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EASTERN WATER LAW™

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CONTENTS

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EWL

WATER NEWS

GOLDEN STATE WIND SECURES LEASE FOR OFFSHORE FLOATING WIND FARM

A new joint venture from Ocean Winds (OW) and Canada Pension Plan Investment Board (CPP Investment), called Golden State Wind, has been awarded an 80,000-acre lease by the United States Office of Ocean Energy Management (OEM) in the Morro Bay area off California's Central Coast for the development of an offshore wind project. The lease area awarded by OEM is one of just five areas located off the California coast that OEM has offered as the subject of recent auctions. This auction stands out from the rest, however, as it is the first floating offshore wind lease sale in the country and the first offshore wind lease sale of any type on the West Coast.

Floating Offshore Renewable Energy Comes to California

California has long had the goal of reaching 100 percent renewable energy, and to do so the state will need to have a diverse portfolio of sources. One of the newest areas of renewable energy development has come in the form of floating offshore wind energy.

In early December, the Golden State Wind joint venture put up $150.3-million to secure a lease for oceanic management rights, with OW and CPP Investment each maintaining a 50 percent investment in the project. The site of the lease, OCS-P 0564, covers over 80,000 acres of deep ocean waters and is located about 20 miles off the coasts of Morro Bay. Although the project is still years away from being realized, when it is fully built out and operational the lease area could accommodate roughly two gigawatts of offshore wind energy facilities. That amount of power would provide electricity equal to about 900,000 homes and make a sizeable impact on California's renewable energy portfolio.

Offshore wind energy production is still a relatively new idea as a whole, but the floating variant of wind technology that Golden State Wind is bringing to California is as promising as it is complex. With floating offshore wind, the facilities involve wind turbines as tall as 120 meters fixed to floating platforms, which in turn are anchored by cables to the sea bed hundreds of meters below. The technology required for these floating farms to generate clean power is still advancing and getting cheaper, but at the end of the day floating offshore is fairly novel compared to other renewable sources, such as traditional wind and solar, and is years away from becoming a popular option.

Floating offshore wind projects have been implemented elsewhere, such as the Windfloat Atlantic project of the coast of Portugal, but Golden State Wind's project is notable as being part of the first floating offshore lease sale in the United States, and one of the first offshore wind leases of any kind awarded on the West Coast. Importantly, projects such as this fit right into California's plan to generate 140 gigawatts of renewable energy by 2045, including 10 gigawatts from offshore wind. The rest of this total is expected to come from a wide array of renewable energy sources, although it seems the bulk of these sources could include solar power complemented by long-duration energy storage and traditional wind energy.

Interest in floating wind farms has been growing in countries such as Britain, France and Japan. While conventional offshore wind is limited to shallow waters with sea beds suitable to installing turbines, floating platforms open the door to moving the turbines much farther offshore, where winds are higher and more consistent, and the environmental effect could be lower.

The duo working together on the Golden State Wind project both stand out in the arena of renewable energy development. OW has expertise spanning over a decade in offshore wind, including its role in the above mentioned Windfloat Atlantic project near Portugal. CPP Investment also comes into the project with familiarity in the world of renewables and power generation, having significant investments in Calpine Energy Solutions, a producer of gas and geothermal energy, and in Pattern Energy Group LP, specializing in wind and solar energy.

Conclusion and Implications

Obtaining the lease area itself was a major step towards floating offshore coming to California, but there are still significant hurdles that stand in the way of Golden State Wind's success. On the technological side of things, developing floating platforms capable of supporting turbines and distributing their weight in the water comes as an obvious challenge. Coming as a bigger challenge, however, is the development of floating substations at sea that can be used to gather power from offshore turbines and transport that power back to shore.

In addition to the technological challenges the project will have to overcome, there are also hurdles in the form of regulatory approvals and permits to transfer the power onshore and connect it with California's energy grid, not to mention the process of arranging power purchase agreements with local utilities. Furthermore, the project will undoubtedly need to prepare for environmental challenges along the way as some environmental groups have already raised concerns about the effect the cables and turbines might have on oceanic life.

Despite the challenges the future has in store for the Golden State Wind project, the securing of the lease area represents a huge step forward in California as it means a new technology has found its way to the state. In order for California to build an energy grid fueled by renewables that is sufficiently stable, the state will have to become host to many different kinds of renewable energy-based projects, and Golden State Wind's new project is certainly one to keep an eye on as it comes to fruition. For more information on the project, *see:* https://www.oceanwinds.com/news/uncategorized/golden-state-wind-a-joint-venture-of-ocean-winds-and-cpp-investments-wins-2-gw-california-wind-energy-lease/.
(Wesley A. Miliband, Kristopher T. Strouse)

NEWS FROM THE WEST

In this month's News from the West we first address the status of the interstate compact between New Mexico, Texas and Colorado over equitable apportionment of each state's water allocation from the Rio Grande and Rio Grande Compact.

Lastly, we look to California where the state has experienced recently-unprecedented rain and snow pack. Despite the state now experiencing of 200 percent more snow pack than is "usual" the State Water Resources Control Board continues on with emergency water conservation regulations.

Interstate Compact Litigation Update: Federal Government Objects to Proposed Historic Settlement Agreement Submitted By New Mexico, Texas and Colorado

In November, 2022 after almost ten years of litigation, Colorado, New Mexico and Texas officials delivered the announcement of a proposed interstate compact settlement agreement between New Mexico, Texas and Colorado over equitable apportionment of the states' shared river system under the Rio Grande Compact after almost ten years of litigation. The three states filed a Notice of Joint Motion to Enter a Consent Decree supporting the Rio Grande Compact on November 14, 2022. On November 23, 2033, the United States subsequently filed a Notice of Motion to Strike the Proposed Consent Decree. The Special Master entered an Order denying the Motion to Strike on December 30, 2022. The proposed settlement agreement was unsealed and became public January 9, 2023. The United States' objections to the proposed settlement decree remain under seal pending further confidential negotiations among the parties and a hearing on the Joint Motion.

Background

The Rio Grande originates in the eastern slopes of the Rockies in Colorado about seventy miles from the New Mexico border. It flows through the fertile San Luis Valley and then into New Mexico where it travels south eventually forming the boundary between the United States and Mexico before emptying into the Gulf of Mexico. As neighboring states and partners to several interstate compacts (the Pecos River Compact, the Rio Grande Compact, and the Canadian River Compact) New Mexico and Texas

share a long water history. As the downstream state, Texas's focus is ensuring New Mexico meets its various compact delivery requirements.

To this end, on January 5, 2013, the State of Texas filed a Motion with the United States Supreme Court seeking leave to file its Complaint against New Mexico contending that excessive groundwater pumping between Elephant Butte Reservoir and the New Mexico-Texas border is depriving Texas of water. The Motion sought to invoke the Supreme Court's original jurisdiction to both determine and enforce Texas' rights against New Mexico to deliveries of Rio Grande water in accordance with the Rio Grande Compact, 53 Stat. 785 (1939). The Supreme Court granted Texas's Motion in 2014 and appointed a Special Master. The United States filed a Complaint-in-Intervention paralleling Texas's allegations against New Mexico. New Mexico filed a Motion to Dismiss. On October 10, 2017, the Supreme Court denied New Mexico's Motion to Dismiss Texas's Complaint. On March 5, 2018, the United States Supreme Court held that the United States may pursue its federal interests in the Rio Grande Compact in ensuring water entitlements are met on the Rio Grande, one of North America's longest rivers. *Texas v. New Mexico*, 138 S.Ct. 954 (2018).

Drought and New Mexico

In recent years, prolonged drought conditions continue to play a significant role in all western states' interstate water issues. Ongoing severe drought seasons implicate New Mexico's delivery obligations. One emerging trend is that downstream states are increasingly seeking to invoke the United States Supreme Court's original jurisdiction to address problems created in the event drought results in under-deliveries and municipal demand increases in the face of decreased supplies and storage. Ironically, these are some of the same tensions that prompted the states to develop and negotiate the Compact.

The Rio Grande is apportioned by the Rio Grande Compact of 1938, which allocates water to Colorado, New Mexico and Texas. The Compact effects an equitable apportionment of the waters of the Rio Grande among Colorado, New Mexico and Texas by establishing delivery amounts due at specific gauges. The motivating factor behind the Compact negotiations was the insufficient supply of water in the Rio Grande for irrigation in the three states and Mexico.

The Rio Grande Compact

The Rio Grande Compact divides the waters of the Rio Grande between the three Compact states. In doing so, it maximizes the beneficial use of the water without impairment of any beneficial uses under the conditions prevailing in 1929. Colorado and New Mexico can increase their storage using excess flood-water and Texas is assured that 790,000 acre-feet will be released below Elephant Butte Reservoir. However, during drought conditions Colorado and New Mexico may be required to release water from storage and may be precluded from increasing the amount of water in storage.

The Proposed Settlement

Highlights among the states' proposed settlement agreement include changes to the location where Texas's share of water under the Rio Grande Compact will be measured. Currently, the delivery measurement is approximately 100 miles north of the Texas state line. The proposed new measurement line would be on the New Mexico-Texas state line at the El Paso Gage. In addition, the proposed agreement incorporates groundwater pumping calculations into the delivery formulas. The effects of groundwater pumping have been a major source of contention among the states. The states' proposal also provides for updated conditions for the resolution of disputes regarding over or under delivers of water under the Compact.

Conclusion and Implications

Given the fact that the legal bases for interstate water deliveries under the Rio Grande Compact is 83 years old, revisions and more sophisticated hydrologic accounting methodologies was expected in any settlement proposal among Colorado, New Mexico and Texas. Another major goal of the proposed settlement included crafting new dispute resolution procedures to avoid future conflicts. A hearing on the proposed settlement decree is scheduled for February 2023. (Christina J. Bruff)

California State Water Resources Control Board Extends Emergency Water Conservation Regulations

The California State Water Resources Control Board (State Water Board) recently extended emer-

gency water conservation regulations originally adopted in January 2022, which will now remain in place through December 2023. Additional water conservation regulations adopted in May 2022 remain in effect through June 2023.

Background

The State Water Board's stated mission is to preserve, enhance and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper resource allocation and efficient use for the benefit of present and future generations. Despite sporadic, intense wet months, California has generally been experiencing one of the most severe droughts in its recorded history. In response, the State Water Board adopted two sets of emergency water conservation regulations. The regulations implement directives contained in drought emergency declarations and executive orders issued by Governor Gavin Newsom.

Emergency Drought Proclamations

Throughout the Summer of 2021, Governor Newsom issued evolving proclamations declaring drought states of emergency for a total of 50 counties and directing state agencies to take immediate action to preserve critical water supplies, to mitigate the effects of drought and to ensure the protection of health, safety, and the environment. In late Fall 2021, Governor Newsom issued a further proclamation extending the drought emergency declaration to the remainder of the state and urging Californians to reduce water use.

Emergency Regulations

The State Water Board implemented two sets of emergency regulations in response to Governor Newsom's directives.

First Water Conservation Emergency Regulation

The first set of water conservation emergency regulations were adopted and took effect in January 2022. These regulations prohibit: (1) application of potable water to outdoor landscapes in a way that causes more than incidental runoff; (2) the use of a water hose to wash a motor vehicle, unless it has a shut-off nozzle; (3) use of potable water for washing sidewalks, driveways, buildings, structures, or other hard surfaces; (4) the use of potable water for street cleaning or construction site preparation purposes; (5) the application of water to irrigate turf and ornamental landscapes during and within 48 hours after measurable rainfall of at least one fourth of one inch of rain. The regulations also prohibit cities and homeowners associations from preventing homeowners from replacing their lawns with drought-tolerant vegetation.

Second Water Conservation Emergency Regulation

The State Water Board's second set of water conservation regulations took effect in May 2022. These regulations build upon the first set of regulations and further prohibit the watering of non-functional turf at commercial, industrial, and institutional properties. The ban does not apply to watering grass that is used for recreation or other community activities. The regulation also requires urban water suppliers to implement all demand-reduction actions under Level 2 of their Water Shortage Contingency Plans, which are actions meant to address a 10 percent to 20 percent water shortage. Level 2 actions may vary with each water supplier, but they often include things such as: (1) increasing communication about the importance of water conservation; (2) limiting outdoor irrigation to certain days or hours, and (3) increasing patrolling to identify water waste.

Additionally, the second set of emergency regulations requires suppliers who do not have drought plans to take conservation actions. These actions may include conducting outreach to customers about conservation and limiting outdoor irrigation to two days a week. Water suppliers are also required to communicate with their customers about the requirements of the emergency regulation. Violations of the non-functional turf irrigation provision are subject to enforcement through fines of up to $500.

Readoption of Wasteful Water Ban

The State Water Board recently extended the first set of water conservation regulations that were originally adopted in January 2022. Those regulations will remain in place through December 2023. The regulation applies to water suppliers and individual

water users. Violations may be subject to enforcement through warning letters, water audits or fines.

State Water Board officials have indicated that the extension of the emergency regulation is intended not only bolster the state's conservation efforts, but to also further efforts to make water conservation a daily habit and way of life for Californians.

Conclusion and Implications

The State Water Resources Control Board continues to adopt, extend and implement emergency regulations in response to severe drought conditions. The current water year has experienced unprecedented storm events and is seeing improvements in snowpack and surface water reservoir levels; however, California has seen similar patterns in recent years erode to hot, dry conditions accelerating runoff and limiting long-term supplies. The State Water Board's extension of the emergency regulations reflect the possibility of another dry year. In the meantime, may Californians would likely urge pursuit of more stabilizing, long-term water supply solutions that could minimize the need to operate in seemingly perpetual emergency conditions. Information on the latest updates to the Water Conservation Emergency Regulations can be found on the State Water Board website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html. (Christina Suarez, Derek Hoffman)

REGULATORY DEVELOPMENTS

FINAL RULE DEFINING CLEAN WATER ACT 'WATERS OF THE UNITED STATES' PUBLISHED IN THE FEDERAL REGISTER

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) published the "Revised Definition of 'Waters of the United States'" rule in the Federal Register. This final rule will become effective March 19, 2023, 60 days after its publication. [88 Fed. Reg. 3004, Jan. 18, 2023]

The final rule purports to return to the pre-2015 definition of waters of the United States (WOTUS), which was implemented by the agencies for over 40 years, and, according to an EPA fact sheet on the new Rule, prioritizes:

> . . .practical, on-the ground implementation by providing tools and resources to support timely and consistent jurisdictional determinations[.]

Background

Justice Kennedy's "significant nexus" test, articulated in the concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), predominated jurisdictional determinations for "waters of the United States" until 2015, when President Obama's administration adopted the "Clean Water Rule: Definition of 'Waters of the United States'" (2015 Clean Water Rule). The 2015 Clean Water Rule significantly expanded the regulatory definition of WOTUS. The 2015 Clean Water Rule was immediately challenged, resulting in a number of federal court decisions that stayed the application of the rule in a number of jurisdictions. This effectively created a patchwork of applicable WOTUS definitions that varied based on geography.

On October 22, 2019, the Trump administration issued a repeal rule, which took the WOTUS definition back to pre-2015 regulations. Then, three months later, on January 23, 2020, the Trump administration issued a final rule —the "Navigable Waters Protection Rule: Definition of 'Waters of the United States'" (2020 NWPR). For the first time, the 2020 NWPR defined "waters of the United States" based primarily on Justice Scalia's plurality test from *Rapanos*. Among other changes, the NWPR purported to categorically exclude from federal Clean Water Act jurisdiction ephemeral streams and features, regardless of whether they had a "significant nexus" with traditionally navigable waters. The 2020 NWPR was also subject to a series of legal challenges.

Revised Definition of 'Waters of The United States'

On January 20, 2021, President Biden signed Executive Order 13990, entitled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." In conformance with the Order, the agencies reviewed the 2020 NWPR to determine its alignment with three principles laid out in the Executive Order: science, climate change, and environmental justice.

Five Categories of WOTUS

The final rule defines "waters of the United States" to include (a): (1) traditional navigable waters, the territorial seas, and interstate waters; (2) impoundments of "waters of the United States"; (3) tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (jurisdictional tributaries); (4) wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or to jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard ("jurisdictional adjacent wetlands"); and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard.

Further definitions are intended to help interpret and apply these five categories of jurisdictional wa-

ters. For example, the final rule states that "relatively permanent standard" means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. The "significant nexus standard" means waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. A waterbody that meets either the significant nexus test or the relatively permanent test is likely to be treated as a WOTUS, and subject to EPA and Corps of Engineers permitting jurisdiction under the final rule. These definitions, however, are not bright-line rules and will likely require the assistance of an expert.

Exclusions from WOTUS

Finally, the final codifies eight exclusions from the definition of "waters of the United States" in the regulatory text to provide clarity, consistency, and certainty to a broad range of stakeholders. The exclusions are: (1) Prior converted cropland, adopting USDA's definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985; (2) Waste treatment systems, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act; (3) Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water; (4) Artificially irrigated areas, that would revert to dry land if the irrigation ceased; (5) Artificial lakes or ponds, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (6) Artificial reflecting pools or swimming pools, and other small ornamental bodies of water created by excavating or diking dry land; (7) Water-filled depressions, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of "waters of the United States" and ; (8) Swales and erosional features (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Conclusion and Implications

Based on recent history, it is reasonable to expect legal challenges to the final rule. Moreover, the U.S. Supreme Court is expected to issue a ruling this year in *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), cert. granted Jan. 24, 2022, a case argued in October 2022, which focuses on the question of how regulators should interpret WOTUS. For more information, *see:* https://www.epa.gov/system/files/documents/2023-01/Revised%20Definition%20of%20Waters%20of%20the%20United%20States%20FRN%20January%202023.pdf.

(Tiffany Michou; Rebecca Andrews)

EPA'S AMENDMENTS TO THE NATIONAL EMISSIONS STANDARDS FOR SITE REMEDIATION ELIMINATES CERTAIN CERCLA AND RCRA EXEMPTIONS

On December 22, 2022, the U.S. Environmental Protection Agency (EPA) promulgated a final rule amending the national emission standards for hazardous air pollutants (NESHAP) for the site remediation source category. The amendments in the recent rule eliminate certain exemptions from NESHAP for site remediation activities performed under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

Regulatory Background of NESHAP

In 2003, the EPA promulgated a rule to control certain hazardous air pollutants (HAP) from remediation sites located at major sources of HAP, *i.e.* where remediation technologies and practices are used at the site to clean up contaminated soil, groundwater, or surface water, or where certain materials posing a reasonable potential threat to contaminate soil, groundwater, or surface water are stored or disposed (Site Remediation NESHAP). Under the Site Re-

mediation NESHAP, only volatile organic HAP were being controlled. The Site Remediation NESHAP also exempted certain site remediations including those (1) performed under CERCLA as remedial action or non-time-critical removal action; and (2) performed under a RCRA corrective action conducted at a treatment, storage, and disposal facility (TSDF) either required by a permit issued by EPA or an EPA-authorized state program under RCRA. EPA's reasoning was that programs using remediation approaches would generally address protection of public health and the environment from air pollutants and be "functionally equivalent" to the HAP emissions control under the Site Remediation NESHAP. Further, certain site remediations are not subject to the Site Remediation NESHAP unless they are co-located at a facility with one or more other stationary sources that emit HAP and meet certain affected source definitions (co-location exemption).

Following the promulgation of the Site Remediation NESHAP in 2003, citizen groups petitioned the EPA Administrator for reconsideration, including petitioning EPA's authority to create the CERCLA and RCRA exemptions. In a lawsuit regarding the petition for reconsideration, the petitioner citizen groups and EPA agreed to place the case in abeyance so that EPA could review the petition for reconsideration. *See, Sierra Club et al. v. EPA*, Case No. 03-1435 (D.C. Cir. 2003). EPA failed to address the issues in a 2006 amendment to the Site Remediation NESHAP, and in 2014 the Court in *Sierra Club* ordered the parties to explain why the case should not be terminated. In the explanation, the parties jointly informed the court that the agency would issue a Federal Register notice to initiate the reconsideration process.

In 2016, EPA proposed to remove the CERCLA and RCRA exemptions as well as the co-location conditions in the Site Remediation NESHAP and requested comment regarding the same. In 2019, EPA sought further comments about removing the exemptions, including whether there were other methods of distinguishing among appropriate requirements for CERCLA and RCRA-exempt sources. For example, could monitoring, recordkeeping, reporting, and compliance demonstration be structured so that exempt sources could comply with the Site Remediation NESHAP. In 2020, EPA made certain amendments without addressing the CERCLA and RCRA exemptions again. This prompted another lawsuit and petitions for reconsideration from citizen groups.

In the recent 2022 rule, EPA finalized removing the CERCLA and RCRA exemptions from the Site Remediation NESHAP. On EPA's reconsideration, the agency agreed that it lacked authority to exempt affected sources in a listed source category from otherwise applicable NESHAP requirements. The agency further reasoned that the requirements of the Site Remediation NESHAP were appropriate and could be achieved at all subject site remediations, including those under CERCLA and RCRA authority.

Removal of CERCLA and RCRA Exemptions

Several comments to the 2022 amendments raised that EPA failed to provide a sufficient basis and purpose for the amendments, as required by the federal Clean Air Act (CAA). The same commenters also stated that nothing in CERCLA, RCRA, or CAA has changed in a way to make the exemptions improper. EPA responded that the basis and purpose of the amendments is to meet the obligations under the CAA to establish NESHAP for all sources in listed source categories. Because site remediation is among the listed source categories, CAA mandates EPA to establish emissions standards. While CAA does allow EPA to distinguish among classes, types, and sizes of sources, there is nothing in CAA that allows EPA to exempt sources based on the regulation of another statute like CERCLA or RCRA. EPA ultimately reasoned that simply because a source in a listed source category may be subject to similar requirements through other statutes, the source is not exempt from NESHAP requirements.

Co-Location Exemption Retained

Despite EPA's consideration to remove the co-location exemption, i.e. the requirement that an affected site remediation is subject to NESHAP if it is co-located with a facility that is a major source already subject to at least one other NESHAP, the agency declined to remove the co-location requirement. This was largely based on the agency's finding that remediation facilities that are not co-located with major sources are not major sources of HAP.

Conclusion and Implications

The final rule initiates a compliance date of 18 months from the effective date of the 2022 amend-

ments for existing sources, and for new sources subject to NESHAP due to the removal of the CERCLA and RCRA exemptions, on the later of either the effective date or upon initial startup. During this time, the owners and operators of site remediation affected sources will need to evaluate whether additional emissions control is necessary.
(Alexandra Lizano and Hina Gupta)

DEPARTMENT OF THE INTERIOR ANNOUNCES $85 MILLION FOR WESTERN DROUGHT RESILIENCE PROJECTS

On December 22, 2022, the U.S. Department of the Interior announced an investment of $84.7 million to help 36 communities in the western United States prepare for and respond to the challenges of drought, including for projects such as groundwater recharge, rainwater harvesting, aquifer recharge, water reuse, and other methods to maximize existing water supplies. More than $36 million will go to 17 projects in California.

Background

The Department of the Interior (Interior) conducts water-related infrastructure projects in the West through the U.S. Bureau of Reclamation (Bureau). The Bureau was established in 1902 and develops and manages water resources in the western United States and is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial use. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

Under the Bipartisan Infrastructure Law of 2021 (Infrastructure Law), the Interior is set to receive $30.6 billion over five years. The Infrastructure Law allocated $8.3 billion of this $30.6 billion for the Bureau water infrastructure projects, to be provided in equal increments over five years to advance drought resilience and expand access to clean water for domestic, agricultural, and environmental uses. The Bureau has developed a spending plan (Plan) under the Infrastructure Law that includes four key priorities: increase water reliability and resilience; support racial and economic equity; modernize infrastructure; and enhance water conservation, ecosystem, and climate resilience. Under the Plan, the Bureau considers a potential projects' ability to effectively address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate environmental impacts of projects. Accordingly, the Bureau generally gives priority to projects that complete or advance infrastructure development, make significant progress toward species recovery and protection, maximize and stabilize the water supply benefits to a given basin, and enhance regional and local economic development as well as advance tribal settlements. The $85 million announced by Interior is part of the funding allocated under the Infrastructure Law.

Plan Funding

The Bureau's Plan for 2022 provided for significant investment in water and groundwater storage and conveyance projects. The purpose of these projects is to increase water supply, and the Plan allocates funding across a broad range of project types related to construction of water storage or conveyance infrastructure or by providing technical assistance to non-federal entities: ($1.05 billion); aging infrastructure to support, among other things, developing and resolving significant reserved and transferred works failures that prevented delivery of water for irrigation ($3.1 billion); rural water projects, including developing municipal and industrial water supply projects ($1.0 billion); water recycling and reuse projects ($550 million) and "large scale" water recycling and reuse projects ($450 million) to promote greater water reliability and contribute to the resiliency of water supply issues; water desalination ($250 million); safety of dams to ensure Bureau dams do not present unacceptable risk to people, property, and the environment ($500 million); WaterSMART grants to provide adequate and safe water supplies that are fundamental to the health, economy, and security of the country ($300 million); watershed management projects ($100 million); aquatic ecosystem restoration

and protection ($250 million); multi-benefit watershed health improvement ($100 million); and endangered species recovery and conservation programs in the Colorado River Basin ($50 million).

WaterSMART Program

Specifically, the funding announcement of $85 million is part of the Bureau's WaterSMART program, which supports states, tribes, and local entities plan for and implement actions to increase water supply through investments to modernize existing infrastructure and avoid potential water conflicts. Under that program, the Bureau provides financial assistance to water managers for projects that seek to conserve and use water more efficiently, implement renewable energy, investigate and develop water marketing strategies, mitigate conflict risk in areas at a high risk of future conflict, and accomplish other benefits that contribute to the sustainability of the western United States. The Bureau had selected 255 projects across the western states since January 2021 to be funded with $93 million in WaterSMART funding and $314.3 million in non-Federal funding, with a total of $1 billion provided for WaterSMART grants in 2022. In addition to advancing the WaterSMART program, the $85 million investment will help repair aging water delivery systems, secure dams, complete rural water projects, and protect aquatic ecosystems.

Projects in California

There are 17 projects in California that will receive funding from Interior's $85 million investment. There are a number of different entities and project types represented across the 17 funded projects. For instance, a number of public agencies will receive funding related to the development of conjunctive use modeling (e.g., using groundwater instead of surface water to meet demand), recycled water reuse projects, water treatments projects including for per- and poly-fluoroalkyl (PFAS), groundwater recharge projects, pipeline conveyance projects, and aquifer storage and recovery. Other projects include drought resiliency projects for state parks—also referred to as "mitigation actions" in drought contingency planning documents that provide for fish and wildlife benefits—and rural water supply planning for smaller communities in northern California. A number of municipal projects include treatment and pipeline projects.

Conclusion and Implications

The drought resilience funding announced by Interior is part of an overarching and substantial investment in Western water planning efforts by the Bureau, local entities, tribes, and others. While it remains to be seen to what extent the funded projects will achieve their objectives, particularly as water tensions in the West appear to be increasing, the funding is a step forward in federal and non-federal efforts to address ongoing drought impacts. For more information, *see: Biden-Harris Administration Invests More Than $84 million in 36 Drought Resiliency Projects* (Dec. 22, 2022), https://www.usbr.gov/newsroom/news-release/4395.

(Miles Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

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

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

"Newark, Harrison, and many other vibrant communities have borne the brunt of pollution along the Lower Passaic River for too long," said First Assistant U.S. Attorney Vikas Khanna for the District of New Jersey. "This agreement is an important step forward. It will support significant cleanup efforts that restore this historic waterway, advance a new chapter of responsible land use, and return the river to the people of New Jersey.

On behalf of EPA, the Justice Department lodged the consent decree with the U.S. District Court for the District of New Jersey. If and when the settlement becomes final, EPA expects to use the settlement funds to support ongoing efforts to clean up the site, specifically the lower 8.3 miles and the upper 9 miles which make up the entire 17-mile Lower Passaic River Study Area. In addition to the proposed consent decree, EPA has reached several related agreements, including one whereby many parties investigated the 17-mile Lower Passaic River, another whereby Occidental Chemical Corporation, a potentially responsible party, is designing the cleanup chosen for the lower 8.3 miles, and several cost recovery agreements that resulted in payments to EPA of millions of dollars.

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

•Dec. 13, 2022— In a decision issued on December 9, the U.S. District Court for the Eastern District of California granted the request of the Justice Department to direct John Sweeney and his company, Point Buckler Club LLC, to restore sensitive tidal channels and marsh they unlawfully harmed. The court's decision follows an earlier order dated Sept. 1, 2020, when the court found defendants committed "very serious" violations of the federal Clean Water Act associated with the construction of a nearly mile-long levee without a permit.

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

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

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

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•Jan. 26, 2023— The U.S. Environmental Protection Agency announced a proposed $5.4 million settlement with The Dow Chemical Co. to recover costs for EPA's cleanup work at the Tittabawassee River, Saginaw River & Bay Superfund site in Midland, Michigan. EPA began a 30-day public comment period today.

In 1897, the 1,900-acre Dow facility began producing various chemicals along the Tittabawassee River. Most of the plant is located on the east side of the river and south of the city of Midland. At various times, the Midland Plant produced more than 1,000 different organic and inorganic chemicals. Historical operations at Dow's Midland Plant caused the release of toxic chemicals known as dioxins into the Tittabawassee River which moved downstream and mixed with sediment in the Saginaw River and Bay.

The costs recovered by the proposed settlement are associated with EPA performing sampling work at the site, negotiating time critical and non-time critical removal orders with Dow prior to 2010, as well as negotiating the 2010 Administrative Settlement Agreement and Order on Consent for the remedial investigation, feasibility study, and remedial design at the site.

Public comments on the proposed settlement will be accepted online until Feb. 26.

•Jan 25, 2023—The U.S. Environmental Protection Agency (EPA) announced the latest action to protect communities and hold facilities accountable for controlling and cleaning up the contamination created by coal ash disposal. The agency issued six proposed determinations to deny facilities' requests to continue disposing of coal combustion residuals (CCR or coal ash) into unlined surface impoundments.

For a seventh facility that has withdrawn its application, Apache Generating Station in Cochise, Arizona, EPA issued a letter identifying concerns with deficiencies in its liner components and groundwater monitoring program.

Coal ash is a byproduct of burning coal in coal-fired power plants that, without proper management, can pollute waterways, groundwater, drinking water, and the air. Coal ash contains contaminants like mercury, cadmium, chromium, and arsenic associated with cancer and various other serious health effects.

EPA is proposing to deny the applications for continued use of unlined surface impoundments at the following six facilities:

(1) Belle River Power Plant, China Township, Michigan.

(2) Coal Creek Station, Underwood, North Dakota.

(3) Conemaugh Generating Station, New Florence, Pennsylvania.

(4) Coronado Generating Station, St. Johns, Arizona.

(5) Martin Lake Steam Electric Station, Tatum, Texas.

(6) Monroe Power Plant, Monroe, Michigan.

EPA is proposing to deny these applications because the owners and operators of the CCR units fail to demonstrate that the surface impoundments comply with requirements of the CCR regulations.

Evidence of potential releases from the impoundments and insufficient information to support claims that the contamination is from sources other than the impoundments.

If EPA finalizes these denials, the facilities will have to either stop sending waste to these unlined impoundments or submit applications to EPA for extensions to the deadline for unlined coal ash surface impoundments to stop receiving waste.

Indictments, Sanctions, and Sentencing

Jan. 19, 2023—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

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.
(Robert Schuster)

LAWSUITS FILED OR PENDING

TRIBES AND ENVIRONMENTAL ORGANIZATIONS FILE CIVIL RIGHTS COMPLAINT AND PETITION FOR RULEMAKING WITH EPA FOR SAN FRANCISCO BAY-DELTA WATER QUALITY STANDARDS

A coalition of California Tribes and environmental justice organizations, including Save California Salmon, Restore the Delta, Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and Little Manila Rising (collectively: Coalition), filed a civil rights complaint and petition for rulemaking (Complaint) with the U.S. Environmental Protection Agency (EPA). The Coalition's Complaint urges the EPA investigate the State Water Resources Control Board's (State Water Board) alleged civil rights violations and initiate rulemaking to adopt federal Clean Water Act-compliant water quality standards for the San Francisco Bay/Sacramento-San Joaquin Bay-Delta Estuary (Bay-Delta). [*Title VI Complaint and Petition for Rulemaking of Shingle Springs Band of Miwok Indians, et al., v. U.S. EPA* (Dec. 16, 2022).]

Background

The State Water Board is responsible for implementing the federal Clean Water Act and the California Porter-Cologne Water Quality Act. (Wat. Code §§ 13141, 13160.) Pursuant to this authority, the State Water Board adopted the first Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Estuary (Bay-Delta Plan) in 1978. (Complaint, at p. 26.) The Bay-Delta Plan designates beneficial uses for the Bay-Delta, establishes water quality objectives for those uses, and sets forth an implementation program to achieve those objectives. (Bay-Delta Plan (2006) at p. 26.) As part of the State Water Board's duties under Porter Cologne, it must periodically review the Bay-Delta Plan. (Wat. Code § 13240.) The State Water Board has conducted three full reviews of the Bay-Delta Plan since its initial adoption—1991, 1995, and 2006. (Complaint, at pp. 26–27.)

After its most recent review in 2006, the State Water Board began the review process again in 2008 via a bifurcated process. (Resolution No. 2008-0056 (2008) State Water Board.) First, the State Water Board would review and update the salinity and flow objectives for the southern Delta and San Joaquin River in Phase I. (*Id.*) Then, in Phase II, the State Water Board would review and update standards to protect native fish and wildlife in the Sacramento River, Delta, and associated tributaries. (*Id.*) The State Water Board adopted amendments relevant to the Phase I update of the Bay-Delta Plan in December, 2018. (*Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Dec. 12, 2018) State Water Resources Control Board, Resolution 2018-0059.) The State Water Board is currently in the process of conducting Phase II, which includes consideration of voluntary agreements in which water users would agree to limit surface water diversions to attain water quality standards. (*See, Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreements for the Sacramento River, Delta, and Tributaries Update to the San Francisco Bay/Sacramento-San Joaquin Delta Water Quality Control Plan* (2023) State Water Board.)

Civil Rights Complaint and Petition For Rulemaking

The Coalition's Complaint is the latest in a series of actions over the past year regarding updates to the Bay-Delta water quality control plan. On May 22, 2022, the Coalition filed a petition for rulemaking before the State Water Board. (Complaint, at p. 31.) The Board rejected the petition on June 24, and then denied a request for reconsideration on September 21, 2022. (*Id.*) Then, on December 16, 2022, the Coalition submitted its Complaint pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Administrative Procedures Act (5 U.S.C. § 551 *et seq*) before the U.S. EPA. (Complaint, at p. 2.)

Civil Rights Act Allegations

Under Title VI of the Civil Rights Act, federal agencies are authorized and directed to adopt rules

and regulations implementing the act. (42 U.S.C. § 2000d-1.) Accordingly, the EPA promulgated regulations prohibiting entities or programs that receive EPA assistance from discriminating on the "basis of race, color, national origin or . . . sex." (40 C.F.R. § 7.35.) Individuals who believe their civil rights were violated by an entity that receives funding from the EPA can submit a complaint to the EPA's External Civil Rights Compliance Office, which will then investigate and resolve the complaint. (*External Civil Rights Compliance Office Compliance Toolkit* 8 (2017) U.S. EPA.).

The Coalition alleges the State Water Board is violating Title VI of the Civil Rights Act by failing to update the Bay-Delta Plan. (Complaint, at p. 33.) According to the Coalition, the EPA External Civil Rights Compliance Office should investigate the Complaint because the State Water Board's failure to update the Bay-Delta Plan's water quality standards disproportionately impacts Native American Tribes and communities of color in the Bay-Delta watershed. (*Id.*) Specifically, the Coalition alleges that the State Water Board is violating native tribes' civil rights by failing to maintain water quality standards that result in impaired tribal access to fish, riparian resources, and waterways. (*Id.*) Additionally, the Coalition argues the same failures resulted in outsized impacts from harmful algae blooms to communities of color. (*Id.*) Finally, the Complaint alleges that the State Water Board's purportedly preferred approach to Phase II—the consideration of voluntary agreements—has excluded communities of color and tribes from the decision making process. (*Id.*) The Coalition seeks an investigation into the Complaint's allegations, and remedies such as withholding or terminating State Water Board funding, and withholding approvals for permits for Delta Conveyance Project and for water quality standards that result from the Voluntary Agreements. (*Id.* at p. 55.)

Seeking Promulgation of Water Quality Standards

In addition to alleging civil rights violations, the Coalition asks the EPA to promulgate water quality standards for the Bay-Delta under the Administrative Procedure Act and its discretionary oversight authority to promulgate federal water quality standards. (Complaint, at p. 47; 33 U.S.C. § 1313(c)(4)(B).) The Coalition asks that the EPA designate Tribal Beneficial uses and adopt flow-based and temperature water quality criteria, including criteria for cyanotoxins to address harmful algal blooms. (*Id.* at p. 55.)

Conclusion and Implications

As of this writing, the U.S. Environmental Protection Agency has not publicly commented on the complaint or petition for rulemaking. The EPA's External Civil Rights Compliance Office's website further states the Coalition's complaint is pending under jurisdictional review.
(Nico Chapman, Sam Bivins)

RECENT FEDERAL DECISIONS

FIFTH CIRCUIT FINDS SCOPE OF STATE WHISTLEBLOWER PROTECTIONS FOR ENVIRONMENTAL COMPLIANCE WORKERS TO BE SETTLED BY THE LOUISIANA SUPREME COURT

Menard v. Targa Resources, L.L.C., 56 F.4th 1019 (5th Cir. 2023).

On January 6, 2023 the Fifth Circuit Court of Appeals certified questions of state law to the Louisiana Supreme Court regarding the scope and interpretation of a state whistleblower statute, including whether an exclusion applies that would deny protections to environmental compliance workers for reports that are among those workers' normal job duties. This issue is common to, and the conclusion varies, several state whistleblower statutes.

Background

Kirk Menard worked as an environmental, safety, and health specialist at Targa Resources' Venice, Louisiana wastewater treatment plant, with job duties including ensuring compliance with state and federal environmental and safety standards. On a conference call in October 2018, Menard reported to three of superiors, including Perry Berthelot, a District Manager, that certain water samples had total suspended solids exceeding regulatory limits.

At the end of the call, Berthelot told Menard to call him back to discuss the plan for rectifying these exceedances. Menard obliged, and he alleges that Berthelot told him he should dilute the sewage samples with bottled water. Menard claims that in response he nervously laughed and said, "no, we're going to correct it the right way."

Menard subsequently reported Berthelot's request to Menard's official supervisor, who responded, "no we're not going to do that, because that will not correct the problem." Six days later, Menard was terminated by Targa for supposed work performance issues.

Menard filed suit under the Louisiana Environmental Whistleblower Statute (LEWS or the Statute):

> . . .which prohibits businesses from retaliating 'against an employee, acting in good faith, who … [d]iscloses' an employer's practice that he 'reasonably believes' violates an environmental laws or regulation. LA. STAT. ANN. § 30:2027(A)(1).

Menard alleged he was fired for:

> (1) refusing to comply with Berthelot's request to dilute certain sewage samples with bottled water to ensure they met certain environmental regulatory standards, and (2) reporting the request to his supervisor.

Menard prevailed at a bench trial, and Targa appealed.

The Fifth Circuit's Decision

The Fifth Circuit examined "whether Menard engaged in a 'protected activity' under LEWS," an inquiry turning on two questions: (1) whether 'refusals' to engage in an illegal activity constitute 'disclosures' under the current version of the Statute, and (2) whether LEWS applies to reports made as part of an employee's normal job duties.

Regarding the second question, Targa argued that Menard did not enjoy LEWS's protection with respect to his report of Berthelot's request to Menard's direct supervisor "because reporting was 'part of is normal job responsibilities.'" While LEWS's text and prior Louisiana Supreme Court precedent have not recognized such an exclusion, the state's lower courts have generated conflicting opinions.

While *Stone v. Entergy Servs., Inc.*, 9 So. 3d 193, 200 (La. Ct. App. 2009) and *Matthews v. Mil. Dep't ex rel. State*, 970 So. 2d 1089, 1090 (La. Ct. App. 2007) have "embraced" a reporting exclusion, *Derbonne v. State Police Commission*, 314 So. 3d 861, 870–73 (La. Ct. App. 2020) "reject[ed] the exclusion

as atextual and contrary to the purpose of whistleblower statutes."

The Circuit Court noted as well that: "This indeterminacy is furthered by the fact that other state courts grappling with the same issue have reached contrary conclusions. *See, e.g., City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 186 (Tex. 2022) (rejecting the existence of a job-duties exclusion in the Texas Whistleblower Act). *But see Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 228 (Minn. 2010) (holding that an "employee cannot be said to have 'blown the whistle' " under Minnesota's whistleblower statute "when the employee's report is made because it is the employee's job to investigate and report wrongdoing"). These fractured opinions also reveal the competing policy implications at stake: On the one hand, adopting a job-duties exclusion may undermine protections for the employees who are best-positioned to report misconduct but most vulnerable to retaliation. On the other hand, rejecting the exclusion risks insulating a massive class of employees from discipline. Accordingly, we are left with a split of authority and no clear way to resolve it.

This question was therefore certified to the state Supreme Court for resolution pursuant to *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) (whether to certify a question to a state supreme court depends on: "(1) 'the closeness of the question[s]'; (2) federal–state comity; and (3) 'practical limitations,' such as the possibility of delay or difficulty of framing the issue.").

Analysis under the *Cheramie* State Decision

On the first question, the U.S. District Court had relied on *Cheramie v. J. Wayne Plaisance, Inc.*, 595 So. 2d 619, 624 (La. 1992) to conclude that Menard's refusal to dilute the samples. However, while: "*Cheramie* squarely holds that LEWS covers refusals to engage in illegal activity," the pertinent statutory language was subsequently amended. Pre-amendmen:

> LEWS … prohibited employers from retaliating against 'an employee, acting in good faith, who *reports* or *complains* about possible environmental violations.'
>
> Post-amendment, the statute:
>
> . . .protects an employee who '*[d]iscloses, or threatens to disclose, to a supervisor* ... [a] practice of the employer ... that the employee reasonably believes is in violation of an environmental law, rule, or regulation.' LA. STAT. ANN. § 30:2027(A)(1) (emphasis added by the Court).

Left with the choices of applying *Cheramie*'s holding to the amended language and possibly thereby "treading on the state legislature's toes" or "conclud[ing] that it is a dead precedent," the Court also chose to certify this issue as one "which implicates such important state interests" to the state's Supreme Court.

Conclusion and Implications

The scope of whistleblower protections for environmental compliance workers is a state law issue with important implications for both individual workers, the public, and the natural environment. Louisiana's high concentration of refinery and other industrial operations, alone, raises the stakes for resolution of this issue.
(Deborah Quick)

D.C. CIRCUIT VACATES HYDROELECTRIC DAM LICENSE OVER DEFICIENCIES WITH THE CLEAN WATER ACT W ATER QUALITY CERTIFICATION

Waterkeepers Chesapeake v. Federal Energy Regulatory Commission, 56 F.4th 45 (D.C. Cir. Dec. 20, 2022).

The United States Circuit Court of Appeals for the District of Columbia recently determined that the State of Maryland could not retroactively waive its previously-issued water quality certification for a license for a hydroelectric dam. The license was vacated and remanded to the Federal Energy Regulatory Commission (FERC).

Background

Constellation Energy Generation, LLC is the operator of Conowingo Dam, a hydroelectric dam on the Susquehanna River in Maryland. In 2014, Constellation Energy submitted a request for a water quality certification under Section 401 of the Clean Water Act to Maryland's Department of the Environment. After years of negotiation, public notice, commenting, and a public hearing, Maryland issued a section 401(a)(1) water quality certification in 2018.

The water quality certification required Constellation to develop a plan to reduce the amount of nitrogen and phosphorus in the dam's discharge, improve fish and eel passage, make changes to the dam's flow regime, control trash and debris, provide for monitoring, and undertake other measures for aquatic resource and habitat protection. Constellation challenged the certification and its conditions, calling the conditions unprecedented and extraordinary.

As part of settling Constellation's challenge to the water quality certification, Maryland and Constellation agreed to submit a series of proposed license articles to FERC for incorporation into the dam's license. If those articles were incorporated into the license, Maryland agreed to conditionally waive any and all rights it had to issue a water quality certification. FERC issued a 50-year license that included the proposed license articles.

Several environmental groups, collectively referred to as "Waterkeepers," filed a petition for rehearing with FERC. They argued that Maryland had no authority to retroactively waive its 2018 water quality certification and that FERC therefore exceeded its authority under the federal Clean Water Act by issuing a license that failed to incorporate the conditions of that certification. FERC rejected Waterkeepers' argument and denied the petition. Waterkeepers petitioned for review.

The D.C. Circuit's Decision

Retroactive Waiver Argument

The court first considered Waterkeepers' argument that the Clean Water Act does not allow a retroactive waiver of the kind Maryland has attempted. In opposition, FERC argued that Section 401 of the Clean Water Act does not prevent a state from affirmatively waiving its authority to issue a water quality certification. The court rejected FERC's argument, reasoning that the Clean Water Act provides two routes for a state to waive a water quality certification: failure or refusal to act on a request for certification, within a reasonable period of time. If a state has not granted a certification or has not failed or refused to act on a certification request, section 401(a)(1) prohibits FERC from issuing a license. Because the state acted when it issued the water quality certification in 2018, the subsequent backtracking of that issuance through a settlement agreement was not a failure or refusal to act. In the end, the court agreed with Waterkeepers.

Remedy

The court next considered what the appropriate remedy should be. FERC argued that the appropriate remedy would be to remand the license back to FERC without vacating the license. This would allow the license to remain in place while a new permit was issued and would avoid disruptive consequences that result from vacating a license with environmental protections in place. The decision whether to vacate depends on the seriousness of the license's deficiencies and the disruptive consequences of an interim change that may itself be changed.

The court determined *vacatur* was appropriate. First, the license had serious deficiencies because FERC issued it without statutory authority. Second, disruptions to the environmental protections can be avoided through issuance of interim, annual licenses until a permanent license can be issued. Further, Waterkeepers' brought the action for the very purpose of strengthening the environmental protections, and Waterkeepers agreed with vacatur. Finally, vacating the license would allow the administrative and judicial review to be completed after being interrupted by the settlement agreement.

Conclusion and Implications

This decision is another case reminding states and project proponents to proceed with caution when attempting to resolve disputes surrounding Section 401 water quality certifications. Under the Clean Water Act. The court's opinion is available online here: https://www.cadc.uscourts.gov/internet/opinions.nsf/3A0ACFE0A2A87BFE8525891E00572389/$file/21-1139-1978279.pdf.
(Rebecca Andrews)

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