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ENVIRONMENTAL NEWS

CALIFORNIA IRRIGATION DISTRICT RECEIVES STATE FUNDING FOR SOLAR PANEL COVERED CANALS PILOT PROGRAM

In an innovative effort to combine water conservation with energy generation, the Turlock Irrigation District (TID) is now set to move forward with its solar panel covered canals program, Project Nexus, with the help of $20 million awarded by the Department of Water Resources in early February. Allocated by Governor Gavin Newsom and the California Legislature through the state's 2021-2022 budget, the $20 million will go towards TID's pilot program that seeks to showcase the benefits that will come from using solar energy generation equipment to cover its water supply canals.

Project Nexus

Stemming from the study performed last year by the University of California, Merced and Santa Cruz, Project Nexus plans to utilize solar panel canopies over various sections of TID's irrigation canals, providing an upgrade for the water conveyance systems already in place and additional solar energy generation in furtherance of the state's renewable energy portfolio.

The UC study estimated that by covering all of the Central Valley's 4,000 or so miles of canals, the state could get roughly halfway to its 2030 goal for clean energy. After the study was released, Governor Newsom proposed the $20 million for a pilot program in the State's 2021-2022 budget. As the program was realized, TID and the Department of Water Resources, along with the University of California, Merced and development firm Solar AquaGrid, partnered together and were able to polish the plan into what it is now.

Project Nexus, aptly named for the water-energy nexus the plan builds upon, is designed to function as a proof of concept and will be used to further study the solar over canal system's design, its deployment, and the benefits that this duet can bring to the Central Valley and California as a whole. The Project's solar panels are only expected to generate a combined 5 megawatts, not even 1 percent of the typical peak demand of the TID's 103,000 customers, but the aim is that if the system can prove itself as a significant infrastructural upgrade then it can be used as a model for the rest of the Central Valley.

The solar panel canopies of Project Nexus are currently planned for two different test sites. One of these sites is slated to cover about 500 feet of the Main Canal near Hawkins Road, about five miles east of Hickman, where the canal is 110 feet wide. The other site is set to cover about 1.5 miles of the Ceres Main Canal and Upper Lateral 3, located about three miles west of Keyes. Here the canals here are much smaller than the Main Canal at only 20 to 25 feet wide.

TID's expectation for the Project is that the solar shading over canals will provide numerous benefits, including reduced water evaporation, water quality improvements, reduced canal maintenance, renewable electricity generation, and air quality improvements, among others. Furthermore, the Project partners anticipate adding energy storage capabilities to support the local electric grid when solar generation is suboptimal.

TID's Board President, Michael Frantz offered his view of the pilot project as follows:

> In our 135-year history, we've always pursued innovative projects that benefit TID water and power customers. . . .There will always be reasons to say 'no' to projects like this, but as the first public irrigation district in California, we aren't afraid to chart a new path with pilot projects that have potential to meet our water and energy sustainability goals.

On top of the advances to both renewable energy and water conservation TID will bring to its service area, the overall concept of solar panels over canals will likely be of significant interest statewide. Implementing this idea elsewhere along irrigation canals would have massive benefits related to efficiency, cost, air-quality, and ecological impacts. The UC study

showed that covering all of the roughly 4,000 miles of public water delivery system infrastructure in California with solar panels would have significant water, energy and cost savings for the state. Specifically, the study showed a savings of up to 63 billion gallons of water per year (about 232,000 acre-feet). The study also showed that a statewide solar canopy system would generate 13 gigawatts of solar power or about one sixth of the state's current installed capacity. As such, Project Nexus is a way to test these conceptual projections at a much smaller scale.

Moreover, putting solar panels over water rather than land can help cool the panels, making them operate more efficiently. Because solar cells become less efficient as they heat up, the water's cooling effect can increase their conversion ability. Putting solar panels over canals rather than on land can also save money and time spent on permitting processes and allows operators to double up on the land use of these canals by combining infrastructure for electrical energy generation with preexisting water conveyance systems. Additionally, by covering otherwise exposed waterways from direct sunlight, the panels can not only reduce evaporation, but can also work as a preventative measure against the growth of aquatic weeds, further reducing maintenance cost.

Conclusion and Implications

TID's Project Nexus should be a highly anticipated development over the next decade and could have a trailblazing effect on water conveyance infrastructure moving forward has the promise to be a perfect display of innovative and ambitious solutions to several of the major issues California faces today from water supply to renewable energy generation and even land use. While the true benefits of the Project will only be seen once up and running which isn't set to occur until 2024, Project Nexus is an incredible step towards the kind of utopian infrastructure Californians have waiting for. For more information, *see:* https://www.tid.org/wp-content/uploads/2022/02/TID-ProjectNexus-PressRelease_final.pdf; and https://snri.ucmerced.edu/news/2022/solar-paneled-canals-getting-test-run-san-joaquin-valley.
(Wesley A. Miliband, Kristopher T. Strouse)

CALIFORNIA MAY PROHIBIT SEABED MINING OF PRECIOUS METALS IN THE STATE'S COASTAL WATERS

Computers have come a long way over the last 50 years, and nowadays if you were to stop any American on the street odds are they would have a computer on them in one form or another. Likewise, pretty much every car you pass on your morning commute is running thanks in part to a computer. But like all finite resources, the issues in maintaining a steady supply of precious metals to craft these brilliant machines has become more and more of an issue as the years go by and manufacturers continue to search for ways to keep the metals coming. One relatively new concept in harvesting precious metals is seabed mining, but a new California bill is seeking to prevent such operations from coming to California's coastline.

Assembly Bill 1832: The California Seabed Mining Prevention Act

In early February 2022, California Assemblywoman Luz Rivas (D – San Fernando Valley) introduced Assembly Bill (AB) 1832) (Bill), dubbed the California Seabed Mining Prevention Act, a bill which would proactively prohibit mining from taking place in roughly 2,500 square miles of California waters that aren't currently protected. California's neighbors to the north, Oregon and Washington, already have laws in place that prohibit such seabed mining.

Specifically, the Bill takes issue with seabed mineral mining as inconsistent with the public trust by posing an "unacceptably high risk of damage and disruption to the marine environment of the state." The Bill also draws attention to importance of our state's marine waters, describing the rich and diverse ecosystems present along the coast and how these ecosystems are critical to the state's commercial fishing, recreational fishing, and tourism industries.

Another concern of the proposed legislation is the largely speculative impact these operations might have on marine environments. For example, the ma-

chinery required for such operations could have seriously destructive impacts on many of the surrounding communities of marine life. Furthermore, these operations could kick up large sediment clouds capable of traveling long distances and smother or otherwise negatively impact the feeding and reproduction of marine life. These sediment plumes and the noise generated by such operations could also negatively impact whales, dolphins, and other marine mammals throughout the region. On top of all the potential environmental concerns, these mining operations could also negatively impact the scenic value of the state's beaches, tide pools, and rocky reaches that Californians and tourists alike enjoy on a daily basis.

As mentioned above, the Legislatures of both Oregon and Washington have already passed legislation that prohibits seabed mining in their state waters, with Oregon's law dating back to 1991 and Washington joining just last year, so the proposed California Bill far from unprecedented. In fact, protections against seabed mining have gained popularity on a global scale with the European Parliament adopting a resolution in support of a moratorium on seabed mining in June of 2021.

Seabed Mining in California Waters

The technology and industry of seabed mining is still in its early stages, but these operations have already begun in several regions around the world, including waters off the coast of Namibia, Papua New Guinea, Japan and South Korea. While California waters have yet to host these seabed mining operations, the California Legislature can still utilize this opportunity to preemptively weigh in on the impacts of seabed mining before any negative impacts are realized.

As the Bill advocates, a prohibition on seabed mining would prevent potentially disastrous impacts on marine environments and it would likely do so without much impact on precious metal supplies. In the words of the Bill itself:

> California state waters do not represent a marketable source for battery metals, the emerging justification for extraction interest at the seafloor globally.

Even so, seabed mining operations in California could still provide meaningful supplies for other uses and would likely pop up along the coast in one of two areas: the North Coast for its caches of gold, titanium, and other precious and semiprecious metals and the South Coast for phosphorites.

The leasing authority for California's tidelands and submerged lands is generally held by the State Lands Commission, unless the California Legislature has granted such lands to local governments to manage on behalf of the state. At the state level, California is currently required to accept applications for hard mineral exploration and extraction leases along its coast, and to consider those applications on a case-by-case basis, so at this point seabed mining is at least a possibility in the state even if the industry has yet to come to California waters. The proposed Bill would nip that industry in the bud before it has the chance to take off.

Conclusion and Implications

While the aim of the bill is designed to protect the state's marine environment, it will undoubtedly face heavy opposition as it progresses as it poses a hard barrier to entry in the state for an industry permeated by future supply problems. Exacerbating the issue is the skyrocketing demand for computer electronics and electric vehicles over the last two decades and manufacturers will be hard pressed to keep pace. In order to do so, large deposits of metals and minerals will need to be sourced and a block on such a source is guaranteed to cause controversy, regardless of how well-intentioned the Bill may be. For the history and full current text of the bill, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1832.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA'S LEGISLATIVE ANALYST'S OFFICE RECOMMENDS GOVERNOR'S WATER AND DROUGHT RESPONSE PROPOSAL INCLUDE MORE FUNDING FOR GROUNDWATER RECHARGE

The Legislative Analyst's Office (LAO), the California Legislature's nonpartisan fiscal and policy advisor, recently released its analysis of Governor Newsom's proposed funding plan for drought response activities in the 2022-23 budget (Proposal). The LAO recommended changes in the priorities of the funding package, including greater emphasis on groundwater recharge and storage and immediate drought response, if necessary.

Background

In the Drought and Water Resilience Packages approved in July and September 2021, the Governor and the Legislature agreed to spend $4.6 billion over three years for water activities. Approximately $3.3 billion of that funding is focused on water supply and reliability, drinking water, and flood control, and approximately $1.2 billion will fund initiatives related to water quality and ecosystem restoration. These initiatives largely focus on long-term planning and preparedness. The Legislature's plan also included $137 million for immediate drought response in the summer and fall of 2021, but did not allocate funds for those activities in 2022-24.

The Governor's Proposal

Consistent with the 2021 Drought and Water Resilience Packages, the Governor's Proposal for 2022-23 contained $880 million for predetermined water-related initiatives. The Proposal also included an additional $750 million for projects categorized as "drought response activities." However, of that amount, only $65 million is allocated for immediate drought response. Further, $200 million is allocated to water conservation; $150 million is allocated to water storage and reliability; and, $85 million is allocated to land management and habitat enhancement. Another $250 million is unallocated until later in this water year when further information regarding the year's precipitation and snowpack is available.

The LAO's Analysis of the Proposal

The LAO analysis recognized the importance of funding water related activities including longer-term drought resilience, particularly given the severe statewide drought conditions in 2021 and variable precipitation patterns. However, the LAO noted that the Legislature has already made significant investments into long-term drought resilience and long-range planning. The LAO posited that state and local agencies are likely to be busy administering previously allocated funding, which generally represents a significant increase in their budgets, and that they may not have capacity at this time to effectively apply additional funds to those initiatives. Moreover, the LAO observed, at this point in the year it is not yet known whether drought conditions in 2022 will require more allocated funds for immediate drought response.

The LAO questioned whether the Proposal's heavily weighted funding allocation for water conservation is the most effective use of state funding. The LAO noted that California has already significantly reduced urban water use and that it may not be reasonable or cost-effective to expect further reductions. The LAO further asserted that urban water use represents a comparatively small proportion of the state's overall water use, and that the water conservation and water budget legislation enacted in 2018 is still in the early phases of implementation.

The LAO further stated that the Proposal's $30 million allocation for Sustainable Groundwater Management Act (SGMA) groundwater recharge initiatives is insufficient. The LAO pointed to the hydrological trend towards lower snowpack, prolonged dry periods, and occasional heavy, wet storms that contribute to flooding and observed that in such conditions, efforts to trap water during storms and direct it to aquifer recharge, where it will remain available during later dry spells, can offer significant benefits. Such projects can also have the benefit of reducing the flood risk of heavy, wet storms.

The Proposal calls for continued funding of the Department of Conservation's (DOC) multi-benefit land repurposing program, in the amount of $40 million. The goals of this project are to reduce groundwater use, repurpose irrigated agricultural land to less water-intensive uses, and provide wildlife habitat. However, DOC is still in the initial processes of designing and implementing the program, so information related to the type and number of projects that be eligible for funding remains unknown. The LAO observed this program must first be put into operation in order to evaluate whether additional funding will be warranted.

LAO's Recommendations to the Legislature

In light of its above analysis, the LAO recommended that the Legislature delay adopting spending legislation based upon the Proposal until this year's hydrological conditions are better known, and that it considers spending a lower amount on long-range planning given the recent, significant investments made in those areas. The LAO also recommended modifying the Proposal to focus more on groundwater recharge and storage projects and less on water conservation. The LAO also proposed that any decision regarding additional funding for the multi-benefit land repurposing program wait at least another year.

Conclusion and Implications

With respect to the 2022-2023 budget, one thing is clear: Governor Newsom, the Legislature and the Legislative Analyst's Office appear aligned in that hundreds of millions of dollars should be allocated to water related initiatives. The present focus is how those funds should be allocated, in light of progress made on conservation efforts and potentially looming drought conditions that may warrant more immediate spending. The Legislature has until June 15, 2022, to make those final decisions.
(Jaclyn Kawagoe, Derek Hoffman)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS AND NOAA ENTER INTO JOINT MEMORANDUM REGARDING ESA CONSULTATIONS FOR EXISTING STRUCTURES

On January 5, 2022, the U.S. Army Corps of Engineers' (Corps) Civil Works Program and the National Oceanic and Atmospheric Administration (NOAA) signed an inter-departmental Memorandum of Understanding (MOU) aimed at streamlining the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA) Section 7 Consultation for projects involving existing structures, such as bulkheads and piers. In particular, the MOU seeks to resolve certain legal and policy issues regarding "how the agencies evaluate the effects of projects involving existing structures on listed species and designated critical habitat," while accounting for recent revisions to the ESA's implementing regulations. (Mem. Between the Dept. of the Army (Civ. Works) and the Nat. Oceanic and Atmospheric Admin., Jan. 5, 2022 (Corps/NOAA MOU.).)

Background

ESA Section 7 requires that federal agencies ensure any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species (collectively: special status species) or result in the destruction or adverse modification of designated critical habitat of such species. (16 U.S.C. § 1536(a).) As part of this consultation process, federal agencies must identify the "environmental baseline" against which the action is evaluated. (50 C.F.R. § 402.02.) Federal agencies must then evaluate the "effects of the action" against that baseline to determine whether the proposed action may jeopardize the continued existence of a special status species or its designated habitat. (50 C.F.R. § 402.14(c)(1)(i), (c)(1)(iv), (c)(4).) Traditionally, confusion existed over what constituted an effect of the action and what could be included in the environmental baseline—in particular, for permits issued for proposed actions involving existing structures, which may include bulkheads, piers, bridge or other in-water infrastructure.

In 2018, the NOAA National Marine Fisheries Service (NMFS) West Coast Region issued guidance to assist NMFS biologists in discerning whether the future impacts of a structure were "effects of the action." Subsequently, on August 27, 2019, NMFS adopted a final rule updating Section 7 inter-departmental consultation regulations to clarify definitions and analyses pertinent to the consultation requirement. (*See*, 84 Fed.Reg. 44976 (Aug. 27, 2019).) The updated regulations simplify the definition of "effects of the action" by adopting a two-part test: an "effect of the action" is a consequence that would not occur "but for" the proposed action and that consequence is "reasonably certain to occur." (50 C.F.R. § 402.02.) A conclusion that a consequence is "reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available." (50 C.F.R. § 402.17.)

The updated consultation regulations also establish a standalone definition of "environmental baseline," as "[t]he consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify." (84 Fed.Reg 45016; 50 C.F.R. §402.2.) To this end, the preamble to the rule asserts that the extent of an agency's discretion should be used to determine whether consequences of an action are part of the environmental baseline, but the effects of the action are not limited to those over which a federal agency exerts legal authority or control. (84 Fed.Reg. 44978-79, 44990.)

The MOU

Under the Corps' Civil Works Program, the Corps plans, constructs, operates, and maintains a wide range of in-water facilities at the direction of Congress. The Corps is charged with authorizing such projects under appropriate permitting, which may include establishing a particular use for a structure without providing a date by which the project must

be decommissioned. (*See* 33 C.F.R. § 325.6(a) - (b).) Such long-term infrastructure may require consistent maintenance and operation throughout its useable life. For instance, Corps' constructed civil works projects may implicate adjustments to fish passage facilities. (Corps/NOAA MOU at p. 4.) Generally, the Corps lacks discretion to cease the maintenance and operation of civil works projects that are congressionally authorized. Thus, the Corps interprets the new environmental baseline definition, set forth above, to include the future and ongoing effects of these existing structures' existences. (Corps/NOAA MOU at p. 5.)

Where maintenance of an existing structure implicates a new discharge, new structure, or work that affects navigable waters, the project proponent must obtain appropriate authorizations and permits from the Corps. (*See e.g.*, 33 C.F.R. §§ 322.3(a), 323.3(a).) The short-term effects that result from the Corps' discretionary approvals and permitting, such as construction impacts or the manner and timing of maintenance or operations, are included in the effects of the action. (Corps/NOAA MOU at p. 5.) Similarly, the Corps may not issue a Clean Water Action Section 404 permit for the discharge of dredged or fill material, if such authorization would jeopardize the continued existence of a threatened or endangered species and it must consider the effects of its decision on listed species and critical habitat. (*Ibid*; 33 C.F.R. §§ 320.4, 325.2(b)(5); 40 C.F.R. § 230.10(b)(3).)

In the MOU, NMFS agrees to defer to the Corps' interpretation of its discretion, as set forth above, on a project-by-project basis. (Corps/NOAA MOU at p. 5.) And the Corps commits to interpreting the scope of its discretion on a case-specific basis, by analyzing:

> . . .what consequences would not occur but for the action [*i.e.*, permit issuance] and are reasonably certain to occur." (*Id.* at p. 5, 6.)

In this analysis, the Corps will review, inter alia, the:

> . . .current condition of the [existing] structure, how long it would likely exist irrespective of the action, and how much of it is being replaced, repaired, or strengthened. (*Id.* at p. 6.)

The Corps will include these consequences, which stem from maintenance on or updates to an existing structure, as an effect of the action. (*Ibid.*)

Like the analyses of civil works projects, which involve minimal Corps' discretion, certain federal agencies also lack discretion to modify or cease maintenance or operation of an existing agency structure or facility. The Corps intends to consider this lack of discretion to define the "effects of the action" during the consultation process. Similarly, NMFS will defer to that federal agency's interpretation of its discretion following a project-specific analysis.

Conclusion and Implications

In sum, the MOU provides a clearer scope of consultation for Corps-issued permits authorizing maintenance or modification of existing structures, while establishing principles of interpretation for the revised ESA consultation regulations where Corps permitting is implicated. Establishing these principles is intended to facilitate timely project implementation through streamlined consultation. According to NOAA and the Corps, the MOU is also intended to allow for the expedited development of certain programmatic biological opinions and permitting for new projects that implicate the need for Corps authorization where existing structures are involved.
(Meghan Quinn, Tiffanie A. Ellis, Darrin Gambelin)

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

•January 25, 2022—The U.S. Environmental Protection Agency (EPA) will collect a $144,924 penalty from Fuller Industries Inc. to resolve alleged violations of the federal Clean Air Act's Risk Management Plan Rule. According to EPA, as part of its manufacturing of chemical cleaning products, Fuller Industries stores isobutane and propane, subjecting the company to regulations intended to protect workers and the surrounding community from accidental releases of regulated substances. After inspecting Fuller Industries' facility in 2019, EPA determined that the company failed to comply with several key release prevention requirements, including failure to develop adequate standard operating procedures; failure to establish procedures for ensuring appropriate inspections of piping; and failure to conduct certain safety reviews. In addition, EPA documented violations of hazard assessment and recordkeeping requirements. In response to EPA's findings, the company took the necessary steps to return the facility to compliance.

•February 1, 2022—EPA entered into settlement agreements with three companies to resolve alleged violations of the federal Clean Air Act. According to EPA, the companies installed and/or sold illegal "defeat devices" in vehicle engines designed to render emissions controls inoperative. The companies are Banghart Diesel Performance of Wahoo, Nebraska, and Black Widow Diesel of Center Point, Iowa, both diesel repair shops; and Voodoo Diesel, an online retailer based in Raymore, Missouri. As part of the settlements, all three companies agreed to demolish their inventories of defeat device components and certified that they stopped selling or installing devices that disable vehicle emission controls. The companies will also pay cumulative civil penalties of $86,000.

•February 22, 2022—The United States, together with the State of Louisiana, announced that the U.S. District Court for the Western District of Louisiana has approved the consent decree resolving alleged violations of the Clean Air Act and several other federal and state environmental laws at the company's synthetic rubber manufacturing facility in Sulfur, Louisiana. Under the terms of the settlement, Firestone will install equipment controls to reduce emissions of hazardous air pollutants, fund ambient air monitoring system upgrades, and pay a total of $3.35 million in civil penalties. The consent decree requires several actions from Firestone, including meeting emissions limits, operating and maintenance requirements, equipment controls, limiting hazardous air pollutants from facility dryers, conducting inspections of heat exchangers, installing controls and monitors on covered flares, and installing flaring instrumentation and monitoring systems. After being notified of the violations but prior to the consent decree being lodged, Firestone took other compliance measures, including installing and operating a regenerative thermal oxidizer system to receive waste gases from dryers, reducing n-hexane solvent concentrations and inspecting and testing heat exchangers. As part of the consent decree, Firestone will pay a civil penalty of $2,098,678.50 to the United States and $1,251,321.50 to LDEQ for a total of $3,350,000. Firestone will also complete a Beneficial Environmental Project in Louisiana by funding ambient air monitoring system upgrades in several locations in Southwest Louisiana.

•February 22, 2022—EPA announced a settlement with Tesla Motors Inc. EPA found Clean Air Act violations at their automobile manufacturing plant in Fremont, California. This settlement aligns

with EPA's National Compliance Initiative, Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants. Under the settlement, Tesla agreed to pay a $275,000 penalty. Based on several information requests to Tesla, EPA determined that the company violated federal Clean Air Act regulations known as National Emission Standards for Hazardous Air Pollutants for Surface Coating of Automobiles and Light-Duty Trucks from October 2016 through September 2019 by: 1) Failing to develop and/or implement a work practice plan to minimize hazardous air pollutants emissions from the storage and mixing of materials used in vehicle coating operations; and 2) Failing to correctly perform required monthly emissions calculations needed to demonstrate that the facility's coating operations complied with federal hazardous air pollutant standards.

Failing to collect and keep all required records associated with the calculation of the hazardous air pollutants emission rate for Tesla's coating operations.

Civil Enforcement Actions and Settlements—Water Quality

•January 27, 2022—EPA has taken enforcement actions against Hale Kauai Limited and Halona Pacific LLC to close two illegal, pollution-causing large capacity cesspools on the islands of Kauai and Oahu. EPA will collect a total of $110,000 in fines. In 2005, EPA banned water polluting large capacity cesspools under the Safe Drinking Water Act. In August 2020, EPA requested information about wastewater disposal at the Hale Kauai property. In March 2021, EPA requested similar information at the Halona Pacific property. The agency determined that a single cesspool operating at each property met the federal criteria to qualify as an illegal large capacity cesspool by being able to serve 20 or more people in a day. The Hale Kauai property operates as Hardware Hawaii, a neighborhood hardware store located in Kauai's Koloa area. Under this enforcement action, Hale Kauai Limited will pay a $40,000 fine, backfill the illegal cesspool, and install a state-approved septic system by March 15, 2023. Under this enforcement action, Halona Pacific LLC will pay a $70,000 fine, backfill the illegal cesspool, and install a state-approved septic system by January 31, 2023.

•February 8, 2022—EPA announced a settlement with Edward Lynn Brown, owner of an almond orchard near Merced, California, for violations of the federal Clean Water Act that impacted more than two acres of rare vernal pool wetlands . The settlement requires Brown to pay $212,000 in civil penalties and restore and preserve 15 acres of wetland habitat. Inspectors determined that earth-moving activities by Brown had discharged fill material into waters that flow into the San Joaquin River. This work had been undertaken without obtaining a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers. Brown's earth-moving activities from 2016 to 2020 involved building a retention basin and access roads and planting a new almond orchard. The impacts from these activities resulted in the degradation of over two acres of vernal pool wetlands adjacent to Parkinson Creek, a tributary of the San Joaquin River that bisects the ranch.

•February 14, 2022—Cliffs Burns Harbor (Cleveland-Cliffs) has agreed to resolve alleged violations of the Clean Water Act (CWA) and other laws, for an August 2019 discharge of ammonia and cyanide-laden wastewater into the East Branch of the Little Calumet River. The discharge, which led to fish kills in the river, also caused beach closures along the Indiana Dunes National Lakeshore. Cleveland-Cliffs is undertaking substantial measures to improve its wastewater system at its steel manufacturing and finishing facility in Burns Harbor, Indiana. The complaint filed with the settlement alleges that Cleveland-Cliffs exceeded discharge pollution limits for cyanide and ammonia; failed to properly report those cyanide and ammonia releases under the Emergency Planning and Community Right-to-Know Act (EPCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and violated other Clean Water Act and permit terms. The settlement agreement, which is memorialized in a consent decree lodged in federal District Court in the Northern District of Indiana, requires Cleveland-Cliffs to pay $3 million as a civil penalty and to reimburse the EPA and the State of Indiana for response costs incurred as a result of an August 2019 discharge of wastewater containing ammonia and cyanide into a river that flows into Lake Michigan. Cleveland-Cliffs will also resolve allegations under EPCRA and CERCLA by

implementing a protocol to notify relevant state and local groups about any future spills of cyanide from its Burns Harbor facility. Under the consent decree, Cleveland-Cliffs will construct and operate a new ammonia treatment system at the blast furnaces, implement a new procedure for managing and treating once-through water during emergency situations, and follow enhanced preventive maintenance, operation and sampling requirements for the facility. These measures are designed to fix conditions at the facility that gave rise to the August 2019 spill, furthering compliance with the CWA and analogous state laws.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•January 14, 2022—Judge Greg Kays of the Western District of Missouri issued an order appointing a receiver to take control of facilities owned by defendants HPI Products Inc., St. Joe Properties LLC, and William Garvey, after the defendants repeatedly failed to comply with a 2011 settlement intended to resolve alleged longstanding violations of state and federal environmental laws. The defendants operate six pesticide manufacturing, storage, and distribution facilities in St. Joseph, Missouri. According to the government's Court filings, since at least 2007, the defendants stored thousands of containers of hazardous and non-hazardous wastes at its facilities in an overburdened community of the city. EPA and state inspectors repeatedly found rusted and/or leaking containers and observed that the facilities themselves were dilapidated with some buildings partially collapsed or in danger of collapse. The judge's order grants a June 2021 motion filed by the plaintiffs, the U.S. Department of Justice, EPA, state of Missouri, Missouri Attorney General, and Missouri Department of Natural Resources. The order temporarily freezes the defendants' assets and enables the receiver to access and take control of the defendants' buildings, assets, and limited operations for a period of 60 days. During that time, the receiver will determine if the defendants have the assets to comply with the 2011 settlement, which included requirements for cleaning up defendants' facilities.

•January 21, 2022—EPA, the Justice Department, the Department of Interior, the Department of Agriculture (USDA) and the State of Colorado announced a settlement with Sunnyside Gold Corporation and its Canadian parent company Kinross Gold Corporation resolving federal and state liability related to the Bonita Peak Mining District Superfund site, which includes the Gold King Mine and many other abandoned mines near Silverton, Colorado. If entered by the court, this agreement provides for the continued cleanup of mining-related contamination within the Upper Animas Watershed and will protect public health and the environment by improving water quality, stabilizing mine source areas, and minimizing unplanned releases. Under the agreement, Sunnyside Gold Corporation and Kinross Gold Corporation will together pay $45 million to the United States and State of Colorado and the United States will dismiss its claims against Sunnyside Gold Corporation and Kinross Gold Corporation. The United States will also contribute $45 million to the continuing cleanup at the Bonita Peak Mining District Superfund site and Sunnyside Gold Corporation and Kinross Gold Corporation will dismiss its claims against the United States. Recent interim cleanup work at the site, including efforts to stabilize mine waste and reduce contaminant releases to surface waters from source areas, have improved environmental conditions and will inform the development of future cleanup remedies for the entire site under an adaptive management framework. EPA has already spent over $75 million on cleanup work at the site and expects to continue significant work at the site in the coming years.

•February 2, 2022—Three companies operating in New England have reported publicly on their use of certain chemicals, creating a safer environment for the public, because of investigations and enforcement actions taken by the U.S. Environmental Protection Agency (EPA). The companies are in Bristol, Connecticut, Norwood, Massachusetts and Providence, Rhode Island. EPA alleged that CertainTeed LLC, in Norwood, Massachusetts, owned by the French company Saint-Gobain, failed to timely file TRI reports for zinc compounds and chromium compounds for reporting years 2017, 2018, and 2019. Following EPA's notification about the alleged violations, CertainTeed LLC filed the required information. CertainTeed LLC has agreed to pay a settlement penalty of $104,572. EPA alleged that Manchester Street, LLC, operating in Providence, R.I., failed to timely file TRI reports for ammonia for reporting years 2018 and

2019. Following EPA's notification about the alleged violations, Manchester Street, LLC filed the required information. Manchester Street, LLC has agreed to pay a settlement penalty of $11,707. Manchester Street, LLC's Rhode Island facility is located in an environmental justice area. EPA alleged that Clean Harbors of Connecticut, Inc., operating in Bristol, Conn., failed to timely file TRI reports for zinc compounds and nitrate compounds manufactured at the company's Bristol waste treatment facility in calendar years 2017, 2018, and 2019. Following EPA's notification about the alleged violations, Clean Harbors of Connecticut, Inc. filed all six of its overdue reports. Clean Harbors of Connecticut, Inc. has agreed to pay a settlement penalty of $30,688.

•February 14, 2022—EPA announced a settlement with the GB Group, Inc., for failing to comply with regulations that protect the public from exposure to lead while residential remodeling is being performed. The firm, based in Gilroy, California, will pay a $137,804 civil penalty. EPA found that during renovation work at residential properties in Oakland and San Francisco, the GB Group failed to conduct pre-renovation education by not providing the Renovate Right pamphlet to homeowners and adult occupants. The GB Group also failed to assign a certified renovator to each renovation, did not follow work-site lead-safe practices, and failed to develop and maintain required records.

•February 17, 2022—EPA has penalized SGL Composites $139,100 for repeated failures to immediately report releases of hydrogen cyanide from its facility, SGL Automotive Carbon Fibers, in Moses Lake, Washington. In a consent agreement issued in December 2021, EPA alleged the company waited 57 hours to notify the proper authorities following a release of HCN on November 25, 2017, approximately 40 minutes after a January 2018 release, and almost three hours after a release in October 2019. SGL paid $100,100 for violations of EPCRA and $39,000 for violations of CERCLA.

•February 22, 2022—EPA will collect a $130,243 penalty from Champion Brands LLC, a producer and seller of automotive lubricants, to resolve alleged violations of the federal Emergency Planning and Community Right-to-Know Act. According to EPA, the company failed to submit required annual reports listing releases of toxic chemicals at the company's facility in Clinton, Missouri. EPA's review of Champion Brands' records showed that the company manufactured, processed, or otherwise used quantities of toxic chemicals above thresholds that require the company to submit annual reports to EPA. Specifically, the company failed to timely submit reports for certain glycol ethers in 2016, 2017 and 2018; diethanolamine in 2017; and toluene in 2017.

Indictments, Sanctions, and Sentencing

•February 9, 2022—A federal grand jury in Bowling Green, Kentucky, issued an indictment charging Columbia resident Joshua M. Franklin, 32, with violating the Clean Water Act. The charge stems from a 2018 discharge of oil and brine water into Adair County creeks. Franklin was an operator at an oil lease tank battery in Columbia. His duties included ensuring that brine water, a waste product from oil production, was separated from the oil before it was delivered to customers. The indictment alleges that on Aug. 22, 2018, the oil/water separator at the site used to remove brine water was not functioning. Instead, to remove the brine water, Franklin attached a conduit to the bottom of the oil tank and placed the open end of the conduit yards from a nearby creek. Franklin opened the tank valve, allowing a mixture of brine water and oil to discharge from the tank. With the valve still open, Franklin left the site. As a result, approximately 100 barrels (about 4,000 gallons) of the oily mixture discharged into a nearby creek and eventually flowed into connecting tributaries. EPA and the Kentucky Department of Environmental Protection conducted the investigation. The maximum penalty under the Clean Water Act is three years' imprisonment and a fine of $250,000. A court may also impose a restitution payment for the costs of the cleanup.
(Andre Monette)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT VACATES U.S. FISH AND WILDLIFE SERVICE'S 2020 BIOLOGICAL OPINION FOR NATURAL GAS PIPELINE

Appalachian Voices, et. al. v. U.S. Department of the Interior, ___F.4th___, Case No. 20-2159 (4th Cir. Feb. 3, 2022).

On February 3, 2022, the United States Court of Appeals for the Fourth Circuit held that the analysis conducted by the United States Fish and Wildlife Service (FWS) in its 2020 Biological Opinion and Incidental Take Statement for the Mountain Valley Pipeline project (Project) was arbitrary and capricious. More specifically, the court concluded that the FWS failed to adequately consider the Project's impacts on two species of endangered fish, the Roanoke logperch (logperch) and the candy darter (darter) within the action area, and relied on post hoc rationalizations. The court vacated the FWS 2020 Biological Opinion and Incidental Take Statement and remanded for further proceedings. The FWS must now reassess the impacts to the two species in the Project's action area.

The Endangered Species Act

The Endangered Species Act of 1973 (ESA) requires federal agencies, in consultation with the FWS, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species. During the consultation, the FWS must prepare a Biological Opinion on whether that action, in light of the relevant environmental context, is likely to jeopardize the continued existence of the species. The ESA requires the FWS to formulate its Biological Opinion in three primary steps: First, the FWS must review all relevant information provided by the action agency or otherwise available; second, the FWS must evaluate, in part, the environmental baseline of the listed species and the cumulative effects of non-federal action; and third, the FWS must incorporate its environmental-baseline and cumulative-effects findings into its jeopardy determinations for the listed species. If the FWS determines that the agency action is not likely to jeopardize a listed species but is reasonably certain to lead to an "incidental take" of that species, it must provide the agency with an Incidental Take Statement.

The ESA does not specify a standard of review, but the Administrative Procedure Act requires a reviewing court to:

> . . .hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Review under this standard is highly deferential but requires a reviewing court to analyze whether the agency's decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment. In determining whether such an error was made, the reviewing court may look only to the agency's contemporaneous justifications for its actions and may not accept post hoc rationalizations for agency action.

The FERC and FWS Actions

The Federal Energy Regulatory Commission (FERC) authorized the construction of the Project on October 13, 2017. The Project is a 42-inch diameter, 304-mile natural gas pipeline stretching from West Virginia to Virginia. Because the Project could impact listed species, FERC consulted with the FWS for preparation of a Biological Opinion. The FWS then submitted its 2017 Biological Opinion and Incidental Take Permit, which concluded that the Project was not likely to jeopardize the listed species the FWS examined.

The 2018 Decision and the 2020 Biological Opinion

On July 27, 2018, the Fourth Circuit found the U.S. Forest Service violated the National Environ-

mental Policy Act (NEPA) when it adopted FERC's Environmental Impact Statement (EIS) for the Project. In relevant part, the Fourth Circuit held that the U.S. Forest Service arbitrarily adopted FERC's flawed sedimentation analysis when assessing impacts to the Jefferson National Forest. A few months later, a U.S. Geological Survey scientist sent comments to the FWS, stating that its analysis of the Project's impacts on the logperch in its 2017 Biological Opinion was based on the same arbitrary assumptions. The scientist also identified several analytical flaws that significantly underestimated the potential impacts of the Project on the logperch.

Around the same time, the FWS published a final rule listing the darter as endangered. The court subsequently issued an order staying the 2017 Biological Opinion.

FERC reinitiated consultation for the Project with the FWS. On September 4, 2020, the FWS issued a new Biological Opinion (2020 BiOp) and Incidental Take Statement. The FWS determined that the Project was likely to adversely affect five listed species: a shrub called the Virginia spiraea, the logperch, the darter, the Indiana bat, and the northern long-eared bat. However, the agency ultimately found that the Project was unlikely to jeopardize these five species.

The Fourth Circuit's Decision

Alleged Failure to Adequately Analyze Environmental Baseline for Endangered Species

A collection of environmental nonprofit organizations petitioned the Fourth Circuit to review the 2020 BiOp and alleged, among other things, that the FWS failed to adequately analyze the environmental context for two species of endangered fish: the logperch and the darter. Specifically, the petitioners alleged that the FWS failed to adequately evaluate the environmental baseline and the cumulative effects of non-Federal activities within the action area for the two species and failed to incorporate these findings into its jeopardy determinations. Petitioners also alleged that the FWS failed to adequately consider climate change in its analysis.

The Fourth Circuit agreed with the petitioners that the FWS failed to adequately conduct its jeopardy analysis of the two species and instead relied on post hoc rationalizations. The court stated that while the 2020 BiOp described the range-wide conditions and population-level threats for the logperch and the darter, it failed to sufficiently evaluate the environmental baseline for the two species within the Project's action area itself. Additionally, the court found that the 2020 BiOp failed to analyze several stressors in the administrative record. The FWS challenged the court's analysis stating, in relevant part, that since it incorporated the results of two population and risk-projection models—one for the logperch and one for the darter—into the 2020 BiOp, it necessarily accounted for *all* potential past and ongoing stressors in the action area. The court disagreed with the FWS and explained that the FWS did not mention its reliance on these statistical models to evaluate the environmental baseline in the administrative record and its subsequent litigation reasoning was an impermissible post hoc rationalization. Additionally, the court stated that even if the FWS relied on these models, such reliance was unpersuasive because the models did not specifically focus on the action areas and the FWS did not explain why it believed these models reflect conditions within the action area.

Alleged Failure to Analyze for Cumulative Impacts to Species

Separately, the petitioners challenged the 2020 BiOp's analysis of the cumulative effects impacting the logperch and the darter. The court agreed, noting that the FWS failed to analyze non-Federal activities previously flagged in FERC's 2017 Environmental Impact Statement and included in the administrative record, including oil and gas extraction, mining, logging, water withdrawals, agricultural activities, road improvement, urbanization, and anthropogenic discharges. The court noted that none of these future impacts were expressly addressed in the 2020 BiOp or in the documents that the FWS relied on. In response, the FWS put forth the same argument above, stating that these future impacts were implicitly evaluated when the agency incorporated the logperch and darter models' projections. The court similarly rejected this argument as a post hoc rationalization.

Alleged Failure to Analyze Impacts of Climate Change

Lastly, the petitioners challenged the 2020 BiOp's analysis of the effects of climate change as part of the

environmental-baseline analysis. The court found that the FWS never explained in the 2020 BiOp that it was relying on these models to account for the effects of climate change and its claim that it implicitly accounted for it was an impermissible post hoc rationalization.

The court found it unnecessary to analyze the FWS' no-jeopardy conclusion in step three of the 2020 BiOp analysis because it concluded that the FWS arbitrarily evaluated the Project's environmental context at step two.

Conclusion and Implications

The court vacated the FWS 2020 Biological Opinion and Incidental Take Statement and remanded for further proceedings. On remand, the court directed the FWS to reassess the impacts to the two species and to ensure that it analyzes the Project against the aggregate effects of everything that has led to the species' current status and, for non-federal activities, those things reasonably certain to affect the species in the future. Factors relied on for this analysis should be included in the administrative record and the agency must not rely on post hoc justifications. The Fourth Circuit's opinion is available online at: https://www.ca4.uscourts.gov/Opinions/202159.P.pdf.
(Nirvesh Sikand, Darrin Gambelin)

RENEWABLE FUEL PRODUCERS SUFFERING VOLATILITY IN CONGRESSIONALLY-CREATED FUEL CREDIT MARKET LACK STANDING TO CHALLENGE REISSUANCE OF EXPIRED CREDITS

Producers of Renewables United for Integrity Truth and Transparency v. U.S. Environmental Protection Agency, ___F.4th___, Case No. 19-9532 (10th Cir. Feb. 23, 2022).

Volatility and price drops in the Congressionally-created market for renewable fuel credits could not be fairly traced to the U.S. Environmental Protection Agency (EPA) having reissued expired credits as compensation to three small refineries who had been denied exemptions, and renewable fuel producers therefore lacked standing to challenge EPA's authority to reissue expire credits. So ruled the Tenth Circuit Court of Appeals in a February 2022 opinion.

Background

Under the 2005 Renewable Fuel Standard Program, adopted to amend the federal Clean Air Act and itself amended in 2007 (RFS), EPA is required:

> . . .to promulgate annual 'renewable fuel obligation[s]' specifying volumes of renewable fuels to be introduced into the country's supply of transportation fuel each year. 42 U.S.C. § 7545(o)(2)(B), (3)(B).

The RFS requires refineries, blenders and importers of fuels to meet annual "renewable fuel obligation," *i.e.*, "mandatory and annually increasing quantities of renewable fuels that must be 'introduced into commerce in the United States' each year." These parties may comply by demonstrating to EPA that every product they produce or trade in meets the applicable yearly standard. Alternatively, they can document that a certain product exceeds the minimum standard and then trade that "credit" with another party whose product falls below the standard. This compliance and trading regimen is accomplished via "Renewable Identification Numbers," or "RINs." RINs have a two-year life:

> . . .[a] RIN may be used to demonstrate compliance during the calendar year it was generated, or the following calendar year, and thereafter is considered expired and cannot be used for compliance purposes.

Separately, Congress provided an exemption from the RFS for small refineries that ran until 2011, later extended for two years, with the opportunity for individual small refineries to petition EPA for an

individual exemption extension "for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B)(i).

Three small refineries sought from EPA, and were denied, small refinery exemptions for 2014 and 2015. In 2017, those denials were reversed by the Tenth Circuit and the proceedings returned to EPA. EPA determined the exemptions were warranted. However, when considering its remedy, EPA had to contend with the fact that the refineries in the meantime had accumulated sufficient RINs to satisfy their 2014 and 2015 RFS obligations—but that in the time it had taken to litigate and consider the matter administratively, those RINs had expired. The agency "decided to 'un-retire' the RINs these refineries had used for their 2015 and 2015 compliance and return them to each refinery" as "trackable 2018 RINs." Separately, EPA granted a nationwide small refinery exemption for the 2018 compliance year.

Petitioners in this matter, Producers of Renewables, alleged that EPA fashioned the reissuance-of-RINs remedy without notice and comment and that, further, EPA lacked authority to implement the remedy.

The Tenth Circuit's Decision

Before considering the merits, the Tenth Circuit *sua sponte* examined Producers of Renewables' organizational standing. When, as here, an organization or association sues on behalf of its members, the organization has standing if:

> (a) [I]ts members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 840 (10th Cir. 2019) (*quoting Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The Court of Appeals and all parties agreed that Producers of Renewables met the second and third requirements for organizational standing—the opinion focused on whether petitioners' members would have standing to sue in their own right by establishing that:

> 1) at least one of its members:
>
> . . .has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

Injury in Fact, Causation and Redressability

These elements are shorthanded as "injury in fact, causation, and redressability." *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1224 (10th Cir. 2008).

"Setting aside" whether any member of petitioner could establish an injury in fact, the court focused on causation and redressability.

Regarding causation, Producers argued that resurrection of the expired RINs for the three small refineries "'reduced the need to purchase physical galleons of biofuel to meet the RFS' and 'reduced RIN prices.'" This resulted in its members having:

> . . .'lost sales, lost value for their product under previously entered contracts, lost customers, and, in some cases, have had to strand investments, as a result of EPA's actions and lost demand.'

In support of these contentions, petitioner submitted press reports and expert declarations relying on the same purporting to establish the volatility of the RINs market and that RINs were valued at $0.75 in April 2018 and at $0.31 in October 2018—rather than remaining stable once EPA had set the RFS standards for 2018. However, the evidence supported the proposition that EPAs "granting of a nationwide small refinery exemption" in 2018 "caused volatility in the market and devalued RINs," rather than that "falling RIN prices or market volatility was caused by the EPA's decision to unretire RINs" for the three refineries at issue. Further, petitioners failed to counter the refineries' observation that:

> . . .[s]upply and demand for transportation fuels, renewable fuel, and RINs can be influenced by a

host of factors, such as trade policies, consumer demand, and overall renewable fuel production.

Turning to redressability, the court found that:

> . . .a judgment instructing the EPA to claw back the replacement RINs issued to [the three refineries] would relieve [petitioner's] injuries. As noted above, Producers of Renewables repeatedly asserts that the EPA's decision to increasingly grant small refinery exemptions across the nation caused volatility in the market and a subsequent drop in RIN prices. For that reason, we do not see how a decision reversing the EPA's chosen remedy for three small refineries recoups lost demand for its biofuel or halts falling RIN prices.

Further, a ruling on the broader legal issue of whether or not EPA acted outside its authority when it re-issued expired RINs "would do nothing to stem the volume of small refinery exemptions granted by the EPA"—indeed, petitioners did not challenge EPA's authority to prospectively issue small refinery exemptions.

Organization standing was therefore denied.

Conclusion and Implications

The issuance of tradeable credits to achieve environmental regulatory compliance enjoyed a long vogue, although these programs do not seem to currently hold the same appeal to legislators as they did for several decades. This case illustrates the complexities involved when the regulator's continued activity *qua* regulator inevitably gives rise to arguments that prices have been improperly affected. The lack of a link between the regulatory act complained of and the market response disposed of this case on standing—would a better pled case have survived to see the meris considered? The court's opinion is accessible online at: https://ca10.washburnlaw.edu/cases/2022/02/19-9532.pdf.
(Deborah Quick)

DISTRICT COURT DENIES MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL ON THE MEANING OF 'WATERS OF THE UNITED STATES'

United States v. Mashni, ___F.Supp.4th___, Case No. 2:18-CV-2288-DCN (D. S.C. Jan. 19, 2022).

The United States District Court for the District of South Carolina recently rejected a motion to certify an interlocutory appeal that would address the meaning of "waters of the United States." (WOTUS) The District court found there was no substantial ground for difference of opinion regarding the meaning of "waters of the United States," and that allowing an interlocutory appeal would not materially advance the litigation. It concluded that the legal standard for certifying an order for interlocutory appeal was not met.

Factual and Procedural Background

On August 17, 2018, the United States of America filed a complaint pursuant to §§ 301, 309, and 404 of the Clean Water Act to obtain injunctive relief and impose civil penalties against Paul Edward Mashni and other corporate defendants. Mashni owned two multi-parcel sites on John's Island, South Carolina, near the Stono and Kiawah Rivers. According to the government, the corporate defendants were entities involved in the development projects, each of which was owned and operated by Mashni. The government alleged that in preparing the sites for construction, defendants violated the federal Clean Water Act by discharging pollutants into the Kiawah and Stono watersheds and redistributing soil to fill federally protected waters.

The Clean Water Act applies to "navigable waters," defined as "waters of the United States." Effective June 2020, the United States Army Corps of Engineers and the U.S. Environmental Protection Agency promulgated the "Navigable Waters Protection Rule" (NWPR), which provided a new, narrower regulatory definition for "waters of the United States" than the definition in the 1986 Regulations.

On July 1, 2021, the court entered an order denying defendants' motion for partial summary judgment and motion for judgment on the pleadings (July Order). In the July Order, the issue was whether the government's suit should be governed by the 1986 definition of waters of the United States —the law at the time of the government's claim—or whether the NWPR's definition—which was still in effect at the time of the July Order—should be retroactively applied. The court concluded that the language contained within the rule "manifests an undeniable directive for the NWPR to apply prospectively."

After the July Order, a separate court order, executive order, and federal rulemaking process indicated the *vacatur* of the NWPR and reissuance of the regulatory definition of "waters of the United States." On July 19, 2021, defendants filed a motion for certification of an interlocutory appeal, seeking the court's leave to appeal the July Order's findings on the meaning of "waters of the United States."

The District Court's Decision

In order for the federal District Court to certify an interlocutory order for appeal, three criteria must be met. The order at issue must present: 1) a controlling question of law, 2) over which there is a substantial ground for difference of opinion, and 3) an immediate appeal will materially advance the ultimate termination of the litigation. The court addressed each prong and concluded that none of the three prerequisites for certification of the definitional question were met and denied the motion for interlocutory appeal.

A Controlling Question of Law

To be a "controlling" question of law, the issue must be one of law the appellate court can review *de novo*. It must be controlling in the sense of resolving a significant portion of the case. It must be efficient to have the appellate court resolve the issue now, in a piecemeal fashion, rather than waiting until the other issues are ready to be reviewed.

The court conceded that the question of which definition of 'waters of the United States' is applicable in this case was a pure question of law, but resolution was not completely dispositive of the litigation. The court explained that the government alleged a violation of the CWA regardless of which WOTUS definition applied. Therefore, the first prong for certification was not met because there was no completely dispositive controlling question of law.

Substantial Ground for Difference of Opinion

The court likewise found that the second prong for certification—substantial ground for difference of opinion—was not satisfied. Courts have traditionally found a substantial ground for difference of opinion exists where circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.

Defendants asserted that there was no controlling authority in the circuit on the question of whether the 2020 rule and that this case presented an issue of first impression in the circuit. The District Court disagreed and indicated that defendants' argument ran directly contrary to caselaw indicating that the mere existence of a question of first impression is an insufficient basis for interlocutory appeal. The court added that there was no dispute among the circuits on the question of whether the NWPR definition applied, because the NWPR did not suggest retroactive application. The court concluded that defendants failed to prove there was a more novel or difficult question beyond the court's purview.

Material Advancement of the Ultimate Termination of Litigation

Finally, the court briefly considered whether an immediate appeal of the July Order would materially advance the ultimate termination of the litigation. As the court explained, interlocutory appeal would only prolong the litigation on the issue of whether new legislation may be retroactively applied and also what regulation is supposed to be retroactively applied.

Conclusion and Implications

Despite the significant uncertainty regarding the scope and meaning of the CWA jurisdictional term "waters of the United States," litigants may not be able to obtain review of an interlocutory order that relies on a pre-2015 regulatory definition of the term. The court's opinion is available online at: https://casetext.com/case/united-states-v-mashni.
(Tiffany Michou, Rebecca Andrews)

FEDERAL CLAIMS COURT DETERMINES FEDERAL GOVERNMENT IS NOT REQUIRED TO PAY LOCAL FEES TO ABATE WATER POLLUTION

City of Wilmington v. United States, ___F.Supp.4th___, Case No. 16-1619C (Fed. Cl. Jan. 26, 2022).

The Court of Federal Claims recently determined the federal government was not required to pay local charges for water pollution abatement activities under the federal Clean Water Act because the charge was not based on the proportionate contribution of the property to storm water pollution.

Factual and Procedural Background

The U.S. Army Corp of Engineers (the government) owns five properties in Wilmington, Delaware (Properties). The Clear Water Act requires federal property owners to comply with local water pollution laws, including requirements to pay reasonable service charges imposed by local governments to recover costs of storm water management. In 2007, the City of Wilmington, Delaware (City) implemented a charge on the owners of all properties within its corporate boundaries to recover the costs "related to all aspects of storm water management," including capital improvements, flooding mitigation, and watershed planning.

In 2021, the City filed the operative complaint seeking to recover service charges for the control and abatement of water pollution against the Properties for a time period from January 4, 2011 to the present. The City claimed that the government owed $2,577,686.82 in principal charges and $3,360,441.32 in interest for storm water fees assessed to the government's Properties for the approximate ten-year period.

The City offers a limited appeal process for storm water charges in which an owner can file a fee adjustment request if they believe there was an error in calculation, the assigned storm water class, the assigned tier, and the eligibility for credit. The appeal process applies only to future charges and provide no adjustment to prior billing periods. Further, an owner must pay all fees before the City will consider an appeal. The government did not pay the storm water charges or associated interest, nor did it appeal the charges assigned via the City's appeal process.

On April 20, 2021, following the close of Wilmington's case-in-chief, the court suspended trial to permit the government to file a motion for judgment on partial findings pursuant to Rule 52(c) of the Rules of the United States Court of Federal Claims.

The Court of Federal Claims' Decision

The government first argued that the City did not demonstrate the storm water charges it assessed against the government Properties were "reasonable services charges" under the Clean Water Act. A "reasonable service charge" is defined as: 1) "any reasonable nondiscriminatory fee, charge, or assessment" that is 2) "based on some fair approximation of the proportionate contribution of the property or facility to storm water pollution (in terms of quantities of pollutants, or volume or rate of storm water discharge or runoff from the property or facility)" and 3) is "used to pay or reimburse the costs associated with any storm water management program."

The court reasoned that the statutory phrase "proportionate contribution of the property or facility to storm water pollution" required some link between the charges the City sought to impose and the Properties' storm water pollution relative to total pollution. To establish charges, the City relied upon county tax records and runoff coefficients. The court, however, found that the City did not present any evidence linking the Properties to any particular amount of storm water pollution, nor did the tax record categories and runoff coefficients yield a fair approximation for computing the charge. Because the "specific physical characteristics" of the Properties were not taken into account and the coefficients may not reflect the percentage of a particular property generating runoff, the court held the government was not liable for these charges.

The court next addressed whether the government was required to follow the City's fee adjustment process. The City argued that the government could not contest the City's storm water charges because the government did not challenge the charges through the City's appeal process. The court, however, was unpersuaded. In particular, the court reasoned that the City's administrative appeal process was permissive and was not a substantive "requirement" relating

to the control or abatement of water pollution which the Clean Water Act requires federal property owners to follow. Further, the appeal process authorized only the appeal of future charges, after all assessed fees—no matter how unreasonable—have been paid. The appeal process did not provide retroactive adjustment of past charges, which were at issue in the present case.

Finally, the court considered the City's claim that the government owed interest accrued due to the government's refusal to pay the City's outstanding storm water charges. The government argued that the Clean Water Act section requiring compliance with water pollution control and abatement requirements did not waive sovereign immunity to recover interest. Here, the court declined to address the government's argument as because it raised a "thorny issue of first impression." Instead, the court reasoned that federal law only authorized the court to award interest "under a contract or an Act of Congress expressly providing for payment thereof." In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award. Because the Clean Water Act section at issue contained no such express Congressional consent, the court held that the government would not be liable for interest, even if it were entitled to the principal charges.

Conclusion and Implications

This case is a reminder that a local agency must be cautious in crafting local water pollution fees pursuant to the Clean Water Act. As seen above, the federal government will only be liable for reasonable service charges linked to the physical characteristics of the federal property. Additionally, the United States cannot be liable for interest accrued on unpaid charges. This case is also informative for local agencies in a state that imposes similar proportionality requirements for fees imposed on all payers, such as California. The court's opinion is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv1691-124-0.
(Megan Kilmer, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS HOUSING DEVELOPMENT CONTEMPLATED BY THE CITY'S SPECIFIC PLAN WAS EXEMPT FROM FURTHER CEQA REVIEW

Citizens Committee to Complete the Refuge v. City of Newark, 74 Cal.App.5th 560 (1st Dist. 2022).

The First District Court of Appeal in *Citizens Committee to Complete the Refuge v. City of Newark* has upheld the denial of an interest group's petition that alleged the City of Newark violated the California Environmental Quality Act (CEQA) by relying on a Specific Plan Environmental Impact Report (EIR) to approve a housing development without conducting subsequent environmental review. The court held that the project was exempt from further review under the California Environmental Impact Report (CEQA) pursuant to Government Code § 65457 because it was consistent with the Specific Plan and substantial evidence supported the City of Newark's (City) conclusion that no project changes, changed circumstances, or new information required further analysis.

Factual and Procedural Background

The City's 1990 General Plan allowed for preparation of a Specific Plan for low-density housing, a business park, a golf course, and other recreational facilities in Areas 3 and 4 of the City. Because the Areas are located next to the San Francisco Bay, the General Plan acknowledged that development in Area 4 would have impacts on wetlands that contained the endangered salt marsh harvest mouse.

In 2010, the City approved and certified an EIR for a Specific Plan for Areas 3 and 4. The Specific Plan authorized development of 1,260 residential units, a golf course, and related recreational activities. In Area 4, the Specific Plan allowed development of up to 316 acres across three subareas: Subarea B (residential uses), Subarea C (residential and/or recreational uses, such as the golf course), and Subarea D (only recreational uses). Citizens Committee to Complete the Refuge (CCCR) filed a CEQA action challenging the Specific Plan EIR. The trial court granted the petition and identified several deficiencies in the EIR, including the document's failure to articulate which aspects were intended to be used on a program-level versus project-level basis.

In response, the City prepared a recirculated EIR (REIR) for the Specific Plan. The REIR explained that it provided a program-level analysis of environmental impacts related to the development of housing and a golf course in Area 4. Because the exact location and final design of these developments was not yet known, the REIR analyzed environmental impacts based on the maximum development permitted. The REIR explained that once the City received a development proposal for Area 4, the City would proceed under CEQA Guidelines § 15168 by using a checklist or initial study to determine whether environmental review for the specific approvals would consist of an exemption, addendum, tiered negative declaration, or full subsequent or supplemental EIR.

The REIR found that the Specific Plan could significantly impact the harvest mouse by destroying its habitat through the filling wetlands and increased predation from cats, rats, and racoons from the placement of houses next to its habitat. The REIR also discussed impacts from climate change and sea level rise, noting that the San Francisco Bay's sea levels could rise by as much as 5.5 feet by 2100. To protect Area 4's housing units from flooding under this scenario, the REIR stated that fill would be used to raise the units to approximately 10–14.5 feet above sea level to avoid flooding. However, because sea level rise beyond 2100 could not be predicted with certainty, the REIR explained that it would be too speculative to analyze the efficacy of future potential adaptive strategies beyond that time frame, such as additional fill, levees, or sea walls.

The City certified the final REIR and readopted the Specific Plan in 2015. Later that year, the City executed a development agreement with real parties. In 2016, the City approved a subdivision map for

the development of 386 housing units in Area 3. In 2019, real parties submitted a proposed subdivision map for Area 4, which would include 469 residential lots across 96.5 acres in Subareas B and C, but no other development. The map also omitted the golf course and proposed to deed much of Subarea D to the City. The City subsequently prepared a checklist and concluded that the REIR's analysis of the Specific Plan adequately encompassed the potential impacts of the proposed subdivision map, such that no further environmental review was required.

CCCR and the Center for Biological Diversity filed a petition for writ of mandate and complaint for injunctive relief challenging the checklist. The Alameda County Superior Court denied the petition, finding that substantial evidence supported the City's conclusion that no further environmental review beyond the REIR was necessary. petitioners appealed.

The Court of Appeal's Decision

The Legal Framework and Issues on Appeal

Government Code § 65457 provides a CEQA exemption for residential housing developments that implement and are consistent with a Specific Plan for which an EIR was previously certified. However, if any of the events under Public Resources Code § 21166 occurred after the Specific Plan was adopted—*i.e.*, substantial project changes, changed circumstances requiring major revisions to the EIR, or new information not previously known—the exemption does not apply unless and until a supplemental EIR is prepared and certified.

Under this framework, the Court of Appeal confined its review to two issues raised by petitioners: 1) whether project changes, changed circumstances, or new information triggered the § 21166 exception to the § 65457 exemption; and 2) whether the City failed to adequately study certain sea level rise mitigation measures that it may adopted in the second half of the century.

The First District concluded that the project was exempt from CEQA under § 65457 because substantial evidence supported the City's determination that no project changes, changed circumstances, or new information required additional environmental analysis.

Changes to the Project

Petitioners alleged the project contemplated three specific changes that would yield new significant impacts on the harvest mouse: 1) the project now proposed residential development in all upland portions of Subareas B and C; 2) the project eliminated the golf course; and 3) the elevated areas that will be developed next to wetland habitat and now called for riprap armoring.

As to the first project change, petitioners alleged that filling and elevating all upland portions of Subareas B and C for residential development, instead of the areas' wetlands, would deprive the harvest mouse of "escape habitat" (*i.e.,* refugia) because harvest mice temporarily flee to the uplands' higher ground when wetland habitat is inundated with periodic flooding. The court rejected this claim, observing that the Specific Plan proposed development in upland areas that were used for agriculture. The REIR thus concluded that losing these upland habitats would be less than significant because their current agricultural use did not provide high quality transitional habitat for the mouse. The project also contemplated a smaller development footprint, which meant the subdivision would eliminate less upland habitat than what the REIR originally analyzed.

As to the second project change, petitioners asserted that omitting the golf course further eliminated potential escape habitat because developing the course would not change upland elevation. The appellate court likewise rejected this claim, explaining that the REIR's finding of no significant impact from upland development did not depend on the golf course to provide escape habitat. Rather, the REIR discounted the quality of area because it was regularly disced and ripped for agriculture. Moreover, by eliminating the golf course, the map also abandoned development in Subarea D, therefore, the area could provide continued refugia for the mouse.

Finally, petitioners claimed that additional review was required to analyze potential *indirect* impacts to harvest mouse habitation associated with developing adjacent to (rather than on) wetland habitat. Specifically, the project's adjacent development now contemplated armoring the western sides of the raised and filled areas with riprap. petitioners contended the use of riprap would significantly impact the harvest mouse because it would provide additional rat habi-

tat, and thus increase the severity of rat predation on the mouse. While the REIR identified different techniques the City could use to avoid settlement of fill, the court agreed that the REIR failed to mention "riprap," therefore, the project's use of it in connection with erosion was new.

As such, the court whether the project's use of riprap constituted a "*substantial*" change from the techniques previously analyzed in the REIR—*i.e.*, whether it created a new impact or increased the severity of previously identified impacts, or, whether petitioners' claim presented new information of substantial importance regarding new/different mitigation measures that would substantially reduce one or more environmental effects. (Pub. Resources Code § 21166, subd. (a); CEQA Guidelines § 15162, subd. (a)(1), (3)(D).) Here, the use of riprap did not meet this standard. Though petitioners argued that, without riprap, rats would den further from mouse habitat thereby reducing rat predation relative to the Specific Plan, petitioners failed to cite any evidence that would substantiate the need for additional environmental review. Moreover, even if the City was required to revise the project or its predator management plan to accommodate for, or require elimination of, increased rat predation, such an adjustment would not constitute a "major" revision to the REIR.

In rejecting petitioners' riprap arguments, the First District Court of Appeal acknowledged that it was allowing the City's development to proceed despite potentially increased impacts to the harvest mouse. Nevertheless, the appellate court explained that Government Code § 65457 compels this result because it set a higher threshold for review pursuant to its evident legislative intent: to increase the supply of housing. Therefore, projects, such as the City's, are permitted to proceed when they are consistent with a Specific Plan that has already undergone environmental review, regardless of the project's possible environmental impacts.

Climate Change and Sea Level Rise

Petitioners also asserted that subsequent environmental review was required because changed circumstances and new information related to the amount and rate of sea level rise emerged after the City certified the REIR. petitioners argued that the City was required to examine whether the project risked exacerbating the effects of sea level rise on the environment because of how the project interacts with wetlands. Specifically, developing all the uplands in Subareas B and C will prevent wetlands from migrating inland as sea levels rise and wetlands gradually become submerged. The project would induce "coastal squeeze" by preventing wetlands from becoming established on higher ground, in turn forcing the harvest mouse to retreat to residential areas where it will face increased predation from dogs, cats, peoples, and cars.

The court disagreed that this constituted "new" information that required subsequent analysis. While increased rates of sea level rise might expedite the effects of thwarted wetland mitigation, the overall impact remains the same: wetlands will be lost because the Specific Plan did not provide for any mitigation of thwarted wetland migration. Thus, under CEQA, it is immaterial that sea level rise may occur faster or make mitigation more difficult. Moreover, the REIR's adaptive management strategies were responses to, not mitigation measures for, sea level, and were thus not governed by the rules concerning deferred mitigation. Finally, the City's potential response to environmental conditions that will take place 50-80 years from now cannot be considered part of the current project, for doing so would be too speculative.

Conclusion and Implications

The First District Court of Appeal's opinion offers a straightforward analysis of the CEQA exemption for a residential project that implements and is consistent with a Specific Plan that had previously undergone environmental review. While the court's opinion analyzes well-established principles under Public Resources Code § 21166, it also follows a recent, but growing trend in appellate decisions regarding housing statutes: Government Code § 65457 reflects the Legislature's clear interest in increasing the supplying of housing, and that interest is important enough to justify forging the benefits of environmental review. And while that interest is arguably tempered by the looming, but expedited, rate of sea level rise, CEQA does not require agencies to mitigate for speculative or unknown impacts that are anticipated to occur in the latter half of this century. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/A162045.PDF.
(Bridget McDonald)

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