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

FEATURE ARTICLE

CALIFORNIA SUPREME COURT HOLDS FEDERAL POWER ACT DOES NOT PREEMPT APPLICATION OF CEQA TO STATE'S AUTHORITY OVER DAM LICENSING

By Bridget McDonald

On August 1, 2022, the California Supreme Court issued its highly anticipated decision in *County of Butte v. Department of Water Resources*. In a 5-2 opinion, a divided court held that the Federal Power Act (FPA) does not entirely preempt the California Environmental Quality Act's (CEQA) application to the state's participation, as an applicant, in the FPA's licensing process for hydroelectric facilities. The Court agreed, however, that CEQA could not be used to challenge a settlement agreement prepared by the Department of Water Resources (DWR) as part of FPA proceedings conducted by the Federal Energy Regulatory Commission (FERC). Finally, the Court also held that claims challenging the sufficiency of an ENvironmental Impact Report (EIR) that DWR prepared pursuant to that agreement were not preempted because DWR's CEQA decisions concerned matters outside of FERC's jurisdiction. [*County of Butte v. Department of Water Resources*, ___Cal.5th___, Case No. C071785 (Cal. Aug. 1, 2022).]

Statutory Background

The Federal Power Act

The Federal Power Act facilitates development of the nation's hydropower resources, in part by removing state-imposed roadblocks to such development. Under the FPA, the construction and operation of a dam or hydroelectric power plant requires a license from the Federal Energy Regulatory Commission. A FERC license must provide for, among other things, adequate protection, mitigation, and enhancement of fish and wildlife, and for other beneficial public uses, such as irrigation, flood control, water supply, recreational, and other purposes. The FPA expressly grants FERC authority to require any project be modified before approval.

Federal Preemption

The Supremacy Clause of the U.S. Constitution provides that federal law is "the supreme Law of the Land." Congress may explicitly or implicitly preempt (*i.e.*, invalidate) a state law through federal legislation. Three types of preemption could preclude the effect of a state law: "conflict," "express," and "field" preemption. As relevant here, "conflict" preemption exists when compliance with both state and federal law is impossible, or where state law stands as an obstacle to achieving compliance with federal law. To prove a conflict exists, the challenging party must present proof that Congress had particular purposes and objectives in mind, such that leaving the state law in place would compromise those objectives. The inquiry is narrowly focused on whether the conflict is "irreconcilable"—hypothetical or potential conflicts are insufficient to warrant preemption.

Factual and Procedura Background

The California Department of Water Resources operates the Oroville Facilities—a collection of public works projects and hydroelectric facilities in Butte County. FERC issued DWR a license to operate

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the facilities in 1957. In anticipation of the license's expiration in 2007, DWR began the license application process under the FPA in October 1999.

At the time DWR undertook the relicensing process, FERC regulations allowed applicants to purpose the traditional licensing process or an "alternative licenses process" (ALP)—a voluntary procedure designed to achieve consensus among interested parties before the application is submitted. The ALP requires stakeholders with an interest in the project's operation to cooperate in a series of hearings, consultations, and negotiations, in order to identify and resolve areas of concern regarding the terms of the license. The process also combines the consultation and environmental review process required by the National Environmental Policy Act (NEPA), as well as the administrative processes associated with the federal Clean Water Act (CWA) and other applicable federal statutes. Ideally, ALP participants conclude the process by entering into a settlement agreement that reflects the terms of the proposed license. That agreement becomes the centerpiece of the license application and serves as the basis for FERC's "orderly and expeditious review" in settling the terms of the license.

DWR elected to purse the ALP. FERC approved DWR's request in January 2001. The ALP process consumed the next five years. ALP participants included representatives from 39 organizations, including federal and state agencies, government entities, Native American tribes, water agencies, and nongovernmental organizations. In September 2001, DWR issued a document combining a CEQA notice of preparation (NOP) and a NEPA "scoping document," which sought comments on the scope of a preliminary draft environmental assessment (PDEA)—a document mandated by the ALP. DWR issued the PDEA for the Facilities in January 2005. Partially relying on the PDEA, FERC issued a draft environmental impact statement (EIS) in September 2006. And from April 2004 to March 2006, the ALP participants negotiated and ultimately signed a settlement agreement. The Counties of Butte and Plumas declined to sign the agreement because they were dissatisfied with its terms.

In May 2007, DWR issued a draft EIR that considered the same project and alternatives that FERC considered in its draft EIS. The EIR characterized the project under review as "implementation of the settlement agreement," which would allow "the continued operation and maintenance of the Oroville Facilities for electric power generation." DWR undertook CEQA procedures because the State Water Resources Control Board (Water Board) required preparation and certification of an EIR under the Clean Water Act, and the CEQA process could inform whether DWR would accept the license of the terms of the settlement agreement, or the alternative proposed by FERC in the EIS (both of which were analyzed in the EIR). DWR issued a NOD approving the EIR in July 2008; and the Water Board certified the Project's compliance under the CWA in December 2010.

At the Trial Court

In August 2008, the Counties of Butte and Plumas (Counties) filed separate petitions for writ of mandate challenging DWR's compliance with CEQA in connection with the relicensing. The Counties raised similar claims regarding the adequacy of the EIR's project description, analysis of environmental impacts and alternatives, and its adoption of feasible mitigation measures. In May 2012, after consolidating the two cases, the trial court rejected the Counties' claims and found the EIR complied with CEQA. The Counties appealed.

Initial Review by the Court of Appeal and California Supreme Court

On appeal, the Third District Court of Appeal declined to reach the merits of the Counties' CEQA claims. Instead, the court held the Counties' actions were preempted because FERC had exclusive jurisdiction over the settlement agreement. The court also deemed the claims premature to the extent they challenged the Water Board's certification, which had not been filed yet.

The Counties petitioned the California Supreme Court for review, which the Court granted in 2019. The Court subsequently transferred the matter back to the Third District for reconsideration in light of the Supreme Court's decision in *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017) (*Friends of the Eel River*). The Court in *Friends of the Eel River* held that the Interstate Commerce Commission Termination Act (ICCTA) did not preempt a state railroad authority's application of CEQA to its own rail project, for such application "operates

as a form of self-government" because the agency is, in effect, regulating itself.

Following the Supreme Court's remand, the Third District Court of Appeal considered the *Friends of the Eel River* ruling, and ultimately reached the same conclusion: the FPA preempts the Counties' challenge to the environmental sufficiency of the settlement agreement. Because FERC has sole jurisdiction over disputes concerning the licensing process, an injunction would be akin to prohibited "veto power." In light of this preemption, the Third District maintained the FPA preempted the Counties' CEQA challenges to the sufficiency of the EIR.

The California Supreme Court's Decision

The California Supreme Court, again, granted the Counties' petition for review to determine: (1) whether the FPA fully preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in relicensing a hydroelectric dam; and (2) whether the FPA preempts challenges in state court to an EIR prepared under CEQA to comply with the CWA. The Court concluded the second issue was not properly presented and thus declined to address it.

Turning to the first issue, the Court agreed with the Court of Appeal that the Counties' claims were preempted by the FPA to the extent they attempted to "unwind the terms of the settlement agreement reached through a carefully established federal process and seek to enjoin DWR from operating the Oroville Facilities under the proposed license." As to the Counties' claim against the EIR, the Court rejected the Third District's finding that those were also preempt, instead concluding that nothing "in the FPA suggests Congress intended to interfere with the way the state as owner makes these or other decisions concerning matters outside FERC's jurisdiction or compatible with FERC's exclusive licensing authority."

The FPA Does Not Categorically Preempt CEQA

To consider whether Congress intended for the FPA to categorically preempt CEQA, the Court applied a presumption that "protects against undue federal incursions into the internal, sovereign concerns of the states." In the absence of unmistakably clear language, the Court would presume that Congress did not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the constitutional balance of state and federal powers, or intend to preempt a state's propriety arrangements in the marketplace, absent evidence of such a directive.

Here, the FPA's Savings Clause does not evince an "unmistakably clear" intent by Congress to preempt California's environmental review of its own project, as opposed to its regulation of a private entity. The issue here rests on whether Congress intended to preclude the state from trying to govern *itself*—therefore, it would be contrary to the "strong presumption against preemption" to assume the existence and/or scope of preemption based on statutory silence. In particular, neither the FPA's legislative history nor its language suggests that Congress intended it to be one of the "rare cases" where it has "legislative so comprehensively" that it "leaves no room for supplementary state legislation" on the issues at bar.

The fact that the FPA has a significant preemptive sweep says nothing about congressional intent to prohibit state action that is non-regulatory. Instead, CEQA operates as a form of self-government, therefore, application of CEQA to the public entity charged with developing state property is not classic "regulatory behavior," especially when there is no encroachment on the regulatory domain of federal authority or inconsistency with federal law. Rather, application of CEQA here constitutes self-governance on the part of a sovereign state and owner.

But the FPA Does Preempt CEQA Claims Against DWR and FERC's Settlement Agreement

Although the FPA does not *categorically* preempt CEQA, that does not mean that *no* applications of CEQA are preempted. To the contrary, CEQA—in this instance—cannot be used to challenge the terms of the settlement agreement.

The overriding purpose of the FPA is to facilitate the development of the nation's hydropower resources by centralizing regulatory authority in the federal government to remove obstacles posed by state regulation. Therefore, a CEQA challenge to the terms of the agreement would raise preemption concerns to the extent the action would interfere with the federal process prescribed by the ALP or with FERC's juris-

diction over those proceedings. Were the Court to enjoin DWR from executing the terms of the agreement, the injunction would stand as a direct obstacle to accomplishing Congress' objective of vesting exclusive licensing authority in FERC.

The FPA Does Not Preempt CEQA Review of DWR's EIR

While the Court of Appeal correctly held the FPA preempted the Counties' challenge to the environmental sufficiency of the *settlement agreement*, the appellate court erred in also finding the FPA preempted the Counties' CEQA challenge to the environmental sufficiency of the *EIR*.

Here, the EIR explained that the project subject to CEQA was the implementation of the settlement agreement. It therefore analyzed the environmental impact of the settlement agreement, as well as the alternative FERC identified in the related EIS. At this stage, review of DWR's EIR would not interfere with FERC's jurisdiction or its exclusive licensing authority. Federal law expressly allows applicants to amend their license application or seek reconsideration once FERC has issued a license. There is no federal law that limits an applicant's ability to analyze its options or the proposed terms of the license before doing so. Accordingly, DWR can undertake CEQA review, including permitting challenges to the EIR it prepares as part of that review, in order to assess its options going forward. Nothing about DWR's use of CEQA is incompatible with the FPA or FERC's authority.

Moreover, any preemption concerns related to DWR's ability to adopt additional mitigation measures in the EIR are premature. At this stage, the Counties challenge only the sufficiency of the EIR. They do not ask the Court to impose or enforce any mitigation measures, much less any that are contrary to federal authority. Therefore, a CEQA challenge to DWR's EIR is not inherently impermissible, nor is it clear that any mitigation measures will conflict with the terms of the license that FERC ultimately issues. If anything, federal law provides avenues for DWR to employ the mitigation measures identified in the EIR. If FERC concludes those measures interfere with the agency's federal authority, it has the discretion to dictate the scope and extent of those measures in the license it issues.

For these reasons, the majority affirmed the Third District Court of Appeal's ruling that the Counties could not challenge the environmental sufficiency of the settlement agreement or seek to unwind it, for doing so would pose an unnecessary obstacle to the exclusive authority Congress granted to FERC. That rationale does not, however, extend to the Counties' challenge to the environmental sufficiency of the EIR, insofar as a compliant EIR can still inform the state agency concerning actions that do not encroach on FERC's jurisdiction. Nothing precludes courts from considering a challenge to the sufficiency of an EIR in these circumstances and ordering the agency, such as DWR, to reconsider its analysis.

The Concurring and Dissenting Opinion

The Chief Justice of the Court, who also authored the *Friends of the Eel River* opinion, concurred, and dissented. The Chief Justice agreed that any CEQA challenge to FERC's licensing process, including the settlement agreement, was preempted. The Chief Justice disagreed, however, that broader CEQA challenges were not similarly preempted.

The dissenting opinion reasoned that, in addition to "field" and "conflict" preemption, state law that presents an obstacle to the purposes and objectives of federal law would be similarly preempted. Here, CEQA presents an obstacle to the FPA given standing federal precedent and the statute's "savings clause." The FPA's licensing process notably includes "CEQA-equivalents" via the ALP and NEPA, but does not contemplate the delays created by state court review of CEQA litigation.

Moreover, CEQA is subject to "field" preemption because CEQA does not involve state regulation of water rights. While federal FPA preemption cases addressed state-operated projects, the concept of "field" preemption is broad enough preempt all state regulation, regardless of who the operator is.

With respect to the *Friends of the Eel River* decision, the dissent explained that the opinion portrayed an example of "self-governance" when it held CEQA was exempt from ICCTA preemption. Because the ICCTA sought to deregulate railroads, and thus allow greater "self-governance" by railroad operators, the state's voluntary compliance with CEQA was not preempted. In contrast here, the FPA's purpose and

objectives is to vest exclusive regulation of hydroelectric facilities to FERC and to exclude all state regulation, with the exception of water rights. Unlike the ICCTA, the language of the FPA made it "unmistakably clear" that *all* state regulation of hydroelectricity facilities (except regulation of water rights) is preempted.

Finally, the dissent noted that the majority's "partial preemption" determination was unworkable. Finding DWR's CEQA compliance deficient would still not impact FERC's decision to issue a license. Instead, forcing DWR to perform additional analyses, or consider additional mitigation or alternatives, would be an impractical paper-generating exercise. As the majority acknowledged, FERC retains complete discretion to deny or alter the terms of a license, regardless of whether those changes are necessary to comply with CEQA. Therefore, requiring CEQA compliance would merely be redundant given the environmental studies FERC performed pursuant to NEPA.

Post-Script

On August 24, 2022, the Supreme Court modified its opinion following a letter signed by numerous CEQA practitioners, which asked the court to correct an erroneous statement in its opinion about the topics an EIR is required to discuss. The Court's opinion previously stated that an EIR was required to discuss the "economic and social effects of [a] project." Following the practitioners' letter, the Court corrected the opinion to remove this phrase from its list of mandatory EIR discussions, but noted that an EIR may—but is not generally required to—discuss such topics.

Conclusion and Implications

The Supreme Court's long-awaited, but divided decision, clarifies the scope of CEQA and its concurrent relationship to federal environmental statutes. Here, the Court demonstrated that federal preemption must be explicit. Absent unmistakably clear language from Congress, federal statutes should not interfere with a state government's right to self-govern—particularly in matters concerning environmental protection. However, the scope of state regulation is not unlimited. Where such regulation would interfere with jurisdiction plainly vested in federal agencies, a state statute cannot serve as an obstacle thereto.

The Supreme Court's opinion is available at: **https://www.courts.ca.gov/opinions/documents/S258574.PDF**

Bridget McDonald, Esq. is an Associate at the law firm, Remy Moose Manley, LLP, practicing from the firm's Sacramento, California office. Bridget's practice focuses on land use and environmental law, handling all phases of the land use entitlement and permitting processes, including administrative approvals and litigation. Her practice includes the California Environmental Quality Act, the National Environmental Policy Act, the State Planning and Zoning Law, natural resources, endangered species, air and water quality, and other land use environmental statutes. Bridget serves on the Editorial Board of the *California Land Use Law & Policy Reporter*.

ENVIRONMENTAL NEWS

CALIFORNIA GOVERNOR NEWSOM RELEASES STATE'S WATER SUPPLY STRATEGY

As the summer of 2022 has now passed, Governor Gavin Newsom has unveiled a new strategic plan titled California's Water Supply Strategy. The nearly 20-page document contains a surprisingly concise walkthrough of the pressing issues the state faces on the water supply side of things and outlines California's strategy and priority actions to adapt and protect water supplies in an "era of rising temperatures." With a heavy emphasis on enhancing resiliency in the future to withstand the impacts of climate change—thus the subtitle Adapting to a Hotter, Drier Future—the Water Supply Strategy showcases recent highlights in improving the state's water infrastructure and sets a series of goals and milestones for the state in the years to come and how we can work towards them.

Developing New Water Supplies

The first milestone addressed in the Water Supply Strategy focuses on increased utilization of wastewater recycling and desalination as well as increased stormwater capture and conservation, generally. Specifically, this section proposes two main goals moving forward.

First, the Water Supply Strategy sets a short-term goal to increase recycled water use that would utilize at least 800,000 acre-feet (AF) of recycled water annually by 2030. Currently, recycled water offsets about 9 percent of the state's water demand, right around 728,000 AF annually, and with over $1.8 billion invested in recycled water projects statewide over the last five years, the state has already laid the groundwork for reaching this goal as those projects are expected to generate an additional 124,000 AF of new water supply. To meet the proposed long-term goal, however, the state will need to redouble its efforts as the goal more than doubles that 800,000 figure, jumping to a whopping 1.8 million AF annually in recycled water use throughout the state.

The second specific goal discussed in this section is two-part in nature, focusing on an increase in yield and in the efficiency of doing so. To meet this second goal, the state would expand brackish groundwater desalination production by 28,000 AF per year by 2030 and 84,000 AF per year by 2040. The kicker to this goal comes in its second part, however, as the state will also work to help guide the placement of seawater desalination projects where they are cost effective and environmentally appropriate, an issue that has stood in the way of many proposals.

Expanding Water Storage Capacity

While admitting that creating more space to store water in reservoirs and aquifers does not create more precipitation, the Water Supply Strategy addresses expanding the water supply storage side of things, looking at efforts both above ground and below.

Above ground, the strategic plan highlights seven locally-driven projects supported by Proposition 1 that would create an additional 2.77 million AF of water storage statewide. Also discussed is the opportunity—or even need—to improve water storage infrastructure throughout the state by rehabilitating dams in need to regain storage capacity and even expanding the San Luis Reservoir by 135,000 AF.

Below ground, the strategic plan endeavors to expand annual groundwater recharge by at least 500,000 AF. Local efforts have been a huge part of the increased utilization of groundwater reservoirs, and by the end of next year the state will have invested around $350 million in local assistance for recharge projects. To help bolster these local efforts, the Water Supply Strategy proposes a coordinated, state-level approach to provide for orderly, efficient disbursement of rights to high winter flows by providing incentives to local agencies emphasizing such projects and by streamlining regulatory roadblocks and speedbumps that may be hindering the expansion of such projects.

Reducing Demand

At this point, many Californians are tired of hearing the "C" word—conservation. But reducing

demand has simply become a continuing effort of the state and conservation efforts won't be slacking up any time soon. Without beating the dead horse for too long, the Water Supply Strategy reiterates the importance, and importantly the success, of our conservation efforts statewide, especially with a potential fourth dry-year on the horizon.

Improving Conveyance Systems and Modernizing Water Rights

The final section of the Water Supply Strategy tackles two distinct auxiliary issues relating to water supply management: the movement of water throughout the state and the management of water rights.

California depends upon—to an undesirable extent—aging, damaged, or increasingly risk-prone infrastructure to transport water between different areas of the state. It comes as no surprise then that the strategic plan discusses plans to both repair damaged facilities in the San Joaquin Valley—specifically those of the federal and state water projects—and modernize existing conveyance facilities by getting the ball rolling with respect to the Delta Conveyance Project.

Closing out the final section, the strategic plan expresses the state's desire "to make a century-old water rights system work in this new era" of aridification in the west. Calling out how other western states such as Washington, Oregon, Nevada, and Idaho manage water diversions much more "nimbly" than California, the strategic plan looks at what it can do to get the California State Water Resources Control Board more accurate and timely data, modern data infrastructure, and increased capacity to halt water diversions when the flows in streams diminish.

Conclusion and Implications

The Water Supply Strategy covers a lot of forward-facing information—far too much to cover this concisely. Many of the issues and proposed solutions addressed are the same we see broadcasted on an almost daily basis—aging infrastructure, the need for increased storage capacity, heightened conservation efforts—but other areas stand out and illicit a closer look into the topic—such as the how part in how the state plans to modernize its Gold Rush era water rights system. With the main topics noted herein, and with the full publication being a comparatively short read for a statewide strategic plan, the Water Supply Strategy may not be the most revolutionary publication the state has released, but it at least provides Californians with a bit of transparency as to the pet projects the state will focus on in the years to come. For more information, *see:* https://www.gov.ca.gov/2022/08/11/governor-newsom-announces-water-strategy-for-a-hotter-drier-california/
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

FEDERAL INFLATION REDUCTION ACT PROVIDES ADDITIONAL FUNDING FOR DROUGHT RELIEF EFFORTS

In August, President Biden signed the Inflation Reduction Act that included $4 billion for the United States Bureau of Reclamation (Bureau) to mitigate the impacts of drought in the western United States, with priority given to the Colorado River Basin and others experiencing similar levels of drought. The funds are available to public entities and Indian tribes until 2026.

Background

The Bureau of Reclamation was established in 1902 and manages and develops water resources in the western United States. The Bureau is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial uses. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

The western United States is facing historic drought conditions, particularly in the Colorado River Basin. Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines, collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows:

> California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In 2019, lower basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. However, in August of this year, the Bureau announced additional reductions in releases from Lake Mead for 2023 following first-ever cutbacks in Colorado River allocations to Arizona and Nevada this year. The cutbacks were necessary despite significant investment in western water infrastructure beginning last year.

Under the Bipartisan Infrastructure Law of 2021, the Bureau became eligible to receive roughly $30.6 billion over five years. The 2021 law provided a total of $8.3 billion for Western programs and activities, with an initial $1.66 billion allocated to the Bureau in fiscal year 2022. Funding included $250 million for implementation of the DCP and could be used for projects to establish or conserve recurring Colorado River water that contributed to supplies in Lake Mead and other Colorado River water reservoirs in the Lower Colorado River Basin, or to improve the long-term efficiency of operations in the Lower Colorado River Basin. Despite these investments, Congress recently determined that additional drought

funding relief was necessary in the form of the Inflation Reduction Act (Act).

The Inflation Reduction Act

The Act appropriates $4 billion for the Bureau to make available to public entities and Indian tribes until September 30, 2026. Funding is available via grants, contracts, and other financial assistance agreements. Eligible States include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

There are a variety of drought mitigation activities for which funding is available. These activities include temporary or multiyear voluntary reduction in diversion of water or consumptive water use, voluntary system conservation projects that achieve verifiable reductions in use of or demand for water supplies or provide environmental benefits in the Lower Basin or Upper Basin of the Colorado River, and ecosystem and habitat restoration projects to address issues directly caused by drought in a river basin or inland water body. Regarding the Colorado River, the Act provides temporary financial assistance to farmers who voluntarily fallow their lands to adjust to reduced levels of river flow, coupled with funding for water conservation and efficiency projects intended to keep more water in the river system. Efficiency projects for which funding is available could include turf and lawn removal and replacement, and funding for drought-resilient landscaping programs.

The Act also provides $12.5 million in emergency drought relief for tribes. Funding is intended for near-term drought relief actions to mitigate drought impacts for tribes that are impacted by Bureau water projects, including direct financial assistance for drinking water shortages and the loss of tribal trust resources held on behalf of tribes by the federal government. Recently, the Bureau awarded $10.3 million to 26 tribes for drought response water projects in various Colorado River Basin states including Arizona, California, Colorado, Nevada, and Utah.

The Act also provides $550 million for disadvantaged western communities to fund up to 100 percent of the cost of planning, designing, or constructing water project the primary purpose of which is to provide domestic water supplies to communities or households that do not have reliable access to domestic water supplies.

Finally, the Act provides for up to $25 million for the design, study, and implementation of projects to cover water conveyance facilities with solar panels to generate renewable energy, including those that increase water efficiency and assist in implementing clean energy goals.

Conclusion and Implications

The Inflation Reduction Act is another substantial effort to provide adequate funding to redress drought impacts. However, as drought conditions in the west worsen, it is unclear if funding for drought mitigation activities will offset ongoing drought impacts. Moreover, it is not clear if funding is available for the development of alternative water supplies, like desalination. The Inflation Reduction Act, P.L. 117-169 is available online at https://www.congress.gov/bill/117th-congress/house-bill/5376/text
(Miles B. H. Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

REVERSAL OF CRITICAL HABITAT EXCLUSION REGULATION UNDER ENDANGERED SPECIES ACT BECOMES FINAL

The U.S. Fish & Wildlife Service (FWS or Service), on July 21, issued a final rule rescinding a rule previously adopted in December 2020 that changed the process for excluding areas from critical habitat designations under the federal Endangered Species Act (ESA). (87 Fed. Reg. 43,433.) Under the final rule, the Service will resume its previous approach to exclusions. The final rule became effective on August 22.

Background

When a species is listed under the ESA, Section 4(b)(2) requires that the Service designate critical habitat for the species. Critical habitat designations identify areas that are essential to the conservation of the species. The FWS may also exclude areas from designation based on a variety of factors. Critical habitat designations affect federal agency actions or federally funded or permitted activities. Federal agencies must ensure that actions they fund, permit, or conduct do not destroy or adversely modify designated critical habitat.

When designating critical habitat, the FWS considers physical and biological features that the species needs for life processes and successful reproduction, including, but not limited to: cover or shelter, food, water, air, light, minerals or other nutrients, and sites for breeding. The Service must also take into account several practical considerations, including the economic impact, the impact on national security, and any other relevant impacts. Section 4(b)(2) further provides that the Service may exclude areas from critical habitat if the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," provided that exclusion will not result in the extinction of the species concerned.
2020 Critical Habitat Exclusions Rule

In September 2020, under the previous administration, the FWS proposed "Regulations for Designating Critical Habitat," which provided a process for critical habitat exclusions partially in response to the U.S. Supreme Court's opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* (2018) 139 S. Ct. 361. In *Weyerhaeuser*, the Court held that the Service's decision to exclude areas from critical habitat is subject to judicial review under the arbitrary and capricious standard.

The 2020 rule was meant to provide guidelines for the FWS in weighing the impacts and benefits of critical habitat exclusions, with the aim of providing transparency in the process. (85 Fed. Reg. 82,376.) The rule provided a non-exhaustive list of impacts that can be considered "economic," including the economy of a particular area, productivity, jobs, opportunity costs arising from critical habitat designation, or possible benefits and transfers, such as outdoor recreation and ecosystem services. The rule further provided a non-exhaustive list of "other impacts" the Service may consider, including impacts to tribes, states, and local governments, public health and safety, community interests, the environment, federal lands, and conservation plans, agreements, or partnerships.

The 2020 rule provided a process for how exclusion determinations under section 4(b)(2) were to be made. If an exclusion analysis was conducted, the rule explained how the information was to be weighed and assessed. The Service's judgement controlled when evaluating impacts that fell within the agency's scope of expertise, such as species biology. With respect to evaluating impacts that fell outside of the Service's expertise, outside experts' judgment controlled.

Rescission of 2020 Critical Habitat Exclusions Rule

In a July 2022 press release the Service announced it was rescinding the 2020 critical habitat exclusion rule "to better fulfill the conservation purposes" of the ESA. [https://www.fws.gov/press-release/2022-07/service-rescinds-endangered-species-act-critical-habitat-exclusion]

This decision was in accordance with Executive Order 13990, which directed all federal agencies to review and address agency actions to ensure consistency with the current administration's objectives.

The final rule, gives three main points of rationale supporting the rescission. First, the 2020 rule potentially undermined the Service's role as the expert agency responsible for administering the ESA by giving undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Second, the rule employed a set process in all situations, regardless of the specific facts, as to when and how the Secretary would exercise the discretion to exclude areas from critical habitat designations. Finally, the rule was inconsistent with National Marine Fisheries Service's critical habitat exclusion process and standards, which could confuse other federal agencies, tribes, states, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations. C

Conclusion and Implications

Effective August 22, the Service will resume its previous approach to exclusions of critical habitat under regulations at 50 C.F.R. § 424.19 and a joint 2016 Policy with the National Marine Fisheries Service. [https://www.federalregister.gov/documents/2016/02/11/2016-02677/policy-regarding-implementation-of-section-4b2-of-the-endangered-species-act]

The Service decided to rescind the critical habitat exclusions rule because it found the rule unnecessary and confusing. Now, the Service will resume its previous approach to exclusions. Although rescinding the critical habitat exclusions rule, the Service recognizes the impact of the Weyerhaeuser holding and reiterated a commitment to explaining its decisions regarding critical habitat exclusions in the final rule. The Final Rule is available online at: https://www.federalregister.gov/documents/2022/07/21/2022-15495/endangered-and-threatened-wildlife-and-plants-regulations-for-designating-critical-habitat
(Breana Inoshita, Darrin Gambelin)

U.S. ENVIRONMENTAL PROTECTION AGENCY ANNOUNCES UPDATES TO DRINKING WATER HEALTH ADVISORIES FOR 'FOREVER CHEMICALS' PFAS

On June 15, 2022, the United States Environmental Protection Agency (EPA) announced updates to its drinking water health advisories for chemicals considered to be "forever chemicals." The update to drinking water health advisories for per- and polyfluoroalkyl substances (PFAS) is part of the Biden administration's action plan to deliver clean water and EPA Administrator Regan's 2021-2024 PFAS Strategic Roadmap.

This update strengthens the EPA's PFAS guidance issued in 2016. While research on the harms of PFAS is still ongoing, exposure to PFAS has been linked to higher cholesterol levels, developmental effects or delays in children, changes to your immune system, thyroid problems, higher chances of kidney, prostate, or testicular cancers, increased cholesterol levels, and higher blood pressure during pregnancy.

Background

PFAS are chemicals that have been used in a variety of industry and consumer products worldwide since the 1950s, such as nonstick cookware, water-repellent clothing, stain resistant fabrics and carpets, cosmetics, some firefighting foams, and products that resist grease, water, and oil. PFAS in many instances move to our soil, water, and air and cause concerning and dangerous pollution. Most PFAS cannot break down, so they remain in the environment as "forever chemicals." Because of their widespread use and their persistence in the environment, PFAS are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment. PFAS are very dangerous because they can build up in humans' and animals' bodies with repeated exposure.

In New Mexico, several communities have been struggling to control PFAS contaminants for years. The eastern part of the state, specifically the city of Clovis, has dealt with PFAS due to contamination near Cannon Air Force Base. The chemicals were within firefighting foam which was used on base as part of firefighting training exercises. *See*, Theresa Davis, EPA updates toxic PFAS chemical advisories (Albuquerque Journal, June 15, 2022). Ultimately, the PFAS within the firefighting foam used in training migrated to the groundwater. A neighboring dairy farm, Highland Dairy, had no choice but to euthanize thousands of contaminated cows and filter water for daily use.

The Clovis water utility, EPCOR, discovered that these same toxic substances linked to the groundwater contamination from Cannon Air Force Base were also in the city's water supply in 2020. Laura Paskus, Clovis City Water Tests Find Toxic 'Forever Chemicals' Linked to Cannon Air Force Base (NMPBS February 8, 2020). After the discovery, EPCOR informed its customers that trace amounts of PFAS were found in 10 percent of the company's 82 intake wells. The challenge to clean and control PFA pollution is only exacerbated by the fact that there is no legally enforceable policy or regulation. Without a federal regulatory limit provided by enforceable law, New Mexico and the rest of the states cannot mandate water quality controls over PFAS.

In 2018, the U.S. Air Force notified the New Mexico Environment Department (NMED) that wells at Cannon Air Force Base had PFAS concentrations more than 370 times what federal regulators consider safe for a lifetime of exposure, and nearby private drinking wells were also tainted. Other regions of New Mexico with military presence are also suffering because of PFAS. For example, Air Force testing also revealed levels of PFAS up to 1,294,000 parts per trillion—more than 27,000 times the advisory level—in waters below Holloman Air Force Base near the city of Alamogordo. Because of the lack of power to enforce any limits on these pollutants, State Environment Secretary Jim Kenney has long encouraged the EPA to move quickly on finalizing regulations, which would mean the state can then enforce the regulations by law. By providing legally enforceable policies, or as Secretary Kenney stated, "putting teeth to policy," this would enable the federal government and the states to require PFAS cleanup and PFAS pollution prevention.

Regulating PFAS

The EPA is actively preparing PFAS regulations that will be more than just policy suggestions. The current head of the EPA, Administrator Michael S. Regan, established the EPA Council on PFAS which ultimately lead to the creation of the EPA's 2021-2024 PFAS Strategic Roadmap. Within the roadmap, EPA commits to "leveraging the full range of statutory authorities to confront the human health and ecological risks of PFAS." See 2021-2024 PFAS Strategic Roadmap. The EPA also details its integrated approach to PFAS, which is focused on three central directives:

- Research. Invest in research, development, and innovation to increase understanding of PFAS exposures and toxicities, human health and ecological effects, and effective interventions that incorporate the best available science.

- Restrict. Pursue a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.

- Remediate. Broaden and accelerate the cleanup of PFAS contamination to protect human health and ecological systems. 2021-2024 PFAS Strategic Roadmap at 5.

The EPA's plan is to use existing statutory authorities to implement regulations and address PFAS pollution under specific circumstances. For example, the EPA is currently developing a national PFAS testing strategy. Id. at 12. This will aid the EPA in identifying and selecting which PFAS the Agency will require testing under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (1976) (TSCA).

Additionally, EPA is anticipating providing legal enforcement to PFAS pollution control and prevention through the Safe Drinking Water Act of 1974, §§ 1411, 1448(a)(2), 42 U.S.C.A. §§ 300g, 300j–7(a)(2) (SDWA). Under the SDWA, the EPA has authority to set legally enforceable National Primary Drinking Water Regulations (NPDWRs) for

drinking water contaminants. Further, the EPA can require monitoring of public water supplies through NPDWRs which would directly help states like New Mexico that have been impacted by pollution to drinking water, but have dealt with having no tools for legal enforcement. The EPA has regulated more than 90 drinking water contaminants, but has yet to established national drinking water regulations for any PFAS. The deadline EPA has set to establish national primary drinking water regulation for PFAS in the form of an initial proposed rule is expected to be this upcoming Fall of 2022. The EPA expects that the final rule will be implemented by Fall 2023. The EPA is also planning on proposing rules affecting PFAS in the contexts of other effective statutory authorities such as the federal Clean Water Act, 33 U.S.C. §1251 *et seq*. (1972) (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq*. (1980) (CERCLA).

Conclusion and Implications

The EPA is committed to tackling the PFAS pollution issue head-on by providing a strategic roadmap that outlines when and how the agency plans to implement legally enforceable regulations to PFAS. This commitment likely comes as an urgently welcome action to many states and state leaders, such as New Mexico Environment Secretary Jim Kenney, who not long ago called for the EPA to provide "teeth to its policy." By finally tying PFAS policy to statutory enforcement mechanisms, states will have the power to further protect households and businesses from the dangers PFAS may pose to communities across the country. For more information, *see*, United States Environmental Protection Agency, PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024 (October 2021) (2021-2024 PFAS Strategic Roadmap), https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024
(Christina J. Bruff, James Grieco)

CALIFORNIA EXPANDS STATE ENERGY COMMISSION'S AUTHORITY AND EASES ENVIRONMENTAL REQUIREMENTS TO PROMOTE CLEAN ENERGY PROJECTS AND IMPROVE GRID RELIABILITY

On June 30, 2022, California Governor Gavin Newsom signed Assembly Bill (AB) 205 into law, which aims to bolster the state's energy resources by rapidly deploying clean energy technologies and also improving energy grid reliability in the face of extreme weather events. As one of its main components, AB 205 expands the California Energy Commission's (CEC) siting authority under the Warren-Alquist Act to cover a broader array of clean energy projects through exclusive state jurisdiction, in order to streamline the environmental review and authorization process. AB 205 also allocates $2.2 billion in the 2022 Budget Act to create the Strategic Reliability Reserve Fund to support electrical grid reliability during extreme climate events by extending the life of existing generation facilities, securing new emergency and temporary power, and developing new, clean generation facilities. The bill also establishes a Long-Duration Energy Storage Program to promote grid reliability by encouraging the development of distributed resources that can be dispatched for emergency supply or load reduction during extreme events.

Another provision of AB 205 also provides approximately $1.2 billion of financial assistance to power utilities' residential customers for past due bills incurred during the COVID-19 pandemic through the California Arrearage Payment Program, but this article focusses on the CEC's Siting Authority and streamlined review, the Strategic Reliability Reserve Fund, and Long-Duration Energy Storage Program provisions of the bill.

Expansion of the CEC's Siting Authority and Streamlining Provisions for Qualifying Energy Projects

Previously under the Warren-Alquist State Energy Resources Conservation and Development Act (hereinafter, "Warren-Alquist Act," Pub. Resources Code, § 25000 *et seq.*), the CEC's siting jurisdiction was limited to thermal generating facilities, such as gas-fired and geothermal power plants, with a capacity of 50 megawatts (MW) or more. But to expedite

the State's transition to clean energy and to promote energy reliability in the face of power outages due to the extreme weather events, AB 205 amends the Warren-Alquist Act to expand CEC's exclusive siting jurisdiction until June 30, 2029 to include:

- Solar photovoltaic or terrestrial wind electrical generation powerplant with a capacity of 50 MW or more;

- Thermal powerplant that does not use fossil or nuclear fuels, with a capacity of 50 MW or more;

- Energy storage facilities with a capacity of 200 MW hours or more;

- Electric transmission lines from these generating or storage facilities to the first point of interconnection; and

- Projects that require capital investment of at least $250 million over a five-year period and manufacture, produce, or assemble energy storage system or components manufacturing wind or solar photovoltaic energy system or other components.

Under AB 205, a qualifying project developer can apply under the CEC's new certification process, no later than June 30, 2029. The CEC certification streamlines the approval for such qualifying projects, as the CEC process functions:

> . . .in lieu of any permit, certificate, or similar document required by a state, local, or regional agency, or federal agency, to the extent permitted by federal law.

Qualifying projects must still obtain leases issued by the State Lands Commission and the approvals from:

> . . .the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the State Water Resources Control Board, or the applicable regional water quality control boards.

The CEC will also be the lead agency for California Environmental Quality Act (CEQA) purposes for the qualifying projects. AB 205 expedites the CEQA approval timeline for these projects, requiring CEC to review a project application for completeness within 30 days of the application submittal; initiate Native American tribal consultation and hold various public meetings in the communities of the proposed project, all within the next 60 days after the applications is deemed complete; and with limited exceptions, complete the environmental review for projects within 270 days after the application is deemed complete, or "as soon as practicable" thereafter. CEC, however, cannot approve such a project without making a finding that the project:

> . . .will have an overall net positive economic benefit to the local government that would have had permitting authority for the site and related facility.

In addition to process streamlining, a certified project automatically qualifies as an "environmental leadership" project under CEQA, if the CEC finds that certain criteria are met. This designation would expedite any CEQA litigation for the project, requiring that all legal proceedings, including appeals, be resolved within 270 days.

But these streamlining benefits do come with certain obligations, including prevailing wage and project labor agreement requirements and contracts with community-based organizations for community benefits. Further, the CEC process has hefty fee requirement—$250,000 to be submitted with the certification application, plus additional fees depending on the nameplate capacity of generation and storage facilities or the square footage of manufacturing facilities, with the total fee capped at $750,000. Projects that receive certification are also subject to an annual fee of $25,000.

Strategic Reliability Reserve Fund Program

Through AB 205, the 2022 Budget Act allocates $2.2 billion to create the Strategic Reliability Reserve Fund to support the Distributed Electricity Backup Assets Program "to incentivize the construction of cleaner and more efficient distributed energy assets" and the Demand Side Grid Support Program "to incentivize dispatchable customer load reduction and backup generation operation as on-call emergency

supply and load reduction" for the state's electrical grid during extreme events.

AB 205 provides the California Department of Water Resources (DWR), in consultation with CEC, California Independent System Operator, California Public Utilities Commission, and California Air Resources Board, with broad authority to administer this fund and implement projects, purchases, and contracts to support the above-mentioned programs. The bill establishes the DWR Electricity Supply Reliability Reserve Fund to cover these costs. Eligible facilities include the following:

•New emergency and temporary power generators of 5 MW or more.
New energy storage systems of 20 MW or more that are capable of discharging for at least two hours.

•Generation facilities using clean, zero-emission fuel technology of any size to produce electricity.

•Development of zero-emission generation technologies that can provide at least 50% of their capacity after 8:00 p.m. (after sundown) with an operational date no later than December 31, 2026.

CEC will retain the exclusive jurisdiction to certify sites and facilities that are proposed and undertaken by DWR. Certification of such a site and facilities related to the Strategic Reliability Reserve would be exempt from CEQA. And, the siting application also receives an expedited review, with the CEC determination to issue a certification to be issued no later than 180 days after the application is deemed complete.

Long-Duration Storage Program

AB 205 also requires CEC to establish and implement the Long-Duration Energy Storage Program to deploy innovative energy storage systems to the electrical grid for purposes of providing critical capacity and grid services. This program will provide financial incentives for energy storage facilities that have power ratings of at least one megawatt and are capable of reaching a target of at least eight hours of continuous discharge of electricity at that power rating. The projects eligible for such funding include: (1) Compressed air or liquid air technologies, (2) flow batteries, advanced chemistry batteries, or mechanical energy storage (3) thermal storage or aqueous battery systems, and (4) a hydrogen demonstration project.

Conclusion and Implications

AB 205, with its temporary provisions for expedited environmental review provisions and prioritization of zero-emission energy resource reflects the Legislature's concerns about balancing the need for greenhouse gas emissions reduction with the need to prevent energy disruptions caused due to extreme weather events. To a certain extent, the sunset deadline for expedited environmental review provisions also reflects the intent to return to full environmental review requirements once the state gets past the current energy emergency. Initial reactions to AB 205 have been mixed. Energy project developers have welcomed the streamlining benefits of AB 205 while local jurisdictions are apprehensive that AB 205's exclusive CEC siting authority for qualified projects usurps local control over project permitting and excludes the local concerns from being incorporated into the project approval process. Similarly, environmental groups are also concerned about the streamlined environmental review provisions in AB 205, particularly where the Strategic Reliability Reserve Program may be utilized to extend the life of fossil fuel- and nuclear energy-based generation.
(Hina Gupta)

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

•August 17, 2022—EPA announced a settlement with Saputo Cheese USA Inc., the owner and operator of a mozzarella cheese and whey protein concentrate production facility in Tulare, California. An accident at the facility on June 22, 2018, led to the release of 5,690 pounds of anhydrous ammonia. EPA subsequently performed an inspection of the Saputo Cheese facility in 2019 and found that the company failed to correct corrosion on piping and structural supports and failed to demonstrate that safety vents met industry standards. EPA also found that Saputo Cheese did not accurately report the total amount of ammonia it manages and failed to comply with requirements related to planning for accidental releases. EPA found that safety improvements were necessary at the facility to help prevent future accidents. Pursuant to the settlement, the company will pay $170,000 in civil penalties, ensure compliance with its Risk Management Plan, and make safety improvements to its facility.

•August 19, 2022—EPA issued a issued a notice of violation to Renergy, Inc. alleging Clean Air Act permit violations at the company's Dovetail Energy facility in Greene County and Emerald BioEnergy LLC facility in Morrow County. Both facilities operate under permits issued by the Ohio Environmental Protection Agency, through the Ohio State Implementation Plan, and have anaerobic digesters, which accept organic wastes to create biogas for energy or disposal. The alleged violations include excess emissions from the flare and engine operations, improper operation of the facility engines, improper operation of the facility flares, and the failure to report all parameters required by facility permits.

•August 22, 2022—EPA announced a settlement with Ohio-based Autosales, Inc. pursuant to which the company will pay a $600,000 penalty for illegally selling aftermarket products that alter vehicles' emissions-control systems—known popularly as defeat devices—across the United States. Autosales, Inc. offered or sold at least 2,390 exhaust emissions control delete hardware parts, also known as "straight" or "delete" pipes, for diesel-fueled motor vehicles between January 1, 2018 and October 2, 2019. The devices are designed to bypass, defeat, or render inoperative emission control technology in motor vehicles, thus violating the Clean Air Act.

•August 29, 2022—The U.S. District Court in the Eastern District of Michigan awarded a default judgment, granting the proposed $10 million civil penalty against DieselOps LLC and Orion Diesel LLC of Waterford, Michigan. The violations the United States identified in its December 2021 complaint included the manufacture, sale and installation of aftermarket "defeat devices" designed to disable or bypass required vehicle emissions controls. The court also granted the proposed $455,925 civil penalty against the owner of the two companies, Nicholas Piccolo, for failing to respond to an information request issued pursuant to Section 208 of the Clean Air Act and entered a judgment against Piccolo of slightly less than $1 million for alleged fraudulent transfers in violation of the Federal Debt Collection Procedures Act. And the court entered a permanent injunction against future sales of defeat devices against all of the defendants.

•August 31, 2022—EPA announced a settlement with Ventura Coastal, LLC, to resolve Clean Air Act chemical risk management violations at its citrus processing facility located in Visalia, California. The

facility improperly managed refrigeration equipment containing more than 10,000 pounds of anhydrous ammonia and will pay $270,000 in civil penalties. On May 21, 2019, EPA inspected the Visalia facility and determined that Ventura Coastal violated provisions of Section 112(r) of the Clean Air Act, which governs extremely hazardous substances such as anhydrous ammonia. EPA found that the company failed to keep up-to-date information on equipment, failed to label piping and equipment, did not adequately describe maintenance and inspection frequencies for equipment and instrumentation, failed to inspect equipment and correct deficiencies, and did not address internal audit and incident investigation findings in a timely manner.

•September 1, 2022—EPA announced a settlement with Keystone Automotive, a vehicle parts distributor with headquarters in Exeter, Pennsylvania, pursuant to which the company will pay a $2.5 million penalty for allegedly selling aftermarket devices that were designed to defeat the emissions control systems on cars and trucks. The company's actions allegedly violated the Clean Air Act's prohibition on the sale of so-called "defeat devices," which are designed to "bypass, defeat or render inoperative" a motor vehicle engine's air pollution control equipment or systems. This enforcement action is part of EPA's National Compliance Initiative for Stopping Aftermarket Defeat Devices for Vehicles and Engines. The Keystone settlement, at $2.5 million, is the third largest civil penalty settlement nationwide for aftermarket defeat device cases.

•September 2, 2022—The U.S. Department of Justice (on behalf of EPA) filed a civil judicial complaint against River City Diesel LLC, RCD Performance LLC, and Midwest Truck and 4WD Center LLC (collectively RCD) and Joshua Davis of East Peoria, Illinois, for manufacturing, selling, and installing aftermarket "defeat devices" designed to bypass vehicle emission controls in violation of the federal Clean Air Act. DOJ is seeking monetary civil penalties and injunctive relief in its complaint to prevent RCD from manufacturing, selling or installing the defeat devices. The complaint also alleges that RCD transferred assets to Joshua Davis in violation of the Federal Debt Collection Procedures Act.

•September 12, 2022—EPA announced an agreement with TPC Group LLC to correct Clean Air Act violations at its Houston, Texas facility. The EPA alleged the facility had multiple deficiencies, including visible external corrosion of equipment and failure to adequately track, manage, and mitigate dead legs. Dead legs occur in areas of a piping system that have no flow yet are still exposed to process, which can result in equipment failure if not managed properly. This scenario triggered an explosion at TPC's Port Neches facility in 2019 that injured workers and caused evacuations of nearby communities. The agreement gives TPC Group specific deadlines to address the violations and penalizes TPC for failure to meet the deadlines. Required actions include safely addressing equipment deficiencies, conducting remaining life calculations, and establishing a system to track the status of all dead legs at the facility.

Civil Enforcement Actions and Settlements—Water Quality

•August 18, 2022—EPA announced a settlement with residential developer Heartland Development LP, pursuant to which Heartland will pay a $51,690 civil penalty to resolve alleged violations of the Clean Water Act (CWA). According to EPA, the company failed to adequately control stormwater runoff from the Covington Creek and Covington Court construction developments in Olathe, Kansas. Specifically, EPA alleged that Heartland failed to construct and/or maintain required stormwater controls; failed to take actions when stormwater control deficiencies were identified; and failed to conduct required inspections of the construction sites.

•August 19, 2022—EPA announced a settlement with Asphalt manufacturer Shilling Construction Company Inc. under which the company will pay $71,324 in civil penalties to resolve alleged violations of the CWA. According to the EPA, the company failed to adequately control stormwater runoff from its Manhattan, Kansas, facility. EPA alleged that Shilling Construction failed to comply with its CWA permit, including failure to develop an adequate plan to reduce pollutants in stormwater runoff; failure to construct and/or maintain adequate stormwater controls; and failure to conduct and/or document required inspections and monitoring of the facility. The Agency also cited violations of regulations intended

to prevent spills from oil stored at the company's facility. In addition to paying the penalty, Shilling Construction agreed to submit reports to EPA and the Kansas Department of Health and Environment outlining the steps it has taken to return to compliance, as well as sampling stormwater runoff from the facility to ensure stormwater controls and management practices are functioning as intended.

•August 23, 2022—EPA announced a settlement with announced a settlement with Amalie Oil Company USA (AOCUSA) for violations of the Clean Water Act and its regulations related to oil pollution prevention at the company's Vernon, Calif. facility. Under the settlement, AOCUSA will pay a $132,590 penalty. The facility, which stores and distributes oil, is located approximately one mile from the Los Angeles River, which flows into the Pacific Ocean. During an October, 2021 inspection, EPA found that the company violated the Clean Water Act's Oil Pollution Prevention Regulations.

•September 8, 2022—EPA announced a settlement with the Conservation Law Foundation (CLF) and the New Hampshire Fish and Game Department that will require the Department to reduce phosphorus discharges from its Powder Mill Fish Hatchery, located in New Durham, N.H., and study the water quality impacts of historic pollution on downstream waters. The state-owned and operated Powder Mill Fish Hatchery is located at the Merrymeeting Lake Dam in New Durham, N.H. The hatchery supports recreational fishing in the state and discharges wastewater to the Merrymeeting River, pursuant to a federally issued permit under the Clean Water Act. In October 2020, EPA re-issued a permit for the hatchery, which included, for the first-time specific limits, for phosphorus discharges, based on EPA's determination that the hatchery's discharge of phosphorus negatively impacts downstream water quality, including contributing to the growth of toxic algae blooms and cyanobacteria. In 2018, the Conversation Law Foundation sued officials of the New Hampshire Fish and Game Department under the citizen-suit provisions of the Clean Water Act. CLF alleged, among other claims, violations of the permit's prohibition against water quality violations caused by its phosphorus discharges and, in an amended complaint, violations of the new numeric phosphorus limits. After successful settlement negotiations, the U.S. Department of Justice, on behalf of EPA, filed a motion to intervene in the CLF action and filed its own complaint against the New Hampshire Fish and Game Department.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•August 17, 2022—EPA announced a $1.7 million settlement with The Andersons Marathon Holdings (Andersons Marathon) LLC to resolve alleged Toxics Release Inventory (TRI) reporting violations of the Emergency Planning and Community Right-to-Know Act (EPCRA) at four ethanol manufacturing facilities in Indiana, Iowa, Michigan, and Ohio. The settlement resolved Andersons Marathon's alleged failure to file, failure to file timely, and failure to file accurate annual EPCRA TRI Forms for several chemicals from its fermentation vapor stream. The company has agreed to pay a total penalty of $1,731,256 between two Consent Agreements and Final Orders (CAFO), the largest EPCRA TRI penalty ever obtained by the Agency.

•September 13, 2022—EPA announced an agreement with General Electric Company (GE) under which the company will investigate the Lower River portion of the Hudson River PCBs Superfund site to determine next steps for addressing contamination. Under the terms of the agreement, GE will immediately develop a plan for extensive water, sediment, and fish sampling between the Troy Dam and the mouth of the New York Harbor. While polychlorinated biphenyls (PCBs) will be a focus of the data collection in the Lower Hudson River, other contaminants will be evaluated as well. The new data is needed to determine from a scientific standpoint the best path forward, even in advance of a potential formal set of studies that would be required to develop a plan or plans for cleanup. The agreement requires data collection to begin in early 2023. GE will also pay EPA's costs to oversee the work.

•September 15, 2022—EPA announced a settlement with Siemens Industry, Inc., d/b/a Russelectric, a Siemens Business, a Delaware corporation, regarding alleged violations of the federal Resource Conservation and Recovery Act (RCRA) as well as hazardous waste regulations established by the Commonwealth of Massachusetts at the company's power

control system manufacturing facility in Hingham, Mass. EPA alleged that the company the company failed to comply with requirements necessary to operate as a "large quantity generator" of hazardous waste, including initial and refresher training for employees, maintenance of a chemical release contingency plan, and performance of weekly inspections. As part of the settlement, Russelectric has confirmed that the facility is in compliance with state and federal hazardous waste management laws. The company has also agreed pay a penalty of $121,546.

Indictments, Sanctions, and Sentencing

•August 31, 2022—Kirill Kompaniets, the Chief Engineer of a foreign flagged vessel, was sentenced to prison for deliberately discharging approximately 10,000 gallons of oil-contaminated bilge water overboard in U.S. waters off the coast of New Orleans last year, and for obstructing justice. The illegal conduct was first reported to the Coast Guard by a crew member via social media. The Honorable Nannette Jolivette Brown sentenced Kompaniets to serve a year and a day in prison, pay a $5,000 fine and $200 special assessment and serve six months of supervised release. Repair operations to correct a problem with the discharge of clean ballast water resulted in engine room flooding. After the leak was controlled, Chief Engineer Kompanietes and a subordinate engineer dumped the oily bilge water overboard while the ship was at an anchorage near the Southwest Passage off the Louisiana coast. The ship's required pollution prevention devices—an oily-water separator and oil content monitor—were not used, and the discharge was not recorded in the Oil Record Book, a required ship log. Kompaniets was also charged with obstruction of justice based on various efforts to conceal the illegal discharge. In a joint factual statement filed in Court with his guilty plea, Kompaniets admitted to: (1) making false statements to the Coast Guard that concealed the cause and nature of a hazardous condition, and concealing that the engine room of the vessel had flooded and that oil-contaminated bilge water had been discharged overboard; (2) destroying the computer alarm printouts for the period of the illegal discharge that were sought by the Coast Guard; (3) holding meetings with subordinate crew members and directing them to make false statements to the Coast Guard; (4) making a false Oil Record Book that failed to disclose the illegal discharge; (5) directing subordinate engine room employees to delete all evidence from their cell phones in anticipation of the Coast Guard inspection; and (6) preparing a retaliatory document accusing the whistleblower of poor performance as part of an effort to discredit him.

•September 12, 2022—U.S. District Court Judge John T. Fowlkes Jr. of the Western District of Tennessee today sentenced DiAne Gordon, 61, of Memphis, Tennessee, to 36 months in prison followed by two years' supervised release in connection with her fabrication of discharge monitoring reports required under the Clean Water Act and the submission of those fraudulent documents to state regulators in Tennessee and Mississippi. The court further ordered Gordon to pay restitution in the amount of $222,388. On the fraud count, Gordon was sentenced to 26 months in prison, and she received an additional 10 months' incarceration on the related probation revocation for having engaged in the criminal conduct while on supervision. According to court documents and information in the public record, Gordon was the co-owner and chief executive officer of Environmental Compliance and Testing (ECT). ECT held itself out to the public as a full-service environmental consulting firm and offered, among other things, sampling and testing of stormwater, process water and wastewater. Customers, typically concrete companies, hired ECT to take samples and analyze them in a manner consistent with Clean Water Act permit requirements. Gordon claimed to gather and send the samples to a full-service environmental testing laboratory. The alleged results were memorialized in lab reports and chain of custody forms submitted to two state agencies, Mississippi Department of Environmental Quality (MDEQ) and the Tennessee Department of Environment and Conservation (TDEC), to satisfy permit requirements. In reality, Gordon fabricated the test results and related reports. She even forged documents from a reputable testing laboratory in furtherance of her crime. Gordon then billed her clients for the sampling and analysis. Law enforcement and regulators quickly determined that Gordon created and submitted, or caused to be submitted, at least 405 false lab reports and chain of custody forms from her company in Memphis to state regulators since 2017.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT LIMITS WAIVERS OF CLEAN WATER ACT SECTION 401 CERTIFICATIONS

California State Water Resources Control Board v. FERC, 43 F.4th 920 (9th Cir. 2022).

The United States Court of Appeals for the Ninth Circuit recently vacated and remanded several decisions by the Federal Energy Regulatory Commission (FERC)/U.S. Environmental Protection Agency (EPA) holding that the California State Water Resources Control Board (State Water Board) waived its certification authority for certain hydroelectric projects. The court held that FERC's findings that the State Water Board participated in coordinated schemes with applicants to delay certification and to avoid making a decision on certification requests was unsupported by substantial evidence.

Factual and Procedural Background

Under Section 401 of the Clean Water Act (CWA), states are required to provide a water quality certification before a federal license can be issued for activities that may result in discharge into intrastate navigable waters. States can adopt water quality standards that are stricter than federal laws—an effective tool in addressing the broad range of pollution. Accordingly, states may impose conditions on federal licenses for hydroelectric projects to make sure that that those projects comply with state water quality standards. Section 401 provides for a one-year deadline by which states must act on request for certification. If states do no act on a request for water quality certification within one year of receipt, their Section 401 certification is waived.

Waiver of Section 401 certification authority can have significant consequences. If a state waives their authority to impose conditions through Section 401's certification procedure, projects run the risk of being noncompliant with a state's water quality standards for significant periods of time. Federal licenses for hydroelectric projects can last for decades; the default term is 40 years.

California's requirement under the California Environmental Quality Act (CEQA) poses an obstacle for a certification to be issued within one year of a project applicant's submission. Under CEQA, the State Water Board must receive and consider a project's environmental impact prior to granting a certification request. If materials required by CEQA are submitted late in the State Water Board's review period, the State Water Board is unlikely to be able to issue a certification within the one-year deadline. Consequently, California's regulations would require the State Water Board to deny the certification without prejudice unless the applicant in writing withdraws the request for certification. Given the infeasibility of the State Water Board issuing a 401 certificate within the one-year deadline, it became common for project applicants to withdraw their certification requests before the one-year deadline and resubmit them as new request—avoiding having their original request denied.

In 1963, the Federal Energy Regulatory Commission issued three 50-year licenses for three hydroelectric projects: (1) Nevada Irrigation District's (NID) Yuba-Bear Hydroelectric Project; (2) Yuba County Water Agency's (YCWA) Yuba River Development Project; and (3) Merced Irrigation District's (MID) Merced River Hydroelectric Project. Before each of these licenses expired, each licensee submitted a request for a Section 401 Certification to the State Water Board.

In each case, the licensee failed to complete the environmental review requirements under CEQA. Each agency filed a letter with the State Water Board withdrawing and resubmitting its application for water quality certification. NID and MID continued to withdraw and resubmit their certification requests annually between 2014 and 2018, and the State Water Board continued to issue new deadlines for certification action.

In 2019, the United States Court of Appeals for the District of Columbia found that that California

and Oregon had entered into a formal contract with a project applicant to delay federal licensing proceedings, via continual withdrawal-and-resubmission, and held that the states had waived their Section 401 certification authority. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). After *Hoopa Valley*, the State Water Board ultimately denied without prejudice NID, YCWA, and MID's requests for certification, relying on their failure to begin the CEQA process.

Each licensee then sought a declaratory order from FERC that the State Water Board had waived its Section 401 certification authority. Relying on *Hoopa Valley*, FERC took the position that even without an explicit contractual agreement, the State Water Board coordinated with NID, YCWA, and MID on the withdrawal-and- resubmission of Section 401 certification requests. As evidence of coordination, FERC pointed to: (1) MID withdrawing and resubmitting its applications for four-years; (2) its assertion that California's regulations "codify" the withdrawal-and-resubmission practice; and (3) the State Water Board's failure to "request additional information regarding the Section 401 requests. Because of that alleged coordination, FERC held that the State Water Board had failed or refused to act on the certification requests and therefore, waived its Section 401 certification authority under the CWA.

The State Water Board submitted a petition for review on all three orders, alleging the decisions were no supported by substantial evidence.

The Ninth Circuit's Decision

The court first considered but did not determine whether FERC's standard for waiver was consistent with the text of Section 401. FERC argued that a waiver exists under *Hoopa Valley* when a state coordinates with a project applicant to afford itself more time to decide a certification request. The court did not determine whether this test is consistent with the text of Section 401 because it held that FERC's findings of coordination were not supported by substantial evidence in the record.

The court then discussed the sufficiency of the evidence to conclude that the State Water Board only acquiesced in the applicants' own decisions to withdraw and resubmit their applications rather than have them denied. The court noted that FERC's ruling against NID relied almost entirely on comments that the State Water Board submitted in response to FERC's draft environmental impact statement, which provided that the CEQA process had not yet started and that the most likely action would be that NID would withdraw and resubmit is certification request, because otherwise, the State Water Board would deny certification without prejudice. Similarly, the court noted that FERC's rulings against YCWA and MID relied on an email from a State Water Board staff member to each applicant reminding them that the final CEQA document had not been filed and that a "deny without prejudice" letter may be the consequence.

For all three projects, the court found the State Water Board's anticipation or prediction that the applicants would withdraw and resubmit their certification applications did not amount to coordination. There was nothing to indicate that the State Water Board was working to engineer that outcome but rather, the evidence showed only that the State Water Board acquiesced in the applicants' own unilateral decisions to withdraw and resubmit their applications rather than have them denied. The court further reasoned that the State Water Board's mere acquiescence in the applicants' withdrawals-and-resubmissions could not demonstrate that the State Water Board was engaged in a coordinated schemed to delay certification.

The court went on to reason that FERC wrongly concluded California's regulations codified withdrawal-and-resubmission practice, providing that the regulations just acknowledge applicants' longstanding practice—accepted by FERC for decades—of withdrawing and resubmitting Section 401 certification requests to avoid having them denied for failure to comply with state environmental-review requirements. Finally, the court found that FERC incorrectly relied on statements by the applicants that the State Water Board had all of the information it needed or to request additional information. According to the court, the State Water Board continually reminded NID, YCWA, and MID that the board did not have the information it would need to grant a request—namely, the CEQA evaluation that California law required.

Conclusion and Implications

This case limits the holding of *Hoopa Valley* and clarifies that the long-standing withdrawal-

and-resubmission process for a Section 401 certification does not amount to coordination if states merely acquiescence in a project applicant's actions. The court's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/04/20-72432.pdf
(McKenzie Schnell, Rebecca Andrews)

NINTH CIRCUIT FINDS FAILURE TO JOIN KLAMATH TRIBES IN SUIT AGAINST THE BUREAU OF RECLAMATION FATAL TO LAW SUIT

Klamath Irrigation District v. United States Bureau of Reclamation,
___F.4th___, Case No. 20-36009 (9th Cir. 2022).

The United States Court of Appeals for the Ninth Circuit affirmed that the failure by the Klamath Basin irrigation districts (Districts) to join the Hoopa and Klamath tribes (Tribes) in their suit against the United States Bureau of Reclamation (Bureau) constituted grounds for dismissal. The court reasoned that the tribes were required parties to the suit and that tribal sovereign immunity prevented the Tribes from joined. Accordingly, dismissal was appropriate.

Background and General Information

This case revolves around the operations and water levels of the Klamath Lake and the flows of the Klamath River in southern Oregon and northern California. The plaintiff Districts in this case are irrigation companies or districts that divert project water from the Klamath project, specifically the Upper Klamath Lake (UKL). UKL is controlled and operated by the Bureau, which has adopted operations plans to manage the water resources of UKL and the Klamath River to meet a wide variety of needs and interests. However, the Bureau has a "nearly impossible" task in managing its responsibilities, particularly in times of shortage. 2022 WL 4101175, at 4.

"Reclamation maintains contracts with individual irrigators and the irrigation districts that represent them, under which the United States has agreed to supply water from the Klamath Project to the irrigators, "subject to the availability of water." *Id.* Additionally, as a federal agency, "the Bureau also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA." *Id.* Since the early 2000s, the Bureau has incorporated operating conditions developed through consultation with federal fish and wildlife agencies to ensure that its operations do not jeopardize the existence of fish species protected by the federal Endangered Species Act (ESA)These conditions require the Bureau to balance the maintenance of minimum lake levels in UKL and minimum stream flows in the Klamath River downstream from the lake to benefit the fish. *Id.* Finally, the Bureau must operate the Project consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project and any resulting Project rights. *Id.*

In 2018 and 2019 the Bureau issued (and amended) Biological Assessments following consultation with the Fish and Wildlife Service and the National Marine Fisheries Service pursuant to section 7(c) of the ESA:

> In the [2019] Amended Proposed Action, [the Bureau] confirmed that it would continue using the water in UKL for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, necessarily limiting the amount of water available to other water users who hold junior rights to the Klamath Basin's waters. *Id.* at 5.

On March 27, 2019, or soon thereafter, the Districts and other water users filed this action for declaratory and injunctive relief against the Bureau and its officials:

> The [Districts] sought a declaration that [the Bureau's] operation of the Klamath Project pursuant to the 2019 Amended Proposed Action based on the Services' biological assessments was unlawful under the Administrative Procedure Act (APA). *Id.*

The Districts also sought to enjoin the Bureau from using water from UKL for instream purposes and limiting the amount of water available to the irrigation districts. The Tribes successfully moved to intervene as of right, arguing that they were required parties to the suit. The Districts then filed Second Amended Complaints (SACs) seeking declaratory relief only.

The Districts asked the court to "[d]eclare Defendants [sic] actions under the APA unlawful" and

> . . .for declaratory relief setting forth the rights of the parties' rights [sic] under the [administrative findings in the ongoing Klamath Basin Adjudication known as the ACFFOD], the Bureau Act and the Fifth Amendment. . . *Id.*

Specifically, the Districts' alleged that the Bureau's 2019 Amended Proposed Action was improper because the Bureau intended to use water stored in UKL for its own instream purposes without a water right or other authority under the laws of the State of Oregon, in violation of the APA and Section 8 of the Bureau Act. *Id.*

> The Districts also alleged that the Bureau's actions violated the APA and Section 7 of the Reclamation Act, which requires the Bureau to acquire property rights, such as the right to use water under Oregon law, through Oregon's appropriation process or 'by purchase or condemnation under judicial process,' using the procedure set out by Oregon law. . . .Although the Districts' claims are framed as procedural challenges, their underlying challenge is to the Bureau's authority and obligations to provide water instream to comply with the ESA, an obligation that is coextensive with the Tribes' time immemorial treaty water and fishing rights. *Id.*

The Tribes moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party under Federal Rule of Civil Procedure 19, arguing that tribal sovereign immunity barred their joinder. In a well-reasoned opinion, the magistrate judge recommended that the district court grant the Tribes' motions and dismiss this case, and on September 25, 2020, the district court adopted the magistrate's decision in full. This timely appeal followed.

The Ninth Circuit's Decision

Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a defense that may result in dismissal under Federal Rule of Civil Procedure 12(b)(7). A court engages in a three-part inquiry. The court first examines whether the absent party must be joined under Rule 19(a). The court next determines whether joinder of that party is feasible. Finally, if joinder is infeasible, the court must "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

A party is a "required party" and must be joined under Federal Rule of Civil Procedure 19 if:

> (A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and. . .disposing of the action in [their] absence may: (i) as a practical matter impair or impede the person's ability to protect the interest ... or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1). . . .Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.

The Districts advanced several arguments that the Tribes were not required parties. First, the Districts argued that:

> Reclamation has neither a right nor any other legal authorization to use water stored in the UKL reservoir for instream purposes, a claim that, 'as a practical matter,' would impair the Bureau's ability to comply with its ESA and tribal obligations. *Id.* at 6.

The court noted that its case law establishes that the Tribes' water rights are "at a minimum coextensive with the Bureau's obligations to provide water for instream purposes under the ESA." *Id.* Thus, it held a suit, like this one, that seeks to amend, clarify, reprioritize, or otherwise alter the Bureau's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights. Accordingly, the Districts' invocation of the APA does not alone render this suit merely procedural. Put simply, if the Districts are successful in their suit, the Tribes' water rights could be impaired, so the Tribes are required parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i). *Id.*

Second, the Districts asserted that the Bureau adequately represented the Tribes interests in this matter. Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments;" and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id*, *citing Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 852 (9th Cir. 2019), *cert. denied*, ___U.S.___, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020).

Analysis Under the *Dine Citizens* Decision

In *Dine Citizens*, this court previously held that:

> . . .although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted. *Dine Citizens*. at 852.

The court ultimately concluded in *Dine Citizens* that:

> . . .[a]lthough Federal Defendants ha[d] an interest in defending their decisions, their overriding interest ... must be in complying with environmental laws such as ... the ESA. This interest differs in a meaningful sense from [the tribe's] sovereign interest in ensuring [continued access to natural resources]. Id. at 855.

The court also explained why it distinguished *Dine Citizens* from *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), which held that the Bureau adequately represented the tribes. That court reasoned that:

> . . .while Federal Defendants [in Dine Citizens had] an interest in defending their own analyses that formed the basis of the approvals at issue, [ ] they [did] not share an interest in the outcome of the approvals. *Dine Citizens*, 932 F.3d at 855 (emphasis omitted).

The court held that the present action is analogous to that in *Dine Citizens*, explanting that:

> . . .while Reclamation has an interest in defending its interpretations of its obligations under the ESA in the wake of the ACFFOD, it does not share the same interest in the water that is at issue here. 2022 WL 4101175, at 8.

Finally, the Districts argue that the Bureau is an adequate representative of the Tribes arising from the relationship of the federal government as a trustee for the federal reserved water and fishing rights of Native American tribes. Thus, the Districts contend that this relationship results in a "unity of interest" sufficient to allow the Bureau to adequately represent the Tribes' interests. However, a unity of some interests does not equal a unity of all interests. In this matter the Bureau and the Tribes share an interest in the ultimate outcome of this case for very different reasons. Further, case law has firmly rejected the notion that a trustee-trustor relationship alone is sufficient to create adequate representation. *Id.*

The McCarran Amendment

Alternatively, the the Districts argue that even if the Tribes are required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity. The McCarran Amendment waives the United States' sovereign immunity in suits:

(1) for the adjudication of rights to the use of

water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

Id. at 9, *citing* 43 U.S.C. § 666(a).

While the McCarran Amendment clearly "reach[es] federal water rights reserved on behalf of Indians," (*see*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811–12, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)), the Amendment only controls in cases "adjudicati[ng]" or "administ[ering]" water rights. 43 U.S.C. § 666(a). The court held that "even assuming the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties the Amendment does not waive sovereign immunity in every case that implicates water rights." *Id.* at 9.

An "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See, South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). However, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. *Id.*

In this case the parties disagree as to whether this case is an administration of that general stream adjudication within the meaning of the McCarran Amendment. The Districts argue that this case is an enforcement action to ensure that the Bureau complies with the terms of the ACFFOD. The Bureau argues this suit is not an administration because the Klamath Basin Adjudication is ongoing and the present suit is not one to administer rights that were provisionally determined in the administrative phase of that adjudication. The court agreed with the Bureau and held that that this lawsuit is not an administration of previously determined rights but is instead an APA challenge to federal agency action. Thus, the Tribes sovereign immunity has not been waived.

Finally, the Districts argued that despite the foregoing conclusions, the case should proceed without the required parties. To determine if the case can proceed in equity and good conscience the court evaluated the (i) potential prejudice, (ii) possibility to reduce prejudice, (iii) adequacy of a judgment without the required party, and (iv) adequacy of a remedy with dismissal. Fed. R. Civ. P. 19(b). *Id.* at 10. The court cited a "a wall of circuit authority" requiring dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity and affirmed the decision to dismiss the case.

Conclusion and Implications

This decision severely limits the ability of the Districts to see APA review of the Bureau of Reclamation's final orders. In holding that the Tribes are a required party, but that sovereign immunity is not waived, the Districts cannot challenge the Bureau operating/action plans absent the Tribes consent. A copy of the Ninth Circuit's opinion may be found at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/08/20-36009.pdf
(Jonathan Clyde)

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 Cleanup Coalition appealed.

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)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL AFFIRMS DECISION DENYING CHALLENGE TO FLOOD CONTROL PROJECT PROGRAMMATIC EIR RANGE OF ALTERNATIVES

Joshua v. San Francisquito Creek Joint Powers Authority, Unpub., Case No. A163294 (1st Dist. Aug. 23, 2022).

The First District Court of Appeal in *Joshua v. San Francisquito Creek Joint Powers Authority* affirmed in an *unpublished* opinion the trial court's decision that a flood control project programmatic Environmental Impact Report (EIR), pursuant to the California Environmental Quality Act (CEQA), considered a reasonable range of alternatives and that the EIR appropriately found that the alternatives were not feasible in support of a statement of overriding considerations.

Factual and Procedural Background

This case pertains to the San Francisquito Creek Flood Protection, Ecosystem Restoration, and Recreation Project Upstream of Highway 101 (project).

San Francisquito Creek originates in the eastern foothills of the Santa Cruz Mountains and drains a watershed that is approximately 45 square miles in size, from Skyline Boulevard to San Francisco Bay. The creek flows through Stanford University and the communities of Menlo Park, Palo Alto, and East Palo Alto to San Francisco Bay. The watershed's five-square-mile floodplain is located primarily within these cities.

A Program EIR was prepared for the project pertaining to reaches 2 and 3 of the San Francisquito Creek. Reach 1 extends from San Francisco Bay to the upstream side of U.S. Highway 101. The San Francisquito Creek Joint Powers Agency (JPA), which prepared the Program EIR, previously completed construction of improvements in Reach 1 following the completion of CEQA documentation in 2012.

Flooding from the creek is a common occurrence, including twice within the past decade. The largest recorded flooding occurred in February 1998, when the creek overtopped its banks in several areas, affecting approximately 1,700 properties.

The EIR described the JPA specific objectives of the project: (1) Protect life, property, and infrastructure from floodwaters exiting the creek; (2) Enhance habitat within the project area; (3) Create new recreational opportunities; (4) Minimize operational and maintenance requirements; and (5) Not preclude future actions to bring cumulative flood protection up to a 100-year flow event.

The JPA began with a list of 17 potential projects and three fundamental approaches to providing flood protection—contain, detain, or bypass: (a) Removing constrictions or raising the height of the creek bank in the floodplain: (b) Temporarily detain or store portions of high flows during storms through one or more floodwater detention facilities in Reach 3; and/or (c) Remove a portion of the high flows immediately upstream of Reach 2, route that portion of the flow through the flood-prone area in an underground bypass channel, and deposit this water at a location in the creek that can safely convey it to San Francisco Bay .

The JPA then screened the alternatives first for their ability to meet the project objectives and second for their cost, logistical and technical feasibility.

Three alternatives survived the screening process: Alternative 2: Replace the Pope-Chaucer Bridge and Widen Channel Downstream; Alternative 3: Construct One or More Detention Basins; Alternative 5: Replace the Pope-Chaucer Bridge and Construct Floodwalls Downstream. The alternatives were grouped according to the reaches in which the primarily occur, with Alternatives 2 and 5 occurring in Reach 2, and Alternative 3 occurring in Reach 3.

The EIR went to fully analyze 5 potential projects: the statutorily-required "No-Project" alternative, the Channel Widening Alternative, the Floodwalls Alternative, and two detention basin alternatives: the Former Nursery Detention Basin Alternative and the Webb Ranch Detention Basin Alternative.

Deep Widening Alternative as Preferred Project

Based on its analysis, the EIR deemed the Channel Widening Alternative the "Preferred Project," and adopted four separate and independent statements of overriding considerations to override the unavoidable noise and cumulative air quality impacts associated with the Preferred Project's construction:

> 1. The proposed project would restore San Francisquito Creek to its natural capacity throughout the project reach; this improved hydrologic functioning provides long-term benefits to aquatic species.
> 2. The proposed project would restore aquatic habitat by installing permanent woody debris, boulders, pools, and other features to approximately 1,800 linear feet of the channel at widening sites and the Pope-Chaucer Bridge. These elements, together with the improvements in hydrologic function in the project reach, will provide long-term benefits to salmonids and other aquatic species.
> 3. The proposed project will provide flood protection benefits to over 4,000 homes, businesses, and schools in the San Francisquito Creek floodplain. Although implementation of this project by itself will not completely remove the affected area from the FEMA 100-year flood zone, it will protect life, property, and infrastructure from the largest recorded flood flow and reduce damages during higher flows. Thus, it is a key piece of SFCJPA's long-term comprehensive flood protection strategy.
> 4. The proposed project will create recreational opportunities by connecting the new features to existing bike and pedestrian corridors and potentially constructing two creekside parks.

The JPA certified the EIR, adopted the statement of overriding considerations, and approved the project. Petitioner filed a petition for writ of mandamus alleging violations of CEQA. The trial court denied the petition in its entirety.

The Court of Appeal's Decision

The First District Court of Appeal, using the substantial evidence standard of review with a presumption of correctness of the JPA's findings, affirmed the trial court determination that the EIR contained a reasonable range of alternatives and that it appropriately found the alternatives were infeasible in support of a statement of overriding considerations.

Alternatives Review Under CEQA

The range of alternatives included in an EIR must be potential feasible alternatives that will foster informed decision making and public participation. An EIR should describe a range of reasonable alternatives to the project which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

However, the statutory requirements for consideration of alternatives must be judged against a rule of reason. Courts uphold an agency's selection of alternatives unless it is manifested unreasonable or inclusion of an alternative does not contribute to a reasonable range of alternatives. The rule of reason requires the EIR to set forth only those alternatives necessary to permit a reasoned choice and to examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.

The Alternatives Analysis

Petitioner argued that the detention basins were not true alternatives because they would complement or supplement Reach 2 channel projects. However, the evidence showed that the detention basins were considered as standalone alternatives that would provide real flood protection, either separately or following the Reach 2 channel projects.

Petitioner argued that the floodwalls alternative for Reach 2 should not have been considered as an alternative because it does not lessen the environmental impact of the project. However, Petitioner failed to exhaust his administrative remedy in making that argument to the JPA, and thus was barred from raising that argument at trial and on appeal.

Petitioner argued that there was no express finding of infeasibility of the project alternatives sufficient to allow the statement of overriding considerations. An agency may not approve a project that will have significant environmental effects if there are feasible alternatives of feasible mitigation measures that would substantially lessen those effects. An agency may find, however, that particular economic, social,

or other considerations make the alternatives and mitigation measures infeasible and that particular project benefits outweigh the adverse environmental effects.

The Court of Appeal held that an express finding of infeasibility is not required as long as the EIR contains the factual information showing that the alternatives were infeasible. In the EIR, the detention basins were found to offer environmentally superior alternatives, but would not have achieved half of the perk flow reduction of the approved project, and the detention basins would not achieve the same level of benefit as the project in terms of habitat enhancement.

Conclusion and Implications

This opinion by the First District Court of Appeal illustrates the deferential review that courts typically apply to an EIR alternatives analysis that appropriately considers both project objectives and well-documented feasibility determinations. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A163294.PDF (Boyd Hill)

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