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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
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FEATURE ARTICLE

CALIFORNIA COURT OF APPEAL UPHOLDS GENERAL PLAN STANDARDS WHEN PROJECT APPLICATION DEEMED COMPLETE—RATHER THAN NEW STANDARDS RELEASED WHILE PROJECT APPROVAL WAS PENDING

By Veronika Morrison and Bridget McDonald

In the *published portion* of an opinion the First District Court of Appeal in *Save Lafayette v. City of Lafayette*, ___Cal.App.5th___, Case No. A164394 (1st Dist. Nov. 30, 2022) held that, in approving a residential housing development under the Housing Affordability Act, the City of Lafayette (City) properly applied the general plan and zoning standards that were in effect at the time it deemed the project application "complete." The court concluded the Permit Streamlining Act's statutory time limits did not deprive the City of its power to act on the application many years later, such that the project application must be treated as "resubmitted" and governed by later-adopted zoning standards.

Factual and Procedural Background

The Original Project

In March 2011, O'Brien Land Company, LLC (Applicant) applied for approval of the Terraces of Lafayette Project (Original Project)—a 315-unit residential apartment development located on a 22.27-acre site in the City of Lafayette. The Project included 14 residential buildings, a clubhouse, a leasing office, parking in carports and garages, and internal roadways.

The City notified the Applicant that its application was deemed complete on July 5, 2011. At that time, the underlying zoning of the Project site was designated to allow multi-family developments with a land use permit. The City certified an Environmental Impact Report (EIR) for the Project on August 12, 2013 (2013 EIR). The City's Design Review Commission, however, recommended that the Planning Commission deny the application for a land use permit.

The Alternative Project

The Applicant and the City subsequently considered a lower-density alternative to the Project, consisting of 44–45 single-family detached homes, public parkland, and other amenities (Alternative Project).

On January 22, 2014, the Parties entered into an Alternative Process Agreement that provided the City would "suspend" its processing of the Original Project while it processed the Alternative Project; but if the Alternative Project was not approved, the Applicant could terminate the Agreement and immediately resume the City's processing of the Original Project. The Agreement also stated that, because the Parties mutually agreed to toll processing the Original Project, the City had not failed to either approve or disapprove the Project under the Permit Streamlining Act (PSA), thus suspending the Act's "automatic approval" provision.

On August 10, 2015, the City approved the Alternative Project and certified its supplemental EIR (SEIR). In doing so, the City also adopted a general plan amendment and ordinance that changed the Project site's land use designation from Multi Family resident, which allowed 35 dwelling units per acre, to Low Density Single Family Residential, which allowed only two units per acre.

Save Lafayette's First and Related Lawsuits

On September 8, 2015, Save Lafayette filed a petition for writ of administrative mandate (2015

Lawsuit), challenging the approval of the Alternative Project based on alleged California Environmental Quality Act (CEQA) violations. In January 2016, the parties entered into a settlement agreement and petitioner dismissed the action with prejudice. The Applicant proceeded to demolish existing structures and trees on the Project site pursuant to its permits.

Shortly after, a referendum petition was filed to separately challenge the City's approval of the zoning ordinance that reduced housing developments to two units per acre. The City declined to repeal the ordinance or submit it to a vote. Petitioner thus sued, and the First Appellate District Court of Appeal ultimately held the City could not properly keep the referendum off the ballot. (*Save Lafayette v. City of Lafayette*, 20 Cal.App.5th 657, 662, 671–672 (2018).)

On June 5, 2018, the voters subsequently rejected the ordinance. The following month, the City adopted a new zoning ordinance that would now allow lot sizes more than three times larger than those the voters had rejected.

The 'Resumed' Original Project

On June 15, 2018, the Applicant notified the City that it was terminating their Agreement, withdrawing its application for the Alternative Project, and requesting that the City resume its review of the Original Project application, with modifications. The newly "resumed" Original Project slightly differed from the initial iteration, as it would preserve ten fewer trees and plant approximately 68 more new trees than originally planned. The Applicant's consultant thus prepared an addendum to the Original Project's EIR, which, after further analysis, City staff deemed appropriate.

In August 2020, the City certified the final Addendum and approved the Project. As part of its approval, the City determined the Project qualified as a housing development project for very low-, low-, or moderate-income households under the Housing Accountability Act (HAA). The HAA thus preempted any conflicting requirements with the City's Municipal Code and exempted the Project from certain findings typically required for permitting.

Save Lafayette's Second Lawsuit

In September 2020, Safe Lafayette filed a new suit alleging the Project was inconsistent with general plan and zoning requirements, and that an SEIR was required to adequately analyze several of the Project's impacts, including those related to special status species, wildfire risk, and mature tree destruction. The trial court denied the petition's CEQA claims on their merits, but nevertheless found that the 2015 Lawsuit did not bar petitioner from challenging the 2013 EIR. The court also concluded that, under the HAA, the Applicant was entitled to the benefit of the site's zoning in place at the time the Project application was deemed complete in 2011. Petitioner appealed.

The Court of Appeal's Decision

The First District Court of Appeal affirmed the trial court's decision. In the *published portion* of the opinion, the court held that, in harmony with the principles of the HAA, the PSA's time limits did not strip the City of its power to act on the Project application and that the general plan and zoning standards in effect at the time the application was deemed complete in 2011 still applied.

Permit Streamlining Act and Housing Affordability Act

Recognizing the undisputed facts that the Project was consistent with the general plan and zoning designations in 2011, and inconsistent with the designations in effect in 2018 when the applicant asked the City to resume processing its original application, the appellate court rejected petitioner's argument that the application was deemed "disapproved" once the statutory time limit under the PSA passed.

The court explained that the PSA does not permit consideration of a project to be suspended in the manner contemplated by the Agreement between the City and the Applicant. For the purposes of its analysis, the court therefore assumed that the years-long delay following the Agreement violated the PSA. The court emphasized, however, that this assumption was not dispositive of whether the City's "substantially complete" determination lapsed under the PSA. Moreover, the court explained that, under the PSA, an agency's failure to act on an application within the statutory time limits results in a project being deemed approved if notice requirements are met—not disapproved, withdrawn, or resubmitted.

The court further elaborated that any "resubmittal" of an application under the PSA refers to resubmission in response to a notice that an application is

incomplete, after which the agency must assess the application's completeness within 30 days. This rule therefore did not apply here because the City deemed the Original Project application "complete" in 2011. As such, resubmission was not required, and no re-evaluation of the application's completeness occurred.

The court rejected petitioner's construction of the PSA because it conflicted with the statute's express provision that an agency must specify the reasons why it disapproved a development, other than failure to timely act. Here, any "disapproval" would have been improperly silent under the PSA because the City never specified its reasons for initially disapproving the Project.

Lastly, the First District highlighted the interaction between the PSA and HAA, particularly based on the specific facts at bar. Notably, the HAA promotes the development of housing. Therefore, in the context of the PSA, the HAA's principles weigh in favor of finding that the date the City deemed the application "complete" was when the City actually made that determination in 2011, rather than some later date. This is particularly compelling given that the City later significantly reduced the allowable amount of housing that could be developed on the Project site. The court rejected petitioner's argument that this construction of the PSA conflicts with the California Legislature's subsequent prohibition on waiving the PSA's strict time limits, which it did in response to the Supreme Court's decision in *Bickel v. City of Piedmont*, 16 Cal.4th 1040 (1997). The court explained that the Legislature did not intend for an agency to lose power to act on an application after the time limits have passed and that petitioner failed to provide any legal authority to the contrary.

The court therefore held that the Project's inconsistencies with the general plan and zoning designations that were in effect in June 2018 were immaterial. Rather, the City properly applied analyzed the Project's consistency with those in effect in 2011—*i.e.*, when the City first deemed the development application "complete."

In an *unpublished* portion of the opinion, the court likewise rejected petitioner's CEQA challenges, concluding that the EIR and modified Project description were adequate, and that an SEIR was not required to address the new numbers of trees that would be preserved and planted.

PSA Context

The court rejected petitioner's argument that, because the PSA requires projects to be approved or disapproved within specific times—e.g., the longest of which is 180 days after an EIR is certified, plus one extension for up to 90 days—the 2013 EIR was "stale" and an SEIR was required. The court reasoned that CEQA's statute of limitations for challenging an EIR begins to run only when the agency files its notice of determination after approving a project, which does not prevent an agency from allowing substantial time to elapse between its decision to certify an EIR and approve the project. Further, the court explained that the Legislature forbids it to impose requirements—such as a 180- or 270- day limit on a Project's approval following certification of an EIR—beyond those explicitly stated in CEQA.

Special Status Species

The court rejected petitioner's arguments that the presence of protected species seen at or heard from the Project site constituted new information requiring an SEIR. The court explained that the EIR appropriately anticipated the occasional presence of special status species, as no special status species were determined to inhabit the Project site. The court also rejected petitioner's attacks of the EIR's underlying analysis, concluding that the fact that the Project site contains habitat suitable for special status species does not amount to new information justifying preparation of an SEIR.

Wildfire Risk

The court rejected petitioner's challenge to the EIR's wildfire risk analysis because it was based on a factually mistaken interpretation and misreading of the EIR. First, the site's re-designation to Very-High hazard went into effect several weeks before the EIR was certified—thus factually debunking petitioner's assertion that the site was re-designated after the EIR's certification. Second, petitioner misread the EIR by claiming attacking its conclusion that wildfires were not a significant risk because the Project does not include any Very High-Risk areas. To the contrary, the EIR concluded that the measures required to address the area's High-Risk designation are what rendered impacts less than significant—not the outdated High-Risk designation itself. Moreover, the

EIR concluded that the Project would not interfere with emergency response and evacuation plans.

The court further explained that courts analyzing whether new information exists necessitating an SEIR look to the physical characteristics and actual environmental effects of a project—not mere regulatory changes. As such, the Project site's re-designation did not warrant an SEIR, nor did it render the environmental setting description deficient, because the changed designation did not relate to the EIR's description of the Project site's *physical* conditions.

Tree Removal

The court finally held that the Project's removal of ten additional protected trees beyond that contemplated by the Original Project did not render the EIR's project description inaccurate and did not require an SEIR. The court found it sufficient that the addendum's new mitigation measure of planting additional replacement trees would result in similarly significant and unavoidable impacts as those identified in the 2013 EIR.

Conclusion and Implications

The First District Court of Appeal's decision provides guidance on the interpretation of, and interaction between, the PSA and the HAA. Specifically, it clarifies that the failure of an agency to act on an application within the PSA's time limits does not result in the application being deemed disapproved, especially in the context of applications for affordable housing developments. Moreover, the court's opinion indicates that agencies and applicants cannot unilaterally agree to "suspend" the processing of an application to toll or bypass the PSA's time limits. Finally, and though part of an unpublished portion of the opinion, the PSA's statutory deadlines do not alter the existing procedural or statutory requirements of CEQA. A copy of the First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/A164394M.PDF.

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ENVIRONMENTAL NEWS

FEDERAL GOVERNMENT TO PROVIDE $250 MILLION IN FUNDING TO LOCAL AGENCIES FOR SALTON SEA RESTORATION PROJECTS

In late November, southern California's Imperial Irrigation District (IID) officially announced that they would be partnering with the U.S. Department of the Interior, the California Natural Resources Agency, and the Coachella Valley Water District in an effort to clean up the dilapidated Salton Sea (Sea).

The Salton Sea has been hit particularly hard by the effects of climate change and persistent drought, so much so that the nearby communities have even experienced health problems caused by algae blooms and dust storms due to wins kicking up drying sediment along the Sea's widening shores. The new partnership plans to alleviate some of these problems with $250 million in funding from the federal government. These funds will go towards environmental restoration projects, including air quality improvements, public health programs, and ecosystem restoration projects, with the local agencies providing the land necessary for the implementation of such projects and the California Natural Resources Agency assisting in the permitting processes.

The State of the Salton Sea

Occupying nearly 350 square miles of southern California's Riverside and Imperial counties, the Salton Sea is California's largest lake by surface area, dwarfing even Lake Tahoe—California's largest *fresh water* lake—which has a surface area just under 200 square miles. The Sea's formation is also an anomaly itself, as it was originally formed over an old and empty lakebed in 1905 when Colorado River floodwaters breached an irrigation canal being constructed in the Imperial Valley. This flooding filled the area then known as the Salton Sink, and the Sea has since been maintained by irrigation runoff from the Imperial and Coachella valleys—largely fueled by Colorado River water—and local rivers.

As the Salton Sea is a terminal lake, meaning there are no outflows from the lake, the Sea has faced increasing salinity and other water quality issues, including temperature extremes, eutrophication, and related anoxia and algal productivity. Salinity levels in the Sea have reached such high levels that they exceed those of the Pacific Ocean by 50 percent. In fact, salt levels are so high that the Sea's sole native fish is the desert pupfish, a fish known for its capacity to resist the changing salinity levels in the Salton Sea and now classified as a federally endangered species.

Furthermore, climate change, water-conservation measures, and water transfer agreements shifting the use of Colorado River water have all led to a decrease in irrigation runoff that previously fed the Sea. With less irrigation runoff, the Salton Sea has experienced increased evaporation, exposing dry lakebed saturated in contaminants such as pesticides and farming byproducts. These contaminants are then kicked up into the air as toxic dust clouds and the communities surrounding the Sea have suffered disproportionately from negative health effects as result, including asthma and other respiratory conditions, allergies and nosebleeds.

Funding for Restoration Projects

The multi-agency partnership will take aim at addressing these concerns and will also focus on meeting the contingency placed on the funding—namely that the state must conserve 400,000 acre-feet of Colorado River water each year starting in 2023.

The first $22 million will be provided by the Department of the Interior's Bureau of Reclamation between now and the end of the summer of 2023 for restoration projects around the Salton Sea, research on current and future cleanup projects, and to hire two representatives from the Torres Martinez Desert Cahuilla Indian Tribe to help implement those projects. The rest of the funding, $228 million in total, will be contingent on the state following its commitment to conserve 400,000 acre-feet of Colorado River water annually. Per the terms of the partnership's agreement, this will require IID to conserve 250,000 acre-feet of Colorado River water per year as part of the state's larger goal.

Conserving that much water, however, will only exacerbate the problems the partnership seeks to remediate. An IID projection shows that by 2027, the required conservation measures will expose an additional 8,100 acres of dry shoreline. It is the aim of the partnership, however, for the additional $228 million in funding to not only mitigate these impacts, but to help restore the Salton Sea beyond any mitigation efforts. The agreement involves expanding and expediting existing projects that will flood portions of the lakebed to protect human health by limiting dust emissions while also providing increased aquatic habitat.

Additionally, the California Natural Resources Agency agreed to accelerate any permitting processes. Although most lakes fall under the jurisdiction of their state, the Salton Sea's lakebed is broken up into a large puzzle of separate landowners, creating the need for expedited land access as land access issues have historically popped up as an obstacle in the way of restoration efforts. To this end, both IID and Coachella Valley Water District have also pledged that they would provide expedited land access for the projects.

Conclusion and Implication

The Salton Sea's condition has grown worse and worse over the past decade and is well on its way to becoming nothing more than a toxic cesspool of agricultural waste. Furthermore, the state's persistent drought is accelerating that process, making it all the more important to get these restoration projects going in any fashion. Even if more can be done—or needs to be done—to keep the Salton Sea from becoming a wasteland, the efforts undertaken by the Department of the Interior, Imperial Irrigation District, Coachella Valley Water District, and the California Natural Resources Agency in this agreement put pen to paper and creatively combine two of the region's major efforts in one agreement: water conservation efforts and restoration projects in and around the Salton Sea. Although most of the funding is conditioned on IID's conservation of 250,000 acre-feet of water each year, assuming this goal is met and the funding is provided, the partnership's efforts could result in impactful projects to clean up the Salton Sea and at least slow the decline of the health of both the lake and its surround communities.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

WASHINGTON STATE JOINT LEGISLATIVE TASK FORCE ISSUES REPORT ON WATER RESOURCE MITIGATION

This article serves as an update on the continuing discussion of water right mitigation standards in Washington State. Specifically, this article will provide an overview of the seminal *Foster* case decided by the Washington Supreme Court in 2015, mitigation strategies utilized by the Washington Department of Ecology (Ecology) stemming from that decision, and an update to the Joint Legislative Task Force on Water Resource Mitigation established by Engrossed Substitute Senate Bill No. 6091, Sec. 301 (ESSB 6091) following the *Foster* decision.

Background

Due to historical demands coupled with increasing population and diminishing supply, in many parts of Washington, water is not available for appropriation. Under RCW 90.03.290 Ecology is required to make four determinations prior to the issuance of a water right permit: one, what water, if any, is available for appropriation; two, what beneficial uses the water is to be applied; three, will appropriation impair existing water rights; and four, will the appropriation detrimentally affect the public welfare. For parts of the state in which water is not available for appropriation or impairment is possible because of existing water rights, including instream flows, mitigation is needed to establish a new use of water. Mitigation can be in-kind, such as another water right transferred to the State Trust Water Right Program. Unlike in-kind, or water-for-water mitigation, out-of-kind water right mitigation relies on habitat restoration projects, or monetary payments for such projects, to offset the stream-depleting impacts of a new water right.

The adequacy of mitigation for new uses of water was before the Supreme Court of Washington in *Foster v. Department of Ecology*, 184 Wn.2d 465, 362 P.3d 959 (2015) (*Foster*). Under the decision the Supreme Court reversed the lower court's decision to approve Ecology authorization of a water right for the City of Yelm that would impair the minimum flows of waterways connected to the Deschutes and the Nisqually Basins.

The *Foster* Decision

In *Foster*, the City of Yelm proposed a water right permit based on an extensive mitigation package. The proposed water right included offsetting the total quantity of new water use through both "in-kind" mitigation, including plans to retire existing irrigation water rights and an aquifer recharge project, and "out-of-kind" mitigation, that included a variety of habitat improvements. Ecology accepted out-of-kind mitigation to offset the impacts of the new appropriation water rights issued under the Overriding Considerations of Public Interest (OCPI) under RCW 90.54.020(3)(a) because having found that public benefits arising from the mitigation package would far outweigh any adverse impacts on stream flows. In the decision, the Washington Supreme Court rejected Ecology's reasoning that out-of-kind mitigation was an acceptable method to offset impacts to senior rights, including instream flows, saying "The [out-of-kind] mitigation plan does not mitigate the injury that occurs when a junior water right holder impairs a senior water right. The water code, including the statutory exemption, is concerned with the legal injury caused by impairment of senior water rights—water law does not turn on notions of "ecological injury." *Foster,* at 963 . The Court held that the prior appropriation doctrine does not allow for any impairment, even de minimis impairment, of senior water rights, in accordance with the Court's earlier decision in *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000). Under the *Foster* decision, the Court reasoned that water is not interchangeable with habitat and permanent water rights cannot be issued in exchange for ecological improvements. *Foster*, at 963.

The Legislative Task Force

In January 2018, the Washington Legislature established the Joint Legislative Task Force on Water Resource Mitigation (Task Force) as a part of ESSB 6091, codified under RCW 90.94.090. The Legisla-

ture directed the Task Force to address the impacts of the *Foster* decision; review the treatment of surface water and groundwater appropriations as they relate to instream flows and fish habitat; required Ecology to issue up to five permit decisions using a mitigation sequencing process; and to establish five pilot projects which would be used to inform the Task Force process created by ESSB 6091 and enable the processing of water right applications that address water supply needs. The original legislation directed the Task Force to submit recommendations to the Legislature by November 15, 2019.

Ecology received applications from the City of Sumner, Spanaway Water Company, City of Port Orchard, City of Yelm, and the Ag Water Board of Whatcom County that met the criteria for eligibility specified under RCW 90.94.090(10). The Legislature outlines a mitigation sequence that the pilot participants must follow when creating a mitigation plan to offset impacts from the proposed projects which are: avoidance, minimization, and compensation. RCW 90.94.090(8). Avoidance means complying with prescribed mitigation set forth within an instream flow rule; or through conditions on water right approvals in which the water use would be interrupted when flows in affected water bodies fall below instream flow levels. Minimization means applicants would provide "water-for-water" mitigation by transferring a valid water right into Ecology's Trust Water Right Program or by finding other means to supply replacement water to the affected water body. And finally, if an applicant can show that avoidance and minimization are not reasonably attainable, the mitigation approach can move onto the next step: compensation. Under compensation, applicants may use other approaches that provide net ecological benefits to fish and related aquatic resources. Applicants may use in-kind or out-of-kind mitigation (or a combination of both), provided that the mitigation improves the function and productivity of affected fish populations and related aquatic habitat. Ecology provided the Task Force with information on conceptual mitigation plans for each pilot projects on November 15, 2018, based on the mitigation sequencing of avoidance, minimization, and compensation as outlined above. As of July 2020, Ecology states "The Task Force issued an initial report on progress from the pilot projects, but work continues" (Ecology Pub 20-11-083).

The Task Force was comprised of two members each from the largest caucuses of the Senate and House of Representatives as appointed by the President of the Senate and the Speaker of the House, additionally, there was one representative from each department of Ecology, Fish and Wildlife, and Agriculture, appointed by their respective agency directors, and finally, several members appointed by consensus of the Task Force co-chairs representing a variety of interested parties including people from: the farming industry, cities, municipal water purveyors, business interests, environmental organizations, and two federally recognized Indian tribes, one invited by recommendation of the Northwest Indian Fisheries Commission and the other invited by recommendation of the Columbia River Intertribal Fish Commission. In total there were 11 voting members of the Task Force. The state agency representatives are not eligible to vote on Task Force recommendations. The Task Force was reauthorized through the passage of Substitute House Bill No. 1080, Sec. 7024 (SHB 1080) in 2021, and the deadline for Task Force recommendations to the Legislature was extended to November 15, 2022. During the period from November 16, 2019, through December 31, 2022, the work of the Task Force was limited to a review of any additional information that may be developed after November 15, 2019, as a result of the pilot projects, and an update of the Task Force's November 15, 2019, recommendations. Recommendations were developed through comments by various Task Force members. Comments were complied from letters and emails from the Task Force members and grouped into Majority Recommendations, supported by 60 percent majority of Task Force members, Minority Recommendations, supported by at least five of the appointed voting members of the Task Force members, and Other Topics Discussed, where not enough votes were obtained to reach the threshold of minority recommendations.

The Mitigation Report

All participants voted in favor of Majority Recommendations in four categories: (1) Conservation, (2) Source Switch, (3) OCPI, and (4) Modeling.

Under Conservation, Legislature should consider new conservation standards for water systems served by water rights utilizing mitigation, the state should seek ways to reuse wastewater, and legislation should be developed to require high consumptive users to

reduce leakage below five percent.

Members believe that Ecology should help facilitate continued discussion among stakeholders on the subject of "source switch" to see if agreement can be reached on a streamlined approach for approving transfers from surface water to ground water, as long as instream flows are not impaired. Many members generally supported the Legislature revisiting its intent in the term "overriding considerations of the public interest."

All voting members believe that hydrogeologic modeling is in the best interest of managing water resources, but they disagreed on whether the legislature should, or should not, be involved with managing the appropriate level of modeling.

Conclusion and Implications

The full report, issue by the Joint Legislative Task Force, along with the letters from the member of the Task Force, comments, summaries of meetings, and recommendations, can be found at: https://leg.wa.gov/JointCommittees/WRM/Pages/default.aspx.
(Jessica Kuchan, Jamie Morin)

REGULATORY DEVELOPMENTS

U.S. ENVIRONMENTAL PROTECTION AGENCY ALIGNS AIRCRAFT ENGINE EMISSIONS STANDARDS WITH UNITED NATIONS AND CONSIDERS INCREASING STRINGENCY IN THE FUTURE

On November 23, 2022, the U.S. Environmental Protection Agency (EPA) published a final rule setting particulate matter emission standards and standardizing test procedures for certain classes of engines used by civil subsonic jet airplanes to replace the existing smoke standard for those engines. *See* Control of Air Pollution From Aircraft Engines: Emission Standards and Test Procedures, 87 Fed. Reg. 225, 72312 (Nov. 23, 2022) (amending 40 C.F.R. Parts 9, 87, 1030, and 1031). These new particulate matter emission standards and test procedures are the same as the engine standards adopted by the United Nations' International Civil Aviation Organization (ICAO) in 2017 and 2020, and will apply to both new type design aircraft engines and in-production aircraft engines. The Final Rule became effective on December 23, 2022, and will be implemented starting January 1, 2023.

Background and Legal Authority

The federal Clean Air Act (CAA) gives EPA the legal authority to adopt these new standards nationwide. Specifically, CAA § 231(a)(2)(A) directs the Administrator of EPA to propose aircraft engine emission standards applicable to the emission of any air pollutant from classes of aircraft engines that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Additionally, CAA § 231(a)(2)(B) directs EPA to consult with the U.S. Federal Aviation Administration (FAA) on such standards, and it prohibits EPA from changing aircraft emission standards if doing so would significantly increase noise and adversely affect safety. Moreover, CAA § 231(a)(3) states that after providing notice and an opportunity for a public hearing on the standards, the Administrator shall issue such standards "with such modifications as [they deem] appropriate." *See* 42 U.S.C. 7571(a)(3). Lastly, under CAA § 231(b), EPA is required to ensure, in consultation with the United States Department of Transportation (DOT), that the effective date of any standard provides the necessary time to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such a period. *See* 42 U.S.C. 7571(b). EPA has consistently interpreted its legal authority under CAA § 231 as providing the Administrator with great discretion in determining appropriate standards, including taking international standards into account. This interpretation is consistent with that of the United States Court of Appeals for the District of Columbia Circuit. *See National Association of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229–30 (D.C. Cir. 2007).

Using this broad authority, EPA previously issued a rule in January 2021 that set the country's first aviation greenhouse gas emissions standards by adopting the same fuel-efficiency standards set by the ICAO in 2017. This aligned the country's standards with the international community's standards. However, twelve states, the District of Columbia, and several environmental groups sued, claiming that the standards inadequately addressed the aviation industry's impact on the environment. *See State of California et al. v. EPA*, 21-1018 (D.C. Cir. 2022) and *Center for Biological Diversity et al. v. EPA et al.*, 21-1021 (D.C. Cir. 2022). The United States Court of Appeals for the District of Columbia Circuit is currently considering this January 2021 rule, and the court heard oral arguments for this case on October 6, 2022. Despite the legal challenges to EPA's past attempts to align the aviation emissions standards with the ICAO standards and the possibility of EPA's new aircraft emissions standards being challenged again, EPA published the Final Rule adopting the ICAO standards for particulate matter emissions for aircraft engines.

The Final Rule

The Final Rule sets particulate matter mass and number standards for both new type design aircraft

engines and in-production aircraft engines. These standards apply to commercial passenger and freight airplanes and to larger business jets. The Final Rule also sets a particulate matter maximum mass concentration standard for covered engines manufactured on or after January 1, 2023. This standard is based on a particulate matter measurement rather than the smoke measurement standard. EPA further aligned with the ICAO by applying the same smoke standards to engines less than or equal to 26.7 kilonewtons rated output that are used on supersonic airplanes. EPA and the FAA had previously actively participated in the ICAO proceedings to develop these particulate matter emission standards and test procedures for the international community.

In the Final Rule, EPA addressed several comments requesting the agency to adopt more stringent particulate matter emission standards than those of the ICAO. EPA stated that it did not believe it would be feasible to re-propose more stringent particulate matter standards and also meet the international deadline for new mass and number standards. Should the United States miss this January 1, 2023 deadline, American airplane and engine manufacturers could be forced to seek particulate matter emissions certification from other countries in order to continue marketing and operating their airplanes and engines internationally. Further, while the agency's discretion under CAA § 231 would allow it to select more stringent standards when appropriate, it does not mandate that EPA go further than any particular aircraft standard. Ultimately, EPA highlighted the agency's need to control particulate matter emissions, the importance of international harmonization of standards, and avoiding adverse impacts of delaying adoption of particulate matter standards at least as stringent as the ICAO's to justify its rulemaking decision. However, EPA did note the possibility of adopting future, successive particulate matter standards of "increasing stringency."

Conclusion and Implications

It remains to be seen how certain states and environmental groups will react to EPA's Final Rule regulating particulate matter emission standards for specific aircrafts in the United States. Should another lawsuit unfold, EPA will likely make the same or similar arguments it did in both *State of California et al. v. EPA* and *Center for Biological Diversity et al. v. EPA et al*, relying on its broad discretion and legal authority under the CAA. In the end, EPA's decision to align aircraft engine emissions standards with the international community will have far-reaching impacts for the industry and the environment. EPA's final rule is available online at: https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-control-air-pollution-aircraft-engines.
(Lauren Murvihill, Hina Gupta)

U.S. BUREAU OF LAND MANAGEMENT PROPOSES A NEW REGULATION TO REDUCE METHANE EMISSIONS AT ENERGY PLANTS

On November 30, 2022, the U.S. Bureau of Land Management (BLM) proposed a new regulation to reduce the amount of methane and other greenhouse gases released into the atmosphere during the extraction of natural gas and oil (Rule). 87 FR 73588 (Nov. 30, 2022). The Rule would impose requirements on energy production facilities on both federal and Native American lands in an effort by the federal government to cut carbon emissions drastically by 2030. BLM estimates that the Rule would impose costs to industry of approximately $122 million annually for compliance, while generating estimated annual profits of $55 million to industry and $40 million in royalties for the American public due, both due to the capture of previously wasted gas. The focus on lack of wasted gas is therefore for the joint purposes of reduction of greenhouse gas emissions and also recouping royalties for wasted resources from federal and Native American lands. The public comment period is open through January 30, 2023.

A Growing Problem

The Rule aims to reduce venting, flaring, and leaks—all of which cause the release of greenhouse gases into the atmosphere. According to the Department of Energy's (DOE) August 2021 Report to Congress:

> Flaring is the process of combusting natural gas and oxygen at the wellhead using a dedicated flame, which converts methane (and other combustible gases) to carbon dioxide, water, and heat. Department of Energy, Flaring and Venting Reduction Research & Development Activities (August 2021), available at: https://www.energy.gov/sites/default/files/2021-08/Flaring%20and%20Venting%20Report%20to%20Congress%20Report.pdf.

This process typically occurs for safety reasons "due to emergency relief, overpressure, process upsets, startups, shutdowns," and more. Venting, comparatively, is the "direct release of natural gas." The DOE stated:

> Flaring is less harmful from a greenhouse gas perspective because the methane that is vented is a more potent greenhouse gas than the carbon dioxide that results from flaring.

Venting is illegal in certain states, like Colorado and New Mexico, and, to this point, the only regulations regarding venting and flaring have been enacted at the state level, including in Wyoming and Pennsylvania.

According to a press release from BLM, "[w]hile some amount of venting and flaring is expected to occur during oil and gas exploration and production operations," the practices should be minimized. Press Release, Bureau of Land Management, INTERIOR DEPARTMENT TAKES ACTION TO REDUCE METHANE RELEASES ON PUBLIC AND TRIBAL LANDS (Nov. 28, 2022), https://www.blm.gov/press-release/interior-department-takes-action-reduce-methane-releases-public-and-tribal-lands.

To that end, BLM proposes the Rule at a time when venting and flaring activity increased dramatically from 2010 to 2020 compared to the prior decade. "Between 2010 and 2020, the total venting and flaring reported by federal and Tribal onshore lessees averaged approximately 44.2 billion cubic feet per year," which would power approximately 675,000 homes. It's a nearly four-fold increase compared to the prior decade in which 11 billion cubic feet were lost.

Existing Rules and Procedural History

The Rule would replace BLM's current regulations governing venting and flaring, which date back to 1979 and are contained in Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases: Royalty or Compensation for Oil and Gas Lost (NTL). 44 FR 76,600 (Dec. 27, 1979). In 2016, BLM issued a final rule (2016 Rule) replacing NTL with new regulations intended to reduce venting, flaring, and leaks. 81 FR 83008 (Nov. 18, 2016). But the 2016 Rule was challenged in federal court by industry groups and various states, and BLM never fully implemented the rule due to the litigation. *See, Wyoming v. U.S. Dept. of the Interior*, 493 F.Supp.3d 1046, 1052-1057 (D. Wyo. 2020).

In September 2018, BLM issued a final rule (the "2018 Rule") to effectively rescind the 2016 Rule (83 FR 49184 (Sept. 28, 2018). The 2018 Rule was challenged in federal court, then the U.S. District Court for the Northern District of California vacated the 2018 rescission of the 2016 Rule. *California v. Bernhardt*, 472 F.Supp.3d 573 (N.D. Cal. 2020). Then the U.S. District Court for Wyoming vacated the 2016 Rule, the end result of which is that the NTL continues to govern venting and flaring from leases managed by BLM on federal and Native American lands. *See, Wyoming v. U.S. Dept. of the Interior*, 493 F. Supp. 3d 1046, 1086-87 (D. Wyo. 2020). BLM states in the Rule that NTL—implemented in 1979—is now insufficient to address the large volume of flaring associated with the boom in developing "unconventional tight oil and gas resources… in recent years."

The Proposed Rule

There are five key components to the Rule, which in sum would require various technology upgrades, leak detection plans, waste minimization plans, and would impose monthly limits on the practice of flaring.

The Rule contains a general provision that "operators must use all reasonable precautions to prevent the waste of oil or gas developed from the lease." Under this provision, BLM may require certain measures to prevent waste as conditions of approval of an Application for Permit to Drill and also after the approval of the permit.

The Rule would require any application for permits to drill oil wells to include a waste minimization

plan (Plan), the goal of which is to provide BLM with information regarding anticipated associated gas production, the operator's capacity to capture that gas production for sale or use, and other steps the operator commits to take to reduce or eliminate gas losses. BLM may delay action on the permit if the Plan does not take reasonable steps to avoid wasting gas.

The Rule will recognize that if the operator has not acted negligently, some oil or gas can be "unavoidably lost" during production, and those losses will not be considered wasted. Otherwise royalty payments are due for "all avoidably lost oil or gas." BLM will take into account the operator's compliance with applicable laws, regulations, and operating plan before making a determination of "unavoidably lost." The Rule states that operators must flare, rather than vent, any gas that is not captured except in specifically listed circumstances.

In addition to specifying circumstances during which oil or gas would be considered "unavoidably lost," the Rule establishes a monthly limit on royalty-free flaring due to events that may prevent produced gas from reaching the market, such as capacity constraints and emergencies. The operator must measure or estimate all volumes of gas vented or flared from wells, facilities, or equipment. BLM will make a determination whether operator negligence caused loss of gas during well drilling, however operators are allowed to flare a certain amount of gas during well completion of a hydraulically-fractured well and during initial and subsequent well production tests and emergencies.

Finally, the Rule will impose a number of specific affirmative obligations that operators must perform to avoid wasting oil or gas. Those requirements include:

- The use of natural-gas-activated pneumatic controllers or pneumatic diaphragm pumps with a bleed rate that exceeds 6 standard cubic feet/hour will be prohibited, and operators must use "low-bleed" pneumatic equipment instead.

- Oil storage tanks must be equipped with a vapor recovery system that prevents the loss of natural gas from the tank.

- Operators must maintain a leak detection and repair program ("LDAR Program") designed to prevent the unreasonable and undue waste of gas. The LDAR Program must provide for regular inspections of all oil and gas production, processing, treatment, storage, and measurement equipment.

- Operators must repair any leaks as soon as practicable, and in no event 30 days after discovery absent good cause. In addition, the operator must maintain records regarding leak inspection and provide an annual report to BLM.

Conclusion and Implications

The Rule will impose compliance costs on the industry with the parallel goal of generating more revenue through reduced waste. The estimated extra revenue to industry will not match estimated costs, while the general public assumes the majority of the benefits through additional royalties and a reduction in greenhouse gas emissions. Some states have more stringent prohibitions than what the Bureau of Land Management proposes here, while the industry may oppose increased costs from this approach. Those with an interest in the issue have until January 30, 2023 to submit public comment. For more information, *see:* https://www.blm.gov/press-release/interior-department-takes-action-reduce-methane-releases-public-and-tribal-lands.
(Adam Pearse, Darrin Gambelin)

IN A MAJOR REGULATORY STEP, FERC APPROVES REMOVAL OF FOUR DAMS ON THE KLAMATH RIVER

On November 17, 2022, the Federal Energy Regulatory Commission (FERC) issued an order approving the surrender of license and removal of project facilities for four dams on the Klamath River. The four dams—the J.C. Boyle Dam, Copco Dam No. 1, Copco Dam No. 2 and Iron Gate Dam—restrain the lower reaches of the Klamath River. Owned and operated by PacifiCorp, a subsidiary utility company of Berkshire Hathaway Energy, the dams were built to provide hydroelectric power to customers in Califor-

nia and Oregon. Stakeholders in the effort to remove the dams include PacifiCorp, the states of California and Oregon, and the Yurok and Karuk Tribes, and a number of environmental interest groups, including American Rivers, California Trout, Northern California Council Federation of Fly Fishers, Salmon River Restoration Council, Sustainable Northwest, Trout Unlimited, and Pacific Coast Federation of Fishermen's Association.

Background

The Klamath River runs through southern Oregon and northern California before emptying into the Pacific Ocean near the town of Klamath, California. Prior to the arrival of European settlers during the California Gold Rush in the 1840s and the construction of the dams in the following century, the Yurok and Karuk tribes populated the region and fished the Klamath River. The salmon from the Klamath River was a primary food source for the Tribes and holds great cultural significance. Between 1903 and 1964, a number of dams were built on the Klamath River as part of the Klamath River Hydroelectric Project (Klamath Project). Both Tribes—already decimated and displaced by European settlement—were severely impacted by the damming of the Klamath River. In addition to blocking the passage of anadromous fish to the upper reaches of the Klamath River, the dams slow the flow of the river, which results in higher water temperatures that increase the mortality of fish eggs and the growth of toxic algae blooms. A massive die-off of salmon in the lower reaches of the Klamath River in 2002 has been attributed to these effects.

FERC Relicensing Leads to Decision to Allow Removal of Klamath Dams

FERC has responsibility for licensing and inspecting hydroelectric projects such as the Klamath Project. FERC issued the original license for the Klamath Project in 1954, and the license expired in 2006. PacifiCorp has been operating the Klamath Project under an annual license since that time. In 2004, PacifiCorp filed an application to relicense the Klamath Project. The final Environmental Impact Statement (EIS) for the relicensing of the Klamath Project issued in 2007. The EIS recommended issuing a new license, but recommended that the new license include mandatory conditions from the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to mitigate environmental impacts. PacifiCorp determined that the costs of complying with such conditions would be cost-prohibitive. PacifiCorp thereafter asked FERC to put the relicensing application in abeyance and commenced negotiations with federal, state, and tribal authorities to consider alternatives to relicensing the four lower dams of the Klamath Project.

A number of parties reached an agreement to remove the four dams in February 2010. In April 2016, the states of California and Oregon, the U.S. Department of the Interior, PacifiCorp, NMFS, and the Yurok and Karuk tribes entered an amended settlement agreement whereby PacifiCorp would seek permission from FERC to transfer the four dams to a new entity called the Klamath River Renewal Corporation (Renewal Corporation), a nonprofit established to oversee dam removal and river restoration. The Renewal Corporation is funded by contributions from the states of California and Oregon, as well as rate surcharges on PacifiCorp customers. The Renewal Corporation's board of directors are appointed by various stakeholders, including the states of California and Oregon, the Karuk and Yurok Tribes, and a number of environmental interest groups.

FERC required PacifiCorp to remain a co-licensee to assure sufficient funding and responsibility for the surrender and removal process and any impacts therefrom. PacifiCorp resisted this requirement, fearing the effect of such continued, open-ended involvement on its rate-payers. Following further negotiations, the states of California and Oregon agreed to step in as the co-licensee with the Renewal Corporation in place of PacifiCorp. While the parties negotiated the co-licensee issue, PacifiCorp and the Renewal Corporation submitted a new application to surrender the license.

FERC approval of the license surrender has involved a litany of approvals from and coordination with other federal and state regulators. FERC prepared an EIS with cooperation from the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency. The final EIS was issued on August 26, 2022. In consultation with FWS and NMFS, FERC prepared a Biological Assessment pursuant to Section 7 of the federal Endangered Species Act. FERC also engaged in consultation with NMFS to review adverse effects on Essential Fish Habitat

under Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act. The Renewal Corporation received water quality certifications from the Oregon Department of Environmental Quality and the California State Water Resources Control Board pursuant to the federal Clean Water Act (CWA). In February 2022, the California Coastal Commission has determined that the dam removal would not have a substantial effect on California's coastal zone. The National Park Service, U.S. Forest Service, and the U.S. Bureau of Land Management determined that dam removal was consistent with Section 7 of the Wild and Scenic Rivers Act. The Renewal Corporation has also applied to the Corps for a dredge-and-fill permit pursuant to Section 404 of the CWA. That application remains under consideration.

Based on these regulatory actions, as well as review and analysis of other federal, state, and local requirements, FERC found that dam removal is in the public interest. FERC granted the license surrender application and approved the removal of the four dams. Although the Section 404 permit application remains under consideration with the Corps, dam removal is expected to start in summer 2023, with Copco Dam No. 2 the first dam scheduled to be razed. Renewal Corporation expects the removal of all four dams to be completed by the end of 2024.

Opposition to the Projects

Removal of the dams is not without opposition. Farmers and municipalities that rely on the Klamath River for irrigation and drinking water expressed concerns about the effect of dam removal on water deliveries. Others have expressed concern with the loss of flood control and fire protection, the release of downstream sediments and toxic material as a result of the removals (including potential Clean Water Act violations), the impacts on recreation, and the potential destruction of wildlife habitat.

On December 3, 2022, the Siskiyou County Water Users Association (SCWUA) filed a complaint in the Siskiyou County Superior Court seeking an injunction against the state of California to stop the dam removal project on the basis that removal will result in sedimentation and channel modifications in violation of the federal Wild and Scenic River Act. At this early stage of the litigation, it is unclear what effect it may have on the removal effort.

Conclusion and Implications

The removal of the four dams on the lower reach of the Klamath River is seen by many as an important and long-sought victory for salmon and the Tribes that depend on them. Others remain skeptical about the consequences of removing the dams. A few hurdles remain, including local permitting, the pending Section 404 application, and a pending lawsuit. But many view FERC approval of the license surrender application as the final significant regulatory obstacle before dam removal can proceed.
(Brian E. Hamilton, Meredith Nikkel)

CALIFORNIA COASTAL COMMISSION APPROVES SUBSTANTIAL DESALINATION PROJECT

The California Coastal Commission (Commission) recently approved a consolidated Coastal Development Permit (CDP) to support the construction of a desalination plant in Marina, California and its source water wells located beneath the Monterey Bay seafloor. Approval of the permit was conditioned on limiting the harm to dunes and wetlands, groundwater stores and local communities.

Background

Western states continue to face an extended period of drought conditions, which increasingly impacts available drinking water supplies. For the past three years, California has faced some of the driest years on record with another dry year currently anticipated in 2023. In an effort to bolster local drinking water supplies, water suppliers and stakeholders continue to explore and advance construction of desalination

plants. There are currently just four desalination facilities providing drinking water in the state.

Two proposed plants recently received Commission approval. One of the facilities is the California-American Water Company (Cal-Am) development located in Marina, California. Cal-Am intends to use this plant to bolster local supplies following recent directives from the California State Water Resources Control Board to cease diverting excess water from the Carmel River.

The Project Summary

Cal-Am proposes to construct and operate desalination components of its overall Monterey Peninsula Water Supply Project that would consist of a desalination facility, a well field, water transmission pipelines, pump station and other related infrastructure. The desalination facility will be located inland in the City of Marina with slant wells located partially in the CEMEX sand mining facility and produce initially about 4.8 million gallons of water per day (mgd). At full scale, the facility would produce 6.8 mgd. The intake wells will be located beneath the Monterey Bay seafloor. The brine will be discharged through an existing outfall after modification. Ratepayers in the Monterey Peninsula (Carmel-by-the-Sea, Pacific Grove and Pebble Beach) and the City of Castroville would receive the desalinated water.

Discussion and Differing Views

Elected officials, state agencies and local businesses have expressed support the approval of the desalination facility in order to develop drought-resistant water supplies. The Monterey Peninsula relies exclusively on groundwater, the Carmel River, and highly treated wastewater for its supplies. Additionally, regulators believe the new source will assist with easing housing shortages in the region. Because of the area's limited water supply, parts of the peninsula have been under a moratorium for new water connections for over a decade.

While the project aims to resolve water security issues, project opponents have voiced concerns. First, opponents assert the project raises environmental justice issues for designated disadvantaged neighborhoods within the City of Marina and that city residence should receive water from the facility. Opponents also assert that construction and operation of the facility may cause environmental impacts including to sensitive species, wetlands and vernal pools, and that the intake wells could degrade groundwater supplies and cause saltwater intrusion into the aquifer.

Project estimates peg the cost of the desalinated water supplies to be approximately $6,000 per acre-foot. Project proponents point to the reliability of and need for these additional supplies. Opponents assert that additional recycled water should instead be pursued.

Coastal Commission Approval

Commission staff (Staff) recommended approval of the permit based on the addition of 20 special conditions. Staff found that uncertainty surrounding the groundwater, environmental and environmental justices concerns can be addressed through a number of prior-to-issuance conditions. To address the sensitive species concerns, Staff required closure of areas during certain periods of the year, biological and habitat monitoring, compensatory mitigation for habitat, and establishment of conservation easements for dune habitat. Regarding protection of water resources, Staff required the production of a groundwater monitoring plan and a wetlands and vernal pool adaptive management plan. Staff further required Cal-Am to annually produce an environmental justice report providing the status of project-related measures to reduce costs to low income-ratepayers and a community engagement plan for the residents and representatives of the City of Marina.

During the public hearing for consideration and approval of the permit, the Commissioners modified some of the conditions and imposed additional obligations. Per the Commission, Cal-Am must update plans for assisting low-income ratepayers and cap monthly water rate increases for eligible customers. Additionally, the Commission requires Cal-Am to pay $3 million to the City of Marina and fund employment of persons to oversee a public access and amenities plan.

Conclusion and Implications

Cal-Am originally proposed a larger desalination plant in 2020. At the time, Coastal Commision Staff recommended denial of the permit for the larger facility as Staff had identified the expansion of the water recycling facility as a feasible alternative. However,

three years later, Staff have found that updated supply and demand models reasonably demonstrate the need to supplement existing supplies in the current 20-year planning period, with desalination comprising an integral component.

As drought conditions continue in California, it is likely that additional coastal cities will reevaluate their existing demand and supply models. While water recycling is an alternative, it is often inextricably linked to surface water supplies that vary from year to year. Cities facing water supply constraints will likely look to the development of new sources such as desalination. The Commission will continue to face complex environmental, resource, and environmental justice issues as demand for desalination likely increases. Future developers can glean some insight from the Cal-Am permit process as to what the Commission will require for the construction of additional desalination facilities.
(Christina Jovanovic, Derek Hoffman)

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

•Dec. 2, 2022—The Department of Justice and the Environmental Protection Agency (EPA) announced a proposed Clean Air Act settlement with Republic Steel, a steel manufacturer in Canton, Ohio, which will require the company to reduce its facility's lead emissions that have caused airborne lead levels in the surrounding area to exceed the National Ambient Air Quality Standards for Lead. The settlement terms are included in a proposed consent decree filed with the U.S. District Court for the Northern District of Ohio. In addition to securing air pollution reductions, the settlement requires Republic Steel to pay a $990,000 civil penalty.

The United States' complaint, filed simultaneously with the consent decree, alleges that Republic Steel is operating in violation of its Clean Air Act permit for failing to conduct emissions tests and for exceeding lead emission limits. Under the consent decree, Republic Steel will install and operate new control technologies at its Flexcast Vacuum Tank Degasser and associated cooling tower to reduce lead emissions from the facility. EPA estimates that the new controls will result in the reduction of over 1,000 pounds of lead emissions per year.

Exposure to lead pollution can affect almost every organ and system in the human body. It is especially harmful to young children, as they are most susceptible to some adverse effects of lead. This is of significance here, as there is a residential community with three schools within a one-mile radius of the Republic Steel facility. Additionally, this is an area with environmental justice concerns.

The settlement is subject to a public comment period that will end on Jan. 13, 2023, and final court approval. The consent decree will be available for viewing at https://www.justice.gov/enrd/consent-decrees.

Civil Enforcement Actions and Settlements—Water Quality

•Nov. 9, 2022—The City of Elyria, Ohio provides wastewater collection and treatment for approximately 55,000 residents. Elyria owns and operates a municipal wastewater treatment plant (WWTP) and a sewage collection system that is comprised of a separate sanitary sewer system and a combined sewer system. Elyria is permitted to discharge treated wastewater and combined sewage from its WWTP and combined sewer system under the terms and conditions of its National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Ohio.

The United States alleges that Elyria violated terms and conditions of its National Pollutant Discharge Elimination System permit, which set limits for how much of a certain pollutant an entity can discharge into a waterbody. The alleged violations include unauthorized discharges of pollutants into the Black River or its tributaries from sanitary sewer overflows (SSOs), repeated discharges of untreated sewage into the Black River from combined sewer overflows (CSOs) during wet weather periods, and bypasses of wastewater treatment facilities at its WWTP into the Black River, in violation of its permit.

The proposed settlement includes specific requirements to address SSOs, CSOs and bypasses of wastewater treatment. The consent decree requires completion of the construction and full implementation of all projects and pollution control measures by no later than December 31, 2044. The total cost of implementing these measures is estimated to be approximately $248 million:

(1) SSOs – Elyria shall complete sewer system improvements designed to eliminate SSOs. Specifically,

the storage and sewage conveyance project known as the East Side Relief Sewer will consist of large diameter sewer measuring nearly five miles in length. The city will also complete various pump station improvements, and construction and rehabilitation of sanitary and storm sewers to reduce inflow and infiltration.

(2) CSOs – Along with the construction of the East Side Relief Sewer the city will construct outfall specific storage projects sized up to 110,000 gallons to control CSOs to no more than 4 events with a total annual volume of less than six million gallons of discharge during the typical year.

(3) Bypasses – Construct and implement improvements at the WWTP to expand peak treatment capacity at the WWTP from 30 million gallons per day to 40 million gallons per day. Additionally, Elyria will construction a chemically enhanced primary treatment and high-rate disinfection (CEPT/HRD) facility to treat combined sewage wet weather flows above the expanded secondary treatment capacity.

The proposed settlement, lodged in the U.S. District Court for the Northern District of Ohio, Eastern Division, is subject to a 30-day public comment period and final court approval. Information on submitting comment is available at the Department of Justice website

•Nov. 29, 2022—The United States has filed a proposal in federal court that—if approved by the court—would appoint an Interim Third Party Manager to stabilize the city of Jackson, Mississippi's public drinking water system, and build confidence in the system's ability to supply safe drinking water to the system's customers. The city and the Mississippi State Department of Health (MSDH) have signed this order and agreed to its terms. At the same time, the Justice Department, on behalf of U.S. Environmental Protection Agency (EPA), filed a complaint against the city alleging that the city has failed to provide drinking water that is reliably compliant with the Safe Drinking Water Act (SDWA) to the system's customers.

The proposal, which was called a "proposed stipulated order" in court filings, is meant to serve as an interim measure while the United States, the city, and MSDH attempt to negotiate a judicially enforceable consent decree to achieve long-term sustainability of the system and the city's compliance with the SDWA and other relevant laws.

"Today the Justice Department is taking action in federal court to address long-standing failures in the city of Jackson's public drinking water system," said Attorney General Merrick B. Garland. "For many years now, the people of Jackson have lived in uncertainty—uncertainty about whether, on any given day, the water that flows from their taps will be safe to drink. With our court filings today, we have taken an important step towards finally giving the people of Jackson the relief they so desperately deserve."

The proposal seeks the court's appointment of an Interim Third Party Manager that would have the authority to, among other things:

(1) Operate and maintain the city's public drinking water system in compliance with SDWA, the Mississippi Safe Drinking Water Act, and related regulations;

(2) Take charge of the Water Sewer Business Administration, the arm of the city responsible for billing water users;

(3) Implement capital improvements to the city's public drinking water system, in particular, a set of priority projects meant to improve the system's near-term stability, including a winterization project meant to make the system less vulnerable to winter storms; and

(4) Correct conditions within the city's public drinking water system that present, or may present, an imminent and substantial endangerment to the health of the city's residents.

This court filing marks the latest efforts to address Jackson's drinking water crisis, but there is much work still to be done to solve the myriad problems plaguing Jackson's public drinking water system. On July 29, MSDH issued a boil-water notice for Jackson's public drinking water system. The next month, the city proclaimed an emergency after excessive rainfall and extreme flooding prevented the system from delivering any water to the approximately 160,000 persons living within the city and in certain areas of nearby Hinds County who rely on the system. That meant that many of those residents had no running water to drink, or to use for basic hygiene and safety purposes like washing hands, showering, flushing toilets, fighting fires, or washing dishes. The water pressure was

not restored until Sept. 6, and the boil-water notice remained in effect until Sept. 15.

•Dec. 13, 2022—The U.S. District Court for the Eastern District of California granted the request of the Justice Department to direct John Sweeney and his company, Point Buckler Club LLC, to restore sensitive tidal channels and marsh they unlawfully harmed. The court's decision follows an earlier order dated Sept. 1, 2020, when the court found defendants committed "very serious" violations of the Clean Water Act associated with the construction of a nearly mile-long levee without a permit.

The defendants' violations occurred on Point Buckler Island, an island in the greater San Francisco Bay that Sweeney had purchased in 2011. The Island's tidal channels and marsh are part of the Suisun Marsh, the largest contiguous brackish water marsh remaining on the west coast of North America. The Island is located in a heavily utilized fish corridor and is critical habitat for several species of federally protected fish.

When Sweeney acquired the Island, nearly all of it functioned as a tidal channel and tidal marsh wetlands system. Beginning in 2014, without a permit, Sweeney excavated and dumped thousands of cubic yards of soil directly into the Island's tidal channels and marsh. This unlawful conduct, the court found, eliminated tidal exchange, harmed aquatic habitat and adversely impacted water quality.

In its detailed remedial decision, the court concluded that restoration is the appropriate goal, and an injunction is necessary to achieve it.

•Dec 16, 2022—The Department of Justice and the Environmental Protection Agency (EPA) announced today a proposed consent decree with 85 potentially responsible parties, requiring them to pay a total of $150 million to support the cleanup work and resolve their liability for discharging hazardous substances into the Lower Passaic River, which is part of the Diamond Alkali Superfund Site in Newark, New Jersey.

The Justice Department and EPA alleged that these 85 parties are responsible for releases of hazardous substances into the Lower Passaic River, contaminating the 17-mile tidal stretch, including the lower 8.3 miles. The proposed consent decree seeks to hold the parties accountable for their share of the total cost of cleaning up this stretch of the river.

"This agreement holds responsible parties financially accountable for the legacy of pollution in the Lower Passaic River," said Assistant Attorney General Todd Kim of the Justice Department's Environment and Natural Resources Division. The settlement will advance the cleanup of the river for the benefit of those communities living alongside it who have been historically overburdened by pollution.

On behalf of EPA, the Justice Department lodged the consent decree with the U.S. District Court for the District of New Jersey. If and when the settlement becomes final, EPA expects to use the settlement funds to support ongoing efforts to clean up the site, specifically the lower 8.3 miles and the upper nine miles which make up the entire 17-mile Lower Passaic River Study Area. In addition to the proposed consent decree, EPA has reached several related agreements, including one whereby many parties investigated the 17-mile Lower Passaic River, another whereby Occidental Chemical Corporation, a potentially responsible party, is designing the cleanup chosen for the lower 8.3 miles, and several cost recovery agreements that resulted in payments to EPA of millions of dollars.

This consent decree is subject to a 45-day public comment period and is available for public review on the Justice Department website.

Indictments, Sanctions, and Sentencing

Dec. 8, 2022—A Burlington County, New Jersey, man who sold more than $2.7 million worth of pesticides he falsely claimed were registered with the Environmental Protection Agency as being effective against coronavirus, was sentenced today to 60 months in prison, U.S. Attorney Philip R. Sellinger and Assistant Attorney General Todd Kim of the Justice Department's Environment and Natural Resources Division announced.

Paul Andrecola, 63, of Maple Shade, New Jersey, previously pleaded guilty before U.S. District Court Judge Robert B. Kugler in Camden federal court to an information charging him with one count each of knowingly distributing or selling an unregistered pesticide in violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), wire fraud, and presenting false claims to the United States. Judge Kugler imposed the sentence today in Camden federal court.

"The defendant committed a brazen fraud in the midst of a global pandemic and sought to profit from people's fears of contracting the coronavirus," Assistant Attorney General Todd Kim of the Justice Department's Environment and Natural Resources Division (ENRD) said. "

"Today's sentence holds the defendant accountable for perpetrating the largest pandemic fraud case related to the sale of unregistered pesticides charged nationwide," Special Agent in Charge Tyler Amon of EPA's Criminal Investigation Division in New Jersey said. "This case underscores EPA's commitment to hold violators accountable for placing the public at risk by failing to ensure the integrity and safety of their products."
(R. Schuster)

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RECENT FEDERAL DECISIONS

GEORGIA MUNICIPAL IMMUNITY DOES NOT SHIELD WASTEWATER TREATMENT UTILITY FROM PFAS LIABILITY

Johnson v. 3M Company, ___F.4th___, Case No. 21-13663 (11th Cir. Dec. 21, 2022).

As the vast wave of "forever chemical" litigation breaks across state and federal courts, ensnaring wastewater treatment and disposal utilities, the precise contours of state and municipal liability are coming under scrutiny. In this case, the Eleventh Circuit Court of Appeals considered whether Georgia municipal immunity shielded a wastewater treatment utility from personal injury nuisance liability and abatement relief.

Background

Per- and polyfluoroalkyl substances (PFAS) have made multiple appearances in these pages in the context of litigation targeting manufacturers, distributors and retailers of these remarkably useful, and equally persistent, industrial chemicals. Claims alleging liability for drinking water contamination are inevitably also being brought against utilities responsible for treating, disposing of, and/or distributing wastewater and drinking water.

"[M]ore than ninety percent of the world's carpet comes from manufacturers in and around Dalton, [Georgia.]" PFAS are used in carpet manufacture for their oil and water repellent properties that render carpets stain resistant. As alleged by the plaintiff in this case, the resulting process wastewater "containing dangerously high levels of the chemicals" is discharged "directly into Dalton's wastewater treatment system." Following treatment (that does not remove PFAS), the wastewater is discharged via spraying onto the surface of the land at the Dalton Utilities' "Land Application System." The accumulation of PFAS in the Land Application System flows:

> . . .into the neighboring Conasauga River and its tributaries. After that, they travel downstream to the Oostanaula River, the primary source of Rome, Georgia's drinking water, exposing its residents to 'dangerously high levels' of the chemicals.

In 2016, the City of Rome (City) installed an emergency filtration process to remove some PFAS from tis water supply. To cover the cost of this emergency filtration system and to pay for a new, permanent one, the City imposed a surcharge the price of water for all ratepayers. The City estimates that the rate will increase by at least 2.5 percent each year for the foreseeable future.

Plaintiff Johnson is a resident of Rome and is the name plaintiff in a class action suit. He stated claims against a variety of defendants, including Dalton Utilities for nuisance, alleging personal injury and seeking abatement.

The litigation was removed to federal court under the Class Action Fairness Act. Dalton Utilities sought to dismiss the nuisance claims on that basis of municipal immunity. The district court denied the motion, and Dalton Utilities brought this interlocutory appeal.

The Eleventh Circuit's Decision

The Eleventh Circuit concluded it had jurisdiction over the appeal under the collateral order doctrine:

> Under the collateral order doctrine, an order denying state sovereign immunity 'is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability.' [*Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016).] Under Georgia law state sovereign immunity is immunity from suit, and an order denying state sovereign immunity is immediately appealable. *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992).

Here, because like Georgia state sovereign immunity, Georgia municipal immunity is immunity from suit, the collateral order doctrine applies 'even though a reviewing court must consider the plaintiff's

factual allegations in resolving the immunity issue.' *Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985). (Parallel citations omitted.)

Municipal Immunity and Georgia Common Law

Turning to the issue of municipal immunity, Dalton Utilities argued that the exception to municipal immunity under Georgia law is limited to nuisance claims alleging a taking of property seeking monetary damages, so that Johnson's personal injury-based nuisance claim seeking abatement is barred.

The Court of Appeals analysis focused on the development of Georgia's common law prior to a 1974 amendment to the state constitution "to constitutionalize the common law doctrine of sovereign immunity and the decisions involving it" while removing from the judiciary the "authority to expand (or contract) the sovereign immunity doctrine's scope in the future, effectively freezing in place Georgia sovereign immunity law."

Thus:

> . . .while a municipality's nuisance liability was traditionally limited to injuries to the physical condition of the plaintiff's property or his use and enjoyment of it, the Georgia Supreme Court abandoned that limitation in 1968 in *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968).

Phillips allowed a nuisance claim "against a city for its failure to fix a faulty traffic light, which caused the plaintiff's injuries." *Phillips* represents the common law state of play when Georgia's constitution was amended to halt common law evolution of municipal immunity.

Dalton Utilities relied on *Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014), as limiting the holding in *Phillips* by disallowing any judicially-created "exception" to state sovereign immunity. *Sustainable Coast* observed that the:

> . . .longstanding principle that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property … [is] not an exception at all, but instead, a proper recognition that the [Georgia] Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases.

Subsequent to *Sustainable Coast*, however, Georgia's Supreme Court issued *Gatto v. City of Statesboro*, 312 Ga. 164, 860 S.E.2d 713 (2021), recasting the "nuisance exception" as the "nuisance doctrine." Reviewing the history of the doctrine, the *Gatto* opinion affirmed that in *Phillips* it had "abandoned" the limitation on municipal liability "to injuries to the physical condition of the plaintiff's property or his use and enjoyment of it." Characterizing *Gatto* as "the latest word" on municipal immunity, the court denied the appeal.

Conclusion and Implications

This case illustrates the piecemeal, case-by-case litigation that, in the absence of a highly unlikely universal federal legislative disposition, will keep issues of utility liability for PFAS claims in a state of high-stakes uncertainty for many years to come. The Eleventh Circuit's opinion is available online at: https://media.ca11.uscourts.gov/opinions/pub/files/202113663.pdf.

(Deborah Quick)

DISTRICT COURT FINDS COLORADO MINE VIOLATED THE CLEAN WATER ACT

The United States District Court for the District of Colorado recently ruled against High Mountain Mining Company, LLC (High Mountain) in a challenge pursuant to the citizen suit provision of the federal Clean Water Act.

Factual and Procedural Background

High Mountain owns and operates the Alma Pacer Mine (Mine), which is an active mining site directly adjacent to a stretch of the South Platte River, called the Middle Fork. The mining process begins with digging a hole and transporting the material to the processing plant where it is sifted out by size and weight. The materials not sifted out are discharged into four settling ponds. The ponds are designed to allow water to leak out, so as to prevent a significant water problem on site. The Mine did not utilize the industry standard or typical methods for preventing pond leakage, such as a synthetic or clay liner. As a result, water was allowed to seep into the ground and travel through groundwater into the Middle Fork.

Plaintiffs Pamela Stone, M. Jamie Morrow, and Doris LeDue, all residents of towns near the river, alleged that High Mountain and James Murray, one of five managing members of the Mine, violated the Clean Water Act by discharging pollutants from the Mine into the Middle Fork without the proper NPDES permit. Plaintiffs requested that the defendants receive a civil penalty of one million dollars and that the court issue a permanent injunction prohibiting defendants from operating the Mine in violation of the Clean Water Act.

The District Court's Decision

High Mountain conceded that they did not have an NPDES permit or the state equivalent, and that the Middle Fork is a navigable water of the United States. The threshold issue, therefore, was whether the Mine was discharging a pollutant from a point source.

The Settling Ponds

First, the court determined the settling ponds were point sources under the Clean Water Act. A point source is "any discernible, confined and discrete conveyance…from which pollutants are or may be discharged. The court reasoned that the settling ponds were "discrete conveyances" that collected and channeled pollutants into the Middle Fork through groundwater. The court further reasoned that liquid escaped from a supposedly confined system. Thus, the settling ponds were point sources.

Next, the court determined the material discharged into the Middle Fork was a pollutant under the act. A pollutant is "…industrial, municipal, and agricultural waste discharged into water." The court reasoned that the water in the settling ponds was a byproduct of the mining process and therefore considered industrial waste. The water in ponds 3 and 4 also contained high concentrations of calcium, potassium, magnesium, and sodium than the water in the Middle Fork. Thus, the material discharged into the Middle Fork was a pollutant.

Last, the court determined the Settling Ponds discharged the polluted water, even though the water was carried to the Middle Fork through groundwater, a nonpoint source. To determine whether a discharge to groundwater is the functional equivalent of a direct discharge, the court considered the factors articulated by the U.S. Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution has maintained its specific identity. Time and distance are the most important factors in most cases.

The court found that the 'distance traveled' factor weighed heavily in favor of the plaintiffs because the ponds were not much farther than 100 feet from the Middle Fork. This distance is remarkably shorter than the 50 miles that the *Maui* court gave as dicta for when the Act would not apply. The court also found that the 'transit time' factor weighed heavily in favor of the plaintiffs. The court contrasted the finding in *Maui* where a transit time of "many years" would weigh against applying the Act, and reasoned that a transit time of two days in this case, even if miscalculated by a factor of ten, is "but a tiny fraction of 'many years.'" The court gave little to no weight to the remaining *Maui* factors because neither party presented sufficient evidence. Thus, leaks from the settling ponds were the functional equivalent of a direct discharge and the court found in favor of the plaintiffs on their claim against High Mountain with respect to the settling ponds.

Personal Liability and Relief

The court went on to find that plaintiffs waived their claim against James Murray when they failed to present any argument in support. However, he would not have been found personally liable under the Clean Water Act because he did not have the final say on important decisions at the Mine, did not manage day-to-day operations, and plaintiffs failed to establish that he acted knowingly.

The court calculated the civil penalty against High Mountain using the "bottom-up" method where the court first determines the economic benefit the defendant realized by failing to comply with the act and adjusts the penalty upward or downward based on various factors. Based on reliable expert testimony, High Mountain avoided paying roughly $500,000 to install competent liners in the ponds. After a brief analysis of various factors, the $500,000 penalty was imposed on High Mountain. Plaintiffs' request for injunctive relief was denied because they failed to offer any meaningful arguments in support.

Conclusion and Implications

This case provides an example of the *Maui* factors in action and may be a trend towards encompassing more activities as violations of the Clean Water Act. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-cod-1_19-cv-01246/pdf/USCOURTS-cod-1_19-cv-01246-6.pdf.

(Christina Lee, Rebecca Andrews)

Editors' Note: On Friday 30 December, the U.S. Environmental Protection Agency released its latest definition of WOTUS—the timing of which is of note as the U.S. Supreme Court may be close to a decision which would likely establishe a test to be used to determine the "reach" of the act.

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RECENT STATE DECISIONS

WASHINGTON SUPREME COURT HOLDS GUIDANCE PROVIDING FOR BROAD DISCRETION IN DEVELOPING NPDES TESTING REQUIREMENTS NOT SUBJECT TO NOTICE-AND-COMMENT RULEMAKING PROCEDURES

Northwest Pulp & Paper Association v. State of Washington, Department of Ecology, Case No. 100573-3 (Wash. Sup. Ct. Dec. 8, 2022).

The Washington State Administrative Procedures Act does not impose notice and comment procedures when individual regulators are provided with agency guidance directing them to exercise broad discretion in developing individualized testing programs for water pollutant dischargers. Such was held recently by the Washington Supreme Court.

Background

Although the use of polychlorinated biphenyls (PCBs) was banned by the U.S. Environmental Protection Agency (EPA) in 1976, "due to their toxicity, ubiquity, persistency, and tendency to bioaccumulate," they remain an actively regulated pollutant under the federal Clean Water Act (CWA), the discharge of which is prohibited in the absence of a permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES). 40 C.F.R. § 129.4(f); 33 U.S.C. §§ 1311(a), 1342(a)(1).

Washington State's Department of Ecology (Ecologyt) establishes water standards under the CWA and administers the state's NPDES program. A NPDES permit for a discharger must include effluent limits for any pollutant for which there is a "reasonable potential" water quality standards will be violated. 40 C.F.R. § 122.44(d)(1)(iii).

In 2018, Ecology issued a revision to its *Water Quality Program Permit Writer's Manual* (Manual) to add a new Section 4.5 "address[ing] methods permit writers can use to identify and measure" PCBs. While EPA's regulations currently only approve of the use of Method 608.3, which "has a detection limit for PCBs of .065 µg/L (micrograms per liter)," the state's "water quality standards set a much lower numeric effluent limit for concentrations of PCBs at 0.00017 µg/L. WAC 173-201A-240." The revised Manual therefore added two additional test methods, 1668C and 8082A, that "may be sued for permitting purposes to evaluate sources, but not for numeric effluent limit compliance."

Plaintiff business associations challenged the revised Manual, and Section 4.5 in particular, as the promulgation of a rule without compliance with Washington's Administrative Procedure Act (APA).

The Supreme Court's Decision

A "rule" under the Washington APA is defined under a two-prong test. First, an "agency order, directive, or regulation" must be one "of general applicability." If this first criterium is met then it must "fall into one of five enumerated categories." *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wash.2d 488, 494, 886 P.2d 147 (1994). Here, the Supreme Court focused on the first criterium—whether Section 4.5 is an order, directive or regulation of general applicability?

Failor's established that "[a]n action is of general applicability if it applies uniformly to all members of a class." *Ibid.* That case dealt with a challenge to changes in the reimbursement schedule for Medicaid prescription service providers. Those schedules were applied to all providers without discretion, although the application of the schedule resulted in a different payment amount for each provider and each provider could chose to "accept or reject the amount in their individual contract." Due to the general applicability and lack of discretion, the first criterium under the APA was met.

Section 4.5, however:

> . . .does not impose a uniform numeric standard or schedule because permit writers have discre-

tion to choose the type of monitoring necessary based on the circumstances of the facility.

Before requiring any monitoring for PCBs, permit writers "should evaluate their facility and the potential for exceeding the water quality standard." In fact, PCB monitoring may not be necessary at all. Permit writers are cautioned to:

> . . .only include monitoring requirements when necessary for the facility and its specific discharge situation" and to "consider the value and purpose of requiring PCB monitoring.

This discretion to choose a method on a case-by-case basis was totally absent in *Failor's*.

(Record citations omitted.) In contrast to this wide discretion to be employed based on the particularities of each discharging facility, in *Failor's* "the same reimbursement schedule was applied to all members of the community, which made the standards generally applicable. Here, different monitoring requirements apply depending on the circumstances of the facility, so no standard for testing is applied uniformly to all dischargers" and Section 4.5 is not a rule subject to APA standards.

Having determined that the first criterium under the APA was not met, the Supreme Court concluded its analysis.

Conclusion and Implications

The notice and comment protections typical of administrative procedures for the adoption of generally-applicable agency orders, rules and directives are clearly a poor fit with the wide discretion wielded by individual regulators in the creation of individualized monitoring programs for PCB dischargers. The hyper-specific process contemplated by the *Manual* is perhaps best illustrated by Section 4.5 counsel to permit writers that they could "discuss alternative processes," *i.e.*, other than that prescribed by Section 4.5 itself, "with their supervisors." The Supreme Court's opinion is available online at: https://www.courts.wa.gov/opinions/pdf/1005733.pdf.
(Deborah Quick)

MICHIGAN COURT OF CLAIMS OVERTURNS PFAS DRINKING WATER REGULATIONS FOR FAILURE TO CONSIDER GROUNDWATER CLEANUP COSTS

3M Company v. Michigan Department of Environment, Great Lakes, and Energy, 21-000078-MZ (Mich. Ct. Cl. Nov. 15, 2022).

The Michigan Court of Claims recently ruled on motions for summary judgement relating to whether or not the Michigan Department of Environment, Great Lakes, and Energy's drinking water regulations on seven per- and poly- fluorinated alkyl substances (collectively: PFAS) were proper. The court determined that the drinking water regulations were not proper because the drinking water regulations were explicitly related to groundwater cleanup standards and the increase to groundwater cleanup costs were not considered in making the regulation. This ruling has been appealed but indicates that courts may be sensitive to costs implicated PFAS regulations.

Factual and Procedural Background

PFAS are a class of compounds which have been found to be hazardous to human health. As a result of these findings, the Michigan Governor requested the Michigan Department of Environment, Great Lakes, and Energy (Department) to promulgate drinking water rules. The Department promulgated generic groundwater cleanup standards and maximum contaminant levels (MCLs) for perfluoroocanoic acid (PFOA) and perfluorooctane sulfonate (PFOS). These PFOA and PFOS MCLs indicated that any drinking water standard that was more stringent than the groundwater MCLs would be automatically be applied to the groundwater standard for those same

compounds. There were no other existing groundwater standards relating to other PFAS compounds.

The Department proposed drinking water standards for seven PFAS (including PFOA and PFOS) which included a regulatory-impact statement (RIS). In promulgating these drinking-water standards, the Department considered the costs to large and small water agencies relating to testing for these compounds and the benefits to the population relating to reduction of PFAS in water. The drinking water standards did not consider costs and benefits related to groundwater cleanup because the original cleanup costs for PFOA and PFOS were considered in the groundwater cleanup standards and no cleanup costs were required for the other five compounds, because the same process could be applied to all seven PFAS compounds.

3M sued the Department alleging the drinking water rules exceeded the Department's authority because PFAS MCLs are not required to protect public health, that the rules were arbitrary and capricious because the deliberative process was rushed, and the RIS was deficient as it didn't consider groundwater cleanup. The Department responded that its actions were within the Department's authority, the decision was not arbitrary because the deliberative process was followed, and the RIS was not deficient because the rulemaking did not need to consider groundwater MCLs. The Department also asserted that 3M did not have standing because it was not a public water agency; 3M responded that it had standing because the drinking water standards would impact groundwater which affected 3M's business.

The Court of Claims Decision

The court first considered the standing issue and determined that 3M had standing because the drinking water standards changed the MCLs for PFOA and PFOS in groundwater which impacted 3M's business.

The court next considered if the Department exceeded its rulemaking authority. The Michigan Legislature permits the Department to promulgate rules necessary to protect public health. 3M argued that the term necessary should mean "requisite" or "indispensable" and because the MCLs at the implemented levels were not indispensable to protecting human health, the Department had exceeded its authority. The Department asserted that in the context of public health, necessary should mean "suitable" or "appropriate." The court disagreed with 3M's definition of "necessary" as it is impossible for the Department to create a perfectly optimized regulatory scheme. As such, the Department did not exceed its rulemaking authority by promulgating the MCLs.

The third issue considered was whether the rule making was arbitrary and capricious. 3M asserted that the decision was arbitrary and capricious because the benefit of removing PFAS from drinking water was not fully analyzed or considered during the rule promulgation. The court determined the Department's analysis of PFAS concerns and the existing scientific research on the matter indicated that the MCLs were not arbitrary and capricious.

The fourth issue analyzed was whether the RIS was deficient. 3M challenged the RIS on a variety of grounds; however, the court only examined whether the RIS adequately considered costs. The court determined that the RIS did not adequately consider costs because the drinking water regulation immediately changed the groundwater MCLs for the PFOS and PFOA. Given that the groundwater MCLs for PFOS and PFOA became stricter and more expensive, this was a cost that needed to be considered in the drinking water rule promulgation. This was compounded by the Department's finding that costs for removing the five other PFAS compounds from groundwater was not required given that the cleanup procedure for all seven PFAS compounds was the same. Because the Department never considered the cleanup costs of any of the seven PFAS compounds in groundwater, the Court determined that the RIS was deficient.

Conclusion and Implications

Although this decision does not bind any other court or state and is currently on appeal, it suggests that PFAS manufactures may have standing to challenge PFAS drinking water standards that affect groundwater cleanup costs, even if the manufacturers do not own or manage a drinking water facility. (Anya Kwan, Rebecca Andrews)

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