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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LEGISLATIVE DEVELOPMENTS

U.S. SENATORS INTRODUCE FINANCIAL ASSISTANCE BILL TO PROVIDE ADDITIONAL FUNDING FOR WATER PROJECTS IN THE WEST

In May of 2022, U.S. Senators Feinstein (D-CA), Kelly (D-AZ), and Sinema (D-AZ) introduced Senate Bill 4231, the Support to Rehydrate the Environment, Agriculture, and Municipalities Act or *STREAM Act*. The bill's purpose is to increase water supply and update water infrastructure in the West by providing funding for new water projects.

Background

California and the West have been dealing with years of unprecedented drought. The *STREAM Act* attempts to address the issues of historic drought, climate change, and aging water infrastructure by providing financial assistance to new water projects that improve water resiliency in the West. (*See,* Press Release, Dianne Feinstein, United States Senator for California, Feinstein, Kelly, Sinema Introduce Bill to Increase, Modernize Water Supply (May 18, 2022), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=1783E95E-F02C-4CFC-9E81-AEFF7AAAC3AF#:~:text=yesterday%20introduced%20S.,California%20and%20throughout%20the%20West.

In introducing the bill, Senator Feinstein expressed concern about the ongoing drought by stating that "… the past two years have painfully demonstrated, severe and prolonged drought exacerbated by climate change is the stark reality for the West." (*Id.*) She also said:

> . . .if we don't take action now to improve our drought resilience, it's only going to get worse. We need an 'all-of-the-above' strategy to meet this challenge, including increasing our water supply, incentivizing projects that provide environmental benefits and drinking water for disadvantaged communities, and investing in environmental restoration efforts. (*Id.*)

The introduction of the *STREAM Act* is also part of an ongoing effort to provide financing for future infrastructure projects in the West. Senator Kelly said:

> As Arizona continues to navigate this historic drought, it's more important than ever to build infrastructure that promotes a secure water future. Combined with the investments made in the bipartisan infrastructure law, this legislation will help Arizona and the West expand drought resiliency projects, increase groundwater storage, and better manage and conserve our water resources. (*Id.*)

The Bill's Proposed Funding and Appropriations

The *STREAM Act* provides funding for water storage, water recycling, and water desalination projects. (Support to Rehydrate the Environment, Agriculture and Municipalities Act, S 4231, 117th Cong. (2022).) The bill also provides financial incentives for storage and conveyance projects that enhance environmental benefits and expand drinking water access to disadvantaged communities.

The *STREAM Act's* largest appropriation would provide $750 million for the Secretary of the Interior to spend on eligible water storage and conveyance projects from 2024 to 2028. Section 103 of the bill establishes a competitive grant program for non-federal projects. Entities eligible to obtain grant funding include any state, political subdivision of a state, public agency, Indian tribe, water users' association, agency established by an interstate compact, and an agency established under a state's joint exercise of powers law.

To qualify for grant funds, a project proposed by an eligible entity must involve either a surface or groundwater storage project, a facility that conveys water to or from surface or groundwater storage, or a natural water retention and release project as defined by the proposed law. Other requirements include that the federal cost-share cannot exceed $250 million,

the project must be in a Bureau of Reclamation state, the eligible entity must construct, operate, and maintain the project, and there must be a federal benefit.

A federal benefit is defined as public benefits provided directly by a project. These public benefits can be fish and wildlife benefits that provide excess water to environmental mitigation or compliance efforts, flood control benefits, recreational benefits, or water quality benefits.

The Secretary of the Interior may provide a grant to an eligible entity for an eligible project under the program "for the study of the eligible project… or for the construction of a non-federal storage project that is not a natural water retention project." (*Id.*) However, for the Secretary to provide a grant for the construction of a non-federal storage project, the eligible entity must conduct a feasibility study, and the Secretary must concur that the eligible project is technically and financially feasible, provides a federal benefit, and is consistent with applicable federal and state laws. The Secretary must also determine that the eligible entity has sufficient non-federal funding to complete the project and is financially solvent. Lastly, the governor, a member of the cabinet of the governor, or the head of a department in the Bureau of Reclamation state where the proposed project is located must support the project or federal funding of the project.

Prioritizing Projects

The *STREAM Act* would prioritize funding projects that meet two or more of the following criteria: 1) provides multiples benefits, such as water reliability for states and communities that are frequently drought-stricken, fish and wildlife benefits, and water quality improvements; 2) reduces impacts on environmental resources from water projects owned and operated by federal or state agencies; 3) advances water management plans across a multi-state area; 4) is collaboratively developed or supported by multiple stakeholders; 5) the project is within a watershed where there is a comprehensive watershed management plan that enhances the resilience of ecosystems, agricultural operations, and communities.

Conclusion and Implications

Senator Feinstein introduced the STREAM Act in the Senate on May 17, 2022, and the bill was referred to the Senate Committee on Energy and Natural Resources. On May 25, 2022, before the Senate Committee on Energy and Natural Resources Subcommittee on Water and Power, Senator Feinstein testified in support of the bill and introduced letters supporting the bill. Supporters of the bill in its current form include the Association of California Water Agencies and the Nature Conservancy. The Committee of Energy and Natural Resources will consider the bill in its current form and make changes it deems necessary before deciding whether to release the bill to the Senate floor. To track updates and changes to the bill, *see:* https://www.congress.gov/bill/117th-congress/senate-bill/4231.

(Jake Voorhees; Meredith E. Nikkel)

REGULATORY DEVELOPMENTS

U.S. EPA AND DEPARTMENT OF JUSTICE ANNOUNCE THE RETURN OF THE USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

On May 5, 2022, the U.S. Environmental Protection Agency (EPA) and the Department of Justice (DOJ) restored the use of Supplemental Environmental Projects (SEPs). (Memorandum from the Attorney General, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties (May 5, 2022) (hereinafter "May 2022 SEP Memorandum"); *see also* Memorandum from the Attorney General, Comprehensive Environmental Justice Enforcement Strategy (May 5, 2022).)

Prior to the Trump administration barring their use in 2017, SEPs had been used for 30 years when settling government enforcement actions brought by the DOJ on behalf of the EPA, the defendant agreed to fund projects that provide environmental benefits to the area where impacts of the alleged violation of environmental statutes were felt. In exchange, the use of SEPs offset the defendant's civil penalty payment. While some are skeptical of SEPs, many are excited at the return of what they find to be a community and natural resource building tool.

Supplemental Environmental Projects

SEPs are environmentally beneficial projects or activities that a defendant agrees to undertake as part of the settlement of an enforcement action relating to violations of federal environmental laws or regulations. SEPs are projects and activities:

> . . .that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws. (2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy (March 10, 2015), at p.1; *see also* May 2022 SEP Memorandum.)

The EPA can bring a civil administrative enforcement action against individuals and companies. However, the EPA refers matters to the DOJ if it lacks authority or seeks civil judicial penalties or criminal sanctions against a violator. In such circumstances, instead of heading to trial, violators have an option to settle with the government. The terms of the settlement are negotiated and usually include the payment of a penalty and the performance of injunctive relief in order to rectify the wrong at issue in the case. When defendants propose including a SEP along with the penalties and injunctive relief, the penalties, in turn, can be reduced. Thus, SEPs allow the projects to be funded that benefit the communities that were negatively affected by the violation at issue, while also making a settlement more enticing.

The Trump Administration's Barring of SEPs

In 2017, under the Trump administration, Attorney General Jeff Sessions issued a memorandum generally prohibiting the DOJ from entering into settlement agreements, including SEPs, that directed payments to non-governmental third-party organizations as a condition of a settlement agreement. (See Memorandum from the Attorney General, Prohibition on Settlement Payments to Third Parties (June 5, 2017).) This was later incorporated in to the Code of Federal Regulations and the Justice Manual. (*See* 28 C.F.R. § 50.28, and Justice Manual §§ 1-17.000, 5-11.105, 9-16.325.) The prohibition was made in part because the DOJ at the time concluded that SEPs violated the federal Miscellaneous Receipts Act (MRA), as the administration was concerned about SEP agreements being used to inappropriately fund projects unrelated to the environmental harm at issue. Some also argued that SEPs gave an easy out to the violators who enter into SEP agreements due to the reduced penalties.

The Biden Administrations' Response

During a press conference on May 5, 2022, Attorney General Merrick Garland and EPA Adminis-

trator Michael Regan announced the return of SEPs and rescinded the 2017 memorandum. Regan stated SEPs were "inexplicably revoked during the previous administration," but they are "an important part of EPA's enforcement program for more than 30 years." SEPs are an important environmental justice tool as they allow the government to better compensate victims, punish and discourage violations in the future, and remedy harm caused by violations of federal environmental statutes, as it can be hard to directly rectify such harms. These environmentally favorable projects are able to advance the goals of federal environmental laws by redressing the harms felt by the communities most directly affected by violations of those laws.

The Attorney General Memorandum Providing SEP Guidance

Released on the same day as the press conference, the May 2022 SEP Memorandum outlined new guidelines and limitations to govern the future use of SEPs. The memorandum clarifies that when properly structured, such settlements do not violate the MRA. An Interim Final Rule, issued with the memorandum, rescinds the relevant Code of Federal Regulations section and invites public comment on the new policy. The memorandum also directs the DOJ to revise the current relevant provisions of the Justice Manual accordingly.

The memorandum also lists various guidelines and limitations to govern the DOJ's future approach to SEPs as follows:

- Each settlement agreement must define "with particularity the nature and scope of the specific project or projects that the defendant has agreed to fund."

- Each project must have a "strong connection" to the underlying violation(s) of federal law at issue in the enforcement action, which includes the project being designed to reduce the harmful effects of the underlying violation(s) to the maximum extent feasible and reduce the likelihood of such violations moving forward.

- The DOJ and its client agencies cannot "propose the selection of any particular third party to receive payments to implement" any SEP or select a specific entity to be the beneficiary of the SEP.
- Settlement using SEPs must be executed prior to "an admission or finding of liability in favor of the United States," and the DOJ and its client agencies may only retain post-settlement control over the disposition or management of the funds or projects at issue to ensure the parties' are complying with the settlements.

- DOJ or other federal agencies cannot use SEPs to satisfy their statutory obligations or provide the DOJ and other federal agencies with resources for activities for which they have received specific appropriation.

- SEPs cannot "require payments to non-governmental third parties solely for general public education or awareness projects; solely in the form of contributions to generalized research, including at a college or university; or in the form of unrestricted cash donations."

Conclusion and Implications

The EPA and DOJ press conference, along with the corresponding DOJ memo, announced the return of SEPs. While there are skeptics of SEPs, as exemplified by the banning of the tool under the Trump administration in 2017, many are pleased by the return of SEPs as they find them to be a tool for goodwill. Proponents of SEPs, like EPA Administrator Regan, find that "[t]his environmental justice enforcement strategy epitomizes the Biden-Harris Administration's commitment to holding polluters accountable as a means to deliver on our environmental justice priorities. Critical to that is the return of [SEPs] as a tool to secure tangible public health benefits for communities harmed by environmental violations." Associate Attorney General Vanita Gupta, stated SEPs ensure the DOJ is using "every available tool" to prioritize environmental laws and Title VI of the Civil Rights Act are enforced. While time will tell whether SEPs will remain in place over time and through changing administrations, but many are pleased at their return. For more information, *see*: Memorandum from the Attorney General, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental

Third Parties (May 5, 2022) (hereinafter "May 2022 SEP Memorandum"); *see also* Memorandum from the Attorney General, Comprehensive Environmental Justice Enforcement Strategy (May 5, 2022).) (Hina Gupta, Megan Unger)

U.S. DEPARTMENT OF JUSTICE ISSUES COMPREHENSIVE ENVIRONMENTAL JUSTICE ENFORCEMENT STRATEGY

On May 5, 2022, the Department of Justice (DOJ) issued a Comprehensive Environmental Justice Enforcement Strategy (Strategy) that establishes principles for environmental justice enforcement designed to reduce disproportionate adverse public health and environmental burdens borne by underserved communities. [Memorandum from The Associate Attorney General on *Comprehensive Environmental Justice Enforcement Strategy* (May 5, 2022).]

Summary of the Strategy

On January 27 2021, President Biden issued Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad,* which instructed the Attorney General to "ensure comprehensive attention to environmental justice throughout the Department of Justice" and, more specifically, to:

> . . .develop a comprehensive environmental justice enforcement strategy, which shall seek to provide timely remedies for systemic environmental violations and contaminations, and injury to natural resources[.]

The Strategy is the DOJ's Response to the Executive Order

The Strategy outlines four principles for using the DOJ's civil and criminal enforcement authorities and for working with EPA and other federal partners.

Principle #1

The first principle is to increase compliance in communities disproportionately impacted by public health and environmental harms. The DOJ will prioritize cases that will result in significant reductions in environmental and public health harms, or injury to natural resources, in overburdened and underserved communities. To achieve this goal, the Strategy identifies six steps:

- *Environmental Justice Enforcement Steering Committee*. The Attorney General will create an Office of Environmental Justice within the Environment and Natural Resources Division (ENRD). The new office will convene a standing DOJ Environmental Justice Enforcement Steering Committee. The Committee will include representatives from various entities within the DOJ, and will make recommendations to the DOJ on efforts to further environmental justice enforcement.

- *Protocols for assessing environmental justice impacts during investigations*. The Office of Environmental Justice will assist in developing protocols for assessing the environmental justice impacts during investigations. At a minimum, protocols are expected to include a methodology for identifying and assessing 1) any actual or threatened adverse impacts to public health or the environment from systemic environmental violations, contamination, or injury to natural resources, and 2) information concerning the affected community and potential remedies for public health or environmental harms.

- *Designation of environmental justice coordinators in U.S. Attorneys' offices*. Each U.S. Attorney will designate an environmental justice coordinator within their office and consider outreach efforts to identify areas of environmental justice concern within its district.

- *Pursuit of Tribal Environmental Justice*. The ENRD, U.S. Attorneys, Executive Office for United States Attorneys, and the Office of Tribal Justice will consider opportunities to work with the governments of federally recognized Tribes and recommend ways to incorporate Tribal concerns into the Department's enforcement work.

•*Creation of environmental enforcement task forces.* U.S. Attorneys and DOJ components are encouraged to participate in local or regional environmental task forces. In districts where such a task force does not exist, U.S. Attorneys and DOJ are encouraged to consider establishing a local or regional environmental task force to pursue environmental justice enforcement matters.

Principle #2

The second principle is to broaden the traditional scope of authority and tools used to remedy environmental violations by considering all existing authorities and tools that could be used to remedy environmental violations and contaminations. This includes tools outside of the traditional environmental statutes, such as civil rights laws, worker safety and consumer protection statutes, and the False Claims Act. The Strategy specifically calls for collaboration between ENRD and the Civil Rights Division to remedy environmental violations and contamination and to identify and address discrimination in programs and activities receiving federal assistance.

Principle #3

The third principle is to increase outreach to impacted communities and develop case-specific community outreach plans to ensure meaningful engagement with impacted communities. The DOJ will increase outreach and listening sessions and develop case-specific community outreach plans for cases initiated under the DOJ's environmental justice strategy. The Strategy also identifies use of the DOJ's Community Relations Service to assist communities in preventing and resolving tensions or conflicts related to alleged discriminatory practices based on race, color, or national origin.

Principle #4

The fourth principle is to develop performance standards which promote transparency regarding environmental justice enforcement efforts and their results. Communities with environmental justice concerns should be able to easily access information about filed and concluded enforcement actions and the benefits achieved. To aid with accessibility, the DOJ will develop performance standards to assess and publicly report on its progress under the Strategy, including communication about cases brought, judgments or settlement achieved, and remedies secured. In addition, within 90 days after the end of the first year of the Strategy, the Deputy Attorney General will evaluate implementation of the Strategy and recommend adjustments to the Strategy.

Conclusion and Implications

The Strategy signals increased federal effort to reduce disproportionate public health and environmental impacts from public and private activities. The Strategy's focus on enforcement and remediation suggests that environmental-justice oriented administrative, civil, and criminal actions may increase in the coming years. The Strategy is available online at: https://www.justice.gov/asg/page/file/1499286/download.

Editor's Note: With the U.S. Supreme Court's decision in *West Virginia, et al. v. U.S. Environmental Protection Agency,* Case No. 20-153, announced June 30, which set limits to EPA's authority to mandate greenhouse gas reductions, it will be interesting to see how that decision impacts the DOJ's implementation of the Strategy discussed in this article. *See:* https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.
(Kristin Allen, Rebecca Andrews)

U.S. ENVIRONMENTAL PROTECTION AGENCY AGREES TO PAY NEW MEXICO AND NAVAJO NATION $63 MILLION FOR GOLD KING MINE SPILL

On June 16, 2022, the U.S. Environmental Protection Agency (EPA), the State of New Mexico and the Navajo Nation announced that the EPA will pay $63 million in accordance with settlement agreements reached among the parties. New Mexico will receive $32 million and the Navajo Nation

will receive $31 million. The announcement of the settlement comes almost seven years after the Gold King Mine spill near Silverton, Colorado. The spill occurred on August 5, 2015, when EPA personnel and federal contractors breached a containment wall in an abandoned and plugged mine causing 3 million gallons of wastewater containing high levels of heavy metals and elements such as lead, cadmium, and arsenic to flow into the Animas and San Juan rivers.

The effects of the spill were devastating and immediate. Over 880,000 pounds of metal was released into the Cement Creek tributary of the Animas River. A mustard-colored plume flowed down the Animas River into the San Juan River and through Navajo Nation lands. The plume traveled down the San Juan River into Utah, reaching Lake Powell within a week of the "blowout." The metal concentrations in the water exceeded both federal and state drinking water standards affecting New Mexico residents, tourism, livestock, agriculture, and the local environment. The effects were felt by those in Colorado, New Mexico, and Utah including the Navajo Nation and Southern Ute Indian Reservations. A federal report issued in April 2016 concluded the spill was the EPA's fault. Multiple lawsuits followed.

Background

There are thousands of inactive mines in the western United States that are leaking or have the potential to leak toxic wastewater. One of these mines is the Gold King Mine located near the Animas River at Silverton, Colorado. The Animas River is a tributary of the San Juan River running from the San Juan Mountains of Colorado through Silverton and Durango, Colorado until it reaches the San Juan River in Farmington, New Mexico.

Sometime after the Gold King Mine closed, toxic wastewater began leaking from the mine. The EPA hired a contractor to use an excavator to cover the portal entrance of the mine, while being supervised by EPA and Colorado employees. According to Colorado Division of Reclamation Mining and Safety records and EPA's work plan, the risk of "blowout" was known by the crew. The excavator destroyed the plug blocking the toxic water and over several days, 3 million gallons of wastewater flowed out of the mine and into the Animas River.

The Spill

The effects of the spill were devastating and immediate. Over 880,000 pounds of metal was released into the Cement Creek tributary of the Animas River. A mustard-colored plume flowed down the Animas River into the San Juan River and through Navajo Nation lands. The plume traveled down the San Juan River into Utah, reaching Lake Powell within a week of the "blowout." The metal concentrations in the water exceeded both federal and state drinking water standards affecting New Mexico residents, tourism, livestock, agriculture, and the local environment. The effects were felt by those in Colorado, New Mexico, and Utah including the Navajo Nation and Southern Ute Indian Reservations. New Mexico contends that the long-term impacts are significant because rainfall and snowmelt can "re-suspend" the metals in the riverbed. The Gold King Mine spill resulted in the creation of the Bonita Peak Mining District Superfund Site that includes the Gold Mine area.

The EPA's response to the Gold King Mine spill into the Animas River was highly criticized by the media and local residents, in part, because the EPA did not alert the public to the spill for 24 hours. The EPA has since taken responsibility for the cleanup creating drainage impoundments and expending more than $6 million dollars in reimbursements to state, federal, and local entities.

The Supreme Court's Decision

In June 2016, New Mexico filed suit against Colorado in the U.S. Supreme Court for damages caused by Colorado's participation in the spill including, inter alia, Colorado's alleged failure to property oversee the contamination. New Mexico claimed that Colorado was liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. Section 9607(a) and CERCLA 42 U.S.C. Section 9613(g)(2) for costs New Mexico incurred while responding to the spill. *State of New Mexico v. State of Colorado, Mot. For Leave to File Bill of Complaint*, No. 220147, Orig. (June 22, 2016). New Mexico also claimed Colorado was in violation of the Resource Conservation and Recovery Act's (RCRA) "imminent and substantial endangerment provision," 42 U.S.C. § 6972(a)(1). Complaint at 43-44. New Mexico further claimed that Colorado

had caused a public nuisance through its "past, present and ongoing conduct" regarding the contamination. Complaint at 47. Finally, New Mexico claimed that Colorado was negligent or grossly negligent in its actions by "failing to investigate or test the hydraulic pressures within the Gold King Mine despite knowing the mine was holding back significant quantities of water." Complaint at 49.

On June 26, 2017, the U.S. Supreme Court rejected New Mexico's lawsuit against Colorado over damages incurred from the Gold King Mine spill. The Court ruled 8-1 in favor of denying a motion to hear the case. Order, *New Mexico v. Colorado*, No. 220147, Orig. (June 26, 2017) (denying Motion For Leave to File a Bill of Complaint). No reason was provided for the Court's decision.

Conclusion and Implications

The announcement of the settlement signals closure of multiple claims and issues among the parties. Some officials note that the Animas and San Juan Rivers have undergone significant healing since spill polluted waterways for miles. New Mexico and Navajo Nation applauded this latest settlement. Portions of the settlement will fund cropland rehabilitation, aquatic habitat and long-term water quality monitoring. New Mexico officials noted that a significant portion of the settlement monies will be used to fund outdoor recreation activities in northwest New Mexico. This latest settlement is one of many. In 2021, New Mexico and the Navajo Nation reached a settlement with the Sunnyside Gold Corporation mining company for $21 million. With thousands of abandoned mines scattered throughout the western United States, there is a need for clear legal precedent to ensure that any future environmental accidents involving mine clean-ups are met with the proper response and reimbursement.
(Christina J. Bruff)

CALIFORNIA COASTAL COMMISSION DENIES PERMIT TO BUILD DESALINATION PLANT IN HUNTINGTON BEACH DUE TO ENVIRONMENTAL RISKS

At the May 2022 meeting of the California Coastal Commission, the Commission denied Poseidon Water's application for a Coastal Development Permit (CDP) to build and operate a desalination plant in Huntington Beach (City), California. The proposed project would draw in up to 106.7 million gallons per day of seawater and produce up to 50 mgd of potable water, with the remaining high-salinity brine discharged back into the ocean. Commission staff found there were significant issues related to protecting marine life, water quality, environmentally sensitive habitat areas, naturally occurring hazards, and environmental justice considerations. The Commission followed staff's recommendation and denied Poseidon the permit, officially rejecting the project.

Background

Poseidon first proposed to build a desalination plant in both Huntington Beach and Carlsbad in 1998. The Carlsbad desalination plant was ultimately approved and began operating in 2016. The City of Huntington Beach (City) ultimately approved Poseidon's Coastal Development Permit in 2010, which was appealed to the Commission. The Commission heard the appeal in 2013, and staff recommended approving the project with conditions, including conditions to mitigate the project's impact on adjacent wetlands as well as address seismic, flooding, and other hazards. However, Poseidon withdrew its application before the vote for further study. Since Poseidon withdrew its application, the appeal has been held in abeyance as Poseidon obtained permits from the State Lands Commission and the Regional Water Quality Control Board (Regional Board).

Poseidon's proposed desalination facility would have drawn in up to 106.7 million gallons per day (mgd) of seawater and produce up to 50 mgd of potable water, with the remaining 57 mgd of high-salinity brine discharged back into the ocean. Poseidon planned to operate the facility for 50-60 years. The facility would have operated on 12 acres in the 54-acre site of the Huntington Beach Generating

Station, a power plant located in the City. The facility would be nestled in a low-lying area of Huntington Beach in a seismically active region within the Newport-Inglewood Fault Zone. In order to construct the facility, Poseidon would have needed to demolish and remove the infrastructure no longer used by the power plant, clean up soil and groundwater contamination, and construct a water supply reservoir in addition to the desalination facility in order to provide an emergency water supply.

After 2013—the last time the Commission reviewed Poseidon's proposed desalination facility—the State Water Resources Control Board amended its water quality control plan for marine waters (Ocean Plan), which included limitations on the site, design, and technology available for use by desalination facilities, as well requiring new mitigation requirements to protect marine life. In response to those changed circumstances, Poseidon revised its proposal to address the amended Ocean Plan and the City's Local Coastal Program (LCP)—a basic planning tool used by the City, in partnership with the Commission, to guide development in a coastal zone.

Issues Impacting the Denial

In denying Poseidon's proposed desalination facility, the Commission upheld staff's concerns with the project as defined by three main categories: 1) conflicts with the Coastal Act (enforced by the Commission) and LCP; 2) potential harm to marine life and water; and 3) extent of the burden on environmental justice communities.

LCP and Coastal Act Issues

For Coastal Act and LCP issues, staff identified certain issues related to the proposed location of the project, where new research estimated an increase in the severity and frequency of coastal hazard events. This research is reflected in the current Coastal Act and LCP policies regarding sea level-rise adaptation and risk-avoidance planning. Staff concluded that Poseidon's chosen location has

> . . .little to no adaptive capacity to address increased hazards. . .[and could]. . .limit the City's ability to upgrade the adjacent flood control panel or otherwise adapt this portion of the City to rising sea levels.

Thus, staff found the project conflicted with the LCP and Coastal Act.

Marine Life and Water Quality

Second, staff made findings that Poseidon's proposed facility would harm marine life and water quality. Staff found that the discharge of approximately 57 million gallons per day of high-salinity brine would need to be diffused so as not to concentrate and create a "dead zone," yet the diffusion process discharges brine with enough velocity to kill marine life in about 100 billion gallons of seawater annually. The Regional Water Quality Control Board estimated the impact to marine life would be equal to a loss of productivity from 423 acres of nearshore and estuarine waters each year. Commission staff noted that such substantial losses to the marine ecosystem would require significant mitigation but determined that Poseidon's proposed mitigation was substantially less than needed to conform to Coastal Act provisions. Staff further found that, because most of the proposed mitigation would not be implemented before the facility starts operating, a mitigation deficit would be created that could to grow to more than four square miles of lost ocean productivity within the first ten or 15 years of facility operations. Staff further recommended against imposing additional mitigation measures as inappropriate, as the scale of the project's impact would be so large that few mitigation options existed to offset the impacts of the project.

Additionally, staff found that the planning, permitting, and construction of the large-scale restoration projects necessary to mitigate project impacts would add complexity and time to the overall project timeline. Staff found the scale of risk of harm to marine life and water quality needed a "well defined and thoroughly evaluated mitigation in place" that was reasonably timed with the start of the facility's operations. Staff concluded that Poseidon's proposed mitigations did not meet that standard.

Inconsistency with Environmental Justice Policy

Finally, staff determined that Poseidon's proposed facility was inconsistent with the Commission's Environmental Justice Policy. Adopted in March 2019, the Environmental Justice Policy created a framework to include underserved communities, including the

households that have often been burdened by industrial development. In addition to the environmental risks of the proposed facility's location, there are environmental justice issues raised by the desalination facility being built in an area with concentrated industrial development. Currently, the site was proximate to "a nearby wastewater treatment plant, power plant, partially remediated Superfund site, former oil tank farm, and former dump." Moreover, staff determined that the costs for Poseidon's water would be higher than other current and planned sources of water. Staff highlighted multiple studies that concluded Poseidon's water would result in higher system rates. Although Poseidon had not secured a buyer and therefore it was unknown to which communities in the Orange County Water District (OCWD) the water would be delivered, staff found that such rate hikes would disproportionately impact low-income residents in OCWD's service area. Therefore, staff found such a project to raise environmental justice issues.

The Option to Override Issues with the Coastal Act and LCP Provisions

Commission staff noted that the Commission could approve a coastal dependent industrial facility despite its purported inconsistencies with Coastal Act and LCP provisions. Coastal Act § 30260 puts forth a three-part test to determine if the Commission should exercise its option to override the issues with LCP or Coastal Act policies and approve the project: 1) alternative locations are infeasible or more environmentally damaging; 2) denial of the permit would adversely affect the public welfare; and 3) the project's effects are mitigated to the maximum extent feasible.

The staff report indicated, however, that under the LCP, the Commission's override would not apply to the land-based portion of the desalination plant, which is within the City's permit jurisdiction. In any event, Commission staff did not agree that Poseidon's project met the three-part test. Staff stated that due to a lack of a near-term need for the project, the likelihood that other water projects would be more reliable and cost-effective, the variety of uncertainties associated with the project, the project's unmitigated harms to marine resources and sensitive habitat, and its siting in a hazardous location, denial would actually serve, not harm, the public interest. Staff could not reach a decision as to the other two tests as there was insufficient information to determine whether an alternative location would be infeasible or more environmentally damaging, or whether the project's adverse effects have been mitigated as much as is feasible.

Conclusion and Implications

The Coastal Commission's denial of Poseidon's proposed desalination facility reflects the complicated regulatory environment governing desalination projects. It remains to be seen whether future desalination projects will win Commission approval. The Coastal Commission Staff Report for Poseidon Water is available online at: https://documents.coastal.ca.gov/reports/2022/5/Th9a10a/Th9a10a-5-2022-staffreport.pdf.

(Miles Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•June 1, 2022 - The United States has filed a complaint in federal court against EES Coke Battery, LLC, on behalf of EPA. The complaint alleges that EES Coke violated the Clean Air Act by significantly increasing its emissions of sulfur dioxide at its River Rouge, Michigan, coke oven battery without complying with New Source Review requirements. The complaint asks the Court to order required pollution controls for sulfur dioxide at the facility, measures to redress the harm from the pollution, and a civil penalty. The EES Coke facility is located on Zug Island, between River Rouge and Detroit, in an area that fails to meet federal standards for sulfur dioxide in the air. The facility uses coal and other raw materials to produce metallurgical coke, an input for making steel. It is one of the largest sources of sulfur dioxide in the State of Michigan. The complaint alleges that EES Coke increased its sulfur dioxide pollution as a result of changes the company sought to its state air permit in 2014. For example, EES Coke emitted over 3,200 tons of sulfur dioxide pollution in 2018, compared to permitted baseline sulfur dioxide levels of under 2,100 tons per year.

•June 1, 2022 - EPA announced that Allied Exhaust Systems, Inc., doing business as Team Allied Distribution, has agreed to pay a $1.1 million penalty under the Clean Air Act for illegally selling aftermarket emissions-control defeat devices to individuals throughout the U.S. Vehicles are a significant contributor to air pollution, and aftermarket defeat devices that disable emission controls lead to even higher levels of pollution. This settlement is part of EPA's National Compliance Initiative, which focuses on stopping the manufacture, sale, and installation of defeat devices on vehicles and engines. Team Allied Distribution, based in Benicia, Calif., sold more than 4,500 parts or components that bypass, defeat, or render inoperative motor vehicles' technology developed by the original equipment manufacturer to reduce emissions. The Court has not yet ruled on any of the United States' allegations, and EES Coke will have an opportunity to respond to the allegations in the litigation.

Civil Enforcement Actions and Settlements—Water Quality

•June 1, 2022 - EPA announced that Space Age Fuel, Inc. of Clackamas, Oregon has agreed to pay a $135,000 penalty for federal Clean Water Act violations following the release of oil from an overturned tanker into the North Santiam River. On February 16, 2020, a Space Age Fuel, Inc. tanker truck carrying approximately 10,700 gallons of gasoline and diesel fuel rolled over on Oregon Highway 22 and released an estimated 7,800 gallons of oil onto the highway and the surrounding area, which is adjacent to the North Santiam River. Most of the released oil collected in a ditch on the side of the highway and a portion flowed directly into the North Santiam River. The oil in the ditch seeped into the soil and moved into the riverbank, eventually reaching the river. Water quality sampling indicated elevated levels of petroleum in the river from February 17 through March 11, 2020, and sheen was visible on the river for over three months. The river is home to federally endangered and threatened steelhead and salmon. The North Santiam River provides drinking water to the City of Salem and other communities. The spill threatened, but ultimately did not affect, drinking water. In addition to the $135,000 Clean Water Act penalty the company also agreed to pay a $72,000 penalty to the Oregon Department of Environmental Quality and agreed to a requirement that it develop an inclement weather safety program.

•June 2, 2022—EPA announced a settlement with California's Imperial Irrigation District (IID) for violations of the Clean Water Act related to polluting of local wetlands. Under the settlement, Imperial Irrigation District will pay a $299,857 penalty and provide mitigation to offset the harm to the environment. On November 5, 2020, inspectors from EPA's Pacific Southwest Region and the U.S. Army Corps of Engineers inspected IID's construction of drain banks in the area and found that activities resulted in the discharge of sediment to approximately 1 acre of wetlands. This discharge also impacted approximately 20 acres of wetlands by severing the connection with Morton Bay, which drains to the Salton Sea. In addition to paying the penalty, IID will develop a plan for the removal of the sediment in question and the restoration of the water connection to Morton Bay. If they are unable to restore the impacted site, IID would need to reestablish 63 acres of wetlands at an alternative location.

•June 14, 2022—EPA and the Department of Justice filed a motion to terminate the consent decree with the Knoxville Utilities Board (KUB) citing concurrence and completion of work by KUB in the agreement. In February 2005, the EPA, DOJ, the Tennessee Department of Environment and Conservation (TDEC), the City of Knoxville and the Tennessee Clean Water Network (TCWN) entered into a comprehensive Clean Water Act settlement with KUB. The purpose of the settlement was to ensure the proper management, operation, and maintenance of KUB's sewer system including measures to prevent overflows of untreated sewage and to accomplish two primary goals: eliminate unpermitted discharges from the wastewater collection system. "Unpermitted Discharges" are sanitary sewer overflows (SSOs) that reach waters of the U.S., and develop and implement Management, Operation, and Maintenance (MOM) programs to ensure well maintained publicly owned treatment works into the future.

In addition, the KUB consent decree required the development and implementation of comprehensive management, operation, and maintenance programs to prevent future overflows; respond to overflows when they occur, including cleaning up building backups; to continuously analyze the causes of overflows and propose specific corrective action plans to abate such causes; comprehensively review the performance of its treatment plants; and institute a comprehensive water quality monitoring program.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•May 19, 2022—EPA and U.S. Department of Justice announced a proposed consent decree that requires seven potentially responsible parties, or PRPs, to cleanup contamination at the Tremont City Barrel Fill Superfund site in German Township, Ohio, at an estimated cost of $27.7 million. The complaint was filed simultaneously with the proposed consent decree in the District Court for the Southern District of Ohio. The complaint alleges that the PRPs, Chemical Waste Management Inc., Franklin International Inc., International Paper Co., The Procter & Gamble Co., PPG Industries Inc., Strebor Inc. and Worthington Cylinder Corp., are liable for the cleanup because they are either former owners and operators of the barrel fill or sent wastes to the site for disposal. The Tremont City Barrel Fill site, located at 3108 Snyder Domer Road, is a closed industrial waste landfill that covers 8.5 acres. From 1976 until 1979, when operations ceased, about 51,500 drums and 300,000 gallons of industrial liquid waste were disposed in waste cells at the site. The proposed consent decree requires the PRPs to excavate and characterize drums and uncontained waste in the barrel fill. All liquid waste and nearly 1,000 drums containing hazardous substances, known as still-bottom waste, will be disposed off-site. The remaining hazardous and non-hazardous solid waste will be disposed on-site in a newly constructed hazardous waste landfill.

•May 23, 2022—EPA announced a first-of-its-kind settlement under the Agency's Coal Combustion Residuals (CCR) program at the Public Service Company of Colorado's ("PSCo's") Comanche power station in Pueblo, Colorado. The settlement commits PSCo to address groundwater contamination issues and to ensure the proper closure of CCR surface impoundments under the Resource Conservation and Recovery Act (RCRA). Under the agreement, PSCo agrees to return to compliance with the CCR program and to pay a civil penalty of $925,000. Produced primarily from the burning of coal in coal-fired power plants, CCR is a large industrial waste stream by volume and can contain harmful levels of contaminants like mercury, cadmium, and arsenic. Without proper

management, contaminants from CCR can pollute waterways, groundwater, drinking water, and the air. The administrative settlement was approved by the Regional Judicial Officer for EPA Region 8 on

•May 20, 2022. In the agreement EPA alleges that PSCo did not meet certain requirements under the CCR program, including failure to:

Monitor groundwater under the facility and prepare corrective action reports;

Conduct statistical analysis of groundwater data and establish groundwater background contaminant concentrations; cease using a CCR surface impoundment after the "cease receipt" date; and provide access to documents that were required to be posted on a publicly-accessible website.

The settlement requires PSCo to design a groundwater monitoring system that meets CCR program requirements. PSCo will also develop a corrective measures plan, a remedy implementation plan, and a closure plan for the impoundment. The EPA will oversee all work, including planning for closure of the CCR landfill at the facility. PSCo is an operating utility engaged primarily in the generation, purchase, transmission, distribution, and sale of electricity in Colorado and is a wholly-owned subsidiary of Xcel Energy Inc., which is headquartered in Minnesota. The company has worked cooperatively with the Agency to address the issues in the agreement. The civil penalty is due 30 days after the effective date of the agreement.

•May 24, 2022—EPA has issued an enforcement order under the Clean Water Act to ALV Development LLC to address untreated sewage discharges coming from a residential development in Peñuelas, Puerto Rico, that are flowing into Los Cedros Creek. On April 5, 2022, EPA inspected the Parque Miramonte residential development's pump station after the agency received a series of complaints alleging that sewage overflows were reaching a nearby creek and impacting water quality and ecosystems. EPA determined that ALV Development LLC violated the Clean Water Act for its discharges of untreated sewage from the development's pump station without a National Pollutant Elimination Discharge System permit. Discharges of untreated sewage through a pump station without the appropriate permit are a violation of the Clean Water Act. The order requires ALV Development LLC to cease to discharge any pollutant, including untreated sewage, into waters of the United States, except with authorization under a permit. ALV Development LLC must also develop and submit for EPA's review a compliance plan to repair the development's pump station and related infrastructure to prevent sanitary sewer overflows from occurring. The plan must be completed within 45 days of the company's receipt of the order. The EPA order also requires ALV Development LLC to develop a preventive maintenance program for the development's pump station and its sanitary sewer collection system and to submit monthly status reports documenting actions taken pursuant to the order.

•June 7, 2022—EPA and the State of Delaware have reached an agreement, reached under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), with 21 defendants on completing a $41.6 million cleanup plan for the 27-acre Delaware Sand & Gravel Landfill Superfund Site in New Castle County, Delaware. Between 1969 and 1976, approximately 550,000 cubic yards of industrial waste and construction debris, including at least 13,000 drums containing hazardous substances, were disposed of at the industrial waste landfill that was formerly a sand and gravel quarry. EPA and the Delaware Department of Natural Resources and Environmental Control (DNREC) confirmed the presence of several hazardous substances in the site's soil and groundwater, and in 1981, EPA added the site to the "National Priorities List" of the most contaminated sites nationwide.

•June 9, 2022—Asbestos piles will be removed from the Tech City site, under a June 7, 2022, EPA agreement with developer iPark 87, LLC requiring it to remove asbestos contamination from the site in Ulster County, New York. The site is being cleaned up under EPA's Superfund program. Under the settlement, iPark 87, LLC has agreed to remove three large outdoor piles of demolition debris contaminated with asbestos and will abate asbestos in one building. EPA properly stabilized the site while the agency pursued the settlement. In addition, EPA will recover all its past costs as well as the cost of overseeing this work. After entering into the settlement, the company purchased most of the site property, with the intention of developing it into a variety of ventures

including highlighting local businesses. The site is a former IBM computer manufacturing facility that had been in operation for more than 30 years until 1998, when it was sold to companies affiliated with Mr. Alan Ginsberg, who re-branded the facility as TechCity and operated it as a multi-tenant industrial park. Between 2015 and 2016, improper asbestos abatement and demolition of buildings occurred at the site. In May 2017, Ulster County requested EPA assistance with addressing the conditions at the site. EPA attempted to negotiate with the potentially responsible parties to remove asbestos without success. In March 2020, EPA mobilized to the site to undertake a portion of the removal work, which included demolition of an asbestos-contaminated, partially demolished structure identified as building 2, disposal of approximately 200 tons of asbestos-contaminated material, and the securing of building 1. On July 15, 2021, Ulster County filed an action to foreclose on 18 parcels at the site for failure to pay over $12 million in property taxes. In September 2021, EPA unilaterally issued an administrative order to six potentially responsible parties directing them to remove the three large piles and abate building 1. In December 2021, in connection with a court-approved settlement of the County foreclosure action, iPark 87, LLC indicated its intention to purchase and redevelop the site, perform the remaining asbestos cleanup work, and reimburse EPA's costs. The settlement will mean that public funds will no longer be needed for the cleanup.

•June 9, 2022—EPA announced a settlement with Coltene/Whaledent, Inc. in Cuyahoga Falls, Ohio, for allegedly selling unregistered pesticide products in violation of the Federal Insecticide, Fungicide, and Rodenticide Act. The settlement includes a $654,064 civil penalty. Coltene/Whaledent, Inc. allegedly distributed or sold two unregistered pesticides, Ultronics 10 Minute Instrument Disinfectant and Biosonic Germicidal Ultrasonic Cleaner Concentrate, used for disinfecting dental equipment. The company allegedly continued to produce and sell the two pesticide products after the products were no longer registered with EPA. Under the terms of the consent agreement and final order with EPA, Coltene/Whaledent, Inc. has addressed the alleged FIFRA violations and will pay a civil penalty of $654,064 to the federal government. Coltene/Whaledent has stopped producing and selling the two pesticide products, which must be registered with EPA in order to protect human health and the environment

Indictments, Sanctions, and Sentencing

•June 3, 2022—FCA US LLC (FCA US), formerly Chrysler Group LLC, pleaded guilty to one criminal felony count and has agreed to pay approximately $300 million in criminal penalties as a result of the company's conspiracy to defraud U.S. regulators and customers by making false and misleading representations about the design, calibration, and function of the emissions control systems on more than 100,000 Model Year 2014, 2015, and 2016 Jeep Grand Cherokee and Ram 1500 diesel vehicles, and about these vehicles' emission of pollutants, fuel efficiency, and compliance with U.S. emissions standards. FCA US entered a guilty plea to a criminal information charging the company with one count of conspiracy to defraud the United States, commit wire fraud, and violate the Clean Air Act. Pursuant to the plea agreement, FCA US has agreed to pay a criminal fine of $96,145,784 and to forfeit $203,572,892.FCA US installed software features in the Subject Vehicles and engaged in other deceptive and fraudulent conduct intended to avoid regulatory scrutiny and fraudulently help the Subject Vehicles meet the required emissions standards, while maintaining features that would make them more attractive to consumers, including with respect to fuel efficiency, service intervals, and performance. Under the terms of the guilty plea, which remains subject to court approval, FCA US has agreed to continue to cooperate with the Department of Justice in any ongoing or future criminal investigations relating to this conduct. In addition, as part of the guilty plea, FCA US has also agreed to continue to implement a compliance and ethics program designed to prevent and detect fraudulent conduct throughout its operations and will report to the department regarding remediation, implementation, and testing of its compliance program and internal controls.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS U.S. FOREST SERVICE ACTED ARBITRARILY AND CAPRICIOUSLY IN APPROVING PLAN OF OPERATIONS FOR COPPER MINE

Center for Biological Diversity v. U.S. Fish and Wildlife Service, 33 F.4th 1202 (9th Cir. 2022).

Environmental conservation organizations and Native American tribes brought actions against the U.S. Forest Service (Forest Service), challenging its approval of an open-pit copper mining operation under the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), the Mining Law of 1872, and related statutes. The U.S. District Court granted summary judgment on some claims and the Forest Service and intervenor appealed. The Ninth Circuit affirmed, finding among other things that the Forest Service's approval of the mining operation without considering whether the claimant held a valid mining claim to certain areas was arbitrary and capricious.

Factual and Procedural Background

Rosemont Copper sought to dig a large open-pit copper mine in the Santa Rita Mountains, south of Tucson, Arizona. The mining operation would be partly within the Coronado National Forest. The proposed pit would be 3,000 feet deep and 6,500 feet wide, and it would produce over 5 billion pounds of copper. There was no dispute that Rosemont holds valid mining rights on the land where the copper pit itself would be located.

In connection with this use, Rosemont proposed to dump 1.9 billion tons of waste rock near its pit, on 2,447 acres of National Forest land. The pit itself would occupy just over 950 acres. When operations cease after 20 to 25 years, waste rock on the 2,447 acres would be 700 feet deep and would occupy the land in perpetuity.

The Forest Service approved Rosemont's proposed mining plan of operations (MPO) on two grounds. First, it found that § 612 of the Surface Resources and Multiple Use Act of 1955 (Multiple Use Act) gave Rosemont the right to dump waste rock on open National Forest land, without regard to whether it has any mining rights on that land, as a "use[ ] reasonably incident" to its operations at the mine pit. Second, the Forest Service assumed that under the Mining Law of 1872 (Mining Law) Rosemont had valid mining claims on the 2,447 acres it proposed to occupy with its waste rock.

Relying on these grounds, the Forest Service approved the MPO, finding under § 612 of the Multiple Use Act and under the Mining Act it only had the authority contained in its "Part 228A" regulations to regulate Rosemont's proposal to occupy its mining claims with its waste rock. The Forest Service suggested that if it had greater regulatory authority than that provided by its Part 228A regulations, it might not have approved the MPO in its proposed form.

Environmental organizations and Native American tribes brought suit and the separate cases were consolidated. The U.S. District Court found that neither ground supported the Forest Service's approval of the MPO. It found that § 612 grants no rights beyond those granted by the Mining Law. It also held that there was no basis for the Forest Service's assumption that Rosemont's mining claims were valid under the Mining Law; to the contrary, it found that the claims actually were invalid. The U.S. District Court therefore found the Forest Service acted arbitrarily and capriciously in approving the MPO and vacated the Final Environmental Impact Statement and Record of Decision. Both the Forest Service and Rosemont appealed.

The Ninth Circuit's Decision

The Ninth Circuit first agreed with the District Court's holding that § 612 grants no rights beyond those granted by the Mining Law. It also noted that, although the Forest Service had defended this position during the U.S. District Court proceedings, the

Forest Service ultimately abandoned this argument on appeal. Rosemont also did not rely on § 612 on appeal.

The Ninth Circuit also agreed with the U.S. District Court holding that the Forest Service improperly assumed Rosemont's mining claims were valid under the Mining Law, rejecting the Forest Service's claim that it was not required to assess the validity of the claims. Although its reasoning differed from the District Court, the Ninth Circuit also agreed that the claims themselves were invalid. Where the District Court found that no valuable minerals exist on the claims, however, the Ninth Circuit found the claims invalid because no valuable minerals have yet been found on the claims. This distinction, however, the Ninth Circuit noted, was legally irrelevant, as the relevant question was whether valuable minerals have been "found."

The Ninth Circuit further noted that it did not know what the Forest Service would have done if it had understood that Se§ction 612 grants no rights beyond those granted by the Mining Law and that Rosemont's mining claims were invalid under the Mining Law. These were decisions, the Ninth Circuit found, that must be made in the first instance by the Forest Service. Accordingly, it remanded to the Forest Service for such further proceedings as the Forest Service may deem appropriate, informed by the conclusions of the Ninth Circuit's opinion.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the Mining Law, including the validity of claims made thereunder. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/12/19-17585.pdf.
(James Purvis)

TENTH CIRCUIT DETERMINES POINT SOURCE'S STATUTE OF LIMITATIONS APPLIES TO STATE CLAIMS IN FEDERAL COURT DIVERSITY ACTIONS UNDER THE CLEAN WATER ACT

Allen, Jr., et al. v. U.S. Environmental Restoration, 32 F.4th 1239 (10th Cir. 2022).

The U.S. Court of Appeals for the Tenth Circuit, on May 3, 2022, held that a point source's state statute of limitations applies to state-law claims preserved under the federal Clean Water Act (CWA).

Factual and Procedural Background

On August 5, 2015, while excavating the Colorado Gold King Mine, the U.S. Environmental Protection Agency (EPA) triggered the release of over three million gallons of contaminated water into Cement Creek, the Animas River and San Juan River. Affected states, New Mexico and Utah, and the Navajo Nation separately sued the EPA, mine owners, and EPA contractors for violation of the Clean Water Act. In the suits, each plaintiff filed civil actions against the defendants and the cases were transferred to New Mexico as requested by EPA clean-up contractor, Environmental Restoration LLC. After the suits were transferred to New Mexico, individual farmers along the Animas and San Juan rivers (Allen plaintiffs) filed state law claims of negligence against the defendants in New Mexico. These cases were added to the larger multidistrict lawsuit.

The CWA preserved state law claims against illegal dischargers, and made it clear that the substantive law of an affected state, including the forum, is subordinate to the point source. However, the CWA did not clearly distinguish whose procedural law would apply to state law claims.

Environmental Restoration LLC, moved to dismiss the Allen plaintiffs' complaint, arguing the Allen plaintiffs did not file their complaint within Colorado's two-year statute of limitations and therefore they failed to state a claim. The Allen plaintiffs argued their complaint was timely under New Mexico's three-year statute of limitations.

The U.S. District Court denied the motion to dismiss, reasoning that New Mexico's longer statute of limitations applied.

Environmental Restoration LLC, filed an interlocutory appeal of the District Court's decision, arguing that Colorado's procedural laws applied to the Allen plaintiffs' state law claims because the point source at issue was located in Colorado. The Tenth Circuit accepted the interlocutory appeal to determine what statute of limitations applies to state law claims preserved under the CWA.

The Tenth Circuit's Decision

The Court of Appeals first noted that the U.S. Supreme Court has already determined that a point source's state substantive law applies to state actions preserved under the CWA. The court then considered and rejected the Allen plaintiffs' argument that the forum state's statute of limitations applies, even though the forum state's procedural laws typically apply in diversity cases where plaintiffs and defendants reside in different states.

The court rejected the general rule for three reasons. First, the court reasoned that application of general rule (application of the forum state's statute of limitations) would result in different statutes of limitations being applied to state laws claims emanating from a single water-polluting event, depending on where the case was filed. This result would be inconsistent with Congress's purposes and objectives in passing the CWA—those being efficiency, predictability, and certainty in determining liability for discharging pollutants into an interstate body of water.

Second, the court noted that without a uniform statute of limitations, a defendant could be exposed to lawsuits indefinitely. Statutes of limitations encourage prompt filing of claims and remove uncertainty about legal liabilities. The Allen plaintiffs' argument would allow a forum state law to govern procedural issues and point source state law to govern substantive issues, which would lead to little uniformity and less predictability for the same polluting event. Thus frustrating the purpose of the CWA's regulatory scheme and overall purpose.

Third, the court considered and rejected the Allen plaintiffs' alternative argument that the five-year federal "catch all" statute of limitations should apply to the state law claims. The court noted that the catch all statute of limitations applies only to claims arising under the CWA and not to state law claims preserved by the CWA.

Ultimately, the court reversed the District Court's holding, ruling that the point source state's law applies to procedural and substantive matters.

Conclusion and Implications

The Allen plaintiffs' petition for *en banc* rehearing was recently denied, which will leave this decision in place. Contrary to the rule governing most diversity cases in federal court, the Tenth Circuit Court of Appeals determined that a point source state's procedural law applies to state law claim preserved under the CWA. By relying on U.S. Supreme Court precedent the court implies that its reasoning could be followed nationally. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca10/19-2197/19-2197-2022-05-03.html
(Elleasse Taylor, Rebecca Andrews)

FIFTH CIRCUIT STRIKES BLOW AT ADMINISTRATIVE STATE—SEC CANNOT SEEK CIVIL PENALTIES

Jarkesy v. Securities and Exchange Commission, ___F.4th___, Case No. 20:61007 (5th Cir. May 18, 2022).

Departing from decades of U.S. Supreme Court and federal appellate jurisprudence, the Fifth Circuit Court of Appeals held that the Securities and Exchange Commission (SEC or Commission) cannot seek civil penalties for securities fraud via administrative proceedings, but rather must pursue enforcement actions in federal courts. The court's reasoning has broad implications for the implementation of numerous federal environmental statutes.

Background

The SEC's structure and responsibilities will be familiar with those familiar with the U.S. Environmental Protection Agency's implementation of numerous

federal environmental statutes: the SEC implements federal securities law by promulgating regulations, decides administrative cases, and brings enforcement actions in federal courts. In 2010, Congress granted the SEC the power to impose civil penalties in administrative cases or to seek such penalties in federal court, leaving it to the agency's discretion which route to pursue in any particular case. Penalties imposed by a SEC administrative law judge can be appealed to the Commission, and the Commission's decision may be challenged in a Circuit Court. The various environmental statutes the EPA administers include similar Congressional delegations of authority. For example, the Clean Air Act empowers the EPA to enforce against violations of a State Implementation Plan by:

> (A) issuing an order requiring such person to comply with such requirement or prohibition,
>
> (B) issuing an administrative penalty order in accorance with subsection (d), or
>
> (C) bringing a civil action in accordance with subsection (b). 42 U.S.C. § 7413(a)(3).

The SEC brought an administrative enforcement action against Jarkesy, alleging securities fraud. The agency's administrative law judge imposed a $300,000 civil penalty and ordered Jarkesy to disgorge $685,000. Jarkesy's appeal to the Commission was denied; he then appealed to the Fifth Circuit.

The Fifth Circuit's Decision

The Fifth Circuit's opinion finds the SEC's administrative adjudication system faulty on three bases.

First, the court held that Jarkesy was deprived of his Seventh Amendment right to a jury trial, likening the administrative proceedings to "traditional actions at law to which the jury-trial right attaches," specifically—agency claims that "do not concern public rights alone." Congress may delegate to agencies the power to seek civil penalties in administrative proceedings (*i.e.*, where no jury trial is available):

> . . .in cases where in which 'public rights' are being litigated[,] e.g., cases in the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 450 (1977).

Public rights are those "so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution." Determining whether a right is public requires deciding: 1) "whether Congress create[ed] a new cause of action, and remedies therefore, unknown to common law"; 2) "whether jury trials would 'go far to dismantle the statutory scheme' or 3) 'impede swift resolution' of the claims created by statute.'" Quoting *Atlas Roofing*, 430 U.S. at 454 n.11, and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 60-63 (1989).

The Fifth Circuit held that no public right was involved in the enforcement action against Jarkesy as "[f]raud prosecutions were regularly brought in English courts at common law," and relying on *Tull v. U.S.*, 481 U.S. 412, 418-419 (1987), which noted that early in our nation's history certain actions seeking payments of debts were "distinctly legal claims," and thus "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." Here, as with the federal Clean Water Act civil penalties at issue in *Tull*, the Fifth Circuit concluded that the SEC must seek civil penalties in an Article III court where a jury trial is available. Further, the court held that jury trials in securities fraud actions would not dismantle the statutory scheme or impede swift resolution of enforcement actions. Note also that common law actions for air and water pollution date to the nineteenth century. *Theories of Water Pollution Litigation*, Wisconsin Law Review, Peter Davis (1971: 738–816).

Non-Delegation Doctrine

Next, the court held that the delegation to the SEC of the power to, at its discretion, chose whether to pursue enforcement action in administrative proceedings or before a U.S. District Court violated the "non-delegation doctrine." Arguable, the doctrine has been relied on the U.S. Supreme Court only three times in such a sweeping fashion, in each instance to overturn elements of President's Roosevelt's New Deal. *Panamal Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). These cases all pre-date Roosevelt's

submission of his Judicial Procedures Reform Bill of 1937, familiarly known as his court-packing plan.

The non-delegation doctrine prohibits Congress from delegating to an administrative agency "what would be a legislative power absent a guiding intelligible principle." Quoting a 1909 Supreme Court opinion, the court asserts that "the power to assign disputes to agency adjudication 'is peculiarly within the authority of the legislative department.'" *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

Through Dodd–Frank § 929P(a), Congress gave the SEC the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so. *See* 15 U.S.C. § 78u-2(a). Thus, it gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power. As the Court said in *Crowell v. Benson*, "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control." 285 U.S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. [438,] 451 [(1929)]).

This broad application of the non-delegation doctrine departs from the narrower approach taken by Justice Scalia in, *e.g.*, *Whitman v. American Trucking Association*, 531 U.S. 457 (2001), in which the Court held that Congress had not impermissibly delegated to the EPA authority to enforce the federal Clean Air Act, but that in the absence of unambiguous Congressional authorization the agency could not consider implementation costs in setting national ambient air quality standards. The Fifth Circuit distinguished *American Trucking* on the basis that the securities legislation at issue "offer[s] *no guidance* whatsoever" but rather constitutes an "open-ended delegation of legislative power."

Analysis under the *Free Enterprise Fund* Decision

Lastly, the court held that the civil service protections from removal absent "good cause" enjoyed by the SEC's administrative law judges run afoul of the holding in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 498 (2010), that the President must have the power to appoint and remove executive officers in order to carry out the constitutionally-required function of ensuring the faithful execution of the law. This is because, according to the court, the SEC's administrative law judges:

> . . .exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding.

Conclusion and Implications

Jarkesy establishes stark splits among the Circuits by each of its three holdings, and seems designed to be granted certiorari. The Fifth Circuit likely felt emboldened by Supreme Court's accelerating openness to imposing significant new constraints on the administrative state, for example in *National Federation of Independent Business v. Dept. of Labor*, Nos. 21A244 and 21A247 (2022) (striking down the Occupational Safety and Health Administration's vaccine-or-test mandate for large employers) and *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ___ (2020) (structure of agency violated separation of powers).

The Fifth Circuit's reasoning in each of its holdings, if adopted by the Supreme Court, would arguable significantly impair the ability to effectively implement numerous federal environmental statutes as they are currently written. Were the EPA and other agencies required to seek enforcement for every alleged violation in Article III federal courts, that already-overburdened system would quickly be overwhelmed. The likelihood that Congress, on the other hand, could agree on sufficiently precise directives to guide agency prosecutorial discretion, seems extremely low.

(Deborah Quick)

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FIFTH CIRCUIT RULES OIL POLLUTION ACT CLAIMS MERIT A JURY TRIAL

United States v. ERR, LLC, et al., ___F.4th___, Case No. 21-30028 (5th Cir. May 26, 2022).

A wastewater treatment facility on the bank of the Mississippi River in Louisiana took on oil for treatment from a barge. Soon thereafter there were reports of oils slicks in the river, and a Coast Guard investigation eventually pointed to the facility itself as being the party at fault. The facility (ERR) hired a cleanup contractor that spent days performing a cleanup and producing a bill for services exceeding $900,000.00. ERR declined to pay, and the cleanup contractor filed for reimbursement from the Fund set up under the Oil Pollution Act (Act). The contractor was paid about $630,000 by the government. The United States then proceeded to file a claim for restitution against ERR.

The Oil Pollution Act

The Oil Pollution Act (Act) became law in 1990, in great part in response to the Exxon Valdez calamity. It establishes the Oil Spill Liability Trust Fund, a governmental fund gathered from certain taxes and penalties that can reimburse people who incur expense but did not cause a spill. In turn, the government succeeds to all claims of the reimbursed party. See generally 33 U.S.C.A. §§ 2712, 2713; Exec. Order No. 12,777, § 7, 56 Fed. Reg. 54,757, 54,766-68 (Oct. 18, 1991)

At the U.S. District Court

The defendant ERR demanded a jury trial for the government claim, but the trial court denied the request. In the ensuing U.S. District Court bench trial the court's ruling went against ERR. The trial judge ruled not only that ERR was the responsible party for the oil spill, but also that the nature of the remedy under the Act sounded in equity, warranting no jury trial right to be recognized. The trial court cited to cases and law indicating that restitution was historically regarded as an equitable remedy available from courts, but without juries hearing facts. Thus, the demand for jury trial that ERR had made at the outset was stricken on motions prior to the bench trial.

The trial court stated in its opinion that its decision on whether the right to jury trial existed on the facts and law before it was a close call.

The Fifth Circuit's Decision

The Fifth Circuit opinion by Judge Andrew S. Oldham explains at some length and in an interesting historical review why the Fifth Circuit reversed the lower court decision and decided that the right to jury trial should have been afforded ERR.

The opinion notes that the right to a trial by jury was one of the rights and liberties not originally contained in the U. S. Constitution. It further delves into the debates on how to word the granting of that right, which some patriots, including Alexander Hamilton, saying it should be up to the will of Congress on a law-by-law basis. In the end, the issue was resolved by adopting the following language as part of the Bill of Rights, specifically the 7th Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

The opinion goes on at some length to emphasize that while the remedy of restitution was originally a court invented and applied action, the federal test in the United States turns on two factors.

First, the courts compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, they examine the remedy sought and determine whether it is legal or equitable in nature. The second factor is more important.

The opinion then analyzes the nature of the claim against ERR. The recoupment of funds sought here, it notes, is based on the concept of a tort being at the origin of the claim. It cites Supreme Court's discussion of restitution in *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Instead of recovering money or unique property that once belonged to plaintiff and can be "restored," the court observes that the claim in question against ERR is really in the nature of a tort claim for damages, because ERR must be shown to be responsible for the oil spill in order to

have liability. The fact that the device of subrogation of claims is being used to get the government into the case does not alter the basic nature of the claim itself.

Conclusion and Implications

The government sought to rely on cases from the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that have concluded no jury trial right should exist there. That argument made little impression on the Fifth Circuit, which considered the U.S. Supreme Court's decision in *Knudson* definitive. Whether those CERCLA cases are apposite or whether there is a conflict of the Circuits on the jury right is beyond the scope of this article. The court's opinion is available here: https://fingfx.thomsonreuters.com/gfx/legaldocs/zjpqkgoyw-px/USA%20v%20ERR%20LLC%205th%20Cir%20OPA.pdf.
(Harvey Sheldon)

DISTRICT COURT REINFORCES PROTECTION FOR RESPONSIBLE PARTIES AGAINST STATE LAW CLAIMS CONFLICTING WITH ALREADY SET REMEDIAL ACTION

York et al. v. Northrop Grumman Corp. Guidance and Electronics Co. Inc. et al., ___F.Supp.4th___, Case No. 6:21-cv-03251 (W.D. Mo. 2022).

In April 2022, a decision from the U.S. District Court for the Western District of Missouri further solidified protection for potentially responsible parties related to hazardous substance releases against state law claims where a consent agreement is already in place. The holding of this case is consistent with the recent U.S. Supreme Court decision in *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1345-46 (2020) (*ARCO v. Christian*), which held that landowners around a Superfund site could not recover damages or obtain equitable relief that conflicted with EPA's remedial action without EPA approval. In the case at hand, *York et al. v. Northrop Grumman Corp. Guidance and Electronics Co. Inc. et al*, the District Court extended this logic to hold that a state-entered consent decree with the force of federal law similarly shields responsible parties from liability for claims seeking relief that would conflict with the terms of the consent decree.

Background

The site at issue in *York v. Northrop* involved a printed circuit boards manufacturing facility in Springfield, owned by Litton, which used tricholorethyline, (TCE) in its production. In 1993, as a result of TCE contamination present at the site, Litton and the state of Missouri entered into a Consent Agreement which "contemplat[ed] ongoing work and future disputes between" the state and Litton. In 2010, the state brought a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) claims against the current owner of the facility, Northrup Grumman, alleging that contamination had spread to adjoining properties. This suit resulted in a Consent Decree which set forth the requirements for response actions in accordance with CERCLA.

After detecting TCE on their properties in 2018, property owners in Springfield brought suit against the current owner of the facility, Northrup Grumman, asserting claims of negligence, nuisance, and trespass. Plaintiffs alleged that Northrup failed to notify the public of the extent of the TCE contamination, noting that the public only became aware of the problem when TCE was detected in a cave known as Fantastic Caverns, a tourist attraction in the area. Defendants moved to dismiss plaintiffs' complaint on the grounds that their claims were preempted because they conflicted with the Consent Decree.

The District Court's Decision

The U.S. District Court ultimately agreed with defendants and dismissed the complaint without prejudice on the grounds that the claims were preempted to the extent the requested equitable relief or damages stemmed from conduct different from or not required by the Consent Decree. In arriving at

this holding, the court first pointed to the notion, derived from 42 U.S.C. § 9622(e)(6), that because a consent decree has the effect of federal law, state laws that conflict with the consent decree are preempted. 42 U.S.C. § 9622(e)(6) provides that that once a consent decree is entered, "no potentially responsible party may undertake any remedial action" that is not authorized by the consent decree. The court referenced other cases in which courts held that § 9622(e)(6) preempted state law claims because such claims would require the responsible party to break the terms of its governing consent decree. The court also noted that generally courts have determined that once *an*y remedy is imposed by the state or EPA, not just consent decrees, the responsible party cannot be held liable for claims based on the response.

Plaintiffs argued that CERCLA's savings clause, which provides in part that CERCLA does not affect the liabilities of any person under state and common law with regard to releases of hazardous substances, permitted Plaintiffs' claims. They further pointed to the CERCLA provision which states that CERCLA is not to be construed as preempting a state from imposing additional requirements with respect to hazardous substances releases. The court addressed both of these arguments by noting that these clauses have been construed by courts to mean that CERCLA does not preempt the entire field of environmental regulation or preempt state causes of action arising from the discharge of hazardous waste. However, the court noted that the U.S. Supreme Court in *ARCO v. Christian* held that interpreting CERCLA's savings clause in the sweeping manner Plaintiffs argued for would "erase the clear mandate of [§ 9622(e)(6)]" and "would allow [CERCLA] to destroy itself." Thus, as the court maintained in this case, issues of conflict preemption are not affected by the savings clauses.

Conclusion and Implications

The District Court did leave open the possibility for plaintiffs to amend their complaint to more clearly state their claim alleging that defendants failed to disclose facts they learned or should have learned about the extent of the TCE contamination. Although the court did caution that such claim may not be valid or could also be preempted. It's also important to note that plaintiffs can still challenge a responsible party's implementation of a consent decree by, for example, alleging that a party's actions in implementing the consent decree were negligent. Regardless of whether plaintiffs decide to amend their complaint, the District Court's decision in *York v. Northrup* reinforces the protection that an existing consent decree confers on responsible parties against state and common law claims.

(Monica Browner, Darrin Gambelin)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS BUMBLE BEES MAY BE CLASSIFIED AS 'FISH' UNDER THE CALIFORNIA ENDANGERED SPECIES ACT

Almond Alliance of California v. Fish & Game Commission, ___Cal.App.5th___, Case No. C093542 (3rd Dist. May 31, 2022).

In May, the Court of Appeal for the Third District of California held that the meaning of "fish" under the California Endangered Species Act (CESA) extends to terrestrial invertebrates, such as certain species of bumble bee, and thus are eligible for listing as endangered or threatened under the CESA. The Court of Appeal also affirmed a prior holding that the general definition of "fish" in the California Fish and Game Code supplies the meaning of that term in the CESA, despite invertebrates not being specifically listed in the act.

Background

The California Endangered Species Act is intended to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. (Fish & Game Code, § 2052.) Threatened or endangered species under the CESA include a "bird, mammal, fish, amphibian, reptile, or plant." The CESA became law in 1984 and is codified in Fish and Game Code § 2050 *et seq*. The Fish and Game Code provides general definitions for terms used within the code, including "fish" as set forth in § 45. Prior to 1969, § 45 defined fish as "wild fish, mollusks, or crustaceans, including any part, spawn or ova thereof." In 1969, the California Legislature amended § 45 to add invertebrates and amphibia to the definition of fish. The definition remained unchanged until 2015, when the Legislature made stylistic changes to the definition to read "a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." (Stats. 2015, ch. 154, § 5.)

Prior to the CESA, the Fish and Game Commission (Commission) had listed several species of invertebrates as endangered or rare under existing state law that prohibited the importation, possession, or sale of "any endangered or rare bird, mammal, fish, amphibian, or reptile." While the Office of Administrative Law had previously rejected the Commission's attempt to codify certain snails and butterflies (terrestrial invertebrates) as endangered because it did not view terrestrial invertebrates as fish—a position the Attorney General agreed with regarding inspects in an opinion in 1998—certain of those species and other vertebrates were subsequently listed as endangered or rare.

The CESA repealed and replaced existing state law related to endangered or rare animals. Specific inclusion of "invertebrates" in the act's legislation had been proposed but subsequently eliminated from the text of the bill. Nonetheless, in support of the CESA, the Department of Fish and Wildlife (Department—the bureaucratic parent of the Commission), submitted a bill analysis indicating that the inclusion of the term "invertebrate" in the act was unnecessary. The Department reasoned that the definition of "fish" in the Fish and Game Code already includes the term "invertebrates," and thus including the term "invertebrates" in the CESA could create confusion by necessitating amending other provisions of the Fish and Game Code to include that class of animal, where necessary. The Department noted that it had already included invertebrates to be endangered or rare prior to the CESA.

Listing Endangered and Threatened Species

The CESA directs the Fish and Game Commission to establish a list of endangered and threatened species, and to add or remove species from either list if it finds, upon receipt of sufficient scientific information, that the action is warranted.

Under the act, any interested person may petition the Commission to add a species to, or to remove a species from, the Commission's lists. A multi-step

process applies to such petitions. First, the Department evaluates a petition on its face and in relation to other relevant information the Department possesses or receives, and prepares a written evaluation report that includes a recommendation as to whether the Commission should reject the petition or accept and consider it, depending on whether there is sufficient information to indicate that the petitioned action may be warranted. During this evaluation, any person may submit information to the Department relating to the petitioned species.

Second, the Commission, after considering the petition, the Department's written report, and written comments received, determines whether the petition provides sufficient information to indicate that the petitioned action may be warranted. Upon finding that the petition does not provide such information, the Commission rejects it. Upon finding that the petition does provide such information, the Commission accepts it for consideration.

Third, as to an accepted petition, the Department then conducts a more comprehensive review of the status of the petitioned species and produces a written report, based upon the best scientific information available to the Department, which indicates whether the petitioned action is warranted. Finally, after receiving the Department's report, the Commission determines whether the petitioned action is warranted or is not warranted.

2018 Petition to List Four Species of Bumble Bee

In 2018, several public interest groups petitioned the Commission to list the Crotch bumble bee, the Franklin bumble bee, the Suckley cuckoo bumble bee, and the Western bumble bee as endangered species under the act. The Commission ultimately determined that the four species of bumble bee qualified as candidate species for listing purposes.

In 2019, various agricultural associations and interest groups (petitioners) challenged the Commission's decision by filing a writ of administrative mandate, which the trial court granted. The trial court determined that the word "invertebrates" in § 45's definition of "fish" extended only to aquatic invertebrates, and that the legislative history of the Act supported its conclusion that the legislature did not intend to protect invertebrates categorically. The Court of Appeal reviewed the trial court's ruling *de novo*.

The Court of Appeal's Decision

On appeal, petitioners argued that the definition of "fish" in § 45 of the Fish and Game Code does not supply the meaning of that term in the CESA because the language of the act indicates the legislature intentionally included amphibians but did not include invertebrates. Including invertebrates within the purview of the act would, according to petitioners, render the inclusion of amphibians and other specified types of animals meaningless, which is disfavored by the rule of statutory construction against surplusage.

The Court of Appeal rejected petitioners' argument in part because the court had previously ruled in an earlier case that § 45's definition of fish supplies the meaning of that term within the act, and the court did not deem it necessary to depart from that prior decision. The court also reasoned that the Legislature amended § 45 of the CESA in 2015 and took no action in changing the statute, meaning that § 45 of the act expressly included invertebrates within the definition of "fish."

The court also rejected the petitioners' argument that legislative history of the CESA supports the exclusion of invertebrates. According to the court, the legislature could have disagreed with the Department's bill analysis that the Department had authority to list invertebrates under the act but instead took no action against that position. As the court explained, the legislature believed that invertebrates were already included in the definition of "fish" by application of § 45 and did not feel the need to have the Department report on including invertebrates. The court concluded that the balance of the CESA's legislative history did not indicate the legislature intended to exclude invertebrates from coverage under the act. The court also determined that the Attorney General opinion of 1998 was not persuasive since it was issued after the CESA was adopted, made no mention of § 45, and did not recognize that the Commission had already listed several species of invertebrates before 1984.

The court also held that terrestrial invertebrates may be listed as an endangered or threated species under the CESA, thus rejecting the trial court's conclusion that the definition of "fish" under § 45 only extended to aquatic invertebrates. The Court of Appeal determined that a liberal, *i.e.* more expan-

mission had already listed several species of invertebrates before 1984.

The court also held that terrestrial invertebrates may be listed as an endangered or threated species under the CESA, thus rejecting the trial court's conclusion that the definition of "fish" under § 45 only extended to aquatic invertebrates. The Court of Appeal determined that a liberal, *i.e.* more expansive, interpretation of the CESA was appropriate; the legislative history and prior listings by the Commission supported including terrestrial species under the purview of the act; and the express language in § 2067 supported a determination that the term "fish" is not limited to solely aquatic species. Instead, the court concluded that as a term of art—as opposed to common parlance—a terrestrial invertebrate may be considered as an endangered or threatened species under the CESA. Thus, the Court of Appeal held that the four bumble bee species are considered to be fish and thus capable of being protected under the CESA.

Conclusion and Implications

Under this decision, invertebrates like the species of bumble bee at issue in the case are eligible to be listed as endangered or threatened under the California Endangered Species Act. Presumably, additional petitions for listing other species of terrestrial invertebrates will be submitted to the Commission for potential protection under the CESA, although it is not clear whether any of the petitioned species will ultimately be listed. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093542.PDF.
(Miles B. H. Krieger, Steve Anderson)

NEVADA SUPREME COURT CHANGES THE LANDSCAPE ON GROUNDWATER MANAGEMENT IN DROUGHT STRICKEN OVER-DRAFTED BASINS

Diamond Natural Resources Protection & Conservation Association v. Diamond Valley Ranch, LLC, 138 Nev. Adv.Op. 43 (2022).

On June 16, 2022, the Nevada Supreme Court issued a narrow 4-3 ruling that may dramatically change the way Nevada manages groundwater in areas experiencing severe overdraft. The opinion marks a significant shift in the way Nevada's high court applies the doctrines of prior appropriation and beneficial use as applied to senior water rights holders in basins that are subject to regulation under state law.

Background

Diamond Valley is an arid farming district in Eureka County, Nevada. The valley has been found to be over-appropriated and pumped at rates exceeding its perennial yield for many years. In 2015, the Nevada State Engineer designated Diamond Valley as a Critical Management Area (CMA) due to the extent of pumping and conditions in the basin.

The Groundwater Management Plan

Once a basin has been designated a CMA, Nevada law permits the majority of water rights holders to petition the State Engineer to approve a Groundwater Management Plan (GMP) to implement steps to remove a basin from CMA designation.

Following CMA designation, a majority of its water rights holders in the valley submitted a GMP to the State Engineer for approval. The GMP laid out a 35-year plan to reduce groundwater pumping in Diamond Valley and remove the basin's CMA designation. In 2019, the State Engineer approved the proposed GMP. Notably, the approved GMP required all water rights holders—not just junior rights holders—to reduce water use. In addition to mandating cutbacks across the board, the GMP created a water-banking system allowing appropriators to buy, sell, or lease their water rights to other users, regardless of whether water was determined to have been put to beneficial use.

Senior Rights Holders Seek Judicial Review

A group of senior water rights holders petitioned for judicial review, arguing that the GMP deviated from Nevada's long-established water law principles. The district court agreed and invalidated the GMP on the grounds that it: 1) forced senior rights holders to reduce water use in violation of the doctrine of prior appropriation; 2) violated Nevada's beneficial use statute by allowing for the banking and trade of unused groundwater; and 3) improperly allowed appropriators to change the point or manner of diversion.

The Supreme Court's Decision—Upholds the GMP

In a narrow, 4-3 majority opinion written by Chief Justice Hardesty, the Nevada Supreme Court reversed the district court and held that the GMP may be implemented as approved by the State Engineer. The Court found that the Nevada Legislature had granted the State Engineer broad authority to curtail water use when implementing a GMP in a basin designated as a CMA. The Court rejected the senior rights holders' argument that the State Engineer is required to strictly comply with the doctrine of prior appropriation. Instead, the Court held that Nevada Revised Statutes (NRS) §§ 534.110(7) and 534.037 allow the State Engineer to approve a GMP that:

> (1) sets forth the necessary steps for removal of the basin's designation as a CMA … and (2) is warranted under the seven factors enumerated in NRS 534.037(2). (alterations omitted).

The Court reasoned that the Legislature may impair what it referred to as nonvested water (*i.e.* rights appropriated after 1913). As a result, the:

> Legislature may create a regulatory scheme that modified the use of water appropriated after 1913 in a manner inconsistent with the doctrine of prior appropriation.

Because these senior water rights were appropriated after 1913, the Court found that the Legislature could impair these rights.

Two separate dissenting opinions asserted the GMP impermissibly deviated from the doctrines of prior appropriation and beneficial use and constituted an impermissible taking under the Fifth Amendment.

Doctrine of Prior Appropriation

Traditionally, Nevada has followed the doctrine of prior appropriation, a rule commonly known as "first in time, first in right." Under this rule, in times of drought, senior water rights holders are generally protected from curtailment and the burden of cutbacks falls to junior rights holders. The majority held that NRS 534.110(7) unambiguously permits the State Engineer to issue a GMP that is inconsistent with the doctrine of prior appropriation. The Court observed that when issuing a GMP, the State Engineer must only consider if curtailment is warranted under the seven factors listed in NRS 534.037(2). The majority determined that reading NRS 534.110(7) and NRS 534.037 together also clearly exempts a GMP from other statutory requirements in Nevada's water law scheme. The Court found that the language in NRS 534.110(7) stating "that the State Engineer shall order curtailment *unless* a GMP has been approved for the basin" meant a GMP could, but is not required to conform to the doctrine of prior appropriation. (emphasis in original). The Court therefore found that where a GMP is in place, the State Engineer may deviate from the doctrine of prior appropriation to mandate water reduction for both senior and junior water rights holders.

Both dissenting opinions highlighted what they describe as the majority's departure from over 150 years of water law precedent in Nevada. They view NRS 534.110 and NRS 534.032 do not unambiguously exempt a GMP from existing water law structure. Rather, the dissents considered the statutes to be ambiguous at best and the legislative history and the doctrine disfavoring implied repeal would not support a position that a GMP may depart from existing water law doctrines.

The dissenting Justices further content that the GMP violates the doctrine of reasonable and beneficial use because it permits unused water to be banked and traded rather than conditioning allocations based upon actual beneficial use. The majority did not expressly address the beneficial use doctrine in the body of its opinion but did indicate in a footnote that the beneficial use arguments lack merit.

The Takings Clause

The dissents would have also found that the mandatory reductions for senior rights holders in the GMP constitutes a taking under the Fifth Amendment and the impacted senior rights holders would be entitled to just compensation. The majority declined to reach this constitutional question because it observed that the senior rights holders failed to identify whether they lost any water rights under the GMP. The majority clarified that its ruling would not preclude the senior rights holders from seeking future relief on the takings issue, setting the table for further litigation over the water rights in Diamond Valley.

Conclusion and Imsplications

It is important to note that this opinion addressed a GMP approved by the State Engineer in a basin that has been designated a CMA. However, the implications of the opinion are likely to be far-reaching and could significantly shape the manner in which Nevada water regulators will implement GMPs moving forward. While Diamond Valley is currently the only basin in Nevada designated as a CMA, Chief Justice Hardesty is correct that this "opinion will significantly affect water management in Nevada." Equally important will be the Court's inevitable decision on the takings issues raised by the senior rights holders and the dissenting justices. Whether or not the state will be required to pay just compensation for reducing these senior rights will be an important development going forward.
(Scott Cooper, Derek Hoffman)

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