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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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ENVIRONMENTAL NEWS

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA PROJECTS 2023 WATER DEMANDS WILL EXCEED AVAILABLE SUPPLIES FROM THE COLORADO RIVER AND THE CALIFORNIA STATE WATER PROJECT

The Metropolitan Water District of Southern California (Metropolitan) supplies water to a substantial region of Southern Californians living and working in the Los Angeles and San Diego metropolitan areas. Metropolitan's 2023 water demand is projected to be approximately 1.71 million acre-feet (MAF). However, it projects supplies from the Colorado River and the California State Water Project (SWP) to be approximately 1.22 MAF, leaving a projected supply deficit of 483 thousand acre-feet (TAF) for 2023. Metropolitan is implementing conservation efforts to reduce projected demand and relying on water purchases and storage withdrawals to supplement supply.

Background

Metropolitan is responsible for supplying water to 26 public water agencies who then deliver water directly or indirectly to approximately 19 million people in southern California. Metropolitan's service territory includes areas within Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura counties. To meet the water demands of these communities, Metropolitan relies on local supplies but also primarily upon imported water from the Colorado River and the SWP. Both of these sources are now constrained by the continued, historic drought conditions in the Western States.

Colorado River Supply

On a monthly basis, the U.S. Bureau of Reclamation (Bureau) publishes 24-Month Study Report presenting hydrological descriptions and projected operations for the Colorado River system reservoirs for the next two years. It is a key planning tool for states dependent upon Colorado River water. Based upon the data presented in the August update to the Bureau's 24-Month Study Report, the Bureau declared the first-ever level 2A shortage for the calendar year 2023. The Bureau reports indicate this means supplies delivered to Arizona, Nevada, and Mexico would be reduced by approximately 21 percent, 8 percent, and 7 percent respectively. Based upon current projections, the Bureau indicates supplies delivered to California would not be reduced. However, if drought conditions continue or worsen, supplies to California may be reduced in 2024. Metropolitan's supply from the Colorado River for 2023 is expected to be just under 1 MAF.

In June 2022, the Bureau Commissioner directed the Colorado River basin states to form a unified plan to supplement Colorado River reservoirs, such as Lake Mead and Lake Powell, with an additional 2-4 MAF in order to stabilize water levels. Though there were several meetings among the basin states, no unified plan was produced.

State Water Project Supply

The SWP is a water storage and delivery system spanning two-thirds the length of California. It is operated by the California Department of Water Resources (DWR) and serves water to 27 million Californians and 750,000 acres of farmland. In March 2022, DWR substantially reduced SWP allocations. A portion of Metropolitan's northern-most water agencies have limited access to Colorado River water and are therefore more dependent upon SWP water.

In April of 2022, Metropolitan declared a Water Shortage Emergency for SWP dependent areas, requiring drastic water-use reductions. In June 2022, affected member agencies implemented mandatory local conservation measures. One such conservation measure is that outdoor watering is limited to one day per week. In November, if enough water is not conserved, outdoor watering could be prohibited entirely and volumetric limits may come into effect in December. The emergency water conservation programs are scheduled to continue through, at least, June 30, 2023. In addition, DWR is seeking to supplement SWP supplies by acquiring transfer supplies from users

in the Central Valley. Metropolitan's supply from the SWP is expected to be about 250 TAF in 2023.

Drawing from Storage to Meet Demands

Metropolitan currently expects to end the calendar year with approximately 2.1 MAF of region-wide storage; 1.4 MAF from the Colorado River, 460 TAF from the SWP, and 290 TAF from in-region storage. At first glance, it appears there is enough stored water to satisfy the supply deficit. However, due to operational limits and expected Colorado River Drought Contingency Plan contributions, only a portion of this storage will be accessible in 2023. Metropolitan estimates that its maximum take capacity for stored water will be 410 TAF from the Colorado River, 86 TAF from the SWP, and all 290 TAF from in region storage. This adds up to 786 TAF which, from a region-wide perspective, will be sufficient to meet the current estimated supply deficit.

Conclusion and Implications

In the coming months it is expected that Metropolitan may ramp up its conservation efforts to further reduce water demands within its service territory. This is especially true for the northern-most water agencies that are dependent upon SWP water. It is also expected that DWR will look to purchase additional water supplies supplementing the SWP. (Byrin Romney, Derek Hoffman)

LEGISLATIVE DEVELOPMENTS

FEDERAL DRAFT WATER INFRASTRUCTURE BILL INTRODUCED WHICH AIMS TO IMPROVE CALIFORNIA'S LONG-TERM WATER SUPPLY AND REGULATORY RELIABILITY

On September 29, U.S. Representative David Valadao (CA-21) introduced House Resolution (HR) 9084 that would address funding and regulation of California's water storage infrastructure. Titled the Working to Advance Tangible and Effective Reforms (WATER) for California Act, HR 9084 is cosponsored by the entire California Republican delegation.

Background

The proposed legislation arrives amidst a historic drought roiling California. In a statement, Rep. Valadao introduced the bill in order to provide "water to the farmers, businesses, and rural communities" in the Central Valley, the state's agricultural hub, which Rep. Valadao represents [https://valadao.house.gov/news/documentsingle.aspx?DocumentID=446]. *See:* Faith Mabry, *Congressman Valadao Introduces Sweeping California Water Legislation*, Office of U.S. Congressman David G. Valadao (Sept. 29, 2022) [https://valadao/house.gov/news/documentsingle.aspx?DocumentID=446].

House Resolution 9084

The proposed legislation has three different areas of focus: operations, infrastructure, and allocations.

This bill's proposed changes to operations would require the management and long-term operations plans of the Central Valley Project (CVP) and State Water Project (SWP) to be consistent with the 2019 Biological Opinions (BiOps). (HR 9084, 117th Cong. § 104 (2022).) Issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, the 2019 BiOps determined that increased water diversions from the Bay-Delta would not jeopardize threatened or endangered species under the Endangered Species Act [https://wwd.ca.gov/wp-content/uploads/2021/05/about-the-2019-biological-opinions.pdf] and *see: About the 2019 Biological* Opinions, Westlands Water District (May, 2021), https://wwd.ca.gov/wp-content/uploads/2021/05/about-the-2019-biological-opinions.pdf

If passed, provisions of the new bill would halt the current administration's attempt to revisit the findings of the 2019 BiOps following criticism from environmental groups [https://www.nrdc.org/experts/doug-obegi/trumps-bay-delta-biops-are-plan-extinction].

Regarding infrastructure, HR 9084 would make available funding to advance several water storage projects, including the Shasta Dam and Reservoir Enlargement Project. (HR 9084 at § 301.)

The bill would also require the Commissioner of the Bureau of Reclamation to develop a "water deficit report" that would include a list of infrastructure projects or actions to reduce projected water supply shortages. (*Id.*) Moreover, this bill would amend the 2018 Water Infrastructure Improvements for The Nation (WIIN) Act regarding eligible funding recipients. Current law permits only a state or public agency to receive federal funding for certain water-storage projects. (S 612, 114th Cong. § 4007 (2016).) This bill would expand the types of eligible entities to allow "any stakeholder" to receive federal funding. (HR 9084 at § 304.)

Lastly, the proposed bill addresses CVP water allocations. The bill aims to increase the water quantity that CVP stakeholders receive, because, as the statement from Rep. Valadao notes, the "South-of-Delta agricultural repayment and water service contractors have received zero percent of their allocation" for the past two years. The bill ties the minimum water quantity allocations of the CVP's agricultural water service contractors to a percentage of the contracted amount, with a majority of the provisions requiring "100 percent of the contract quantity" of water allocations to be provided. (HR\ 9084 at § 202.)

Conclusion and Implications

House Resolution 9084 is before the House Committee on Natural Resources. If passed, the bill could cement the substantial increases in

the levels of water diverted in the Bay-Delta initially authorized by the 2019 BiOps. Moreover, the bill would expand the list of eligible applicants for federal funding for certain water storage projects as well as generate additional data and administrative actions to increase California's water storage. Finally, the proposed legislation would protect the contractual expectations of CVP stakeholders from the fluctuating water allocations caused by California's historic drought. To track the status and text of the bill, *see:* https://valadao.house.gov/uploadedfiles/water_for_california_act_valada_044_xml.pdf.
(Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE PROPOSES NEW EAGLE RULE TO CREATE A GENERAL INCIDENTAL TAKE PERMIT PROCESS FOR POWER LINE INFRASTRUCTURE AND WIND-ENERGY PROJECTS

On September 30, 2022, the U.S. Fish and Wildlife Service (FWS) proposed new regulations related to the issuance of permits for eagle incidental take and eagle nest take. (*See* FWS, Permits for Incidental Take of Eagles and Eagle Nests, 87 Fed. Reg. 59,598 (Sept. 30, 2022).) The FWS' proposed rule includes the creation of a general permit option for qualifying power line infrastructure, wind-energy generation projects, and other activities that may disturb breeding bald eagles and bald eagle nests. The rule is the agency's latest attempt to revise implementation of the Bald and Golden Eagle Protection Act and increase both the efficiency and effectiveness of the incidental take permitting process while also increasing conservation efforts for eagles.

Background

The FWS is the federal agency tasked with the authority and responsibility to manage bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act). (16 U.S.C. § 668 *et seq.*) The Eagle Act prohibits the take, possession, and transportation of bald eagles and golden eagles except pursuant to federal regulations. The Eagle Act also authorizes the Department of the Interior (via FWS) to adopt regulations to allow the "taking" of eagles including when "necessary . . . for the protection of wildlife or of agricultural or other interests in any particular locality" provided that the taking is also compatible with the preservation of bald eagles and golden eagles. (16 U.S.C. § 668a.) For purposes of the Eagle Act, "take" means "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb;" and "transport" means:

> . . .ship, convey, carry, or transport by any means whatever, and deliver or receive or cause to be delivered or received for such shipment, conveyance, carriage, or transportation. (16 U.S.C. § 668c.)

The FWS established a permit process for the incidental take of eagles and eagle nests in 2009. Notably, the FWS took this action *after* bald eagles were delisted as endangered species and threatened wildlife under the federal Endangered Species Act.

In 2016, the FWS revised the permit process for the incidental take of eagles and eagle nests. Among other changes, the FWS extended the maximum tenure of permits for the incidental take of eagles from five to 30 years and imposed preconstruction monitoring requirements for wind-energy projects applying for incidental take permits.

Prior to the FWS' official publication of its latest rule, the FWS published an advance notice of proposed rulemaking to inform the public of changes the FWS was considering to help expedite the permit process for the incidental take of eagles. The FWS received almost 1,900 public comments on the advanced rulemaking. According to the FWS, many of the comments also expressed concerns with the efficiency of the current permitting process.

The 2022 Eagle Rule

The FWS' new proposed rule (2022 Eagle Rule) attempts to address some of the inefficiencies and delays associated with the current incidental take permitting process while also maintaining conservation efforts for bald eagles and golden eagles. More specifically, and consistent with the Eagle Act, the FWS has proposed new regulations authorizing take that is necessary for the protection of other interests in any particular locality. The regulations also include revised provisions for processing individual or project-specific permits and adds a general permit alternative for qualifying activities.

The FWS' general permit alternatives is intended for four main activities: (1) certain categories of bald eagle nest take (*e.g.*, emergency and health and safety); (2) certain activities that may cause bald eagle disturbance take (*e.g.*, construction and utility line activities); (3) eagle incidental take associated

with power-line infrastructure; and (4) eagle incidental take associated with certain wind-energy projects (*e.g.*, installation and operation of wind turbines in specific areas). Each general permit alternative outlines eligibility criteria and mitigation requirements to avoid, minimize and compensate for impacts to eagles. The general-permit applicants would self-identify eligibility and register with the FWS and provide the:

> . . .required application information and fees, as well as certify that they meet eligibility criteria and will implement permit conditions and reporting requirements.

The FWS' general permit rules also set forth certain conditions for power-line infrastructure and wind-energy projects. For example, general permits for power-line infrastructure will only be issued where new construction is "electrocution-safe" and there is both a reactive retrofit and proactive strategy to address high-risk poles when an eagle electrocution is discovered, and underlying applications must also consider eagle nesting, foraging, and roosting areas. Similarly, general permits for wind-energy projects must consider eagle abundance thresholds or data reflecting bald eagle and golden eagle populations and seasonal migrations or nesting habits.

Finally, it is worthwhile to point out that the FWS does not propose any changes to the current preservation standard or management objectives for bald eagle and golden eagle populations, which the FWS believes will continue to help promote conservation efforts for eagles. Indeed, FWS' rulemaking states that the current population size estimate for bald eagles for the conterminous United States is approximately 336,000. Data from 2019 estimated the population to be 316,708, which was a four-fold increase above previously published estimates for 2016. As for golden eagles, the estimated United States population is approximately 38,000, but the golden eagle take limit remains set at zero, unless there are offsets for compensatory mitigation.

The FWS will limit the general permits for incidental take to a maximum of five years, and a maximum of one year for disturbance take or nest removal. Any project that does not qualify for one of the proposed general permits would still be able to apply for a specific permit.

Conclusion and Implications

The Fish and Wildlife Service's 2022 Eagle Rule is expected to help increase efficiency and the effectiveness of the FWS' incidental take permit program under the Bald and Golden Eagle Protection Act, especially for projects related to power-line infrastructure and wind-energy projects. The FWS' current deadline to submit public comments is November 29, 2022. For more information see the Federal Register for the Rule at: https://www.federalregister.gov/documents/2022/09/30/2022-21025/permits-for-incidental-take-of-eagles-and-eagle-nests.
(Patrick Veasy, Hina Gupta)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES STEPS TO SUPPORT CALIFORNIA IN WATER CONSERVATION EFFORTS AMID SEVERE DROUGHT AND FUTURE CLIMATE CHANGE

As of October 2022, over 90 percent of California residents live in areas subject to severe drought, with over 37 million people affected statewide. *California Drought Monitor*, NIDIS, https://www.drought.gov/. Within the past four months, Governor Newsom presented the California Water Supply Strategy Plan and signed Assembly Bill (AB) 2142 and Senate Bill (SB) 1157 to, according to the state, help improve water conservation efforts in urban, residential, and commercial areas throughout California. In support of his plan, the Department of Water Resources (DWR) has announced efforts to implement and support actions that lower outdoor and indoor water usage, fund turf installation, and support tax-exemptions for financial assistance for turf transitions throughout California.

Background

DWR manages water resources throughout the state and works with water agencies to enhance water quality, efficiency, and restoration. One of DWR's goals is to help ensure long-term water supply and sustainability throughout the state. Recently, DWR began recommending policy, standards, and land use changes to reduce water usage during the current drought. *Mission*, Cal. Dep. Water Resources, https://water.ca.gov/about.

In September 2022, the Department of Water Resources made several recommendations to the State Water Resources Control Board (State Water Board) to lower urban water usage in outdoor residential and commercial industry areas, as well as changes to indoor residential water use standards, in conjunction with Assembly Bill 1668.

Proposed by Assembly Member Friedman in 2018, AB 1668 aimed to revamp the state's commitment to water conservation by advancing urban water use efficiency and creating new water use standards and special land use allowances, along with heightened performance measures for urban water suppliers. The goal of the legislation was to investigate and provide guidelines for water suppliers to abide by to receive state funding. This was intended to reduce water usage where possible. The bill went into effect in 2018 and its goals were supplemented this year with the announcement of Governor Newsom's water plan.

In June 2022, Governor Newsom released the California Water Supply Strategy plan, which describes efforts to advance water efficiency and make long-term changes to water conservation in the state. This plan includes several actions and policies to aid Californians in adapting to a hotter and drier future, including four proposals supported by DWR: outdoor water use recommendations, indoor water use legislation, financial assistance a transition to conservation, and turf tax exemptions.

These plans mirrored recent legislation including AB 2142: Turf Replacement and Water Conservation Program, and SB 1157: Urban Water Use Objectives. AB 2142 revised the California tax code to allow for gross income tax exceptions for funds paid by local government, state agencies and public water systems, for turf replacement water conservation program. This provided financial incentives to reduce consumption of water and improve the management of water. SB 1157 is designed to reduce urban retail goal water usage rates for 2025 from 52 gallons to 47 gallons per capita. These changes reflect DWR recommendations to increase water conservation, and the department doubled down on these plans in its most recent suggestions to the State Water Board. Now, DWR plans to implement and support further actions falling within noted categories of Governor Newsom's water plan.

New Standards and Frameworks

First, DWR recently submitted outdoor water use recommendations to the State Water Resources Control Board. The recommendations outline new standards and frameworks to help retail water suppliers, particularly in urban areas, decrease outdoor residential water usage and improvements to irrigation systems in large commercial and industrial landscapes. Among the highlighted recommendations are new outdoor residential water use efficiency standards (ORWUS) that phase in lower water use allowances for residential landscaping and construction zones. Additionally, DWR recommended changes to variances for unique water uses, to limit significant water use in horse corrals and animal exercise arenas, while expanding use during all major emergencies.

Second, DWR claims that SB 1157, along with its other outdoor use recommendations could save enough water to supply about 1.6 million homes or 4.7 million residents to meet annual indoor and outdoor water needs. When Governor Newsom signed SB 1157 into effect, the Legislature aimed to ensure California could preserve more water and improve water use efficiency during the ongoing drought, which is one of the major focuses of DWR.

Third, DWR proposed funding programs to better assist communities in their turf transition and water conservation projects. These programs provide grants to help finance turf installation and strengthen conservation efforts of underserved communities and local water agencies. DWR hopes these programs can provide a sense of security and equity among communities, and financially support urban water suppliers' conservation programs and residential and commercial landscapes turf transition.

Fourth, DWR endorsed the signing of AB 2142 and bringing its mandates into action, namely, grants, rebates, and other financial assistance awarded for turf transitions as exempt from state income tax through 2027. DWR views this exemption and the associ-

ated funding programs as useful aids to Californians in conserving water during and after the current drought, without the associated financial burden or obligation.

Conclusion and Implications

Following, DWR's recommendations, the State Water Resources Control Board will meet to evaluate and analyze the plan, as well as allow for public comment on the recommendations before giving a final decision on the matter. For more information, *see: DWR Takes Actions to Support State's Future Water Supply Strategy*, CA Dept. Water Resources (Sept. 29, 2022) https://water.ca.gov/News/News-Releases/2022/Sep-22/DWR-Takes-Actions-to-Support-Future-Water-Supply-Strategy.
(Elleasse Taylor, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•September 23, 2022—EPA announced a settlement with Altivia Petrochemicals LLC for alleged violations of the federal Clean Air Act at its petrochemical manufacturing facility in Haverhill, Ohio. The company will pay a $1,112,500 civil penalty, improve leak detection and repair work practices. Emissions of hazardous air pollutants (HAPs), such as phenol, from leaking equipment impact the environment and may cause serious health effects including anorexia, vertigo, and blood and liver effects. According to the seven-count complaint, filed on October 5, 2021, in the Southern District of Ohio, Altivia allegedly violated CAA requirements to monitor and repair leaking equipment, demonstrate compliance with regulations applicable to chemical plants and control HAP emissions from equipment as required.

•September 23, 2022—EPA filed a Consent Decree and Final Order issuing a $41,582 penalty to DDM Imports of Airway Heights, Washington for attempting to import a 2016 Ford F-350 diesel pickup that had been stripped of its major emissions control devices. In 2020 the company paid a $2,400 penalty for importing a tampered vehicle and later paid a $65,000 penalty for importing three tampered vehicles. In 2021, DDM paid a $66,662 penalty for importing two tampered vehicles. In each case, the violations were uncovered after officers from U.S. Department of Homeland Security Customs and Border Protection inspected U.S.-bound diesel pickups at the U.S.-Canada border in Eastport, Idaho and found the vehicles' emissions control systems had been tampered with or removed.

•September 27, 2022—EPA announced a settlement with TotalEnergies Marketing Puerto Rico Corp. under which the company will implement compliance measures valued at approximately $1.3 million to resolve violations of the Clean Air Act at its petroleum storage facility in Guaynabo, Puerto Rico. The settlement requires measures and actions to resolve serious problems and inadequate maintenance at the company's petroleum storage facility in Guaynabo. The company will also pay a civil penalty of $500,000. TotalEnergies operates a large bulk storage facility in Guaynabo. EPA issued a Clean Air Act emergency order to the company in 2019 for its failure to adequately respond when it was informed by EPA that its gasoline storage operation resulted in vapor concentrations high enough to pose unacceptable fire and explosion risks. The company previously addressed the immediate dangers posed by its facility. The violations addressed in the settlement include failure to use good air pollution control practices at the petroleum storage tanks; failure to follow regulatory requirements after liquid was found on an internal floating roof within one petroleum storage tank; and violations related to the vapor recovery system at the site's truck loading racks, which resulted in excess emissions of hazardous air pollutants. Under the settlement, the company must replace parts of some tanks that are defective before using them further and improve monitoring. vapor concentrations in tanks build to a certain level. This includes repairing or making operational adjustments to the tanks or removing tanks from service, as well as safety testing. The settlement includes other improvement measures and reporting to EPA.

•September 28, 2022—EPA announced a citation against Bell Lumber and Pole Company for alleged violations of the Clean Air Act. EPA alleges that Bell Lumber failed to use pollution control practices to minimize emissions from its New Brighton facility in Ramsey County, Minnesota. Bell Lumber pressure-treats wood with a solution containing a hazardous

air pollutant called pentachlorophenol, which is associated with cancer-related health risks. The alleged violations include failure to promptly respond to a large indoor spill; properly operate the pressure-treatment cylinders; and comply with reporting requirements. EPA alleges these actions violated the maximum available control technology requirements established under section 112 of the Clean Air Act. These standards are performance criteria designed to significantly reduce air toxics emissions.

•September 29, 2022—EPA announced a settlement with Packaging Corporation of America (PCA), headquartered in Illinois, under which the company has agreed to pay $2.5 million in civil penalties to resolve allegations that it violated the Clean Air Act's General Duty Clause and Risk Management Program Regulations at its containerboard production mill in DeRidder, Louisiana. EPA and the United States and the Louisiana Department of Environmental Quality (LDEQ) alleged nine Clean Air Act violations that stem, in part, from a fatal explosion and accidental release at the DeRidder mill on Feb 8, 2017. The explosion—which killed three workers and injured seven others—launched a 100,000-gallon storage tank into the air and over a six-story building before it landed on mill equipment approximately 400 feet away. The blast also caused property damage and released extremely hazardous substances into the environment. EPA inspected the DeRidder mill after the explosion, and uncovered additional Clean Air Act violations.

•October 4, 2022—EPA announced a settlement with Reddy Ice Phoenix for EPA's Clean Air Act findings at its Phoenix-based facility. The company will pay $182,659 in civil penalties. Following an EPA inspection of Reddy Ice's Phoenix-based ice manufacturing facility in June 2019, EPA determined that Reddy Ice failed to comply with Clean Air Act Section 112(r) rules to prevent accidental release, which requires that facilities storing more than 10,000 pounds of anhydrous ammonia are properly designed, operated, and maintained to minimize the risk of an accidental release. Specifically, EPA determined that Reddy Ice failed to properly design its refrigeration system to comply with applicable design codes and standards, maintain inspection and testing records on certain equipment, correct engineering control deficiencies related to ammonia detectors, emergency exhaust fans, and alarms, and did not act upon compliance audit findings.

•October 6, 2022—EPA and the Department of Justice announced a settlement with the Stony Brook Regional Sewerage Authority (SBRSA). The settlement was filed in the U.S. District Court for the District of New Jersey resolves violations of Clean Air Act and New Jersey Air Pollution Control Act regulations at SBRSA's wastewater treatment plant in Princeton, N.J. Under the proposed settlement, SBRSA will bring the facility into compliance with federal and state laws that protect clean air by reducing pollution from sewage sludge incinerators. SBRSA will also pay a $335,750 civil penalty. The State of New Jersey joined the federal government as a co-plaintiff in this case.

Civil Enforcement Actions and Settlements—Water Quality

•September 19, 2022—EPA issued Emergency Administrative Orders under the authority of the federal Safe Drinking Water Act to two mobile home parks located in the Eastern Coachella Valley on the Torres Martinez Desert Cahuilla Indians Tribe's Reservation in California. EPA discovered that the mobile home parks are serving residents drinking water with naturally occurring, elevated levels of arsenic that exceed federal standards. The Gamez Mobile Home Park and Desert Rose Mobile Home Park serve predominantly agricultural workers. The EPA emergency orders require the parks to provide safe alternative drinking water to residents, install treatment for arsenic, and comply with all federal regulatory requirements for water systems.

•September 27, 2022—EPA announced a cease and desist order issued to a New Strawn, Kansas, man and his excavating company directing them to cease dumping materials into wetlands adjacent to a tributary to the Neosho River. According to the order, Michael Skillman, who owns Victory Excavating LLC, placed debris into at least 3.7 acres of wetlands in violation of the federal Clean Water Act (CWA). The Agency says the illegal fill continued even after a Cease and Desist Order was issued by the U.S. Army Corps of Engineers in October 2021. Skillman has a history of CWA violations, according to EPA.

Last summer, he paid a $60,000 civil penalty to the federal government for the unauthorized placement of broken concrete into the Neosho River. The Compliance Order requires Skillman and Victory Excavating to remove the debris from the wetlands and submit a plan to restore the site. Failure to comply with the order could subject the parties to further enforcement, including penalties.

•October 6, 2022—EPA announced a settlement with Seaport Refining & Environmental, LLC, the owner and operator of a petroleum refinery in Redwood City, California, over claims of violations of the Clean Water Act and the Resource Conservation and Recovery Act. The refinery, which receives and processes waste fuel including gasoline, diesel and jet fuel, is located near Redwood Creek and First Slough, which flow to the San Francisco Bay and the Pacific Ocean. Seaport Refining produces approximately 2,200 pounds of hazardous waste per month. As a result of EPA's findings, the company will pay $127,192 in civil penalties and implement compliance tasks, including developing an air emission monitoring plan, submitting quarterly air emission monitoring results, and inspecting and repairing the facility's tanks.

•October 7, 2022—EPA issued an administrative order under its Clean Water Act authority to the East Chicago Sanitary District in East Chicago, Indiana, to stop an ongoing discharge of untreated wastewater to the Grand Calumet River following the rupture of a major sewer line. The agency urges residents and visitors to the area to avoid contact with the river until further notice. On September 28, a semi-truck fell through a sinkhole and ruptured a 42-inch sewer pipe carrying raw wastewater to the East Chicago wastewater treatment plant. The incident caused raw sewage to flood the wastewater treatment plant site and Indianapolis Boulevard, which was temporarily blocked. Discharges are also flowing out of a combined sewer overflow point (located on the west side of the Cline Avenue frontage road) into the east branch of the Grand Calumet River at a rate of about 8 million gallons per day. EPA's order requires East Chicago Sanitary District (ECSD) to stop discharges of untreated sewage to the Grand Calumet River by October 11. ECSD will install bypass piping and begin repairs to the ruptured sewer pipe, which carries almost 80 percent of the system's wastewater to the treatment plant. EPA's order also requires ECSD to improve communication with the public by supplementing a public service advisory that was previously issued about the combined sewer overflow and posting results of daily sampling in the river online.

•October 11, 2022—EPA announced a settlement with the Asphalt Sales Company in Olathe, Kansas, under which the company will pay $82,798 in civil penalties and improve pollution controls to resolve alleged violations of the federal Clean Water Act. According to EPA, the company failed to adequately control stormwater runoff from its asphalt production and demolition landfill facility. EPA says these failures led to illegal discharges of pollutants into Cedar Creek.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 22, 2022—EPA announced a settlement agreement with chemical import and distribution company Transchem Inc. for violations of the federal Toxic Substances Control Act (TSCA). Pursuant to the settlement, the company has agreed to pay a $147,617 civil penalty. EPA found that Transchem failed to accurately report the total annual volume of six chemical substances that it imported in 2015 at its Carlsbad, California facility. EPA also found that the company failed to submit a notice to EPA 90 days before it imported and distributed a chemical substance subject to a "significant new use" rule.

•September 26, 2022—EPA announced a settlement with Clean Harbors Wilmington LLC for claims of violations of the Resource Conservation and Recovery Act at the company's Wilmington, California, facility. Clean Harbors has certified that the facility has addressed the claims and agreed to pay a $99,500 civil penalty. The Clean Harbors Wilmington facility is a commercial hazardous waste treatment, storage, and disposal facility that accepts solid, semi-solid, and liquid hazardous waste. The EPA claimed that Clean Harbors violated the Resource Conservation and Recovery Act by not following volatile organic air emission requirements. This included failure to properly implement the facility's leak detection and monitoring program, failure to obtain approval to monitor less frequently valves identified as difficult to

monitor, and failure to maintain and monitor air pollution control equipment.The Resource Conservation and Recovery Act requires effective monitoring and control of air emissions from hazardous waste storage tanks, pipes, valves, and other equipment since these emissions can cause adverse health and environmental effects as well as contribute to climate change.

•September 28, 2022—EPA announced a settlement with wholesale chemical distributor Univar Solutions USA Inc. over claims of improper management of hazardous waste at its facility in Commerce, California. The company has agreed to pay a $134,386 civil penalty. Univar is a large chemical company headquartered in Downers Grove, Illinois. Its facility in the city of Commerce engages in wholesale distribution of chemical raw materials, among other activities. The facility is classified as a large quantity generator of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). On May 6, 2021, EPA conducted an inspection at the Commerce facility as part of a national initiative focused on reducing hazardous air toxic emissions at hazardous waste facilities. Inspectors found the company violated federal RCRA regulations and California's hazardous waste air emission regulations.

•September 29, 2022—EPA announced a settlement with NRT West Inc. dba Coldwell Banker to resolve claims of ten violations of the Toxic Substances Control Act at seven residential properties in and around the cities of San Jose, Sunnyvale, and Vallejo, California. Acting as the agent for the seller in a real estate transaction, NRT West failed to ensure that the sellers properly disclosed information related to lead-based paint in its sales contracts and will pay a penalty of $35,433.

•September 30, 2022—EPA announced a settlement with the Atlantic Richfield Company (AR) under which the company has agreed to complete its cleanup of the Anaconda Smelter Superfund Site (Site) in Deer Lodge County, Montana. The State of Montana, on behalf of the Department of Environmental Quality, is also a signatory to the consent decree that was filed in the U.S. District Court in Butte, Montana. Decades of copper smelting activity at the town of Anaconda polluted the soils in yards, commercial and industrial areas, pastures and open spaces throughout the 300-square-mile Anaconda Site. This pollution has in turn contributed to the contamination of creeks and other surface waters at the Site, as well as of alluvial and bedrock ground water. The closure of smelting operations in 1980 left large volumes of smelter slag, flue dust and hazardous rock tailings that have had to be secured through a variety of remediation methods. Under the settlement, AR—a subsidiary of British Petroleum—will complete numerous remedial activities that it has undertaken at the Anaconda Site pursuant to EPA administrative orders since the 1990s. Among other actions, AR will finish remediating residential yards in the towns of Anaconda and Opportunity, clean up soils in upland areas above Anaconda and eventually effect the closure of remaining slag piles at the Site. The estimated cost of the remaining Site work, including operation and maintenance activities intended to protect remediated lands over the long term, is $83.1 million. AR will pay $48 million to reimburse the EPA Superfund Program for EPA and Department of Justice response costs and will pay approximately $185,000 to the U.S. Forest Service for oversight of future remedial activities on Forest Service-administered lands at the Site.

•October 6, 2022—EPA announced a settlement with the Baltimore County Police Department under which the Department will pay a $15,800 penalty for hazardous waste violations associated with the improper management of lead-contaminated soil at an outdoor firing range in Timonium, Maryland. The soil at the firing range is considered hazardous waste due to lead concentrations from bullets, and it must be handled and disposed of in accordance with EPA regulations. EPA cited the police department for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. Alleged violations included: operation of a hazardous waste management facility without a permit, failure to provide hazardous waste management training to staff, failure to provide hazardous waste responsibilities in written job descriptions, and failure to have a hazardous waste contingency plan.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS AGENCIES HAVE DISCRETION TO OPERATE TWITCHELL DAM TO AVOID ENDANGERED SPECIES ACT 'TAKE'

San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District, 49 F.4th 1242 (9th Cir. 2022).

Environmental organizations brought a lawsuit against the U.S. Bureau of Reclamation and the Santa Maria Valley Water Conservation District, claiming that operation of a dam interfered with the endangered Southern California steelhead's reproductive migration, thereby constituting an unlawful take in violation of the federal Endangered Species Act (ESA). The organizations sought declaratory relief and an injunction requiring properly timed water releases. The U.S. District Court granted summary judgment in favor of the agency defendants, and the Ninth Circuit Court of Appeals then reversed, finding that the agencies had discretion to operate the dam to avoid take.

Factual and Procedural Background

The Twitchell Dam, constructed in 1958 within the Santa Maria River watershed, has contributed to the endangerment of Southern California steelhead populations, a federally endangered species. It is operated to retain water during high precipitation periods. As a result of dam operations, the Santa Maria River has insufficient flow to sustain Southern California steelhead migration to the ocean, preventing them from completing their reproductive cycle.

Construction of the dam was authorized by Public Law 774 (PL 774), which authorized the Secretary of the Interior:

> . . .to construct the project for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953 [the "Secretary's Report"].

The U.S. Bureau of Reclamation and the Santa Maria Water District (collectively: Agencies) are jointly responsible for the dam's operation.

San Luis Obispo Coastkeeper and Los Padres ForestWatch sued, claiming that operation of the dam interferes with Southern California steelhead's reproductive migration, which constitutes an unlawful take under the ESA. They sought declaratory relief and an injunction requiring properly timed water releases of appropriate magnitude and duration to support Southern California steelhead reproduction. The Agencies moved for summary judgment, claiming that PL 774 affords no discretion to release dam water to preserve Southern California steelhead and, thus, they could not be liable for take under the ESA. The U.S. District Court agreed with the Agencies and granted summary judgment, and the environmental organizations appealed.

The Ninth Circuit's Decision

Because the parties assumed that agency discretion is required to establish proximate cause under the ESA, the Ninth Circuit framed the operative question as whether, under PL 774, the Agencies have any discretion to release any amount of water from the Twitchell Dam to avoid take of endangered Southern California steelhead. The Ninth Circuit found that they do.

The Ninth Circuit first found that PL 774 expressly authorizes Twitchell Dam to be operated for "other purposes" in addition to the enumerated purposes of "irrigation and the conservation of water [and] flood control." This expansive language, the Ninth Circuit concluded, reflected a congressional intent to grant the Agencies discretion to operate the dam for a variety of purposes, including to accommodate changed circumstances such as the enactment of new statutes. Had Congress intended to limit operations solely to enumerated purposes, the Ninth Circuit found,

it knew how to do so and would have used limiting language rather than broad language. The Ninth Circuit also found that the statutory requirement of substantial compliance—rather than strict compliance—with the Secretary's Report granted discretion to the Agencies.

The Ninth Circuit also found that this interpretation was supported by the principles of statutory construction. Namely, it found that it was possible to harmonize PL 774 and the ESA, and that there was no clear congressional intent to preclude the dam from being operated to avoid take of Southern California steelhead. Nor was there any implied conflict. Rather, Twitchell Dam could be operated to provide modest releases at certain times of the year and during certain water years while still satisfying the dam's primary purpose of conserving water for consumptive uses.

Based on this reasoning, the Ninth Circuit reversed the U.S. District Court ruling and remanded for further proceedings consistent with its opinion. It did not reach the question of how the Agencies might be required to exercise their discretion in order to come into compliance with the requirements of the ESA and instead left that for consideration by the U.S. District Court.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the scope of agency discretion regarding operation of the Twitchell Dam, statutory interpretation principles, and the relationship of federal statutory regimes and the ESA. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/23/21-55479.pdf.
(James Purvis)

NINTH CIRCUIT APPLIES CLAIM PRECLUSION TO BAR CITIZEN SUIT CHALLENGE TO BULL TROUT RECOVERY PLAN

Save the Bull Trout v. Williams, ___F.4th___, Case No. 21-35480 (9th Cir. Sep. 28, 2022).

Environmental advocacy groups sued in the U.S. District Court for Oregon, challenging a U.S. Fish and Wildlife Service (Service) recovery plan for a threatened species. That suit was dismissed on the basis that the court lacked subject matter jurisdiction of the claims. Rather than amend their complaint, the groups appealed. The denial of that appeal resulted in a final judgment in the Oregon District Court. A subsequent suit by the groups in the U.S. District Court for Montana involving claims that were, or could have been, raised in the Oregon litigation was held by the Ninth Circuit Court of Appeals to be barred by the doctrine of claim preclusion.

Background

In 1999, the bull trout (Salvelinus confluentus) was listed as threatened pursuant to the Endangered Species Act, 16 U.S.C. 1531 *et seq.* (ESA), triggering a duty for the U.S. Fish and Wildlife Service "to develop a recovery plan 'unless [the Secretary] finds that such a plan will not promote the conservation of the species.'" 16 U.S.C. § 1533(f)(1). Subsequently, the Service developed several draft recovery plans and was sued over its failure to finalize a plan, before the release in 2015 of the Bull Trout Recovery Plan.

Friends of the Wild Swan (Friends) and Alliance of the Wild Rockies (Alliance) brought suit in Oregon District Court, challenging the 2015 Bull Trout Recovery Plan pursuant to the ESA's citizen suit provision, which:

> . . .empowers 'any person' to 'commence a civil suit on his own behald' against 'the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 … which is not discretionary with the Secretary.' 16 U.S.C. § 1540(g)(1)(C).

The suit was dismissed for failure "to state a claim for violation of a nondiscretionary duty." The Oregon court observed that "[t]he consequence of this particular type of failure to state claim is that this Court

lacks jurisdiction over the claims under the citizen-suit provision.'" Quoting *Friends of the Wild Swan, Inc. v. Thorson*, 260 F.Supp.3d 1338, 1343 (Dist. Or. 2017).

On appeal, Friends argued for the first time that the Service failed to perform a nondiscretionary duty to account for the five statutory delisting factors in the Plan's recovery criteria ('Additional Claims'). *Friends of the Wild Swan, Inc. v. Dir. of U.S. Fish and Wildlife Serv.*, 745 F.App'x 718, 720 (9th Cir. 2018). The Ninth Circuit affirmed without addressing the Additional Claims, noting that "Friends had declined the opportunity to amend their complaint in the District Court and instead chose to appeal." *Ibid.* Friends sought in the Oregon District Court to set aside the judgment and amend their claims. That motion was denied, and Friends did not appeal.

Friends and Alliance, now joined by Save the Bull Trout, then sued in Montana District Court, once again challenging the Service's 2015 Bull Trout Recovery Plan. The Montana court denied the Service's motion to dismiss the claims as precluded by the Oregon litigation, concluding that the judgment entered by the Oregon District Court was not a "final judgment on the merits." It then granted summary judgment to the Service on the merits. The plaintiffs appealed.

The Ninth Circuit's Decision

Before the Ninth Circuit, the Service renewed its argument that claims preclusion barred the Montana litigation.

Claim Preclusion

Claim preclusion is a doctrine that "bars a party in successive litigation from pursuing claims that 'were raised or could have been raised in a prior action.'" *Media Rts. [Techs., Inc. v. Microsoft Corp.]*, 922 F.3d [1014,] 1020 [(9th Cir. 2019)] (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)) (formatting omitted). It serves to:

> . . .protect against 'the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.' *Id.* (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)) (formatting omitted).

Claim preclusion applies where "the earlier suit (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005) (quoting *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir. 2002)) (formatting omitted).

The Ninth Circuit easily found that elements of claim identity and privity were met. Both suits challenged whether the 2015 Bull Trout Recovery Plan conformed to the requirements of ESA § 1533(f), and the:

> Additional Claims rest on theories [Friends and Alliance] indisputably could have included in an amended complaint in Oregon. *See Mpoyo*, 430 F.3d at 988 ("Different theories supporting the same claim for relief must be brought in the initial action. (quoting *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992))).

And there was no dispute that Save the Wild Bull Trout was in privity with Friends and Alliance.

Final Judgment on the Merits

Disposition of the matter, per the Ninth Circuit, turned on whether or not there was a final judgment on the merits in the Oregon litigation. In *Mpoyo*, the Ninth Circuit:

> . . .applied claim preclusion to bar the subsequent filing of claims that were subject to the denial of leave to amend event when the denial was based on dilatoriness rather than the merits.

This rule disincentives plaintiffs from "hold[ing] back claims and have a second adjudication." *Mpoyo*, 430 F.3d at 989. Friends chose to appeal the initial dismissal of their claims by the Oregon court, rather than amend their complaint. Now, they were stuck with the consequences of that choice - including the Oregon court's refusal to re-open its judgment post-appeal - even though that denial was unrelated to the merits of their ESA-based claims.

Further, the Ninth Circuit noted that the dismissal by the Oregon court reached the merits of Friends' ESA claims, as the court there held that those claims did not fall within the ESA's citizen suit provisions, and on that basis the court did not have subject mat-

ter jurisdiction. In order to reach that conclusion, the Oregon court necessarily:

> . . .had to analyze whether Friends plausibly alleged that the Service failed to comply with a nondiscretionary duty in order to determine whether there was jurisdiction. *Friends of the Wild Swan*, 260 F.Supp.3d at 1343.

Conclusion and Implications

When they decided to appeal from the dismissal of the Oregon action, rather than amend their complaint, the plaintiffs forewent the benefits of a liberal pleading standard. They lost twice on that gamble. First, they subjected themselves to the stringent standard in Rule 60(b) for opening and judgment. And they left themselves open to the Service's argument that the Montana claims were precluded. When evaluating strategic litigation choices, a valuable question to keep in mind is whether you are charting accounts for the general trajectory favored by modern procedural regimes: linear and narrowing with respect to the claims and defenses the parties may put at issue. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/21-35480.pdf.
(Deborah Quick)

TENTH CIRCUIT REFUSES EXCLUSIVE JURISDICTION ON FERC-LICENSED PROJECT BECAUSE PETITION INSTEAD CHALLENGED THE CORPS' SECTION 404 PERMIT

Save the Colorado, et al. v. Spellmon, et al., ___F.4th___, Case No. 21-1155 (10th Cir. Sept. 30, 2022).

The U.S. Court of Appeals for the Tenth Circuit found on a claim-by-claim basis that conservation organizations' challenges to a municipality's application for a Section 404 permit to dredge fill material issued by the U.S. Army Corps of Engineers (Corps) and consideration by the U.S. Fish and Wildlife Service (FWS) did not inhere in the controversy of the Federal Energy Regulatory Commission's (FERC) decision granting the municipality an amended license to operate a larger dam. The court applied a narrow interpretation of the Federal Powers Act that gives appellate courts exclusive jurisdiction over FERC orders. The claims did not attack the merits of FERC's approval of an amended license. Therefore, the U.S. District Court erred in dismissing the petition for lack of subject-matter jurisdiction.

Background

The Denver Board of Water Commissioners (municipality) needed to complete two federal applications for permission to implement a project intended to boost the City of Denver's water supply: (1) an amendment to its existing license with FERC to operate an expansion of the Gross Reservoir and Dam in Boulder County, Colorado; and (2) a discharge permit from the Corps to discharge fill materials during construction. To issue the discharge permit, the Corps had to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act, and to consult with FWS. FERC cooperated with the Corps in reviewing the municipality's compliance with federal laws; FERC helped it draft an environmental impact statement and participated in consultations with the FWS regarding endangered species. The Corps issued the discharge permit.

FERC later issued an amendment to the municipality's existing license, finding that the project would not cause significant environmental damage. Meanwhile, the conservation organizations filed a petition in federal District Court, arguing the Corps violated several federal laws when it issued the discharge permit: the NEPA, the federal Clean Water Act, the federal Endangered Species Act, and the Administrative Procedure Act.

After FERC granted the municipality's license amendment, the municipality sought to dismiss the petition in District Court, arguing the appeals court had exclusive jurisdiction. Federal courts of appeal have exclusive jurisdiction to hear challenges to deci-

sions made by FERC under 16 U.S.C. § 825*l*(b). U.S. District Courts have jurisdiction to hear challenges to decisions made by Corps. Despite the conservation organizations' framing of their petition as a challenge to a Corps-issued permit, the District Court granted the municipality's motion to dismiss, concluding that jurisdiction lay exclusive in the federal courts of appeal. The conservation organizations' appealed the dismissal.

The Tenth Circuits' Decision

On appeal, the court first considered whether the grant of exclusive jurisdiction under 16 U.S.C. § 825*l*(b) extended beyond FERC orders to any issue "inhering in the controversy" or "sufficiently related" to a FERC order. The municipality, Corps, and FWS urged the court to adopt a broad reading of the statute. They argued that because both Corps and FERC developed an environmental impact statement and because FERC weighed in on its environmental impact statement, that the analyses were intertwined and therefore subject to the jurisdictional statute.

The Court of Appeals rejected a broad application of the jurisdictional statute, reasoning that statute only restricted jurisdiction to the courts of appeal to actions that challenge FERC orders, not collateral attacks on those orders.

The court next considered whether, under the narrow reading of the jurisdictional statute, the District Court had jurisdiction to hear the conservation organizations' claims. The court's analysis proceeded on a claim-by-claim basis.

Clean Water Act Claim

Beginning with the conservation organizations' Clean Water Act claim, the court found that the conservation organizations' claims were unrelated to FERC's approval of the amended license for two reasons. First, FERC does not have the authority to review Corps permits under FERC precedent. Second, while both agencies analyzed the project under the Clean Water Act, their tasks differed. The Corps was tasked with selecting the least environmentally damaging practical alternative and properly evaluate the project's costs, whereas FERC only had to consider whether reasonable alternatives existed. The conservation organizations only challenged the Corps' tasks, which were not inherent in the controversy of considering reasonable alternatives. The court further reasoned, that even if the jurisdictional statute otherwise applied, it could not cover the claims at issue because FERC lacked authority to decide those issues.

NEPA Claim

Turning next to the conservation organizations' NEPA claim, the court noted that FERC's supplemental environmental assessment disavowed consideration of Corps' environmental analysis involving expansion of the reservoir and that the environmental issues facing FERC were narrower than the issues facing the Corps. The court noted that FERC's cooperation with the Corps and the FWS in drafting the Environmental Impact Statement was separate and apart from FERC's license amendment process. Further, FERC's decision did not incorporate the Corps' findings. The Court of Appeals again pressed the nature of the conservation organizations' claims—that they only filed claims against the Corps' permitting process—not FERC's analysis in its decision regarding the license amendment. As a result, the jurisdictional statute did not extend to the Corps' action.

Endangered Species Act Claims

When addressing the conservation organizations' Endangered Species Act claims, the court noted that FERC did not incorporate the FWS decisions into the terms of FERC's amended license. The differences between the Corps and the FWS and FERC in their application of the Endangered Species Act to the project meant that even though all agencies reviewed the project's compliance with the statute, that the issue did not inhere in the controversy. FERC neither solicited nor adopted opinions from the other agencies on the effects of the project on an endangered species. As a result, the court of appeal concluded it lacked exclusive jurisdiction over challenges to FWS's opinions.

Issue of Exclusive Jurisdiction

Finally, the Corps and the FWS argued the petition itself invoked the court's exclusive jurisdiction, because relief would interfere with the FERC-licensed project. The court rejected the attempt to lump all of the administrative actions together because they involve the same general project. It found that on a claim-by-claim basis, the challenges to the permit

did not impact FERC's decision regarding the license, even where the result of the petition might impact the municipality's FERC-licensed project.

Therefore, the U.S. District Court erred when it dismissed the petition for lack of subject-matter jurisdiction because it did not invoke the Federal Power Act's exclusive jurisdiction provision. Specifically, the petition failed to raise any issues inhering in the controversy of FERC's order regarding the municipality's license amendment because the conservation organizations' claims only challenged the Corps and FWS decisions.

Conclusion and Implications

This case clarifies that an appellate court's exclusive jurisdiction over FERC orders under the Federal Powers Act is limited to FERC decisions and issues inhering in the controversy of those decisions. A party aggrieved by a FERC order must challenge the merits of FERC's decision in its petition for relief. This case provides a helpful in-depth factual analysis of the application of an exclusive jurisdiction statute where multiple agencies and multiple analyses are involved. The Tenth Circuit's opinion is available online at: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110747304.pdf.
(Amanda Wells, Rebecca Andrews)

THIRD CIRCUIT AFFIRMS DISMISSAL OF CLEAN WATER ACT CITIZEN SUIT FOR INSUFFICIENT PRE-SUIT NOTICE WRITTEN BY ATTORNEY

Shark River Cleanup Coalition v. Township of Wall, 47 F.4th 126 (3rd Cir. Aug. 24, 2022).

On August 24, 2002, the United States Court of Appeals for the Third Circuit affirmed the United States District Court for the District of New Jersey's dismissal of the Cleanup Coalition's citizen suit. The Court of Appeals found that the Cleanup Coalition's pre-trial notice was deficient because it did not include sufficient information to permit the defendants to identify the specific standard, limitation, or order alleged to have been violated.

Factual and Procedural Background

In 2015, a hiker on the Estate of Fred McDowell, Jr. (Estate) discovered that portions of an underground sewer line no longer remained underground. The sewer line was located within a sewer easement held by the Wall Township (Township). The hiker informed Shark River Cleanup Coalition (Cleanup Coalition) of the exposed sewer line.

In 2016, the counsel for the Cleanup Coalition prepared and served the Estate and the Township with a notice of intent to commence suit under the Clean Water Act's citizen-suit provision. The notice alleged "historic and continuing" erosion of the ground surrounding the buried sewer line released "large areas of sand" into the nearby Shark River Brook, a tributary of the Shark River, and that the release violated the Clean Water Act. The notice did not specify which section of the Clean Water Act had been violated. The notice also did not provide the exact or approximate location of the sewer line's exposed condition. Consequently, the Township and the Estate were unable to locate the site in question and took no further action.

One-year after notice was served, the Cleanup Coalition sued the Township and the Estate in federal court, alleging a Clean Water Act violation relating to the same sewer line condition it complained of in its notice. Litigation between the parties primarily concerned the merits of the Cleanup Coalitions' claim, as well as, the sufficiency of the Cleanup Coalition's notice.

In 2020, the parties briefed cross- motions for summary judgment on both notice and merits issues and the district court granted summary judgment for the defendants. The U.S. District Court's decision only addressed the adequacy the Cleanup Coalition's notice finding it defective in failing to identify the complained-of site's location along the over three-mile easement. The district court dismissed the Cleanup Coalition's Clean Water Act claim for failure to provide sufficient notice and the Cleanup Coalition appealed shortly thereafter.

The Third Circuit's Decision

Under federal law, a Clean Water Act notice must contain sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. At issue here on appeal was whether the notice provided enough information to enable the recipient to identify the components of an alleged violation.

The court first considered whether the description of the location of the alleged violation included sufficient information to identify the location of the alleged violation. The court noted that the notice made reference to public records of the easement and that within weeks of the Cleanup Coalition filing suit, the Township found the location. The court went on to make the distinction that while additional information describing the location would have been courteous, it was not needed to satisfy minimum requirements. The Township's own conduct was strong evidence of the notice's sufficiency with respect to notice.

The court did not end its analysis there, however, the court next considered whether the notice provided enough information to enable the recipient to identify the specific effluent discharge limitation which has been violated, including the parameter violated. The court reasoned that a notice is not necessarily deficient under if it fails to cite a specific section of the Clean Water Act. However, because the Cleanup Coalition's notice was prepared by counsel and referred to the entire Clean Water Act, as well as, many unrelated New Jersey Statutes and regulations, the court determined the notice was not "enough" to permit the defendants to identify the specific standard, limitation, or order alleged to have been violated.

The Concurring Opinion

In the concurring opinion Judge Hardiman agreed with the court that Cleanup Coalition's notice failed to describe the standard violated, but disagreed that the notice provided sufficient information as to the location of the alleged violation. Citing omissions in the notice as to the location and the availability of photos of the sewer line condition, the concurring opinion was of the position that had these been provided, the Township and the Estate could have remedied the erosion issue years ago, rendering unnecessary this citizen suit.

Conclusion and Implications

This case upholds the standard of sufficient pre-lawsuit notice the Clean Water Act. It suggests that when an attorney prepares the pre-lawsuit notice, the adequacy of the notice may be construed in favor of the recipient. The Court of Appeals' opinion is available online at: http://www2.ca3.uscourts.gov/opinarch/212060p.pdf
(McKenzie Schnell, Rebecca Andrews)

DISTRICT COURT IN CONNECTICUT DISMISSES THIRD PARTY SUIT FINDING STANDING ALLEGATIONS INADEQUATE IN CLIMATE ADAPTATION CASE

Conservation Law Foundation, Inc. v. Gulf Oil Limited Partnership,
___F.Supp.4th___, Case No. 3:21-CV-00932 SVN (D. Conn. Sept. 20, 2022).

On September 20, 2022 the U.S. District Court for Connecticut dismissed, without prejudice, allegations brought in a citizen suit where the plaintiff relied on future negative impacts of climate change to allege injury in fact for purposes of standing. The District Court found that nonprofit organization Conservation Law Foundation (Foundation) failed to allege injury in fact (and therefore failed to demonstrate Article III standing) when charging a Gulf Oil Limited Partnership bulk petroleum storage facility with inadequate infrastructure to weather future negative impacts of climate change. The September

2022 decision highlights a vital aspect of citizen suit standing when allegations rest on the future effects of climate change; flagging to plaintiff organizations that an injury alleged cannot merely rely on the future occurrence of major and foreseeable weather events but must particularize how those weather events would result in violations of the underlying environmental statutes.

Factual and Procedural Background

The defendant, Gulf Oil Limited Partnership (Gulf Oil), owns and operates a bulk petroleum storage terminal in New Haven, Connecticut. Tanker ships deliver oil products to the storage terminal where the products are stored in large aboveground storage tanks (ASTs). The storage terminal contains drainage systems to facilitate stormwater management and to prevent contaminant discharge into New Haven Harbor. The terminal is surrounded by berms to protect against flooding and provide additional support. Operation of the storage terminal is subject to Connecticut Department of Energy and Environmental Protection's General Permit for Discharge of Stormwater Associated with Industrial Activity (General Permit) implemented and enforced pursuant to the federal Clean Water Act (CWA). The General Permit delineates various requirements and restrictions for stormwater discharges. Relevant in this case, the General Permit requires that dischargers implement control measures to guard against the risk of pollutant discharges in stormwater and that operations be consistent with the goals and policies of the Connecticut Coastal Management Act. The Coastal Management Act provides for consideration of:

> . . .the potential impact of a rise in sea level, coastal flooding and erosion patters on coastal development so as to minimize damage and destruction of life and property. . . .

The plaintiff is a nonprofit organization that promotes conservation and protection of public health, environment, and natural resources. The Foundation has over 5,000 members nationwide, with more than 190 members residing in Connecticut. Some of the Foundation members use the area and waters near the storage terminal (New Haven Harbor) for recreational activities and asserted concern over discharge and release of pollutants into those waters. In bringing the action against Gulf Oil, the Foundation asserted violations of the CWA and the federal Resource Conservation and Recovery Act (RCRA) because the storage terminal was not designed, maintained, modified, or operated to account for the effects of climate change and that risk of pollutant discharge is exacerbated by climate change impacts (sea level rise, increasing sea temperatures, and increasing storm severity and flooding). The Foundation alleged in its 18 counts against Gulf Oil that the risk of climate change impacts were not merely theoretical, as evidenced by flooding at the storage terminal in October 2012 when Superstorm Sandy hit New Haven. [https://www.clf.org/wp-content/uploads/2021/07/Stamped-Gulf-Complaint.pdf]

In the action, the Foundation sought injunctive relief and civil penalties against Gulf Oil. In response, Gulf Oil moved to dismiss 12 of the counts for lack of subject matter jurisdiction—solely for the plaintiff's failure to allege injury in fact under the standing doctrine.

Article III Standing

Article III of the United States Constitution provides that federal courts have jurisdiction to hear cases and controversies arising under federal law. (U.S. Const. art. 3, § 2.) A case may be dismissed for lack of subject matter jurisdiction where the federal court lacks the "constitutional power to adjudicate… such as when the plaintiff lacks constitutional standing to bring the action." (*Corlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 417 (2nd Cir. 2015).) To establish Article III standing, the plaintiff must evince (1) that they have suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the defendant caused the injury, and (3) that the injury will likely be redressed by the requested judicial relief. (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).)

The District Court's Decision

The U.S. District Court ultimately agreed with Gulf Oil that the Foundation failed to allege an injury in fact for purposes of standing in its citizen suit alleging Gulf Oil's failure to prepare its AST infrastructure for the impacts of climate change. The holding stemmed from two key findings: (1) the Foundation's arguments of imminent threat focused

on harms to the environment and not harm to the Foundation's members, and (2) the Foundation's case failed to discuss how climate change impacts would result in the discharge of pollutants from Gulf Oil's storage terminal into waters the Foundation's members use and enjoy.

The District Court found that the Foundation focused predominantly on harms to the environment when the relevant showing for Article III standing is "not injury to the environment but injury to the plaintiff." Additionally, the District Court held that while the Foundation's "attempt to establish standing based on an increased risk of future harm is not without basis in law" and the "harms associated with climate change are serious and well recognized" the enhanced risk of future injury is only cognizable where the plaintiff alleges actual future exposure to that increased risk. The District Court found that the Foundation's reliance on allegations of longer-term impacts (increased frequency of storms, sea level rise, and the increased risk of flooding) over the next several decades stretched the imminence requirement "beyond its purpose, which is to ensure that the alleged injury is not too speculative." In addition, the Foundation failed to demonstrate a link between climate change driven weather events and "how such weather events would result in the discharge of pollutants, thereby validating [the] theory of increased risk of exposure to such pollutants." The District Court ultimately held that the failure of the Foundation to relate the impending impacts of climate change to a specific injury to Foundation's members was insufficient to demonstrate standing for the plaintiffs.

Conclusion and Implications

The U.S. District Court for Connecticut's decision highlights a tension in the District Courts regarding adequacy of standing as it relates to allegations of future harm from the impacts of climate change. While the United States Supreme Court has recognized the harms associated with climate change, this recent opinion demonstrates that plaintiff's must allege more than amorphous negative impacts of climate change. Citizen suits must allege how such impacts present a real and immediate threat of harm to the plaintiff and/or the plaintiff's members—not how the impacts present a real and immediate threat of harm to the environment.
(Jaycee Dean, Darrin Gambelin)

DISTRICT COURT IGRANTS MOTION FOR REMEDIES, ISSUES INJUNCTION, BUT LIMITS CIVIL PENALTIES IN CLEAN WATER ACT CLAIMS RELATED TO DREDGE MINING

Idaho Conservation League v. Shannon Poe,
___F.Supp.4th___, Case No. 1:18-CV-353-REP (D. Id. Sept. 28, 2022).

The U.S. District Court for the District of Idaho recently granted environmental organization's motion for remedies. The court granted a permanent injunction barring a defendant from suction dredge mining on the South Fork Clearwater River (River) unless the defendant acquires and complies with a National Pollutant Discharge Elimination System (NPDES) permit. The court also imposed a $150,000 civil penalty for 42 instances of suction dredge mining on the River without an NPDES permit.

Factual and Procedural Background

Defendant Shannon Poe suction dredge mined the River on 42 separate days during 2014, 2015, and 2018 without obtaining an NPDES permit under Section 402 of the Clean Water Act (CWA). Plaintiff brought a citizen-suit enforcement action to enjoin the defendant's mining activities in the state of Idaho and impose a civil penalty on the defendant for violations of the CWA. The case was bifurcated into a liability phase and a remedial phase. During the liability phase, the court found that: (1) the defendant's

suction dredge mining discharged pollutants into the River, thus requiring an NPDES permit under § 402 of the Clean Water Act (CWA); and (2) the material discharged from the defendant's mining operation was a pollutant requiring an NPDES permit under § 402.

The plaintiff then filed a motion for remedies requesting that the court order (1) an injunction barring the defendant from suction dredge mining in Idaho unless he obtains and complies with an NPDES permit under the CWA, and (ii) civil penalties against the defendant in an amount of at least $564,924. The Clean Water Act authorizes a court to order that relief it considers necessary to secure prompt compliance with the Act.

The District Court's Decision

Injunctive Relief

The court first considered plaintiff's request for injunctive relief. To demonstrate a permanent injunction should issue, a plaintiff must establish that: (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) a remedy in equity is warranted, considering the balance of hardships between plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction. Defendant did not dispute that the plaintiff failed to meet these elements; instead, the defendant argued that the injunction was unnecessary and moot because he was not currently mining and had not since 2018, and a civil penalty would deter future violations.

The court concluded that an irreparable injury occurred as a matter of law when defendant's dredge mining added pollutants to the River. Based upon this and other facts in the record, the court found that that the dredge mining caused environmental harm by degrading water quality and potentially threating endangered species in the waterway, sufficient to amount to an irreparable injury. Additionally, the court dismissed the defendant's argument that his alleged compliance with state permits with best practices that somewhat overlapped with those of an NPDES permit meant that no irreparable injury occurred, stating that such a conclusion would render the CWA without purpose and found this position unsupported by the law.

The court next found that legal remedies were inadequate, noting that the U.S. Supreme Court has recognized, in most instances, environmental harms are not readily compensable by money damages. The court further noted that money damages were not available to the plaintiff, because civil penalties are paid to the U.S. Treasury.

The court concluded that the balance of hardships favored issuing an injunction, finding that there was no counterweight to the irreparable injury caused by defendant's permitless suction dredge mining. The court noted that any burden from complying with the CWA by securing a legally-required NPDES permit is not a hardship, let alone one sufficient to outweigh the proven environmental harms caused by the defendant.

The court also reasoned that an injunction would be in the public interest, as courts have recognized that the public interest is served by protecting the environment and ensuring compliance with and strict enforcement of the CWA.

Turning to the defendant's arguments that an injunction would be unnecessary and moot, the court disagreed, stating that the defendant's lack of CWA violations since 2018 was due to the fact he had not mined in the River since then rather than because he had secured an NPDES permit as required. Voluntary cessation of a challenged practice in response to pending litigation does not moot a case. Further, the court dismissed the defendant's contention that the availability of civil penalties precluded injunctive relief, affirming that the CWA authorizes courts to impose one, either, or both of the potential remedies, and that, regardless, the factors in this case independently supported granting injunctive relief.

Finally, the court determined that an injunction against suction dredge mining in the River was sufficiently narrow and specifically tailored to fit the dispute giving rise to its issuance. The scope of the issued injunction was narrower than the entire state as requested by the plaintiff.

Civil Penalties

The court then considered plaintiff's request for civil penalties in the amount of $564,924. The CWA permits courts to apply any appropriate civil penalties for violations in order to provide restitution, punish the violator, and deter similar conduct by the violator and others in the future. The court explained that

civil penalties in CWA cases involve highly discretionary calculations in which the court must take into account the following factors: (1) the seriousness of the violations; (2) the economic benefit, if any, resulting from the violations; (3) any history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) any other matters as justice may require. Defendant argued the requested penalties were excessive and unduly burdensome, proposing that a $60,924 penalty more accurately addressed his conduct and the surrounding circumstances.

Courts either employ a "top-down" or "bottom-up" approach when calculating civil penalties under the CWA. In a top-down approach, a court first calculates the maximum penalty, and then adjusts the penalty downward in consideration of the six statutory factors. In a bottom-up method, the court begins by calculating the economic benefit realized by the defendant as a result of non-compliance, and then adjusts that amount upward or downward based on the court's evaluation of the remaining factors.

The court employed a bottom-up approach here, noting that the defendant chose not to pull an NPDES permit largely due to advice from his legal counsel not to do so, as well as their correspondence with the U.S. Environmental Protection Agency, to which the EPA never replied, in which counsel disagreed with the EPA's assertion that an NPDES permit was needed for the defendant's suction dredge mining activities.

First, the court determined that that economic benefit to the defendant was $10,524—the value of the minerals extracted from the River by the defendant, as conceded by him – and set the initial cost of the penalty at that amount. Next, the court examined the seriousness and history of the defendant's CWA violations, acknowledging that Congress has flatly prohibited the discharge of any pollutant by any person except in compliance with the CWA. The defendant violated this clear prohibition in the CWA 42 times, and the court found that such violations were unquestionably serious. In determining the relative seriousness of the defendant's violations, the court declined to compare the environmental impacts of the defendant's mining activities against permitted suction dredge mining, stating that it is a false equivalence given that the defendant should not have been mining without a permit at all, and that if he had not illegally mined, he would not have discharged any pollutants into the waterway. The court concluded that all 42 incidents were serious CWA violations which, together, warranted an upward adjustment of the penalty amount.

Third, the court noted that good faith efforts to comply with applicable permit requirements may reduce civil penalties, and that this factor turned on whether the defendant took any actions to decrease the number of violations or made efforts to mitigate the impact of violations on the environment. The court explained that the defendant had not only steadfastly maintained his position that suction dredge mining does not require an NPDES permit and that his activities were not in opposition to the EPA, but also claimed that his opinions were protected by the First Amendment. The defendant also argued that his compliance with state permit requirements demonstrated that he still respected the conditions that are in place to minimize and eliminate the environmental impacts of his operations. The court dismissed the First Amendment argument, stating that whatever protections exist thereunder do not excuse CWA violations and do not amount to good faith efforts to comply with the CWA. The court acknowledged that the defendant's insistence against acquiring an NPDES permit appeared to arise from his attorneys' advice, but noted that this does not establish a good faith effort to comply with the CWA, and that short of actually acquiring an NPDES permit before mining, the proper course of action in this instance was to administratively engage to resolution or proactively seek relief from the courts. Ultimately, the court found that the defendant purposely chose not to seek an NPDES permit, ignored violation noticed, and repeatedly mined without a permit, and justifying an upward adjustment of the penalty.

Fourth, the court stated that it may reduce the civil penalty against a party if the maximum statutory penalty would work an undue hardship, which is established by the defendant showing that the penalty will have a ruinous effect. The court noted that the record did not support a finding that the defendant had significant funds to pay the $564,924 penalty sought by the plaintiffs, instead finding that such a penalty would have a more drastic effect on than necessary to account for his CWA violations and ensure future compliance. However, the court held that the

defendant failed to establish a basis for the significantly lower amount he suggested, or explain how a higher penalty would be ruinous to him, and thus it was not limited to his proposed penalty of $60,925.

Conclusion and Implications

In light of the factors discussed above, the court assessed a civil penalty of $150,000, the sum of the economic benefit to the defendant and $3,320.86 per violation. The court explained that this penalty was 8 percent of the maximum possible penalty and consistent with the penalties imposed in analogous cases. Furthermore, the court concluded that the penalty accounts for the serious nature of the defendant's violations over three years while acknowledging that suction dredge mining is allowed on the River when properly permitted and the defendant was acting as an individual and has limited resources.

This case affirms well-established guidelines for providing remedies in the form of injunctive relief and civil penalties for violations of the Clean Water Act. Of particular note is the court's unequivocal reliance on attempts—or lack thereof—to obtain and comply with an NPDES permit. The court's opinion is available online at: https://scholar.google.com/scholar_case?case=8667808127392641 66&q=Idaho+Conservation+League+v.+Poe&hl=en&as_sdt=2006. (Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL HOLDS STATE DEPARTMENT OF PESTICIDE REGULATION VIOLATED CEQA BY RENEWING A REGISTRATION WITHOUT REEVALUATING ENVIRONMENTAL IMPACTS

Raptors are the Solution v. Superior Court, *Unpub.*, Case No. A161787 (1st Dist. Sept. 27, 2022).

In a September 27, 2022 *unpublished* decision, the First District Court of Appeal in *Raptors are the Solution v. Superior Court* reversed the trial court's denial of Raptors Are the Solution's petition for writ of mandate filed against California Department of Pesticide Regulation (Department). The Court of Appeal held that the Department abused its discretion by failing to proceed in the manner required by law by declining to reevaluate diphacinone, a registered rodenticide.

Regulatory Background

Pesticide Registration

The California Department of Pesticide Regulation is responsible for the registration, renewal, and reevaluation of pesticides that are manufactured or sold in California. After a pesticide is registered by the U.S. Environmental Protection Agency (EPA), the Department evaluates the pesticide's potential adverse environmental effects and determines whether to register the pesticide. Pesticide registrations must be renewed annually, generally within 60 days of the Department receiving a satisfactory renewal application. At any time, the Department may reevaluate a registered pesticide. The Department must investigate all reports of a pesticide's adverse environmental impacts and reevaluate the pesticide if the investigation reveals that a significant adverse impact has occurred or is likely to occur or that an alternative is available that may significantly reduce such an impact.

When registering, renewing, or reevaluating a pesticide, the Department must post its proposed decision for a 30-day public review and comment period. If the Department intends to renew a pesticide without a reevaluation, it must also make a written finding that it did not receive sufficient information to require a reevaluation.

Under the California Environmental Quality Act (CEQA), the Department's pesticide program is a certified regulatory program that is exempt from certain CEQA procedural requirements. While EIR requirements, for example, are not applicable to the program, CEQA still requires evaluation, disclosure, and, where feasible, avoidance of significant adverse environmental effects.

Factual Background

In December 2017, in response to the Department's proposed decision to renew various registered rodenticides, plaintiff Raptors Are the Solution (Raptors) requested reevaluation of several first- and second-generation anticoagulant rodenticides (FGARs and SGARs). Raptors provided the Department with information and data to support its claim that the rodenticides would have significant cumulative impacts on wildlife. In April 2018, the Department published a final decision renewing the rodenticides without reevaluation.

At the Trial Court

In June 2018, Raptors filed a petition for writ of mandate, alleging that the Department's decision to renew the rodenticides without reevaluation violated both CEQA and the Department's own regulations. The Department notified Raptors in November 2018 that it would reevaluate the SGARs but not the FGARs, explaining in its investigation report that FGARs had lower rates of exposure to non-target wildlife than SGARs. The Department then filed a demurrer arguing that the Department was not required to place a pesticide into reevaluation during

the 60-day renewal period. The trial court sustained the demurrer with leave to amend. In May 2019, Raptors filed an amended petition challenging the Department's November 2018 decision to not re-evaluate diphacinone, one of the FGARs. In November 2020, the trial court denied Raptors' amended petition, holding that the Department did not abuse its discretion because its decision to not reevaluate diphacinone was supported by substantial evidence in the record. Raptors appealed.

The Court of Appeal's Decision

CEQA Applicability

Contrary to the Department's argument that CEQA does not apply to decisions to *not* act, the First District Court of Appeal held that CEQA applied to the Department's decision to not reevaluate diphacinone. The court explained that, in making its decision, the Department had effectively approved the continued use and sale of the rodenticide. Additionally, the court reasoned that because CEQA requires certified regulatory programs to evaluate and avoid significant adverse environmental effects where feasible, it would frustrate CEQA's purpose to conclude that decisions to reevaluate, but not decisions to *not* reevaluate, could be challenged under CEQA.

CEQA Violations

After holding that CEQA's substantive mandates applied to the Department's decision, the court reviewed the Department's compliance with CEQA *de novo*. The court concluded that the Department abused its discretion by failing to perform a cumulative impacts analysis as required by CEQA. Additionally, the court determined that some of the Department's information disclosures were deficient.

The court explained that the Department was required to perform a cumulative analysis that considered diphacinone's incremental effect when used alongside other anticoagulant rodenticides. Instead, the Department improperly declined to reevaluate diphacinone and other FGARs based on a comparative analysis of the environmental effects of FGARs compared to those of SGARs. Alternatively, the court noted that if the Department had determined that concerns about diphacinone's cumulative effect were too speculative, it was required to state that conclusion and its basis.

Additionally, the court found that the Department's investigation report failed as a CEQA informational document because it contained misleading information about of diphacinone. By grouping diphacinone with the other FGARs, which the Department characterized as having generally low exposure rates, the Department obscured the fact that diphacinone more closely resembled an SGAR in terms of prevalence and toxicity.

While the court held that the Department had disclosed misleading information about diphacinone, it concluded that the Department was not incorrect or misleading in its characterization of two studies which separately analyzed rodenticide exposures in non-target wildlife. Raptors argued that the Department had abused its discretion by failing to discuss both a preliminary study assessing exposures in owls and a hypothesis that that the impacts of FGARs on bobcats was underestimated. Ultimately, the court did not agree with Raptors that the omissions constituted legal error.

Conclusion and Implications

As a result of the Department's CEQA violations, the First District Court of Appeal reversed the trial court's judgment denying Raptors' petition for writ of mandate. The court remanded with instructions for the superior court to issue a writ of mandate directing the Department to analyze the cumulative environmental effects of diphacinone and to reconsider the reevaluation decision.

This *unpublished* opinion provides one example of a regulatory scheme that is not subject to CEQA's procedural requirements nevertheless falling short of CEQA's substantive mandates. By amending its petition to focus more narrowly on a single FGAR, Raptors successfully demonstrated to the court that the Department's decision to analyze classes of rodenticides, rather than individual rodenticides, resulted in inadequate disclosure of adverse environmental effects. A copy of the First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/A161787.PDF.
(Bridget McDonald)

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