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FEATURE ARTICLE

SCOTUS LIMITS WOTUS: JURISDICTIONAL WATERS AND WETLANDS UNDER THE CLEAN WATER ACT MUST BE RELATIVELY PERMANENT, STANDING, OR CONTINUOUSLY FLOWING BODIES OF WATER

By Nicole Granquist and Jaycee Dean

On May 25, 2023, the U.S. Supreme Court released its highly anticipated opinion in *Sackett v Environmental Protection Agency* (*Sackett*), delineating the appropriate standard to determine waters of the United States (WOTUS) under the federal Clean Water Act (CWA). The Supreme Court significantly reduced the reach of WOTUS from earlier jurisprudence by holding that under the CWA, the word "waters" refers only to geographical features that are described in ordinary parlance as "streams, rivers, oceans, and lakes" and adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection. The ruling is a critical blow to the "significant nexus" standard originally penned by Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006) and recently memorialized by the Biden administration's Revised Definition of Waters of the United States. The "significant nexus" standard set a controversially expansive definition of WOTUS and required in-depth, arduous, and often expensive consultant and legal analysis for applicability.

Regulatory Background and Jurisprudence to Date

Historically, the regulation of water pollution was achieved through common law nuisance suits against dischargers with state's gradually shifting to enforcement by regulatory agencies. Federal regulation was limited to interstate waters that were either *navigable in fact* and used in commerce or readily susceptible to use in commerce. (Rivers and Harbors Act of 1899, 20 Stat. 1151). In 1948, Congress enacted the Federal Water Pollution Control Act as an effort to directly regulate water pollution. (62 Stat. 1156.)

In 1972, Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1252, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas" and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1362(7), 1311(a).) Those in violation of the CWA potentially face criminal and civil penalties. (*Id.* §§ 1319(c), 1319(d).) The term "waters of the United States" is not defined further within the CWA thereby leaving federal agencies, through regulation and policy guidance, to attempt to define the what constitutes a WOTUS—including what wetlands are WOTUS. Courts have then been tasked, and rarely reached consensus, on identifying the boundaries of the geographic reach of "waters of the United States" to guide the scope of regulatory jurisdiction under the CWA.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), (collectively: Agencies) jointly enforce the CWA and have modified the WOTUS definition more than a handful of times. Upon initial enactment of the CWA, the Corps adopted the traditional judicial term for navigable waters—that the waters must be "navigable in fact." (39 Fed. Reg. 12115, 12119 (Apr. 3, 1974).) In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over "wetlands adjacent to traditional navigable waters." (EPA and Corps, Memorandum on Clean Water Act Jurisdiction Following U.S. Supreme Court's

Decision in *Rapanos v. U.S.* (2008).) In 2015, under the Obama administration, the Agencies issued the Clean Water Rule that amended the WOTUS definition to include eight categories of jurisdictional waters, including non-adjacent wetlands and other non-navigable water bodies. (80 Fed. Reg. 37054 (June 29, 2015).) In 2019, under the Trump administration, the Agencies repealed the 2015 rule and restored the pre-2015 WOTUS definitions. (84 Fed. Reg. 56626 (Dec. 23, 2019).) Then, in 2020, the Agencies under the Trump administration issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250 (Apr. 21, 2020)), which narrowed the conditions upon which non-adjacent wetlands would be considered WOTUS, but this rule was vacated in 2021 by a federal District Court in Arizona (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021)), thereby prompting the Agencies' re-implementation of the pre-2015 WOTUS definitions. On March 20, 2023, under guidance from the Biden administration, the Agencies most recent regulation, the "Revised Definition of Waters of the United States" went into effect. (88 Fed. Reg. 3004 (Jan. 18, 2023).) The 2023 WOTUS Rule relies heavily on the pre-2015 regulatory framework and associated case law, while simultaneously reinvigorating the "significant nexus" standard delineated by Justice Kennedy in *Rapanos*.

Contemporaneous to the Agencies' various iterations of the WOTUS definition, the Supreme Court has, over the years, provided parallel jurisprudence guiding the interpretation of WOTUS. In 1985, the Court held that wetlands actually abutting traditional navigable waterways were considered WOTUS. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).) In 2001, the Court held that WOTUS does not include "nonnavigable, isolated, intrastate waters" in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 (2001). Most relevant here, in 2006, the Court issued its fragmented opinion in *Rapanos v. United States*, holding that the CWA does not regulate all waters and wetlands, but failing to provide a majority approach to determining WOTUS jurisdiction. Justice Scalia, writing for the plurality, argued that wetlands that have a contiguous surface water connection to regulated waters "so that there is no clear demarcation between the two" are adjacent and may then be regulated as WOTUS. (574 U.S. at 742.) The concurring opinion, authored by Justice Kennedy, advanced a broader "significant nexus" test that would allow regulation of wetlands as WOTUS if wetlands "alone or in combination with similarly situated lands…significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." (*Id.* at 780.)

The Sacketts

In 2004, near Idaho's Priest Lake, the Sacketts purchased a residential lot that they planned to develop. In 2007, shortly after the Sacketts began filling the lot with sand and gravel, the EPA issued an administrative compliance order stating that the property contained wetlands subject to CWA protection. According to EPA the wetlands on the Sackett's lot are "adjacent to" an unnamed tributary on the other side of a 30-foot road. The unnamed tributary feeds into a non-navigable creek, which feeds into Priest Lake (an intrastate body of water that the EPA designated as traditionally navigable). In 2008, the Sacketts initially brought suit against the EPA asserting that the agency's jurisdiction under the CWA did not extend to their property. Various aspects of the case have been slowly making their way up and down the federal court system. In 2021, the Ninth Circuit Court of Appeals considered whether the Sackett's Idaho property contained wetlands subject to CWA jurisdiction. (*Sackett v. U.S. Envtl. Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021).) The Sacketts argued that Justice Scalia's reasoning in *Rapanos* controlled because their property does not have a continuous surface connection to a navigable water. The Ninth Circuit disagreed and ultimately upheld Justice Kennedy's "significant nexus" test as the controlling authority in the Ninth Circuit. On September 22, 2021, the Sacketts submitted their petition for writ of *certiorari* to the Supreme Court requesting that the Court revisit its decision in *Rapanos* and on January 24, 2023, the petition was granted. (595 U.S. __ (2022).)

The May 25, 2023 Supreme Court Opinion

The Supreme Court granted the Sackett's petition to consider whether the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under CWA § 502(7). In its May 25, 2023

ruling, the Supreme Court reversed and remanded the matter for further proceedings, consistent with the holding that the CWA extends only to waters or wetlands with a continuous surface connection with WOTUS—*i.e., relatively permanent, standing or continuously flowing* bodies of water connected to a traditional interstate navigable water—such that it is difficult to determine where the traditionally navigable water ends and the adjacent wetland begins.

In striking down the Ninth Circuit's reliance on Justice Kennedy's "significant nexus" test, the Supreme Court provided that, in order to assert jurisdiction over an adjacent wetland under the CWA, a party must establish that the wetland: (1) is adjacent to a WOTUS and (2) has a continuous surface connection with that WOTUS. The majority opinion was delivered by Justice Alito with Justices Barrett, Gorsuch, Roberts, and Thomas joining. Justices Thomas, Kagan, and Kavanaugh each filed concurring opinions. In the majority decision, Justice Alito considered: (1) the extent of the CWA's geographical reach and (2) whether the Court should defer to the Agencies' interpretation of WOTUS in the 2023 Revised Definition.

Extent of the CWA's Geographical Reach

In considering the geographical reach of the CWA, the Supreme Court in *Sackett* held that "waters" encompasses only relatively permanent, standing, or continuously flowing bodies of water for several reasons. First, the Supreme Court looked to the plural use of "waters" in Section 502(7) of the CWA, with the Court stating such use typically refers to bodies of water like streams, oceans, rivers, and is difficult to reconcile with classifying "lands" (wet or otherwise) as waters. (*Sackett* at 14; 33 U.S.C.§ 1362(7).) The Supreme Court also noted that use of the word "navigable" signals that the definition principally refers to navigable bodies of water. Second, the use of the term "waters" in other portions of the CWA (*e.g.*, CWA section 117) confirmed for the Supreme Court that the term refers to "bodies of open water" (*Sackett* at 16 and 33 U.S.C. §1267(i)(2)(D) pertaining to the waters of the Chesapeake Bay). Third, the CWA expressly "protects the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and the Supreme Court found that the state's role would not remain primary if the "EPA had jurisdiction over anything defined by the presence of water." (*Sackett* at 17 and 33 U.S.C. § 1251(b).)

Moreover, in determining CWA jurisdiction, the Supreme Court noted that while the ordinary meaning of "waters" might seem to exclude all wetlands, statutory context shows that some wetlands qualify as WOTUS. (*Sackett* at 18.) For example, Congress amended the CWA in 1977 to add CWA section 404(g)(1),) which authorizes state permitting programs to regulate discharges into any waters of the United States, except for traditional navigable waters, *including wetlands adjacent thereto*. (33 U.S.C.§1344(g)(1)) Justice Alito opined that while some wetlands are WOTUS, the above cited provision must be harmonized with CWA section 502(7) "water of the United States" language. (33 U.S.C. §1362(7); *Sackett* at 19) Because "adjacent wetlands" are included within water of the United States, Justice Alito found that these wetlands must qualify as WOTUS in their own right, *i.e.*, the wetlands must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. (*Id.*) Therefore, the Supreme Court concluded wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

As it now stands, the jurisdictional reach of the CWA extends to only those waters or wetlands that are "indistinguishable" from traditionally defined WOTUS, which must be relatively permanent, standing or continuously flowing bodies of water. As the Supreme Court noted, it must be difficult to determine where the "water" ends and the "wetland" begins. (*Sackett* at 22.)

Impacts to the 2023 Biden Administration's Definition of WOTUS

Justice Alito's majority opinion directly addresses the current Agencies' definition of WOTUS, and the majority of Justices agreed that finding jurisdiction based on a "significant nexus" to traditional navigable waters "lacks merit." (*Sackett* at 22-27.) Given the number of legal actions challenging the Agencies' new definition of WOTUS, alleging many of the same theories used by Justice Alito to criticize the new rules, the Supreme Court's opinion is likely to reverberate through the judicial system. (*See State of Texas v. U.S. EPA*, No. 3:23-cv-0007 (S. D. Tx. 2023); *Kentucky Chamber of Commerce v. U.S. EPA*, No. 3:23-cv-00008-GFVT (E. D. Ky.); *West Virginia, et al v. U.S. EPA*, No. 3:23-cv-00032-ARS

(D.N.D.).) Whether the Biden administration will act to modify the Agencies' definition of WOTUS consistent with the *Sackett* decision remains to be seen.

First, the majority found that the Agencies' interpretation is inconsistent with the CWA because Congress was not clear that it wanted to alter the federal/state balance of power over private property when it enacted the CWA. (*Sackett* at 23.) The Supreme Court enunciated its standard that Congress must enact exceedingly clear language if it wishes to alter that balance, which it did not do here. (*Id.*) They concluded that an overly broad interpretation of the CWA's reach would impinge on state authority to regulate land and water use—the core of traditional state authority. (*Id.*)

Second, the Agencies' use of the "significant nexus" test to determine jurisdictional waters present a due process issue, as it gives rise to serious vagueness concerns in light of statutorily authorized criminal penalties. (*Sackett* at 24.) Due process requires Congress to define penal statutes "with sufficient definiteness that ordinary people can understand what conduct is prohibited." (*Id.*) The Court noted that the only thing preventing the Agencies from interpreting WOTUS to cover every water in the country is the "significant nexus" test, and the boundary between significant and insignificant is far from clear. (*Id.*) Further, the Court observed the "significant nexus" test takes another step into vagueness by introducing "similarly situated waters" in the aggregate that are subject to CWA jurisdiction. (*Id.*) The majority found that these inquiries "provide little notice to landowners of their obligations under the CWA" and the Agencies lack "the clear authority from Congress" to create such an indeterminate standard. (*Id.* at 25.)

Third, the Court rejected the Agencies' argument that Congress ratified the regulatory definition of "adjacent" when the CWA was amended to include reference to "adjacent" wetlands in CWA section 404(g)(1), finding that adjacency cannot include wetlands that are merely "nearby" covered waters, existing jurisprudence repeatedly recognizes that CWA section 404 does not conclusively determine construction of other CWA provisions, and the Agencies failed to provide enough evidence to support their interpretation in the face of Congress's failure to amend CWA section 502(7). (33 U.S.C. § 1362(7)).

The Concurring Opinions

Justice Thomas filed a concurring opinion and was joined by Justice Gorsuch, ultimately arguing for an even narrower construction of the CWA. (*Sackett*, Thomas, J concurring at 1.) Thomas argues that the majority opinion focused on "waters" without determining the extent how the terms "navigable" and "of the United States" limit the reach of the statute. (*Id.* at 2.) The concurrence argues that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters.

Justice Kagan filed a concurring opinion and was joined by Justice Sotomayor and Justice Jackson, agreeing that textual construction is most important but arguing that "adjacent" is not only touching but includes nearby. (*Sackett*, Kagan, J concurring at 1.) Kagan argued a broader reading of adjacent would ultimately protect wetlands "separated from a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like" that have been regulated by the Agencies for decades. Kagan opined the majority's "continuous surface connection" test disregards the ordinary meaning of adjacent and narrows the CWA as Congress drafted it.

Justice Kavanaugh also filed a concurring opinion and was joined by Justice Kagan, Justice Sotomayor, and Justice Jackson essentially arguing similarly to Justice Kagan that the continuous surface connection test "departs from the statutory text, from 45 years of consistent agency practice, and from [the Supreme] Court's precedent," and that adjacency should include wetlands separated from a covered water by a man made barrier. (*Sackett*, Kavanaugh, J concurring at 2.) Kavanaugh argued that failing to include those wetlands will have "significant repercussions for water quality and flood control throughout the United States." (*Id.*)

Conclusion and Implications

While the *Sackett* ruling provides clarity to the regulated community, which has faced uncertainty with regard to the scope of federal CWA permitting and project approval(s) because of historic WOTUS ambiguity, the full ramifications of this ruling on project permitting remain to be determined. For example, in California, the regulated community will now have to more fully contend with the "State Wetland Definition and Procedures for Discharges of

Dredged or Fill Material to Waters of the State," (the "Procedures," effective May of 2020), for wetlands and waters that now fall outside the federal CWA's scope (losing the exemption the Procedures offered if the wetlands or waters were regulated under CWA section 404). This circumstance may increase, not lessen, regulatory permitting burdens. Project proponents should carefully evaluate (or re-evaluate) project features to determine the appropriate scope of federal and/or state requirements, and watch for guidance from the Agencies as to how projects that are in a current process of securing approvals (or recently approved but not yet commenced) might be handled in the face of shifting jurisdiction.

The now-defunct "significant nexus" test played a prominent role in the Agencies' 2023 Revised Definition of WOTUS. How the *Sackett* decision will procedurally and substantively impact the Agencies' recent rulemaking in the near term is still unclear, though the U.S. Supreme Court provided plenty of specific input as to the Agencies' rule's likely demise if the Biden administration does not take action and current judicial actions challenging the rule proceed. If there is anything the last three decades of WOTUS jurisprudence and regulatory rulemakings has taught, is not to get too comfortable with a defining "rule." Change in this arena is inevitable. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

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LEGISLATIVE DEVELOPMENTS

FEDERAL OPEN ACCESS EVAPOTRANSPIRATION DATA ACT IN CONGRESS PROPOSES SIGNIFICANT UPDATES TO WATER MEASUREMENT AND MANAGEMENT

The Open Access Evapotranspiration Data Act (HR 2429) (OAEDA) is once again on the United States House floor after Sen. Catherine Cortez Masto, D-Nev., and Rep. Susie Lee, D-Nev., reintroduced the OAEDA alongside Sen. John Hickenlooper, D-Colo., and Reps. Chris Stewart, R-Utah, Jared Huffman, D-Calif., and Burgess Owens, R-Utah. The version currently under consideration in Congress has the potential to significantly change how water resources are managed and measured in the United States. The OAEDA would require the development of a system for measuring evapotranspiration using satellites, which would provide valuable data for farmers, water managers, and policymakers.

A similar bill was introduced in the 2021-2022 session back did not make it out the House Natural Resources Subcommittee on Water, Oceans, and Wildlife.

Measuring Evapotranspiration

One primary purpose of the OAEDA is to measure evapotranspiration, which is the process by which water is transferred from the land to the atmosphere through evaporation from soil and plant surfaces, as well as through transpiration from plants. It is a key component of the water cycle and is critical for understanding water availability and uses in agricultural and natural systems. However, OAEDA sponsors assert that current methods for measuring evapotranspiration are often time-consuming and costly, and may not be representative of the entire landscape.

Satellites and OpenET Data Program

OAEDA sponsors state that the value of improved evapotranspiration reporting is widely understood in the water resources science and management community, and that satellites offer a promising solution to these challenges, as they can provide a more comprehensive view of evapotranspiration across large areas. The OAEDA would require the development of a system for measuring evapotranspiration using satellites, and would require that this data be made available to the public through an open-access platform called the Open Access Evapotranspiration (OpenET) Data Program. This would allow researchers, farmers, and water managers to access the data they need to make informed decisions about water use and management.

The OAEDA finds one of the key benefits of using satellites to measure evapotranspiration is the ability to obtain data across large areas, particularly in agricultural regions. By providing data on evapotranspiration across entire watersheds or regions, farmers and water managers could make more informed decisions about when and how much to irrigate, and how to allocate water resources among different crops and uses.

OAEDA sponsors assert that satellite data can also provide a more accurate picture of evapotranspiration than current methods, which often rely on point measurements or estimates based on weather data. Satellites can provide continuous, spatially explicit data that can capture variability in evapotranspiration across different land cover types, soil types, and other factors. This may lead to more accurate estimates of water use and availability, and better predictions of drought and other water-related risks.

OAEDA Challenges

OAEDA also faces challenges. One of the main challenges is the technical complexity of developing a satellite-based evapotranspiration measurement system. This will require significant investment in research and development, as well as coordination among multiple agencies and organizations. The OAEDA looks to share these costs among project partners, though at this time it is not exactly clear which partners those might be. The OAEDA as drafted currently expects the project to have a $23,000,000 annual impact from 2024 to 2028.

Conclusion and Implications

The potential impacts of the OAEDA are significant, but several many important aspects will likley require refinement before making it to the President's desk for signature. By providing open access to evapotranspiration data obtained through satellite measurements, the OAEDA could help to transform how water resources are managed and measured in the Western United States. The OAEDA has the potential to benefit farmers, water managers, and natural resource managers alike, by providing the data needed to make informed decisions about water use and management.
(Darien Key)

2023 COLORADO LEGISLATIVE UPDATE

The Colorado General Assembly adjourned its legislative session in early May. This latest session included the legislative passage of several water-related bills and a clear emphasis on addressing water use in the face of long-term drought and water shortage. What follows is a summary of relevant bills.

•SB 177- General Water Appropriations

Every year the Colorado General Assembly passes a general water appropriations bill allocating funding to various programs and projects across the state. The legislature unanimously passed this bill and sent it to Governor Jared Polis' desk on May 9. In total the bill allocates more than $90 million to various projects around the state including flood mapping, watershed restoration, reservoir enlargement, and river and fish recovery. The appropriations include $25.2 million for grant funds dedicated to projects that assist in implementing the Colorado Water Plan. This bill is one of the largest general water appropriations to date, funded in large part by increased sports betting revenues. The appropriations do not take any money from the general fund, but rather are funded entirely through the Colorado Water Conservation Board construction fund, severance taxes on oil and gas development, and sports betting. The sports betting appropriations alone tripled from last year to more than $25 million.

•HB 1242 – Water Use in Oil & Gas Operations

HB 1242 sets a goal to reduce freshwater use in oil and gas development by increasing the recycling and reuse of "produced" water. Produced water is water that is extracted during oil and gas production or otherwise separated from oil and gas after extraction. The bill would create a 28-member Colorado Produced Water Consortium to make recommendations on legislation and rules necessary to remove barriers to the reuse of produced water.

If enacted, oil and gas operators would be required to report various freshwater and produced water data to the Colorado Oil & Gas Conservation Commission. This data would then be used to adopt rules to require increased recycling and reuse of produced water in an effort to further conserve freshwater resources. The bill passed the Senate 23-12 and the House 46-18, although it has not yet been sent to the Governor.

•SB 295 – Colorado River Drought Task Force

SB 295 passed both the Senate and House with near unanimous support and was sent to the Governor on May 17. This bill would create the Colorado River Drought Task Force to make legislative recommendations regarding the state's obligations under the Colorado River Compact. The 17-member board will include a wide range of representatives including members from the industrial, conservation, agricultural, and municipal sectors. The board would also include representatives from the Southern Ute and Ute Mountain Ute tribes, in addition to a sub task force to make specific recommendations on tribal matters. The bill specifically mentions demand management programs through its requirement that "any acquisition by the programs of a water right used for agricultural irrigation purposes is voluntary, temporary, and compensated." That language has become a significant factor in Colorado water policy as the state works to balance water shortage with supporting rural agricultural communities. Any task force recommendations would be due by the end of this year.

•SB 270 – Projects to Restore Natural Stream Systems

This bill initially caused headlines throughout Colorado, although the final version is significantly reduced in scope. As originally drafted, the bill aimed to allow stream restoration projects that would mimic beaver dams in an attempt to restore wetlands and other stream ecology. However, critics worried these modifications would push water out of the channel in a way that would change the hydrology and potentially injure downstream water rights owners. Therefore, the legislature amended the bill to reduce the scope of "stream restoration projects" while providing that such projects do not need a water right and, as long as the projects meet the statutory definition, do not cause material injury to vested water rights and are not unnecessary dams or other obstructions.

The larger goals of this bill fit within the Colorado Water Plan's direction for projects that restore stream health. Healthy streams in turn provide clean water for cities and farms in addition to public safety and ecological benefits including forest and watershed health, wildfire and flood mitigation and recovery, and riparian and aquatic habitat. Under SB 270, "minor stream restoration activities" include bank stabilization that does not cause the water level to exceed the ordinary high water mark; mechanical grading along a stream that does not result in groundwater exposures, diversion of surface water, or collection of storm water; daylighting natural streams that have been piped or buried; reducing surface area of a natural stream to address reductions in historical flow amounts; and installing structures or reconstructing a channel for the sole purpose of recovery from wildfire or flood. These stream restoration projects must be designed and constructed within a natural stream system for fire or flood mitigation, bank stabilization, or protection of water quality and habitat, among other approved uses.

The General Assembly unanimously passed SB 270 and sent it to the Governor's desk on May 15.

•SB 262 – Water Desalination Study and Report

Although this bill ultimately failed, it demonstrates the creative efforts being considered to address ongoing drought and looming water shortages in the west. SB 262 would have required the Colorado Water Conservation Board to perform a literature review of the challenges and opportunities of operating desalination facilities in California or Mexico. The bill noted that California has 12 operating facilities and recently approved a new $140 million facility to supply 5 million gallons per day to resident of Orange County. Although the bill would only have authorized a study, it seemingly contemplates a future in which widespread desalination plants are used to reduce demand throughout the entire Colorado River system.

Conclusion and Implications

The 2023 Colorado legislative session demonstrated an ongoing awareness of water issues and the General Assembly's willingness to spend money on those issues. In addition to funding, the legislature created several committees that will study various issues with the common goal of maintaining Colorado's water security amidst ongoing drought and water shortage issues. However, several innovative bills either failed or were significantly reduced in scope, again highlighting the complexity of water issues and conflicts among various stakeholders. Recommendations from committees created during this session are expected to lead to follow up legislation in 2024.
(John Sittler)

REGULATORY DEVELOPMENTS

NATIONAL MARINE FISHERIES SERVICE MAINTAINS ENDANGERED LISTING STATUS FOR SOUTHERN CALIFORNIA STEELHEAD

On May 2, 2023, the National Marine Fisheries Service (NMFS) issued its Five-Year Review (Review) of Southern California steelhead (*Oncorhynchus mykiss*) under the federal Endangered Species Act (ESA). The Review found that current conditions warrant the continued protection of Southern California steelhead as an endangered species.

Background

On August 18, 1997, NMFS listed Southern California steelhead as an endangered species under the ESA. (62 Fed. Reg. 43937.) Southern California steelhead are a distinct population segment (DPS) of *Oncorhynchus mykiss* that originate and reside below natural and manmade impassable barriers from the Santa Maria River south to the U.S.-Mexico border. (*See* 71 Fed. Reg. 834.) Southern California steelhead are one of 28 West Coast Pacific salmon and steelhead populations that NMFS listed in 1997 as a result of declining population numbers. NMFS attributed the declines to several factors, including loss of freshwater and estuarine habitat, poor ocean conditions due to anthropogenic activities such as water-supply and hydropower development, urban and agricultural land practices, overfishing and hatchery practices, and more recently, climate changes. (*See* 2023 Five-Year Review at 1.)

The ESA directs the Secretary of Commerce (who oversees NMFS) to review the listing classification of threatened and endangered species at least once every five years. (16 U.S.C. § 1533 (c)(2).) The purpose of the five-year review is to ensure that the listing classification remains accurate. To make this determination, NMFS examines the current biological viability of the species—including its abundance, productivity, spatial structure, and diversity—to determine whether and how its resilience and capacity to survive in the wild has changed. NMFS also uses any new information to analyze changes to the five factors considered in the original listing decision: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or man-made factors affecting the species' continued existence. (*Id.* at § 1533(a)(1).)

After completing the Review, the Secretary of Commerce must determine if the species should be removed from the endangered species list or have its status changed. (16 U.S.C. § 1533(c)(2).) If the five-year review recommends a change to the listing classification (*e.g.*, from endangered to threatened), the recommended change will prompt a separate rulemaking process. (2023 Five-Year Review at 2.)

The last Review of Southern California steelhead occurred in 2016. On October 4, 2019, NMFS announced the initiation of the 2023 Five-Year Review. (84 Fed. Reg. 53117.) NMFS invited the public to submit any new information that had become available since the 2016 review, and received responses from federal, state, and local agencies, Native American Tribes, conservation groups, angling groups, and individuals. NMFS considered the information received and information it routinely collects to complete the 2023 Five-Year Review based on the best available science. (2023 Five-Year Review at 5-6.)

2023 Five-Year Review of Southern California Steelhead

The 2023 Five-Year Review found that current conditions warrant the continued protection of Southern California steelhead as an endangered species. (2023 Five-Year Review at 144.) Among other things, NMFS found that extended drought conditions coupled with wildfires since 2016 have elevated threat levels to Southern California steelhead. (*Id.*) Over the past five to seven years, drought and wildfire have diminished stream flow conditions to the point that adult steelhead were not present at all on most streams. (*Id.* at 45.) Where adult steelhead were observed, counts were in the single digits. (*Id.*)

NMFS determined that the systemic anthropogenic threats to Southern California steelhead identified

at the time of initial listing have remained essentially unchanged over the past five years. (*Id.* at 144.) NMFS recognized significant progress in removing small-scale fish passage barriers in a number of core recovery watersheds. (*Id.*) NMFS also recognized the completion, or progress toward completion, of several Biological Opinions and other regulatory measures consistent with NMFS' recommended recovery actions. (*Id.* at 60.)

NMFS also revealed new research on the genetic architecture of anadromous Southern California steelhead and non-anadromous rainbow trout, which indicates that endangered steelhead populations may be reconstituted from populations of rainbow trout in drought refugia if they exhibit certain genetic features. (*See id.* at 32-33, 45, 144.) Nearly all drought refugia, however, are currently inaccessible to endangered steelhead due to impassible barriers or other altered flow regimes. (*See id.* at 32-33.) For this and other reasons, NMFS concluded that although "the overall level of threat to Southern California steelhead DPS remains the same," actions to promote recovery should remain a top priority. (*See id.* at 145, 147.)

Conclusion and Implications

In recommending future actions, NMFS focused on activities to address ongoing and emerging habitat concerns over the next five year period. (*See id.* at 147.) NMFS' recommended actions include specific "high-priority habitat restoration projects" to remedy barriers to the movement of adult and juvenile steelhead. (*Id.* at 147-48.) The recommended actions also include measures to prevent local extirpations of steelhead populations, improve research, monitoring, and evaluation, promote key ESA consultations, and improve enforcement of ESA protections. (*Id.* at 147-153.)

NMFS will issue its next status review of Southern California steelhead in approximately five years. The next review will examine whether any new conditions from now until approximately 2028 warrant a change to the species' listing status. The 2023 Five-Year Status Review is available at: https://media.fisheries.noaa.gov/2023-05/5-year-status-review-sc-steelhead.pdf.
(Holly E. Tokar, Sam Bivins)

CALIFORNIA DEPARTMENT OF WATER RESOURCES APPROVES 12 GROUNDWATER SUSTAINABILITY PLANS FOR NON-CRITICALLY OVERDRAFTED BASINS

On April 27, 2023, the California Department of Water Resources (DWR) announced its approval of the Groundwater Sustainability Plans (GSPs) for 12 non-critically overdrafted groundwater basins under the Sustainable Groundwater Management Act (SGMA). With this announcement, DWR has now issued GSP determinations for 36 out of the 94 medium- or high-priority groundwater basins in the state. Of that total, the GSPs for six basins have been deemed "inadequate" and are now subject to pending intervention by the State Water Resources Control Board (State Water Board), while the plans for eight more basins are presently considered "incomplete." As with the previously approved GSPs, DWR's latest approvals include recommended corrective actions for the Groundwater Sustainability Agencies (GSAs) to consider implementing before the first five-year review.

Background

The California Legislature enacted SGMA in 2014 to achieve long-term sustainability of the state's groundwater basins by requiring that each medium- and high-priority basin be managed pursuant to an adopted and approved GSP or alternative plan that maps out how the basin can reach its sustainability goals and avoid undesirable results such as critical overdraft and subsidence. GSAs are special entities formed to develop and adopt GSPs or alternative plans. The GSPs for critically overdrafted basins and non-critically overdrafted basins were due to DWR by January 31, 2020 and January 31, 2022, respectively. In addition to its GSP determinations for 36 basins, DWR has approved alternative management plans for nine others.

Within two years of a GSP submittal, DWR is charged with evaluating compliance with the statu-

tory and regulatory requirements of SGMA, and determining whether implementation of the GSP is likely to achieve the identified sustainability goals for that basin. DWR's GSP review can result in one of three potential determinations: (1) approved with recommended corrective actions; (2) incomplete with required corrective actions; or (3) inadequate.

When DWR approves a GSP, it has found a reasonable likelihood that groundwater sustainability can be achieved for that basin within the prescribed 20-year horizon. Where a particular GSP could benefit from additional details or minor improvements, DWR will propose corrective actions to be taken within the following five years. The GSA may proceed with further implementation of its GSP upon approval.

A GSP may be deemed incomplete if it is missing information that DWR needs to conduct its review or to find that sustainability of the basin can be achieved within 20 years. Prior to an incomplete determination, DWR will notify the GSA of the identified deficiencies with an opportunity to cure. An incomplete determination will prompt the GSA to go back and submit a revised plan within 180 days. If problems persist or the GSA does not resubmit, then the GSP may be reclassified as inadequate. Earlier this year, DWR issued "incomplete" determinations for GSPs in the Westside, Paso Robles Area, Merced, Kings, Eastern San Joaquin, Cuyama Valley, and Madera groundwater basins.

DWR will find a GSP inadequate if it finds significant omissions or deficiencies that will take the GSA more than 180 days to correct. An inadequate determination acts as a referral to the State Water Board, which may then notice a public hearing to consider designating the basin as probationary and intervening with an interim plan. In March of 2023, DWR issued "inadequate" determinations for six critically overdrafted basins, including the Kern County, Tule, Tulare Lake, Kaweah, Delta-Mendota, and Chowchilla basins. The State Water Board has not yet issued a notice of hearing for the inadequate GSPs.

Approval of 'Single Plan' GSPs

DWR's latest approval covers 12 "single plan" GSPs that comprehensively manage the following basins or subbasins: San Jacinto; Upper Ventura River; Santa Margarita; San Luis Obispo Valley; Monterey; Langley Area; Upper Valley Aquifer; Forebay Aquifer; East Side Aquifer; Shasta Valley; Scott River Valley; and Big Valley.

Each approval includes a statement of findings and an attached staff report recommending approval and corrective actions. For the 12 approved basins, DWR finds that each GSP is complete, was prepared and submitted in compliance with the Water Code and SGMA regulations, and accounts for management of the entire basin. Sustainability goals and undesirable results have been reasonably formulated using appropriate thresholds and criteria, and the proposed projects and management actions are commensurate with the level of understanding of basin conditions. In each instance, DWR concludes its findings that the GSP is acceptable and DWR adopts the recommendations in its staff report.

The corrective actions DWR recommends differ slightly among the GSPs, but generally include suggested revisions of certain terms and definitions relating to sustainability metrics, the collection of additional information from well surveys and pumping meters, and refinements of how GSAs will investigate and enforce compliance with applicable management criteria. SGMA requires GSAs to evaluate their GSPs and submit written assessments to DWR every five years, by which point they are strongly encouraged to incorporate all suggested corrective actions.

DWR wrote in their news release on this topic that they were "impressed with the effort that local agencies have put into their groundwater sustainability plans." Highlighting the diligence of the local agencies in implementing their plans, DWR expressed optimism about the local agencies' ability to act proactively and to continue adapting and updating as necessary to face changing circumstances brought on by climate change and drought. More recently, DWR also released its determination for the Cuyama Valley basin's groundwater sustainability plan on May 25, recommending it for approval.

Out of the 94 total groundwater basins that were required to submit plans under SGMA, DWR has now provided determinations for 37 basins with 31 of those basins recommended for approval. According to DWR's online SGMA Portal, review is currently in progress for the groundwater sustainability plans for the Cosumnes, South American, and North American basins. As for the rest, DWR anticipates issuing determinations for the remaining basins throughout 2023.

Conclusion and Implications

With the 10th Anniversary of SGMA's passage fast approaching, DWR is continuing to make progress on the onerous task of reviewing and providing determinations for each and every groundwater sustainability plan across the state.. About a third of all groundwater basins have had their sustainability plans so far and as the summer months move along the real question will be whether DWR can keep pace and finish the task at hand by the year's end. 63 basins are still awaiting approval from DWR, and with just over six months until 2024, DWR staff will no doubt have their work cut out for them.

Following DWR's approval, GSAs are free to proceed with the funding and implementation of the projects and management actions contemplated in their plans. GSPs will need to be updated as new data and information become available, or as physical conditions change over time. DWR will review annual progress reports and five-year plan updates to monitor continued compliance with SGMA and its regulations. As noted on DWR's SGMA website portal, determinations for the GSPs in 47 additional basins are forthcoming in 2023.

The SGMA portal with an up to date list of DWR's GSP evaluations is available at: https://sgma.water.ca.gov/portal/gsp/status.

(Austin C. Cho, Sam Bivins, Wesley Miliband, Kristopher Strouse)

U.S. GOLDEN EAGLE FARMS AVOIDS LITIGATION WITH ADMINISTRATIVE SETTLEMENT IN WASHINGTON

In the October 2021 edition, we reported an administrative appeal denying issuance of a new mitigated water right in Washington. The Department of Ecology denial opened up the potential for a critical review of the agency's authorities for a number of open issues in Washington including public interest criteria and the scope of municipal water rights for instream mitigation. [*U.S. Golden Eagle Farms LP v. State of Washington, Department of Ecology*, PCHB No. 21-66c (2023).]

Background

The appellant, U.S. Golden Eagle Farms LP irrigates berries in the Skagit River Valley. In 2019, Appellants filed an application for a new groundwater right. Since Washington recognizes hydraulic continuity between groundwater and surface water and the Skagit River and its tributaries are regulated for minimum flows under Ch 173-503 WAC, new water rights which are junior must be regulated when minimum flows in the river are not met.

To address the potential for interference with instream flows, Appellants proposed a mitigation plan wherein the Appellants would lease water from a nearby municipality to mitigate impacts of the new appropriation. Under the lease, the municipality agreed to place a portion of its water right into the State Trust Water Rights Program as an administrative means of "protecting" that water instream. The Trust transfer had two components, mitigation of the above referenced groundwater application, and additional mitigation for exempt wells in the basin.

The mitigation proposal was processed through Washington State's Department of Ecology's Cost Reimbursement Program, with the contractor-prepared technical examination recommending approval. Despite this, Ecology denied the application as being contrary to the Public Interest.

In issuing new water rights, Ecology must make an investigation and review under RCW 90.03.290. RCW 90.03.290 requires Ecology to find that (1) water is available for appropriation; (2) the proposed use is a beneficial use; (3) the use will not impair existing rights; and (4) the use will not be detrimental to the public welfare, which includes the public interest. The Report of Examination made the necessary finding for the first three of these criteria--that water was available, that the proposed use was a beneficial purpose, and that, with an approved mitigation plan, there would not be impairment. However, despite the finding that the water right being used for mitigation was a perfected municipal water right and was otherwise not subject to relinquishment, Ecology determined that the water right was insufficient for

mitigation purposes under the public welfare / public interest test.

At the Pollution Control Hearings Board

The Applicant appealed the decision to the Pollution Control Hearings Board. The case posed a variety of legal questions; Does the public interest test allow Ecology to deny applications on the basis of impacts to fishery resources separate from flow considerations of instream flows set by rule? And if so, what is the limit to this recognition of protection of the fishery resources—does it apply to the fishery resource generally, or only to threatened or endangered species under ESA? And how do the federal tribal treaty obligations associated with usual and accustomed fishing areas interact with Ecology's application of the public interest criteria in water right decisions? And can municipal water rights be relied upon for mitigation and instream protection purposes? Any one of those issues would be likely to wind up with the State Supreme Court.

The Settlement

Ultimately, with the Swinomish Tribe as intervenor, the Applicant, Ecology and the Tribe settled on a different route to find the necessary water supplies. It is becoming increasingly common for new water supplies on the west side of the state to seek interruptible water rights in lieu of mitigated water supplies. Western Washington, being generally wetter than the rest of the State, has far fewer existing water rights to use for mitigation purposes. However, Western Washington streams commonly see high flows early in the season, when crops don't yet need irrigation. An interruptible water right together with a reservoir permit allows water users to divert water when in excess to fish needs and store the water for use later in the season. And while the infrastructure costs of the necessary storage are not insignificant, relative to the litigation costs, provide more certainty of return.

Conclusion and Implications

Alas, instead of a case for all of us to watch, Ecology, US Golden Eagle, and the Swinomish Tribe found a cooperative route to address the applicants ongoing irrigation needs while being sensitive to regulated stream flows and avoiding further litigation. The rest of us will have to wait for answers to the questions. (Jamie Morin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

•June 1, 2023—This week, U.S. Environmental Protection Agency will contact affected property owners as part of the first phase of cleaning up contaminated sediment in a 3.25-mile section of the Little Scioto River Superfund site in Marion Township, Ohio.

The section being cleaned up is north of Marion-Agosta Road and ends slightly south of Marion-Green Camp Road, in Marion Township, Ohio. EPA is contacting property owners to request access to their properties to survey the river and the surrounding area and conduct preliminary activities as necessary.

Preliminary activities will include clearing vegetation, creating access roads to the river, and preparing temporary staging areas to place excavated sediment that will be removed and disposed of in a permitted landfill. EPA will restore all disturbed areas to pre-excavation conditions. EPA anticipates the entire cleanup project should be finished in 2028. Cleanup activities will be done at no cost to property owners.

Main activities throughout the entire cleanup will include:

Placing temporary dams and bypassing water in segments of the river at approximately 0.5-mile intervals; excavating the top 2-4 feet of sediment from the river channel; staging contaminated sediment for drying and treating it with a cement-like material; transporting treated sediment to an offsite permitted landfill; replacing excavated sediment with clean sediment and restoring the river's water flow; restoring riverbanks and the temporary staging areas for excavated sediment with natural vegetation.

Previous sampling performed in this section of the river detected sediment contaminated with polycyclic aromatic hydrocarbon, or PAH, chemicals. PAHs are a group of chemicals that are formed during the incomplete burning of coal, oil and gas, garbage, or other organic substances. The Little Scioto River Superfund site is comprised of two separate operable units, or OUs. This portion of the river is part of the first operable unit, OU1, an 8.5-mile stretch of the river and four small nearby ditches. OU2 includes the former Baker Woods Creosoting facility, a lumber preserver from the 1890s until the 1960s. Historical information suggests that poor disposal practices at the Baker Woods facility contaminated groundwater, sediment, and soil in the area with arsenic and PAH chemicals.

•May 25, 2023—Eastman Chemical Resins Inc. will pay a $2.4 million penalty for environmental violations at the sprawling 56-acre manufacturing facility in West Elizabeth, Pennsylvania, that is now owned and operated by Synthomer Jefferson Hills, LLC, the U.S. Environmental Protection Agency announced today.

"Pennsylvanians have a right enshrined in the state constitution to clean air and pure water, and we will always pursue operators that violate that right and hold polluters accountable," said Pennsylvania Department of Environmental Protection Acting Secretary Rich Negrin. Along with the financial penalty being paid by Eastman, Synthomer has agreed to take actions to eliminate ongoing violations and prevent future violations. This includes conducting a comprehensive review of stormwater discharges and groundwater contamination and implementing initiatives to ensure compliance with environmental laws, including the

The penalty will be divided equally between the United States and Pennsylvania, who are co-plaintiffs in this consent decree. Pennsylvania DEP assisted EPA in the investigation and litigation. The settlement addresses alleged federal and state environ-

mental law violations that have occurred since 2017, which threaten to degrade receiving streams and impact public health and harm aquatic life and the environment.

The chemical producing facility is bordered on the southeast by the Monongahela River and bisected by an unnamed tributary to that river. The proposed consent decree, filed in the federal District Court in Pittsburgh, is subject to a 30-day public comment period and approval by the federal court.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

• May 31, 2023—The U.S. Environmental Protection Agency (EPA) will collect a $49,953 penalty from TransChemical Inc., which owns and operates a chemical distribution facility in St. Louis, Missouri, to resolve alleged violations of the federal Emergency Planning and Community Right-to-Know Act (EPCRA). According to EPA, the company failed to submit required annual reports listing toxic chemicals at the facility.

As part of the settlement with EPA, the company also agreed to install controls around the facility designed to contain releases of chemicals to bordering neighborhood properties. EPA says that TransChemical will spend approximately $151,000 to complete the containment project.

EPA's review of TransChemical Inc.'s records showed that the company manufactured, processed, or otherwise used quantities of toxic chemicals above thresholds that require the company to submit annual reports to EPA. Specifically, the company failed to timely submit reports for methanol, xylene, toluene, tert-butyl alcohol, n-hexane, n-butyl alcohol, methyl isobutyl ketone, and nonylphenol ethoxylates in 2017, 2018, and 2019.

EPCRA requires facilities to report on the storage, use, and releases of toxic chemicals. The information submitted is compiled in the Toxics Release Inventory, which supports informed decision-making by companies, government agencies, non-governmental organizations, and the public.

•May 31, 2023—The Justice Department announced the filing of a civil action against James C. Justice III and 13 coal companies he owns or operates seeking to collect unpaid civil penalties previously assessed by the Department of the Interior (DOI) Office of Surface Mining Reclamation and Enforcement (OSMRE), as well as Abandoned Mine Land (AML) reclamation fee and audit debts.

"Over a five-year period, defendants engaged in over 130 violations of federal law, thereby posing health and safety risks to the public and the environment," said U.S. Attorney Christopher R. Kavanaugh for the Western District of Virginia. "After given notice, they then failed to remedy those violations and were ordered over 50 times to cease mining activities until their violations were abated. Today, the filing of this complaint continues the process of holding defendants accountable for jeopardizing the health and safety of the public and our environment."

Pursuant to the Surface Mining Control and Reclamation Act (SMCRA), when a permittee violates SMCRA or their applicable permit, OSMRE issues a notice of violation (NOV) for non-imminently dangerous violations. The NOV sets a deadline for abating the violation. If the permittee fails to abate the violation by the NOV's deadline, OSMRE issues a cessation order to halt mining until the violation is abated. If the permittee still fails to abate the violation within 30 days of the cessation order, OSMRE can take certain actions, including assessing civil penalties. If the violation creates an imminent danger to the health or safety of the public, OSMRE issues a second type of cessation order, called an Imminent Harm Cessation Order (IHCO), in lieu of an NOV, which requires cessation of active mining until the violation is abated. Separately, a director, officer or agent of a corporate permittee can be subject to individual civil penalties for willfully and knowingly authorizing, ordering or carrying out a permit violation or failure to comply with certain OSMRE orders.

From 2018 to 2022, OSMRE cited the defendants for over 130 violations and issued the companies over 50 cessation orders. The underlying violations pose health and safety risks or threaten environmental harm. In addition, defendants failed to pay required AML fees, which fund the reclamation of coal mining sites abandoned or left in an inadequate reclamation status. According to today's filing, the total amount of the penalties and AML fees, plus interest, penalties and administrative expenses, owed by the defendants is approximately $7.6 million.

Criminal Enforcement

•May 11, 2023—A federal grand jury returned two separate indictments charging Luis Enrique Rodriguez Sanchez and Pedro Luis Bones Torres with violations of the Clean Water Act and the Rivers and Harbors Act related to the illegal construction and deposit of material into the wetlands and waters of the United States in the area of the Jobos Bay National Estuarine Research Reserve (JBNERR) and Las Mareas community of Salinas, Puerto Rico.

According to the indictments, from approximately January 2020 through October 2022, Luis Enrique Rodriguez Sanchez (Rodriguez Sanchez) and Pedro Luis Bones Torres (Bones Torres) knowingly discharged fill material from excavation and earth moving equipment into the wetlands and waters of the United States in violation of the Clean Water Act. Further, both Rodriguez Sanchez and Bones Torres are charged with building structures within the navigable waters of the United States without authorization of the Secretary of the Army, in violation of the Rivers and Harbors Act. These activities occurred in the coastal waters and wetlands of the Las Mareas community and JBNERR in Salinas, Puerto Rico.

The Clean Water Act was enacted by Congress in 1972 to protect and maintain the integrity of the waters of the United States. The Clean Water Act's main purpose is to ensure the restoration and maintenance of the chemical, physical and biological integrity of the nation's waters. It prohibits the discharge of any pollutant and fill material into waters of the United States except when a permit is obtained from the United States.

The Rivers and Harbors Act was originally enacted in 1899 and is generally considered the oldest environmental law in the United States. It serves to regulate and protect the navigable waters of the United States and prohibits the un-permitted construction of structures within those waters. Both the Clean Water Act and the Rivers and Harbors Act protect the coastal waters within the JBNERR.

The JBNERR was designated as a National Estuarine Research Reserve by the NOAA in 1981 and is comprised of approximately 2,800 acres of coastal ecosystems in the Southern coastal plain of Puerto Rico. The JBNERR contains mangrove islands, mangrove forests, tidal wetlands, coral reefs, lagoons, salt flats, dry forest and seagrass beds. It is also home to the endangered brown pelican, peregrine falcon, hawksbill turtle and West Indian manatee. The JBNERR is owned and operated by the Puerto Rico Department of Natural and Environmental Resources (PR-DNER).

If convicted, the defendants face up to four years in prison, as well as fines and injunctive relief to remove violative structures.

•May 3, 2023— Zeus Lines Management S.A. (Zeus), a vessel operating company, pleaded guilty on Monday in Providence, Rhode Island, to maintaining false and incomplete records relating to the discharge of oily bilge and for failing to report a hazardous condition on board the oil tanker Galissas. The company's chief engineer, Roberto Cayabyab Penaflor, and Captain Jose Ervin Mahigne Porquez also pleaded guilty today for their roles in those crimes. The defendants are scheduled to be sentenced on Aug. 8.

According to court documents, Zeus and Penaflor admitted that oily bilge water was illegally dumped from the Galissas directly into the ocean without being properly processed through required pollution prevention equipment. Oily bilge water typically contains oil contamination from the operation and cleaning of machinery on the vessel. They also admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law.

Specifically, on three separate occasions between November 2021 and February 2022, Penaflor ordered crew members working for him in the engine room to discharge a total of approximately 9,544 gallons of oily bilge water from the vessel's bilge holding tank directly into the ocean using the vessel's emergency fire pump, bypassing the vessel's required pollution prevention equipment.

In addition to the illegal discharges of oily bilge water, on Feb. 2, 2022, while the Galissas was conducting cargo operations in Rotterdam, the Netherlands, crew members became aware that the vessel's inert gas system was inoperable. This system is necessary to ensure that oxygen levels within the vessel's cargo tanks remain at safe levels – at or below 8% – and do not pose a hazardous condition that could lead to an explosion or fire. Rather than remaining in Rotterdam until the inert gas system could be repaired, shore side management of Zeus and Captain Porquez determined that the vessel should instead sail to the United States, where a spare part would be delivered upon the vessel's arrival for the crew to repair the system.

Zeus and Penaflor each pleaded guilty to a felony violation of the Act to Prevent Pollution from Ships for failing to accurately maintain the oil record book for the Galissas. Zeus and Porquez also pleaded guilty to a felony violation of the Ports and Waterways Safety Act for failing to report the vessel's hazardous condition to the U.S. Coast Guard. Under the terms of the plea agreement Zeus will pay a total monetary penalty of $2.25 million, consisting of a fine of $1,687,500 and a community service payment of $562,500. The community service payment will go to the National Fish and Wildlife Foundation to fund projects to benefit marine and coastal natural resources located in the State of Rhode Island. Additionally, Zeus will serve a four-year term of probation, during which any vessels operated by the company and calling on U.S. ports will be required to implement a robust environmental compliance plan.
(Robert Schuster)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL NGO, SNAKE RIVER WATERKEEPER, FILES SUIT AGAINST J.R. SIMPLOT COMPANY OVER ALLEGED CAFO/FEEDLOT-RELATED CLEAN WATER ACT VIOLATIONS

On May 9, 2023, Snake River Waterkeeper (Waterkeeper) filed a *Complaint for Declaratory Relief, Injunctive Relief and Civil Penalties* in United States District Court for the District of Idaho against J.R. Simplot Company (Simplot) alleging federal Clean Water Act (CWA) violations at Simplot's Grand View, Idaho feedlot operation. Waterkeeper essentially alleges overland claims (as opposed to groundwater tributary-based claims) that Simplot fails to properly handle and dispose of manure, which creates polluted runoff during storm events, originating from the feedlot itself and from neighboring agricultural fields where manure is allegedly excessively applied. [*Snake River Waterkeeper v. J.R. Simplot Company*, Case No. 1:23-CV-239 (D. Id).]

The Grandview Feedlot

According to the *Complaint*, Simplot's Grand View operation is one of the largest cattle feedlot operations in the United States—capable of finishing up to 150,000 head of beef cattle. The feedlot is located approximately two to three miles north (and upgradient) of the Snake River and the town of Grand View, Idaho. Waterkeeper alleges that the feedlot generates "at least" 47,450 tons of manure annually according to Simplot's own estimates dating from 2008-era NPDES Permit materials/regulatory submissions.

Simplot first obtained a CWA National Pollutant Discharge Elimination System (NPDES) permit for the feedlot in 1997. That permit was administratively extended in 2002. In December of 2012, the United States Environmental Protection Agency (EPA) apparently (according to Waterkeeper) informed Simplot that its (Simplot's) failure to submit a Notice of Intent and supporting Nutrient Management Plan resulted in a Simplot lack of coverage under EPA Region 10's NPDES CAFO General Permit. Consequently, the agency allegedly informed Simplot that discharges from the Grand View feedlot to waters of the United States, if any, would be unauthorized and violate Section 301 of the CWA. The state of Idaho has since been delegated CWA permitting authority, and Simplot does not possess an Idaho Pollutant Discharge Elimination System (IPDES) permit either.

Waterkeeper states that the Simplot feedlot is tributary to the Snake River via irrigation ditches, drains, and other waterways located within the feedlot property and other neighboring properties. These include the Middle Line Canal, Low Line Canal, Jack Creek, and Corder Creek.

Mechanisms of Alleged Snake River Contamination

Waterkeeper alleges that manure-laden runoff flows off of the feedlot during storm events because the facility lacks adequate stormwater controls. Because the feedlot lacks the ability to collect and impound stormwater runoff (at least the 25-year, 24-hour precipitation event), Waterkeeper contends that the feedlot fails the regulatory zero discharge requirements. Waterkeeper alleges that Simplot concedes as much in public comments Simplot submitted to EPA in December 2019 related to issuance of a concentrated animal feeding operation (CAFO) general permit in Idaho. The topography of the feedlot creates stormwater retention issues within the facility itself, as well as run-on water flowing onto the feedlot from other surrounding upgradient lands—particularly thousands of acres of BLM land located on the river bench above the feedlot.

Waterkeeper also alleges that Simplot owns various neighboring/vicinity parcels of agricultural lands to which feedlot manure is exported and applied for disposal purposes. Waterkeeper contends that the manure is over-applied in derogation of applicable nutrient management plans and agronomic rates. Consequently, manure-contaminated field irrigation runoff discharges to and through several agricultural ditches and drains that are tributary to the Snake River, contaminating the same.

Waterkeeper alleges that it has documented these exceedances, and the resulting tributary runoff contamination, via water quality grab samples it has obtained upstream and downstream of the feedlot and related manure land application sites on otherwise publicly accessible lands. In general, Waterkeeper data purportedly shows e. coli samples at or below 100 cfu/100 mL of water upstream of the lands/facilities, but above Idaho's primary contact recreation limit of 126 cfu/100 mL of water downstream of the lands/facilities (the Snake River is designated as a primary contact recreation waterbody). In addition to the bacteria findings, Waterkeeper alleges that downstream water samples also contain elevated quantities of Nitrogen and Phosphorus compounds it attributed to Simplot's operations.

Conclusion and Implications

Waterkeeper's *Complaint* seeks relief for Simplot's alleged unauthorized/unpermitted pollutant discharges to the Snake River. Specifically, Waterkeeper seeks a judgment that: declares Simplot's violation of the permitting requirements of the CWA; enjoins Simplot from further discharging pollutants absent a valid CWA permit to do so; orders Simplot to pay civil penalties of up to $64,618 per violation per day of violation duration; orders Simplot to remediate any water quality harm caused; and orders that Simplot reimburse Waterkeeper for its costs and attorney's fees incurred from bringing suit.

What bearing, if any, the United States Supreme Court's recent opinion in *Sackett v. EPA*, 598 U.S. ____ (2023) (Opinion No. 21-454; May 25, 2023) remains to be seen. It appears that Simplot's alleged mechanisms of discharge are more direct than the wetland-based facts and circumstances of the *Sackett* case. No doubt, however, that both Waterkeeper and Simplot are scouring the opinion for support of their respective claims and defenses.
(Andrew J. Waldera)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT REQUIRES EPA TO REGULATE PERCHLORATE LEVELS IN UNDER THE SAFE DRINKING WATER ACT

NRDC v. Regan, ___F.4th___, Case No. 20-1335 (D.C. Cir. May 9, 2023).

In *NRDC v. Regan* the United States Court of Appeal for the D. C. Circuit determined that the United States Environmental Protection Agency (EPA) erred in withdrawing its regulatory determination to regulate perchlorate in drinking water under the Safe Drinking Water Act (SDWA). The majority held that, once EPA makes a preliminary determination that a contaminant warrants regulation under the SDWA, the agency lacks discretion to withdraw the determination. A concurring opinion would have found EPA's decision was arbitrary and capricious, agreeing that its withdrawal should be vacated, but disagreed with the majority's view that EPA could never withdraw such a determination.

Background

The SDWA authorizes EPA to regulate potentially harmful contaminants in drinking water. As part of that authority, the EPA is required to maintain a list of unregulated contaminants that may require future regulation (Contaminant Candidate List). Every five years the agency must update the list, as well as make preliminary determinations for at least five of the listed contaminants as to whether they warrant regulation. After finding regulation to be warranted in a preliminary determination, EPA "shall" promulgate a maximum contaminant level goal (MCLG) and national primary drinking water regulation for the contaminants. While the MCLG is aspirational and unenforceable, the national primary drinking water regulation normally includes an enforceable maximum containment level (MCL). The MCLG and national primary drinking water regulations must be proposed within 24 months of the preliminary determination, and the agency must promulgate the regulations within 18 months of the proposal, subject to a nine-month extension. The law also contains an anti-backslide provision, requiring any subsequent revisions to adopted regulations to maintain current safeguards or provide for greater health protection.

Perchlorate is a naturally occurring and manufactured chemical commonly used in the aerospace and defense sectors. Ingesting perchlorate can inhibit the thyroid's ability to absorb iodide, disrupting the production of hormones and leading to potential adverse neurodevelopmental outcomes.

In recognition of these health risks, EPA added perchlorate to the Contaminant Candidate List in 1998. In 2008, the agency issued a preliminary determination not to regulate the perchlorate, but later deviated from that preliminary determination when it issued a final determination to regulate the contaminant in 2011. The agency did not, however, propose an MCLG and regulations within 24 months. In 2016, the National Resource Defense Council (NRDC) sued EPA, seeking to compel the agency to regulate the contaminant. The parties entered into a consent decree requiring the EPA to propose and promulgate the MCLG and final regulations by 2020. In 2019 the agency proposed MCLG and MCLs at two possible levels, but also considered withdrawing its 2011 preliminary determination. It sought comment on its proposal and the three alternatives. In 2020, after the comment period ended, EPA announced it was withdrawing the preliminary determination, finding that the contaminant did not meet the statutory criteria for regulation upon its re-evaluation.

The D.C. Circuit's Decision

EPA argued that its decision was consistent with the statute and that the agency had an "inherent authority" not abrogated by the SDWA to change positions and withdraw a determination to regulate. However, the D.C. Circuit found this to be incorrect. The court determined that an agency only has the authority delegated to it by Congress; the appropriate question was not whether the SDWA abrogated any EPA authority, but whether it granted the agency

authority to act as it had. The court found the statutory text to be clear in this respect. Once the threshold determination has been made, the SDWA states that EPA "shall" publish and propose the MCLG and regulations. The court observed that the SDWA "frontloads EPA's discretion, allowing the agency to create the list of contaminants that may require future regulation" but "balances that discretion with a strict, mandatory scheme governing the regulatory process." While EPA maintained that its initial step in the regulatory process did not bind it to issue future regulations, the court found this to contradict the statute's clear language.

The court went on to reject several additional arguments raised by the EPA. The agency argued that other provisions of the SDWA implicitly gave it the authority to withdraw a regulatory determination, but the court found none to negate the "clear directive" to propose and promulgate regulations after making the regulatory determination. EPA also claimed that the court's reading would hamstring its decision-making, resulting in regulations unsupported by current science. However, the court noted that EPA still retained the ability— and mandate— to reflect current science when setting the appropriate regulatory level. The EPA also argued that certain provisions, including the anti-backslide provision, suggested that the agency was free to withdraw its regulatory determination prior to promulgation of final regulations. But the court once more disagreed, finding the statute to permit only a determination to not regulate or a determination to regulate followed by promulgation of the regulations; EPA's attempt to create a third option was at odds with that statutory scheme. The court also considered EPA's argument based on the absence of provisions governing withdrawal of a regulatory determination to merely repackage its already-rejected argument that it retained inherent authority to act as it had. Finally, the court found EPA's argument premised on the SDWA's legislative history insufficient to override the statutory language, and inconsistent with the court's interpretation as well.

Having found that the statute does not permit EPA to withdraw a preliminary determination to regulate, the majority declined to address NRDC's additional contention that EPA's decision was also arbitrary and capricious. The court vacated EPA's withdrawal and remanded to the agency for further proceedings.

The Concurring Opinion

Judge Pan, concurring in the judgement, would have decided the case differently. The concurring opinion expressed the view that EPA does have authority to withdraw an initial regulatory determination. To support this position, Judge Pan explained how the best available scientific evidence had changed since the initial determination in this case. Additional and more rigorous studies had been published in the intervening years, indicating that the "levels of public health concern" were higher than initially thought. Further, in the original UCMR-1 study supporting the agency's initial determination, more than half of the samples detecting perchlorate had been from California, which had subsequently adopted its own state-level perchlorate drinking-water standard. As such, based on the updated information, EPA concluded that perchlorate did not occur in public water systems at the requisite levels to justify regulation.

While the concurrence agreed with the majority's conclusion that the SDWA creates a duty to regulate, it did not read the statute to prevent withdrawal. In its view, the mandatory timelines relied on by the majority are no longer operative once the determination is withdrawn. The opinion also noted the potential application of *Chevron* deference to an agency's interpretation of an ambiguous statute, but declined to apply it to this case as the EPA did not rely on the principle.

Nonetheless, Judge Pan concurred in the judgement because she found the EPA's decision here to have been arbitrary and capricious under the Administrative Procedure Act. The MCLGs EPA sought comments on acknowledged that the proposed levels would still allow for some impacts to average IQ in sensitive populations, but at a level the agency determined to be below what is "biologically significant." The concurring opinion found this to violate the statutory mandate for the MCLGs to be set at the level at which there would be *no* known or anticipated adverse effects.

Further, in revising the data in the updated UCMR-1 study, EPA had only updated those samples where perchlorate was detected, and not the negative samples. Judge Pan agreed with NRDC that this set up a one-way ratchet to selectively update the data only where it would reduce the observed impacts.

As such, the concurrence would have held EPA's withdrawal to be arbitrary and capricious, and still vacated its decision for that reason.

Conclusion and Implications

The majority's ruling draws a hard line: once EPA makes an initial determination that a contaminant warrants regulation under the SDWA, it must proceed through the process to regulate it. If the judgment stands, EPA will have to promulgate regulations for perchlorate under the SDWA. While the controlling opinion does not affect the substance of those regulations, the concurrence suggests that EPA may need to refine its approach to establishing the MCLG for perchlorate as well. The court's opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/E8EC4867311BA7BA852589AA0052854F/$file/20-1335-1998466.pdf.
(Sam Bacal-Graves, Megan Somogyi, Hina Gupta)

FOURTH CIRCUIT REQUIRES DISCHARGER TO RENEW NPDES PERMITS UNDER GENERAL COMPLIANCE REQUIREMENTS IN CONSENT DECREE

United States of America v. Southern Coal Corporation, 64 F.4th 509 (4th Cir. 2023).

The Fourth Circuit Court of Appeals recently determined a coal company, subject to a negotiated consent decree, cannot avoid a statutory requirement to renew federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) permits merely because the consent decree did not contain an explicit requirement to renew the permits.

Factual and Proceural Background

In 2016, multiple government agencies (government) sued Southern Coal Corporation and more than 30 other mining and mining adjacent companies for 23,693 violations of Clean Water Act NPDES permits over five years. The NPDES permits were issued for operations in Alabama, Kentucky, Tennessee, Virginia, and West Virginia. On the same day the lawsuit was filed, the government filed a proposed consent decree to resolve the allegations described in the complaint. The government published the proposed consent decree to the Federal Register and subsequently, the court entered the consent decree. The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas" except in compliance with a permit issued under Act. NPDES permits limit the types and quantities of pollutants and require monitor and reporting of the regulated pollutants. These permits expire every five years to require polluters to continuously comply with the requirements as they change. Permits may be administratively extended if the permittee files a renewal application more than 180 days before the previous permit's expiration.

In 2020, the government sent a notice of default and demand for stipulated penalties to Southern Coal for failing to comply with the consent decree. Specifically, Southern Coal allowed the NPDES permit for facilities in Alabama and Tennessee to lapse. In 2021, the government filed a motion requesting the District Court to compel Southern Coal's compliance with the decree and imposing penalties of $2,523,000 for the failure to maintain permits and $21,000 for unpermitted discharges. Southern Coal argued that the consent decree did not require the NPDES permits to be renewed and thus, there was no violation under the decree and the decree was no longer valid. The district court agreed with the government and required Southern Coal to comply with the consent decree.

On appeal, Southern Coal challenges the District Court's order on the grounds that the district court improperly considered extrinsic evidence beyond the consent decree in determining that the decree required the renewal of the NPDES permits.

The Fourth Circuit's Decision

The Court of Appeals considered and rejected Southern Coal's arguments that the consent decree

did not require renewal of the NPDES permits. First, the court determined that the plain language of the "General Compliance Requirements" in the consent decree reasonably required Southern Coal to "submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." This language and similar language throughout the decree requiring compliance with all applicable federal laws and all necessary permits was sufficient to establish that Southern Coal was required to comply with the Clean Water Act and renew the NPDES permit. The court rejected Southern Coal's argument that renewal was not required because the consent decree did not explicitly require such renewal. The court reasoned the decree's requirements to comply with federal law and acquire permits plainly imposed NPDES-permitting obligations and prohibited unpermitted discharges that run afoul of the CWA.

The court further reasoned that it would be unreasonable to allow Southern Coal to avoid its obligations under the consent decree by allowing the NPDES permit to lapse. First, this interpretation was unreasonable because allowing the NPDES permit to lapse was not an express term of termination. Second, it was unreasonable to expect the parties to intend to undermine the decree by allowing the NPDES permit lapse to terminate the decree. Third, the court reasoned that if Southern Coal intended such a "back-door" termination, then it likely did not negotiate the decree in good faith.

Conclusion and Implications

In a partial concurrence, Judge Rushing distinguished the district court's ruling on the requirement to renew NPDES permits from the ruling regarding whether discharges of pollutants after NPDES permits expired constituted a separate violation of the consent decree. Judge Rushing concurred with the majority in holding that the decree required Southern Coal to renew the NPDES permits, but reasoned that unpermitted discharges, while a violation of the Clean Water Act, were not a violation of the decree. The decree did not specifically prohibit Southern Coal from discharging pollutants without a permit.

This case reinforces the need for careful drafting and good faith negotiation of consent decrees. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca4/22-1110/22-1110-2023-04-04.html.
(Anya Kwan, Rebecca Andrews)

DISTRICT COURT REDUCES ATTORNEY'S FEES AWARD IN CLEAN WATER ACT CITIZEN SUIT

Conservation Law Foundation, Inc. v. Mason,
___F.Supp.4th___, Case No. 1:18-cv-00996-PB (D. N.H. Apr. 26, 2023).

The United States District Court for the District of New Hampshire recently awarded certain fees and costs to an environmental organization related to the organization's successful federal Clean Water Act (CWA) claims against state officials. The court, however, excluded other fees and costs from the award, reasoning that the organization's unsuccessful claims were not sufficiently "interconnected" with its successful claims to entitle the organization to a full award. The court further reduced the organization's overall award due to inadequate documentation and maintenance of its timekeeping records.

Factual and Procedural Background

The CWA prohibits unpermitted discharges of pollutants into navigable waters. Point source discharges of pollutants are permitted through National Pollutant Discharge Elimination System (NPDES) permits. 33 U.S.C. § 1342. The CWA allows for "citizen suits" by private actors alleging that other actors, including states and their instrumentalities, have violated the statute. 33 U.S.C. § 1365(a).

In 2018, the Conservation Law Foundation (CLF) filed a Clean Water Act citizen suit against the New Hampshire Fish & Game Department and its Executive Director, as well as the New Hampshire Fish & Game Commission and its commissioners. CLF's

lawsuit alleged that the fish hatchery (Hatchery) owned by New Hampshire and operated by the state defendants was discharging various pollutants into the Merrymeeting River in violation of a 2011 NPDES permit. CLF asserted two types of claims. First, CLF argued that the Hatchery was causing "Outfall Discharges" of pollutants directly from its two outfalls. Second, CLF claimed that the Hatchery was causing "Sediment Discharges," where past discharges of pollutants settled into sediments at the bottom of the river and continued to leach into the water. CLF sought declaratory judgment, injunctive relief, civil penalties, and an award of fees and costs. After the state agencies filed a motion to dismiss, CLF voluntarily dismissed the agencies from the lawsuit. CLF also voluntarily dismissed its request for civil penalties. The rest of CLF's complaint survived the motion to dismiss.

The parties filed cross-motions for summary judgment. The court granted summary judgment to the defendants on CLF's Sediment Discharge claims because they sought retrospective relief barred by the Eleventh Amendment of the U.S. Constitution. With respect to the Outfall Discharge claims, the court granted summary judgment to the defendants on CLF's claim that formaldehyde discharges from the Hatchery exceeded limits prescribed by the 2011 NPDES permit. However, the court granted summary judgment to CLF on its claim that pH discharges from the Hatchery violated the 2011 NPDES Permit. The court denied summary judgment for both parties on CLF's remaining Outfall Discharge claims.

Subsequently, the U.S. Environmental Protection Agency (EPA) issued a new 2021 NPDES permit for the Hatchery that superseded the 2011 NPDES permit. CLF amended its complaint to restate its claims with reference to the 2021 permit. The court scheduled a status conference with the parties and representatives from the EPA regarding the agency's willingness to intervene and establish a compliance plan for the Hatchery. After a year of negotiation, the EPA joined the lawsuit as a plaintiff and intervenor. The three parties executed a consent decree requiring the defendants to achieve compliance with the 2021 NPDES permit, undertake interim measures, and evaluate options for addressing the Sediment Discharges. The court issued a final judgment in 2022 by adopting an order entering the consent decree.

Following the entry of the consent decree, CLF moved for a full award of attorney's fees and costs. Specifically, CLF sought attorney's fees, expert fees, deposition costs, and other costs. The citizen suit provision of the CWA allows a court to award reasonable attorney's fees and costs to "any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." A "prevailing or substantially prevailing party" is one that has "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. The party's success must "materially alter the litigants' legal relationship by modifying one party's behavior in a way that directly benefits" the successful party. The party seeking fees and costs has the burden of demonstrating that such fees and costs are reasonable.

Under the "lodestar method" employed by the court, the award amount equals the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." In determining the number of hours reasonably expended, courts will exclude hours "that are excessive, redundant, or otherwise unnecessary."

The CLF sought fees and costs for all of its claims, including those for which the Court granted summary judgment to the defendants.

The District Court's Decision

CLF raised three arguments in support of the claim to a full award of its fees and costs.

Consent Decree and the 'Prevailing Party'

First, CLF claimed to be the prevailing party as a result of the consent decree and the court granting summary judgment in its favor on the pH claim. The court agreed with CLF because the consent decree provided relief on at least some of CLF's outstanding claims against the defendants and in ways that have changed the parties' legal relationship. The consent decree also created new rights and obligations beyond those mandated by the 2021 NPDES permit.

'Interrelated' Sucessful Parties

Second, CLF argued the claims which the defendants prevailed on were "interrelated" with CLF's successful claims. A prevailing party may be awarded fees for unsuccessful claims where those claims are interconnected with successful claims. Claims are

interconnected when they are based on "a common core of facts" or "related legal theories. The court rejected this argument, noting that CLF relied CLF relied on separate evidence and legal theories for the successful Outfall Discharge claim and the unsuccessful Sediment Discharge claims. Further, because CLF failed to adequately allocate time between the two types of claims, the court applied a "global reduction," wherein the court effectively estimated the hours spent on the unsuccessful claims and deducted those hours through its lodestar calculation. The court applied the same reduction to CLF's request for expert fees, deposition costs, and other costs.

Attorney's Fees Calculation

Third, CLF argued its hours and rates were "reasonable and well-documented." The court disagreed, imposing a 10 percent reduction in total hours because of CLF's failure to track its time contemporaneously. Relatedly, the court imposed a 50 percent reduction on CLF's hours spent preparing its petition for fees and costs, reasoning that CLF likely spent the majority of its time reconstructing timekeeping records that should have been maintained contemporaneously.

Conclusion and Implications

This case provides guidance for both plaintiffs and defendants regarding the fee shifting provisions of the CWA's citizen suit mechanism. For plaintiffs, the case affirms that a consent decree will not preclude an award of fees and costs, so long as the plaintiff's lawsuit materially contributes to the development of the consent decree and the consent decree modifies the parties' rights and obligations. The case also sheds light on courts' evaluation of whether successful and unsuccessful claims under the CWA are interconnected for purposes of fee shifting. Finally, the case clarifies that proper documentation and maintenance of timekeeping records are critical to obtaining the greatest award. For defendants, the case provides direction on potential vulnerabilities in a plaintiff's request for fees and costs, including arguments against the interconnectedness of claims and deficiencies in documentation and maintenance of timekeeping records. The court's opinion is available online at: https://casetext.com/case/conservation-law-found-v-mason.

(Brendan P. Keenan, Jr., Rebecca Andrews)

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