PERMIT

Save the Colorado, et al. v. Spellmon, et al., ___F.4th___, Case No. 21-1155 (10th Cir. Sept. 30, 2022).

The U.S. Court of Appeals for the Tenth Circuit found on a claim-by-claim basis that conservation organizations' challenges to a municipality's application for a Section 404 permit to dredge fill material issued by the U.S. Army Corps of Engineers (Corps) and consideration by the U.S. Fish and Wildlife Service (FWS) did not inhere in the controversy of the Federal Energy Regulatory Commission's (FERC) decision granting the municipality an amended license to operate a larger dam. The court applied a narrow interpretation of the Federal Powers Act that gives appellate courts exclusive jurisdiction over FERC orders. The claims did not attack the merits of FERC's approval of an amended license. Therefore, the U.S. District Court erred in dismissing the petition for lack of subject-matter jurisdiction.

Background

The Denver Board of Water Commissioners (municipality) needed to complete two federal applications for permission to implement a project intended to boost the City of Denver's water supply: (1) an amendment to its existing license with FERC to operate an expansion of the Gross Reservoir and Dam in Boulder County, Colorado; and (2) a discharge permit from the Corps to discharge fill materials during construction. To issue the discharge permit, the Corps had to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act, and to consult with FWS. FERC cooperated with the Corps in reviewing the municipality's compliance with federal laws; FERC helped it draft an environmental impact statement and participated in consultations with the FWS regarding endangered species. The Corps issued the discharge permit.

FERC later issued an amendment to the municipality's existing license, finding that the project would not cause significant environmental damage. Meanwhile, the conservation organizations filed a petition in federal District Court, arguing the Corps violated several federal laws when it issued the discharge permit: the NEPA, the federal Clean Water Act, the federal Endangered Species Act, and the Administrative Procedure Act.

After FERC granted the municipality's license amendment, the municipality sought to dismiss the petition in District Court, arguing the appeals court had exclusive jurisdiction. Federal courts of appeal have exclusive jurisdiction to hear challenges to decisions made by FERC under 16 U.S.C. § 825*l*(b). U.S. District Courts have jurisdiction to hear challenges to decisions made by Corps. Despite the conservation organizations' framing of their petition as a challenge to a Corps-issued permit, the District Court granted the municipality's motion to dismiss, concluding that jurisdiction lay exclusive in the federal courts of appeal. The conservation organizations' appealed the dismissal.

The Tenth Circuits' Decision

On appeal, the court first considered whether the grant of exclusive jurisdiction under 16 U.S.C. § 825*l*(b) extended beyond FERC orders to any issue "inhering in the controversy" or "sufficiently related" to a FERC order. The municipality, Corps, and FWS urged the court to adopt a broad reading of the statute. They argued that because both Corps and FERC developed an environmental impact statement and because FERC weighed in on its environmental impact statement, that the analyses were intertwined and therefore subject to the jurisdictional statute.

The Court of Appeals rejected a broad application of the jurisdictional statute, reasoning that statute only restricted jurisdiction to the courts of appeal to actions that challenge FERC orders, not collateral attacks on those orders.

The court next considered whether, under the narrow reading of the jurisdictional statute, the District Court had jurisdiction to hear the conservation organizations' claims. The court's analysis proceeded on a claim-by-claim basis.

Clean Water Act Claim

Beginning with the conservation organizations' Clean Water Act claim, the court found that the conservation organizations' claims were unrelated to FERC's approval of the amended license for two reasons. First, FERC does not have the authority to review Corps permits under FERC precedent. Second, while both agencies analyzed the project under the Clean Water Act, their tasks differed. The Corps was tasked with selecting the least environmentally damaging practical alternative and properly evaluate the project's costs, whereas FERC only had to consider whether reasonable alternatives existed. The conservation organizations only challenged the Corps' tasks, which were not inherent in the controversy of considering reasonable alternatives. The court further reasoned, that even if the jurisdictional statute otherwise applied, it could not cover the claims at issue because FERC lacked authority to decide those issues.

NEPA Claim

Turning next to the conservation organizations' NEPA claim, the court noted that FERC's supplemental environmental assessment disavowed consideration of Corps' environmental analysis involving expansion of the reservoir and that the environmental issues facing FERC were narrower than the issues facing the Corps. The court noted that FERC's cooperation with the Corps and the FWS in drafting the Environmental Impact Statement was separate and apart from FERC's license amendment process. Further, FERC's decision did not incorporate the Corps' findings. The Court of Appeals again pressed the nature of the conservation organizations' claims—that they only filed claims against the Corps' permitting process—not FERC's analysis in its decision regarding the license amendment. As a result, the jurisdictional statute did not extend to the Corps' action.

Endangered Species Act Claims

When addressing the conservation organizations' Endangered Species Act claims, the court noted that FERC did not incorporate the FWS decisions into the terms of FERC's amended license. The differences between the Corps and the FWS and FERC in their application of the Endangered Species Act to the project meant that even though all agencies reviewed the project's compliance with the statute, that the

issue did not inhere in the controversy. FERC neither solicited nor adopted opinions from the other agencies on the effects of the project on an endangered species. As a result, the court of appeal concluded it lacked exclusive jurisdiction over challenges to FWS's opinions.

Issue of Exclusive Jurisdiction

Finally, the Corps and the FWS argued the petition itself invoked the court's exclusive jurisdiction, because relief would interfere with the FERC-licensed project. The court rejected the attempt to lump all of the administrative actions together because they involve the same general project. It found that on a claim-by-claim basis, the challenges to the permit did not impact FERC's decision regarding the license, even where the result of the petition might impact the municipality's FERC-licensed project.

Therefore, the U.S. District Court erred when it dismissed the petition for lack of subject-matter jurisdiction because it did not invoke the Federal Power Act's exclusive jurisdiction provision. Specifically, the petition failed to raise any issues inhering in the controversy of FERC's order regarding the municipality's license amendment because the conservation organizations' claims only challenged the Corps and FWS decisions.

Conclusion and Implications

This case clarifies that an appellate court's exclusive jurisdiction over FERC orders under the Federal Powers Act is limited to FERC decisions and issues inhering in the controversy of those decisions. A party aggrieved by a FERC order must challenge the merits of FERC's decision in its petition for relief. This case provides a helpful in-depth factual analysis of the application of an exclusive jurisdiction statute where multiple agencies and multiple analyses are involved. The Tenth Circuit's opinion is available online at: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110747304.pdf.
(Amanda Wells, Rebecca Andrews)

DISTRICT COURT IN CONNECTICUT DISMISSES THIRD PARTY SUIT FINDING STANDING ALLEGATIONS INADEQUATE IN CLIMATE ADAPTATION CASE

Conservation Law Foundation, Inc. v. Gulf Oil Limited Partnership,
___F.Supp.4th___, Case No. 3:21-CV-00932 SVN (D. Conn. Sept. 20, 2022).

On September 20, 2022 the U.S. District Court for Connecticut dismissed, without prejudice, allegations brought in a citizen suit where the plaintiff relied on future negative impacts of climate change to allege injury in fact for purposes of standing. The District Court found that nonprofit organization Conservation Law Foundation (Foundation) failed to allege injury in fact (and therefore failed to demonstrate Article III standing) when charging a Gulf Oil Limited Partnership bulk petroleum storage facility with inadequate infrastructure to weather future negative impacts of climate change. The September 2022 decision highlights a vital aspect of citizen suit standing when allegations rest on the future effects of climate change; flagging to plaintiff organizations that an injury alleged cannot merely rely on the future occurrence of major and foreseeable weather events but must particularize how those weather events would result in violations of the underlying environmental statutes.

Factual and Procedural Background

The defendant, Gulf Oil Limited Partnership (Gulf Oil), owns and operates a bulk petroleum storage terminal in New Haven, Connecticut. Tanker ships deliver oil products to the storage terminal where the products are stored in large aboveground storage tanks (ASTs). The storage terminal contains drainage systems to facilitate stormwater management and to prevent contaminant discharge into New Haven Harbor. The terminal is surrounded by berms to protect against flooding and provide additional support.

Operation of the storage terminal is subject to Connecticut Department of Energy and Environmental Protection's General Permit for Discharge of Stormwater Associated with Industrial Activity (General Permit) implemented and enforced pursuant to the federal Clean Water Act (CWA). The General Permit delineates various requirements and restrictions for stormwater discharges. Relevant in this case, the General Permit requires that dischargers implement control measures to guard against the risk of pollutant discharges in stormwater and that operations be consistent with the goals and policies of the Connecticut Coastal Management Act. The Coastal Management Act provides for consideration of:

> . . .the potential impact of a rise in sea level, coastal flooding and erosion patters on coastal development so as to minimize damage and destruction of life and property. . . .

The plaintiff is a nonprofit organization that promotes conservation and protection of public health, environment, and natural resources. The Foundation has over 5,000 members nationwide, with more than 190 members residing in Connecticut. Some of the Foundation members use the area and waters near the storage terminal (New Haven Harbor) for recreational activities and asserted concern over discharge and release of pollutants into those waters. In bringing the action against Gulf Oil, the Foundation asserted violations of the CWA and the federal Resource Conservation and Recovery Act (RCRA) because the storage terminal was not designed, maintained, modified, or operated to account for the effects of climate change and that risk of pollutant discharge is exacerbated by climate change impacts (sea level rise, increasing sea temperatures, and increasing storm severity and flooding). The Foundation alleged in its 18 counts against Gulf Oil that the risk of climate change impacts were not merely theoretical, as evidenced by flooding at the storage terminal in October 2012 when Superstorm Sandy hit New Haven. [https://www.clf.org/wp-content/uploads/2021/07/Stamped-Gulf-Complaint.pdf]

In the action, the Foundation sought injunctive relief and civil penalties against Gulf Oil. In response, Gulf Oil moved to dismiss 12 of the counts for lack of subject matter jurisdiction—solely for the plaintiff's failure to allege injury in fact under the standing doctrine.

Article III Standing

Article III of the United States Constitution provides that federal courts have jurisdiction to hear cases and controversies arising under federal law. (U.S. Const. art. 3, § 2.) A case may be dismissed for lack of subject matter jurisdiction where the federal court lacks the "constitutional power to adjudicate… such as when the plaintiff lacks constitutional standing to bring the action." (*Corlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 417 (2nd Cir. 2015).) To establish Article III standing, the plaintiff must evince (1) that they have suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the defendant caused the injury, and (3) that the injury will likely be redressed by the requested judicial relief. (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).)

The District Court's Decision

The U.S. District Court ultimately agreed with Gulf Oil that the Foundation failed to allege an injury in fact for purposes of standing in its citizen suit alleging Gulf Oil's failure to prepare its AST infrastructure for the impacts of climate change. The holding stemmed from two key findings: (1) the Foundation's arguments of imminent threat focused on harms to the environment and not harm to the Foundation's members, and (2) the Foundation's case failed to discuss how climate change impacts would result in the discharge of pollutants from Gulf Oil's storage terminal into waters the Foundation's members use and enjoy.

The District Court found that the Foundation focused predominantly on harms to the environment when the relevant showing for Article III standing is "not injury to the environment but injury to the plaintiff." Additionally, the District Court held that while the Foundation's "attempt to establish standing based on an increased risk of future harm is not without basis in law" and the "harms associated with climate change are serious and well recognized" the enhanced risk of future injury is only cognizable where the plaintiff alleges actual future exposure to that increased risk. The District Court found that the Foundation's reliance on allegations of longer-term impacts (increased frequency of storms, sea level rise, and the increased risk of flooding) over the next several decades stretched the imminence

requirement "beyond its purpose, which is to ensure that the alleged injury is not too speculative." In addition, the Foundation failed to demonstrate a link between climate change driven weather events and "how such weather events would result in the discharge of pollutants, thereby validating [the] theory of increased risk of exposure to such pollutants." The District Court ultimately held that the failure of the Foundation to relate the impending impacts of climate change to a specific injury to Foundation's members was insufficient to demonstrate standing for the plaintiffs.

Conclusion and Implications

The U.S. District Court for Connecticut's decision highlights a tension in the District Courts regarding adequacy of standing as it relates to allegations of future harm from the impacts of climate change. While the United States Supreme Court has recognized the harms associated with climate change, this recent opinion demonstrates that plaintiff's must allege more than amorphous negative impacts of climate change. Citizen suits must allege how such impacts present a real and immediate threat of harm to the plaintiff and/or the plaintiff's members—not how the impacts present a real and immediate threat of harm to the environment.
(Jaycee Dean, Darrin Gambelin)

DISTRICT COURT GRANTS MOTION FOR REMEDIES, ISSUES INJUNCTION, BUT LIMITS CIVIL PENALTIES IN CLEAN WATER ACT CLAIMS RELATED TO DREDGE MINING

Idaho Conservation League v. Shannon Poe,
___F.Supp.4th___, Case No. 1:18-CV-353-REP (D. Id. Sept. 28, 2022).

The U.S. District Court for the District of Idaho recently granted environmental organization's motion for remedies. The court granted a permanent injunction barring a defendant from suction dredge mining on the South Fork Clearwater River (River) unless the defendant acquires and complies with a National Pollutant Discharge Elimination System (NPDES) permit. The court also imposed a $150,000 civil penalty for 42 instances of suction dredge mining on the River without an NPDES permit.

Factual and Procedural Background

Defendant Shannon Poe suction dredge mined the River on 42 separate days during 2014, 2015, and 2018 without obtaining an NPDES permit under Section 402 of the Clean Water Act (CWA). Plaintiff brought a citizen-suit enforcement action to enjoin the defendant's mining activities in the state of Idaho and impose a civil penalty on the defendant for violations of the CWA. The case was bifurcated into a liability phase and a remedial phase. During the liability phase, the court found that: (1) the defendant's suction dredge mining discharged pollutants into the River, thus requiring an NPDES permit under § 402 of the Clean Water Act; and (2) the material discharged from the defendant's mining operation was a pollutant requiring an NPDES permit under § 402.

The plaintiff then filed a motion for remedies requesting that the court order (1) an injunction barring the defendant from suction dredge mining in Idaho unless he obtains and complies with an NPDES permit under the CWA, and (ii) civil penalties against the defendant in an amount of at least $564,924. The Clean Water Act authorizes a court to order that relief it considers necessary to secure prompt compliance with the Act.

The District Court's Decision

Injunctive Relief

The court first considered plaintiff's request for injunctive relief. To demonstrate a permanent injunc-

tion should issue, a plaintiff must establish that: (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) a remedy in equity is warranted, considering the balance of hardships between plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction. Defendant did not dispute that the plaintiff failed to meet these elements; instead, the defendant argued that the injunction was unnecessary and moot because he was not currently mining and had not since 2018, and a civil penalty would deter future violations.

The court concluded that an irreparable injury occurred as a matter of law when defendant's dredge mining added pollutants to the River. Based upon this and other facts in the record, the court found that that the dredge mining caused environmental harm by degrading water quality and potentially threating endangered species in the waterway, sufficient to amount to an irreparable injury. Additionally, the court dismissed the defendant's argument that his alleged compliance with state permits with best practices that somewhat overlapped with those of an NPDES permit meant that no irreparable injury occurred, stating that such a conclusion would render the CWA without purpose and found this position unsupported by the law.

The court next found that legal remedies were inadequate, noting that the U.S. Supreme Court has recognized, in most instances, environmental harms are not readily compensable by money damages. The court further noted that money damages were not available to the plaintiff, because civil penalties are paid to the U.S. Treasury.

The court concluded that the balance of hardships favored issuing an injunction, finding that there was no counterweight to the irreparable injury caused by defendant's permitless suction dredge mining. The court noted that any burden from complying with the CWA by securing a legally-required NPDES permit is not a hardship, let alone one sufficient to outweigh the proven environmental harms caused by the defendant.

The court also reasoned that an injunction would be in the public interest, as courts have recognized that the public interest is served by protecting the environment and ensuring compliance with and strict enforcement of the CWA.

Turning to the defendant's arguments that an injunction would be unnecessary and moot, the court disagreed, stating that the defendant's lack of CWA violations since 2018 was due to the fact he had not mined in the River since then rather than because he had secured an NPDES permit as required. Voluntary cessation of a challenged practice in response to pending litigation does not moot a case. Further, the court dismissed the defendant's contention that the availability of civil penalties precluded injunctive relief, affirming that the CWA authorizes courts to impose one, either, or both of the potential remedies, and that, regardless, the factors in this case independently supported granting injunctive relief.

Finally, the court determined that an injunction against suction dredge mining in the River was sufficiently narrow and specifically tailored to fit the dispute giving rise to its issuance. The scope of the issued injunction was narrower than the entire state as requested by the plaintiff.

Civil Penalties

The court then considered plaintiff's request for civil penalties in the amount of $564,924. The CWA permits courts to apply any appropriate civil penalties for violations in order to provide restitution, punish the violator, and deter similar conduct by the violator and others in the future. The court explained that civil penalties in CWA cases involve highly discretionary calculations in which the court must take into account the following factors: (1) the seriousness of the violations; (2) the economic benefit, if any, resulting from the violations; (3) any history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) any other matters as justice may require. Defendant argued the requested penalties were excessive and unduly burdensome, proposing that a $60,924 penalty more accurately addressed his conduct and the surrounding circumstances.

Courts either employ a "top-down" or "bottom-up" approach when calculating civil penalties under the CWA. In a top-down approach, a court first calculates the maximum penalty, and then adjusts the penalty downward in consideration of the six statutory factors. In a bottom-up method, the court begins by calculating the economic benefit realized by the

defendant as a result of non-compliance, and then adjusts that amount upward or downward based on the court's evaluation of the remaining factors.

The court employed a bottom-up approach here, noting that the defendant chose not to pull an NPDES permit largely due to advice from his legal counsel not to do so, as well as their correspondence with the U.S. Environmental Protection Agency, to which the EPA never replied, in which counsel disagreed with the EPA's assertion that an NPDES permit was needed for the defendant's suction dredge mining activities.

First, the court determined that that economic benefit to the defendant was $10,524—the value of the minerals extracted from the River by the defendant, as conceded by him – and set the initial cost of the penalty at that amount. Next, the court examined the seriousness and history of the defendant's CWA violations, acknowledging that Congress has flatly prohibited the discharge of any pollutant by any person except in compliance with the CWA. The defendant violated this clear prohibition in the CWA 42 times, and the court found that such violations were unquestionably serious. In determining the relative seriousness of the defendant's violations, the court declined to compare the environmental impacts of the defendant's mining activities against permitted suction dredge mining, stating that it is a false equivalence given that the defendant should not have been mining without a permit at all, and that if he had not illegally mined, he would not have discharged any pollutants into the waterway. The court concluded that all 42 incidents were serious CWA violations which, together, warranted an upward adjustment of the penalty amount.

Third, the court noted that good faith efforts to comply with applicable permit requirements may reduce civil penalties, and that this factor turned on whether the defendant took any actions to decrease the number of violations or made efforts to mitigate the impact of violations on the environment. The court explained that the defendant had not only steadfastly maintained his position that suction dredge mining does not require an NPDES permit and that his activities were not in opposition to the EPA, but also claimed that his opinions were protected by the First Amendment. The defendant also argued that his compliance with state permit requirements demonstrated that he still respected the conditions that are in place to minimize and eliminate the environmental impacts of his operations. The court dismissed the First Amendment argument, stating that whatever protections exist thereunder do not excuse CWA violations and do not amount to good faith efforts to comply with the CWA. The court acknowledged that the defendant's insistence against acquiring an NPDES permit appeared to arise from his attorneys' advice, but noted that this does not establish a good faith effort to comply with the CWA, and that short of actually acquiring an NPDES permit before mining, the proper course of action in this instance was to administratively engage to resolution or proactively seek relief from the courts. Ultimately, the court found that the defendant purposely chose not to seek an NPDES permit, ignored violation noticed, and repeatedly mined without a permit, and justifying an upward adjustment of the penalty.

Fourth, the court stated that it may reduce the civil penalty against a party if the maximum statutory penalty would work an undue hardship, which is established by the defendant showing that the penalty will have a ruinous effect. The court noted that the record did not support a finding that the defendant had significant funds to pay the $564,924 penalty sought by the plaintiffs, instead finding that such a penalty would have a more drastic effect on than necessary to account for his CWA violations and ensure future compliance. However, the court held that the defendant failed to establish a basis for the significantly lower amount he suggested, or explain how a higher penalty would be ruinous to him, and thus it was not limited to his proposed penalty of $60,925.

Conclusion and Implications

In light of the factors discussed above, the court assessed a civil penalty of $150,000, the sum of the economic benefit to the defendant and $3,320.86 per violation. The court explained that this penalty was 8 percent of the maximum possible penalty and consistent with the penalties imposed in analogous cases. Furthermore, the court concluded that the penalty accounts for the serious nature of the defendant's violations over three years while acknowledging that suction dredge mining is allowed on the River when properly permitted and the defendant was acting as an individual and has limited resources.

This case affirms well-established guidelines for providing remedies in the form of injunctive relief

and civil penalties for violations of the Clean Water Act. Of particular note is the court's unequivocal reliance on attempts—or lack thereof—to obtain and comply with an NPDES permit. The court's opinion is available online at: https://scholar.google.com/scholar_case?case=8667808127392641 66&q=Idaho+Conservation+League+v.+Poe&hl=en&as_sdt=2006 (Rebecca Andrews)

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

CHANGE SERVICE REQUESTED

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