Volume 3, Number 7
April 2023

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation. President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster,.

ENVIRONMENTAL NEWS

NEW MEXICO'S ATTORNEY GENERAL ISSUES OPINION ON OFFICE OF THE STATE ENGINEER PRELIMINARY APPROVALS UNDER NEW MEXICO'S WATER-USE LEASING ACT

On January 30, 2023, the Office of the New Mexico Attorney General issued an Opinion (Opinion No. 23-01) concluding that the Office of the State Engineer's (OSE) practice of issuing "preliminary approvals" or "preliminary authorizations" of proposed water right leases under New Mexico's Water-Use Leasing Act (WULA or Act), NMSA 1978, §§ 72-6-1 to -7, are practices not explicitly or implicitly supported by New Mexico law. The legal analysis and conclusions reached by the office of the New Mexico Attorney General revolve around the OSE practices not being statutorily permitted, the practices being in direct contradiction to existing OSE regulations, OSE's actions not being part of any exception to statutory procedure, and such OSE practices being in violation of Due Process.

Background

The New Mexico State Engineer has for many years allowed preliminary approvals in circumstances where irrigators are attempting to lease their water rights to another irrigator. If the transferor were to have to wait until the full time had expired for an administrative hearing, rather than receiving a preliminary approval, that irrigation season would have long expired. The same would be true in subsequent years. The requirement of a full administrative hearing before the lease can be approved would essentially preclude this practice.

The New Mexico State Engineer has also used this preliminary approval process to allow oil and gas users to lease water for "fracking." Time is also of importance to both the lessor of the water rights and the lessee, and the oil and gas company. The time required for the full administrative process to be completed would once again cost both the lessor, the lessee and the oil and gas company to lose money that they would have made in the absence of this requirement.

Preliminary approvals, when issued, are always accompanied by an opinion by the New Mexico State Engineer that the granting of the preliminary approval would not impair the water rights of water users in the area. If after an administrative hearing there is a finding of impairment to other water users, then the New Mexico State Engineer will immediately withdraw the preliminary approval.

The recent Attorney Opinion, Opinion No. 23-01, was prepared by the office of the New Mexico Attorney General at the request of State Representative Miguel Garcia (D) of Bernalillo. The questions Representative Garcia raised were: 1. Is the State Engineer's practice of "preliminary approval" or "preliminary authorization" of proposed leases of water rights lawful under state law? And 2. Is the State Engineer's practice of "preliminary approval" or "preliminary authorization" of proposed leases of water rights permitted under State Engineer regulations, and, if so, are such regulations lawful?

The AG's Opinion

New Mexico's WULA serves as a guide to allocate and conserve water in drought-stricken and climate challenged times by allowing owners of valid water rights to lease all or any part of the water rights belonging to them for an initial term not to exceed ten years. NMSA 1978, § 72-6-1 *et seq*. The Act aims to alleviate increasing pressure for reallocation of waters in New Mexico due to climate change, population growth and environmental pressures. To participate in water leasing in New Mexico, a person must file an Application to Transfer Point of Diversion, Purpose and/or Place of Use with the Office of the State Engineer detailing the proposed lease. Such lease arrangements ensure water is put to beneficial use in areas of greatest need, thereby ensuring the efficient use of water in low-water situations around the state. This goal is supported by the Act not requiring the lessee to show an absence of impairment and that the lease is consistent with conservation and public welfare as contrasted with applications to transfer water rights.

Despite these clear functions of the WULA, concerns over unclear aspects of the Act, such as the OSE Preliminary Approval practices, were front

and center during this year's New Mexico Legislative Session. On January 19, 2023, House Bill 121, titled "WATER RIGHT LEASE EFFECTIVE DATE" was introduced. The Bill aimed to put an end to the OSE practices of engaging in providing preliminary approvals involving water leases. Only 11 days later, the Office of the New Mexico Attorney General provided some guidance to legislators on the legality and permissibility of OSE's preliminary approval practices.

'Opinion Regarding Preliminary Approvals under the Water Use Leasing Act'

The Attorney General's Opinion, titled "Opinion regarding Preliminary Approvals Under the Water Use Leasing Act," provided legislators with some answers. The opinion confirmed that there is neither a statutory nor a regulatory authority for the OSE to provide preliminary approvals for water leases, as well as the fact that OSE may be in violation of Due Process while engaging in such practices. The Attorney General's opinion begins its analysis by diving into statutory interpretation of WULA, where the Attorney General found that

> . . .there is no process to follow in the WULA, no use of the word "preliminary" in the applicable law, and no express authority for the State Engineer to circumvent the hearings that are explicitly required by § 72-6-6. (of WULA).

The Opinion then provides case law supporting their stance, such as *Fancher v. Board of Comm'rs*, 1921-NMSC-039, ¶ 11, finding that "when the legislature prescribes a mode of procedure the rule is exclusive of all others and must be followed."

The Opinion then goes on to confirm that there is no basis for such OSE practices under relevant New Mexico Code. The Opinion notes that not only does relevant regulation not support the idea of preliminary approvals by OSE, it outright opposes such an action. The Opinion cites NMAC 19.26.2.18, "Prior to the use of water pursuant to a lease, if the proposed use differs in any respect, a permit must be obtained." The Opinion continues to cite other relevant regulation, such as NMAC 19.26.2.12(F)(2) which states:

> . . .the state engineer may approve a protested application after holding a hearing and may impose reasonable conditions of approval.

The Opinion notes that the existence of such regulatory provisions should resolve any lingering ambiguity or confusion regarding the legal authority the state engineer has to issue preliminary approvals. N.M. Att'y Gen., No. 23-01 (Jan. 30, 2023), pg. 4.

The Opinion also clarifies that the phrase used by OSE to justify such actions, the phrase "immediate use" located in section three of the WULA, does not relate to any procedural requirements outlined by the Act, which are all located in section six. The Opinion states that such a phrase is therefore not subject to any statutory exceptions that may permit such preliminary approval actions by OSE. N.M. Att'y Gen., No. 23-01 (Jan. 30, 2023), Pg. 5 *et seq*. Lastly, the Opinion notes that such practices by the OSE may constitute violation of due process:

> The numerous and explicit requirements, procedures, and protections created by the legislature in the WULA demonstrate a clear policy interest to protect substantive and procedural rights and prevent State Engineer from developing processes not expressly authorized by statute.

The Opinion states that by refusing to follow the necessary procedural requirements, the OSE is jeopardizing the property interests of others if no clear procedural protections exist.

Conclusion and Implications

Despite the Opinion by the New Mexico Attorney General being given to legislators, and House Bill 121 being introduced, not much has changed since the start of the 2023 New Mexico Legislative Session. The bill passed the House Environment and Natural Resources Committee but met its end in the House Judiciary Committee. The House Judiciary Committee reported the bill with a Do Not Pass recommendation—but with a Do Pass Recommendation on Committee Substitution. It is unclear whether the State Engineer will heed the Attorney General's warnings, or if the agency will continue to grant such preliminary authorizations when considering water leases. This issue is one that will undoubtedly face legal and political tensions in the years to come, and whether it can be resolved by the legislature, the courts, or inner agency practices remains to be seen. (Christina J. Bruff)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES ADDRESSES 12 CENTRAL CALIFORNIA GROUNDWATER SUSTAINABILITY PLANS

In early March, the California Department of Water Resources (DWR) announced its decisions for Groundwater Sustainability Plans (GSPs) for 12 critically overdrafted groundwater basins in central California under the Sustainable Groundwater Management Act (SGMA). DWR recommended approval of GSPs for six basins but include recommended corrective actions so those GSPs retain their approval status when they are evaluated again in a few years. The GSPs for the remaining six basins were deemed inadequate, thus subjecting them to oversight by the State Water Resources Control Board (State Water Board).

Background

In 2014, then-Governor Jerry Brown signed SGMA into law. SGMA requires local Groundwater Sustainability Agencies (GSAs) in medium- and high-priority groundwater basins, which includes 21 critically overdrafted basins, to develop and implement groundwater sustainability plans (GSPs). GSPs are intended to provide a roadmap for reaching the long-term sustainability of a groundwater basin, which includes near-term actions like expanding monitoring programs, reporting annually on groundwater conditions, implementing groundwater recharge projects and designing allocation programs. GSPs are intended to achieve sustainability in overdrafted groundwater basins within a 20-year time horizon. Each GSP has its own goals specific to the covered groundwater basin and must be accomplished within the 20-year period. To achieve the sustainability goal for the basin, the GSP must demonstrate that implementation of the GSP will lead to sustainable groundwater management, which means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results, such as subsidence, water quality degradation, and lowering of groundwater levels. Undesirable results must be defined quantitatively by the GSAs.

24 Basin Determinations

Out of 94 groundwater basins required to submit plans under SGMA, DWR has provided determinations for 24 basins and anticipates issuing determinations for the remaining basins throughout 2023. DWR's review considers whether there is a reasonable relationship between the information provided and the assumptions and conclusions made by the GSA, including whether the interests of the beneficial uses and users of groundwater in the Subbasin have been considered; whether sustainable management criteria and projects and management actions described in the GSP are commensurate with the level of understanding of the Subbasin setting; and whether those projects and management actions are feasible and likely to prevent undesirable results. To the extent overdraft is present in a subbasin, DWR evaluates whether a GSP provides a reasonable assessment of the overdraft and includes reasonable means to mitigate the overdraft. DWR also considers whether a GSP provides reasonable measures and schedules to eliminate identified data gaps. DWR is also required to evaluate whether the GSP will adversely affect the ability of an adjacent basin to implement its GSP or achieve its sustainability goal.

GSAs are required to evaluate their GSPs at least every five years and whenever a GSP is amended, and to provide a written assessment to DWR. Accordingly, DWR will evaluate approved GSPs and issue an assessment at least every five years. In January 2022, after performing what it termed a "technical evaluation," DWR determined that the GSPs for the 12 critically overdrafted basins were incomplete and thus could not be approved. Under SGMA, the GSAs had 180 days to correct the deficiencies and resubmit the GSPs to DWR for re-evaluation.

DWR Basin Approvals

DWR recommended approval of GSPs for the following Central California basins: (1) the Cuyama Basin; (2) Paso Robles Subbasin; (3) Eastern San Joaquin Subbasin; (4) Merced Subbasin; (5) Westside Subbasin; and (6) Kings Subbasin. According to DWR, the GSAs whose plans were recommended for approval conducted sufficiently detailed analyses of groundwater levels, water quality and inter-connected surface waters to develop and refine sustainable groundwater management criteria. While DWR recommended additional analytical work be conducted during implementation, DWR nonetheless deemed the framework for groundwater management legally sufficient.

GSPs Deemed Inadequate

DWR deemed inadequate the GSPs submitted for the Chowchilla Subbasin, Delta-Mendota Subbasin, Kaweah Subbasin, Tule Subbasin, Tulare Lake Subbasin, and Kern Subbasin, all in central California. According to DWR, the basins deemed inadequate did not sufficiently address deficiencies in how GSAs structured their sustainable management criteria. In particular, DWR described that the management criteria set forth in the GSPs as providing an "operating range" for how groundwater levels would prevent undesirable effects such as overdraft, land subsidence and groundwater levels that may impact drinking water wells, within the applicable 20-year time horizon. However, DWR determined that the management criteria did not adequately explain what DWR concluded were continued groundwater level declines and land subsidence. Moreover, DWR viewed the management criteria of the GSPs to be sufficiently unclear such that the criteria did not demonstrate it would prevent undesired effects on groundwater users in the basins or critical infrastructure.

According to DWR, DWR will continue to work with GSAs in the basins for which DWR approved the applicable GSPs, because those GSPs will be reviewed again in the coming years. For the basins the GSPs for which were rejected, the State Water Board will review each basin to determine whether to put the basin in probationary status after providing public notice and holding a public hearing. Under SGMA, a probationary designation will provide for the identification of the deficiencies that led to State Water Board intervention and potential actions to remedy the identified deficiencies. According to DWR, the ultimate goal of State Water Board intervention is to have every basin returned to local management to achieve sustainability within 20 years of the original GSP submittal.

Conclusion and Implications

DWR is currently reviewing GSPs for 61 basins throughout California. It remains to be seen how many more GSPs DWR will reject. For rejected basins, including those whose rejections were announced in March 2023, it is not clear how the State Water Resources Control Board will effectuate a sustainability management plan for each basin. The challenges this may present will likely be compounded by the unique nature of the groundwater basins themselves, as well as the dynamic relationships between local agencies who rely on the groundwater to supply beneficial uses within their respective boundaries.
(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S NEW SANITARY SEWER SYSTEMS WASTE DISCHARGE REQUIREMENTS TO TAKE EFFECT THIS SUMMER

Late in 2022, the California State Water Resources Control Board (State Water Board) unanimously adopted and reissued a revamped version of its Sanitary Sewer Systems General Waste Discharge Requirements Order (SSS WDR), which takes effect on June 5, 2023. (State Water Board Order No. 2022-0103-DWQ.) The SSS WDR regulates sanitary sewer systems designed to convey sewage longer than one mile in length, and sets forth related reporting and response requirements for sanitary sewer overflows (SSOs). The new SSS WDR contains several immediate and long-term compliance requirements, and public agencies subject to the SSS WDR are highly encouraged to start preparing for the new requirements as soon as possible.

Background

The State Water Board adopted its original SSS WDR General Order in 2006. (State Water Board Order No. 2006-0003-DWQ.) The State Water Board's intent with the SSS General Order was to provide a consistent, statewide regulatory approach to address SSOs. All public agencies that own or operate a sanitary sewer system that is longer than one mile in length and conveys wastewater to a publicly owned treatment works facility must apply for coverage under the SSS General Order. In general, the SSS General Order also requires public agencies subject to the Order to develop and implement sewer system management plans (or SSMPs) and report all SSOs to the State Water Board's online sanitary sewer overflow database.

The State Water Board began public outreach for the reissuance process in 2018, and issued an informal Draft Order in February 2021. The original draft outlined several more prescriptive requirements than what appeared in the prior permit. Significant concerns from the regulated community largely regarding feasibility and cost of compliance were expressed to State Water Board staff, which necessitated further input from stakeholders before additional revisions were released in October 2022.

After nearly four years of negotiations between State Water Board staff, members of the public, and key stakeholders, on December 6, 2022, the State Water Board considered and unanimously adopted the new SSS WDR. Continued public comment and guidance from stakeholders also resulted in the release of two "change sheets" at the State Water Board's adoption hearing, as well as a third change sheet, which incorporated changes to mitigate concerns raised in oral comments. The revised version of the SSS WDR will become effective on June 5, 2023, and will serve as the new regulatory mandate for operation and maintenance of sanitary sewer systems, superseding the State Water Board's previous SSS WDR General Order, State Water Board Order No. 2006-0003-DWQ.

New Key Requirements

There are several new immediate and long-term compliance requirements adopted in the SSS WDR, which public agencies should know about and take steps to review and implement as soon as possible. Immediate compliance requirements include uploading any existing SSMP to the State Water Board's California Integrated Water Quality Systems (CIWQS) database, updating and ensuring compliance with revised Legally Responsible Official eligibility requirements, and updating the enrollee's Spill Emergency Response Plan to reflect several changes and updates including different spill categories for SSOs. The SSS WDR also revises water body sampling requirements for 50,000+ gallon spills to surface waters. Such samples should be conducted no later than 18 hours after the enrollee's knowledge of a potential discharge to a surface water.

Long-term compliance requirements include submitting an updated and fully revised SSMP to CIWQS, which must include several key elements in order to provide a plan and schedule to: (1) properly manage, operate, and maintain all parts of the enrollee's sanitary sewer system(s); (2) reduce and prevent sewer spills; and (3) contain and mitigate spills that do occur.

Finally, the SSS WDR expands existing regulation to protect "Waters of the State" (*e.g.*, expanding the prohibition on discharge from a sanitary system to

include Waters of the State and requiring SSMPs to identify deficiencies in addressing spills to waters of the State). Specifically, any discharge from a sanitary sewer system, discharged directly or indirectly through a drainage conveyance system or other route, to waters of the state is prohibited. Waters of the State means any surface waters or groundwater within boundaries of the state as defined in California Water Code § 13050(e), in which the State Water Board and Regional Water Boards have authority to protect beneficial uses. Per the SSS WDR, waters of the State include, but are not limited to, groundwater aquifers, surface waters, saline waters, natural washes and pools, wetlands, sloughs, and estuaries, regardless of flow or whether water exists during dry conditions. Waters of the State also include waters of the United States.

Conclusion and Implications

The SSS WDR will become effective on June 5, 2023. Those public agencies regulated by the SSS WDR should carefully review the revised permit to begin undertaking appropriate action to ensure compliance with new or revised terms. Attending regulatory training or trade association workshops also is highly recommended given the detailed changes in the new revised version of the SSS WDR. For more information, *see:* https://www.waterboards.ca.gov/water_issues/programs/sso/
(Patrick Veasy, Hina Gupta)

COLORADO FINALIZES THE 2023 WATER PLAN

The Colorado Water Conservation Board (CWCB) recently approved the 2023 Colorado Water Plan. The 2023 Water Plan updates and revises the previous Water Plan, first approved in 2015. The revised plan continues the goals of the original Water Plan while outlining strategies to build a water resilient future for the state.

Background

Colorado is home to several major river headwaters that supply water to 19 states and Mexico. Combined, Colorado's rivers produce an estimated 15 million acre-feet of water annually, although Colorado residents only consume approximately 5 million acre-feet with the balance flowing across state lines for diversion by downstream users. Within the state's borders, there is a geographical divide between the location of the state's major surface water supply and the majority of its population. As of 2023, approximately 80 percent of Colorado's stream flows occur on the western slope, while 90 percent of the population lives across the Continental Divide along the Front Range metropolitan corridor. Consequently, as a headwaters state, Colorado's water policy has wide-reaching effects both within the state and throughout the region.

Large scale fires and drought throughout Colorado in 2002-2003 first spurred a Statewide Water Supply Initiative (SWSI) in 2004. A second devastating fire season in 2012-2013 then set the backdrop for the original 2015 Water Plan, which the CWCB first drafted under an executive order from then-Governor John Hickenlooper. In addition to incorporating the 2004 SWSI, the 2015 Water Plan included significant feedback from the CWCB "basin roundtables." The basin roundtables are nine interdisciplinary stakeholder groups representing Colorado's eight major river basins (Arkansas, Colorado, Gunnison, North Platte, Rio Grande, South Platte, Southwest (San Juan, Dolores, San Miguel), and Yampa/White/Green River) and the Denver metro area.

The 2015 Water Plan

The 2015 Water Plan identified a water "gap" or expected shortage for municipal and industrial water needs by 2050 as a result of climate change and population increases. To resolve that shortfall, the 2015 Water Plan recommended a series of conservation and storage measures to reallocate available water. These strategies included traditional storage such as reservoirs, but also legal and regulatory changes and alternative water transfer measures.

Eight Years Later. . .

Eight years later, the CWCB identified numerous successes of the 2015 Water Plan including dedicated

funding to the Colorado Water Plan grants program, 25 new stream management plans, and 400,000 acre-feet of storage that has been or soon will be constructed. Additionally, even as Colorado's population has boomed, statewide per capita water use is down five percent from 2015 levels. However, the CWCB notes that since 2015 Colorado has also experienced some of the largest fires in state history and deep, prolonged drought. These conditions have led to new challenges such as winter fires, severe post-fire flooding, and changing storage operations in federally controlled reservoirs. Therefore, the CWCB updated and revised the plan and unanimously voted to approve the 2023 Colorado Water Plan on January 24, 2023

The 2023 Colorado Water Plan

The 2023 Colorado Water Plan is the result of extensive public engagement, including a public comment period and workshops throughout the state. The public comment period alone generated 528 pages of comments, 1,597 suggested edits to the plan, and more than 2,000 public observations. The CWCB notes that public engagement and buy-in is critical to the success of Colorado's water future.

The 2023 updates also include revised climate and water needs projections based on the latest available science. Under a worst-case scenario, average temperatures across Colorado could rise 4.2 degrees by 2050. Those climate conditions, combined with a population expected to double to 10 million residents, could result in a water shortfall of up to 740,000 acre-feet per year by 2050. But the CWCB is simultaneously confident that conservation and efficiency efforts should reduce further water needs by up to 300,000 acre-feet per year.

A 'One Water' Ethic

CWCB proposes a "One Water" ethic to shape the 2023 Water Plan and guide Colorado's water future. The One Water ethic means matching the right water to the right use, investing in sustained water conservation efforts, and promoting integrated water and land use planning. The CWCB notes that increased water storage will be critical to Colorado's future. In addition to the 400,000 acre-feet of storage soon to be completed, CWCB said there are existing paper water rights that could double available storage across the state to 6.5 million acre-feet in traditional reservoirs alone. The 2023 Water Plan also highlights the need to study, and perhaps implement, non-traditional means of storage including aquifer storage and recovery, enlargement or rehabilitation of existing reservoirs, and reallocation of existing storage space. On a local level, the CWCB encourages county governments to exercise their "1041" review powers which allow counties to strictly regulate certain activities.

Local activities also include projects funded through the Water Plan Grant Program. The grant program offers funding in five major categories: 1) water storage and supply, 2) conservation and land use, 3) engagement and innovation, 4) agricultural projects, and 5) watershed health and restoration. Governor Jared Polis recently approved $17 million for local implementation of the Colorado Water Plan. Additionally, his 2023-2024 budget proposal includes $25.2 million for the Water plan Grant Program.

Goals

The 2023 Colorado Water Plan reframes the goals of the original plan into four distinct areas: 1) Vibrant Communities, 2) Robust Agriculture, 3) Thriving Watersheds, and 4) Resilient Planning. Within these four areas, the 2023 Water Plan outlines roughly 50 "agency" actions for the state to pursue, and 50 "partner" actions to be addressed by various groups throughout the state, including local governments.

Vibrant Communities outlines a goal of holistic water management to balance supply and demand within Colorado's urban areas. Possible state actions include identifying water-savings benchmarks, water reuse strategies, and urban turf replacement options. The CWCB tasks its partners with developing local storage projects, optimizing water-efficient infrastructure, and water reuse technologies. Water reuse technologies take advantage of graywater, black water, and stormwater, such as direct potable reuse technologies, outlined in the January 2022 edition of Western Water Law and Policy Reporter. *See*, Colorado Adopts New Regulation to Allow Direct Potable Reuse of Public Water Supplies, 27 *W. Water L. & P'lcy Rptr*. 63, 74- 76 (Jan. 2022).

Insuring Robust Agriculture

The 2023 Water Plan emphasizes that Robust Agriculture is not only critical for a sustainable food

supply, but is an integral part of Colorado's heritage, culture, and economy. Specifically, the CWCB cautions that urban growth should not come at the expense of rural communities through "buy and dry" practices in which municipalities purchase irrigation water rights and change them for domestic use in cities and towns, while allowing once productive crop land to be fallowed. To support these goals, the plan recommends the CWCB facilitate water sharing and other agricultural-municipal water agreements in addition to researching adaptive practices to maintain or increase agricultural production while simultaneously decreasing water use. Recommend partner actions include rehabilitation of aging storage and diversion structures, farming efficiency improvements, and increased or improved storage to support plans for augmentation.

The CWCB notes that agriculture is currently a $47 billion per year industry in Colorado, although water-based outdoor recreation generates $19 billion per year and is a rapidly growing sector. Thriving Watersheds are critical to this facet of the economy in addition to protecting Colorado's water supply as a whole. Therefore, the 2023 Water Plan recommends comprehensive planning to include the condition of the natural environment in water policy decisions. On a state level, the CWCB will create a detailed stream construction guide and wildfire ready watersheds framework. The segment encourages local partners to explore options to enhance stream flows and rehabilitate streams to improve wildlife habitat and reduce erosion.

Resilient Planning

The final general category of the 2023 Water Plan is Resilient Planning, which encompasses the goals set out by the other sections. The CWCB emphasized that water security is and will be critical to the quality of life, environment, and economy of Colorado now and into the future. An uncertain future requires detailed planning for a variety of scenarios at the state, regional, and local level. "Resilient" planning acknowledges that threats to Colorado's water security will happen, but that a well-prepared statewide plan will be equipped to handle any eventualities. The CWCB will continue to advance scientific research and promote community outreach and buy-in of the 2023 Water Plan goals. Local planning efforts to protect infrastructure from natural disasters and community planning that considers uncertainty and drought are critical components of a water resilient future.

Conclusion and Implications

The 2023 Water Plan builds on the original plan and reinforces that collaborative, adaptive strategies are necessary to secure Colorado's water future. "The 2023 plan will spark the action we need across all sectors to build a better water future in Colorado, setting the stage for future decision-making and water resiliency," CWCB Director Becky Mitchell said in a press release. Basin roundtables have identified $20 billion in potential water projects over the next 30 years, although not all projects are expected to be implemented or need CWCB funding. On a state level, the CWCB estimates it will need $1.5 billion to support local water projects through 2050. The CWCB summarized the 2023 Colorado Water Plan by clarifying that the plan provides a vision of where the state needs to go, but "iterative advancements," regular assessment, and future actions will be required to implement and revise the plan as necessary to achieve Colorado's water goals.
(John Sittler, Jason Groves)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•April 3, 2023—the U.S. Environmental Protection Agency (EPA) announced a consent order with Joshua Davis, River City Diesel LLC, RCD Performance LLC, and Midwest Truck and 4WD Center LLC (collectively Defendants) of East Peoria, Illinois, which requires the defendants to stop manufacturing, selling, offering to sell, and installing devices that bypass, defeat, or render inoperative EPA-approved emission controls and harm air quality, commonly referred to as Aftermarket Defeat Devices.
The settlement announced resolves a Complaint filed in August 2022 in the United States District Court for the Central District of Illinois, alleging that Mr. Davis and the other defendants' manufacture, sale and installation of tens of thousands of defeat devices violated the Clean Air Act. The Defendants will pay a $600,000 penalty, which was based on their financial situation, and agree to notify customers that Defendants will no longer provide technical support or honor warranty claims for the defeat device products.
As a result of EPA's efforts to improve air quality and fuel efficiency, cars and trucks manufactured today emit far less pollution than older vehicles. To meet EPA's emission standards, engine manufacturers have carefully calibrated their engines and installed sophisticated emissions control systems.
Tampering with diesel-powered vehicles by installing defeat devices causes large amounts of nitrogen oxide and particulate matter emissions, both of which contribute to serious public health problems.

The Consent Decree for this settlement was lodged in the U.S. District Court for the Central District of Illinois and will be available for review and public comments for no less than 30 days.

•March 27, 2023—Matador Production Company has agreed to pay a penalty and ensure compliance with both state and federal clean air regulations at all 239 of its New Mexico oil and gas well pads to resolve unlawful operations alleged in a civil complaint filed today under the Clean Air Act and state regulations.

The complaint, filed jointly by the United States, on behalf of the U.S. Environmental Protection Agency (EPA), and the New Mexico Environment Department (NMED), alleges that Matador failed to capture and control air emissions from storage vessels; comply with inspection, monitoring, and recordkeeping requirements; and obtain required state and federal permits at 25 of its oil and gas production operations in New Mexico. NMED and EPA identified the alleged violations through flyover surveillance and field investigations conducted in 2019.

The consent decree, filed together with the complaint, requires Matador to ensure that all 239 of its well pads in New Mexico are operated lawfully. Under the settlement, Matador will spend at least $2,500,000 to implement extensive design, operation, maintenance and monitoring improvements, including installing new tank pressure monitoring systems that will provide advance notification of potential emissions and allow for immediate response action by the company.

Matador's compliance with the consent decree will result in a reduction of more than 16,000 tons of pollutants, including oxides of nitrogen (NOx), volatile organic compounds (VOCs), and carbon monoxide (CO). VOCs and NOx are key components in the formation of ground-level ozone, a pollutant that irritates the lungs, exacerbates diseases such as asthma, and can increase susceptibility to respiratory illnesses, such as pneumonia and bronchitis. In addition, as a co-benefit of these reductions, the consent decree will result in significant reductions of greenhouse gas

emissions, including reducing methane – a powerful greenhouse gas, by more than 31,000 tons, measured as carbon dioxide (CO2) equivalent. This is similar to the amount of greenhouse gas reductions that would be achieved by taking 6,060 gasoline powered vehicles off the road for one year. Greenhouse gases from human activities are a primary cause of climate change and global warming.

As part of the settlement, Matador also will pay a civil penalty of $1.15 million to be split between the United States and the State of New Mexico. In addition, Matador will spend no less than $1.25 million on a supplemental environmental project involving diesel engine replacements, which will result in significant reductions of harmful air pollutants and help address the environmental harm caused by the Company's previous violations. Matador will also spend another $500,000 to conduct aerial monitoring of its facilities for leaks of methane and other pollutants and to address any problems identified. Finally, Matador will spend approximately $800,000 to offset the harm caused by the alleged violations by reducing emissions from pneumatic devices and vapor recovery units used in its oil and gas operations.

•March 27, 2023—The U.S. Environmental Protection Agency (EPA) has recently reached a settlement with Trelleborg Coated Systems US, Inc., located in New Haven, Conn., for allegedly violating the federal Clean Air Act. The company has agreed to pay a penalty of $305,305 under the terms of the settlement and come into compliance or permanently shut down all of its coating operations at their New Haven facility by July 1, 2023.

Trelleborg Coated Systems US, Inc. is a manufacturing facility that primarily performs urethane coating and laminating processes on various fabrics to achieve water and chemical repellant and flame-retardant properties for fabrics used for products such as escape slides for aircrafts, blood pressure cuffs, mattresses, and protective clothing.

EPA, along with the Connecticut Department of Energy and Environmental Protection (CT DEEP), conducted a comprehensive inspection of Trelleborg's facility. As a result of the inspection EPA alleged that Trelleborg had various violations of its New Source Review Permit to Construct and Operate a Stationary Source. The alleged violations involve the operation of six coating lines and two laminating lines, the associated capture systems (e.g., permanent total enclosures or "PTEs") and the control system.

EPA discovered additional alleged violations after the facility performed stack testing to evaluate whether the facility's oxidizer, used to minimize and control Volatile Organic Compound (VOC) emissions from the coating lines, and the PTEs, used to capture and direct VOC emissions to the oxidizer, were functioning properly. The stack testing results indicated that Trelleborg was not achieving the required destruction efficiency for VOCs and therefore was emitting hazardous air pollutants. In addition, the facility had not been achieving the required capture efficiency until late October 2021 and was not maintaining all required VOC usage records.

EPA brought a similar action against Trelleborg's affiliated entity in North Smithfield, Rhode Island a few years ago. In that case, EPA found that the capture system associated with the one coating line maintained by that facility was not meeting the required capture efficiency and that the oxidizer was not correctly sized to accommodate all VOC emissions generated by the line, had the line been properly capturing VOC emissions.

The Clean Air Act (CAA) requires the EPA to set National Ambient Air Quality Standards (NAAQS) for criteria pollutants that are considered harmful to public health and the environment. Ozone, CO and nitrogen dioxide (NO2, a component of NOx) are criteria pollutants emitted by oil and gas production facilities, such as those operated by Matador where the alleged violations occurred. During the timeframes of Matador's alleged violations, air quality monitors in the relevant counties in New Mexico registered rising ozone concentrations exceeding 95 percent of the NAAQS for ozone. In counties where ozone levels reach 95 percent of the NAAQS, NMED is required by New Mexico state statute to take action to reduce ozone pollution.

Matador is an independent oil and gas producer engaged in the exploration, development, production and acquisition of oil and natural gas resources in the United States. The company is a large producer in the New Mexico portion of the Permian Basin, which is a shale oil and gas producing area located in southeast New Mexico and West Texas.

This settlement is part of EPA's National Enforcement and Compliance Initiative, Creating Cleaner Air for Communities by Reducing Excess Emissions

of Harmful Pollutants.

The consent decree is available for public viewing on the Department of Justice website. The United States will publish a notice of the consent decree's lodging with the U.S. District Court for the District of New Mexico in the Federal Register and will accept public comment for 30 days after the notice is published. The Federal Register notice will also include instructions for submitting public comment.

Civil Enforcement Actions and Settlements—Water Quality

•March 31, 2023—On behalf of the U.S. Environmental Protection Agency (EPA) and in coordination with the U.S. Attorney's Office for the Northern District of Ohio, the Environment and Natural Resources Division of the U.S. Department of Justice filed a complaint against Norfolk Southern Railway Company related to the Feb. 3, 2023, derailment in East Palestine, Ohio. The complaint seeks penalties and injunctive relief for the unlawful discharge of pollutants, oil, and hazardous substances under the Clean Water Act, and declaratory judgment on liability for past and future costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This action follows EPA's issuance on Feb. 21, 2023 of a Unilateral Administrative Order under CERCLA to Norfolk Southern requiring the company to develop and implement plans to address contamination and pay EPA's response costs associated with the order.

On February 3, 2023, a Norfolk Southern Railway Company train carrying hazardous materials, including hazardous substances, pollutants and oil derailed in East Palestine, Ohio. The derailment resulted in a pile of burning rail cars, and contamination of the community's air, land, and water. Residents living near the derailment site were evacuated. Based on information Norfolk Southern provided, the hazardous materials contained in these cars included vinyl chloride, ethylene glycol monobutyl ether, ethylhexyl acrylate, butyl acrylate, isobutylene, and benzene residue. Within hours of the derailment, EPA and its federal and state partners began responding to the incident, including providing on-the-ground assistance to first responders and conducting robust testing in and around East Palestine.

The fire caused by the derailment burned for several days. On Feb. 5, monitoring indicated that the temperature in one of the rail cars containing vinyl chloride was rising. To prevent an explosion, Norfolk Southern vented and burned five rail cars containing vinyl chloride in a flare trench the following day, resulting in additional releases.

Since EPA's issuance of the Unilateral Administrative Order to Norfolk Southern, EPA has been overseeing Norfolk Southern's work under the order. As of March 29, 2023, 9.2 million gallons of liquid wastewater has been shipped off-site, and an estimated 12,932 tons of contaminated soils and solids have been shipped off-site.

EPA and other federal agencies continue to investigate the circumstances leading up to and following the derailment. The United States will pursue further actions as warranted in the future as its investigatory work proceeds.

•March 30, 2023—EPA on-scene coordinators (OSCs) from Region 7 continue to remain on-scene at the site of the pipeline rupture and oil discharge into Mill Creek near Washington, Kansas.

Since the spill occurred, EPA Region 7 has deployed 18 OSCs; EPA Region 6 has deployed five OSCs; and the U.S. Coast Guard has deployed three Atlantic Strike Team members to provide technical advice and assistance to support EPA response oversight. In addition, EPA has utilized contractor resources to provide on-scene and remote technical support to the responding OSCs.

Response crews have made significant progress over the last few months. The installation of a temporary water diversion system in January produced two results: (1) A reduction in oil-related contaminants impacting surface water downstream of the oil-impacted segment of Mill Creek; (2) the ability to conduct submerged oil assessments and perform cleanup of submerged oil from the creek bed, sediment, and shoreline of Mill Creek.

As response crews work to continue removing oil and oil-impacted soil, sediment, shoreline, and debris from Mill Creek, additional personnel working on-scene have constructed a higher-capacity diversion system (Phase 2 Diversion) and two surface water treatment impoundments. These impoundments allow for the separation of oil and water to occur on-scene. The separated water is then treated and tested to ensure that it meets discharge limits established by Kansas Department of Health and Environ-

ment (KDHE) prior to being discharged back to Mill Creek, downstream of the oil-impacted segment.

The response is being performed by TC Energy and overseen by EPA, pursuant to a consent agreement signed by the parties on Jan. 6, 2023. KDHE is also providing oversight of the response actions taken at the scene. Currently, the work being performed on-scene is following a phased-project approach. The phased-project approach has established goals, and response crews work to achieve milestones that correlate to the goals set forth in the workplan.

•March 22, 2023—EPA, The Justice Department, and The Commonwealth of Massachusetts have entered into a consent decree with the City of Holyoke, Massachusetts, to resolve the Clean Water Act and Massachusetts state law. The proposed consent decree calls for Holyoke to take further remedial action to reduce ongoing sewage discharges into the Connecticut River from the city's sewer collection and stormwater systems.

As detailed in the consent decree, Holyoke discharges pollutants from combined sewer overflow (CSO) into the Connecticut River in violation of its federal and state wastewater discharge permits. A combined sewer system collects rainwater runoff, domestic sewage, and industrial wastewater into one pipe. Under normal conditions, it transports all of the wastewater to a sewage treatment plant for treatment, before discharging to a waterbody. However, during periods of heavy rain the wastewater volume can exceed the carrying capacity of the sewer system or the treatment facility, resulting in the discharge of untreated wastewater to the Connecticut River. CSO discharges contain raw sewage and are a major water pollution concern.

In full cooperation with federal and state environmental agencies, the city has taken steps in recent years to address these unlawful discharges, including finalizing a long-term overflow control plan, separating sewers and eliminating overflows in the Jackson Street area. The consent decree will require the city to undertake further sewer separation work that will eliminate or reduce additional CSO discharges, as well as requiring a $50,000 penalty for past permit violations resulting in illegal discharges to the Connecticut River.

The city will also conduct sampling of its storm sewer discharges, work to remove illicit connections, and take other actions to reduce pollution from stormwater runoff. The total cost to comply with the proposed consent decree is estimated at approximately $27 million.

This settlement is part of EPA's continuing efforts to keep raw sewage and contaminated stormwater out of our nation's waters. Raw sewage overflows and inadequately controlled stormwater discharges from municipal sewer systems introduce a variety of harmful pollutants, including disease causing organisms, metals and nutrients that threaten our communities' water quality and can contribute to disease outbreaks, beach and shellfish bed closings, flooding, stream scouring, fishing advisories and basement backups of sewage.

•March 22, 2023—The U.S. Environmental Protection Agency (EPA) announced settlements with six California companies for claims they failed to comply with Spill Prevention, Control, and Countermeasures requirements for handling oil under the Clean Water Act. The payments to the United States under these settlements range from $1,050 to $175,000.

The six companies are: AAK USA Richmond Inc. in Richmond; Baker Commodities Inc. in Vernon; Imerys Filtration Minerals Inc. in Lompoc; Marborg Industries, Liquid Waste Division in Santa Barbara; Mission Foods in Hayward; and Penny Newman Grain Company in Stockton. These firms store, process, refine, transfer, distribute or use animal fats or vegetable oils.

EPA's spill-related requirements help facilities handling animal fats and vegetable oils (AFVO) prevent discharges into navigable waters or onto adjoining shorelines. While AFVO are governed under EPA's federal oil pollution prevention regulations, California's Aboveground Petroleum Storage Act does not extend to this industry sector. It is important that AFVO facilities are aware of their obligations to comply with federal regulations.

The six companies that are settling with EPA have certified that they have corrected their violations and are now in compliance with the spill-related requirements under the Clean Water Act.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

•March 29, 2023—The U.S. Environmental Pro-

tection Agency (EPA) announced that it reached an agreement with Guanica-Caribe Land Development Corporation (G-C), a subsidiary of W. R. Grace & Co., to remove soil contaminated with polychlorinated biphenyls (PCBs) from 19 residential and commercial properties that are part of the Ochoa Fertilizer Co. Superfund site in Guánica, Puerto Rico.

Under the agreement, the company will remove PCB-contaminated soil from the 19 identified properties and will investigate other properties for potential contamination and if necessary, find a method to control stormwater runoff from the fertilizer manufacturing property. The estimated cost of the work is $10 million. EPA will monitor and oversee G-C's cleanup and compliance with the agreement. EPA has informed the community, residents, and property owners and has engaged with them at a community meeting.

In September 2022, EPA added the Ochoa Fertilizer Co. Superfund site to the National Priorities List. The former facility operators produced fertilizers using ammonia, ammonium sulfate, and sulfuric acid starting in the 1950s. The site includes a 112-acre eastern lot and a 13-acre western lot. While the eastern lot, which included an electric substation, was demolished in the 1990s, fertilizer manufacturing on the western lot continues. G-C is the current owner of the eastern lot. Past operations at the site resulted in releases of untreated waste at and from the eastern lot, contaminating soil and causing environmental degradation to Guánica Bay. There is a potential risk of exposure to nearby residents from soil contaminated with PCBs. PCBs are potentially cancer-causing in people and build up in the fat of fish and animals. The potential risk posed to nearby residents by PCBs in soils is currently being addressed through a short-term action plan outlined in the current agreement. The possibility of further investigation and cleanup efforts in the long-term will be considered once the initial work outlined in the agreement has been completed.

•March 28, 2023—The U.S. Environmental Protection Agency announced a $126,000 settlement with Color World Housepainting Inc. (operating as Color World Painting Columbus), in Powell, Ohio, to resolve alleged lead paint renovation violations as part of federal Lead Renovation, Repair and Painting regulations.

After receiving a complaint from a resident, EPA began an investigation into the company's renovations around the Columbus-area and in Powell, Ohio. In 2020, Color World Painting Columbus renovated at least 28 different single-family houses built before 1978. EPA alleges that the company failed to: (1) Retain all records necessary to demonstrate compliance with the RRP rule, including proper safety training for staff and proper disposal of hazardous materials; (2) Certify compliance with EPA as required; (3) Obtain written acknowledgement from property owners of their receipt of the "Renovate Right" pamphlet.

Color World Painting Columbus agreed to pay a civil penalty of $126,000 and has certified compliance with the renovation, repair and painting regulations.

RRP regulations are designed to prevent children's exposure to lead-based paint and/or lead-based paint hazards resulting from renovation, repair, and painting projects in pre-1978 residences, schools and other buildings where children are present. The harmful impacts of lead disproportionately impact environmentally overburdened, low-income families and their communities.
(Robert Schuster)

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RECENT FEDERAL DECISIONS

D.C. CIRCUIT COURT OF APPEALS UPHOLDS POWER PLANT EMISSIONS LIMITATIONS AND DEFERS TO EPA'S SCIENTIFIC AND TECHNICAL EXPERTISE

Midwest Ozone Group v. EPA, ___F.4th___, Case No. 21-1146 (D.C. Cir. March 3, 2023).

On March 3, 2023 the U.S. Court of Appeals for the District of Columbia held that the U.S. Environmental Protection Agency's (EPA) final action entitled Revised Cross-State Air Pollution Update Rule (Revised Rule) for the 2008 Ozone National Ambient Air Quality Standards (NAAQS).

The D.C. Circuit found that limitations on power plant emissions in midwestern and southern states is appropriate under the "Good Neighbor Provision" of the federal Clean Air Act (CAA) which requires upwind states to prevent emissions from contributing significantly to downwind states' failure to attain NAAQS. The March 2023 decision highlights that courts give great deference to agency determinations that are based upon highly complex and technical matters and will not find rulemaking "arbitrary and capricious" when there is a rational relationship between analytical techniques chosen by the agency and the proposed rulemaking.

Factual and Procedural Background

The Petitioner, Midwest Ozone Group (MOG), an association of companies, trade organizations, and individual entities maintaining a collective interest in air quality and its regulation, petitioned the court for review of the Revised Rule, which EPA promulgated in response to the D.C. Circuit Court's remand in *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir 2019).

The CAA (codified at 42 U.S.C. §§ 7401–7671q) authorizes EPA to adopt NAAQS to regulate air pollutants, such as ozone. (42 U.S.C. § 7409(a), (b).) And under the "Good Neighbor Provision" of the CAA, EPA has the authority to regulate "upwind state to prevent its air pollutant emissions from contributing significantly to nonattainment in any other downwind state." (*See* 42 U.S.C. § 7410(a)(2)(D)(i).) In 2016, EPA promulgated the predecessor of the Revised Rule, the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, (81 Fed. Reg. 74,504 (Oct. 26, 2016)), and it was challenged in *Wisconsin v. EPA*. (*See* 938 F.3d 303 (D.C. Cir. 2019).) The D.C. Circuit remanded the 2016 version of the rule because the EPA "acted unlawfully and violated its statutory authority under the Good Neighbor Provision" in implementing that rule.

In *Wisconsin v. EPA*, the D.C. Circuit ruled that the 2016 version of the Cross-State Air Pollution Rule should have imposed ozone emission reduction deadlines on states whose pollution makes it more difficult for other states to comply with limits imposed by the CAA. In response to the remand, EPA devised the Revised Rule using a four step method for evaluating Good Neighbor Provision obligations: (1) performed air quality monitoring coupled with ambient measurements in an interpolation technique to project ozone concentrations; (2) used an air quality modeling-based technique to quantify 2021 contributions from upwind states; (3) applied multifactor test evaluating cost, available emissions reductions, and downwind air quality impact to determine the amount of upwind state emissions that "significantly contributed" to downwind nonattainment; and (4) specified enforceable measures in Federal Implementation Plans (FIP) for twelve states to accomplish emission reductions in these states.

MOG brought this recent petition challenging three of the four steps of the Good Neighbor Provision evaluation method utilized by EPA to promulgate the Revised Rule. MOG asserted that EPA "deviated from past practice of performing photochemical air quality monitoring in favor of using a linear interpolation technique" critiquing the action as a "mathematical and analytical shortcut" to determine state obligations. MOG also argued the Revised Rule is arbitrary and capricious because data determining significant contributors was flawed; the modeling failed to consider official regulatory programs and

other emission reduction requirements in downwind states that could improve ambient air quality; and EPA failed to account for exceptional events that contribute to ozone values (*e.g.*, wildfires).

In response, EPA argued that despite its revised methodology, MOG failed to demonstrate that its preferred photochemical air quality modeling would have changes in the states affected by the Revised Rule.

The D.C. Circuit's Decision

The Court of Appeals ultimately agreed with EPA and deferred to its technical expertise. In doing so the Circuit Court noted "agency determinations based upon highly complex and technical matters are entitled to great deference" and statistical analysis is the "prime example of an area of technical wilderness into which judicial expeditions are best limited to ascertaining the lay of the land." In upholding the Revised Rule, the D.C. Circuit considered MOG's arguments and found that EPA was never required to use a particular modeling method to generate data nor was it required to adhere to past practice. Rather, EPA must demonstrate a "reasonable connection between the facts on the record and its decision" and that when an agency has not otherwise acted contrary to law, a model is arbitrary and capricious if the model "is so oversimplified that the agency's conclusions from it are unreasonable."

The D.C. Circuit found that in utilizing the interpolation model over photochemical model, EPA chose analytical technique that were rationally connected to the Revised Rule, and appropriately explained its use for the model and subsequent methods for establishing the Revised Rule. Furthermore, given the pressure of the deadline D.C. Circuit imposed on the remand of the original rule, EPA was cognizant that emissions reductions should be done "as expeditiously as possible" and given the limited amount of time, the D.C. Circuit held that EPA reasonably chose to use existing air quality modeling and contributing information to "derive an appropriately reliable projection of air quality conditions and contributions." Ultimately, the Circuit Court agreed with EPA that MOG did not establish that EPA's linear interpolation method is oversimplified or that the agency produced unreasonable results.

Conclusion and Implications

The D.C. Circuit decision highlights the high level of deference a Court of Appeals will give to agency actions when those actions involve areas of technical expertise. It is not enough for a plaintiff to allege that an agency's actions are arbitrary because there are more advanced or "superior" technical models available to the agency. Rather, the petitioner must demonstrate that the agency decision lacks a rational basis resulting in a situation where the chosen technology is oversimplified or that the agency was unreasonable in its results. The court's opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/D0E7C47ADDA95784852589670055B837/$file/21-1146-1988395.pdf
(Jaycee Dean, Hina Gupta)

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SEVENTH CIRCUIT ALLOWS SUBPOENA SEEKING VIDEO FOOTAGE OF SEARCH DURING CLEAN WATER ACT CRIMINAL INVESTIGATION

United States v. Doe Corporation, 59 F.4th 301 (7th Cir. 2023).

The United States Court of Appeals for the Seventh Circuit recently reversed a U.S. District Court's decision to quash a subpoena issued by a federal grand jury that was investigating an alleged violated of the Clean Water Act by the Doe Corporation. The Seventh Circuit held that there was a "reasonable possibility" that the corporation's video footage showing law enforcement officers conducting a search of the corporation's headquarters was relevant to the grand jury's task of deciding whether to issue an indictment in the case, and that a request for such information was neither unreasonable nor oppressive.

Factual and Procedural Background

In this case a federal grand jury was investigating suspected criminal violations of toxic and pretreatment effluent standards under the federal Clean Water Act by the Doe Corporation. Under the CWA, any person who "knowingly violates" certain sections of the Act could be held criminally liable and punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or by both. The government sent federal law enforcement agents to search the corporation's headquarters. During the course of the search, the agents requested that the corporation turn off their security cameras.

At the District Court

After the search was completed, the corporation accused the agents of conducting the search "in a dangerous and threatening manner in violation of the corporation's Fourth Amendment rights," and filed a motion to unseal the affidavit that had been used by the federal government to obtain the search warrant. Along with that motion, the corporation filed images taken from video footage captured during the search which appeared to show the law enforcement agents pointing their guns at the corporation's employees. After the corporation refused the government's request for the video footage, the grand jury issued a subpoena seeking the video footage.

The corporation moved to quash the grand jury's subpoena. The District Court granted the motion to quash, finding that the video was not relevant to the grand jury investigation because (1) even if the government conducted an illegal or unfair search, that would not affect whether the corporation should be indicted; and (2) the court did not believe that the agents would have ordered the security cameras to be turned off if the footage was important or relevant to the investigation. The government appealed the district court's order, and the seventh circuit granted review.

The Seventh Circuit's Decision

The court first noted that federal grand juries are vested with broad investigatory powers so that they can investigate potential crimes and return indictments if wrongdoing is uncovered. One of the grand jury's tools is the subpoena, which can help the grand jury uncover information relevant to its investigation. However, if a subpoena is too broad in scope such that it is unreasonable or oppressive, the Federal Rules of Criminal Procedure provide that a trial court may quash the subpoena. The court further noted that it can be difficult to determine before trial whether information will be relevant or admissible, and so a trial court only grants a motion to quash a subpoena if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation.

The court then addressed the issue of whether there was any reasonable possibility that the subpoena in this case, which sought video footage of the law enforcement officer's search, was "relevant to the general subject of the grand jury's investigation," and held that it was "well within the legitimate purview of the grand jury to inquire about the manner in which evidence was collected, including whether any government misconduct occurred in the process." The court noted that the grand jury possessed broad discretion in determining whether to indict the subject of the investigation and what degree of offense to charge, and that there was a reasonable possibility

that the video footage could be related to the grand jury's decision, especially if the government misconduct was as serious as the corporation alleged. If the government misconduct was "so outrageous that the grand jury [was] convinced that the government harbor[ed] improper animus against the target of the investigation," that might factor into the grand jury's decision as to issue an indictment.

Conclusion and Implications

The Seventh Circuit's decision in this case demonstrates the broad discretion afforded to federal grand juries tasked with investigating crimes under the Clean Water Act, and the seriousness of allegations involving government misconduct. The court's decision clarified that searches conducted during Clean Water Act criminal investigations will be deemed relevant in determining whether an indictment should be issued, and that a request for such information is neither unreasonable nor oppressive. The court's order is available online at: https://casetext.com/case/united-states-v-doe-corp
(Caroline Martin, Rebecca Andrews)

DISTRICT COURT FOR NEW MEXICO AWARDS DEFENDANTS THEIR COSTS IN THE GOLD KING MINE RELEASE

In re Gold King Mine Release in San Juan Cnty., Colorado,
___F.Supp.4th___, Case No. 18-CV-744-WJ-KK (D. N.M. Feb. 21, 2023).

The U.S. District Court for New Mexico awarded costs to defendants in the Gold King Mine release case against plaintiffs who filed their case more than 2 years after the state statute of limitations on state law claims.

Factual and Procedural Background

In 2015, Environmental Restoration, LLC, a contractor for Environmental Protection Agency, released contaminated water from the King Gold Mine into Cement Creek, a tributary of the Animas and San Juan Rivers in southwest Colorado. The rivers continue into New Mexico. Multiple federal Clean Water Act lawsuits were centralized in multidistrict litigation in the District of New Mexico.

In 2019, farmers and livestock raisers brought a state law nuisance claims against Environmental Restoration. Their action was consolidated with the multidistrict litigation in New Mexico. In a 2022 decision, the Tenth Circuit Court of Appeals determined that Colorado's two-year statute of limitations, and not the Clean Water Act's five-year statute of limitations, applied to the state law negligence claims. The district court then dismissed plaintiffs' state law claims because they fell outside of the two-year statute of limitations.

Environmental Restoration moved to recover their costs against the farmers and livestock raiser plaintiffs under Federal Rule of Civil Procedure Rule 54. Under Rule 54, costs are generally allowed to the "prevailing party." To deny a prevailing party its costs is considered a severe penalty. As a result, a district court can only deny costs under one of six circumstances: (1) the prevailing party is only partially successful, (2) the prevailing party was obstructive and acted in bad faith during the course of the litigation, (3) damages are only nominal, (4) the non-prevailing party is indigent, (5) costs are unreasonably high or unnecessary, or (6) the issues are close and difficult.

The District Court's Decision

Environmental Restoration asserted that, as the prevailing party, it was entitled to an award of approximately $70,000 in costs for filing fees and deposition costs. Plaintiffs argued the court should deny Environmental Restoration's costs because: (1) the legal issues were close and difficult and the claim was brought in good faith; and (2) Environmental Restoration was only partially successful. In the alternative, the plaintiffs contended the court should deny deposition costs that were not reasonably necessary to defeat the claims.

The court first considered whether the legal issues were close and difficult. Plaintiffs argued the statute of limitations question raised an issue of first impression. The court rejected this argument, reasoning that

the Tenth Circuit Court of Appeals applied existing law that the point source's state law applies to state actions brought as part of a federal diversity action in federal court.

The court next considered whether Environmental Restoration was only partially successful. Plaintiffs argued that the defendants may still be found liable in the larger multi-district litigation. The court rejected this argument because the state law action was centralized with the multi-district litigation only "for coordinated or consolidated pretrial proceedings" but otherwise the actions were separate.

Finally, the court considered whether certain deposition costs should be denied and determined that because Environmental Restoration agreed to deduct approximately $10,000 in deposition costs, the total award of costs would be reduced by that amount. The court awarded approximately $60,000 in costs against the plaintiffs.

Conclusion and Implications

This case reminds potential plaintiffs of the risks of bringing an unsuccessful action in federal court. Statutes of limitations questions can be challenging in environmental actions, and as this case demonstrates, a late filing may result in more than just a dismissal of the action. Under Rule 54 of the Federal Rules of Civil Procedure, a successful defendant may receive costs, and if the underlying substantive law allows it, a successful defendant may also receive attorneys' fees. The District Court's opinion is available online at: https://cases.justia.com/federal/district-courts/new-mexico/nmdce/1:2018cv00744/397922/648/0.pdf_
(Rebecca Andrews)

TEXAS WINS PRELIMINARY INJUNCTION AT THE U.S. DISTRICT COURT AGAINST EPAS NEW WATERS OF THE UNITED STATES RULE

Texas v EPA, ___Fed.Supp.4th___, Case No. 3:23-cv-17 (S.D. Tx. March 19, 2023).

One day before the effective date of the new U.S. Environmental Protection Agency (EPA) interpretation of "waters of the United States" (WOTUS), a U.S. District Court in Galveston, Texas has enjoined the new rule (2023 Rule) within the borders of Texas and Idaho. At the same time, the court denied a nationwide injunction sought by various trade and business advocate organizations.

Challenge to the EPA Promulgated WOTUS Rule

The two state plaintiffs asserted rights to sue and standing under the Administrative Procedure Act, on grounds of the 2023 Rule being arbitrary and capricious, and contrary to or in excess of constitutional powers. They also alleged violations of the U.S. Constitution, viz. the Commerce Clause, the Tenth Amendment, and the Due Process clause. The court finds that the states alleged and filed documentation of likely multi-million-dollar annual costs and losses of their inherent sovereignty to decide questions about their in-state commerce and land and water resources. The District Court differentiated the plaintiff state interests as being directly affected by the 2023 Rule, unlike the situation that arose in the 1970s under the then new Surface Coal Mining statute, where the U.S. Supreme Court found that the regulations challenged were of private activity that was in interstate commerce.

The District Court's Decision

Judge Jeffrey Vincent Brown's opinion includes a short discussion of the history of the WOTUS definition as it has come before the United States Supreme Court in several key decisions. In particular he noted the important concurring opinion of Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715, 765-66, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (Kennedy, J., concurring). He focused on two aspects of the 2023 Rule for purposes of rendering his decision: "First, the Rule codifies a modified version of Justice Kennedy's significant-nexus test. Compare [88 Fed Reg.] at 3006, with *Rapanos*, 547 U.S. at 780. Second, the Rule imposes jurisdiction on all "interstate waters, regardless of their navigability." 88 Fed. Reg. at 3072."

The court's discussion of the 2023 Rule's statement

of what EPA declared is a "significant nexus" of given waters with traditionally navigable waters is a key element of the court's decision. In short, Judge Brown found that the EPA has gone beyond what Justice Kennedy's concurrence in *Rapanos* says. To quote the Court:

> The Agencies' construction of the significant-nexus test ebbs beyond the already uncertain boundaries Justice Kennedy established for it. Specifically, by extending the significant-nexus test to 'interstate waters,' and not just to those 'waters . . . understood as 'navigable,' the Rule disregards the Act's "central requirement"—'the word 'navigable.'

In reaching its conclusion, the court was expressly persuaded that the 2023 Rule includes waters of a type not mentioned or intended by Justice Kennedy's concurrence, "such as ephemeral drainages, many ditches, and non-navigable interstate waters." These differences persuaded the court that the plaintiffs have a likelihood of success on the merits, and that they are deserving of a preliminary injunction on that basis.

Judge Brown then noted that the 2023 Rule has a provision that automatically includes and applies to any waters that are "interstate, regardless of navigability." Such waters are deemed jurisdictional automatically by their being in more than a single state. The court declared that provision plainly beyond the reach of the Act's intended regulatory program, and a plain violation of state sovereignty over its internal non-navigable water resources.

EPA Must Construe the Statute it Relied On to Promulgate the Rule

The Agency defendants argued that statutes that regulated water in the United States before the passage of the Clean Water Act in the 1970s were a basis for creating the new automatic inclusion provision of the 2023 Rule. The court found that reasoning unconvincing, because its job is to construe the statute used to promulgate the rule being challenged, not extraneous ones. Moreover, the court noted that the holdings of the Supreme Court where federalism principles are involved stand for the proposition that where an administrative interpretation of a statute would raise serious constitutional problems, the court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent, citing *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 162, 174 (2001).

Conclusion and Implications

Having found that the states have convinced him of their likelihood of success on the merits, and that the damages to their interests and economy would otherwise not be readily calculable if an unlawfully adopted rule were put into effect, the court granted the preliminary injunction that stays application of the 2023 Rule *within* the borders of Texas and Idaho. The court went on to *deny* such a preliminary injunction nationwide, because not all states would agree with Texas and Idaho. He noted that those who do have the right to go to court, just as Texas and Idaho have done.

(Harvey M. Sheldon)

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DISTRICT COURT FINDS FEDERAL ENDANGERED SPECIES ACT PREEMPTS STATE AGENCY ORDER ON KLAMATH PROJECT OPERATIONS

Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al., ___F.Supp.4th___, Case No. 19-cv-04405-WHO, (N.D. Cal. Feb 6, 2023).

The U.S. District Court for the Northern District of California has issued a decision in *Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al.*, (*Yurok Tribe*) finding that the federal Endangered Species Act (ESA) preempted an order from the Oregon Water Resources Department (OWRD) prohibiting the U.S. Bureau of Reclamation (Bureau) from releasing water from Upper Klamath Lake except for irrigation purposes. The District Court found that the OWRD order presented an obstacle to the Bureau's compliance with the ESA and therefore could not be enforced. The ruling resolved four motions for summary judgment in favor of the United States, as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources.

Factual Background

The Klamath River originates in the high desert of Oregon, flowing southwest into California and eventually the Pacific Ocean. The Klamath River drains into the Klamath Basin, where its waters are relied on by numerous stakeholders including Native American tribes, fish and wildlife, and irrigators.

The Reclamation Act of 1902 (43 U.S.C. § 391 *et seq.*) authorized the Secretary of the Interior to construct and operate works for the storage, diversion, and development of water in the western United States. In 1905, the Secretary of the Interior authorized the Klamath Project (Project) pursuant to the Reclamation Act. Today the Project consists of an extensive series of canals, pumps, diversion structures, and dams capable of routing water to approximately 230,000 acres of irrigable land in the upper Klamath River Basin.

The Bureau is in charge of operating the Project, which includes managing water levels and distribution from Upper Klamath Lake. Upper Klamath Lake is the Project's primary storage facility with a capacity to store approximately 562,000 acre-feet of water. The Bureau's operations of Upper Klamath Lake are influenced by Oregon state law, Tribal water rights, and the federal ESA.

Litigation involving the Klamath Project has a long and complex history. Although the case as a whole originated as a challenge to 2019 biological opinion for the Project, this ruling stems from the Bureau's management of Upper Klamath Lake amid severe drought conditions in 2020. In 2020, the Bureau did not fully allocate Project water to irrigators. But the Bureau continued to release water from the Upper Klamath Lake pursuant to the ESA, which requires that federal agencies ensure their actions are "not likely to jeopardize" the continued existence of a listed species or destroy or modify its habitat. (16 U.S.C. § 1536(a)(2) (ESA Section 7(a)(2)).) On April 6, 2021, the OWRD issued an order that the Bureau "immediately preclude or stop the distribution, use or release of stored water from the UKL" except for water that would be used by irrigators. The United States then filed a crossclaim against OWRD and the Klamath Water Users Association seeking to overturn the OWRD order.

The District Court's Decision

In its February 6, 2023 order in *Yurok Tribe*, the court granted summary judgment in favor of the United States as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources. The court denied summary judgment motions filed by OWRD, Klamath Water Users Association, and Klamath Irrigation District. The central issue in the case was whether the ESA preempted the OWRD order, making it invalid in violation of the Supremacy Clause.

The Bureau and the ESA

The court first addressed the threshold question of whether the Bureau must comply with the ESA in operating the Project. Section 7(a)(2) of the ESA only applies to discretionary agency actions, and does not apply to actions that "an agency is required by statute to undertake once certain specified triggering events have occurred." (*National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669

(2007).) The court held that here "Congress gave [the Bureau] a broad mandate in carrying out the Reclamation Act, meaning it has discretion in deciding how to do so." Therefore, section 7(a)(2) applies and the Bureau must comply with the ESA when releasing stored water from Upper Klamath Lake.

Federal Preemption

Finding that the ESA applies to the Project, the court then addressed the issue of preemption. The Supremacy Clause of the U.S. Constitution grants Congress "the power to preempt state law." (*Arizona v. United States*, 567 U.S. 387, 399 (2012).) One form of preemption occurs where a state law "stands as an obstacle to the accomplishment and execution" of the federal law. (*Id.* at 399-400.) This is referred to as "obstacle preemption." (*United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019).)

The court found that the OWRD order stood as an obstacle to the accomplishment and execution of Congress' intent in enacting the ESA to "halt and reverse the trend toward species extinction, whatever the cost." The OWRD order prohibited the Bureau from releasing water from Upper Klamath Lake except for irrigation purposes, which prevented release of water to avoid jeopardizing endangered species. The District Court granted summary judgment in favor of the United States on preemption grounds, concluding that the OWRD is preempted by the ESA and therefore invalid.

Conclusion and Implications

The court declined to opine on other arguments related to the OWRD order, including an argument based on the doctrine of intergovernmental immunity. At the time of this writing, it remains unclear whether any parties will appeal the court's ruling. The court's ruling highlights the ongoing challenges associated with balancing the needs of different stakeholders in times of drought.
(Holly E. Tokar, Sam Bivins)

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RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL AFFIRMS TRIAL COURT RULING SETTING ASIDE ADDENDUM TO PROGRAM EIR AND RELATED APPROVALS FOR OFFICE COMPLEX

IBC Business Owners for Sensible Development v. City of Irvine, 88 Cal.App.5th 1000 (4th Dist. 2023).

In a decision filed on February 5, 2023, the Fourth District Court of Appeal affirmed a trial court judgment setting aside an addendum to a 2010 program Environmental Impact Report (PEIR) and related approvals for a 275,000 square foot office complex on a 4.95-acre parcel within the Irvine Business Complex (IBC), a 2,800-acre development originally constructed in the 1970s. The court also concluded that given the unusual size and density of the project, the unusual circumstances exception applied, meaning that a Class 32 urban infill exemption was not available.

Factual and Procedural Background

The Irvine Business Complex is roughly 2,800 acres in size and was originally developed in the 1970s as a regional economic and employment based. Most of the land in the IBC is currently developed with office uses, with substantial amounts of industrial and warehouse uses, as well as scattered residential uses in mid-to high-rise condominiums.

In 2010, the City of Irvine (City) adopted the IBC Vision Plan which amended the City's General plan to establish a development guide to create a mixed-use community in the IBC and adopted a Program Environmental Impact Report (2010 PEIR) to analyze the environmental effects of the vision plan. The 2010 PEIR studied the environmental effects from a buildout of the entire vision plan and was designed to "provide environmental clearance for future site-specific development projects within the IBC." Any future projects not consistent with the assumptions in the PEIR may require additional environmental review.

The Vision Plan capped buildout of the IBC at 17,038 residential units and 48,787square feet of non-residential development, with full buildout to occur after 2030. To stay within this cap, each parcel in the IBC was assigned a development budget or "development intensity value" (DIV). DIV allocations for each parcel were tracked in a database and within the IBC a parcel could transfer a portion of its DIV budget to another parcel using transfers of development rights (TDRs) subject to City approval.

The 2010 PEIR included several assumptions about existing conditions, conditions for 2015, and conditions for post-2030. The PEIR only assumed TDRs for projects that had applications pending when it was prepared. Therefore, the PEIR assumed that additional TDRs were possible, but noted that additional traffic analysis and California Environmental Quality Act (CEQA) review would be necessary if such additional TDRs were proposed.

In 2019, real party in interest and developer Gemdale filed an application to develop a 4.95-acre parcel in the IBC in a manner that would convert an existing two story, 69,780 square foot office building into a 275,000 square foot office complex with a five-story office building, a 6-story office building, and a seven-story parking structure. To do this, the project required TDRs from a site on the other side of the IBC equivalent 221,014 square feet of office space and nearly double the largest approved TDR in IBC's history.

Staff initially believed that the project could be CEQA exempt, but then prepared an addendum concluding its impacts were adequately analyzed and mitigated in the 2010 PEIR, meaning that no further environmental review was required. The City Council found the addendum adequate and approved the project.

Petitioner filed a petition for writ of mandate, which the trial court granted, ordering the City to set aside the project approvals, the TDR, the addendum, and any CEQA exemption finding.

The Court of Appeal's Decision

The Court of Appeal agreed with the trial court, finding that the project was not adequately analyzed and mitigated in the 2010 PEIR and that a CEQA exemption did not apply.

The Gemdale Project Was Not Analyzed and Mitigated in the 2010 PEIR

The court held that the City correctly determined that the project would not cause any new significant traffic impacts, but that substantial evidence did not exist in the record to support the conclusion that the project's Greenhouse Gas (GHG) would not be greater than assumed in 2010 PEIR.

With regard to traffic impacts, the addendum found that the project would not cause new traffic impacts because the project would not result in significant vehicle delays at any of the intersections or roadway segments analyzed in the addendum traffic study. This was the same methodology for analyzing traffic impacts as employed by the 2010 PEIR. A VMT analysis was not conducted and petitioner argued that a VMT analysis was required.

The court concluded that § 15064.3 of the CEQA guidelines, added in 2018 and giving rise to the requirement for a VMT analysis, did not apply to the addendum. The Guidelines state that agencies do not need to comply with Guideline 15064.3 until July 1, 2020. Here, although the addendum was not adopted until July 14, 2020, the City began preparing the addendum in 2019, which was well before the effective date of Guideline 15064.3.

With regard to GHG impacts, the addendum noted that the project would incorporate all climate change mitigation measures included in the 2010 PEIR and would therefore achieve the 2010 PEIR's "net zero" emissions vision plan. Moreover, the addendum concluded that the project would not change the overall development intensity for the IBC and would not increase GHG emissions beyond those assumed in the 2010 PEIR. The project was able to reach its development intensity through TDRs from other parcels. A shift in development intensity from one site to another would not result in a substantial increase in GHG impacts.

The court disagreed, finding that the addendum concluded, without substantial evidence, that transferring development intensity from one site to another would only change the source of GHG emissions without changing the total amount of emissions. As the court noted:

> . . .[i]t is unclear from the record whether TDRs simply shift the source of [GHG] emissions or may impact total emissions…. [w]e have not been cited anything in the record to support this assertion…. Which is beyond common knowledge.

The court also noted that there was contrary evidence in the record indicating that the project might have significant emissions that could not be mitigated to a less-than-significant level. Although this specific analysis was not included in the addendum, the court found that the addendum had failed to show that the IBC would remain on track to achieve its "net zero" emissions goal.

The Project Was Not Categorically Exempt under The Class 32 Urban Infill Exemption

The court also rejected the City's argument that the project was exempt from CEQA under a Class 32 urban infill exemption. Specifically, the court held that the project did not qualify for the urban infill exemption because "unusual circumstances" existed, which is an exception to the application of any categorical exemption. The city did not make any express findings that the unusual circumstances exception did not apply, so the court had to assume that the city found the project involved unusual circumstances and then conclude that the record contains no substantial evidence supporting: (1) a finding that any unusual circumstances exist, or (2) that a fair argument giving rise to a reasonable possibility that an unusual circumstance identified by the petitioner will have a significant effect on the environment. Here neither of these findings could be made.

Substantial evidence indicated that unusual circumstances existed. The project was two times larger than the largest TDR approved in the IBC's history and was disproportionately large compared to neighboring buildings. This required a significant increase in development intensity budget, equating to more than twice the amount of office space originally allocated to the parcel, even though it would occupy a much smaller space than existing buildings.

The court also concluded that a fair argument gave rise to a reasonable possibility that the project would have significant environmental impacts. Here, there was evidence in the record that the project could have significant GHG impacts that could not be mitigated to a level of insignificance. This was a result of the unusual size and intensity of the project.

Conclusion and Implications

The *IBC* decision provides an illustrative analysis of the appropriateness of preparing and relying on a project-specific addendum to a program level EIR. Where evidence does not reasonably show that a project will not have new significant or substantially more severe impacts than analyzed in a program level EIR, an addendum is not likely appropriate. Where a project is unique in its intensity and/or scope within the context of a program EIR, the unusual circumstances exception may preclude application of a CEQA exemption. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/G060850.PDF
(Travis Brooks)

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