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FEATURE ARTICLE

LET'S GET PHYSICAL—WATER RIGHTS, TAKINGS, AND THE ENDANGERED SPECIES ACT

By Austin Cho

The turbulence of climate change has added a great deal of uncertainty to water rights throughout the arid West. Notwithstanding the recent flurry of winter storms, California is still held captive by one of the longest and driest droughts to occur since it became a state in 1850. The Pacific Institute's California Drought Monitor reports that while record precipitation may have eased drought conditions in some areas, 28 percent of the state is still classified as "extreme-to-exceptional." Many of the state's groundwater aquifers remain in overdraft. For the moment, Governor Brown's 2014 declaration of a drought state of emergency is still in effect. Similarly, the State Water Resources Control Board (SWRCB) has indicated it will likely maintain its drought conservation rules for urban water users. Moreover, a host of environmental protection statutes place additional pressures on government agencies to respond to the effects of climate change with conservation measures that can often further impact water users' diversion rights.

With so few assurances in place for water security, it is easy to see why water users are often at odds with environmental laws and regulations. A recent Federal Court of Claims decision, authored by Judge Marilyn Blank Horn, suggests right holders may be entitled to relief from government actions that limit the use of a water right without compensation, even when those actions are mandated by a statute like the federal Endangered Species Act (ESA). In holding that the U.S. Bureau of Reclamation's (Bureau) cessation of water deliveries should be viewed as a physical taking rather than a regulatory taking, the court in *Klamath Irrigation v. U.S.*, ___F.Supp.3d___, Case No. 1-591L (Fed. Cl. Dec. 21, 2016) brought farmers and irrigators one step closer to prevailing in a 16-year legal battle that exemplifies the challenges for diverters in the Klamath River Basin and other water-starved regions. Although critical issues remain in dispute, the decision may open the door for water right holders in California and elsewhere to challenge government actions under a physical takings theory when water is taken to meet environmental obligations.

The Endangered Species Act

The ESA was enacted in 1973 amid a national surge in the sentiment that humans, as the stewards of the natural world, are duty-bound to protect and preserve threatened wildlife species and their habitats. In no uncertain terms, the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 184 (1978). With its strong directives and broad applicability, the ESA has been praised by its supporters and decried by its critics with equal fervor.

Under the ESA, federal agencies are tasked with providing:

> …a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved … [and] a program for the conservation of such endangered species and threatened species. 16 U.S.C. § 1531(b).

Section 7(a)(2), in particular, requires all federal agencies to ensure that any actions they undertake, fund, or authorize are not likely to result in jeopardy to a listed species or in adverse modification to a listed or threatened species' critical habitat. Section 9 of the ESA prohibits any person, including govern-

ment agencies, from "taking" a species that has been listed as endangered or threatened, though in this context the term "take" means to:

> …harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

The ESA has operated to constrain the traditional exercise of water rights and limit or modify how proposed projects are carried out. Many of the Bureau's dams and reservoirs lie on waterways that serve as the habitats of fish and wildlife species listed as threatened or endangered under the ESA. Accordingly, the ESA requires the Bureau to evaluate the potential to adversely affect listed species in the course of its operational activities

The Takings Clause

The Fifth Amendment of the U.S. Constitution enshrines a core tenet of property ownership, providing in pertinent part: "…nor shall private property be taken for public use, without just compensation." The U.S. Supreme Court has maintained that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, should be borne by the public as a whole," by securing compensation in the event of otherwise necessary interference. *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

Courts engaging in takings analysis employ a two-part test: to prevail in a claim under the Takings Clause, a plaintiff must demonstrate i) a cognizable property interest that ii) the government took for public use without providing proper compensation. *See, Am. Pelagic Fishing Co. v. U.S.* 379 F.3d 1363, 1372 (Fed. Cir. 2004). Property rights do not stem from the Constitution; whether an asserted interest actually rises to the level of being property, and the nature and scope of those asserted interests, depend on some "independent source" such as state law. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030 (1992).

Establishing a Property Interest in Water

When it comes to water, the normally straightforward first prong of the takings analysis—property ownership—becomes slightly more complicated. Water rights are usufructuary—meaning one may be assigned the right to use water, but does not own the water outright. *See, Eddy v. Simpson,* 3 Cal. 249, 252 (1853) (noting the right of property in water "consists not so much of the fluid itself as the advantage of its use."). The right to the actual corpus of water is considered to be held by the people and managed in trust by the states involved. *See*, *e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 162 (1935) (holding unappropriated waters are to be held free for the use of the public). Indeed, both Oregon and California acknowledge their duties as trustees of the water resources of their citizenry. *See,* Or. Rev. Stat. § 537.110 ("[a]ll water within the state from all sources of water supply belongs to the public."); Cal. Wat. Code, § 102 ("All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."). Thus, a takings analysis with regard to water rights can involve impairments on the right of use or the right to divert.

Physical Takings vs. Regulatory Takings

Under the second prong of the analysis, a court must determine whether the government took a property interest for some public benefit; however, this is typically much easier said than done. Takings can be divided into two categories: physical takings and regulatory takings. Physical takings occur when the government takes possession of or physically occupies property. In contrast, regulatory takings occur when the government's regulation indirectly restricts a particular use to which an owner may put his property to the point that the property loses all economic benefit.

In the context of environmental protections that can require water to be remain in stream for flow or temperature management, the distinction between a physical deprivation and regulatory limitation of water can be subtle. But the application of one framework over the other makes a significant difference. This is because physical takings are considered *per se* takings and impose a "categorical duty" on the government to compensate the owner. When an owner has suffered a physical invasion of his property, courts have held that:

> …no matter how minute the intrusion, and no matter how weighty the public purpose behind

it, we have required compensation. *Lucas*, 505 U.S. at 1015.

On the other hand, regulatory takings generally require an ad hoc balancing of all facts considered in totality, utilizing the so-called *Penn Central* test, before compensation is deemed appropriate. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 323-324 (2002). The *Penn-Central* test employs a multi-factor analysis that weighs the economic impact of the regulation on private property, the extent to which the regulation interferes with distinct, investment-backed expectations, and the character of the government action. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978). Despite the oft-cited articulation of *Penn Central*'s guidelines, the overall uncertainty and lack of bright-line rules, as well as a general deference to the government's justifications for its actions, can make it extremely difficult for plaintiffs to prevail under a regulatory takings analysis. In other cases, courts have refused to apply either framework. *See, Tulare Lake Basin Water Storage District v. U.S.*, 49 Fed. Cl. 313, 318 (2001) (the Fifth Amendment applies only to direct appropriations, not the consequential injuries resulting from the government's lawful actions).

The *Klamath Irrigation v. U.S.* Decision

The Klamath Irrigation Project

The setting for the present case is representative of the difficulties the Bureau often faces in trying to achieve its goal of supplying contractors with reliable water, while at the same time protecting endangered species under the ESA, the consequences of which tend to fall on water right holders. The Klamath River Basin is a vast watershed that stretches across southern Oregon and northern California, featuring distinct geologies, topographies, and agriculture throughout its upper and lower basins. Farming and ranching occupy much of the area, with many of the region's 3,000 farms owned by sole proprietors.

The Klamath Irrigation Project (Klamath Project) is a water management project operated by the Bureau of Reclamation to supply roughly 240,000 acres of irrigable farmland across the Oregon-California border with water from the Upper Klamath Lake and Klamath River. *Klamath Irrigation*, 2016 WL 7385039, at *1. The water is delivered pursuant to the terms of perpetual repayment contracts between various contractors and the Bureau by way of a system of diversion channels, canals, and tunnels. *Id.*

The Klamath Project also supplies water to the Tule Lake and Lower Klamath National Wildlife Refuges, which serve as habitats to over 400 wildlife species; including waterfowl, bald eagles, and endangered and threatened fish that include the Lost River sucker, the shortnose sucker, and the Southern Oregon Northern California Coast biological unit of coho salmon. *Id.* at *2. The ESA requires that if the Bureau determines an endangered or threatened species may be affected by a proposed action, it must consult with federal fisheries agencies and potentially modify its actions to avoid jeopardizing the protected species. *Id.*

Procedural History

The *Klamath Irrigation* litigation began in 2001 during a severe drought in the Klamath River Basin. For much of the Klamath Project's operation, landowners "generally received as much water for irrigation as they needed," with occasional reductions to deliveries in the event of severe droughts. *Id.* However, finding that its operation of the Klamath Project in drought conditions would jeopardize the continued existence of the two suckers and coho salmon, the Bureau all but completely halted its deliveries of irrigation water to contractors until after the irrigation season so that it could instead dedicate the water to satisfying its environmental objectives and preserving the listed species. *Id.* at *4.

The termination of deliveries sparked outrage, protests, and caused farmers and irrigation districts to sue the Bureau for withholding Klamath Lake water for fish conservation efforts to the complete exclusion of the contractors' water rights. The initial complaint alleged, among other things, that the government's shut-off of water deliveries amounted to a breach of contract and a taking of the contractors' water rights without just compensation. *Id.* at *5. Although the Court of Claims granted summary judgment in favor of the government, the case was evaluated on appeal, certified to the Oregon Supreme Court, and mandated back to the Court of Claims to determine whether a taking of water rights had indeed occurred. *Id.* On the eve of litigation, both parties submitted

motions *in limine* asking the court to decide whether the proper legal framework for analyzing the plaintiffs' claim is the *per se* physical taking framework or the regulatory taking balancing test. *Id.* at *7.

Normally, a court would not address the framework question before first identifying and exploring the extent of the plaintiffs' property interests. Indeed, the Federal Circuit directed in its remand that the Court of Claims should first determine "whether plaintiffs have asserted cognizable property interests" and then "determine whether … those interests were taken and impaired." *Id.* at *4. However, due to the limited focus of the cross-motions *in limine*, the Court of Claims addressed the second question in isolation from the existing disputes over the nature and extent of the plaintiffs' water rights.

Casitas and the "Active Hand" of Government

Relying largely on the Federal Circuit's analysis in *Casitas Municipal Water District v. U.S.*, 543 F.3d 1276 (Fed. Cir. 2008), the Court of Claims found in the instant case that the Bureau's impoundment of water upriver from the Klamath Project diverters resembled a physical taking based on the "character of the government action." *Klamath Irrigation*, 2016 WL 7385039, at *8. In *Casitas*, a municipal district challenged the Bureau of Reclamation's requirement that it install a fish ladder to protect steelhead trout under the ESA and allow the use of its waters to operate the fish ladder, thereby reducing the district's available water supply. *Casitas*, 543 F.3d, at 1291-1292. The *Casitas* court rejected the government's contention that its actions merely constituted an indirect and reasonable regulation of water rights, instead finding an "active hand of the government" that physically deprived the plaintiff's water for another purpose. *Id.* at 1292.

The *Casitas* decision was itself guided by three Supreme Court cases in which a physical takings analysis was applied to deprivations of water that the government appropriated for its own use or use by a third party. *See, id.* at 1289-1290. In *International Paper Company v. U.S.*, 282 U.S. 399 (1931), the Supreme Court held that the federal government's diversion of a plaintiff's water for the purposes of power generation, even in the interest of national security during World War I, was a compensable physical taking. *Id.* at 405. As Justice Holmes concluded:

> ….when all the water that it used was withdrawn from the [plaintiff's] mill and turned elsewhere by government requisition for the production of power, it is hard to see what more the Government could do to take the use. *Id.* at 407.

In *U.S. v. Gerlach Live Stock Company,* 339 U.S. 725 (1950), riparian users along the San Joaquin River claimed the Bureau's construction of the Friant Dam for the Central Valley Project effected a physical taking by diverting waters into canals for export that would have otherwise flowed through the plaintiffs' lands downstream. *Id.* at 727-730.

Similarly, in *Dugan v. Rank,* 372 U.S. 609 (1963), San Joaquin River landowners successfully argued that the Bureau's storage behind the Friant Dam left insufficient water in the river to satisfy their riparian water rights. *Id.* at 614. The Supreme Court explained that:

> …[a] seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land. (*Id.* at 625.)

The Court explained that where the government acted with the purpose and effect of subordinating the plaintiff's rights to suit its project needs, the "result of depriving the owner of its profitable use" was essentially an "imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made." *Id.* (alteration in original) (citation omitted).

The *Casitas* court concluded that by requiring the rerouting of water that would have otherwise flowed through the plaintiff's canal, the government's action was:

> …no different than … piping the water to a different location. It is no less a physical appropriation. *Id.* at 1294.

As the Federal Circuit noted, the "appropriate reference point" to determine whether the government effected a physical diversion is not before the project was constructed, "but instead the status quo before the fish ladder was operational." *Id.* at 1292, n. 13. The factual circumstances and analysis in *Casitas* and the Supreme Court cases were determined to be binding precedent for the instant case. *Klamath Irrigation*, 2016 WL 7385039, at *9.

Application of the *Casitas* Rationale

The Court of Claims found that the decision in *Casitas* was directly applicable in light of its similarities to the present facts. The government attempted to distinguish *Casitas* on the ground that the withholding of water in Upper Klamath Lake was more akin to merely requiring water to remain in stream than a fish ladder that diverted the plaintiff's water to another location. *Id.* at *10. Judge Horn held that while the Bureau's actions:

> …may not have amounted to as obvious a physical diversion as in *Casitas* … the government's retention of water … did amount to a physical diversion of water. *Id.* (citing *Dugan*, 372 U.S. at 625).

Judge Horn further emphasized the importance of the timing of the government action as a nexus for the physical taking determination:

> By refusing to release water from Upper Klamath Lake and Klamath River, the government prevented water that would have, under the *status quo ante*, flowed into the Klamath Project canals and to the plaintiffs. *Id.* (emphasis in original).

The government also argued that other takings cases "consistently applied a regulatory takings analysis to restrictions on the use of property, including property comprising natural resources that provide benefits for the common good," citing *Penn Central* and other cases in which statutes or regulations themselves imposed restrictions on the use of property. *Id.* Rejecting the government's assertion, Judge Horn noted that in the instant case it was not the ESA that mandated the termination of water deliveries, but the Bureau acting to satisfy its ESA obligations. *Id.* Thus:

> …it was the government actions which denied plaintiffs the use of water they otherwise allege they were entitled to use. *Id.*

Accordingly, the court held that *Casitas* and the supporting Supreme Court decisions were indeed controlling and granted the plaintiffs' cross-motion *in limine* that a physical takings framework should apply. *Id.* at 13.

Additional Litigation

Although the ruling grants the *Klamath Irrigation* plaintiffs a victory in asserting a physical taking, it is far from clear whether they will ultimately prevail in their takings claim. Judge Horn's ruling emphasizes that the plaintiffs' respective rights to the use of water have not yet been determined and therefore must be considered for the case to move forward. As the Federal Circuit held in its remand to the Court of Claims, the existence of a cognizable water right "is controlled by state law, in this case, that of Oregon, or perhaps, California." *Klamath Irrigation Dist.*, 67 Fed.Cl., at 516–517.

The subsequent outcome in *Casitas* illustrates the difficulties that lie ahead for the *Klamath Irrigation* plaintiffs. On remand and employing a physical takings framework, the Court of Claims ultimately determined that *Casitas*' claim was not ripe; the district could not show it had a right to the water in question. *Casitas Municipal Water District v. U.S.* 708 F.3d 1340, 1356-1357 (Fed. Cir. 2013). In its analysis of the scope of Casitas' claimed water rights, the Court of Claims reviewed an appropriative license that allowed the district to divert up to 107,800 acre-feet per year to storage, while only permitting 28,500 acre-feet per year to be put to use. *Casitas*, 708 F.3d at 1355. The district asserted that any deprivation of its storage rights constituted a compensable taking, but the court disagreed. Whether it is considered physical or regulatory, a taking is only compensable if it infringes upon an existing right. The water rights at issue were limited by the California constitutional doctrines of reasonable and beneficial use; a water right holder has no right to appropriate if the use itself is not beneficial. Cal. Const. art. X, § 2. Because California does not recognize the mere act of storing water in itself as a beneficial use, Casitas was precluded from claiming a taking for the restriction on the ability to divert up to that storage capacity. *Id.*

The determination and scope of the *Klamath Irrigation* plaintiffs' water rights under Oregon law will rest upon the three-part test as set forth by state's Supreme Court. *Klamath Irr. Dist. v. U.S.*, 635 F.3d 505, 518 (Fed. Cir. 2011). The Oregon Supreme Court concluded in its certification of the Federal Circuit's questions that the plaintiffs have satisfied the first part by taking Klamath Project water, applying it to their land, and putting it to beneficial use. *Id.* The second part, showing that the relationship between the United States as an appropriator of the Klamath Project water and the plaintiffs as water users is similar to that of a trustee and beneficiary, was also met. *Id.* As for the third part, the Court of Claims will need to analyze the parties' perpetual water delivery contracts to determine whether the contractual agreements:

> …have clarified, redefined, or altered the foregoing beneficial relationship so as to deprive plaintiffs of cognizable property interests for purposes of their takings … claims. *Id.* at 520.

If so, the *Klamath Irrigation* plaintiffs may find that they have more in common with the *Casitas* plaintiff than they would like.

Conclusion and Implications

The *Klamath Irrigation* decision brings to light the difficulties in achieving the admirable, but often-countervailing goals of meeting water supply demands and the needs for species and habitat conservation. The decision establishes a clear rule in an otherwise murky pool by highlighting the distinction between passive in stream restrictions and active government seizure of water rights. In ruling on the cross-motions *in limine*, Judge Horn has provided a potential path for plaintiffs to avoid situations in which they might spend years of litigation establishing the scope of their water rights, only to be defeated by a deferential balancing test under the regulatory takings analysis.

It bears repeating, however, that while the ruling established a physical takings framework for the second prong of the analysis, it did not address the merits of the preliminary threshold question of the validity of the plaintiffs' underlying water rights. Because the plaintiffs' water rights derive from the delivery contracts they hold with the Bureau, a finding of compensable taking will require proof of a cognizable property interest within the contract terms or other legal bases. Even if the court does eventually find that the *Klamath Irrigation* plaintiffs are due compensation, the quantification of "just compensation" under the Takings Clause as it applies to the right to use water is far from certain. There remains a question of whether the going market rate for a particular volume of water is sufficient, or if the court's assessment should incorporate qualitative factors such as the value of a farmer's water use in the context of the functions it serves for the community as well.

Despite the lingering uncertainty, the decision makes clear that compliance with ESA requirements does not necessarily afford special consideration as to whether a physical or regulatory taking has occurred. Rather, courts will look to the nature of the government action and whether it results in a physical loss of water to determine the appropriate framework.

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EASTERN WATER NEWS

STATE SUES FEDERAL AGENCIES ALLEGING INADEQUATE ENVIRONMENTAL ASSESSMENT OF OFFSHORE FRACKING, FOLLOWING TWO OTHER LAWSUITS

On December 19, 2016, outgoing California Attorney General, Kamala Harris, along with the California Coastal Commission (jointly: Attorney General), filed suit against federal agencies in the U.S. District Court for the Central District of California, challenging the issuance of the Final Programmatic Environmental Assessment (PEA) and Finding of No Significant Impact (FONSI) for well stimulation treatments on the Southern California Outer Continental Shelf. [*People of the State of California v. U.S. Department of the Interior, et al.*, Case No. 2:16-cv-09352 (C.D. Cal. filed Dec. 19, 2016).]

Proposed Action and Other Pending Litigation

The Proposed Action is the approval of well stimulation treatments (WSTs) at 22 production platforms on 43 leases on the Southern California Outer Continental Shelf, which sits off the coast of the southern half of the state. The Department of the Interior, the Bureau of Ocean Energy Management, and the Bureau of Safety and Environmental Enforcement (jointly: the Agencies) prepared the PEA and FONSI for the Proposed Action, which analyzed the potential effects of the use of WSTs and concluded that the Proposed Action would not cause any significant impacts:

> It is our determination that implementing the Proposed Action does not constitute a major federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969. FONSI, at 8.

The preparation of the PEA itself was the result of an earlier lawsuit filed by the Center for Biological Diversity (CBD) against the agencies. *See, CBD v. Bureau of Ocean Energy Management, et al.*, Case No. 2:15-CV-01189 (C.D. Cal., *filed* Feb. 19, 2015). In that case, CBD's complaint asserted that the Agencies issued permits for drilling off the coast of California without adequate environmental review. The settlement agreement in that case resulted in a temporary moratorium on permits for hydraulic fracturing and acid well stimulation from offshore oil platforms in southern California, until the Agencies undertook the National Environmental Policy Act (NEPA) analysis that is now being challenged in the current lawsuits.

Prior to the Attorney General's December 2016 complaint (complaint), two environmental organizations filed similar lawsuits, in November 2016. On November 11, 2016, the Environmental Defense Center (EDC) and Santa Barbara Channelkeeper jointly filed suit against several federal agencies including the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement in the U.S. District Court for the Central District of California. The lawsuit alleges violations of NEPA, the federal Endangered Species Act (ESA), and the Administrative Procedure Act (APA). At the heart of their lawsuit, EDC and Santa Barbara Channelkeeper (jointly: EDC) claim that the Agencies violated NEPA when they issued the FONSI decision approving the Agencies' PEA. Shortly thereafter, CBD followed EDC with their-own lawsuit on November 15, 2016. CBD's complaint asserts similar causes of action including violations of NEPA and the ESA, focusing primarily on the threat of pollution to marine wildlife.

The Attorney General's Lawsuit

The Attorney General's complaint asserts that the Agencies violated NEPA and the Coastal Zone Management Act (CZMA) because they issued the FONSI for the Proposed Action without adequate environmental review. The Agencies "improperly concluded that allowing such activities would result in no significant impacts, in violation of the requirements of [NEPA]," despite the substantial record

showing the potential for significant environmental effects. Complaint, at 3. Further, the Attorney General alleges that the Agencies violated the CZMA by failing to determine whether the Proposed Action is consistent to the "maximum extent practicable" with the enforceable policies in California's coastal zone management program.

Similar to the previous lawsuits, the Attorney General's complaint asserts that the Agencies must prepare an Environmental Impact Statement (EIS) in order to comply with NEPA. According to the complaint, the Agencies have failed to take a "hard look" at the environmental impacts of the Proposed Action. "[T]here are substantial questions, if not certainties, as to whether the proposed action may have significant environmental impacts," and, therefore, preparation of an EIS is necessary. Complaint, at 19-20. The complaint also asserts that issuance of a FONSI was an arbitrary and capricious action and an abuse of discretion, in violation of the APA.

The complaint emphasizes that the Proposed Action touches sensitive marine habitats, including the Santa Barbara Channel, the Santa Maria Basin, and offshore Long Beach. Notably, the complaint references the 1969 Santa Barbara oil spill and notes the impact of that spill on marine species including dolphins, elephant seals, and sea lions. In addition, the complaint quotes a letter sent by Governor Jerry Brown to then President Obama on December 13, 2016, urging the President:

> …to permanently withdraw federal waters off the coast of California from new offshore oil and gas leasing and guarantee that future oil and gas drilling in these waters is prohibited.

The Attorney General's complaint seeks an injunction prohibiting the Agencies from issuing approvals for offshore well stimulation treatments until the Agencies comply with NEPA, the CZMA, and the APA by preparing an EIS for the Proposed Action and submitting a consistency determination to the California Coastal Commission for review.

Conclusion and Implications

This lawsuit may have more "teeth" than the pending suits filed by the Environmental Defense Center and CBD because of the CZMA allegations. The NEPA and APA claims have been litigated and addressed (to an extent) by previous lawsuits and subsequent settlement agreements. CBD raised the CZMA allegation in a complaint in 2015, but the settlement agreement in that case did not resolve the CZMA violations.

The pending EDC lawsuit is: *Environmental Defense Center and Santa Barbara Channelkeeper v. Bureau of Ocean Energy Management et al.*, Case No. 2:16-CV-8418 (C.D. Cal. Nov. 11, 2016).

The pending CBD lawsuit is: *Center for Biological Diversity and the Wishtoyo Foundation v. Bureau of Ocean Energy Management et al.*, Case No. 2:16-CV-8473 (C.D. Cal. Nov. 15, 2016).

(Shannon Morrissey)

NEWS FROM THE WEST

This month in News from the West we cover: 1) the U.S. Bureau and California's filing of final environmental documents in support of the very controversial tunnels project, more officially known as WaterFix; and 2) a ruling from the Colorado Supreme Court addressing transmountain water diversions and the use of historical data in change applications.

U.S. Bureau of Reclamation and California Department of Water Resources Release Final Environmental Documents for the California WaterFix Project

On December 22, 2016, the U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) issued a joint news release announcing the availability of the Final Environmental Impact Report and Environmental Impact Statement for the Bay Delta Conservation Plan/California WaterFix project (EIR/EIS). The EIR/EIS analyzes the environmental impacts that could arise from a project to modernize California's water infrastructure, and analyzes 18 project alternatives. The EIR/EIS concludes that the alternative known as "California WaterFix," also known as Alternative 4A, is the best option for increasing water supply reliability and addressing current California Delta ecosystem concerns while seeking to minimize environmental impacts.

The release of the EIR/EIS marks a significant step in a water infrastructure planning process that began more than a decade ago, to find the best solution for both protecting the Delta's ecosystem and providing a vital water supply for California.

The California WaterFix (WaterFix) planning process began in 2006 when updates to the State Water Project (SWP) and coordinated operations of the federal Central Valley Project (CVP) were initially proposed as the Bay Delta Conservation Plan (BDCP). The BDCP was a plan to update the SWP by adding new points of diversion in the north Sacramento-San Joaquin Delta and by providing for large-scale species conservation through a 50-year Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP).

In December 2013, DWR and the Bureau, along with U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), released the BDCP Draft Environmental Impact Report/Draft Environmental Impact Statement. In July of 2015, DWR and the Bureau issued a Partially Recirculated Draft EIR/Supplemental Draft EIS that included for consideration three additional alternatives that would update the SWP without the large-scale conservation efforts in an HCP/NCCP. DWR and the Bureau proposed that one of these non-HCP alternatives, known as California WaterFix (Alternative 4A), be identified as the preferred alternative in replacement of the BDCP alternative.

WaterFix is the state's plan to upgrade water-related infrastructure in the Delta. The Delta is known as the central hub of the state's water conveyance system. The state's two biggest water projects, the SWP and the federal CVP, deliver water that is diverted at the south Delta after passing through the Delta. The Delta also provides critical habitat for several endangered or threatened species of native fish. Water project operations in the south Delta are increasingly curtailed in an effort to protect listed fish species. WaterFix aims to reduce that conflict between water supply operations and efforts to protect fish and wildlife, by increasing the operational flexibility of the SWP and CVP.

The WaterFix project analyzed in the EIR/EIS consists of new water conveyance facilities with three new diversion points in the north Delta, tunnel conveyance and ancillary facilities, operational elements, and habitat restoration and other environmental commitments to mitigate construction- and operation-related impacts of the new conveyance facilities. The new tunnel conveyance would be two 35-mile-long tunnels to transport water from the new intakes in the north Delta to the existing CVP and SWP pumping plants in the south Delta. The new conveyance, in conjunction with the existing south Delta infrastructure, is designed to allow "dual conveyance" operations in which water could be diverted from either the north Delta or the south Delta, or both, depending on the needs of aquatic species and water quality conditions. According to the available fact sheet regarding the WaterFix alternative, long-term average Delta exports under WaterFix are expected to increase by 1 million acre-feet of water as compared to likely future exports without WaterFix, which is equivalent to enough water to supply 2.5 million households with water for one year. The fact sheet is available at http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF_FS_FinalEIREIS.pdf.

The EIR/EIS was prepared to satisfy the Bureau's and DWR's respective obligations to satisfy the environmental review requirements of the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The EIR/EIS was prepared jointly by DWR and the Bureau. The final EIR/EIS was refined from the earlier draft versions released in 2013 and 2015, after more than 300 days of public review and 600 public meetings throughout the state. The EIR/EIS also includes responses to and revisions based on more than 30,000 public comments received on the earlier versions of the EIR/EIS. The EIR/EIS is available at http://baydeltaconservationplan.com/FinalEIREIS.aspx.

The EIR/EIS identifies the objectives and purposes that DWR and the Bureau are seeking to achieve through the WaterFix project. The EIR/EIS states that:

> DWR's fundamental purpose in proposing the proposed project is to make physical and operational improvements to the SWP system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and CVP south of the Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations.

The EIR/EIS identifies the federal need for the WaterFix project as follows:

> Improvements to the water conveyance system are needed to respond to increased demands upon the system and risks to water supply reliability, water quality, and the aquatic ecosystem. CVP operations are currently constrained in the south Delta. The Bureau can increase its operational flexibility to provide water supply and minimize and avoid adverse effects on listed species by coordinating CVP operation with the proposed new SWP facilities and conveyance.

The EIR/EIS describes the alternatives, discusses potential environmental impacts of those alternatives, and identifies mitigation measures that would help avoid or minimize impacts. The final EIR/EIS builds upon the prior draft versions of the EIR/EIS and contains numerous revisions and additions as compared to the prior versions. Substantial changes made in the final EIR/EIS include, but are not limited to: 1) updates to the hydrologic modeling to include conditions under the WaterFix alternative, Alternative 4A; 2) revisions and updates to Chapter 8 regarding Water Quality; 3) revisions to Chapter 11, regarding Fish and Aquatic Resources, to incorporate the latest engineering assumptions and modeling; as well as 4) updates and revisions to numerous other chapters and appendices. In addition, the final EIR/EIS includes several new supplemental appendices, such as Appendix 3B, which provides information regarding the environmental commitments, avoidance and minimization measures, and conservation measures.

The release of the final EIR/EIS for the WaterFix project is just one step in a multi-step process that involves numerous agencies and several concurrent administrative processes.

To complete the CEQA process, DWR must certify the EIR as adequate in compliance with CEQA. DWR will conduct a public meeting regarding the certification of the EIR/EIS and consideration of project approval. To complete the NEPA process, the Bureau must issue a Record of Decision. The Record of Decision will also include consideration of a final biological opinion issued under § 7 of the federal Endangered Species Act (ESA).

The release of the final EIR/EIS represents progress in a decade-plus process to develop and analyze a project that can improve water infrastructure in the face of increasing conflict between regulatory mandates and water supply needs. At its core, the WaterFix project is a project regarding the future of water in California, and therefore, it has implications for every Californian that has an interest in or a reliance on the water conveyed through the Delta. As the lengthy administrative process for WaterFix and all of its necessary approvals meanders onward, there remains significant uncertainty regarding what California's water future will look like.
(Elizabeth Leeper, Daniel O'Hanlon)

Colorado Supreme Court Issues Ruling Regarding Transmountain Diversions and Historical Use Analysis in Water Right Change Applications

Grand Valley Water Users Ass'n v. Busk-Ivanhoe, Inc., 2016 CO 75, ___P.3d___ (Colo. 2016).

On December 5, 2016, the Colorado Supreme Court reversed the Division 2 Water Court's decision approving Busk-Ivanhoe, Inc.'s (Busk-Ivanhoe) application for a change of place and type of use of its transmountain water rights. In reversing and remanding the decision, the Supreme Court held that the Water Court erred in three ways: 1) by finding that storage of the water rights on Colorado's eastern slope prior to their decreed use was lawful; 2) by including volumes of exported water paid as rental fees for storage in its historic consumptive use quantification; and 3) by finding it was required to exclude twenty-two years of non-decreed municipal use it the representative study period.

Dating back to 1880, transmountain diversions have long been a source of controversy and heated debate in Colorado. Transmountain diversions convey water from the western slope—the western side of the Continental Divide—to Colorado's Front Range—the eastern slope. Supporters of these diversions see them as necessary given the fact that the western slope contains seventy percent of Colorado's surface water, but only eleven percent of the population while the eastern slope contains the rest of Colorado's population, the majority of its economy, and consumes seventy percent of the state's water. This recent Colorado Supreme Court decision is the latest chapter in this saga.

In 1928, the Garfield County District Court decreed the Busk-Ivanhoe System for supplemental irrigation of 80,000 acres in the Arkansas River Basin to A.E. and L.G. Carlton in Civil Action No. 2621 (2621 Decree). The Busk-Ivanhoe System is a transmountain diversion, which diverts water from the Colorado River Basin outside of Aspen through the Ivanhoe Tunnel to the Arkansas River Basin on the eastern slope of Colorado. The 2621 Decree confirmed absolute and conditional appropriations to divert water from the tributaries of the Roaring Fork River and included a priority for storage of 1,200 acre-feet of the diverted water in the Ivanhoe Reservoir on the western slope. The decree, however, made no reference to storage on the eastern slope after its transport and prior to its use. Nevertheless, the water diverted under the decree has been stored on the eastern slope since the 1920s. The Carltons did not own a reservoir on the Arkansas River, but rented storage space in the Sugarloaf Reservoir and paid a storage fee in volumes of water.

In 1950, the Carltons sold the Busk-Ivanhoe water rights to the High Line Canal Company (the Company). The Company continued to store the water in the Sugarloaf Reservoir. Later, as a part of the Fryingpan-Arkansas Project, the Sugarloaf Reservoir was inundated and replaced by the Turquoise Reservoir, and the company contracted with the Bureau of Reclamation to store the imported water in the new reservoir and continued to pay for storage in volumes of water. In 1972, the Company sold an undivided one-half interest in the water rights to the Board of Water Works of Pueblo, Colorado. In 1984, Busk-Ivanhoe was incorporated and acquired the remaining one-half interest in the water rights. Between 1986 and 2001, the City of Aurora, Colorado purchased all of the capital stock of Busk-Ivanhoe. In 1987, at Aurora's direction, Busk-Ivanhoe began putting its interest in the water rights to undecreed municipal uses. This use continued until 2009 and with the exception of one delivery during this twenty-two year period, Busk-Ivanhoe did not apply the water to its decreed use for supplemental irrigation.

On December 30, 2009, Busk-Ivanhoe filed an Application for Change of Water Rights seeking to both change in the place of use and type of use of the water rights in both the Division 1 and Division 5 Water Courts to allow for use of the Busk-Ivanhoe water rights within Aurora's municipal system.

In its May 2014 Order, the Water Court approved Busk-Ivanhoe's application. In doing so, the Water Court concluded that, despite being silent on the issue, the 2621 Decree included a component of lawful storage in the Arkansas River Basin. The court reasoned that the decree's reference to "supplemental supply" was evidence of an intent to use the water for supplemental irrigation when native flows of the Arkansas River Basin were insufficient and therefore storage was necessary. In finding this intent, the Water Court also relied upon extrinsic evidence that was not before the court in the 2621 Decree proceedings including a map and statement filed with the State Engineer's Office describing a proposed reservoir on the eastern slope. Additionally, the Water Court reasoned that the legal distinction between direct flow and storage rights does not apply to transmountain water and that transmountain water may be stored even absent specific authorization. The Water Court also included the volumes of water used to pay for storage in the historical consumptive use quantification finding that the fees paid in volumes of water were akin to evaporative or transit losses. Lastly, the court quantified the historic consumptive use of the water rights using a study period from 1928 through 1986 but excluded from the study period twenty-two years of undecreed municipal and domestic use reasoning that undecreed uses must be excluded. Based upon these findings, the Division 2 Water Court quantified the Busk-Ivanhoe water rights as 2,416 acre-feet per year and approved the change application in its August 2014 Judgment and Decree. The opposers then appealed.

The Colorado Supreme Court reserved the Division 2 Water Court's decision. In so doing, the Court examined the Water Court's quantification of the Busk-Ivanhoe water rights through the lens of two issues: 1) whether storing the Busk-Ivanhoe water rights on the eastern slope prior to use was lawful, and 2) whether the Water Court erred in excluding the twenty-two years of undecreed use in calculating historical use.

First, the Court considered whether storage of the water rights on the eastern slope prior to use was lawful. In reversing the Water Court's decision, the Supreme Court reasoned that the right to store water is not an automatic incident of a direct flow right. Although transmountain water is treated differently than native water in some respects, the right to reuse

imported water is not equivalent to the right to store the imported water unless authorized. The Supreme Court found that nothing in the 2621 Decree, the underlying pleadings including the Carltons' petition and statement of claim, or the extrinsic evidence referenced by the Water Court gave any indication or authorization of a storage right on the eastern slope. On remand, the Court held that the Water Court must be re-quantify and adjust the historical use calculation to the extent that the undecreed storage of the water rights caused an unlawful expansion of use. Because the storage of transmountain water on the eastern slope was unlawful, the Court further found that the Water Court erred in including the volumes of water paid for storage in the historical consumptive use calculation.

Second, the Supreme Court examined the Water Court's treatment of the periods of undecreed use of the water rights in the historical consumptive use calculation. The Supreme Court found that the undecreed use did not represent an expanded use of the decreed right for which an appropriator may not receive historic use credit. Instead, the water was used for undecreed municipal uses in lieu of the decreed purpose. Because of this the 22 years represent non-use of the decreed rights. The Court explained that unjustified non-use of a decreed right should be considered when quantifying historical use for the purposes of a change application and the Water Court should have considered including any years of unjustified non-use of the decreed rights as "zero years." On remand, the Court held that the Water Court must determine whether the years of undecreed use were unjustified and if so it should consider those years as "zero years" for purposes of the consumptive use analysis.

This recent Colorado Supreme Court decision is important in terms of both transmountain diversions and change of water right applications in general. In particular, this case shows the potential issues that may come about when an appropriator uses water rights for undecreed purposes and the consequences that may follow in a subsequent change of water right application. In the end, time will tell if and by how large of a margin the Busk-Ivanhoe's water rights are reduced due to the periods of undecreed uses, but this case may well serve as a warning and reminder of possible repercussions to others in similar circumstances. The Court's decision is accessible online at: http://www.coloradoriverdistrict.org/wp-content/uploads/2016/12/supreme-court-opinion-case-no--14sa303-1.pdf
(Chris Stork, Paul Noto)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

• On December 29, 2017, EPA announced a proposed agreement to amend a 2014 Clean Water Act Consent Decree between the City of West Haven, Connecticut, the U.S. Environmental Protection Agency (EPA) and the State of Connecticut. Under the 2014 Consent Decree, West Haven agreed to make changes to reduce illegal discharges from sanitary sewer overflows. After the Consent Decree was entered, EPA became aware there were also several problems related to the way the city was implementing its municipal separate storm sewer system (MS4) program. The amendments to the Consent Decree would require West Haven to comply with specific provisions of its MS4 Permit by specific dates.

• On December 20, 2016, EPA announced a settlement with Mr. Robert Paul Rice Jr, of Idaho Falls, Idaho, regarding the unauthorized discharge of pollutants to the South Fork Clearwater River. The discharges were a result of Mr. Rice's operation of a suction dredge in the South Fork of the Clearwater River on July 22, 2015. Mr. Rice agreed to pay a $3,600 penalty as part of the settlement. At the time the violation occurred, suction dredge mining in the South Fork of the Clearwater River was prohibited to protect critical habitat for steelhead and bull trout under the Endangered Species Act. In addition, the South Fork of the Clearwater River is impaired under Section 303(d) of the Clean Water Act for sediment. In July, 2015, Mr. Rice operated in the South Fork despite the prohibition in effect at the time. Since then, the US Forest Service completed an environmental assessment to evaluate dredging impacts on the river. As a result of that evaluation, a controlled number of National Pollutant Discharge Elimination System (NPDES) general permit holders may now access the South Fork of the Clearwater for dredging. Miners wishing to operate their dredges in the South Fork of the Clearwater must first submit a "plan of operations" to the U.S. Forest Service prior to the dredge season.

• On December 22, 2016, EPA issued a compliance order to the Navajo Tribal Utility Authority (NTUA) to address an ongoing sewage spill from pipes leading to the Shiprock Wastewater Treatment Facility. The sewage spill is discharging around, under, and directly into the San Juan River. On December 6, NTUA notified EPA of a pipe breach at the Shiprock Lift Station, part of the Shiprock Wastewater Treatment facility, that caused a continuous raw sewage spill. The lift station usually handles about 200,000 gallons of sewage daily. The EPA order required NTUA to complete the pipe replacement by December 31, sample and monitor the river water for evidence of sewage contamination, prohibit public access, notify the public of the spill and keep the EPA informed of all activities pertaining to the spill.

• On December 22, 2016, EPA announced a settlement with the Puerto Rico Land Authority that resolves alleged violations of the Clean Water Act. In 2013 and 2014, the Land Authority filled and cleared land and vegetation in wetlands in Guánica, Puerto Rico, causing sediment to wash into adjacent waters, which include the Lajas Channel and the Rio Loco, damaging the wetlands and water quality. Both the Lajas Channel and the Rio Loco flow into Guánica Bay. Pursuant ot the settlement, the Land Authority will pay a $87,000 penalty.

• On January 13, 2017, EPA and DOJ announced a settlement with the Potomac Electric Power Company (Pepco) for alleged violations of Pepco's Clean

Water Act permit at its service center located in Anacostia. Under the settlement, Pepco will implement a number of measures to reduce metals in stormwater entering into its drainage system and will install an in-pipe treatment system to further treat the stormwater, which discharges into the Anacostia River. Pepco also will pay a civil penalty of $1.6 million. Pepco also agreed to perform a mitigation project to eliminate stormwater discharges from another outfall at the facility, and will pay an additional stipulated penalty of $500,000 if it fails to put the project into operation. The United States filed its complaint in October, 2015, in the US District Court for the District of Columbia and alleged violations of limits in the EPA Clean Water Act Permit for metals, including copper, zinc, iron and nickel, and total suspended solids (TSS). The consent decree filed with the court on January 13 requires Pepco to put into place Best Management Practices or BMPs to prevent the metals and other pollutants from entering into Pepco's stormwater drainage system, including booms and filters at each drain leading into the system, as well as enhanced inspections and other measures. In addition, Pepco will install in-pipe treatment systems in several areas to remove the metals from the stormwater in the drainage system until the permit limits are met. Pepco also will implement a mitigation project using vegetation and a holding pond to capture and treat stormwater that currently drains from the Benning Street facility into the Anacostia River.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• On December 20, 2016, EPA announced that it had assessed a $25,000 fine against Weston Solutions, Inc. for violating an order issued in 2010, when Weston committed to clean up the former Chem-Wood wood treatment facility located in the Kapolei area of Oahu. Between 1975 and 1988, Chem-Wood pressure-treated wood using hazardous chemicals containing chromium, arsenic and mineral spirits, some of which were released to the soil and impacted groundwater. EPA first took an enforcement action in 1988 and has overseen site investigations and cleanup activities. Weston, a Pennsylvania-based environmental cleanup firm, has sold the property since 2010, but retains responsibility for carrying out the cleanup requirements. This includes maintaining the asphalt-concrete cap that provides a protective barrier from contaminated soil on the site. Weston violated the order when it failed to notify and obtain approval from EPA or the Hawaii Department of Health after learning the current property owner, Goodfellow Brothers, Inc., had partially removed the cap. The facility's cleanup plan requires EPA approval prior to altering the asphalt-concrete cap. According to EPA, Weston was aware that Goodfellow began work in December 2015 to install a concrete pad to support a new above-ground fuel tank, but failed to notify EPA or seek its approval until March 2016.

• On December 23, 2016, EPA, DOJ and the Rhode Island Department of Environmental Protection (RIDEM) announced a settlement regarding cleanup at the Peterson/Puritan, Inc. Superfund Site in Cumberland and Lincoln, R.I. The agreement, lodged in federal court in Providence, resolves federal and state liability claims against nearly 100 potentially responsible parties for the cleanup of the site. Under the settlement, 22 of the settling defendants will be responsible for implementation of a remedy selected by EPA in 2015. These parties will also pay for the oversight costs incurred by EPA and RIDEM. The remaining settling parties are required to make payments to a trust to be used to help pay for performance of the site cleanup. The area being cleaned, known as Operable Unit Two, is located adjacent to the Blackstone River and contains many parcels within the Blackstone River floodplain. The total cost for the selected remedy is estimated to be $40.3 million.

• On January 12, 2017, EPA announced a settlement with Innophos Inc, regarding the disposal of hazardous waste at an unpermitted facility. Innophos has agreed to cease sending hazardous waste from the company's facility in Geismar, Louisiana, to an adjacent facility that was not permitted for hazardous waste treatment, storage and disposal. The agreement resolves alleged violations of the Resource Conservation and Recovery Act (RCRA). Innophos will also pay a $1,398,000 civil penalty. Innophos manufactures purified phosphoric acid from merchant-grade acid at its facility in Geismar, Louisiana. Innophos sent hazardous waste streams to a neighboring phosphoric acid manufacturing facility that produces acid from phosphate ore. One waste stream, called RP pondwater, consisted of an acidic stream contaminat-

ed with arsenic, cadmium and chromium. The other waste stream, called raffinate, consisted of a concentrated acid stream contaminated with cadmium and chromium.

Indictments Convictions and Sentencing

• On January 12, 2017, Two Greek shipping companies were sentenced to pay corporate penalties totaling $2.7 million after being convicted for obstructing justice, violating the Act to Prevent Pollution from Ships (APPS), tampering with witnesses and conspiracy. Each company was ordered to pay part of its penalty to Gray's Reef National Marine Sanctuary in recognition of the threat posed by illegal discharges of oily waste to the marine environment. The case stems from an inspection of the M/V Ocean Hope, a large cargo ship, conducted by the U.S. Coast Guard at the Port of Wilmington, North Carolina in July 2015. During that inspection, senior engineers for the companies tried to hide that the vessel had been dumping oily wastes into the ocean for months. Oceanfleet Shipping Limited, the vessel's operator, was sentenced to pay a $1,350,000 fine and make a $450,000 community service payment to Gray's Reef. Oceanic Illsabe Limited, the vessel's corporate owner, was sentenced to pay a $675,000 fine and make a $225,000 community service payment to the reef. Each company was placed on a five-year term of probation and barred from sending ships to United States ports until its financial penalty has been satisfied. (Andre Monette)

JUDICIAL DEVELOPMENTS

DISTRICT COURT FINDS EPA'S APPROVAL OF RHODE ISLAND'S CLEAN WATER ACT TMDL REPORTS DID NOT CONSTITUTE A DETERMINATION OF STORMWATER DISCHARGES

Conservation Law Foundation v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 15-165-ML (D. RI Dec. 13, 2016).

Conservation Law Foundation (plaintiff) sued the U.S. Environmental Protection Agency (EPA) alleging that it failed to carry out its non-discretionary duties under the federal Clean Water Act (CWA). Specifically, plaintiff alleged EPA failed to notify dischargers that contributed to water quality violation of their obligation to obtain discharge permits under the state's National Pollutant Discharge Elimination System's (NPDES) program, and to provide such dischargers with permit applications. Petitioner alleged that EPA's approval of the state's Total Maximum Daily Load (TMDL) for certain Rhode Island waterbodies constituted a determination by EPA that stormwater discharges from certain commercial and industrial facilities contributed to violations of water quality standards as to bacterial and phosphorus concentrations in the water bodies, and that stormwater controls were necessary from these facilities. EPA filed a motion to dismiss for lack of jurisdiction and for failure to state a complaint alleging that, in approving the TMDLs at issue, it did not make a determination that NPDES permits were required, and that there was not legal requirement for it to notify dischargers of permit requirements or to send them permit applications. The U.S. District Court granted EPA's motion holding that in approving the TMDL reports, EPA made no determination of any stormwater discharges contributing to water quality violations—its review was limited to ascertaining that and how the respective TMDL reports met the statutory and regulatory requirements of TMDLs in accordance with CWA § 303(d).

Background

The Clean Water Act requires each state to develop TMDLs for all waterbodies identified on their § 303(d) list of impaired waters, according to their priority ranking on that list. A TMDL is a calculation of the maximum amount of a pollutant allowed to enter a waterbody so that the waterbody will meet and continue to meet water quality standards for that particular pollutant. A TMDL determines a pollutant reduction target and allocates load reductions necessary to the sources of the pollutant.

States develop TMDLs and then submit them to EPA for approval. Under the CWA, EPA reviews and either approves or disapproves the TMDL. If EPA disapproves a state TMDL, EPA must develop a replacement TMDL.

The CWA also prohibits the discharge of any pollutant from a point source unless authorized by an NPDES permit. NPDES permits:

> …bring both state ambient water quality standards and technology-based effluent limitations to bear on individual discharges of pollution… and tailor these to the discharger through procedures laid out in the CWA and in EPA regulation. *Id.* quoting from *Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9, 14 (1st Cir. 2012).

Together with the CWA requirement of state-established water quality standards, TMDLs in part, that protect against degradation of the physical, chemical, or biological attributes of the states' waters, "[the] most important component of the Act is the requirement that an NPDES permit be obtained." *Id.*, quoting from *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1294 (1st Cir. 1996).

The Rhode Island Department of Environmental Management (RIDEM) developed TMDLs for six waterbodies at issue in this case. These waterbodies were listed as impaired based on a host of bacterial factors and phosphorus. EPA approved the TMDLs for all six waterbodies.

The District Court's Decision

An NPDES for stormwater discharges is required under the following circumstances:

> (C) The Director, or in States which approved NPDES programs either the Director of the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of 'total maximum daily loads' that address the pollutant[s] of concern; or…(D) The Director, or in States with approved NPDES programs either the Director of the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of water quality standard or is a significant contributor of pollutants to waters of the United States. *Id.* citing to 40 C.F.R. § 122.26(a)(9)(i)(C),(D).

Based on these regulations, plaintiff alleges that EPA's approval of TMDL reports submitted by RIDEM constituted an exercise of EPA's residual designation authority.

EPA's approval documentation for the respective TMDLs submitted was limited to reviewing and ascertaining that and how the respective TMDL reports met the statutory and regulatory requirements for TMDLs as set forth in § 303(d) of the CWA. Nothing in EPA's approval document indicated that:

> (1) EPA [had] conducted its own analysis or fact finding; …(2)…EPA [had] made an independent determination that the stormwater discharge into Mashapaug Pond contributes to a violation of water quality standards; and/or (3)…additional NPDES permits should be required for stormwater discharges into Masapaug Pond. *Id.*

Mashapaug Pond was specifically cited as representative of the level and nature of EPA's review. As to all reports, EPA's approval documentation did not contain any independent determinations that any stormwater discharges contributed to water quality violations or that they constituted significant contributors of pollutants to those waters. Moreover, the court found that EPA's approval documents stopped short of approving or taking action on the implementation plan contained in the TMDL reports, and did not call for the issuance of any NPDES permits.

All that could be said of EPA's approval was that it appeared limited to a summary of the TMDL reports and an acknowledgment that the TMDLs met the statutory and regulatory requirements.

Conclusion and Implications

The court denied plaintiff's motion based on a lack of jurisdiction. In the absence of an independent determination by the EPA that the stormwater discharges contributed to water quality standard violations, the EPA's decision not to require permits for the discharges doesn't constitute a CWA violation, so the court has no jurisdiction over the matter. The court stated that:

> CLF cannot close the gap between [the Rhode Island Department of Environmental Management's] assessments of the impaired waterbodies and the EPA's alleged duty to notify stormwater dischargers of … permit requirements or to provide them with permit applications….

Given the extensive amount of TMDL-related cases, this decision is important.
(Thierry Montoya)

DISTRICT COURT FINDS MISSISSIPPI NUMERICAL WATER QUALITY STANDARDS ARE NOT COMPELLED BY THE CLEAN WATER ACT

Gulf Restoration Network v Jackson, ___F.Supp.3d___, Case No. 12-677 (E.D. La. Dec 15, 2016).

A U.S. District Court for Louisiana has ruled that it is within the discretion of the U.S. Environmental Protection Agency (EPA) not to compel states to adopt numerical water quality standards for the Mississippi River.

Background

The Gulf Restoration Network and other environmental organizations had petitioned the EPA in 2008 to ask the EPA to compel Mississippi River Basin states to adopt water quality standards to adequately control phosphorous and nitrogen pollution of the River. The notorious "dead zone" below the mouth of the Mississippi would otherwise not be curbed and the oxygen depletion there would only worsen. The EPA finally decided not to adopt the standards plaintiffs wanted in 2011, after plaintiffs made threat of a court action to compel EPA to rule. The plaintiffs sued the EPA in early 2012 for allegedly arbitrary and capricious conduct in deciding not to compel States to act or to impose its own Mississippi River standards. District Judge Jay C. Zainey had initially ruled favorably for plaintiffs on the plaintiffs' Administrative Procedure Act (APA) based lawsuit. However, EPA was successful in its appeal to the Fifth Circuit thereafter.

The District Court's Decision

The District Court summarized plaintiff's position as follows:

> The crux of the Petition is Plaintiffs' dissatisfaction with what they characterize as EPA's 'hands-off approach' to dealing with the problem of nitrogen and phosphorus pollution in the United States. Acknowledging that the Clean Water Act assigns responsibility for such pollution control to the States in the first instance, Plaintiffs contend that most states to date have done little or nothing to meaningfully control the levels of nitrogen and phosphorous that pollute their waters, and that they have even less political will to protect downstream waters.

As Judge Zainey's latest opinion explains, the Fifth Circuit Court of Appeals interpreted the breadth of EPA's discretion under the Clean Water Act to be greater than the Judge determined in the initial ruling. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227 (5th Cir. 2015); http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-31214-CV0.pdf

The Fifth Circuit read the Supreme Court's federal Clean Air Act (CAA) decision in *Massachusetts v. U.S. EPA* not to limit agency standard setting under the federal Clean Water Act (CWA) to considerations of science alone. Instead, EPA is free to make a policy-based decision, so long as the policy is articulated and has a sound basis in the statute itself.

In the present case, the primacy of the states in making their own water quality determinations under the CWA regime was emphasized by EPA, along with the EPA's determination that its water quality resources and staff would be greatly strained and over concentrated on the Mississippi if it attempted to impose numerical water quality standards there. Those factors (and similar strain on state and private resources from a numerical standards exercise) were coupled with EPA believing it could make more progress in limiting nutrient loadings through a program of cooperation with states and encouragement of the development of serious nutrient control programs.

On remand from the Fifth Circuit, the District Court was asked to rule on cross motions for summary judgment. Plaintiffs contended the EPA's justifications were not adequate because they could not be reconciled with the Clean Water Act's requirements for progress toward restoration. However, the District Court saw its task differently:

> This Court's task on remand is a narrow one: To determine whether EPA's explanation for why it refused to make a necessity determination was legally sufficient. Per the Fifth Circuit's application of *Massachusetts v. EPA*, legal sufficiency turns on whether EPA has provided a 'reasonable explanation,' which must be grounded

> in the statute, as to why it declined to make a necessity determination. In reviewing EPA's refusal to make a necessity determination, the Court applies the arbitrary and capricious standard of review set out in the APA. *Gulf Restoration*, 783 F.3d at 244 (citing 5 U.S.C. § 706(2)(A))….This standard will be 'at the high end of the range of deference' in this case, which while dealing specifically with a refusal to make a threshold determination, is analogous to a refusal to initiate rulemaking. *See, id.* This Court's review is therefore 'extremely limited,' and must be 'highly deferential.' *Id.* EPA's burden is 'slight.' *Id.* at 244.

The District Court went on to note that EPA had made and expressed an opinion on what the implementation of plaintiffs' desired numerical standards would require, and EPA concluded that it would severely stretch its resources. While the EPA was not unmindful of the water quality need, it also found that working in partnership with the states toward successful and more robust management programs for nutrients had a reasonable chance of success. This coupled with the CWA's express language on state primacy was sufficient for the District Court to conclude that he must defer to EPA's judgment. In summary, the District Court found that:

> … what Plaintiffs really question in this case is whether EPA's *continued* reliance on the CWA's states-first approach is reasonable in light of the undisputed scientific data surrounding the serious nature of the nitrogen and phosphorous pollution in the nation's waters. According to Plaintiffs, the state-driven approach upon which the CWA is built is simply not working and the scientific data proves it. Even if the Court were to disagree with EPA's stance on rulemaking the Court cannot properly substitute its own judgment for that of the agency. EPA's assessment that the best approach at this time is to continue in its comprehensive strategy of bringing the States along without the use of federal rule making is subject to the highly deferential and limited review that that the Fifth Circuit described in its opinion.

Conclusion and Implications

This latest decision may well serve as a further reason to justify efforts by a new Presidential administration to emphasize the role of the states in a federal system. Anecdotal reports indicate significant progress has been achieved in wetland banking of nutrients, to the point that some states are considering statewide systems. At a waste association breakfast on December 13th in Chicago, the Chairman of the Illinois Pollution Control Board, Gerald Keenan, said Illinois is in the early stages of considering creation of a market mechanism under which downstream agriculture and county interests could have incentive to deliberately construct wetlands and collect nutrients that otherwise would be discharged to rivers (such as the Illinois) that form headwaters of the Mississippi. Such collection effort would generate credits that perhaps, could turn out to be more valuable to farmers than crop income from the land taken out of tillage. Such a market system would allow the publicly owned treatment works for domestic sewage to pay into the market and buy these nutrient credits when the cost of higher-level treatment of nutrients is more expensive than the price of equivalent credits. This might be viewed as a "win-win" situation, because there would be net reduction of nutrient loadings in the river systems for less than the very high marginal cost of mechanical systems of control to remove the last few percentage amounts of nutrient at a publically owned treatment facility. Moreover, an important side benefit is that production of such wetlands would serve as important habitat for numerous wildlife species. The District Court's decision is accessible online at: https://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_12-cv-00677/pdf/USCOURTS-laed-2_12-cv-00677-1.pdf
(Harvey M. Sheldon)

DISTRICT COURT FINDS RCRA DOES NOT CREATE A PRIVATE RIGHT TO RECOVER DAMAGES IN SOIL AND GROUNDWATER CONTAMINATION CASE

Hollingsworth v. Hercules, Inc., ___F.Supp.3d___, Case No. 2:15-CV-113-KS-MTP (S.D. Miss. Dec. 22, 2016).

Plaintiffs filed a toxic tort case alleging that defendant Hercules, Inc. (defendant) improperly disposed of hazardous waste products thereby contaminating the soil and groundwater beneath its facility. Plaintiffs further contended that the hazardous waste products migrated to contaminate the soil, air, and groundwater of their property. Defendant moved for partial summary judgment on seven of plaintiffs' claims; the U.S. District Court granting and denying in part.

Background

Plaintiffs' complaint asserted counts of negligence, gross negligence, nuisance, and trespass, and alleged that they suffered property damage, loss of income, and emotional distress.

Defendant moved for partial summary judgment on seven of plaintiffs' claims. The District Court for the Southern District of Mississippi granted defendant's motion for partial summary judgment as to: 1) plaintiffs' claims of trespass with respect to the groundwater on their properties; 2) plaintiffs' claim for emotional damages based on the fear of future health problems; 3) plaintiffs' claim for emotional damages in connection with their negligence claims; 4) plaintiffs' negligence *per se* claim; and 5) plaintiffs' claim of strict liability for ultrahazardous activity. The court further denied defendant's motion for partial summary judgment as to plaintiffs' claims of decreased property values and plaintiffs' claim for intentional infliction of emotional distress.

The District Court's Decision

Plaintiffs' Claim of Trespass with Respect to Groundwater

The court recognized that trespass under Mississippi law requires evidence of an "'actual physical invasion of the plaintiff's property.'" *Id.* quoting *Prescott v. Leaf River Forest Prods.*, 740 So.2d 301, 310 (Miss. 1999). Recognizing that plaintiffs had put forth no evidence of contaminants in the groundwater on their property, the court granted defendant's motion for summary judgment as to any trespass claim with respect to the groundwater on plaintiffs' property.

Plaintiffs' Claims of Decreased Property Value

As plaintiffs' expert only provided appraisals of the properties' values without any contamination, defendant argued that plaintiffs could not maintain a claim of decreased property value without also presenting an expert opinion of the properties' values after contamination. Plaintiffs' contended that they could provide their own expert testimony as to the contaminated, "as is" value of their properties, and the court agreed, reasoning that "opinion testimony of a landowner as to the value of his land is admissible without further qualification." *Id.* quoting *LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 434 (5th Cir. 1982). Although defendants also contended that plaintiffs had failed to disclose their opinions regarding the value of the properties, the court stated that defendants had failed to challenge plaintiffs' inadequate disclosures per the 30-day discovery deadline under the local rules, and thus waived any argument regarding plaintiffs' testimony regarding the value of their own properties. Denying defendant's motion for partial summary judgment as to plaintiffs' claims of decreased property values, the court reasoned that plaintiffs could demonstrate a diminution in their properties' values by combining their opinion as to the properties' values *as is* with the appraiser's estimates of the properties' unimpaired values.

Plaintiff's Claim for Negligence *Per Se*

Defendant argued that plaintiffs' claim of negligence *per se*, which was based on defendant's alleged violations of the Resource Conservation and Recovery Act (RCRA), was not permitted as RCRA does not create a private right of action for damages. The court recognized that RCRA creates a private right of action, but that the available remedies are limited to "civil penalties, injunctive relief, and attorney's fees."

Id. quoting *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1574 (5th Cir. 1988). Stating that the Fifth Circuit Court of Appeals had not yet addressed the issue of whether RCRA violations could provide a basis for a negligence *per se* claim under state law, the court elected to follow the majority of U.S. District Courts that have held that:

> …allowance of a negligence *per se* action based on violation of RCRA would contravene the clear legislative intent of the statute not to allow for damages based on violation of its provisions. *Id.* quoting *Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F.Supp.2d 203, 210-11 (D. Conn. 2001).

With regard to the RCRA's savings clause, which expressly provides that "[n]othing in this section shall restrict any right which any person…may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of…hazardous waste, or to seek any other relief…. 42 U.S.C. § 6972(f), the court recognized that other federal courts addressing this issue have held that despite the savings clause, such suits are "designed to achieve an end run around [on] the strict limitations placed by Congress on private damages actions under RCRA," and that plaintiffs may not use " RCRA as a springboard to obtain damages via common law claims." *Id.* The court granted defendant's motion for partial summary judgment as to plaintiffs' negligence *per se* claim, reasoning that such claim was premised solely on an RCRA violation, which was "…effectively RCRA claims for compensatory damages, which [was] not permitted." *Id.*

Plaintiffs' Claim of Strict Liability for Ultrahazardous Activity

Last, with regard to plaintiffs' claim of strict liability for ultrahazardous activity, the court recognized that Mississippi law requires participation in a narrowly defined "ultrahazardous activity" before strict liability can be imposed for harm from industrial operations. *Id.* quoting *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 174 (5th Cir. 1997). The court further found that strict liability for ultrahazardous activity in Mississippi courts and the Fifth Circuit had only been found in cases involving the use and transport of explosives in populated areas. Reasoning that both the Fifth Circuit and the Mississippi Supreme Court have declined to extend the definition of "ultrahazardous activity" to include trespass claims like the ones asserted by plaintiffs', the court granted defendant's motion with respect to plaintiffs' claim of strict liability for ultrahazardous activity.

Conclusion and Implications

This case represents a common blend of federal and state law claims in environmental disputes. Missing is a nuisance claim which is a frequently pled as a state law claim in such matters. The state law claims provide for a basis to seek compensatory-type damages as opposed to penalties, costs, injunctive relief and attorneys' fees that are afforded under the federal claims. The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=12706550967131949 14&q=Hollingsworth+v.+Hercules,+Inc&hl=en&as_sdt=2006&as_vis=1
(Thierry Montoya, N. Ram)

DISTRICT COURT REJECTS MAINE'S CHALLENGE TO EPA DISAPPROVAL OF WATER QUALITY STANDARDS UNDER THE CLEAN WATER ACT

State of Maine, et al., v. Gina McCarthy, et al., ___F.Supp.3d___, Case No. 1:14-cv-00264-JDL (D. Me. 2016).

The U.S. District Court for the District of Maine considered the U.S. Environmental Protection Agency's (EPA) motion to dismiss one count from the State of Maine and the Maine Department of Environmental Protection's (collectively: Maine) second amended complaint challenging the EPA's partial disapproval of Maine's revised surface water quality standards established pursuant to the federal Clean Water Act. In its amended complaint, Maine sought judicial review of the EPA's disapproval under the Administrative Procedures Act, a declaratory judgment, and judicial review of the EPA's disapproval under the citizen suit provision of the Clean Water Act, including litigation costs and attorneys' fees.

Background

The Clean Water Act requires that states establish water quality standards for every body of water within a state. Water quality standards established pursuant to the Clean Water Act include three components:

> (1) designated uses for each body of water, such as recreational, agricultural, or industrial uses;
>
> (2) specific limits on the levels of pollutants necessary to protect those designated uses; and
>
> (3) an antidegradation policy designed to protect existing uses and preserve the present condition of the water.

The Clean Water Act also requires that states review water quality standards every three years. States are then required to submit those results to the EPA, which in turn is responsible for reviewing any new or revised standards adopted by the state to determine if such standards comply with the Clean Water Act and EPA regulations promulgated pursuant to it.

In 2014, Maine sued the EPA arguing that the EPA failed to timely approve or disapprove Maine's revised surface water quality standards. Following Maine's complaint, the EPA issued a formal decision approving and disapproving some of Maine's revised surface water quality standards. Maine subsequently filed an amended complaint seeking judicial review of EPA's decision under the Administrative Procedure Act, a declaratory judgment under the Declaratory Judgments Act, and judicial review of EPA's disapproval based on the citizen suit provision of the Clean Water Act, including litigation costs and attorneys' fees. In particular, Maine challenged EPA's disapproval of three of Maine's human health criteria for "all water in Indian lands." The EPA filed a motion to dismiss Maine's effort to seek judicial review of the EPA's disapproval under the citizen suit provision of the Clean Water Act.

The District Court's Decision

The Clean Water Act Claim

In the operative amended complaint, Maine contended that the EPA previously approved its water quality standards without qualification, that those standards have been in effect for all waters, including Indian waters, within Maine since 2000, and that, consequently, EPA had a:

> …non-discretionary duty under the Clean Water Act to accept all of Maine's revised water quality standards and had no discretion to reconsider any of them.

The District Court recognized that the Clean Water Act imposes on the EPA Administrator "a mandatory duty to review any new or revised state water quality standards." However, the court observed that Maine did not contend the EPA failed to review its revised surface water quality standards. Instead, the court characterized Maine's claim as one asserting the EPA's failure to approve the standards. The court therefore distinguished Maine's argument that the challenge was to EPA's mandatory duty to review sur-

face water quality standards from Maine's contention that the EPA has no discretion to reconsider them given the EPA's past approvals. The court found that there was discretion in the EPA's decision to approve or reject new or existing water quality standards, it was the obligation to review that was mandatory. The court concluded that, given the difference between mandatory review and discretionary approval or disapproval, Maine failed to state a claim under the Clean Water Act.

The Maine Indian Settlement and Implementing Acts Claims

The District Court also rejected Maine's argument that, pursuant to the Maine Indian Claims Settlement Act and the Maine Implementing Act, the EPA was required to treat Indian tribes within Maine the same as it does all other Maine citizens. Thus, Maine contended the EPA was mandated to approve all of its water quality standards as revised. The court again relied on the distinction between mandatory review and discretionary action in rejecting Maine's Indian waters argument. While Maine may contend that the disapproval was in error, the court found that Maine cannot maintain a claim based upon a failure to review. Accordingly, the District Court granted the EPA's motion to dismiss Maine's effort to seek judicial review of the EPA's disapproval of some of its revised surface water quality standards based on the citizen's suit provision of the Clean Water Act, including litigation costs and attorneys' fees. The court also declined to address Maine's seeking judicial review pursuant to the Administrative Procedure Act, as no motion before the court challenged the ripeness of that count.

Conclusion and Implications

If Maine wants to challenge the decision of the EPA rejecting Maine's water quality standards, it will not be able to pursue those claims as part of a Clean Water Act citizen suit. However, because the District Court only granted the EPA's motion to dismiss one count of Maine's amended complaint, Maine will still be able proceed in its suit against the EPA under the Administrative Procedures Act and Declaratory Judgments Act claims. Whether it can succeed on that basis will be a dispute for another day. The court's decision is accessible online at: https://elr.info/store/download/209669/15935
(Danielle Sakai, Miles Krieger)

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