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EWL

WATER 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)

NEWS FROM THE WEST

In this month's News from the West we begin with the State of Colorado which has modified its existing drinking water regulations to allow direct potable reuse for public water systems. Next, we turn to Washington where the state's Supreme Court clarified procedural notice requirements for agency notice—in this case, as to agency rules as to NPDES testing requirements.

Finally, we look to California where the state's Coastal Commission approved a new planned desalination plant. The state is notoriously slow in offering final approval of these plants in the face of the myriad of statutes and environmental concerns as to coastal desalination—perhaps ironic for a state with so much coastline and so dependent on snow pack which is precariously difficult to predict from year to year.

Colorado Adopts New Regulation to Allow Direct Potable Reuse of Public Water Supplies

The Colorado Department of Public Health and Environment (CPDHE) recently modified its existing drinking water regulations to allow direct potable reuse for public water systems. The new regulation places strict requirements on suppliers but is intended to allow public water systems to use and reuse their water to serve more customers across the growing state more efficiently.

Background On Domestic Potable Reuse and Other Reuse Systems

Direct potable reuse (DPR) is a process through which wastewater can be treated and directly returned to a drinking water supply. This process differs from indirect potable reuse, in which wastewater effluent is first filtered through an environmental

buffer, such as a river or wetland, before returning to the drinking water system. Before this new regulation, only Ohio, South Carolina, and New Mexico had regulated DPR systems, although California, Florida, and Arizona are working on similar programs.

Indirect potable reuse is currently implemented across the country, including larger municipalities such as San Diego. Indirect potable reuse systems, particularly in geographic regions like Colorado, suffer inefficiencies from transit, seepage, and evaporation losses. Therefore, while indirect potable reuse may increase a supplier's water supply, DPR is potentially a more efficient process by removing environmental losses inherent in arid climates. In Colorado, the city of Aurora has long used an indirect potable reuse system via the South Platte River. Aurora's system is a textbook example of indirect reuse in that it treats wastewater effluent and discharges that water to the river system. The natural environment then filters the water as it descends through an alluvial aquifer before Aurora pumps it back out for subsequent treatment, blending, and ultimately, domestic reuse.

Many suppliers also utilize nonpotable reuse. In this system, wastewater is reclaimed and used for non-drinking water uses, such as irrigation of parks or golf courses. However, in a DPR system wastewater is filtered through a more complex treatment facility such that the water then reenters the drinking water supply. DPR systems, which are attracting more attention in water-scarce regions, allow multiple successive reuses of a drinking water supply source, thus increasing the total water available to end users. According to some DPR proponents, an advanced DPR system may allow total domestic water supplies to be increased as much as 90 percent through successive reuses.

For all of its advantages, DPR has historically struggled to gain traction partly because of public perception. Without sufficient technological advancements and public education, consumers have understandably been hesitant to obtain their drinking water supply from treated wastewater effluent. Yet, the ever-increasing population growth and demand for drinking water in Colorado, coupled with finite supplies, has led the state to pursue new options. Indeed, the Colorado Water Conservation Board's 2015 Colorado Water Plan and Draft 2023 Water Plan Update both include expanded reuse as a stated goal, and the 2023 Water Plan Update specifically includes the development of a water reuse progress report.

Water Quality Control Commission Study, Testing and Rules

To that end, the Colorado Water Quality Control Commission (WQCC), a division of CDPHE, undertook a years-long study and testing process to promulgate rules and regulations for DPR systems in Colorado. The WQCC voted unanimously to approve the new rules on October 11, 2022 and the changes were formally adopted on November 14, 2022.

Rule 11 DPR Changes

WQCC Regulation 11 contains the primary drinking water rules for Colorado. The new rules add section 11.14, the Direct Potable Reuse Rule (DPR Rule). Although the DPR Rule does not require any Colorado suppliers to begin DPR programs, it outlines specific requirements that must be followed for implementing those systems. The DPR Rule supplements the existing regulations for drinking water quality found elsewhere in Rule 11.

Suppliers interested in pursuing DPR must first apply for WQCC approval to assess their technical, managerial, and financial capacity to operate a DPR system. The application must be filed prior to submitting any plans or specifications for the system. Prior to the application, the supplier must also monitor its treated wastewater for at least one year. Those results will be part of the application and help determine whether a DPR system is possible for the supplier.

The DPR Rule also contains specific communication and public outreach requirements. WQCC acknowledged that public opinion may be the most difficult hurdle in creating new DPR systems, so this section is designed to ensure public participation, knowledge, and involvement. The DPR Rule specifically requires at least one public meeting and mailing information to all consumers within its service area. The notification must include an explanation of DPR in general, a description of the proposed system, and the supplier's reasons for the proposed implementation, among other technical information.

Practically, the DPR Rule contains numerous technical requirements, including a mandate for an enhanced source water control program, operations requirements, treated wastewater control parameters, and specific levels of pathogen and chemical reduction. These hyper-specific requirements work to ensure that wastewater reused through any DPR system sufficiently eliminates contaminants to safe or non-

detectable levels. The WQCC and supporters of the DPR Rule believe these provisions may allay public concerns over drinking treated wastewater.

Conclusion and Implications

The DPR Rule will create more flexibility for growing municipalities and other public water providers throughout Colorado to firm up their water supplies. However, the DPR Rule—as a drinking water regulation—does not alter Colorado's prior appropriation system for water rights administration purposes. Colorado's tributary water rights are often limited to an initial use. Return flows generated by the initial use are typically required to be relinquished to the stream system and, in turn, form the water supply available for downstream users within the water rights priority system. In contrast, non-tributary, trans-mountain, and certain trans-basin water rights (*i.e.*, water that is hydraulically disconnected from the surface stream in the basin of use) allows the water right owner to reuse the water outside of the state's typical priority administration. Thus, DPR systems are more likely to be implemented by water providers with the type of water rights that inherently allow for reuse and successive use. Front Range municipalities, such as Aurora and others, which rely on supplies that already include a significant portion of trans-mountain or non-tributary water, are prime candidates for future DPR projects. However, the DPR Rule—at least from a water quality permitting standpoint—also opens the door to other public water suppliers across the state to consider how they too might deploy DPR to bolster their municipal water supplies in the face of prolonged drought.

DPR is praised by many conservation groups, including the boulder-based Western Resource Advocates, who believe that reuse, particularly through DPR, will be critical for water-stressed western states. Ever increasing demand combined with decreasing and finite water supplies throughout the West compels water providers to find creative solutions to water supply challenges. DPR is not a comprehensive solution to these issues, but the recent changes to WQCC Rule 11 now allow water suppliers to consider and plan for DPR as a new potential tool in their arsenal to obtain and provide sustainable water supplies for their customers.
(John Sittler, Jason Groves)

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 discretion 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)

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 Commission Staff recommended denial of the permit for the larger facil-

ity 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)

REGULATORY DEVELOPMENTS

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 California 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 Califor-

nia 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)

U.S. BUREAU OF RECLAMATION UTILIZES HYDROLOGIC SCENARIOS TO PREDICT INFLOW AT LAKE POWELL AND LAKE MEAD

In November 2022, the U.S. Bureau of Reclamation (Bureau) conducted an analysis to determine a possible range of reservoir elevations at Lake Mead and Lake Powell on the Colorado River. The Bureau predicted a significant drop in surface water elevation from the October 2022 reports to the November 2022 reports, suggesting potentially unprecedented low surface water elevations.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

The Bureau periodically models lake elevations at Lake Mead and Lake Powell to facilitate water management activities on the river. To predict the potential impact that reducing the Glen Canyon Dam annual releases will have on Lake Mead and Lake Powell, the Bureau created three hypothetical hydrologic scenarios through model runs. The model runs consisted of the October 2022 24-Month Study Probable Maximum inflow and the November 2022 24-Month Study Probable Minimum inflow. An additional model run was conducted in November to determine a possible range of reservoir elevations.

The Probable Minimum inflow scenario reflects a dry hydrologic condition which statistically would be exceeded 90 percent of the time. The Most Probable inflow scenario reflects a median hydrologic condition which statistically would be exceeded 50 percent of the time. The Probable Maximum inflow scenario reflects a wet hydrologic condition which statistically would be exceeded 10 percent of the time. It is approximately 80 percent likely that future elevations will fall within the range of the predicted minimum and maximum inflow scenarios.

The Department of the Interior implemented an action plan pursuant to the 2007 Interim Guidelines reducing the Glen Canyon Dam annual releases. The reduction of releases from Lake Powell resulted in a reduced released volume that would normally have been released from Glen Canyon Dam to Lake Mead consistent with routine operations under the 2007 Interim Guidelines. The reduction of releases from Glen Canyon resulted in increased storage in Lake Powell and did not affect the operating determina-

tions for 2023 and was accounted for as if the volume of water had been delivered to Lake Mead for operating condition purposes.

More on the Predictive Modelling

The hydrologic scenarios reflect the projected physical elevations at each reservoir after implementing the above action plans. The November 2022 Probable Minimum 24-Month Study's water year (WY) 2023 unregulated inflow into Lake Powell in the Probable Minimum inflow scenario is 51 percent of average. Under the Probable Minimum scenario, Lake Powell's physical elevation is projected to be 3,489.33 feet on December 31, 2023. Including intervening flows between Lake Powell and Lake Mead, Lake Mead's physical elevation is projected to be 1,018.12 feet on December 31, 2023.

Under the November 2022 Most Probable 24-Month Study, the WY 2023 unregulated inflow into Lake Powell in the Most Probable inflow scenario is 83 percent of average. Under the Most Probable scenario, Lake Powell's physical elevation is projected to be 3,529.49 feet on December 31, 2023. Including intervening flows from Lake Powell and Lake Mead, Lake Mead's physical elevation is projected to be 1,021.77 feet on December 31, 2023.

Lastly, the October 2022 Probably Maximum 24-Month Study indicates that the WY 2023 unregulated inflow into Lake Powell is 161 percent of average. Under the Probable Maximum scenario, Lake Powell's physical elevation is projected to be 3,581.67 feet on December 31, 2023. Including intervening flows between Lake Powell and Lake mead, Lake Mead's physical elevation is projected to be 1,062.28 feet on December 31, 2023.

Conclusion and Implications

The prediction models created by the Bureau of Reclamation shows what can be expected months or even years ahead. After a historic drop of water levels which have steadily been declining, the Bureau has identified a possible solution which may maintain and restore a consistent surface water elevation in Lake Mead and Lake Powell. For more information, *see:* U.S. Bureau of Reclamation, *November 2022 24-Month Study Projections Lake Powell and Lake Mead: End of Month Elevation Charts*, https://www.usbr.gov/lc/region/g4000/24mo/2022/November-Chart.pdf.

(Miles Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Water Quality

•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.
(R. Schuster)

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

Stone v. High Mountain Mining Company, LLC, et. al., ___F.Supp.4th___, Case No. 19-CV-1246 (D. Colo. 2022).

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)

RECENT STATE DECISIONS

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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