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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

RECENT STATE DECISIONS

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ENVIRONMENTAL NEWS

CALIFORNIA WATER SUPPLIERS RAMP UP WATER CONSERVATION REQUIREMENTS AS THE STATE ENTERS THE TOUGH SUMMER MONTHS

The summer months are closing in, and like clockwork in California, the drought regulations are kicking back into high gear. In southern California, the Metropolitan Water District (MWD or Met), for example, took action heading into the summer by declaring a water shortage emergency and implementing an emergency water conservation program in its service area. Likewise in northern California, the East Bay Municipal Utility District (East Bay MUD) took action by implementing numerous heightened drought response actions as the dry months roll in, ranging from the implementation of a drought surcharge to the establishment of excessive use penalties for wasteful water users.

Metropolitan Water District Initiates Emergency Water Conservation Program

On April 26, 2022, Met's board declared a Water Shortage Emergency for its areas dependent on State Water Project water. These areas include: Calleguas Municipal Water District, Inland Empire Utilities Agency, Las Virgenes Municipal Water District, Los Angeles Department of Water and Power, Three Valleys Municipal Water District, and Upper San Gabriel Valley Municipal Water District.

The board further adopted an Emergency Water Conservation Program that requires member agencies dependent on State Water Project water deliveries to cut water use by implementing certain water use restrictions or comply with monthly allocation limits set by Met. Specifically, the framework adopted by Met provides member agencies with one of two approaches for obtaining compliance with the new Emergency Water Conservation Program.

The first option under this framework allows member agencies to restrict outdoor irrigation to one day per week, or its equivalent, beginning June 1, 2022. This restriction, however, is subject to modification and could be heightened to include a ban on all non-essential outdoor irrigation or the enforcement of volumetric limits should conditions warrant as we get further into the year.

The second option under the framework allows member agencies to comply with monthly allocation limits directly. The specific limit for each agency is based on an allocated share of the human health and safety water provided by the Department of Water Resources and of additional State Water Project supplies that are delivered through the State Water Project's system.

Member agencies that either document their enforcement of the policies under the first option or that meet the prescribed limits of the second option are deemed compliant with the Emergency Water Conservation Program. Agencies that are deemed non-compliant, however, will face volumetric penalties of $2,000 per acre-foot of any water supplied by Met from the State Water Project in excess of specified monthly allocation limits.

Unless extended by Met's board, the Emergency Water Conservation Program is set to last through June 30, 2023.

East Bay Municipal Utility District Cracks Down on Wasteful Water Users

Moving north to the San Francisco Bay Area, the East Bay MUD customers will also face new water use restrictions this summer. At its April 26, 2022 meeting, the board of directors for East Bay MUD voted 6-1 to elevate its drought response to Stage 2 and implement certain water use restrictions. Notably of these restrictions was the mandatory 10 percent water use reduction district-wide as compared to 2020 with a plan to review progress towards achieving this goal in November.

On top of the mandatory 10 percent water use reduction, East Bay MUD also instated an Excessive Use Penalty, subjecting households that use more than 1,646 gallons per day to fines.

As part of the water use restrictions adopted at the April 26 board meeting, East Bay MUD further updated outdoor water use restrictions including limiting outdoor watering to three times a week, pro-

hibiting the washing of sidewalks and driveways, and requiring restaurants and cafes to only provide water upon request, among other provisions.

Following the adoption of these water use restrictions, on May 10, 2022, East Bay MUD's board of directors approved a drought surcharge of 8 percent to recover a portion of the expenses associated with purchasing supplemental water supplies and other drought costs. The surcharge will only apply to customers' water use charges, however, not their entire water bill. East Bay MUD estimates that its average household, using 200 gallons per day, would see an increase of approximately 10 cents per day to water bills with the addition of the 8 percent surcharge, translating to about $6 per two-month billing cycle.

Conclusion and Implications

While nearly 8 million Californians will be impacted by MWD and East Bay MUD's new drought restrictions alone, there is no doubt that other entities across the state have already or will be implementing drought restrictions of their own, and certainly so following Governor Gavin Newsom's Executive Order N-7-22 and its follow-up emergency conservation regulation. The dynamic discussed above, however, showcases just some of the many drought response actions Californians will be seeing in enduring the drought year—and possibly still drought years—ahead of us at both the wholesaler and urban supplier levels.

While some individual efforts may be seen as pushing conservation too far for some water users, others will no doubt be seen as not strong enough. The challenge water suppliers throughout the state are facing is one that requires a wide array of drought response actions and as we get further into the dry season, the cumulative impacts of these restrictions on Californians' everyday water use will likely be felt soon enough if they haven't already.
(Wesley A. Miliband, Kristopher T. Strouse)

WATER SCARCITY IN THE WEST: IDAHO MUNICIPAL WATER PROVIDER RELEASES PROJECTED WATER DEMAND STUDY FOCUSING ON FUTURE WATER SUPPLY NEEDS IN THE BOISE CITY METROPOLITAN AREA

On May 26, 2022, Veolia Water Idaho, Inc. (formerly Suez Water Idaho, Inc.) (Veolia) released a report titled: *Treasure Valley Water-Supply Options to Meet Projected Municipal Demand* (May 23, 2022) (Report). Veolia is the primary provider of potable (municipal) water in the City of Boise and some neighboring areas—providing potable water in the most populous and fastest-growing region of the state (and the nation). The scope of the report is valley-wide—it does not focus solely upon Veolia's service area.

In 2015, Treasure Valley municipal providers supplied approximately 110,000 acre-feet (AF) of potable water to their customers. Current Treasure Valley population is approximately 760,000 inhabitants—up from approximately 425,000 inhabitants in 2000. By 2065, Treasure Valley population is estimated to be 1.1 to 1.2 million. According to the Report, an additional 110,000 - 190,000 AF of municipal water will be needed to support this anticipated population growth.

The Report

The Report suggests a variety of options potentially available to meet this demand: pumping and importation of water from the Snake River; pumping-back of Boise River water from near its confluence with the Snake River; aquifer recharge with excess (flood) Boise River flows; construction of additional reservoir storage on the Boise River; increased groundwater development; municipal effluent reuse; and the potential "re-purposing" of existing Boise River surface water diversions currently used for irrigation supply purposes. The Report notes that none of the suggestions are perfect, and that a combination of them is likely the best path forward (*i.e.*, no single proposed solution, alone, is likely sufficient to meet the totality of the need for various reasons—source sustainability, regulatory, source quality, cost-effectiveness, among others).

The vast majority of the senior-most priority surface water rights and reservoir storage space on the Boise River is owned (or contracted in terms of

storage) by irrigation water users and irrigation water delivery entities. Irrigation water users divert approximately 1.4 million acre-feet of Boise River surface water for the irrigation of approximately 325,000 acres annually.

Is There Really Unused Water?

Thus, the question has long been asked: what happens to the water when farms become subdivisions—when irrigable ground is replaced by rooftops, roads, and other impermeable, unirrigated hardscapes? The presumed answer has been that the water must be going unused, available for "re-purposing" to other non-irrigation-related uses such as domestic, commercial, municipal, and industrial uses. Known by the irrigation entities as the "paved over" theory, the theoretical reallocation of agricultural irrigation water for other uses and to meet future supply demand has been a popular sound bite for years.

At first blush, the theory is at least intuitive—surely there must be some former irrigation water going unused in urbanizing areas. But this has not been the experience of Treasure Valley irrigation delivery entities (irrigation districts, canal companies and ditch companies). Instead, irrigation water use has remained steady, if not increased, in urbanizing areas forcing increasing need for supply rotation and complaints from residential users of supply shortages.

The first place one would expect to see unused irrigation water in urbanized settings would be in increasing surface water drain flows. But in many areas of the Treasure Valley, particularly the most urbanized, drain flows are decreasing. Pathways feeding drain flows include the baseflows provided by interception of the shallow groundwater table (fed by surface irrigation) and surface water/tailwater drainage flowing overland into the drains. But it seems that the proliferation of residential sprinkler systems (as opposed to former agricultural flood irrigation) is decreasing percolation into the shallow groundwater table, and sprinkler systems are also minimizing overland tailwater returns.

Given these phenomena, one would next expect increased surface water spills to the drains from residential pressurized irrigation pump stations (unused/unpumped water bypassed from urban pressurized irrigation pumpstations). In other words, if 20 acres or rooftops and impermeable surfaces use less water than 40 acres of farm fields, then that water should be going unused on the front end and spilled to the drains. But, again, drain flows are largely declining in most urbanized settings—so where is the water going?

Turf Grass Irrigation

For one thing, irrigation delivery entities are coming to realize that residential turf grass irrigation is a more intensive use of water than typical agricultural uses. Turf grass irrigation creates a different peak demand profile—residents want to irrigate from 6pm to 6am and they have a "light switch" (instant availability and instant on) mentality; residential users typically do not order water on and off ahead of time like agricultural users. This overlapping peak demand problem in the absence of regulation ponds leads to increased need for rotation because gravity irrigation delivery systems designed and constructed over a century ago lack the plumbing capacity to meet these changing use profiles. Instead, the gravity irrigation systems of the Treasure Valley were designed to serve agricultural uses and the rotation-type use inherent to differing cropping/planting patterns and cyclical harvests (a form of plumbing and water use balance created by the different varieties of crops planted—some water intensive like corn, and others not like grains and other forage subject to differing harvest times and cyclical cuttings).

Irrigation delivery entities are also coming to realize that turf grass proliferation brings a longer irrigation season demand—the "keeping up with the Joneses" desire for emerald green lawns and subdivision common areas beginning in early to mid-March and lasting through mid to late-October. This use profile stretches the irrigation season and water supplies because residential sprinkler systems are rarely throttled back in terms of water use—station/zone times tend to remain constant from the beginning of the season to the end.

Residential water users also irrigate differently and less efficiently than agricultural users, which is counterintuitive given that sprinkler systems are, superficially, more efficient than flood irrigation systems. But, many residential users "set it and forget it"; they do not adjust their sprinkler systems when it rains. They also irrigate to the brown spot in the lawn increasing water application sprinkler system-wide rather than on a zone-by zone basis. Residential water users also water far less deeply—they water the first few inches of the soil profile on a daily basis

rather than more infrequent, but deeper, watering. This shallower watering is a constant battle of trying to keep the upper reaches of the soil profile moist for the turf grass root zone—the portion of the soil profile that dries out the fastest in the wind and sun, as opposed to allowing water to migrate up from below as is achieved from deep watering.

The foregoing differences between agricultural water use and residential water use are not necessarily criticisms so much as they are facts that are increasingly having to be managed going forward. Whether one is irrigating a residential lot or a 1,000-acre farm, both customers want ample water delivered as safely and cost-effectively as possible no matter the changing use and demand profiles.

Conclusion and Implications

In sum, the "paved over" theory, while attractive and intuitive, is proving overly-simplistic upon deeper look. This is not to say that urbanization does not, or cannot, free up *any* water for potential "repurposing," but the quantities are certainly not a 1:1 ratio and other regulatory, legal and administrative hurdles remain from water rights and statutory apportionment of benefits perspectives going forward.

As the Report notes, there is no one, single solution or new source of water. There needs to be better and increasing dialogue across the board from all types of water users to meet anticipated future needs. Water in the West is becoming more-scarce and the growing Boise metropolitan area is increasingly competing with agriculture for that scarce resource. The Report emphasizes the challenges ahead.
(Andrew Waldera)

LEGISLATIVE DEVELOPMENTS

PROPOSED CALIFORNIA BILL AIMS TO SUPPORT FARMWORKERS IMPACTED BY DROUGHT

California proposed Senate Bill 1066 (SB 1066) seeks to provide economic aid to communities hit hardest by drought. It would allocate $20 million to create and fund a California Farmworkers Drought Resilience Pilot Project. If the bill passes as introduced, eligible farmworkers could receive $1,000 monthly cash payments.

Background

SB 1066 finds that ongoing drought conditions and water allocation cutbacks forced California farmers to fallow hundreds of thousands of acres of farmland in 2021, resulting in more than 8,000 lost jobs in the California agriculture industry. The bill is State Senator Melissa Hurtado's second attempt to provide funding to farmworkers after proposals last year to prioritize farmworkers were not included in the State's guaranteed basic income pilot program.

Senate Bill 1066

SB 1066 is designed to help sustain agricultural workers in impacted communities so they can remain in their communities and return to the fields if conditions improve. If passed, SB 1066 would establish a California Farmworkers Drought Resilience Pilot Project. It would direct the state Department of Social Services to provide cash assistance to eligible households to help meet their basic needs. The pilot project would commence on January 1, 2023 and continue for a period of three years. Households that meet specific criteria could receive supplemental payments of $1,000 per month for three years.

Additionally, the supplemental payments would not be considered income for the purposes of determining eligibility to receive benefits for CalWORKS, CalFresh, the California Earned Income Tax Credit, Medi-Cal, or state and federal financial aid and college support programs. This means that receipt of supplemental payments would not impact a recipient's ability to qualify for other financial support programs.

Finally, the California Department of Social Services would be directed to conduct a longitudinal study of the pilot project to determine outcomes and evaluate whether the pilot project was successful in achieving its intended outcomes.

Program Eligibility

Only qualifying farmworker households would be eligible to receive the $1,000 monthly payments. To qualify, a household must meet the following criteria: 1) at least one member of the household is a California resident; 2) at least one member of the household worked as a farmworker for the entire period of March 11, 2020 to January 1, 2022; 3) at least one member of the household is a farmworker at the time of consideration for, and throughout the duration of, the project; and 4) the household received benefits under either the CalFresh or California Food Assistance Programs for the entire period of March 11, 2020 to January 1, 2022, or would have been eligible for these benefits, but for the immigration status of one or more members of the household. The bill allows for brief periods of unemployment during the pilot project without losing eligibility if the unemployment is due to circumstances beyond the farmworker's control. Notably, SB 1066 would open up aid to all eligible farmworkers regardless of immigration status. Proponents of the bill assert that this is an important aspect to protect vulnerable agricultural workers who are integral to the industry.

Industry Support and Legislative Next Steps

SB 1066 has received support from certain industry groups, including the California Fresh Fruit Association. The bill recently passed out of the Senate Committee on Appropriations by a vote of five to two, after previously passing the Senate Committee on Human Services. As of the date of this writing, the bill awaited consideration and approval of the full Senate and Assembly before heading to Governor Newsom's desk for approval.

Conclusion and Implications

While SB 1066 will not solve California's ongoing drought, it acknowledges certain economic impacts and hardships caused by the drought. If passed in its current form, SB 1066 could provide economic support to the frontline farmworkers who have lost employment as fields lay fallow. However, no one can predict how long the drought will last, and some assert that available funding should be prioritized for water transfer, storage and infrastructure projects to address long-term water supply needs. The bill is still in the early stages of the legislative process and additional amendments could change its ultimate impact. The bill can be tracked for progress and text changes here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1066
(Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

EPA TAKES THREE MAJOR STEPS TOWARDS REGULATING PFAS COMPOUNDS THROUGH THE CLEAN WATER ACT NPDES PERMIT

On April 28, 2022 the U.S. Environmental Protection Agency (EPA) announced three actions related to the regulation of the per- and polyfluoroalkyl substances (PFAS) through the federal Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*. PFAS are a large group of man-made, persistent, and bio-accumulative chemicals that are used in consumer products and various industrial processes. To address the presence of these chemicals, the EPA has now: 1) issued a new draft testing method intended to detect PFAS in water; 2) adopted a policy to address PFAS through the CWA National Pollutant Discharge Elimination System (NPDES) program (33 U.S.C. § 1342); and 3) published national ambient water quality criteria, which is intended to protect aquatic life.

PFAS Testing Method

Since the adoption of the CWA, the EPA has developed and adopted a number of laboratory analytical methods for the analysis of the chemical, physical, and biological components of wastewater and other environmental samples required by the CWA. Once an analytical method is published in the code of federal regulations, that method is generally considered an "approved method" for use in evaluating and assessing NPDES permit compliance and enforcement actions. Currently, there are no EPA-approved methods for analyzing PFAS, leaving the regulated community to use "any suitable method" for analysis until a method has been developed and officially adopted by EPA.

Because the chemicals generally referred to as "PFAS" include numerous chemical compounds of varying compositions, the development of an analytical method for comprehensive PFAS analysis has been stymied. However, the EPA's Office of Water collaborated with the Department of Defense (DOD), to develop draft Method 1633, which can detect 40 different PFAS compounds in wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue. Draft Method 1633 is ultimately intended for use in evaluating compliance with NPDES permit terms; however, use of this method is not yet required for CWA compliance monitoring, as the method is not yet final. Nonetheless, EPA is recommending use of draft Method 1633 while the agency works to adopt the method through the formal rulemaking process. Once formally adopted, use of Method 1633 will be required for compliance where PFAS sampling and analysis is necessary.

Inclusion of PFAS Monitoring in NPDES Permits

On April 28, 2022, EPA also released a memo, which details how the agency will address discharges of PFAS compounds through EPA-issued NPDES permits. EPA anticipates NPDES permit terms pertinent to PFAS will include monitoring requirements and PFAS-specific best management practice (BMP) implementation requirements. Going forward, PFAS monitoring will generally be required for those industries that are known to discharge PFAS in association with their industrial processes, such as metal finishing, landfills, and airports, among others. Publicly owned treatment works (POTWs) may also be required to monitor for PFAS compounds, given that POTWs typically receive wastewater from a variety of PFAS-discharging entities, including households, given the prevalence of PFAS in consumer products. Where PFAS monitoring is required by an NPDES permit, EPA is suggesting use of draft Method 1633 for compound analysis. Moreover, if PFAS monitoring is required, such monitoring will pertain to all 40 compounds that can be detected by draft Method 1633, and will occur on at least a quarterly basis. The memo details suggested NPDES permit terms for each type of PFAS-discharging entity, as well as industry-specific recommended BMPs, which range from product substitutions to requiring the immediate clean-up of aqueous firefighting foams.

National Water Quality Criteria

On May 3, 2022, EPA published in the Federal Register draft national recommended aquatic life

criteria for two PFAS compounds: 1) Perfluorooctane Sulfonate (PFOS); and 2) Perfluorooctanoic Acid (PFOA). (87 Fed. Reg. 26199.) Water Quality Criteria (referred to as "Water Quality Objectives" in California) are used to protect receiving water quality and aquatic organisms, and are typically incorporated into NPDES permits for that purpose.

Each draft criteria includes both acute and chronic criteria for fresh water, as well as a tissue-based concentration to protect aquatic life from potential bioaccumulation. Once the criteria are made final, states and tribes have the authority to adopt these criteria for use as water quality standards. Comments on the draft are due June 2, 2022.

Conclusion and Implications

Together, these three actions represent significant progress towards fulfilling the agency's commitments under the Biden administration's Plan to Combat PFAS Pollution (Biden PFAS Plan), which was initially adopted on October 18, 2021 and provided steps that eight federal agencies, including EPA should take over the coming years to accelerate federal efforts at combating PFAS pollution. Moreover, the three recent EPA actions further the Office of Water's responsibilities under the EPA's PFAS Strategic Roadmap, which was adopted concurrently with the Biden PFAS Plan. Once made final, the three actions together will have the effect of regulating PFAS nationwide under the Clean Water Act.
(Meghan Quinn, Darrin Gambelin)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS EMERGENCY DROUGHT REGULATIONS PURSUANT TO EXECUTIVE ORDER

California continues to battle worsening drought conditions through regulations designed to reduce water use throughout the state. On May 24, 2022, the California State Water Resources Control Board (SWRCB) adopted emergency regulations to increase water conservation, ban wasteful water uses and prohibit the use of potable water to irrigate certain non-functional turf.

Background

The SWRCB recently published that in March 2022, urban retail water suppliers reported an average statewide water use that was nearly 19 percent *greater* than in March 2020, notwithstanding significant drought conditions. On March 28, 2022, California Governor Newsom signed Executive Order N-7-22 (Order). The Order directed the SWRCB to consider adopting an emergency regulation for urban water conservation by May 25th. The SWRCB proposed an emergency regulation in early May, and adopted the regulation on May 24th (Regulation).

Addition of Preliminary Water Supply and Demand Assessment

Pursuant to California Water Code § 10632.1, urban water suppliers must conduct an annual water supply and demand assessment and submit an annual water shortage assessment report to the California Department of Water Resources (DWR) by July 1st. The Regulation further requires urban water suppliers to submit a *preliminary* annual water supply and demand assessment to DWR by no later than June 1, 2022. DWR issued guidance and provided public workshops to assist urban water suppliers in meeting the preliminary and annual reporting requirements.

Demand Reduction Actions

As a part of their water shortage contingency plans (WSCP), urban water suppliers must identify demand reduction actions they will take in the event of a water shortage emergency. Demand reduction actions generally correspond to six standard water shortage levels outlined by the state and become increasingly restrictive at each level. Level 2 actions are meant to address up to a 20 percent shortage of water supplies and often include measures such as limiting outdoor irrigation to certain days or hours, increasing patrolling to identify water waste, enforcing water-use prohibitions, and increasing communication about the importance of water conservation. The Regulation requires that all urban water suppliers that have submitted a WSCP to DWR to implement, at a minimum,

their Level 2 demand reduction actions by June 10, 2022. The Regulation expressly states that it does not require urban water suppliers to implement moratoria on new residential water service connections.

Urban water suppliers that have not submitted a WSCP must, at a minimum, initiate a public outreach campaign for water conservation, adopt an ordinance limiting landscape irrigation to no more than two days per week, and adopt an ordinance banning wasteful and unreasonable water uses prohibited by California Code of Regulations Title 23 § 995. Section 995 defines wasteful and unreasonable water uses to include:

- Using potable water to irrigate outdoor landscapes in a manner causes water to flow onto adjacent property, non-irrigated areas, walkways, roadway, and parking lots;
- Using a hose to wash a vehicle without equipping the hose with a shut-off nozzle;
- Using potable water for washing hard surfaces such as sidewalks, driveways, buildings, structures, patios, and parking lots;
- Using potable water for street cleaning or construction site preparation purposes;
- Using potable water for decorative fountains or to fill decorative lakes and ponds;
- Watering turf or ornamental landscapes during and within 48 hours after measurable rainfall of at least one-fourth of an inch; and
- Using potable water to irrigate ornamental turf on public street medians.

Violation of these prohibitions is punishable by a fine of up to $500 per day.

Prohibition of Irrigation of Certain Non-Functional Turf

California regulations define turf as a ground cover surface of mowed grass. The Regulation prohibits use of potable water for irrigation of "non-functional turf" at commercial, industrial, and institutional sites. It defines non-functional turf as "turf that is solely ornamental and not regularly used for human recreational purposes or for civic or community events." It clarifies that non-functional turf does not include "sports fields and turf that is regularly used for human recreational purposes or for civic or community events." The Regulation further clarifies that it does not prohibit use of potable water to the extent necessary to ensure the health of trees and other perennial non-turf plantings or to the extent necessary to address an immediate health and safety need. Violations of this Regulation could result in fines of up to $500 per day, in addition to other potential civil or criminal penalties.

Implementation of Regulation

Some urban water suppliers had already imposed new restrictions on customers' water use prior to the adoption of the Regulation. The SWRCB reported that as of May 24th, approximately half of the state's 436 water suppliers (both urban water retailers and wholesalers) had not yet activated Level 2 actions, and 36 had not submitted drought plans to DWR. As of the date of this writing, the Regulation remained subject to approval of the California Office of Administrative Law (OAL), which typically occurs within ten calendar days of submission by the SWRCB. The Regulation provides that the ban on non-functional turf becomes effective upon OAL approval and proposes that Level 2 requirements for urban water suppliers take effect on June 10, 2022.

Conclusion and Implications

The Regulation responds to worsening drought conditions ahead of another hot, dry California summer. The Regulation builds upon prior drought regulations and is more specifically directed at urban water suppliers and prohibiting irrigation of non-functional turf. The required preliminary supply and demand assessment signals the importance of tracking and reporting water use and projected use. The Regulation also increases reporting pressure on urban water suppliers that have not yet submitted drought plans to DWR. Information on the Regulation can be found on the SWRCB website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html.
(Byrin Romney, Derek Hoffman)

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

•April 22, 2022—The United States, on behalf of the U.S. Environmental Protection Agency, has reached a proposed settlement with Schnitzer Steel Inc. of Portland, Oregon, to resolve alleged violations of the Federal Clean Air Act and regulations designed to protect stratospheric ozone at 40 scrap metal recycling facilities throughout the United States. If approved by the court, the settlement will require the company to pay a civil penalty of $1,550,000, implement compliance measures worth over $1,700,000 to prevent the release of ozone-depleting refrigerants and non-exempt substitutes from refrigerant-containing items during their processing and disposal, and complete an environmental mitigation project. The complaint filed together with the consent decree alleges that Schnitzer failed to recover refrigerant from small appliances and motor vehicle air conditioners before disposal or to verify from the supplier that the refrigerant had been properly recovered prior to delivery to Schnitzer's facilities. Under the settlement, Schnitzer must implement an EPA-approved Refrigerant Recovery Management Program (RRMP) at its 40 U.S. facilities. The RRMP includes, among other things: installation of refrigerant recovery systems at Schnitzer's facilities; screening procedures for scrap appliances and vehicles; new forms for statements and contracts to verify any refrigerant recovery from appliances and motor vehicles prior to receipt by Schnitzer; notices to customers regarding proper procedures for delivering items currently or previously containing refrigerants; employee training on procedures for ensuring compliance with regulations designed to prevent the release of refrigerants; and recordkeeping and reporting obligations. The settlement also requires Schnitzer to perform an environmental mitigation project involving the destruction of all R-12 refrigerant in scrapped appliances and automobiles received at its facilities. R-12 contains chlorofluorocarbons and has over 10,000 times the global warming potential of carbon dioxide.

•May 17, 2022—The U.S. Steel Corporation will pay a $1.5 million penalty and make extensive improvements at its steel production facility in Braddock, Pennsylvania, as part of a settlement with the EPA and the Allegheny County Health Department (ACHD) for longstanding air pollution violations. The consent decree addresses numerous Clean Air Act violations dating back to 2016 at the steelmaking facility known as Edgar Thomson Works, that occupies about 250 acres and employs about 900 workers. The one-mile radius around the facility is an area of potential environmental justice concern, exceeding the state average for the percentage of low-income populations and for minority populations. Under the settlement, U.S. Steel is required to make numerous improvements in training, monitoring and work practices to increase compliance and timely response to air pollution. Additionally, the company is tasked with conducting studies on potential improvements to its pollution control systems. The settlement announced also includes a supplemental environmental project solely credited against ACHD's share of the penalty in which U.S. Steel would provide funding to the Allegheny County Department of Economic Development for a specific environmental project. Specifically, U.S. Steel will provide $750,000 in funding to the Allegheny County Department of Economic Development in support of the creation of a multimodal connection trail for hikers and bicyclists that links the Great Allegheny Passage in Rankin Borough to the Westmoreland Heritage Trail in Trafford Borough through the Turtle Creek Valley.

•May 17, 2022—EPA announced a settlement with Smithfield Packaged Meats Corp. (Smithfield)

and Clougherty Packing, LLC (Dba Farmer John) over alleged Clean Air Act violations at the Farmer John animal slaughtering and meatpacking facility in Vernon, Calif. Smithfield and Clougherty Packing, LLC will pay $237,537 in civil penalties. In addition, both entities made safety improvements to the facility to ensure protection of their employees and the public. Smithfield purchased Clougherty Packing, LLC (which owned the Farmer John facility), in January 2017. On September 21, 2017, EPA conducted an inspection of the facility and found violations of the Clean Air Act's Risk Management Program requriements.

•May 18, 2022—EPA reached settlements with two companies resolving claims they violated the chemical accident prevention requirements of the federal Clean Air Act. The companies, Highline Warren, LLC in Leominster and Crystal Ice Co., Inc. in New Bedford agreed to pay civil penalties and have taken steps to improve safety at their facilities, which will help keep facility workers and the communities safer in the event of an emergency.

Highline Warren, LLC uses methanol and ethanol to produce windshield wiper fluid and antifreeze. During EPA's inspection of the facility in 2020, EPA discovered that the company had not assessed the hazards of its process. As a result of EPA's inspection and enforcement action, Highline Warren LLC, conducted a process hazard review, paid a civil penalty of $48,908, and certified that it was implementing its process hazard review.

The Crystal Ice Co., Inc. facility is a primary supplier of ice for the fishing industry in and around New Bedford. The facility uses up to 22,000 pounds of anhydrous ammonia in its refrigeration system. An ammonia release at the Crystal Ice facility occurred in April 2018 and triggered an EPA inspection of the refrigeration system. EPA's inspection led to the discovery of multiple violations of the Clean Air Act's Risk Management Plan regulations. Some of the alleged violations included the failure to comply with requirements to compile written process safety information and comply with recognized and generally accepted good engineering practices, failure to fully comply with process hazard analysis requirements and failure to adequately train employees which help ensure that workers and emergency responders have the information they need to safely respond to an accidental release. The settlement imposes a civil penalty of $170,000 and requires that the company come into compliance with Risk Management Plan regulations.

Civil Enforcement Actions and Settlements—Water Quality

•May 9, 2022—EPA and the City of Montebello, California have entered into an Administrative Order on Consent to assist the city in complying with its municipal stormwater sewer system permit. This action will help the city achieve compliance with the Federal Clean Water Act with respect to discharges of trash into the Los Angeles River. From August 25 through October 29, 2020, inspectors from EPA and the Los Angeles Regional Water Quality Control Board conducted an offsite compliance monitoring audit of the City's compliance with its Municipal Separate Storm Sewer System (MS4) Permit and found multiple violations of the Clean Water Act. EPA found the following violations:

The City had not complied with the final water quality-based outflow limits for trash under its Permit.

The City had not completed their Catch Basin Scoping Study or the Catch Basin Retrofit projects, both of which the City had declared it would complete under its response to the Notice of Violation issued by the Regional Water Board.

Three catch basins in the City were not equipped with full trash capture systems. Two of these three catch basins were not readily identifiable or included on the City's inventory.

EPA is requiring the facility to 1) submit a complete inventory of all catch basins that need full capture devices including those that either have partial or no trash capture devices; 2) submit a completion schedule to install full trash capture devices on all catch basins for EPA approval.

•May 18, 2022—EPA has reached settlements with five Massachusetts and New Hampshire construction companies for violations of stormwater regulations that serve to reduce pollution from construction runoff. Under the settlements, the five companies agreed to pay penalties and follow the terms of their permits for discharging stormwater. All construction sites one acre or larger, with the potential to discharge stormwater to surface waters, are required to obtain coverage under EPA's General Permit for Discharges from Construction Activities, comply

with the terms of the permit, and thereby minimize sediment discharges. The recent enforcement actions include: GAIR, LLC agreed to pay a $6,600 penalty for allegedly failing to renew permit coverage at the Jennings Road development in Charlton, Mass. The site also lacked complete erosion controls; Harbor Classic Homes, LLC agreed to pay a $6,750 penalty for allegedly discharging sediment to a stream at the Laurel Hill Estates site in Lancaster, Massachusetts. The company had also paid a $4,200 penalty to EPA in 2021 for failing to have permit coverage at a construction site in Lunenburg; Highfield Homes, LLC agreed to pay a $4,800 penalty for allegedly failing to implement adequate erosion controls at the Highfield Commons site in Rochester, New Hampshire; Martelli Construction, Inc. agreed to pay a $10,500 penalty for allegedly failing to adequately control erosion at the Greenwood II development site in Holden, Massachuesetts. The company had also paid an $8,400 penalty to EPA in 2019 for erosion control failures; U-Haul Co. of Western Massachusetts, has agreed to pay an $18,000 penalty for allegedly failing to obtain permit coverage at a construction site in Lancaster. Due to a lack of erosion controls at the site, sediment runoff from this site impacted nearby wetlands.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• April 20, 2022—Two Missouri home renovation companies have agreed to pay almost $10,000 collectively in penalties to the EPA to resolve alleged violations of the federal Toxic Substances Control Act. According to EPA, Swedlund Construction LLC of St. Louis and Rozell Siding and Windows Inc. of Springfield failed to comply with regulations intended to reduce the hazards of lead-based paint exposure during renovations. In both cases, EPA alleged that the companies failed to obtain EPA renovator certification and failed to assign a certified renovator prior to performing renovations. EPA says that Swedlund Construction also failed to comply with multiple safety practices while performing renovations, such as containing the spread of renovation dust and debris as well as warning occupants and other people to remain outside the worksite. Rozell Siding and Windows also failed to provide notification of renovation requirements to property owners and failed to maintain required paperwork, according to EPA.

• April 21, 2022—EPA announced a settlement with Best Buy Co., Inc. for selling "Pure Mobile Sanitizing Tech Wipes," an unregistered and misbranded product making disinfectant claims in violation of federal law. Best Buy has agreed to pay a $199,821 civil penalty and has revised its environmental management systems to mitigate the recurrence of such violations. On December 3, 2020, EPA conducted an inspection at the Best Buy store located in Union City, California. During this inspection, EPA found that the store had sold "Pure Mobile Sanitizing Tech Wipes" on 55 occasions from July 2020 through February 2021. Despite making pesticidal claims, this product was not registered as required under federal pesticide law. In addition, the product had misleading information on its label that caused it to be misbranded.

• April 22, 2022—EPA announced that the U.S. District Court in New Mexico approved a consent decree settlement between EPA, the Justice Department, the Department of Interior (DOI), the Department of Agriculture (USDA), the State of Colorado, and Sunnyside Gold Corporation (Sunnyside) and its Canadian parent company Kinross Gold Corporation (Kinross) regarding the Bonita Peak Mining District Superfund Site (Site). EPA and the Justice Department previously announced the details of the proposed settlement on January 21. The settlement provides additional funding for the continued cleanup of mining-related contamination within the Upper Animas Watershed. The settlement also resolves certain federal liability related to the Site, which includes the Gold King Mine and other abandoned mines near Silverton, Colorado. Under the agreement, Sunnyside and Kinross will pay $40,950,000 to the United States and $4,050,000 to the Colorado Department of Public Health and the Environment. All money recovered by the United States will be placed in a special EPA account and used to fund future cleanup actions at the Site. The United States will also contribute $45,000,000 to the ongoing cleanup of the Site. Under the agreement, Sunnyside is also relieved of its obligation to conduct investigation work at the Site, which will be taken over by EPA. Finally, the agreement grants the United States, the State of Colorado and other partys' access to property owned by Sunnyside for the purpose of conducting future cleanup actions. Resolution of these

issues frees time and resources devoted to litigation and enables EPA, the State of Colorado, and partners to move forward and focus on the investigation and cleanup of the Site.

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

Indictments, Sanctions, and Sentencing

•May 5, 2022—Liquimar Tankers Management Services Inc. and Evridiki Navigation Inc. were sentenced after being convicted at trial on all charges, including violating the Act to Prevent Pollution from Ships, falsifying ships' documents, obstructing a U.S. Coast Guard inspection and making false statements to U.S. Coast Guard inspectors. U.S. District Court Judge Richard G. Andrews for the District of Delaware sentenced the corporations to a total of $3 million criminal fine, and a five-year period of probation. Evridiki was fined $2 million and Liquimar was fined $1 million. on March 2019, the Evridiki was inspected by the Coast Guard in Big Stone Anchorage, within Delaware Bay after a delivery of crude oil. The jury found that during the inspection, Liquimar, Evridiki and the ship's Chief Engineer, Nikolaos Vastardis, tried to deceive Coast Guard inspectors regarding the use of the ship's oily water separator (OWS) and oil content meter (OCM), a required pollution prevention device. Chief Engineer Vastardis used a hidden valve to trap fresh water inside the sample line so that the OCM sensor registered zero parts per million concentraton of oil instead of what was really being discharged overboard.

•May 17, 2022—Christopher James Davis, of Venice, California, pleaded guilty in federal court in Mobile, Alabama, to one count of falsifying and using a document to obtain approval from the EPA to manufacture a pesticide. According to court documents, Davis, a product manager for a pesticide manufacturer, submitted documents supporting a pesticide's U.S. registration that he knew falsely indicated that the pesticide had been approved for manufacture and use in Canada, when in fact Davis knew it had not. Relying on the submission with this false information, the EPA approved the pesticide's U.S. application.

•May 18, 2022—The Chief Engineer of a foreign flagged vessel pleaded guilty to two felony counts for deliberately discharging approximately 10,000 gallons of oil-contaminated bilge water overboard in U.S. waters off the coast of New Orleans last year and then trying to obstruct the Coast Guard's investigation of the spill. The illegal conduct was first reported to the Coast Guard by a crew member via social media. Kirill Kompaniets, a Russian national and the Chief Engineer of the ship, a commercial bulk carrier registered in the Marshall Islands, was charged with the illegal discharge in violation of the Act to Prevent Pollution from Ships. According to papers filed in court, repair operations were underway to correct a problem with the discharge of clean ballast water when a valve burst and the engine room flooded. The discharge into U.S. waters occurred while the ship was at an anchorage near the South West Passage off the Louisiana coast. The ship's required pollution prevention equipment—an oily-water separator and oil content monitor—were not used, and the discharge was not recorded in the Oil Record Book, a required ship log. Kompaniets was also charged with obstruction of justice based on various efforts to conceal the illegal discharge. In a joint factual statement filed in court with his guilty plea, Kompaniets admitted to the following acts of obstruction of justice: (1) making false statements to the Coast Guard that concealed the cause and nature of a hazardous condition, and concealing that the engine room of the vessel

had flooded and that oil-contaminated bilge water had been discharged overboard; (2) destroying the computer alarm printouts for the period of the illegal discharge that were sought by the Coast Guard; (3) holding meetings with subordinate crew members and directing them to make false statements to the Coast Guard; (4) making a false Oil Record Book that failed to disclose the illegal discharge; (5) directing subordinate engine room employees to delete all evidence from their cell phones in anticipation of the Coast Guard inspection; and (6) preparing a retaliatory document accusing the whistleblower of poor performance as part of an effort to discredit him.

•May 19, 2022—A Florida corporation pleaded guilty in federal court in the Middle District of Florida to a charge of willfully violating an Occupational Safety and Health Administration (OSHA) rule. The criminal charge related to an explosion at a coal-fired power plant in 2017 that caused the deaths of five workers. Tampa Electric Company (TECO) operates several facilities in Florida, including Big Bend, a coal-fired power plant outside of Tampa. At the time, the facility consisted of four large coal-fired furnaces. Underneath the furnaces were water-filled tanks designed to catch and cool the molten "slag" by-product that drips down from the furnace. On June 29, 2017, hardened slag had accumulated at the top and the bottom of the slag tank and could not be removed. Rather than shutting down the furnace, TECO called in a contractor to perform high-pressure water blasting to try and clear the slag with the unit on-line. The work proceeded without observance of several safety-related procedures required by law. Five people were killed when one of the slag accumulations came loose, spraying the area with molten slag. In a plea agreement with the government, TECO admitted to willfully failing to hold a pre-job briefing with the workers performing the work.
(Andre Monette)

RECENT FEDERAL DECISIONS

FIRST CIRCUIT VACATES *EN BANC* HOLDING TO LIMIT THE 'DILIGENT PROSECUTION' BAR ON CITIZEN SUITS UNDER THE CLEAN WATER ACT

Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc., 32 F.4th 99 (1st Cir. 2022).

The First Circuit Court of Appeals recently vacated a prior *en banc* opinion to hold that the federal Clean Water Act's "diligent prosecution bar" precludes a citizen suit that seeks to apply a civil penalty when a state is diligently prosecuting an administrative enforcement action. The diligent prosecution bar does not preclude a citizen suit that seeks declaratory and injunctive relief.

Factual and Procedural Background

Blackstone Headwaters Coalition (Blackstone) is a Massachusetts-based, non-profit environmental organization whose mission "is to restore and protect water quality and wildlife habitat in the Blackstone River." In June 2013, the Massachusetts Department of Environmental Protection (MassDEP) issued a Unilateral Administrative Order (UAO) to Arboretum Village, LLC, which was involved in the development of Arboretum Village. The UAO alleged Arboretum Village violated the Massachusetts Clean Water Act and required Arboretum Village to pay an $8,000 civil administrative penalty.

In May of 2016, Blackstone filed suit against Gallo Builders, and others involved in the development of the Arboretum Village project, in the U.S. District Court for the District of Massachusetts. Blackstone's complaint set forth two counts. Count I alleged that Gallo Builders violated the Clean Water Act (CWA) by failing to obtain a Construction General Permit from the U.S. Environmental Protection Agency (EPA). Count II, central to the appeal, alleged a CWA violation for their failure to comply with provisions of the Construction General Permit that Arboretum Village obtained from the EPA due to "longstanding and habitual neglect of erosion and sediment control." The complaint sought both declaratory and injunctive relief, as well as the application of civil penalties against the defendants.

At trial, the defendants moved for summary judgment on the grounds that the "diligent prosecution bar" in § 1319(g)(6)(A) of the Clean Water Act precludes "civil penalty actions" brought by either the federal government or by citizens, via citizen suits, when the action concerns a violation for which a state has commenced and is diligently prosecuting an action under a comparable state law. The District Court granted summary judgment in favor of defendant. Blackstone appealed, arguing that the diligent prosecution bar did not prevent its request for either declaratory or prospective injunctive relief, because the bar only applies to a citizen suit for civil penalties.

The First Circuit's Decision

The threshold issue was whether the diligent prosecution bar precludes not only a citizen suit that seeks to apply a "civil penalty" to a defendant for an ongoing violation of the act, but also one that seeks to obtain declaratory or prospective injunctive relief from such a violation.

On appeal, Blackstone conceded that the diligent prosecution bar precludes a citizen suit that seeks a civil penalty for a violation of the Clean Water Act when the prerequisites for triggering that limitation on such a suit are satisfied. However, Blackstone argued that the bar has no application to a citizen suit for prospective injunctive and declaratory relief to redress an ongoing violation of the act because a citizen suit for such relief is not a "civil penalty action" within the meaning of the bar in § 1319(g)(6)(A) of the Clean Water Act.

First, the court noted that § 1319(g)(6)(A) provides that actions taken under the act "shall not be the subject of a civil penalty action." At the time the act was enacted, the word "penalty" had a definition of:

> . . .a sum of money which the law exacts payment of by way of punishment for doing some

act which is prohibited or for not doing some act which is required to be done.

Thus, the word "penalty" would not appear to encompass the kind of relief that a prospective injunction or a declaratory judgment provides. The court then reasoned that the words "civil penalty action" appear to serve no function other than to narrow the range of citizen suits, or "actions," that the provision precludes.

Second, the court analyzed the term "civil penalty action" in the context of the whole statute. Section 1319(b) of the Clean Water Act authorizes EPA to "commence a civil action for appropriate relief, including a permanent or temporary injunction." Section 1319(d) then separately authorizes a court to impose "civil penalties" in an action brought by the EPA. Thus, the court concluded, that with respect to the EPA's enforcement authority, § 1319(g)(6)(A) treats an "action" to assess a "civil penalty" as an "action" that is distinct from a "civil action" that seeks an "injunction."

Looking at the legislative history of CWA, the Court of Appeals found that Congress proposed text for a limitation on citizen suits that referred to a "civil penalty action" to address the potential for overlap between citizen enforcement and administrative penalties. The legislative history explained that the resulting limitation on civil penalty actions would not apply to an action seeking relief other than civil penalties.

Finally, the court held that § 1319(g)(6)(A) permits citizen suits for declaratory and prospective injunctive relief when no governmental enforcement action in court is underway. In reaching this conclusion, the court rejected a prior *en banc* decision of the First Circuit Court of Appeal in *North and South Rivers Watershed Association, Inc. v. Town of Scituate*, which held that a citizen suit seeking declaratory and injunctive relief is barred when the state is diligently prosecuting an administrative enforcement action. The court reasoned that allowing a citizen suit for equitable relief to proceed even when the government has undertaken administrative enforcement action was the intent of Congress. Thus, a civil penalty action is not an action for declaratory or prospective injunctive relief for purposes of the diligent prosecution bar under the Clean Water Act.

Conclusion and Implications

With this decision, the First Circuit Court of Appeals not only changed a prior *en banc* opinion, it also articulated an existing split among the Circuit Courts. The Eighth Circuit embraces a position that applies the diligent prosecution bar broadly to prohibit citizen suits seeking injunctive relief. The Tenth Circuit Court of Appeals takes the narrower position embraced by the First Circuit Court in this decision. Other Circuits have not ruled on this issue.

This case highlights the limitations to civil penalty actions under the Clean Water Act. Ongoing government enforcement of the Clean Water Act, and the prosecution of an action, does not bar citizens from filing their own suit so long as the actions are for injunctive or declaratory relief. The court's April 26, 2022 opinion is available online at: http://media.ca1.uscourts.gov/pdf.opinions/19-2095P-01A.pdf.
(Marco Ornelas Lopez, Rebecca Andrews)

NINTH CIRCUIT RULES CLEAN WATER ACT WATER QUALITY OBJECTIVES ARE NOT DIRECTLY APPLICABLE TO NONPOINT SOURCE DISCHARGERS

Central Sierra Environmental Resource Center v. Stanislaus National Forest, 30 F.4th 929 (9th Cir. 2022).

The U.S. Court of Appeals for the Ninth Circuit recently granted a summary judgment affirming that the government had not been shown to have violated the permitting requirements or water quality objectives of the federal Clean Water Act (CWA).

Background

As an "authorized state," California implements the state Porter-Cologne Water Quality Control Act (Porter-Cologne) in lieu of the CWA. The state acts through the State Water Resources Control Board (State Water Board) and its nine Regional Water

Quality Control Boards (Regional Boards) to issue permits, called Waste Discharge Requirements (WDRs) or waivers from the permitting requirements. In 1981, the State Water Board signed a Management Agency Agreement (MAA) with the United States Forest Service (Forest Service). The MAA formally recognized the state's designation of the Forest Service, pursuant to § 208(c) of the Clean Water Act, as the management agency for all activities on National Forest System lands, with responsibility to implement provisions of water quality management plans. In the MAA, the State Water Board agreed that the practices and procedures set forth in the Forest Service 208 Report constitute sound water quality protection and improvement on Forest Service lands, except with respect to certain enumerated issues. As to the enumerated issues, additional "Best Management Practices" (BMPs) were needed.

The Forest Service has issued permits allowing livestock grazing in three allotments within the Stanislaus National Forest that are at issue here—the Bell Meadow, Eagle Meadow, and Herring Creek Allotments (collectively: BEH Allotments). In March 2017, two environmental plaintiffs sued the Stanislaus National Forest, the Forest Service, and the then-Forest Service Supervisor in her official capacity (together: Government), claiming that the Government violated the CWA in two respects. First, plaintiffs alleged that the Government made new or modified discharges of waste without obtaining WDRs or a waiver of the WDR requirement. Second, plaintiffs alleged the Government's permits for livestock grazing on the BEH Allotments caused violations of state water quality standards for fecal coliform bacteria.

Plaintiffs' suit sought injunctive relief modifying the grazing arrangements in the BEH Allotments. As a result, the District Court allowed the holders of the relevant grazing permits, together with several interested organizations to intervene as defendants. After the parties filed cross-motions for summary judgment, the District Court granted summary judgment to the Government. After entry of final judgment, plaintiffs timely appealed.

The Ninth Circuit's Decision

The issue presented on appeal was whether the Government violated the CWA by discharging waste without first obtaining either WDRs or a waiver. The court noted that the 1981 MAA specifically addressed the obligation to obtain WDRs or a waiver. The 1981 MAA provided that implementation of BMPs constituted compliance with the requirement to apply for and obtain WDRs. Thus, the court found the MAA to clearly establish that in lieu of filing reports and obtaining WDRs, the Forest Service can implement agreed-upon BMPs and the provisions of the MAA.

Plaintiffs asserted, however, that the State Water Board superseded the 1981 MAA in 2004, when it adopted the *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (2004 NPS Policy). The 2004 NPS Policy provided that all current and proposed nonpoint source discharges, such as discharges from grazing operations, must be regulated under WDRs, waivers of WDRs, or some combination of administrative tools. The court did not find the argument compelling as the 2004 NPS Policy expressly acknowledged management agency agreements, such as the MAA, as operative. Because of this, the court concluded that the plaintiffs failed to show that the Government violated the permitting requirements of the CWA and affirmed the district court's grant of summary judgment on this issue.

The court next considered and rejected plaintiffs' argument that the Government violated the CWA by authorizing livestock grazing which caused runoff leading to fecal coliform levels in local waterways in excess of the relevant water quality objectives. The court found this argument failed because water quality objectives do not directly apply to individual dischargers. Instead, these objectives reflect standards that regulators must take into account in fashioning the requirements that do apply to dischargers, such as WDRs and waivers. The court noted that the plaintiffs had not cited any law that makes a discharger directly liable for violating a water quality objective that is not contained in applicable WDRs, waivers, or other regulatory tool.

For the foregoing reasons, the court found the Government had not been shown to have violated the CWA, and that the plaintiffs failed to contend that the Government violated any prohibition contained within a regulatory mechanism. The Court of Appeals affirmed the District Court's grant of summary judgment to the Government.

Conclusion and Implications

This case highlights the challenges to bringing a successful citizen suit against a nonpoint source discharger. It also serves as a reminder that water quality objectives are not directly applicable to dischargers without an additional regulatory mechanism to implement the objective. The Ninth Circuit's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/08/19-16711.pdf. (Helen Byrens, Rebecca Andrews)

SIXTH CIRCUIT FINDS DECLARATORY JUDGMENT SUFFICIENT TO TRIGGER CERCLA STATUTE OF LIMITATIONS FOR CONTRIBUTION ACTIONS

Georgia-Pacific Consumer Products LP v. NCR Corporation, ___F.4th___, Case No. 18:1806 (6th Cir. Apr. 25, 2022).

When a bare-bones declaration judgment is entered with respect to a Superfund site allocating all of the responsibility for clean-up costs, but no clean-up costs have yet been incurred, does the statute of limitations begin to run for contribution actions against non-parties? The Sixth Circuit Court of Appeals holds that it does.

Background

In 1990, the U.S. Environmental Protection Agency (EPA) added the Kalamazoo River in Michigan (River) to the National Priorities List (NPL), "which identifies the most important Superfund sites" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. Ch. 103). Having served as the site for significant paper milling operations from the 1860s, the River suffered severe environmental degradation, with "researchers … raising concerns over the paper industry's environmental impact" beginning in the 1950s. That same decade, the river's environmental problems worsened substantially when paper mills undertaking carbonless copy-paper recycling began releasing polychlorinated biphenyls (PCBs) into the river and surrounding land. PCBs produce a host of negative health effects, including possibly increasing exposed individual's risk of cancer.

International Paper (IP), Weyerhauser, Georgia-Pacific (GP) and NCR Corporation (NCR) either manufactured paper, or are the successors to paper manufacturers, with operations on the River.

In 1990, GP and two other paper manufacturers formed the Kalamazoo River Study Group (KRSG), which entered an Administrative Order on Consent (AOC) with Michigan requiring KRSG to perform a site-wide remedial investigation and feasibility study. KRSG next brought a cost-recovery action in 1995 pursuant to 42 U.S.C. § 107 seeking response costs from several firms that it alleged had released PCBs into the Kalamazoo River. Two of the named parties countersued and, following a District Court trial, a 1998 opinion found GP and the other KRSG members, and one defendant, liable for PCBs contamination. In 2001, the Sixth Circuit upheld a U.S. District Court order allocating *all* remediation costs to the members of the KRSG. The Circuit Court later affirmed a 2003 District Court judgment holding a non-KRSG defendant:

> . . . liable for a small portion of the costs of investigating parts of the NPL site but wrotie 'that it would not be equitable to require [the non-KRSG defendant] to share in the remediation of the NPL Site.

GP nonetheless subsequently re-instituted litigation in 2010, first naming NCR and IP, and later adding Weyerhauser as a defendant. GP claimed IP and Weyerhauser were liable for contribution under 42 U.S.C. § 113(f) as successors to companies that owned mills and discharged PCBs; NCR was sued under both 42 U.S.C. §§ 107 and 113 as an "arranger" for having allegedly arranged the disposal of PCBs "at the affected area." The District Court rejected the statute of limitations defenses raised by IP, Weyerhauser and NCR, and apportioned liability to each defendant.

The Sixth Circuit's Decision

As issue in the appeal was whether the 1998, the 2000 or the 2003 District Court judgments of liability against the KRSG members "started CERCLA's statute of limitation to run for contribution claims."

CERCLA's § 107:

> . . .permits a private party to recover from another the 'necessary costs of response incurred by any other persons consistent with the national contingency plan.

Section 113 "creates a contribution right for any party sued under §§ 106 and 107," where "contribution":

> . . .means the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault. *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 138 (2007) (quoting BLACK'S LAW DICTIONARY 353 (8th ed. 2004)).

The rights granted by §§ 107 and 113 are mutually exclusive:

> . . .costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). *Alt. Rsch. Corp.*, 551 U.S. at 139-140 n. 6.

Cost recovery actions under § 107 are subject to a three-year limitation period "after completion of the removal action" or, for a remedial action, "within [six] years after initiation of physical on-site construction." Section 113 contribution actions are subject to a three-year limitations period from the date of a judgement in any CERCLA action for recovery of costs or damages or the date of various administrative orders related to settlements of such claims.

The Sixth Circuit has previously held that § 107 "likely provides a broader avenue of recovery, and has a longer limitation period than section 113, and that the U.S. Supreme Court having held that suits under § 113 may only be brought when the plaintiff can "'demonstrate that certain preconditions [a]re met,'" "[p]utting those two pieces together, we concluded that if a party *may* bring suit under § 113(f), it *must* do so." *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014). Further, as the Circuit has previously observed:

> . . .[t]he principal purpose of [CERCLA's] limitations periods in this setting is to ensure that the responsible parties get to the bargaining-and clean-up- table sooner rather than later. *RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007).

Extending its reasoning in *RSR*, that "[r]ather than focus on *who* settled the cost-recovery action … the status asks us to focus on *what* was settled" (*id.* at 557), the Sixth Circuit held that § 113's statute of limitations "should bar an action against a nonparty beyond the statutory period."

The court then turned to assessing the 1998 declaratory judgment to determine whether it triggered § 113's limitations period. Focusing on the breadth of the responsibility assigned to the KRSG members, who were allocated one hundred percent of the clean-up costs, the court held that "[t]he 1998 declaratory judgment on liability … started the contribution clock ticking." While GP "did not yet have a bill in hand for response costs or damages," the court analogized to it prior holding in *RSR*, where the judicial action defined the scope of "responsibility to pay for 'as-yet-unfinished' remedial work."

Conclusion and Implications

This decision may have limited applicability based on its facts—here, KRSG members were assigned 100 percent of the liability for clean-up costs. However, even where less than all of the responsibility for costs is assigned, a bare bones declaratory judgment is no less certain. The reasoning of this decisions is not therefore necessarily confined to its facts. The Sixth Circuit's opinion is available online at: https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0080p-06.pdf. (Deborah Quick)

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
LAW AND REGULATION REPORTER

NINTH CIRCUIT FINDS FOREST SERVICE FAILED TO EXPLAIN HOW PROJECT COMPLIED WITH THE ROADLESS AREA CONSERVATION RULE

Los Padres ForestWatch v. U.S. Forest Service, 25 F.4th 649 (9th Cir. 2022).

The State of Alaska and Safari Club International (a hunting organization) filed suits under various federal statutes against the Secretary of the Interior, seeking declaratory relief, injunctive relief, and *vacatur* of portions of the U.S. Fish and Wildlife Service's (FWS) "Kenai Rule," which limited certain hunting practices in the Kenai National Wildlife Refuge, even though the State of Alaska had approved them. After the cases were consolidated and environmental organizations intervened, the U.S. District Court entered summary judgment for the FWS. After Alaska and the hunting organization appealed, the Ninth Circuit affirmed.

Factual and Procedural Background

In 2013, the State of Alaska Board of Game expanded the availability of brown bear hunting permits, extended the brown bear hunting season, increased relevant harvest limits, and approved the taking of brown bears through baiting at registered black bear stations in the Kenai Refuge. The Board of Game also opened a specific area of the Kenai Refuge called the Skilak Wildlife Recreation Area (WRA) to the seasonal hunting of coyotes, lynx, and wolves. The FWS disagreed with these actions and acted to block the Board of Game's authorization of brown bear baiting at black bear stations in 2013 and 2014. It also closed the Skilak WRA to the newly approved coyote, lynx, and wolf hunting before the season started. In May 2016, it then adopted a rule to codify its ban on baiting of Kenai brown bears and its closing of the Skilak WRA to coyote, wolf, and lynx hunts. Under the National Environmental Policy Act (NEPA), FWS found that the Kenai Rule fit the agency's categorical exclusion for regulations that maintain permitted levels of use.

The State of Alaska and Safari Club International separately sued the Secretary of the Interior under the theory that FWS violated the Alaska National Interest Lands Conservation Act (ANILCA), National Wildlife Refuge System Improvement Act of 1997 (Improvement Act), Administrative Procedure Act (APA), and NEPA by enacting the Kenai Rule. The premise of the lawsuits was that the State of Alaska, and not the federal government, has the ultimate regulatory authority over hunting on federal lands in Alaska. The U.S District disagreed and entered summary judgment in favor of FWS. Alaska and Safari Club International then appealed

The Ninth Circuit's Decision

The ANILCA Claims

The Ninth Circuit first addressed Alaska and Safari Club's arguments that FWS exceeded its statutory authority in enacting the Kenai Rule. First, they asserted that the Alaska Statehood Act and ANILCA strip FWS of the power to restrict the means, methods, or scope of State-approved hunting on federal lands in Alaska. Second, they contended that even if FWS could preempt the State's hunting regulations on federal lands in Alaska, the Kenai Rule violated a 2017 congressional joint resolution revoking a Refuges Rules, which had expanded the ban on brown bear hunting to all Alaskan wildlife refuges and restricted certain State-authorized hunting.

The Ninth Circuit disagreed with these arguments, finding that ANILCA gives the Secretary of the Interior the power to manage the public lands in Alaska, and all hunting therein is to be carried out in accordance with ANILCA and other applicable state and federal law. In this context, the Ninth Circuit found, hunting within the Kenai Refuge is subject to federal law, including any regulations imposed by the Secretary of the Interior under the delegated statutory authority to manage federal lands. The Ninth Circuit also rejected the argument that the 2017 congressional joint resolution canceling the Refuges Rule substantively amended ANILCA and other statutes such that it voided the Kenai Rule.

The Improvement Act Claims

The Ninth Circuit next addressed Safari Club's claim that the Skilak WRA aspect of the Kenai Rule

violated the Improvement Act by disfavoring the compatibility priority use of hunting relative to the other compatibility priority uses and compatibility non-priority uses of the Skilak WRA. The Ninth Circuit again disagreed, finding that the Improvement Act does not require FWS to allow all state-sanctioned hunting throughout the Kenai Refuge. Nor did the Improvement Act's statement that FWS hunting regulations "shall be, to the extent practicable, consistent with [s]tate fish and wildlife laws, regulations, and management plans" alter this analysis. The Ninth Circuit found that ANILCA authorizes FWS to enact regulations preempting State-approved hunting in the Kenai Refuge, and when ANILCA and the Improvement Act are in tension, the former prevails.

The APA Claims

The Ninth Circuit next addressed a series of arguments that FWS violated the APA by acting arbitrarily and capriciously in issuing the Kenai Rule. These claims are described and addressed in detail in the Ninth Circuit opinion. Regarding the brown bear baiting aspect of the Kenai Rule, the State and Safari Club claimed that FWS acted arbitrarily and capriciously because: 1) the Rule conflicts with a different regulation; 2) FWS improperly considered a predator control factor not contemplated by Congress; 3) the Rule's conservation basis was improper; and 4) the Rule's public safety justification was not grounded in evidence in the record and constituted an unexplained change in position by FWS.

Regarding the Skilak WRA hunting part of the Kenai Rule, Safari Club also argued that: 1) FWS did not articulate any sufficient basis for banning coyote, lynx, and wolf hunting in the Skilak WRA; 2) the record undercuts FWS' finding that hunting in the Skilak WRA will curb other recreation; 3) FWS did not explain the basis for its changed position on coyote, lynx, and wolf hunting within the Skilak WRA; and 4) the U.S. District Court applied the incorrect legal standard in disposing of the APA claims concerning the Skilak WRA. Finally, Safari Club also claimed that enactment of the Kenai Rule was procedurally improper because FWS did not make necessary predicate findings that the baiting of brown bears and the hunting of coyotes, lynx, and wolves in the Skilak WRA were incompatible with refuge purposes The Ninth Circuit disagreed with all of these claims, in each instance finding that FWS had acted properly.

The NEPA Claims

Finally, the Ninth Circuit addressed Alaska and Safari Club's NEPA arguments. First, they claimed that the Kenai Rule changed the environmental status quo in the Kenai Refuge such that NEPA review is required. Second, they claimed that FWS improperly fulfilled its NEPA obligations for the Kenai Rule through categorical exclusions. Even assuming that NEPA's procedures applied to the Kenai Rule, the Ninth Circuit found that the disputed parts of the Kenai Rule codified longstanding constraints on hunting in the Kenai Refuge, and the fact that these limitations changed from state to federal restrictions did not alter the permitted levels of use in the Kenai Refuge. Within the context, the Ninth Circuit concluded, FWS had sensibly decided that the Kenai Rule fit a categorical exclusion for:

> . . .issuance of special regulations for public use of [FWS]-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse environmental impacts.

The Ninth Circuit also rejected the claim that any "extraordinary circumstances" existed to preclude reliance on a categorical exclusion, rejecting the claim that public controversy constituted such circumstance

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding a variety of federal statutes as they regard the management of National Wildlife Refuge lands in Alaska, including a detailed analysis of various claims made under the APA. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/18/21-35030.pdf.
(James Purvis)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS AGENCY WAS REQUIRED TO MAKE CEQA FINDINGS FOR SIGNIFICANT EFFECTS BEFORE ISSUING WASTEWATER PERMIT

We Advocate Through Environmental Review v. City of Mt. Shasta, ___Cal.App.5th___, Case No. C091021 (3rd Dist. May 11, 2022).

In an opinion certified for publication on May 11, 2022, the Third District Court of Appeal found that the City of Mt. Shasta (City), as a responsible agency, violated the California Environmental Quality Act (CEQA) by failing to issue findings for impacts associated with a wastewater permit it approved for a water bottling facility in Siskiyou County (County). The court held the City failed to proceed in a manner required by law when it issued a "blanket finding" of no unmitigated adverse impacts, even though the underlying EIR found the permitted activities would have potentially significant effects.

Factual and Procedural Background

The Crystal Geyser Water Bottling Facility

From 2001 to 2010, a water bottling company operated a groundwater extraction and bottling plant in Siskiyou County. A few years after the plant closed, Crystal Geyser Water Co. bought and sought to revive the defunct facility. Crystal Geyser requested various approvals from the County, which served as the lead agency in evaluating the facility's potential environmental impacts. The County prepared a draft Environmental Impact Report (EIR), which explained that the project would entail renovations to the former plant to ultimately produce sparkling and flavored water, juice beverages, and teas. To facilitate the Project, the DEIR noted that Crystal Geyser would need to obtain permits from several public agencies, including a permit from the County to construct a caretaker's residence for the plant and a permit from the adjacent City of Mt. Shasta to allow the plant to discharge wastewater into the City's sewer system.

In its limited role as a responsible agency, the City shared a draft of the Project's wastewater permit with the County for inclusion and discussion in the EIR. The draft permit purported to authorize Crystal Geyser to discharge process, non-process, and sanitary wastewater into the City's sewer system. The permit noted the wastewater would be "high-strength" from spilled produce, internal and external cleaning, sanitizing chemicals, flavor-change rinse water, and final rinse water from produce lines and tanks. The permit's final draft further added that the wastewater would also include condensate, boiler blowdown water, and cooling tower blowdown water.

After the County certified the EIR, the City moved to finalize the terms of the permit by stating that it had considered the County's EIR and found no unmitigated adverse environmental impacts related to the alternate waste discharge disposal methods authorized by the permit.

At the Trial Court

Following the County's and City's approvals, two suits arose alleging CEQA violations. In the first action, Petitioners We Advocate Through Environmental Review (WATER) and the Winnehem Wintu Tribe alleged the County's environmental review of the facility was inadequate. In the second suit (the opinion at bar), Petitioners alleged the City, functioning as a responsible agency, violated CEQA by issuing the wastewater permit in reliance on the County's improper environmental review of the facility. Petitioners specifically alleged the City failed to comply with its obligations as a responsible agency because it: 1) failed to make requisite CEQA findings under

Public Resources Code § 21081 before issuing the permit; 2) should have adopted the EIR's mitigation measures to address some of the facility's impacts; and 3) should have performed additional environmental review after it made late revisions to the permit. Petitioners also sought judicial notice of two letters that were inadvertently left out of the administrative record.

The trial court rejected each of petitioners' claims. As to the first, the trial court held that a responsible agency is not required to make written findings if it determines there are no unmitigated significant impacts to the environment. As to the second, the court found that the City did adopt mitigation measures by way of permit conditions for those parts of the Project over which the City had authority. As to petitioners' third claim, the court concluded the City did not need to perform additional environmental review because the City had determined the final permit revision would not add significant new impacts. Finally, the court rejected petitioners' request for judicial notice because the documents were not helpful to rendering a decision and contained confidential information.

Petitioners timely appealed and re-raised the same four claims.

The Court of Appeal's Decision

The Court of Appeal partially reversed the trial court's denial of the entire petition, finding that the City should have made certain findings under CEQA before issuing the wastewater permit. Because the County found several potentially significant impacts related to the permit, the City needed to make findings for each significant impact, accompanied by a brief explanation and rationale. The court denied petitioners' three other remaining claims.

The Trial Court did not Commit Reversible Error in Denying Petitioners' Request for Judicial Notice

Petitioners claimed the trial court erred in denying their request for judicial notice of two comment letters that were inadvertently omitted from the administrative record. Petitioners requested judicial notice of those letters, arguing their inclusion was required under Public Resources Code § 21167.6, subdivision (e)(6).

The appellate court held that, even if the letters should have been included in the record, petitioners failed to establish that their omission was prejudicial. The court noted that petitioners did not even dispute the City's claim that the letters were irrelevant to disposing the issues at bar. For these reasons, the court declined to find that the trial court's denial of petitioners' request constituted reversible error.

The City, as Responsible Agency, Failed to Make Requisite CEQA Findings

Petitioners argued that the City, as responsible agency, failed to comply with basic CEQA requirements. The Third District agreed. Under CEQA, a lead agency is charged with considering all environmental impacts of a project before approving it. A responsible agency, however, need only consider the direct or indirect environmental effects of those parts of the project that it decides to carry out or approve. (Pub. Resources Code, § 21002.1, subd. (d).) Although distinct in this regard, both agencies must make certain findings before approving a project for which an EIR identifies significant effects. Those findings must briefly explain whether the impact had been mitigated or avoided, whether the measures necessary for mitigation were within the responsibility and jurisdiction of another agency, or whether there were specific economic, legal, or other considerations that would make mitigation infeasible. (Pub. Resources Code, § 21081; CEQA Guidelines, § 15091.)

Here, the EIR identified several potentially significant impacts associated with Crystal Geyser's proposed discharge of wastewater into the City's sewer system. For example, the EIR noted the Project's discharge could potentially exceed the capacity of the City's wastewater treatment plant. The EIR also noted that the Project may require installation of additional pipelines to discharge wastewater, which could result in significant impacts to fishery resources, endangered species, and cultural resources. Nevertheless, the City's resolution approving the permit only stated that it had:

> . . .considered the [EIR] prepared by the County…for the [Project] and [found] no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods.

The court reasoned that the City's "blanket finding"—*i.e.*, that a project includes "no unmitigated adverse environmental impacts"—did not satisfy CEQA's findings requirement. Instead, the City was required to make at least one of the findings listed under Public Resources Code § 21081 for each significant impact identified in the EIR. This omission was compounded by the City's failure to acknowledge that the EIR identified several potentially significant effects associated with portions of the Project in the City's jurisdiction. Finally, the City did not provide the requisite "'brief explanation of the rationale' for its nonexistent findings."

These shortcomings amounted to a procedural violation—one that could not be salvaged by the trial court's reasoning. The appellate court was not persuaded by the rationale that an agency need only make findings when the EIR identifies a significant environmental impact that will not be mitigated. To the contrary, an agency simply cannot forego written findings when an EIR explains that a project will have significant effects but adopted mitigation measures would reduce those effects to insignificant levels. Rather, such a determination simply forms the basis for a finding that "changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects." Because the City failed to provide anything along these lines, the appellate court held that the City violated CEQA's procedural requirements.

Petitioners Failed to Establish the City was Required to Adopt an MMRP

Petitioners claimed the City should have adopted the EIR's sewer improvement mitigation measures as part of a Mitigation, Monitoring, and Reporting Plan (MMRP) because the County, as the lead monitoring agency, lacked a clear ability to enforce most measures. Petitioners reasoned that the County's enforcement authority was conditioned on building the plant's caretaker residence—a structure petitioners deemed "unnecessary." The court rejected petitioners' claim because petitioners provided no legal or evidentiary authority to support their assertion that the residence was "unnecessary" and thus deprived the County of its mitigation enforcement authority.

On Remand, the City Should Consider Whether Project Changes Fall Within Another Agency's Jurisdiction

Petitioners further contended the City should have at least found that the sewer improvement mitigation measures would be within the responsibility of another agency. The court generally agreed and explained that should the City decide to re-approve the Project on remand, it will need to consider whether the EIR's mitigation measures fall within another agency's jurisdiction. While the Court of Appeal conceded that the parties may dispute what transpires on remand, it would be premature for the trial court to entertain those issues at this stage. Instead, the trial court simply noted that the City may disclaim the responsibility to mitigate environmental effects only when the other agency said to have responsibility "has exclusive responsibility."

Petitioners Failed to Carry Their Burden of Establishing that the City was Required to Conduct Additional Environmental Review

Lastly, petitioners argued that the City should have performed additional environmental review and provided an opportunity for public comment before approving the revised version of the wastewater permit. Of the permit's three additions—condensate, boiler blowdown water, and cooling tower blowdown water—petitioners alleged the latter two would contain anti-scaling chemicals that were admittedly toxic and should not be discharged into lakes, streams, or public waters. Because this information was disclosed in the chemicals' safety data sheets, petitioners contended the City should have disclosed and adequately reviewed those changes before approving the permit. The City refuted this, noting that the EIR analyzed earlier but equivalent versions of the cited chemicals, and found no detrimental effects would occur.

The court rejected petitioners' overstated characterization of the facts and misapplication of the law. Though petitioners' concern regarding the lack of CEQA findings was relevant to their earlier claims, it carried no relevance to this issue. Moreover, the merits of the EIR were not at issue here—and to the extent petitioners sought to challenge the EIR's adequacy, this suit against the City was not the appropriate forum for doing so. Rather, lawsuits brought against a responsible agency are limited to those ac-

tions the agency took in approving the project; they do not extend to the adequacy of the lead agency's CEQA review.

Conclusion and Implications

The Third District of Appeal's relatively brief opinion offers a helpful reminder to agencies that serve in lead and responsible capacities. As the court reiterated: where an EIR identifies a potentially significant environmental effect—regardless of whether that effect will be mitigated to less-than-significant levels—responsible agencies must make at least one of the CEQA findings prescribed by Public Resources Code § 21081. Those findings must also include a brief explanation and rationale for the agency's determination—"blanket findings" may be insufficient. Responsible and lead agencies are thus encouraged to communicate about the scope and extent of any impacts that fall within their respective jurisdictions to ensure both sets of findings adequately encompass any and all identified effects.

The Third District's opinion is available at: https://www.courts.ca.gov/opinions/documents/C091012.PDF.

(Bridget McDonald)

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