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EWL

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-

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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 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.

WATER NEWS

NEWS FROM THE WEST

In this month's News from the West we first cover proposed legislation in California to address, and in some cases diminish the "superior" nature of "Pre-1914" water rights which have been the benchmark of top level rights. We also address the updated, 2023 Water Plan in the State of Colorado.

California Legislature Introduces Bills Impacting Elevated Status of Pre-1914 and Riparian Water Rights

The California Legislature recently introduced two bills, Assembly Bill 460 and Senate Bill 389, aimed at modifying administrative processes pertaining to pre-1914 and riparian surface water rights and to align them more closely with water rights established post-1914. These bills introduce two primary changes: (1) creating a parallel administrative system for pre-1914 and riparian rights to challenge them on the basis of water quality, permit terms, or § 5937 of the California Fish and Game Code; and (2) allowing an expedited hearing process to extinguish pre-1914 water rights.

Background

California water law is a complex system developed over more than a century. One aspect of this system is that pre-1914 water rights and riparian water rights are generally considered senior to all other surface water rights and are not subject to the same level of regulation as more recently developed water rights. These bills aim to narrow this gap by regulating pre-1914 water rights and riparian water rights in the ways similar to as newer water rights.

Current Administrative Process for Pre-1914 and Riparian Water Rights

Currently, the administrative process used by the California State Water Resources Control Board (SWRCB) to determine water rights is complex and often contentious. Under existing law, the SWRCB has jurisdiction to regulate all diversions of water, including pre-1914 and riparian rights, under Article X, Section 2 of the California Constitution, the reasonable and beneficial water use standard, and the public trust doctrine. However, post-1914 appropriative water rights are subject to additional regulations, such as complying with the terms of each permit or license, water quality objectives, and § 5937 of the Fish and Game Code.

The SWRCB enforces compliance with these requirements through an administrative hearing process. However pre-1914 and riparian water rights are not conditioned on compliance with water quality objectives, § 5937 of the Fish and Game Code, or permit terms, unlike most other California water rights. This results in SWRCB's inability to regulate pre-1914 and riparian rights similarly because most enforcement actions are taken under the three aforementioned categories. These bills attempt to chip away at this crucial difference by instituting a similar administrative process for pre-1914 and riparian rights.

AB 460 Ability to Challenge Pre-1914 and Riparian Rights Based upon Water Quality Objectives

AB 460 would significantly expand existing opportunities for the SWRCB and interested members of the public to investigate whether a particular water right holder is violating: (1) Section 2 of Article X of the California Constitution; (2) the public trust doctrine; (3) Water quality objectives; (4) the terms of post-1914 water rights permits, licenses, certificates, and registrations; or (5) § 5937 of the Fish and Game Code.

AB 460 would significantly expedite the timeframe and simplify the process for SWRCB to bring enforcement actions against pre-1914 and riparian rights for perceived violations of water quality objectives, the terms of post-1914 water rights permits, licenses, certificates, and registrations, or § 5937 of the Fish and Game Code. SWRCB's current authority for such enforcement measures requires lengthy enforcement processes or even lengthier regulations processes.

Via expedited hearings, AB 460 would enable the SWRCB to issue relief orders where the SWRCB could demand that the diverter "cease all harmful

practices," mitigate harm, fund technical and environmental studies, and reimburse the SWRCB for the cost of preparing any required documentation.

This legislation would provide the SWRCB with authority to issue a curtailment order to an individual diverter and require that the diverter fund studies and other mitigation or face penalties. This is a marked difference from the current authority where the SWRCB must develop regulations or initiate enforcement proceedings in order to regulate diversions. The significant costs associated with participating in a hearing process on short notice and complying with an interim relief order may cause many right holders to first consider settling claims outside the hearing process.

SB 389 Expedited Process to Extinguish Pre-1914 and Riparian Right Claims

SB 389 creates authority for SWRCB to investigate the basis for any water rights. Additionally, it requires that a diverter provide information or technical reports regarding the characteristics of its water right before a hearing is held regarding the validity of the water right.

This is a marked difference from existing law. Currently, a riparian or pre-1914 right holder must file initial statement of diversion and use and supplemental annual statements generally describing the characteristics of their riparian or pre-1914 right.

Under SB 389, the SWRCB could require hearings requiring any diverter to prove the elements of their claimed water right. This requirement creates a potentially significant hurdle because this showing is factually intensive and often requires extensive historical research. Failure to demonstrate this historical right could result in an order depriving the owner of its claimed water right or orders for curtailment.

Conclusion and Implications

The proposed Bills would provide powerful new tools and oversight authority to the SWRCB. The Bills would further the goal of many lawmakers to have all water rights regulated in the same fashion. That goal, however, will draw objections and concerns from many riparian and pre1914 water right holders that have exercised, relied upon and carefully preserved their rights—in some cases for many generations.
(Darien Key, Derek Hoffman)

Colorado Finalizes the 2023 Water Plan

The Colorado Water Conservation Board (CWCB) recently approved the 2023 Colorado Water Plan. The 2023 Water Plan updates and revises the previous Water Plan, first approved in 2015. The revised plan continues the goals of the original Water Plan while outlining strategies to build a water resilient future for the state.

Background

Colorado is home to several major river headwaters that supply water to 19 states and Mexico. Combined, Colorado's rivers produce an estimated 15 million acre-feet of water annually, although Colorado residents only consume approximately 5 million acre-feet with the balance flowing across state lines for diversion by downstream users. Within the state's borders, there is a geographical divide between the location of the state's major surface water supply and the majority of its population. As of 2023, approximately 80 percent of Colorado's stream flows occur on the western slope, while 90 percent of the population lives across the Continental Divide along the Front Range metropolitan corridor. Consequently, as a headwaters state, Colorado's water policy has wide-reaching effects both within the state and throughout the region.

Large scale fires and drought throughout Colorado in 2002-2003 first spurred a Statewide Water Supply Initiative (SWSI) in 2004. A second devastating fire season in 2012-2013 then set the backdrop for the original 2015 Water Plan, which the CWCB first drafted under an executive order from then-Governor John Hickenlooper. In addition to incorporating the 2004 SWSI, the 2015 Water Plan included significant feedback from the CWCB "basin roundtables." The basin roundtables are nine interdisciplinary stakeholder groups representing Colorado's eight major river basins (Arkansas, Colorado, Gunnison, North Platte, Rio Grande, South Platte, Southwest (San Juan, Dolores, San Miguel), and Yampa/White/Green River) and the Denver metro area.

The 2015 Water Plan

The 2015 Water Plan identified a water "gap" or expected shortage for municipal and industrial water needs by 2050 as a result of climate change and population increases. To resolve that shortfall, the 2015

Water Plan recommended a series of conservation and storage measures to reallocate available water. These strategies included traditional storage such as reservoirs, but also legal and regulatory changes and alternative water transfer measures.

Eight Years Later. . .

Eight years later, the CWCB identified numerous successes of the 2015 Water Plan including dedicated funding to the Colorado Water Plan grants program, 25 new stream management plans, and 400,000 acre-feet of storage that has been or soon will be constructed. Additionally, even as Colorado's population has boomed, statewide per capita water use is down five percent from 2015 levels. However, the CWCB notes that since 2015 Colorado has also experienced some of the largest fires in state history and deep, prolonged drought. These conditions have led to new challenges such as winter fires, severe post-fire flooding, and changing storage operations in federally controlled reservoirs. Therefore, the CWCB updated and revised the plan and unanimously voted to approve the 2023 Colorado Water Plan on January 24, 2023

The 2023 Colorado Water Plan

The 2023 Colorado Water Plan is the result of extensive public engagement, including a public comment period and workshops throughout the state. The public comment period alone generated 528 pages of comments, 1,597 suggested edits to the plan, and more than 2,000 public observations. The CWCB notes that public engagement and buy-in is critical to the success of Colorado's water future.

The 2023 updates also include revised climate and water needs projections based on the latest available science. Under a worst-case scenario, average temperatures across Colorado could rise 4.2 degrees by 2050. Those climate conditions, combined with a population expected to double to 10 million residents, could result in a water shortfall of up to 740,000 acre-feet per year by 2050. But the CWCB is simultaneously confident that conservation and efficiency efforts should reduce further water needs by up to 300,000 acre-feet per year.

A 'One Water' Ethic

CWCB proposes a "One Water" ethic to shape the 2023 Water Plan and guide Colorado's water future. The One Water ethic means matching the right water to the right use, investing in sustained water conservation efforts, and promoting integrated water and land use planning. The CWCB notes that increased water storage will be critical to Colorado's future. In addition to the 400,000 acre-feet of storage soon to be completed, CWCB said there are existing paper water rights that could double available storage across the state to 6.5 million acre-feet in traditional reservoirs alone. The 2023 Water Plan also highlights the need to study, and perhaps implement, non-traditional means of storage including aquifer storage and recovery, enlargement or rehabilitation of existing reservoirs, and reallocation of existing storage space. On a local level, the CWCB encourages county governments to exercise their "1041" review powers which allow counties to strictly regulate certain activities.

Local activities also include projects funded through the Water Plan Grant Program. The grant program offers funding in five major categories: 1) water storage and supply, 2) conservation and land use, 3) engagement and innovation, 4) agricultural projects, and 5) watershed health and restoration. Governor Jared Polis recently approved $17 million for local implementation of the Colorado Water Plan. Additionally, his 2023-2024 budget proposal includes $25.2 million for the Water plan Grant Program.

Goals

The 2023 Colorado Water Plan reframes the goals of the original plan into four distinct areas: 1) Vibrant Communities, 2) Robust Agriculture, 3) Thriving Watersheds, and 4) Resilient Planning. Within these four areas, the 2023 Water Plan outlines roughly 50 "agency" actions for the state to pursue, and 50 "partner" actions to be addressed by various groups throughout the state, including local governments.

Vibrant Communities outlines a goal of holistic water management to balance supply and demand within Colorado's urban areas. Possible state actions include identifying water-savings benchmarks, water reuse strategies, and urban turf replacement options. The CWCB tasks its partners with developing local storage projects, optimizing water-efficient infrastructure, and water reuse technologies. Water reuse technologies take advantage of graywater, black water, and stormwater, such as direct potable reuse technologies, outlined in the January 2022 edition of

Western Water Law and Policy Reporter. *See,* Colorado Adopts New Regulation to Allow Direct Potable Reuse of Public Water Supplies, 27 *W. Water L. & P'lcy Rptr*. 63, 74- 76 (Jan. 2022).

Insuring Robust Agriculture

The 2023 Water Plan emphasizes that Robust Agriculture is not only critical for a sustainable food supply, but is an integral part of Colorado's heritage, culture, and economy. Specifically, the CWCB cautions that urban growth should not come at the expense of rural communities through "buy and dry" practices in which municipalities purchase irrigation water rights and change them for domestic use in cities and towns, while allowing once productive crop land to be fallowed. To support these goals, the plan recommends the CWCB facilitate water sharing and other agricultural-municipal water agreements in addition to researching adaptive practices to maintain or increase agricultural production while simultaneously decreasing water use. Recommend partner actions include rehabilitation of aging storage and diversion structures, farming efficiency improvements, and increased or improved storage to support plans for augmentation.

The CWCB notes that agriculture is currently a $47 billion per year industry in Colorado, although water-based outdoor recreation generates $19 billion per year and is a rapidly growing sector. Thriving Watersheds are critical to this facet of the economy in addition to protecting Colorado's water supply as a whole. Therefore, the 2023 Water Plan recommends comprehensive planning to include the condition of the natural environment in water policy decisions. On a state level, the CWCB will create a detailed stream construction guide and wildfire ready watersheds framework. The segment encourages local partners to explore options to enhance stream flows and rehabilitate streams to improve wildlife habitat and reduce erosion.

Resilient Planning

The final general category of the 2023 Water Plan is Resilient Planning, which encompasses the goals set out by the other sections. The CWCB emphasized that water security is and will be critical to the quality of life, environment, and economy of Colorado now and into the future. An uncertain future requires detailed planning for a variety of scenarios at the state, regional, and local level. "Resilient" planning acknowledges that threats to Colorado's water security will happen, but that a well-prepared statewide plan will be equipped to handle any eventualities. The CWCB will continue to advance scientific research and promote community outreach and buy-in of the 2023 Water Plan goals. Local planning efforts to protect infrastructure from natural disasters and community planning that considers uncertainty and drought are critical components of a water resilient future.

Conclusion and Implications

The 2023 Water Plan builds on the original plan and reinforces that collaborative, adaptive strategies are necessary to secure Colorado's water future. "The 2023 plan will spark the action we need across all sectors to build a better water future in Colorado, setting the stage for future decision-making and water resiliency," CWCB Director Becky Mitchell said in a press release. Basin roundtables have identified $20 billion in potential water projects over the next 30 years, although not all projects are expected to be implemented or need CWCB funding. On a state level, the CWCB estimates it will need $1.5 billion to support local water projects through 2050. The CWCB summarized the 2023 Colorado Water Plan by clarifying that the plan provides a vision of where the state needs to go, but "iterative advancements," regular assessment, and future actions will be required to implement and revise the plan as necessary to achieve Colorado's water goals.
(John Sittler, Jason Groves)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES 2023 FLOW SCHEDULE FOR SAN JOAQUIN RIVER SPECIES

In January, the U.S. Bureau of Reclamation (Bureau) released its default flow schedule for releases from Friant Dam on the San Joaquin River for the benefit of San Joaquin River fish species, particularly spring-run chinook salmon. According to the Bureau, 2023 is deemed a wet year, and the Bureau allocated 556,542 acre-feet for salmon restoration flows, measured over 30 miles downstream of the dam.

Background

The San Joaquin River Restoration Program (SJRRP) is a long-term collaborative program to restore flows in the San Joaquin River from Friant Dam to the confluence of the Merced River in Central California. One of the SJRRP's two primary goals are to restore a self-sustaining spring-run chinook salmon population. The second goal is to reduce or avoid negative impacts on the water supply for all Friant Division long-term contractors.

The Friant Dam is a concrete gravity dam located on the San Joaquin River in central California. Its construction was completed in 1942 by the U.S. Bureau of Reclamation for the purpose of flood control and providing agricultural irrigation water to the southern San Joaquin Valley. According to the Bureau, before the completion of Friant Dam, the San Joaquin River supported the southernmost populations of Central Valley spring-run chinook salmon and fall-run chinook salmon, where hundreds of thousands of chinook used to return each year. After Friant Dam was completed, parts of the San Joaquin River began to run dry as more and more water was diverted into canals for agricultural irrigation, disconnecting salmon from their habitat in the upper San Joaquin River. Currently, according to the Bureau, the tributaries of the lower San Joaquin River still support populations of fall-run chinook salmon but spring-run chinook salmon have been absent from the mainstem San Joaquin River for over 60 years.

The requirement for water flows to be released from the Friant Dam into the San Joaquin River for the benefit of salmon is a result of a lawsuit that spanned nearly two decades. In an unpublished federal court case, *Natural Resources Defense Council, et al. v. Rodgers, et al.*, United States District Court, Eastern District of California, Case No. CIV-S-88-1658-LKK/GGH, plaintiffs Natural Resources Defense Council, et al., brought suit against the Bureau and others alleging violations of the federal Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, California Fish and Game Code, § 5937, and § 8 of the Reclamation Act of 1902. The alleged violations were a result of the reduction of the natural water flows used by salmon for spawning runs on the San Joaquin and Merced rivers. Ultimately the litigation ended with the a settlement agreement (Settlement) between the parties, the adoption of federal legislation enacted to facilitate the Settlement, structural changes to the Friant Dam and associated facilities, and an ongoing obligation on the Bureau to release water into the San Joaquin River in an effort to re-establish salmon runs.

There are two main goals that came out of the Settlement (which later became the goals of the San Joaquin River Restoration Program): (1) the Restoration Goal, which is to restore and maintain fish populations in "good condition" in the mainstem San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish; and (2) the Water Management Goal, which is to reduce or avoid negative water supply impacts on all of the Friant Division long-term contractors that may result from the Interim and Restoration flows provided for in the Settlement.

Restoration Flows and the Settlement

To meet the Restoration Goal, the Bureau is required to release water pursuant to the terms of section 13 of the Settlement. Section 13, "Restoration Flows," identifies ongoing requirements of the Bureau to source and release water from the Friant Dam to the confluence of the Merced River. The amount

of water to be released is defined in the Settlement pursuant to hydrograph flows, also known as the "Base Flows." Up to an additional 10 percent of the applicable hydrograph flows, or "Buffer Flows," may be released as needed. Together the Base Flows, Buffer Flows, and any additional water acquired by the Bureau from willing sellers to meet the Restoration Goal are collectively referred to as the "Restoration Flows." (Settlement, section 13(a), pp. 10-11.)

In addition to releasing sufficient volumes of water to restore the salmon runs, the Friant Dam must release water for flood control purposes. While dry climate in California limits the needs to flood control from season to season, flood control is nonetheless one of the primary purposes of the Friant Dam. California has recently experienced a season of heavy rain, as such the Friant Dam will release flood flows into the San Joaquin River as part of its flood control operations. These flood flows may accomplish some or all of the Restoration Flows required by this Settlement.

However, nothing in the Settlement is intended to limit, affect, or interfere with the ability to carry out flood control operations. (Settlement, section 13(d), p. 13.) Although flood control flows may lead to more water being released than the Restoration Flows require, the excess flood control flows do not create an additional obligation of the parties. In other words, times of heavy rain and the need for flood control operations have a positive benefit for the purposes and terms of the Settlement. For example, the Settlement contemplates the use of excess waters. These provisions allow for the Bureau to enter in agreements with either the long-term contractors or third parties to bank, store, or exchange the flood flow water for future supplemental Restoration Flows, or to arrange for the transfer of or to sell such water and deposit the proceeds into a Restoration Fund that has been created by the Settlement. Further, the Settlement allows Friant Dam to release the water during times of the year other than those specified by the Settlement. (Settlement, section 13(i), p. 16.)

Conclusion and Implications

The report released January 20, 2023 entitled, "Initial 2023 Restoration Allocation & Default Flow Schedule" is part of the annual and ongoing requirements of the Settlement, and sets the default flow schedule for releases—this year, totaling 556,542 acre-feet—unless hydrological or operations change are warranted to modify the releases.

Increased rains in California have resulted in additional water flowing to the Friant Dam and the San Joaquin River. While it remains to be seen whether the wet year designation for 2023 and corresponding releases will encourage or support salmon spawning more than releases have in dryer years, the additional water from the winter storms appears to add flexibility in meeting current and possibly future flow releases pursuant to the Settlement. For more information, *see:* Initial 2023 Restoration Allocation & Default Flow Schedule, January 20, 2023, available at https://www.restoresjr.net/?wpfb_dl=2707; Settlement Agreement available at https://www.restoresjr.net/?wpfb_dl=9.

(Miles Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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 groundwater 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 addition, 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)

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)

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 costwise 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)

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