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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
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FEATURE ARTICLE

THE PUBLIC TRUST DOCTRINE: DIVERGENT INTERPRETATIONS BY DIFFERENT STATES

By Roderick E. Walston

The public trust doctrine—a legal doctrine rooted in the English common law and traceable to ancient Roman law—holds that the state has sovereignty over its navigable waters and underlying lands, and that the state holds the waters and lands in trust for the public for certain uses, such as navigation, commerce and fisheries. The U.S. Supreme Court—although defining the doctrine in its seminal decision in *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892)—has held that the doctrine is a state law doctrine and not a federal one, and therefore each state is responsible for adopting and interpreting its own doctrine.

Although many state courts have interpreted their public trust doctrines similarly, some state court interpretations have diverged, particularly on the judicial and legislative roles in administering the doctrine. The question is whether the courts, in interpreting the public trust doctrine, may adopt public trust standards that apply to and limit the legislative statutory systems regulating water and water rights, or instead whether the courts should defer to the statutory systems on grounds that the legislatures are responsible for determining the state's public policy in regulation of water. These divergent views are reflected in the California and Nevada Supreme Courts' respective decisions in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), and *Mineral County v. Lyon County, et al.*, 478 P.3d 418 (Nev. 2020).

This article will describe the origin and development of the public trust doctrine, the state courts' interpretations of the doctrine, and how the state court interpretations have converged in some respects but diverged in others, and in particular how they have diverged on the roles of the judicial and legislative branches in establishing public trust standards that apply to the state's regulation of water.

Origin and Development of Public Trust Doctrine

Under the English common law that prevailed in America during the pre-Revolutionary period, the British Crown possessed sovereignty over all navigable waters and underlying lands in the American colonies, subject to the "common rights" of the public, such as the right of free passage and fishing. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589-590 (2012). The Supreme Court has held that, as a result of the American Revolution, the Crown's sovereignty over the waters and lands was transferred to the 13 original states, subject to the federal government's constitutionally-delegated powers, and also subject to the public's "common use." *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The Supreme Court has also held that new states are admitted to the Union on an equal footing with the original thirteen states, and thus acquire the same sovereignty over their navigable waters and underlying lands as the original states—a principle known as the equal footing doctrine. *Pollard v. Hagan*, 44 U.S. 212 (1845); *see Shively v. Bowlby*, 152 U.S. 1, 26-27, 49-50 (1894). The equal footing doctrine, the Supreme Court has held, rests on a constitutional foundation rather than a statutory one; the states' sovereignty over its navigable waters and underlying lands "is conferred not by Congress but the Constitution itself." *E.g., Oregon v. State Land Bd.*, 429 U.S. 363, 374 (1977).

In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court described more fully the nature of the public's common rights in navigable waters and underlying lands. The Court held that the Illinois Legislature—which had granted a fee interest in the Chicago waterfront to a private railroad com-

pany—could revoke the fee grant in order to develop the waterfront for other commercial purposes. The Court reasoned that Illinois held its navigable waters and underlying lands in trust for the public, for purposes of navigation, commerce and fisheries, and that Illinois could not alienate the public interest in the waters and lands except in limited circumstances. *Id.* at 452-453. The Court stated that Illinois could "no more abdicate" its trust responsibility than it could "abdicate its police powers in the administration of government and the preservation of the peace. *Id.* This principle is known as the public trust doctrine, and *Illinois Central* is the seminal decision establishing the doctrine in America.

Later, the Supreme Court held that the public trust doctrine, as established in *Illinois Central*, is a state law doctrine and not a federal one. *Appleby v. New York*, 271 U.S. 364, 395 (1926). Although federal law applies in determining whether waters were navigable when the state was admitted to the Union, and thus whether the state has sovereignty over them, state law applies in determining the nature of the state's trust responsibilities, once it is determined that the waters were navigable and the state has sovereignty over them. *PPL Montana,* 565 U.S. at 604. Thus, there is no uniform public trust doctrine that applies in all states and defines the states' public trust duties. Rather, each state is responsible for adopting its own public trust doctrine and defining its own trust duties.

State Court Interpretations of the Public Trust Doctrine

Many state courts have adopted their own public trust doctrines, and have generally followed the principles established in *Illinois Central*. Generally, the state courts have held that the waters of the state belong to the state, which holds the waters in trust for the public, and that the state cannot dispose of its trust responsibilities, at least unless the disposal is in the public interest or the resources are no longer capable of serving public trust uses. *E.g., National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *Mineral County v. Lyon County, et al.*, 478 P.3d 418 (Nev. 2020); *Kootenai Env'l Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1094-1096 (Id. 1983); *United Plainsman Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 463 (N.D. 1976); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 169-171 (Mont. 1984). Some states have codified the doctrine in their constitutions and statutes, by providing, for example, that the waters within the state belong to or are owned by the public. *E.g.,* Colorado Const., art. XVI, § 5; Cal. Water Code § 102; Nev. Rev. Stat. § 533.025.

Some state courts have expanded the public trust doctrine, by holding that the doctrine not only restrains the state's authority to alienate the public interest in its waters but also ensures that the public has access to the waters for certain purposes, such as recreation and fishing. *E.g., United Plainsman*, 247 at 463 (North Dakota); *Montana Coalition for Stream Access*, 682 P.2d at 170 (Montana); *Kootenai Env'l Alliance*, 671 P.2d at 1094-1096 (Idaho). For example, the Montana Supreme Court has held that the public trust doctrine provides that any surface waters, whether navigable or not, that are capable of use for recreational purposes may be used by the public regardless of who owns the stream bed. *Montana Coalition for Stream Access*, 682 P.2d at 170. On the other hand, the Colorado Supreme Court has held that the public trust doctrine does not preclude the owner of a non-navigable stream bed of the exclusive right to control everything above the stream bed, including the right to fish. *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979).

The state court interpretations have diverged on whether the public trust doctrine applies to both navigable and nonnavigable waters, or only to navigable waters. Some state courts have held that the doctrine applies to both navigable and nonnavigable waters. *E.g., Mineral County*, 478 P.3d at 425-426 (Nevada). Others have held that the doctrine applies only to navigable waters. *E.g., Cernaik v. Brown*, 475 P.3d 68, 71-72 (Or. 2020). The California Supreme Court has held that the doctrine applies to nonnavigable tributaries of navigable waters, because activities in the tributaries can affect public trust uses in the main stream. *National Audubon*, 658 P.2d at 720-721.

The state court interpretations have also diverged on whether the public trust doctrine applies to groundwater. The Minnesota Supreme Court has held that the doctrine does not apply to groundwater, because groundwater is not navigable. *White Bear Lake Restoration Ass'n v. Minn. Dep't of Natural Resources*, 946 N.W.2d 373, 376-377 (Minn. 2020). A California appellate court, following *National Audubon*, has held that the doctrine applies to groundwater if activities in groundwater affect public trust uses in navi-

gable surface waters. *Env'l Law Found. v. State Water Res. Cont. Bd.*, 26 Cal.App.5th 844 (Cal. 2018).

These divergent interpretations of the public trust doctrine demonstrate, as the Supreme Court has held, that there is no uniform doctrine that applies in all states, and that each state is responsible for adopting and interpreting its own doctrine. *PPL Montana,* 565 U.S. at 604

Divergent Interpretations of Judicial and Legislative Roles in Administering Public Trust Doctrine: The *National Audubon* and *Mineral County* Decisions

The most consequential divergence of the state court interpretations of the public trust doctrine concerns the judicial and legislative roles in administering the doctrine. The state courts are responsible for interpreting the law, which includes the public trust doctrine. The state legislative bodies are responsible for establishing the state's public policy in regulation of the state's resources, which include public trust resources. The issue, then, is whether the courts can properly adopt public trust standards that apply to and limit the legislative statutory systems regulating water, or should instead defer to the legislative systems as an integration of public trust principles in the regulatory context. There is a seeming conflict between the judicial and legislative roles in administering the public trust doctrine.

This conflict is heightened in the context of the state's regulation of water rights. The western states, through their legislative processes, have enacted comprehensive statutory systems regulating appropriative water rights, which establish specific standards for acquiring and exercising the rights. *E.g.,* Cal. Water Code §§ 1200 *et seq.;* Nev. Rev. Stat. §§ 533.005 *et seq*. The statutory systems often inculcate public trust principles—although not by name—by providing that the water right is subject to "beneficial use" and "public interest" requirements. *E.g.,* Cal. Water Code §§ 1253, 1255, 1257; Nev. Rev. Stat. §§ 533.030(1), 533.370(2). The question is whether the public trust doctrine applies—and if so, how—in the context of these statutory water rights systems, and whether the courts may establish public trust standards that apply to the regulated rights or should instead defer to the statutory systems' regulation of the rights.

This question was directly addressed in two notable state supreme court decisions—the California Supreme Court's decision in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), and the Nevada Supreme Court's recent decision in *Mineral County v. Lyon County, et al.*, 478 P.3d 418 (Nev. 2020)—and the Courts reached divergent conclusions. The decisions serve as lodestars for opposite views of the public trust doctrine.

In *National Audubon*, the California Supreme Court in 1983 held that an environmental organization was authorized under the public trust doctrine to challenge the City of Los Angeles' (City) right to divert water from the tributaries of Mono Lake, located in northern California, through a canal to southern California in order to provide water for the people of Los Angeles. The Court held that the state or its designated agency is required to *consider*—although not necessarily *preserve*—public trust uses in issuing water rights permits, and that the state's water rights agency had failed to consider public trust uses in issuing a permit to the City in 1940 authorizing the diversions. *National Audubon*, 658 P.2d at 727-728. The Court stated that—although as a matter of "current and historical necessity" the state may issue permits for appropriation of water that may harm public trust uses—the state has various duties in deciding to do so: an "affirmative duty" to consider public trust uses in issuing the permits, a duty to protect public trust uses if "feasible" and not inconsistent with the "public interest," and a duty of "continuing supervision" over the permits after they are issued. *Id.* The Court rejected the City's argument that it had a "vested right" to divert the water under its permit, stating that no one has a "vested right" to divert water that impairs public trust uses. *Id.* at 727, 729.

The *National Audubon* Court indicated that the courts are responsible for determining the state's public trust duties, and that the legislature is bound by the court-established duties. Although the California Legislature had enacted a statute providing that "domestic use" is the highest priority of water use, Cal. Water Code §§ 106, 1254, the Court held that public trust uses—if "feasible" and not inconsistent with the "public interest"—are the highest priority. *National Audubon*, 658 P.2d at 728. The Court stated that the public trust doctrine exists independently of the legislature's statutory authority, and precludes the legislature from reducing statutory protections for public trust uses. *Id.* at 728 n. 27. The Court appeared to depart from its earlier decisions holding that the

legislature is responsible for administering the public trust doctrine and that its judgments are "conclusive." *City of Long Beach v. Mansell*, 476 P.2d 423, 437 n. 17 (Cal. 1970); *Mallon v. City of Long Beach,* 282 P.2d 481, 486 (Cal. 1955); *see Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971).

In *Mineral County*, the Nevada Supreme Court in 2020 held that the public trust doctrine did not authorize reallocation of water rights in the Walker River—an interstate river originating in California and flowing into Nevada—that had been adjudicated in a judicial decree, where the claimed purpose of the reallocation would be to provide additional inflows of water into Mineral Lake, the river's terminus, for the benefit of public trust uses in the lake. The Court held that—while the public trust doctrine *applies* to all water rights, including the rights adjudicated in the decree—the doctrine does not authorize *reallocation* of the adjudicated rights. *Mineral County*, 473 P.3d at 423-427. The Court stated that the public trust doctrine requires the Nevada legislature to regulate water rights in the public interest, and that the legislature had fulfilled its trust duty by enacting a statutory water rights system in the public interest; the statutory system provides, for example, that water belongs to the people and that a water right is subject to the "public interest." *Id.* at 426-427. The Court stated that Nevada is a highly arid state, and that the legislature had properly determined that finality and certainty of water rights serves Nevada's public interest by ensuring availability of water for the state's many public needs, such as irrigation, power, municipal supply, mining, storage, recreation, and other purposes. *Id.* at 429. The Court deferred to the legislature's judgment that finality and certainty of water rights is in the public interest, stating that it cannot "substitute [its] policy judgment for the Legislature's." *Id.* at 430. The Court concluded that the statutory water rights system "codified," "incorporates" and is "consistent with" the public trust doctrine. *Id.* at 424, 429, 431. The Court rejected the view of the California Supreme Court in *National Audubon*, stating that the decision undermined "the stability of prior allocations." *Id.* at 430 n. 10.

Thus, while *National Audubon* established public trust standards that apply to and limit the legislature's statutory system regulating water rights, *Mineral County* deferred to the legislature's statutory system in regulating the rights. While *National Audubon* held that the public interest is served by preservation of public trust resources if "feasible," *Mineral County* held that the public interest is served by finality and certainty of water rights, because finality and certainty ensures availability of water supplies. While *National Audubon* viewed the public trust doctrine as a separate body of law that conflicts with, and must be reconciled with, the statutory water rights laws, *Mineral County* viewed the public trust doctrine as an integral part of the statutory laws. The decisions reflect fundamentally different views of the public trust doctrine, and of the judicial and legislative roles in administering the doctrine.

Indeed, the decisions even diverge concerning the nature and location of public trust uses themselves. *Mineral County* held that the state is authorized under the public trust doctrine to allocate water for various public uses—including not only environmental uses but also economic uses such as the agricultural, municipal and power uses that were in issue—and even though some of these uses were located far from the water source. *Mineral County*, 473 P.3d at 428. *National Audubon*, on the other hand, held that the public trust doctrine protects only "uses and activities in the vicinity of" the water source, which are generally instream environmental uses such as recreation and fisheries. *National Audubon*, 658 P.2d at 723. Thus, *Mineral County* applied the public trust doctrine as a basis for protecting myriad public uses of water, including both economic and environmental uses, whether located in the source stream or elsewhere, and *National Audubon* applied the doctrine primarily as a basis for protecting environmental uses in the source stream.

Other State Court Interpretations of Judicial and Legislative Roles

Other state courts have also addressed the judicial and legislative roles in administering the public trust doctrine, and their decisions have often mirrored the divergent views of *National Audubon* and *Mineral County*.

Some state courts have interpreted the public trust doctrine relatively narrowly, by holding that the doctrine does not authorize the courts to interfere with or override legislative and executive policy judgments. The Iowa Supreme Court has held that the doctrine does not require the state to reduce pesticide use by farmers on grounds that pesticides cause harmful ef-

fects in navigable waters, because the responsibility for regulating pesticide use rests with elected bodies. *Iowa Citizens for Community Improvement v. Iowa*, 962 N.W.2d 780 (Iowa 2021). The Court stated that the public trust doctrine does not authorize the courts "to *weigh* different uses, that is, to second-guess *regulatory* decisions made by elected bodies." *Id.* at 789 (original emphases). The Court also held that the political question doctrine—which precludes judicial review of the legislature's policy judgments—precludes judicial review of state and local decisions regulating use of pesticides. *Id.* at 796-798.

Similarly, the Minnesota Supreme Court has held that the public trust doctrine did not preclude a state agency's issuance of a water right permit for use of groundwater interconnected with a navigable lake, because the state has adopted a comprehensive statutory system governing rights in surface waters and groundwater, which provides that "domestic water supply" is the highest priority of use. *White Bear Lake Restoration Ass'n ex rel. State of Minn. v. Minn. Dep't of Natural Resources*, 946 N.W.2d 373, 376-377 (Minn. 2020). The Oregon Supreme Court has limited the scope of the public trust doctrine, holding that the doctrine does not apply to non-navigable waters; does not apply to fish and wildlife; and does not impose fiduciary duties that private trustees owe to their beneficiaries. *Cernaik v. Brown*, 475 P.3d 68, 76 (Or. 2020).

Other state courts have interpreted the public trust doctrine more broadly, and have held that the courts may adopt public trust standards that apply to and limit legislative statutory systems regulating water—although these courts have generally upheld the statutory systems as a proper integration of public trust principles.

For example, in *Kootenai Env'l Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Id. 1983), the Idaho Supreme Court considered whether the public trust doctrine precludes a state agency from leasing docketing facilities on the bay of a navigable lake to a private entity. The Court stated that the "final determination" of whether the state and its agencies have violated their public trust duties "will be made by the judiciary," but this does not mean that the Court "will supplant its judgment for that of the legislature or agency"; rather, the Court will take a "close look" at the legislative or executive action to determine whether it complies with the public trust doctrine, and "will not act merely as a rubber stamp for agency or legislative action." *Id.* at 1092. After taking a "close look" at the facts, the Court concluded that the state agency had fulfilled its public trust duty in leasing the docketing facilities, because the agency was acting pursuant to its statutory authority. *Id.* at 1095-1096. Thus, the Court held that the agency had fulfilled its trust duty because it had acted pursuant to the legislative command.

Similarly, in *Water Permit Use Applications (Waiahole Ditch)*, 9 P.3d 409 (Haw. 2000), the Hawaii Supreme Court considered whether a state agency had violated the public trust doctrine in issuing water rights permits and adopting water quality standards. The Court, following *National Audubon*, held that Hawaii's public trust doctrine exists independently of the legislature's statutory authority, and limits the legislature's statutory authority in regulating water and water rights. *Id.* at 444-445. In determining whether the state agency had violated its public trust duty in issuing the permits and adopting the standards, however, the Court held that the agency had not violated its trust duty because it had acted pursuant to its statutory authority under the state's water code. *Id.* at 456-498. Like the Idaho Supreme Court in *Kootenai*, the Hawaii Supreme Court held that the agency had not violated its public trust duty because it had acted pursuant to the legislative command. Both the Idaho and Hawaii Supreme Courts appeared reluctant to overturn legislative and executive actions regulating water, at least absent an egregious violation of court-established public trust standards.

Indeed, even the California Supreme Court's decision in *National Audubon*—although interpreting the public trust doctrine more broadly than any other state court decision—contained passages limiting the doctrine as applied to the legislature's statutory system regulating water rights. The Court held that the state may issue appropriative water rights permits even though this may harm trust uses in source streams, *National Audubon*, 658 P.2d at 727, and that the state is required only to *consider* public trust uses but not necessarily *preserve* them. *Id.* at 727. Most importantly, the Court held that—while public trust uses must be protected if "feasible"—such "feasible" trust uses must be protected only if they are consistent with the "public interest," *id.* at 728, which is the constitutional and statutory standard that applies to all water rights in California. Cal. Const., art. X,

§2; Cal. Water Code §§ 1255, 1257. Thus, *National Audubon*, notwithstanding its broad interpretation of public trust doctrine, limited the doctrine as applied to the legislature's statutory system for regulation of water. Notably, no California court, subsequently to *National Audubon*, has overturned a legislative enactment or executive action on grounds that the enactment or action violates the public trust doctrine.

In in interesting postscript to the Idaho Supreme Court's decision in *Kootenai*, which as noted above held that the courts play a significant role in administering the public trust doctrine, the Idaho Legislature in 1996 enacted a statute that significantly limits the judicial role in administering the doctrine. The statute provides that the public trust doctrine is "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters," and the doctrine does not apply to the "appropriation or use of water" or the "adjudication of water or water rights," or the "protection or exercise of private property rights within the state of Idaho." Id. Code § 58-1203. Thus, the statute defines the state's public trust duties, and defines these duties as applicable only to the state's regulation of the beds of navigable waters, and not to the regulation of the waters themselves. The Idaho Supreme Court, if presented with the issue, may be called on to consider the judicial role in administering the public trust doctrine in light of the legislative enactment.

Conclusion and Implications

Many state courts, following *Illinois Central*, have adopted and interpreted their own public trust doctrines. Although the state court interpretations have converged in many respects, they have diverged in other respects, particularly on the roles of the judicial and legislative branches in administering the doctrine—that is, whether the courts may adopt public trust principles that apply to and limit the legislative statutory systems regulating water and water rights, or instead should defer to the legislative systems on grounds that the regulation of water and water rights lies within the legislative province. Stated differently, the issue is whether the public trust doctrine establishes separate principles that must be integrated into the statutory systems, or instead whether the statutory systems already implicitly integrate these principles although not by name.

The goal of the public trust doctrine is to protect the public interest in the state's regulation of water. The legislative branch of government is directly elected by and accountable to the public, and thus, by definition, is the appropriate branch to determine the public interest in regulation of water. The judicial branch may properly ensure that the legislative regulation is in the public interest as legislatively-defined, in that the regulation serves the public needs depicted in the regulation, and was not enacted simply to serve the private needs of water users who may benefit from the regulation (and who, arguably, may even have constitutional protections against the taking of their rights). But in terms of the specific standards that apply in regulation of water, including the standards that apply in acquiring and exercising a water right, the responsibility for establishing these standards rests with the legislative branch, which is responsible for determining the state's public policy in regulation of resources, including water and the right to its use. This responsibility derives from constitutional principles separating the legislative and judicial powers, which are unchanged by the public trust doctrine.

Roderick Walston, a member of the Best Best & Krieger law firm in Walnut Creek, California, has spent virtually his entire career handling cases in the natural resources and water law fields. He has been involved in the two main cases described in this article that provide divergent interpretations of the public trust doctrine; he represented the State of California in *National Audubon Society v. Superior Court* in the California Supreme Court, and Lyon County in *Mineral County v. Lyon County, et al.,* in the Nevada Supreme Court. A fuller explanation of Mr. Walston's views concerning these Courts' divergent interpretations can be found in his law review article, *The Public Trust Doctrine: The Nevada and California Supreme Courts' Divergent Views in Mineral County and National Audubon Society*, 58 Ida. L. Rev. 158 (2022). The views herein are those of Mr. Walston.

ENVIRONMENTAL NEWS

CALIFORNIA GOVERNOR NEWSOM SUSPENDS DELTA OUTFLOW REGULATIONS TO BOLSTER WATER STORAGE, UPDATES PRIOR RESTRICTIONS

On February 13, 2023, California Governor Gavin Newsom issued Executive Order N-3-23 (Order) designed to help California adapt to rapidly changing environmental conditions. The Order allows the State Water Resources Control Board (SWRCB) to waive environmental regulations setting minimum outflows for the Sacramento-San Joaquin Delta (Delta) in order to provide for greater storage.

Background

Following the heavy precipitation and sever flooding that California experienced in January 2023, Governor Newsome faced growing criticism that too much of this water was allowed to flow out of the Delta instead of being stored in the state's reservoirs. Over the past three years, periods record breaking wet and dry periods have made water and drought resilience planning increasingly difficult.

Building Water Resilience

Governor Newsom cited the need to protect California's water supplies from the increasingly extreme weather patterns facing the state. The Governor acknowledged that recent storms have helped bolster California's water supply, but observed that the state needs to be prepared for longterm resilience. The Order is designed to expand the state's ability during wet periods to capture storm runoff and to recharge groundwater aquifers. The Order includes directives addressing: (1) ongoing collaboration among state agencies to expedite permitting for groundwater recharge projects; (2) Delta outflow requirements; (3) new well permitting; and (4) soliciting recommendations from state agencies regarding further actions that may be necessary to address future drought conditions.

Suspension of Environmental Regulations

The Order directs the State Water Resources Control Board (SWRCB) to:

> . . .consider modifying requirements for reservoir releases or diversion limitations in the federal Central Valley Project or state Water Project facilities.

This would allow the SWRCB to release less water through the Delta and store more water in California reservoirs such as Lake Oroville and Lake Shasta. The Order would allow the SWRCB to suspend environmental requirements that mandate minimum outflow requirements from the Delta into the San Francisco Bay.

To facilitate this directive, the Order suspends California Water Code § 13247 and applicable provisions of the California Environmental Quality Act (CEQA). Section 13247 requires state agencies to comply with certain water quality rules. CEQA sets forth environmental review and protection standards.

State Water Board Decision

Eight days after Governor Newsom issued the Order, the SWRCB approved a petition filed by the U.S. Bureau of Reclamation and the California Department of Water Resources (DWR) to reduce Delta outflows and allow water to be diverted to expand inland water supplies. Currently, the minimum outflow requirement for the Port Chicago Delta is 29,200 cubic feet per second. By granting the petition, the SWRCB effectively removed the outflow requirement for the remainder of February and March 2023.

In making this decision, the SWRCB determined that these changes: (1) would not operate to the injury of any other lawful user of water; (2) would not have an undesirable effect upon fish, wildlife, or other instream beneficial; and (3) are in the public interest. The SWRCB order will remain in effect until March 31, 2023. This is not the first time the SWRCB has waived Delta flow standards; however, historically such waivers have been utilized in response to severe drought conditions.

Updated Restrictions on Well Permits

The Order also directs changes to well permitting processes throughout the state. Under a previous executive order, N-7-22, well permitting agencies are prohibited from approving permits for new wells or to alter existing wells in "high-" and "medium-priority" regulated under the Sustainable Groundwater Management Act (SGMA) absent written findings from the local groundwater sustainability agency that the new or altered well will not negatively impact achieving sustainability.

The new Order replaces and expands the exemptions previously contained in Section 9 of N-7-22. The new Order exempts from these requirements: (1) domestic wells that provide less than two acre-feet per year of groundwater; (2) wells that exclusively provided groundwater to public water supply systems; and (3) wells that are replacing existing, currently permitted wells with new wells that will produce an equivalent quantity of water as the well being replaced when the existing well is being replaced because it has been acquired by eminent domain or acquired while under threat of condemnation.

Conclusion and Implications

The Order and subsequent State Water Resources Control Board decision signal an increased focus on fortifying the state's reservoirs and ability to recharge groundwater supplies. The timing of the Order has occurred in the midst of an extremely wet winter with extensive snowpack. It may open the door for welltimed projects and management actions to divert valuable stormwater and runoff for the benefit of groundwater basins. The Order's expanded exemptions from well-permitting restrictions provide some additional relief in certain circumstances, but the ongoing restrictions will likely continue to draw concerns from well operators and inconsistent regulation at the intersection of well permitting agencies and groundwater sustainability agencies.
(Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES APPROVES NEW GROUNDWATER SUSTAINABILITY PLANS FOR NORTHERN STATE

In January 2023, the California Department of Water Resources (DWR) approved Groundwater Sustainability Plans (GSPs) for four northern California groundwater basins pursuant to the Sustainable Groundwater Management Act (SGMA): Napa Valley Subbasin, Santa Rosa Plain Subbasin, Petaluma Valley Basin, and Sonoma Valley Subbasin. The Groundwater Sustainability Agencies (GSAs) for each subbasin adequately demonstrated to DWR that the GSPs would achieve sustainability for each subbasin as required by SGMA, but DWR identified several corrective actions the GSAs should consider moving forward.

Background

Due to the constant changes in drought conditions and flood water levels, groundwater management is of the utmost importance to water agencies throughout the state. By capturing the groundwater and storing it, agencies can keep water available during drought periods. But to do so, local Groundwater Sustainability Agencies must implement groundwater management plans in accordance with the Sustainable Groundwater Management Act (SGMA).

In 2014, then-Governor Jerry Brown signed SGMA into law. SGMA emphasizes local agencies' expertise of local groundwater conditions and ability to manage those basins, either singly or jointly. Among other things, SGMA requires local agencies to form GSAs for basins experiencing moderate to severe overdraft, which occurs when groundwater withdrawal exceeds recharge and can lead to negative impacts like subsidence (sinking of land), poor groundwater quality, and insufficient water supplies for beneficial uses. GSAs are required under SGMA to develop and implement Groundwater Sustainability Plans to achieve sustainability in overdrafted groundwater basins within a 20-year time horizon. Each GSP has its own goals specific to the covered groundwater basin and must be accomplished within the 20-year period. To achieve the sustainability goal for the Subbasin, the GSP must demonstrate that implementation of the Plan will lead to sustainable groundwater management, which means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results, such subsidence, water quality degradation, and lowering of groundwater levels. Undesirable results must be defined quantitatively by the GSAs.

To date, the Department of Water Resources, which is tasked with reviewing GSPs, has approved several GSPs but has also deemed many to be inadequate, thus requiring additional plan development to achieve sustainability. Many more GSPs are still under review. DWR's review considers whether there is a reasonable relationship between the information provided and the assumptions and conclusions made by the GSA, including whether the interests of the beneficial uses and users of groundwater in the Subbasin have been considered; whether sustainable management criteria and projects and management actions described in the GSP are commensurate with the level of understanding of the Subbasin setting; and whether those projects and management actions are feasible and likely to prevent undesirable results. To the extent overdraft is present in a subbasin, DWR evaluates whether a GSP provides a reasonable assessment of the overdraft and includes reasonable means to mitigate the overdraft. DWR also considers whether a GSP provides reasonable measures and schedules to eliminate identified data gaps. DWR is also required to evaluate whether the GSP will adversely affect the ability of an adjacent basin to implement its GSP or achieve its sustainability goal.

GSAs are required to evaluate their GSPs at least every five years and whenever a GSP is amended, and to provide a written assessment to DWR. Accordingly, DWR will evaluate approved GSPs and issue an assessment at least every five years. To that end, SGMA provides a process for local GSAs to follow to ensure water data is gathered and stored properly to facilitate adaptation of groundwater management based on climate and water level changes, which in

turn allows local agencies to better curate plans for their specific region as conditions shift. The process helps ensure groundwater management accounts for uncertainties resulting from climate changes and drought shifts.

The Approvals

DWR approved GSPs for the Santa Rosa Plain Subbasin, Petaluma Valley Subbasin, Napa Valley Subbasin, and Sonoma Valley Subbasin. A single GSP was submitted by the applicable GSA for each subbasin. Each approval was based on DWR's determination that the GSP satisfied the objectives of SGMA and substantially complied with GSP regulations. Specifically, DWR issued a statement of findings for each GSP. Notably, DWR found that the Santa Rosa Plain Subbasin GSP would be closely coordinated with the neighboring GSAs in Petaluma Valley and Sonoma Valley, and that the GSP did not appear to adversely affect the ability to implement the GSPs for those subbasins or impede achievement of sustainability goals in those adjacent basins. DWR also recognized that the eight member agencies of the Santa Rosa GSA historically implemented numerous projects and management actions to address problematic groundwater conditions in the subbasin, and that the GSA reasonably demonstrated it had the legal authority and financial resources to implement the GSP. DWR made similar findings for the other GSPs.

However, DWR also recommended a number of corrective actions for each GSP and strongly encouraged each GSA to consider and implement those actions. For instance, DWR recommended that each GSA: (1) identify certain surface water imports; (2) provide additional details and discussion related to specific components the GSA used to establish chronic lowering of groundwater levels sustainable management criteria; (3) continue to fill in data gaps, collect additional monitoring data, coordinate with resource agencies and interested parties to understand beneficial uses and users that may be impacted by depletions of interconnected surface water caused by groundwater pumping, and potentially refine sustainable management criteria; and (4) provide additional details related to monitoring networks. DWR's recommendations, while different for each GSP, are focused on obtaining increasingly detailed information about the relationship between surface water availability and groundwater use (e.g., from the Russian River), operational responses to chronic lowering of groundwater levels exacerbated by prolonged periods of drought, and impacts on interconnected surface and groundwater related to pumping.

DWR emphasized that this type of information be captured and made available to assist DWR in its five-year review of the GSPs to ensure that the GSPs are on target for achieving sustainability of the groundwater basins within the time horizon set under SGMA. In sum, DWR approved the GSPs but clearly indicated its focus on detailed hydrological information demonstrating whether sustainability would be achieved moving forward as required by SGMA.

Conclusion and Implications

The Department of Water Resource's approval of the four GSPs in northern California are a positive sign for groundwater sustainability management in the region. However, DWR's continuing oversight role in actually achieving sustainability is clear in its approval of the GSPs. It remains to be seen to what extent the GSAs will pursue or satisfy the corrective actions recommended by DWR, and what role accomplishing those actions will play in DWR's subsequent review of the GSPs in five years. For more information, *see: DWR Approves GSPS For Four Northern California Basins* (Jan. 26 2023) https://water.ca.gov/News/News-Releases/2023/Jan-23/DWR-Approves-Groundwater-Sustainability-Plans-for-Four-Northern-California-Basins/.
(Elleasse Taylor, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Civil Enforcement Actions and Settlements—Chemicals and Hazardous Waste

•February 28, 2023— Grocery store chain Hy-Vee Inc. has agreed to pay a $5,374 civil penalty for violating the terms of a "Stop Sale, Use, or Removal Order" issued by the U.S. Environmental Protection Agency (EPA) to Hy-Vee concerning a pesticide product that, according to EPA, was noncompliant with federal law and may have represented a danger to consumers.

According to EPA, "Outlaw Germ Justice Disinfectant Wipes" were produced and distributed by the company MJB Worldwide LLC to 27 Hy-Vee stores in Kansas, Missouri, Iowa, and Minnesota. MJB claimed the product killed bacteria and viruses, but under federal law, any producer of a pesticide – including those intended to kill pathogens such as COVID-19 – must register the product with EPA. The Agency determined that MJB failed to register the disinfectant product, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act. As a result, any subsequent sale of the product, including by Hy-Vee, would also be unlawful under the Act.

After EPA contacted MJB in November 2020 about an unregistered pesticide product, the company assured the Agency that it had recalled all Outlaw disinfectant products and that any future production would be done in compliance with federal law. However, in January 2021, an EPA inspector discovered "Outlaw Germ Justice" wipes available for sale at a Hy-Vee store in Overland Park, Kansas. The inspector also found that the product's label described concentrations of chemicals that could cause severe eye and skin irritation if used improperly.

In January 2021, EPA issued "Stop Sale, Use, or Removal Orders" to both MJB and Hy-Vee, which prohibited all distribution and sales of Outlaw wipes and required the companies to sequester any remaining product they had under their control. After the issuance of the order, however, Hy-Vee disposed some of the product without notifying or seeking approval from EPA. In July 2022, MJB settled a separate enforcement case with EPA for its production and sale of the unlawful product. MJB is no longer an actively registered business.

•January 30, 2023—The U.S. Environmental Protection Agency (EPA) and Department of Justice announced a settlement with Logan Square Aluminum Supply Inc., resolving alleged violations of the federal Lead Renovation, Repair and Painting regulations, known as the RRP rule, at renovation projects Logan Square and its contractors performed in Chicago and Chicago suburbs.

Under the court settlement, Logan Square will implement a comprehensive program to ensure that its contractors are certified and trained to use lead-safe work practices to avoid creating lead dust during home renovation activities. Under a parallel administrative settlement agreement, Logan Square will also pay a $400,000 penalty, and perform $2 million of lead-based paint abatement work in lower-income properties located in Chicago and Chicago suburbs in communities with a higher incidence of childhood lead poisoning.

Renovation is any activity that disturbs painted surfaces and includes most repair, remodeling, and maintenance activities, such as electrical work, plumbing, carpentry and window replacement. Both Logan Square and its contractors are responsible for compliance with the RRP rule to protect the health and safety of families, especially children under the age of six who are most susceptible to lead hazards. For these projects, Logan Square must contract with only EPA-certified firms and renovators, ensure they maintain certification, use lead-safe work practices, and document their work with checklists during renovations.

Logan Square will add a link on its website to EPA's content on lead-safe work practices. In addition, Logan Square will take action to respond to situations where a contractor is not operating in compliance with the RRP rule; investigate all reports

of potential noncompliance; and ensure that any violations are corrected and reported to EPA.

EPA first discovered the alleged violations through customer complaints about a project performed in Evanston, Illinois. EPA learned that Logan Square frequently subcontracted work to uncertified firms and did not use lead-safe work practices, perform required post-renovation cleaning, provide the EPA-required lead-based paint pamphlets to occupants, or establish records of compliance. Logan Square also conducts business under other names, including Climate Guard Thermal Products Co. and Studio 41.

The consent decree was lodged in the U.S. District Court for the Northern District of Illinois. Notice of the lodging of the consent decree will appear in the Federal Register allowing for a 30-day public comment period before the consent decree can be entered by the court as final judgment.

Civil Enforcement Actions and Settlements—Air Quality

•February 20, 2023—The U.S. Environmental Protection Agency (EPA) and in coordination with the U.S. Attorney's Office for the Eastern District of Louisiana, the U.S. Department of Justice filed a complaint under Section 303 of the Clean Air Act against Denka Performance Elastomer LLC (Denka) to compel Denka to significantly reduce hazardous chloroprene emissions from its neoprene manufacturing facility in LaPlace, Louisiana. The complaint asserts that the LaPlace plant's operations present an imminent and substantial endangerment to public health and welfare due to the cancer risks from Denka's chloroprene emissions.

EPA alleges that Denka's emissions have led to unsafe concentrations of carcinogenic chloroprene near homes and schools in St. John the Baptist Parish, Louisiana.

Emissions reductions at Denka has been one of EPA's top priorities at LDEQ, and EPA is now building on the steps LDEQ took five years ago and our continuing efforts to reduce chloroprene emissions from the Denka facility.

Denka's facility manufactures neoprene, a flexible, synthetic rubber used to produce common goods like wetsuits, beverage cozies, laptop sleeves, orthopedic braces, and automotive belts and hoses. Chloroprene is a liquid raw material used to produce neoprene and is emitted into the air from various areas at the facility.

According to the complaint, filed in the U.S. District Court for the Eastern District of Louisiana, air monitoring—conducted by both the EPA and Denka over the past several years— consistently shows long-term chloroprene concentrations in the air near Denka's LaPlace facility that are as high as 14 times the levels recommended for a 70-year lifetime of exposure. This complaint seeks to compel Denka to eliminate the public health endangerment caused by its emissions by greatly reducing the levels of chloroprene to which this community is being exposed.

The complaint also names DuPont Specialty Products USA LLC, the owner of the land beneath Denka's facility and Denka's landlord. DuPont is a necessary party to ensure there are no delays in any actions that Denka is ordered to take to reduce its chloroprene emissions as a result of the rights DuPont holds under its lease agreement with Denka.

•February 14, 2023—The U.S. Environmental Protection Agency has announced a settlement with Fleece Performance LLC of Pittsboro, Indiana to resolve alleged Clean Air Act violations from the sale of "defeat devices" designed to bypass or disable vehicle emissions control systems.

Fleece Performance has agreed to destroy its inventory of defeat device components and remove all defeat devices from any vehicles and engines owned or operated by the company, and has certified that it stopped selling or installing devices that disable vehicle emission controls. The company will pay a $190,548 penalty and post a public announcement about the settlement on its website and social media accounts.

As a result of EPA's efforts to improve air quality and fuel efficiency, cars and trucks manufactured today emit far less pollution than older vehicles. To meet EPA's emission standards, engine manufacturers have carefully calibrated their engines and installed sophisticated emissions control systems.

EPA testing shows that defeat devices can substantially increase vehicle pollution which contributes to a variety of health problems. These include premature death in people with heart or lung disease, heart attacks, irregular heartbeat, aggravated asthma, and decreased lung function. Since excess emissions can disproportionately affect residents living in communi-

ties near highways and freight facilities, EPA regards halting the manufacture, sale, offering for sale, and installation of defeat devices as key issues in working toward environmental justice.

•January 24, 2023—The U.S. Environmental Protection Agency (EPA) and the Department of Justice announced a settlement with Genesee & Wyoming Railroad Services Inc. and numerous affiliated companies (collectively, GWRSI) for violation of Clean Air Act (CAA) locomotive regulations. The complaint, also filed today, alleges that GWRSI's locomotives with rebuilt engines failed to meet applicable EPA emission standards, and that GWRSI did not perform required emissions-related maintenance or keep records of maintenance performed. The locomotives at issue in this settlement burn diesel fuel which produces significant emissions of nitrogen oxides (NOx) and fine particulate matter. NOx is a contributor to the formation of summer ozone, and particulate matter smaller than 2.5 microns has been shown to cause lung damage and cancer. GWRSI estimates that the company will spend approximately $42 million to comply with consent decree requirements which will reduce NOx emissions from its locomotives by approximately 469 tons per year and particulate matter emissions by 14 tons per year.

Due to cost and other considerations, locomotives and their engines are typically rebuilt (or remanufactured) multiple times during their operational lives. EPA regulations require that rebuilt locomotive engines use the latest technology (for that model year locomotive) to reduce emissions. The consent decree requires GWRSI to comply with this requirement for rebuilt engines and take steps to ensure that it does not purchase or sell locomotives that have been rebuilt without conforming to applicable emissions standards. It also requires that GWRSI timely perform critical emissions-related maintenance. To mitigate excess pollutants associated with the alleged violations, the settlement requires GWRSI to remove from service and permanently destroy 88 older locomotives that are not required to meet any EPA emission standards. GWRSI has further agreed that it will replace any locomotives it has scrapped only with locomotives subject to, and meeting, EPA emission standards. The consent decree also requires GWRSI to pay a $1.35 million civil penalty.

The consent decree, lodged in the U.S. District Court for the District of Delaware, is subject to a 30-day public comment period and final court approval.

Civil Enforcement Actions and Settlements—Water Quality

•February 27, 2023— (Feb. 27, 2023) —The U.S. Environmental Protection Agency (EPA) announced an Administrative Settlement Agreement and Order on Consent (AOC) with Union Pacific Railroad (UPRR). The consent order compels UPRR to investigate and evaluate potential contamination in and around the former wood preserving facility in the Greater Fifth Ward area of Houston, Texas. UPRR will conduct the investigation and evaluation and EPA will oversee their work. The field work is expected to begin in early Spring 2023.

The AOC includes a statement of work that UPRR must comply with. Authorized under EPA's Comprehensive Environmental Response, Compensation, and Liability Act, the statement of work requires UPRR to conduct several actions, including: (1) On- and off-site soil sampling; (2) Vapor intrusion investigation at potentially affected residences; (3) Evaluating the off-site storm sewer system for potential contamination associated with the site; (4) Developing a proposal supporting EPA's community involvement plan for the site; (5) Conducting a risk evaluation

EPA, the city of Houston, Harris County, and the Texas Commission on Environmental Quality (TCEQ) will use the results of the investigation to inform the next steps for engagement at and around the site. Additional ongoing investigation and cleanup of the UPRR property is being conducted by UPRR under a TCEQ Industrial and Hazardous Waste Permit.

The Union Pacific Railroad Houston Wood Preserving Works site (UPRR) is just south of the Kashmere Gardens community within the Fifth Ward of Houston, Texas. Formerly owned and operated by Southern Pacific Railroad, the site ceased operating as a wood preserving facility in 1984. It was acquired by UPRR in 1997 through a merger with Southern Pacific. Contamination associated with the former wood treating operations has been identified both on and off-site, including creosote contamination in groundwater. The *groundwater* investigation and cleanup are being addressed under the TCEQ permit, and ground-

water is not used as a drinking water source for the surrounding community.

•February 24, 2023—the U.S. Environmental Protection Agency (EPA) announced over $2.4 billion from President Biden's Bipartisan Infrastructure Law for states, Tribes, and territories through this year's Clean Water State Revolving Fund (CWSRF). The funding will support communities in upgrading essential water, wastewater, and stormwater infrastructure that protects public health and treasured water bodies across the nation. Nearly half of this funding will be available as grants or principal forgiveness loans helping underserved communities across America invest in water infrastructure, while creating good-paying jobs.

EPA has stated that the Bipartisan Infrastructure Law is delivering an unprecedented investment in America that will revitalize essential water and wastewater infrastructure across the country.

The $2.4 billion is the second wave of funding made possible by the Bipartisan Infrastructure Law and builds on the Biden administration's commitment to invest in America. In May 2022, EPA announced the initial allotment of $1.9 billion from the Bipartisan Infrastructure Law to states, Tribes and territories through the CWSRF. That money is supporting hundreds of critical water infrastructure projects around the country.

The Bipartisan Infrastructure Law makes over $50 billion available for water and wastewater improvements across the country between FY2022 and FY2026.

•February 14, 2023—Capital Region Water will make substantial upgrades to the sewer and stormwater systems that serves the Harrisburg, Pennsylvania area under a proposed modified consent decree announced with the U.S. Environmental Protection Agency and Pennsylvania Department of Environmental Protection.

The modified consent decree updates a 2015 consent decree that resolved violations of the Clean Water Act and the Pennsylvania Clean Streams Law for unauthorized discharges into the Susquehanna River and its tributary, Paxton Creek.

Capital Region Water owns and operates the Harrisburg sewer and stormwater systems, including an Advanced Wastewater Treatment Facility located on Cameron Steet in Harrisburg. The Facility discharges treated wastewater from Harrisburg and the surrounding area into the Susquehanna River and eventually the Chesapeake Bay.

The proposed modified consent decree is needed to ensure that Capital Region Water's treatment facility and sewer system is functioning adequately to address continued problems with combined sewage overflows and support a sufficient plan for controlling overflows in the long term.

The modified consent decree also requires Capital Region Water to incorporate green infrastructure planning, provide more robust public notice of any sewer overflows, and post submissions required under the modified consent decree to its website.

•February 8, 2023—The U.S. Environmental Protection Agency (EPA) has issued an Emergency Administrative Order under the authority of the Safe Drinking Water Act to D&D Mobile Home Park. The park serves predominantly agricultural workers and is located within the Torres Martinez Desert Cahuilla Indians Reservation in Thermal, California, a small town in the Coachella Valley.

The EPA emergency order requires the park owners to provide safe alternative drinking water to residents, address deficiencies with their arsenic reduction system, and obtain a certified operator within one month. This action is part of ongoing EPA efforts to ensure small drinking water systems in Coachella Valley comply with the Safe Drinking Water Act.

The park's quarterly sampling results for arsenic in 2022 reached a running annual average of 11.6 parts per billion (ppb), which violates the arsenic maximum contaminant level of 10 ppb. In addition, a 2021 EPA inspection of the park's drinking water system found the owners had not addressed previous significant deficiencies. Based on these cumulative facts, EPA has determined that the conditions of the park's water system may present an imminent and substantial endangerment to the health of persons, making this current emergency order necessary to protect public health.

From the time the emergency order was issued, the mobile home park had 24 hours to begin providing all persons served by the park's water system with at least one gallon of a safe alternative source of water, such as bottled water, per day. The order requires the alternative water to be provided at no direct cost to the residents, including as rent increases or fees. In addi-

tion, the park must notify EPA of its intent to comply with the emergency order and issue a public advisory, in English and Spanish, to all its residents regarding the order and the risks associated with arsenic.

Arsenic is odorless and tasteless and can enter drinking water supplies from natural deposits in the earth or from agricultural and industrial practices. Exposure to arsenic may result in both acute and chronic health effects.

The Torres Martinez Tribe has no direct control or ownership of the D&D Mobile Home Park water system. EPA works closely with the Torres Martinez Tribe and has consulted their leadership about the violations.

• January 5, 2023—The U.S. Environmental Protection Agency (EPA) has released a new interactive webpage, called the "PFAS Analytic Tools," which provides information about per- and polyfluoroalkyl substances (PFAS) across the country. This information will help the public, researchers, and other stakeholders better understand potential PFAS sources in their communities. The PFAS Analytic Tools bring together multiple sources of information in one spot with mapping, charting, and filtering functions, allowing the public to see where testing has been done and what level of detections were measured.

EPA's PFAS Analytic Tools webpage brings together for the first time data from multiple sources in an easy to use format.

EPA's PFAS Analytic Tools draws from multiple national databases and reports to consolidate information in one webpage. The PFAS Analytic Tools includes information on Clean Water Act PFAS discharges from permitted sources, reported spills containing PFAS constituents, facilities historically manufacturing or importing PFAS, federally owned locations where PFAS is being investigated, transfers of PFAS-containing waste, PFAS detection in natural resources such as fish or surface water, and drinking water testing results. The tools cover a broad list of PFAS and represent EPA's ongoing efforts to provide the public with access to the growing amount of testing information that is available.

Because the regulatory framework for PFAS chemicals is emerging, data users should pay close attention to the caveats found within the site so that the completeness of the data sets is fully understood. Rather than wait for complete national data to be available, EPA is publishing what is currently available while information continues to fill in. Users should be aware that some of the datasets are complete at the national level whereas others are not. For example, EPA has included a national inventory for drinking water testing at larger public water utilities. That information was provided between 2013-2016. To include more recent data, EPA also compiled other drinking water datasets that are available online in select states. For the subset of states and tribes publishing PFAS testing results in drinking water, the percentage of public water supplies tested varied significantly from state to state. Because of the differences in testing and reporting across the country, the data should not be used for comparisons across cities, counties, or states.

To improve the availability of the data in the future, EPA has published its fifth Safe Drinking Water Act Unregulated Contaminant Monitoring Rule to expand on the initial drinking water data reporting that was conducted in 2013-2016. Beginning in 2023, this expansion will bring the number of drinking water PFAS samples collected by regulatory agencies into the millions. These reporting enhancements will be incorporated into future versions of the interactive webpage. EPA will continue working toward the expansion of data sets in the PFAS Analytic Tools as a way to improve collective knowledge about PFAS occurrence in the environment.

Indictments, Sanctions, and Sentencing

•January 19, 2023—Greek-Based Corporations Ordered to Pay $2 Million Criminal Fine For Tampering with Pollution Prevention Equipment and Failing to Immediately Report Hazardous Conditions on the Mississippi River

Empire Bulkers Limited and Joanna Maritime Limited, two related companies based in Greece, were sentenced today for committing knowing and willful violations of the Act to Prevent Pollution from Ships (APPS) and the Ports and Waterways Safety Act related to their role as the operator and owner of the *Motor Vessel (M/V) Joanna*.

The prosecution stems from a March 2022 inspection of the *M/V Joanna* in New Orleans that revealed that required pollution prevention equipment had been tampered with to allow fresh water to trick the sensor designed to detect the oil content of bilge waste being discharged overboard. The ship's

oil record book, a required log presented to the U.S. Coast Guard, had been falsified to conceal the improper discharges.

During the same inspection, the Coast Guard also discovered an unreported safety hazard. Following a trail of oil drops, inspectors found an active fuel oil leak in the engine room where the pressure relief valves on the fuel oil heaters, a critical safety device necessary to prevent explosion, had been disabled. In pleading guilty, the defendants admitted that the plugging of the relief valves in the fuel oil purifier room and the large volume of oil leaking from the pressure relief valve presented hazardous conditions that had not been immediately reported to the Coast Guard in violation of the Ports and Waterways Safety Act. Had there been a fire or explosion in the purifier room, it could have been catastrophic and resulted in a loss of propulsion, loss of life, and pollution, according to a joint factual statement filed in court.

U.S. District Court Judge Mary Ann Vial Lemmon sentenced the two related companies to pay $2 million ($1 million each) and serve four years of probation subject to the terms of a government approved environmental compliance plan that includes independent ship audits and supervision by a court-appointed monitor.

The U.S. Coast Guard Investigative Service investigated the case with assistance from Coast Guard Sector New Orleans and the Eighth Coast Guard District

Senior Litigation Counsel Richard A. Udell of the Environment and Natural Resources Division's Environmental Crimes Section and Assistant U.S. Attorney G. Dall Kammer for the Eastern District of Louisiana prosecuted the case.
(Robert Schuster)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS RULEMAKING PETITION REGARDING GRIZZLY BEAR RECOVERY PLAN IS NOT SUBJECT TO JUDICIAL REVIEW

Center for Biological Diversity v. Haaland, ___F.4th___, Case No. 21-35121 (9th Cir 2023).

A divided panel of the Ninth Circuit Court of Appeals, on January 19, 2023, ruled that the U.S. Fish and Wildlife Service's denial of an environmental group's petition to expand protected areas for endangered grizzly bears was not was not subject to judicial review under the Administrative Procedure Act (APA). In *Center for Biological Diversity v. Haaland* the court held that a decision to not modify a recovery plan was not a "final agency action" subject to review, affirming, on different grounds, a Montana District Court's summary judgement against the Center for Biological Diversity. Judge Sung wrote in dissent disagreeing with both the U.S. District Court's and her colleagues' reasoning.

Background

The federal Endangered Species Act (ESA) requires the Secretary of the Interior develop recovery plans "for the conservation and survival of endangered species and threatened species." (16 U.S.C § 1533(f)(1).) The U.S. Fish and Wildlife Service (Service) approved a Grizzly Bear Recovery Plan in 1982 and revised it in 1993. The Recovery Plan aims to "identify actions necessary for the conservation and recovery of the grizzly bear," which "ultimately will result in the removal of the species from threatened status." The Plan identifies "recovery zones," or "areas needed for the recovery of the species," and sets subgoals for each zone. The ESA does not require the Secretary to update recovery plans. And yet, since 1993, the Service has issued several Plan Supplements that provide habitat-based recovery criteria for identified recovery zones.

In 2014, the Center for Biological Diversity (Center) filed a petition with the service requesting that the Service evaluate the recovery potential of areas in Arizona, New Mexico, California, and Utah in a revised recovery plan. The Service denied the petition, stating that neither the ESA nor APA authorizes petitions to revise recovery plans. While the APA allows petitions for issuance, amendment, or repeal of a "rule," the Service's position was that a recovery plan was not a "rule." (*See* 5 U.S.C. § 553(e).)

At the District Court

The Center filed suit in the U.S. District Court for Montana seeking judicial review of the Service's denial of its petition under the APA and ESA. The District Court granted summary judgement to the Service, agreeing with the Service that recovery plans are not "rules" under the APA and thus not subject to petitions for amendment under 5 U.S.C. § 553(e).

The Ninth Circuit's Decision

The Ninth Circuit took a different approach than the District Court and assumed in its analysis that recovery plans are "rules" because rules under the APA are broadly defined, but found that recovery plans are not "final agency actions" subject to judicial review. In reaching this conclusion, the court employed the criterion for "final agency action" articulated in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).
Under *Bennett*, an agency action is final if it both: (1) marks the consummation of the agency's decision making process, and (2) determines rights or obligations from which legal consequences flow. The court did not reach a conclusion as to whether recovery plans meet the first criterion—representing the consummation of the agency's decision making process—but noted that the Service has not treated the 1993 Plan as the last step because it has repeatedly issued Plan Supplements. The court found that recovery plans do not meet the second criterion—determining rights or obligations from which legal consequences flow—because the ESA does not mandate compliance with recovery plans. The Service does not initiate enforcement actions based on recovery plans, nor do recovery plans impose any obligations on or confer

any rights to anyone. Recovery plans operate as more "roadmaps for recovery."
The court held that because recovery plans do not meet one of the two Bennett criterion, they are not "final agency actions." The Service's decision not to amend the grizzly bear Recovery Plan, like the plan itself, was not a "final agency action." And the District Court was not authorized to review denial of the Center's petition under the APA.

The Dissenting Opinion

In dissent, Judge Sung argued that an agency's denial of a rulemaking petition is a final agency action subject to judicial review, disagreeing with both the District Court and the majority. Judge Sung argued that a recovery plan is a rule because the term is broadly defined under the APA. She further argues that recovery plans are "final agency action" because they interpret and implement the requirements of the ESA, even if they are non-binding. And Judge Sung argues that even if a rule is not a "final agency action," an agency's denial of a rulemaking petition regarding the rule is a reviewable final agency action.

Conclusion and Implications

The decision in *Center for Biological Diversity v. Haaland* represents a setback for environmental groups. The decision forecloses an avenue for challenging recovery plans and the Service's decision to deny rulemaking petitions regarding recovery plans. However, environmental groups continue to pursue other avenues of securing additional protections for grizzly bears. For example, in January 2023, Wildearth Guardians, among other environmental groups, filed a lawsuit in Montana District Court (Case No. 9:23-cv-00010) alleging that the U.S. Department of Agriculture's wildlife service violated the ESA and the National Environmental Policy Act by failing to consider the impacts of its decision to continue a predator removal program for grizzly bears in Montana. Despite the adverse ruling in *Center for Biological Diversity*, it appears that environmental groups will continue to employ creative legal theories to pursue additional protections for grizzly bears. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/01/19/21-35121.pdf.
(Breana Inoshita, Darrin Gambelin)

TENTH CIRCUIT FINDS BLM NEEDS TO TAKE A HARD LOOK UNDER NEPA FOR NEW MEXICO FRACKING PERMITS

Diné Citizens Against Ruining Our Environment et al. v. Bernhardt et al.,
___F.4th___ , Case No. 21-2116 (10th Cir. Feb. 1, 2023).

On February 1, 2023, the Tenth Circuit for the United States Court of Appeals barred the United States Department of the Interior's Bureau of Land Management (BLM) from issuing fracking permits in New Mexico's Mancos Shale formation in *Diné Citizens Against Ruining Our Environment et al. v. Bernhardt et al.* because BLM failed to adequately examine climate change and air pollution impacts of these permits under the National Environmental Policy Act (NEPA). The Court found that the BLM analysis, preceding its drilling permit approvals, was "arbitrary and capricious" because it failed to take a hard look at the environmental impacts from greenhouse gas (GHG) emissions and hazardous air pollutant emissions.

Background

NEPA "requires agencies to consider the environmental impact of their actions as part of the decision-making process and to inform the public about these impacts." (*Citizens' Committee to Save Our Canyons v. U.S. Forest Services* (10th Cir. 2002) 297 F.3d 1012, 1021.) Specifically, NEPA requires agencies to "take a hard look at environmental consequences" of a proposed action by considering the direct, indirect, and cumulative environmental impacts of the proposed action. (40 C.F.R. §§ 1502.16 (environmental consequences), 1508.7 (cumulative impact), 1508.8 (direct and indirect effects).) When an agency is unsure if an action will significantly affect the environment, it prepares an Environmental Assessment (EA) to

determine whether an Environmental Impact Statement (EIS) is necessary. (*See*, 40 C.F.R. § 1501.5.) But if the EA determines that a proposed project will not significantly impact the human environment, the agency issues a Finding of No Significant Impact (FONSI), and the action may proceed without an EIS. (*Id.*; see also *Citizens' Committee to Save Our Canyons*, 297 F.3d at 1022–23.)

In 2003, BLM prepared a Resource Management Plan Amendment and an Associated Environmental Impact Statement(RMP/EIS) that considered the New Mexico's Mancos Shale and Gallup Sandstone zones in the San Juan Basin to be "a fully developed oil and gas play." (79 Fed. Reg. 10548, 10548 (Feb. 25, 2014).) Since then, advanced hydraulic fracturing technologies, "made it economical to conduct further drilling for oil and gas in the area," and BLM started issuing applications for permits to drill (APDs) in the shale formation using individual, site-specific EAs tiered to the 2003 RMP/EIS. But in 2019, several citizen groups challenged the site-specific EAs for hundreds of APDs approved by BLM from 2012 through 2016. (*See Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).) While most of the EAs were affirmed by the Tenth Circuit, the Court of Appeals remanded to the lower court "with instructions to vacate five EAs analyzing the impacts of APDs in the area because BLM had failed to consider the cumulative environmental impacts as required by [NEPA for APDs associated with these EAs]," by failing to consider the water needs of new oil and gas wells from fracking in the shale formation.

Following that decision, BLM prepared an EA Addendum to correct the deficiencies in those five EAs and the potential defects in 81 other EAs supporting the approvals of 370 APDs in the shale formation. BLM allowed the previously approved APDs to remain in place while it conducted additional analysis in EA Addendum to consider the air quality, GHG emissions, and groundwater impacts of issuing the APDs. Based on the EA Addendum analysis, BLM then certified the 81 EAs and the EA Addendum and issued the FONSIs. But the citizens groups sued BLM again for these 81 EAs and the EA Addendum alleging NEPA violations:

> . . .because BLM (1) improperly predetermined the outcome of the EA Addendum [by approving APDs before completing the EA Addendum and failing to suspend approvals while gathering additional information] and (2) failed to take a hard look at the environmental impacts of the APD approvals related to [] GHG [] emissions, water resources, and air quality.

The District Court affirmed BLM's action determining: (1) citizen groups' claims based on APDs that had not been approved were not ripe for judicial review, (2) BLM did not unlawfully predetermine the outcome of the EA Addendum, and (3) BLM took a hard look at the environmental impacts of the APD approvals. The citizen groups appealed.

The Tenth Circuit's Decision

In *Dine Citizens*, the Tenth Circuit panel affirmed the District Court ruling that out of the 370 APDs considered by BLM, 161 APDs were in non-final status and were not ripe for judicial review. The Court also agreed with the District Court in holding that BLM did not improperly predetermine the outcome of the EA Addendum when it did not withdraw the prior approved APDs because BLM acted in good-faith by maintaining status quo and taking no new actions on the APDs pending the completion of its voluntary EA addendum analysis. The petitioners here did not meet the high burden of showing that agency engaged in unlawful predetermination by irreversibly and irretrievably committing itself to the action " that was dependent upon the NEPA environmental analysis producing a certain outcome."

The Analysis in the EA Addendum was Arbitrary and Capricious

But, the Tenth Circuit reversed the District Court to hold that BLM's analysis in the EA Addendum and 81 EAs was arbitrary and capricious because it failed to take a hard look at the environmental impacts from GHG emissions and hazardous air pollutant emissions. The court found the BLM's decision to use the estimated annual GHG emissions from the construction and operations of the drilling wells to calculate the estimated direct emission emissions for all 370 wells over 20 year lifespans was unreasonable, arbitrary and capricious. BLM unreasonably used one year of direct emissions from the wells to represent twenty years' worth of total emissions of the well in

the EA Addendum. BLM's justification for not calculating the direct GHG emissions over the lifetime of the wells that it was not possible to estimate the total lifespan of an individual well or "to incorporate the decline curve into results from declining production over time," was inconsistent with the record.

Cumulative Impacts Analysis Defective

Furthermore, the Court found BLM's cumulative impacts analysis of GHG emissions tied to the APDs was defective because "[t]he deficiencies identified in the EAs and EA Addendum necessarily render any new APDs based on those documents invalid." The BLM's cumulative analysis of comparing the wells' emissions to all New Mexico and U.S. emissions rather than comparing the wells' total GHG emissions to the global carbon budget—a widely accepted method of analysis—rendered the EA and EA Addendum to conclude the cumulative GHG impacts as relatively small. The Court found that this comparative analysis only showed that:

> . . .there are other, larger sources of [GHG emissions], and did not show that these APDs, 'which [are] anticipated to emit more than 31 million metric tons of carbon dioxide equivalents, will not have a significant impact on the environment.'

While the BLM need not use a particular methodology:

> . . .it is not free to omit the analysis of environmental effects entirely when an accepted methodology exists to quantify the impact of GHG emissions from the approved APDs.

The Tenth Circuit also found that BLM similarly failed to sufficiently consider the cumulative impacts of the wells' hazardous air pollutant emissions on air quality and human health by only accounting for short-term emissions from a small number of wells, and not the multiyear reality. However, the Court held that BLM's analysis of the cumulative impacts to water resources and methane emissions was sufficient under NEPA.

Conclusion and Implications

As a result of the court's findings, the Tenth Circuit reversed the District Court and remanded the case back to them to consider the appropriate remedy, including if vacatur and injunction is necessary moving forward. The panel also blocked the BLM from issuing any further APDs until the District Court renders a decision.

This NEPA decision provides a good overview of how the courts apply the hard look doctrine to the agency's decision and the record supporting the agency decision, and how a court's analysis can vary based on the record. The decision also underlines the importance for the agencies to carefully select the methodologies used to analyze the GHG and hazardous air pollutants emissions, as well as ensuring the record includes proper evidence to support the agency conclusions, particularly for fossil fuels-related projects. The court's opinion is available online at: https://ca10.washburnlaw.edu/cases/2023/02/21-2116.pdf.
(Hina Gupta)

NINTH CIRCUIT RULES 2020 EPA RULE ON SECTION 401 CERTIFICATION TO REMAIN IN EFFECT DURING AGENCY RECONSIDERATION

In re Clean Water Act Rulemaking,
___F.4th___, Case Nos. 21-16958, 21-16960, 21-16961 (9th Cir. Feb. 21, 2023).

The Ninth Circuit has overruled a U.S. District Court order that set aside a Trump-era U.S. Environmental Protection Agency (EPA) rule that severely limited state's authority in the Section 401 water quality certification process, and required states to take final action on certification requests no later than one year from the initial application.

Background

The federal Clean Water Act (33 U.S.C. § 1251 *et seq*., CWA) delegates to the states the duty to set their own water quality standards and requires state certification, known as Section 401 certification, that the applicable standards have been complied with prior to issuance of "a Federal license or permit to conduct any activity … which may result in any discharge to into the navigable waters" of the United States. 33 U.S.C. § 1341(a)(1). States are required to act on certification requests "within a reasonable period of time (which shall not exceed one year) after the receipt of such request" then "the certification requirements … shall be waived." *Ibid*.

The certification process can be complex. In order to allow state regulators sufficient time to complete the certification process, a practice had developed in which states would request that applicants withdraw and resubmit their applications in order to extend the one-year deadline to act on an application.

In 2020, EPA promulgated the Clean Water Act Section 401 Certification Rule (85 Fed. Reg. 42210 (July 13, 2020), 40 C.F.R. pt. 121 (2021), the 2020 Rule). The 2020 Rule narrowed the substantive scope of Section 401 certification by providing that:

> . . .certification is 'limited to assuring that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements [as defined in the 2020 Rule.'(Emphasis in opinion.)

This change was intended "to focus the certification on 'discharges' affecting water quality, not 'activities' that affect water quality more generally." With respect to the timing of the Section 401 certification process, the 2020 Rule provided that:

> . . .a state 'is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time' beyond one year from the date of receipt.

Several states, environmental groups and tribes challenged the 2020 Rule; other states and energy industry groups intervened to defend the Rule. Before the U.S. District Court could decide any dispositive motions, newly-elected President Biden directed federal agencies to review regulations concerning the protection of public health and the environment that were enacted under the previous Administration. EPA first asked the district court to stay the litigation, and then announced its intent to revised the 2020 Rule. It then moved for remand of the 2020 Rule for agency reconsideration, requesting that the court leave the Rule in effect during the pendency of the remand. The plaintiff-challengers asked that the court either deny remand and decide the merits of their challenge, or, if remand were granted, vacate the 2020 Rule, arguing that:

> . . .keeping the 2020 Rule in place during a potentially lengthy remand would severely harm water quality by frustrating states' efforts to limit the adverse water quality impacts of federally licensed projects.

The District Court remanded and vacated the 2020 Rule.

The intervenors obtained a stay of the vacatur rule from the Supreme Court pending this appeal.

The Ninth Circuit's Decision

At issue in this appeal is whether the District Court has authority under the Administrative Procedure Act (5 U.S.C. § 561 *et seq*., the APA) to vacate a rule on remand without having decided on the merits of the challenge to the rule.

The APA:

> . . .instructs courts to 'set aside' (*i.e*., to vacate) agency actions held to be unlawful. 5 U.S.C § 706(2) (instructing courts to 'set aside' those actions 'found to be,' for example, 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.')

The Court of Appeals applied the:

> . . .basic canon of construction establishing that an 'explicit listing' of some things 'should be understood as an *exclusion of others*' not listed—even when a statute 'does not expressly say that *only*' the listed things are included.

Under this interpretative rubric, courts are authorized to vacate only those agency actions held to be unlawful.

The court relied as well on the APA's definition of "rulemaking"—the "agency process for formulating, amending or *repealing* a rule" (5 U.S.C. § 551(5)), held to require that "agencies use the same procedures within they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

Endorsing the practice of voluntary-remand-with-*vacatur* where there is no merits ruling would essentially turn courts into the accomplices of agencies seeking to avoid this statutory requirement, as it would allow agencies to repeal a rule merely by requesting a remand with vacatur in court. Because Congress set forth in the APA a detailed process for repealing rules, we cannot endorse a judicial practice that would help agencies circumvent that process.

The court rejected various equitable and policy arguments urged by the plaintiffs, holding that federal courts' equitable powers can only be exercised against "*illegal* executive action," and that neither equitable nor policy considerations cannot "trump the best interpretation of the statutory text." *Patel v. Garland*, 142 S.Ct. 1614, 1627 (2022).

Conclusion and Implications

In light of the Supreme Court's stay of the *vacatur* order, plaintiffs would be unwise to seek *certiorari* and provide the Court with an opportunity to definitively foreclose consideration of their equitable and policy arguments in a different factual context. The new Section 401 rule is anticipated to be released in Spring 2023.
(Deborah Quick)

FIFTH CIRCUIT AFFIRMED ORDER TO REMAND FOR THE PORT OF CORPUS CHRISTI AUTHORITY REGARDING DREDGING OPERATIONS

Port of Corpus Christi Authority of Nueces County, Texas v. Port of Corpus Christi L.P., 57 F.4th 432 (5th Cir. 2023).

The United States Court of Appeals for the Fifth Circuit affirmed a U.S. District Court's remand to state court of a lawsuit concerning dredging operations in a ship channel near Corpus Christi. The court held that federal officer removal statute and federal question jurisdiction did not support removal of the case to federal court.

Background

Kenneth Berry owns Berry Island and a company named The Port of Corpus Christi, L.P. (collectively: Berry Parties.) This case concerns a permit issued by the United States Army Corps of Engineers (Corps). Neither of the Berry Parties is the permittee. Instead, the permit was issued to Moda Ingleside Oil Terminal, LLC, which is also known as Enbridge Ingleside Oil Terminal, LLC (Moda/Enbridge). The permit allowed Moda/Enbridge to "conduct maintenance dredging operations" pursuant to specified terms and conditions for compliance with federal regulations. The dredging involves the removal of sea bottom from a subsurface location to a Dredge Material Placement Area (DMPA). The Corps' permit required Moda/Enbridge to deposit the dredged spoil on Berry Island, an approved DMPA. After the spoil is deposited, the solid particles settle, and the liquid decants through a piping system back into Corpus Christi Bay.

The Port of Corpus Christi Authority of Nueces County (Port Authority) filed a petition in state court alleging that the dredging operations on Berry Island resulted in trespass under Texas common law on its submerged land. In response, the Berry Parties removed the case to the United States District Court for the Southern District of Texas on three grounds: (1) Federal Officer Removal Jurisdiction; (2) Federal Question Jurisdiction; and (3) Admiralty/Maritime Jurisdiction.

The Port Authority moved to remand the case back to state court, which the District Court granted. The Berry Parties appealed the remand ordered and asked the District Court to stay the remand during the appeal. The District Court denied the motion to stay.

Arguments on Appeal

The Berry Parties raised three issues on appeal. First, they sought reversal of the District Court's order denying removal for their failure to demonstrate they are entitled to remove under the federal officer removal statute. Second, and in the alternative, they sought reversal of the District Court's order denying removal for failure to demonstrate that the Port Authority's claims raise a federal question. Third, they argued this case arises under maritime and admiralty jurisdiction.

In order to remove under the federal officer removal statute, the defendant must show: (1) it has asserted a colorable federal defense, (2) it is a 'person' within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions. Under existing U.S. Supreme Court precedent, a party does not come within the scope of the federal officer removal statute by mere compliance with federal regulations. In order to succeed in their appeal, the Berry Parties needed to show their activities "involve an effort to assist, or to help carry out, the duties or tasks of the federal superior."

The Fifth Circuit's Decision

The Court of Appeals reasoned that acting consistently with a federal permit that authorized and set conditions for making improvements to berths for barges at a private oil terminal is not carrying out a federal officer's tasks or duties. As such, the court did not consider the other elements for federal officer removal and concluded the District Court did not err in denying removal on the basis of the federal officer removal statute.

In the alternative, the Berry Parties contended this case arose under federal law because:

> . . .any challenge to their operations constitutes a collateral attack on the [Corps'] authority pursuant to federal statutes—the federal Rivers and Harbors Act and federal Clean Water Act—and associated federal regulations.

As a general rule, District Courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Removal based on federal-question jurisdiction is permitted; however, unlike federal officer removal statute, removal based on federal question is "strictly construed against removal," with doubts resolved in favor of remand to state court in recognition of the interests of comity with state court jurisdiction. The court reasoned the Port Authority's complaint alleged state-law trespass claims that do not implicate any federal law. When a claim is based on state law, a federal issue can be a basis for federal jurisdiction, but the federal issue is not automatically a sufficient basis. The Port Authority did not allege a violation of either the Clean Water Act or the Rivers and Harbors Act. Importantly, the court explained that the Clean Water Act's federal permit program does not preempt all state common law causes of action. The court concluded there is no federal issue raised by the Port Authority under any of the theories suggested by the Berry Parties.

The Berry Parties finally argued this case arose under maritime and admiralty jurisdiction. The District Court determined the defendants abandoned this basis for removal because they did not address it in their response or sur-reply to the Port Authority's motion to remand. The Berry Parties contend this basis for removal is not waived because these arguments were "incorporated by reference from the Removal." The Court of Appeals clarified that the Berry Parties failed to address the Port Authority's citations to cases holding that maritime cases filed in state court cannot be removed to federal court, unless an independent basis for federal jurisdiction exists. The Fifth Circuit concluded there was insufficient briefing on this issue in District Court.

Conclusion and Implications

This case provides a detailed analysis and clarity on the bases for removal and other general federal principles. The court's opinion is available online at: https://www.cfa5.uscourts.gov/opinions/pub/22/22-40124-CV0.pdf.
(Tiffany Michou and Rebecca Andrews)

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FIFTH CIRCUIT UPHOLDS PERMIT FOR OIL AND GAS FACILITY ON WETLANDS

Shrimpers v. United States Army Corps, 56 F.4th 992 (5th Cir. 2023).

The United States Court of Appeals for the Fifth Circuit recently denied a petition seeking review of an order of the United States Army Corps of Engineers (Corps) in which the Corps issued a federal Clean Water Act (CWA) permit authorizing the construction of a natural gas pipeline and liquefied natural gas export facility located partially on wetlands. The court held that the Corps had approved the least environmentally damaging practicable alternative that was presented during the permitting process and that the Corps did not act arbitrarily when it decided that the pipeline's impacts on wetlands would be temporary and did not require any compensatory mitigation measures.

Factual and Procedural Background

The CWA prohibits the discharge of pollutants into wetlands except in compliance with a permit issued by the Corps under Section 404 of the CWA (404 permits). The Corps must ensure that three criteria are met before issuing a valid 404 permit. First, the Corps cannot issue a permit to discharge dredged or fill material into wetlands "if there is a practicable alternative. . .which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences," or, in other words, the Corps can only issue a permit for the least environmentally damaging practicable alternative (LEDPA).

Second, the Corps cannot issue a 404 permit "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts."

And third, the Corps must determine the compensatory mitigation to be required when issuing a permit, which must be:

> . . .based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitting activity.

When reviewing the Corps' issuance of a 404 permit, a court must invalidate the issuance if it finds that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A court will not find the Corps' decision to be "arbitrary" so long as it finds that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action" and the decision "was based on a consideration of the relevant factors" and evidence.

In 2020, the Corps issued a 404 permit allowing an energy company to build a natural gas pipeline and liquefied natural gas facility on an area that was partially composed of wetlands. The approved project would be composed of two parallel pipelines each pumping about 4.5 billion cubic feet of gas per day, six "trains" to cool and liquefy the natural gas, as well as two ground flares to depressurize the trains in case of emergency.

In 2021, the petitioners in this case, Shrimpers and Fishermen of the RGV, Sierra Club, and Save RGV from LNG filed suit challenging the Corps' issuance of the permit, but the Fifth Circuit Court of Appeals held the petition in abeyance while the energy company modified its project proposal. The Corps reconsidered the company's proposal and issued a second 404 permit allowing the company to move forward with construction of the pipeline project. The petitioners filed suit in the Fifth Circuit a second time, challenging the Corps' issuance of the permit.

The Fifth Circuit's Decision

The court first analyzed and rejected the petitioners' argument that the Corps' issuance of the 404 permit violated the section of the CWA which required the agency to choose the LEDPA, The petitioners first argued that it would have been practicable and less environmentally damaging to move several of the project's six trains to a different area so that ground flares would no longer sit upon five acres of wetlands, resulting in the wetlands becoming "impaired" rather than removed entirely. Citing the Corps' argument that, even under the proposed alternative, the five acres of wetlands would be degraded by construction and operation of the pipeline such that they would

cease to be functional, the court found that the first alternative was not the LEDPA because it was not any less environmentally damaging than the approved project.

Secondly, the petitioners argued that the Corps should move the entire infrastructure of the project and all gas liquefaction trains to the west of the approved projects' location in order to avoid the wetlands. The court also rejected this argument, holding that the petitioners had not presented this alternative to the Corps at the correct stage in the approval project, and therefore neither the Corps nor the court had any obligation to consider it.

Thirdly, the petitioners proposed it would have been practicable and less environmentally damaging to utilize an existing pipeline rather than building the new pipeline. The court held that use of the existing pipeline was impracticable, given that: (1) the existing pipeline's capacity was already fully subscribed; (2) the existing pipeline would need to be fully redesigned to support the additional gas, which would result in a forty percent increase in the transportation service rate compared to the approved project; (3) a single pipeline would result in an impairment of terminal operations if that pipeline were to shut down, whereas a dual pipeline system would be safer and more reliable; and (4) the existing pipeline was not available, given that the energy company did not own the existing pipeline and there was nothing in the record showing that the company might buy it. Based on its analysis of the petitioners' arguments, the court held that the Corps had:

> . . .satisfactorily explained its reasons for rejecting the alternatives previously presented to it. . .[and that]. . .the permitted project is the LEDPA.

The court also found that the Corps did not act arbitrarily when it determined the pipeline project's impacts to wetlands would be temporary and did not necessitate compensatory mitigation. The court agreed with the Corps' conclusion that the conditions of the project "would ensure successful revegetation within one year after restoration [was] completed," and held that the Corps was not required to find any compensatory mitigation was necessary for the project. The court noted the permit placed "significant requirements on the Developers to avoid and minimize wetland impacts, such as the requirement to use horizontal drilling," and contemplated short construction periods. Ultimately, the court found it best to defer to the Corps' judgment on the compensatory mitigation issue, and held that the 404 permit was valid and review of the permit was denied.

Conclusion and Implications

The Fifth Circuit's decision in this case further defines the term "least environmentally damaging practicable alternative" for section 404 permits, and holds that the alternative must be practicable cost-wise and must not be overly burdensome for a permittee to implement. The decision grants great deference to the Corps in determining both the LEDPA and whether compensatory mitigation is required for adverse environmental impacts. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca5/21-60889/21-60889-2023-01-05.html.
(Caroline Martin and Rebecca Andrews)

DISTRICT COURT IN MASSACHUSETTS LEAVES ENFORCEMENT DECISIONS ABOUT INDUSTRIAL SEWER DISCHARGERS TO PUBLIC AUTHORITIES

Conservation Law Foundation, Inc. v. Massachusetts Water Resources Authority, ___F.Supp.4th___, Case No. 22-10626-RGS (D. Mass. Feb. 17, 2023).

A citizens group challenged the Massachusetts Water Resources Authority (MWRA) for a lack of adequate enforcement against industrial users of the public sewer system the MWRA administers, whose discharges are conducted to the MWRA's Deer Island sewage treatment plant located in the midst of Boston Harbor. Deer Island is a very large treatment facility, processing over 1.3 billion gallons of sewage water a

day from many sources. Since the early 1980s, Boston Harbor pollution has been the subject of litigation aimed at making it cleaner. A long-standing regime was originally put in place by findings and orders of District Judge David Mazzone. Judge Mazzone ordered the MWRA to implement an Industrial Pretreatment Program, including an EPA-approved Enforcement Response Plan (ERP), setting out the criteria by which the MWRA is to investigate and respond to discharging violations by industrial users.

Background

In this case the plaintiff Conservation Law Foundation alleged that the MWRA was not sufficiently and properly enforcing its ERP, asserting the federal Clean Water Act's Citizen Suit provisions as the basis for court jurisdiction. Plaintiffs alleged there were multiple violators in the system.

The District Court's Decision

In his opinion, U.S. District Judge Richard G. Stearns examines the defendant's motion to dismiss the complaint for failure to state a claim for which relief can be granted under Rule 12(b)(6) FRCP. The court rules for the MWRA, essentially on the basis that the plaintiffs cannot bring a citizen's suit to compel what it finds to be an act of prosecutorial discretion vested in the United States and it permittee, MWRA.

Plaintiff's theory of the basis of its case, per the court opinion, is that the Clean Water Act plainly and strictly prohibits the discharge of pollutants to waters in violation of a permit. Since the MWRA was allowing industrial dischargers to continue violating the rules governing their sewer discharges, *ipso facto* there was an ongoing violation of the Authority's NPDES permit. Thus, the citizen suit authority under the Act was plainly invokable. The MWRA asserted, and the court examined, the proposition that the Act's citizen suit authority did not include indirect discharges as actionable, because the decision to prosecute indirect dischargers is within the prosecutorial discretion of the MWRA under the ERP.

The court examined the wording of Act, Section 1319(f), which says the EPA "may" find that given indirect dischargers are in violation, in which case its remedy is a suit against the treatment works authority, with the faulted discharger added as a necessary party. Even so, however, the court noted that the 1319(f) language did not make the Administrator expressly the exclusive prosecutorial authority. It examines a small number of cases reviewing the breadth of citizen suit reach. In the end, it finds that the First Circuit Court of Appeals has itself issued a relevant opinion, viz. *Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc.*, 32 F.4th 99 (1st Cir. 2022).

The First Circuit's discussion of the role of the EPA in enforcing the CWA provides this court with some guidance. As the First Circuit noted:

> . . .'[c]itizen suits are,' as a general matter, 'an important supplement to government enforcement of the Clean Water Act, given that the government has only limited resources to bring its own enforcement actions.' Blackstone, 32 F.4th at 108 (emphasis added), quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1136 (11th Cir. 1990).

And although *Blackstone* overruled so much of *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991), as held that section 1319(g)(6)(A)'s preclusion extended to injunctive and declaratory relief, the ruling did not question the fact that "primary enforcement responsibility" for the CWA lies with the EPA. See, *Blackstone, 32 F.4th at 108*, quoting Scituate, 949 F.2d at 558. Thus, while the role of the citizen as an adjunct [*10] to EPA's primary enforcement power is estimable, it does not supplant the discretionary authority of the EPA Administrator, particularly in areas like the enforcement of an ERP, where consistency of purpose and predictability of result are the desirable outcomes. See, *Gwaltney, 484 U.S. at 61* ("If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.").

Citizen Suits under the Clean Water Act

The court goes on to note that allowing the citizen suit in this type of case would be potentially disruptive of a systematic enforcement regime that a treatment works had adopted and that was expressly within its discretion under the terms of its National Pollutant Discharge Elimination System permit, which contained language recognizing that

discretion. It would also risk having citizens tie up a treatment staff with assertions that were ignorant of operational engineering systems and practical realities of a given system's design and operation. Given the actual MWRA's permit language, the court quickly goes on to dismiss the plaintiff's additional argument that there was a violation of its permit that the plaintiff could enforce.

Conclusion and Implications

All in all, the court's reasoning makes legal and practical sense, although it may disappoint and not satisfy those concerned with urban treatment systems and their impacts on local waters. In the case of large American cities like Chicago, Los Angeles, New York and Boston, there is often a lack of adequate investment in treatment capacity. It can take many years and a lot of time and dedication to make available the sometimes billions of dollars needed to install and bring urban systems to the levels demanded by the law and its goals.
(Harvey Sheldon)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL REJECTS CHALLENGE TO EIR PREPARED FOR PROJECT TO CONNECT THE CITY OF BUENAVENTURA TO THE STATE WATER PROJECT

California Water Impact Network v. City of San Buenaventura, *Unpub.*, Case No. B315362 (2nd Dist. Jan. 4, 2023).

In an *unpublished* decision filed on January 4, 2023, the Second District Court of Appeal rejected a wide range of claims raised by an environmental group that challenged an Environmental Impact Report (EIR) prepared for a water pipeline project to connect the City of San Buenaventura's water supply to the California State Water Project (SWP). The project's primary objective was to make up for growing shortages in the city's locally sourced water supply. Ultimately, the court found that the EIR provided sufficient information and analysis to allow the city and the public to make an informed decision on the project.

Factual and Procedural Background

The City of Buenaventura has a contractual right to water from the SWP, however the city was never able to use the SWP because of a lack of infrastructure to deliver water allocations to the city. The project sought to remedy this by constructing a pipeline to connect to the SWP. The project, termed the State Water Interconnection Project (SWI Project) was necessitated by diminishing local water resources that it sought to replace. The project proposed a pipeline approximately seven miles long. The city prepared an EIR for the SWI Project that concluded that with mitigation measures, the project would not have any significant environmental impacts.

The city was concurrently working on a parallel project, called the Ventura Water Supply Projects (Water Supply Projects), that sought to develop a "supplemental" supply of water from local resources such as wastewater and groundwater treatment. Whereas the SWI Project was intended to replace diminishing local water sources, the goal of the Water Supply Projects was to increase the overall supply of potable water in the city. The city prepared a separate EIR for the Water Supply Projects.

An environmental organization called the California Water Impact Network (CWIN) challenged the adequacy of the EIR for the SWI Project and filed petition for writ of mandate. The trial court denied the petition.

The Court of Appeal's Decision

In its appeal, CWIN reiterated its myriad claims that the SWI Project EIR was inadequate. The Second District court rejected each of them.

The SWI Project EIR Did Not Exclude Essential Analysis'

Petitioners argued that the SWI Project EIR improperly excluded a separate environmental review of the Water Supply Project. Specifically, petitioners alleged that the city should have included a separate environmental review of the Water Supply Projects in the SWI Project EIR. The court noted that the EIR for the Water Supply Projects discussed the SWI Project and the variability of its water supply. The court found that the SWI Project's discussion of the amount of SWP water each year, and acknowledgement that it would vary each year, was sufficient to inform the city and the public about the reliability of the SWP water. It was not necessary for the SWI Project EIR to explicitly state that that the SWP project is not a reliable supply of water, sufficient information was provided in the EIR for the city to make that determination.

Petitioners also claimed that the SWI Project EIR violated the California Environmental Quality Act's (CEQA) prohibition on piecemealing single project into multiple projects because it did not discuss the Water Supply Projects in the same EIR. Here, although both projects concerned the city's water, each project involved a different source of water, different infrastructure, and neither project is dependent on the completion of the other. As the court noted:

> . . .different projects may properly undergo separate environmental review when the projects can be implemented independently.

Petitioners also challenged some of the project objectives discussed in the EIR as a "fait accompli." However, the court noted that CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives.

Petitioners also argued that the EIR did not consider project alternatives that include other local sources of water. Local sources were insufficient to meet the city's water supply and the court noted that an EIR does not need to consider alternatives that cannot achieve the basic goal of the project.

The SWI Project EIR's Discussion of the No Project Alternative Was Sufficient

Petitioners also alleged that the EIR's no project alternative "evaded the foreseeable need to reduce reliance on the Sacramento River Delta and protect public trust resources." However, as the court noted, the purpose of the no project alternative is to provide a "factually based forecast of the environmental impacts of preserving the status quo." The SWI Project EIR did this. Moreover, because there is not enough SWP water for every entity entitled to it, if the city did not use its allocation, the allocation would be used by another entity as a result the Delta would not be aided if the city decided not to build the pipeline.

Conclusion and Implications

The decision in *California Water Impact Network* helps highlight the principle that an EIR need not be perfect, it only needs to provide the important and pertinent information to allow a local agency to make an informed decision on a project. A copy of the court's *unpublished* opinion can be found here: https://www.courts.ca.gov/opinions/nonpub/B315362.PDF. (Travis Brooks)

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