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# EASTERN WATER LAW™

## & POLICY REPORTER

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## EASTERN WATER NEWS

# TRUMP ADMINISTRATION OFFICIALLY REPEALS OBAMA-ERA FRACKING RULES

On December 29, 2017, the Department of the Interior's Bureau of Land Management (BLM) officially repealed the 2015 fracking rules regulating oil and natural gas drilling practices on federal lands. The rules would have applied mainly in the West, where most federal lands are located. The final rule returns the majority of the affected sections of the Code of Federal Regulations (CFR) to the language that existed immediately before the published effective date of the 2015 rule.

### Background

In 2015, the Obama administration developed and implemented the nation's first major federal regulations on hydraulic fracturing (or fracking), a technique for oil and gas drilling. At the time, the hydraulic fracking boom had led to a significant increase in American energy production, but at the cost of health and safety risks.

The 2015 fracking rules were intended to increase the safety of fracking by reducing the risk of water contamination. It forced companies drilling on public lands to comply with federal safety standards in the construction of fracking wells, as well as disclose which chemicals companies used in the fracking process. States would remain with jurisdiction over drilling and fracking regulations on private and state-owned land, while the federal rules would only regulate drilling on federal lands.

The regulations were instantly met with opposition. Big companies such as Western Energy Alliance and Independent Petroleum Association of America filed lawsuits. The rules never took effect because a federal judge in Wyoming blocked the 2015 fracking regulations, holding that the BLM did not have authority from Congress to issue the regulation, among other things. The case reached the 10th Circuit Court of Appeals in 2017, but the court ultimately decided the case was moot since the BLM was moving to repeal the regulation on oil and natural gas drilling on federal lands.

### Industry's Response to Repealing the 2015 Fracking Rules

Industry groups are applauding the Trump administration's decision to rescind the 2015 fracking regulations. Since their enactment in 2015, the rules have been vehemently opposed by companies in the oil and gas drilling industry. According to these companies, the federal rules are overly restrictive, unnecessary and expensive burdens on petroleum developers. The federal rules were also duplicative of state rules, which already provided exemplary safety regulations and environmental protection. Killing off the rule has been a top priority for those in the oil and gas industry, as well as Republican lawmakers from western states.

### Environmentalists' Response to Repealing the 2015 Fracking Rules

Environmentalists say that the potential risk to groundwater requires federal regulation in addition to state regulation. Many states and counties have banned fracking because it is a toxic business. Environmentalists are adamant that President Trump's reckless decision to repeal these common-sense protections will have serious consequences.

### Conclusion and Implications

Ninety percent of fracking is done on state and private land that is governed by state and local regulations, thus, the repealed rule would not have affected most fracking operations in the United States. However, this act is another example of President Trump's determination to make eliminating certain federal regulations a priority. Since taking office in January 2017, the Trump administration has sought to reverse at least 60 environmental rules. Activist groups are expected to sue the agency after the rule is made final, adding to the list of Trump administration actions being challenged in court this year.
(Paula B. Hernandez, Martin Stratte)

# NEWS FROM THE WEST

In this month's News from the West we report on a decision from the Federal Wildlife Services Program to suspend and reevaluate Oregon's Aquatic Mammal Damage Program. The decision came on the heels of a Notice to Sue from the Center for Biological Diversity alleging that the program violated the federal Endangered Species Act. We also report on a Notice of Intent issued by the U.S. Bureau of Reclamation to develop options to "maximize" contract water deliveries from the federal Central Valley Project in California, while also "maximizing" hydroelectric energy production from the project.

## Under Threat of Lawsuit, Federal Wildlife Services Program Agrees to Suspend and Evaluate Oregon Aquatic Mammal Damage Management Program

On November 2, 2017, Northwest Environmental Advocates (NEA) and The Center for Biological Diversity (CBD) issued a 60-day Notice of Intent to Sue letter alleging that the U.S. Department of Agriculture Animal and Plant Health Inspection Service's Wildlife Services program (Wildlife Services) violated the federal Endangered Species Act (ESA) by failing to consider the impact of its Oregon Aquatic Mammal Damage Management Program (Program) on threatened and endangered species such as the Oregon coast coho salmon and the Oregon spotted frog.

Through the Program, Oregon counties contract with Wildlife Services to kill animals that are damaging private property. Between 2010 and 2016, the Program killed 3,459 beavers, 4 mink, 159 muskrat, and 36 river otter in Oregon through the use of traps, snares, firearms, and nets. Beavers typically become problematic when their dams flood private property. According to the Argus Observer in Malheur County, Oregon, beavers can damage irrigation systems and "cause a problem to producers who get their irrigation water directly from streams" such as by "plugging up irrigation facilities including headgates."

NEA and CBD's Notice of Intent to Sue alleged that "[b]eaver dams and ponds adjust stream morphology and in-stream habitat in a variety of ways that are beneficial for many fish species, including federally-protected salmonids," and that, therefore, killing beavers harms these threatened and endangered species. As NEA and CBD point out, the National Marine Fisheries Service (NMFS) has "articulated the importance of beavers to survival and recovery of the Oregon Coast coho in its Recovery Plan for the species."

NEA and CBD also alleged that Wildlife Services failed to consult with the U.S. Fish and Wildlife Service (FWS) and NMFS concerning the impacts of the Program on threatened and endangered species. The ESA requires that when a species has been listed or critical habitat designated under the ESA, federal agencies must consult with FWS and/or NMFS to:

> . . .insure that any action authorized, funded, or carried out by such agency. . .is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.

During the consultation process, an agency is barred from:

> . . .mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

On December 27, Wildlife Services responded to NEA and CBD's Notice of Intent to Sue. It notified NEA and CBD that it was preparing a Biological Assessment and had sent a letter to NMFS requesting consultation concerning the species identified by NEA and CBD. Wildlife Services reported that it had "ceased all aquatic mammal damage management activities in Oregon related to damage caused by beaver, river otter, muskrat, and mink out of an abundance of caution to ensure compliance" with the ESA during the pendency of the consultation process. However, Wildlife Services will:

> . . .continue limited aquatic mammal damage management activities in Oregon related to

> damage caused by nutria because…such activities do not make any irreversible or irretrievable commitment of resources that have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures for the protection of threatened or endangered salmonids.

According to Wildlife Services, nutria are "a non-native and invasive species" and "do not create habitat beneficial for any ESA-listed species in Oregon."

Wildlife Services also reported that it had already consulted FWS with respect to the species under FWS jurisdiction, the Warner sucker, bull trout, Lahontan cutthroat trout, and Oregon spotted frog. Specifically, Wildlife Services consulted with FWS regarding its "integrated wildlife damage management activities in Oregon" which "include aquatic mammal damage management." Wildlife Services stated that FWS "issued a letter of concurrence agreeing with" Wildlife Services' assessment that its actions may affect, but were not likely to adversely affect, the Warner Sucker, Bull Trout, Lahontan Cutthroat Trout, and Oregon Spotted Frog.

### Conclusion and Implications

The Wildlife Services' determination may lead to an increase in beaver and other aquatic mammal populations, at least temporarily, which may in turn benefit salmon and other populations. It could also lead to increased human-wildlife conflict. At least one irrigation district is reportedly considering offering a bounty to private trappers to kill beavers in the absence of the Program, according to the Argus Observer. Longer-term implications will depend on the outcome of the consultation process and whether the Program is ultimately resumed.
(Alexa Shasteen)

## U.S. Bureau of Reclamation Issues Notice of Intent to Develop and Evaluate Options to Maximize CVP Water Deliveries and Hydropower Production

On December 29, 2017, the U.S. Bureau of Reclamation (Bureau) published a notice in the *Federal Register* announcing its intent to evaluate methods and projects to maximize Central Valley Project (CVP) water deliveries and hydropower generation, and announcing it is preparing an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for this effort (Notice). (82 FR 61789) NEPA requires that federal agencies conduct an environmental analysis of their proposed actions to determine if the actions may significantly affect the human environment, and its procedures serve the dual purposes of fostering informed-decision making and public involvement and disclosure. (42 U.S.C. § 4321 *et seq.*)

The Bureau's Notice indicates it intends to analyze potential modifications to the continued long-term operation of the CVP (proposed action), in a coordinated manner with the California State Water Project (SWP), to achieve the following:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.

- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the U.S. Fish & Wildlife Service and National Marine Fisheries Service in 2008 and 2009, respectively.

- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.

- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

As required by NEPA, the Notice indicates the EIS will include and consider a proposed action and a reasonable range of alternatives, including a No Action Alternative. The Bureau scheduled scoping meetings for {date.

The CVP is a major water source for agricultural, municipal and industrial, and fish and wildlife demands in California. Operated by the Bureau, the CVP ranks as the largest Federal reclamation project, bringing precious water supplies to farmland and urban areas in our State. Historically, nowhere was the

CVP's beneficial impact more significant than in the San Joaquin Valley where its delivery of surface water to dozens of irrigation and water districts relieved historically stressed aquifers from intense groundwater pumping and allowed vast tracts of formerly dusty lands to become verdant fields of plenty.

CVP operations today are more challenging than ever, and state and federal regulatory actions, federal trust responsibilities, and other agreements, have significantly reduced the water available for delivery south of the Sacramento-San Joaquin River Delta. In 2016 Congress spoke to these declines in the Water Infrastructure Improvements for the Nation Act, Public Law 114-322, 130 Stat. 1628, 114th Congress (WIIN Act), an omnibus statutory regime addressing water issues throughout the nation. Specifically, § 4001 of the WIIN Act provided the following express mandate to the Bureau:

The Secretary of the Interior and Secretary of Commerce shall provide the maximum quantity of water supplies practicable to Central Valley Project agricultural, municipal and industrial contractors, and State Water Project contractors, by approving, in accordance with applicable Federal and State laws (including regulations), operations or temporary projects to provide additional water supplies as quickly as possible based on available information.

The Notice is apparently in furtherance of this statutory mandate.

The Bureau's Notice suggests that reasonable alternatives to the proposed action may include a combination of:

- Actions that increase storage capacity upstream of the Delta for the CVP.

- Actions that increase storage capacity south of the Delta.

- Actions that increase export capabilities through the Delta.

- Actions to generate additional water or that improve and optimize the utilization of water such as desalinization, water conservation, or water reuse.

- Modified operations of the CVP and SWP with and without new or proposed facilities including possible requests to modify environmental and regulatory requirements, and sharing of water and responsibilities in the Delta.

- Habitat restoration and ecosystem improvement projects intended to increase fish populations which would be factored into the regulatory process.

- Modification to existing state and federal facilities to reduce impacts to listed species.

The Notice informs that the Bureau expects the EIS to be primarily programmatic in nature. The Bureau anticipates that the programmatic EIS will be followed by tiered project-level NEPA analyses to implement various site specific projects or detailed programs that are generally identified and described in the programmatic EIS.

The Bureau's Notice and its announcement that it would seek ways to maximize water deliveries was met with a spectrum of responses by stakeholders and members of the public. Some organizations decried the effort, citing environmental and policy concerns, among others. Others, including water user groups, hailed the Notice and the evaluation's goal as a much needed introspective on CVP operations. Regardless of these opinions, the Bureau's effort seems objectively reasonable given the increasing scarcity and variability of California's water supplies and the competing regulatory and human demands placed on the CVP. Under such circumstances, it is wise to periodically conduct an assessment of whether there are alternatives or better ways to achieve the CVP's myriad goals while at the same time meeting all regulatory requirements. Finally, the effort was mandated by Congress, and it is also consistent with California's policy that "the general welfare requires that the water resources of this State be put to beneficial use to the fullest extent of which they are capable." (Water Code §100)

## Conclusion and Implications

The Notice essentially commenced the initial stages of the NEPA process and offered interested members of the public an opportunity to provide written "scoping" comments regarding the range of alternatives and other issues related to the development of the proposed action. The Notice indicates that comments have to be written and were due

February 1, 2018. NEPA requires additional public review and comment periods, such as when the Bureau has completed a draft EIS. The Bureau also intends to hold several public workshops and scoping meetings. Interested parties should watch for the draft EIS and other opportunities to participate this year. For further information on this effort the Notice directs inquiries to Katrina Harrison at (916) 414-2425; or *kharrison@usbr.gov*.
(Hanspeter Walter, Daniel O'Hanlon)

## PENALTIES & SANCTIONS

# RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

### Civil Enforcement Actions and Settlements—Water Quality

•December 19, 2017 - U.S. EPA Requires Salinas Facility to Reduce Risk of Spills to Monterey Bay Watershed. the U.S. Environmental Protection Agency reached a settlement with Encore Oils, LLC and Ottone-Salinas, Inc., to take steps to reduce the risk of oil spills from their biodiesel processing facility in Salinas, California to the Monterey Bay watershed. The agreement, which includes a $31,893 penalty, resolves several federal Clean Water Act (CWA) violations. Encore Oils, known as SeQuential, operates on property owned by Ottone-Salinas. The facility is located ten feet from Alisal Creek, a tributary of the Salinas River, which feeds into Monterey Bay. A September 2016 inspection by EPA found the company violated the Clean Water Act's Oil Spill Prevention, Control and Countermeasure (SPCC) rules by failure to: provide adequate secondary containment around tanks to keep spilled oil from leaving the site and entering surrounding waters; use safe and appropriate containers for oil storage; regularly conduct inspection and tank integrity testing; provide and maintain records substantiating the company's compliance with requirements, including inspection reports, and test records. Under the June 2017 agreement, SeQuential has implemented multiple safeguards to ensure spills will not discharge into nearby waterways, including permanently closing failing tanks and improving secondary containment. The company is in the process of installing new aboveground oil storage tanks to replace inadequate infrastructure. EPA's oil pollution prevention regulations aim to prevent oil from reaching navigable waters and adjoining shorelines, and to ensure containment of oil discharges in the event of a spill. Specific prevention measures include developing and implementing spill prevention plans, training staff, and installing physical controls to contain and clean up oil spills.

•December 26, 2017 - U.S. EPA, American Samoa reach revised settlement with Starkist. The U.S. Department of Justice and the U.S. Environmental Protection Agency (EPA) have reached a revised $6.5 million settlement with StarKist Co. and its subsidiary, Starkist Samoa Co., to resolve federal environmental violations at their tuna processing facility in American Samoa. In addition to the $6.3 million penalty announced in September, Starkist will pay $200,000 to address alleged Clean Water Act violations found before the original consent decree was finalized by the court. The American Samoa government has also been added as a co-plaintiff in the revised action, formalizing its role as a partner in the implementation of the settlement. Under the agreement, Starkist will pay $2.6 million to American Samoa and $3.9 million to the United States. As specified in the original consent decree, the company will also provide $88,000 in emergency equipment to American Samoa for responses to chemical releases.. The additional violations included unauthorized stormwater discharges to Pago Pago Harbor from Starkist's stormwater system. The revised consent decree requires Starkist to obtain authorization for its stormwater discharges and take steps to reduce and eliminate discharges to the harbor. After full implementation of the wastewater treatment system upgrades, the facility's annual discharge of pollutants into Pago Pago Harbor, including total nitrogen, phosphorus, oil and grease, and total suspended solids, will be reduced by at least 85 percent—more than 13 million pounds. Starkist Samoa Co. owns and operates the tuna processing facility, located on Route 1 on the Island of Tutuila in American Samoa. Starkist

Samoa Co. is a subsidiary of StarKist Co. which is owned by Korean company Dongwon Industries. StarKist Co. is the world's largest supplier of canned tuna. Its American Samoa facility processes and cans tuna for human consumption and processes fish byproducts into fishmeal and fish oil. The proposed consent decree, lodged in the U.S. District Court in Pittsburgh, Pennsylvania, is subject to a 30-day comment period and final court approval.

### Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•December 19, 2017 - EPA Settlement with FMC Corp. Enforces Federal Pesticide Safety Protections. FMC Corporation has agreed to pay a $1 million penalty to settle alleged violations of federal pesticide regulations. Most of the violations involved advertisements for the FMC product "Stallion Insecticide" that omitted required "restricted use" statements for the proper purchase and safe application of this pesticide, which is used for several crops including alfalfa and sunflowers. Other violations included sales using the disapproved brand name "Stallion Insecticide." EPA cited the Philadelphia-based chemical company for violating the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA is a federal law requiring EPA registration of pesticide products and pesticide production facilities, and the proper labeling and advertising of pesticides. FIFRA's requirements protect public health and the environment by ensuring the safe production, handling and application of pesticides; and by preventing false, misleading, or unverifiable product claims. Due to the health and environmental risks of improper use of FMC's Stallion Insecticide, EPA classified this product under FIFRA as a "restricted use pesticide" (RUP), meaning that it should only be used by (or under the supervision of) a certified pesticide applicator. The product label included the RUP designation, but FMC omitted this restricted use caution from several printed advertisements, online advertisements and more than 12,000 direct mailers sent to farmers and retailers.

•January 8, 2018 - EnPro Holdings, Inc. Agrees to Assess Eight Mines Near Cameron, Arizona or over ten years, EPA has worked in close coordination with the Navajo Nation to address contamination at over 500 abandoned uranium mines on and near the Navajo Nation. Today, the Environmental Protection Agency (EPA) announced a settlement under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or the Superfund Law) worth $500,000 with EnPro Holdings, Inc. to assess eight abandoned uranium mines located on the Navajo Nation, near Cameron and Tuba City, Arizona. The eight abandoned uranium mines were originally operated by the A&B Mining Corporation in the 1950s. A+B Mining Corporation's operations contributed to the contamination at these eight sites and made them liable for the cleanup under CERCLA. Through a series of mergers between 1959 and 2016, EnPro Industries became the corporate successor to A&B Mining Corporation. In 2012, the EPA, in partnership with the Navajo Nation, developed a list of 46 "high priority" abandoned uranium mines based on radiation levels, proximity to homes and potential for water contamination. Two of the mines EnPro has agreed to assess are on the agency's high priority list. EPA projects that EnPro will complete the assessment of the eight sites under this settlement by the end of 2019. Under the agreement, EnPro will coordinate with EPA and the Navajo Nation in performing radiation assessments, installing fencing and signs warning residents and visitors of potential exposure, and preparing cultural resources and biological surveys. The agreement also requires EnPro to pay EPA's oversight costs. During the Cold War, 30 million tons of uranium ore were mined on or adjacent to the Navajo Nation, leaving more than 500 abandoned mines. Since 2008, EPA has conducted preliminary investigations at all the mines, remediated 51 contaminated structures, provided safe drinking water to 3,013 families in partnership with the Indian Health Service, and performed cleanup or stabilization work at nine mines. In total, EPA has reached enforcement agreements and settlements valued at $1.7 billion to reduce the highest risks of radiation exposure to the Navajo people from abandoned uranium mines. As a result, funding is now available to begin the assessment and cleanup process at 219 of the 523 abandoned uranium mines. Cleanup of the of abandoned uranium mines is a closely coordinated effort of EPA and the Navajo Nation.

•January 10, 2018 - EPA orders further assessment work at Wolverine tannery, landfill in Rockford, Michigan. U.S. Environmental Protection Agency issued an administrative order to Wolverine World

Wide Inc. to conduct further assessment and potential cleanup work at its former tannery and at the House Street landfill in Rockford, Mich. The order requires additional investigation and characterization of soil, groundwater and river sediment contaminated with hazardous substances including arsenic, chromium, mercury and ammonia. This is EPA's most recent activity in its ongoing response to Wolverine contamination issues. EPA is working with the state of Michigan on a coordinated enforcement approach at the Wolverine sites in and around Rockford that are contaminated with PFAS (per- and polyfluoroalkyl substances) and hazardous constituents. Also today, Michigan issued an order to Wolverine to address drinking water contamination from its operations. Last month, EPA staff assisted Michigan's response efforts by sampling for PFAS in surface water from the Rogue River and Rum Creek, groundwater from two Wolverine industrial properties and drinking water at affected residences. EPA will notify residents of their individual sampling results as soon as they are available. Wolverine manufactures several footwear brands and historically treated its products with PFAS compounds. The tanning process also used chrome and other hazardous substances. Contamination is believed to be from the company's former tannery, shoe factory manufacturing operations and related waste disposal activities.

### Indictments, Convictions and Sentencing

•December 20, 2017 - Honeywell to Restore Onondaga Lake Natural Resources Under Proposed Agreement With The United States and The State of New York. The Departments of Justice and the Interior joined with the New York State Office of the Attorney General (NYSOAG) and Department of Environmental Conservation (NYSDEC) today to announce a proposed settlement with Honeywell International Inc. (Honeywell) and Onondaga County related to contamination of Onondaga Lake, portions of its tributaries, and surrounding wetlands and uplands. The proposal would resolve claims brought under the federal Superfund law for damages to natural resources stemming from releases of mercury and other hazardous substances from facilities owned and operated by Honeywell (formerly Allied-Signal) and Onondaga County at the Onondaga Lake Superfund Site in Syracuse, New York. As part of its operations over many years, Honeywell contributed hazardous substances that resulted in the contamination of Onondaga Lake, portions of its tributaries, and surrounding wetlands and uplands. Hazardous substances from Onondaga County's operations made their way into Onondaga Lake as well. Federal Superfund law seeks to make the environment and public whole for injuries to natural resources and ecological and recreational services resulting from releases of hazardous substances to the environment. The proposed settlement requires Honeywell to implement and maintain 20 restoration projects to restore and protect wildlife habitat and water quality, and increase recreational opportunities at Onondaga Lake. Honeywell will also pay over $6 million allocated to restoration and preservation programs overseen by the federal and state trustees, Department of Interior, and the Commissioner of Environmental Conservation acting through NYSDEC. Onondaga County will operate, repair, maintain, and monitor five of these restoration projects located on or adjacent to County parklands for 25 years. The settlement terms are outlined in a proposed consent decree filed in federal court in Syracuse, New York today. The total value of this proposed settlement is $26 million. This past August, the trustees, through U.S. Fish and Wildlife Service and the State of New York, issued a final restoration plan and environmental assessment plan outlining these 20 restoration projects to restore the Lake and wildlife habitat and improve recreational resources. This plan also included responses to oral and written comments received from the public on the draft plan during a 90-day public comment period, which included four public meetings and one public hearing held throughout Syracuse during the spring 2017. Since 2008, Honeywell and the trustees have worked together to assess and identify potential restoration projects to benefit natural resources affected by releases of mercury and other hazardous substances. Some of the damaged natural resources include fish, birds, reptiles, amphibians, and mammals. Recreational fishing opportunities were also impacted by mercury contamination. The U.S. District Court for the Northern District of New York, is subject to a 30-day public comment period to begin following notification in the *Federal Register*.
(Andre Monette)

## JUDICIAL DEVELOPMENTS

# UNANIMOUS SUPREME COURT RULES 'WATERS OF THE UNITED STATES' CHALLENGES ARE JURISDICTIONAL WITH THE U.S. DISTRICT COURTS

*National Association of Manufacturers v. Department of Defense et al.*,
Supreme Court Case No. 16–299 (Jan. 22, 2018).

On Monday January 22, 2018 the Supreme Court issued its decision regarding which lower federal courts have jurisdiction to review challenges to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) rule changing the definition of "Waters of the United States" or WOTUS.

### The Supreme Court's Decision

Justice Sonia Sotomayor wrote the unanimous opinion. The Supreme Court plainly disagreed with U.S. government contentions that the WOTUS Rule could only be reviewed in the Courts of Appeals. The federal Clean Water Act makes review of specified actions exclusively Court of Appeals business if the subject matter fits within two of enumerated categories: 1) EPA actions "in approving or promulgating any effluent limitation or other limitation under section[s] 1311, 1312, 1316, or 1345," 33 U. S. C. §1369(b)(1)(E), and 2) EPA actions "in issuing or denying any permit under section 1342," §1369(b)(1)(F).

### The Clean Water Act and Judicial Jurisdiction

The Court's opinion starts with a fairly comprehensive overview of the Clean Water Act regulatory programs and the means of their implementation. It notes that either National Pollutant Discharge Elimination System (NPDES) permits from EPA or an authorized state, or Section 404 "dredge and fill permits" from the Corps serve as the principal exceptions to the CWA's prohibition on discharges of pollutants from point sources and the dredging or filling of jurisdictional waters. The Court also noted that "waters of the United States" is the active phrase that generally determines waters to which the Clean Water Act programs apply. The Court noted that its importance, while central, does not govern the proper *forum* in which review of its adoption can be sought.

### Areas of Express Exclusive Jurisdiction

The Supreme Court explained that the CWA gives exclusive jurisdiction of specified agency actions in the Courts of Appeals. It then examined the validity of government arguments that what was expressly a "definitional" rule change that imposed no duty on states or dischargers in and by itself was also within the specified categories of Appeals Court exclusivity.

The Court's analysis begins by noting that §1369(b)(1) enumerates seven categories of EPA actions that have to be challenged directly in the federal Courts of Appeals. Of those seven, only two were at issue in the WOTUS case: 1) subparagraph §1369(b)(1)(E): which covers actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," and 2) subparagraph §1369(b)(1)(F), which covers actions "issuing or denying any [NPDES] permit."

### WOTUS as an 'Effluent Limitation'

The Government contended that the WOTUS definition was an "effluent limitation" and that therefore review was exclusively in the Courts of Appeals. The Supreme Court made short work of discrediting that position. To the Court, plainly the rule is not an effluent limitation because:

> An 'effluent limitation' is 'any restriction . . . on quantities, rates, and concentrations' of certain pollutants 'which are discharged from point sources into navigable waters.' §1362(11).

The Court found that the WOTUS Rule imposes

no such restriction. Rather, the Rule announces a regulatory definition for a statutory term and "imposes no enforceable duty" on the "private sector." *See*, 80 *Fed. Reg.* 37102.

### WOTUS and 'Other Limitations'

The Court went on to explain that the Government was wrong to contend that WOTUS could be seen as an example of "other limitations" as that terms is used in subparagraph E. The Opinion noted the specifics of each of the statutory limitations expressed in subparagraph E, and that each deals with a physical or operational limitation or restriction of discharges. WOTUS was not that sort of restriction. It was therefore not appropriate to read into the words "other limitations" the broad meaning the government was urging. The Court stated that to do so the Court would be "rewriting the statute," which it was not free to do.

### WOTUS and National Pollutant Discharge Elimination System Rules

Additionally, the Court rejected the Government's attempts to say that WOTUS was adopted somehow "under" § 1311 (NPDES rules). The Court found that § 1311 makes no reference to "waters of the United States." The Court concluded that the definitional term change was pursuant to the Clean Water act's general regulation authority, viz. 41 U.S.C. §1361.

### WOTUS and Section 1369(b)(1)(F)

The Court then proceeded to deal with the contention by the United States that WOTUS review was controlled by subparagraph §1369(b)(1)(F). The Court found that:

> . . .that provision grants Courts of Appeals exclusive and original jurisdiction to review any EPA action 'in issuing or denying any permit under section 1342.'

However, the Court found that NPDES permits issued under §1342 "authoriz[e] the discharge of pollutants" into certain waters "in accordance with specified conditions." Therefore, the Court concluded that the Government's argument was far off the mark, virtually ignoring the statutory language. Since as previously indicated regarding subparagraph (E) the WOTUS rule prescribes no limitations, and the statute is plain, so the argument is rejected.

### Policy Argument That the Courts of Appeals Are Best Suited for WOTUS Decisions

The Court in closing dealt with policy arguments the Government made to it. Essentially they argued that the Courts of Appeals', reposed with exclusive jurisdiction, made better sense than individual District Courts— essentially arguing that the Courts of Appeals in Clean Water Act matters were superior to those of the lower courts. The Supreme Court by unanimous ruling rejected the invitation to act as a super-legislature. Congress, it said, has particularized what actions go to the Courts of Appeals. Given that the particularization did not embrace general rules or definitions like WOTUS, the Supreme Court would and could not override the will of Congress on jurisdiction:

> It is true that Congress could have funneled all challenges to national rules to the courts of appeals, but it chose a different tack here: It carefully enumerated the seven categories of EPA action for which it wanted immediate circuit court review and relegated the rest to the jurisdiction of the federal district courts[.]

The Court went on to emphasize the point as follows:

> As the Court recognized in *Florida Power*, jurisdiction is 'governed by the intent of Congress and not by any views we may have about sound policy.' [Citations Omitted] Here, Congress' intent is clear from the statutory text.

### Conclusion and Implications

It's important to note what the Court's ruling *does not do*—it did not address the merits of the challenges to the WOTUS rule. By so doing [or not doing] legal scholars have already opined that the status of the nationwide injunction entered by the Sixth Circuit Court of Appeals enjoining enforcement of the WOTUS rule, remains intact.

The consequence of the Court's opinion will certainly be that whatever change in WOTUS

the current administration arrives at, there will be multiple District Court challenges. Months ago the current EPA and Corps suspended effectiveness of the challenged WOTUS definition for two years, and the permit programs are proceeding under the definitions that governed the programs pre-WOTUS. It is remarkable that a Supreme Court, so often noted for philosophical and political splits, came to a unanimous ruling on what the language of an important environmental law statute means. The Supreme Court's opinion is accessible online at: https://www.supremecourt.gov/opinions/17pdf/16-299_8nk0.pdf (Harvey M. Sheldon)

## TENTH CIRCUIT HOLDS CONSERVATION GROUPS MAY INTERVENE IN LITIGATION TAKING AIM AT OIL AND GAS LEASING POLICY REFORMS CONSERVATION GROUPS HAD NEGOTIATED WITH BLM

*Western Energy Alliance v. Zinke*, 877 F.3d 1157 (10th Cir. 2017).

The Tenth Circuit reveresed a U.S. District Court denial of conservation groups' motion to intervene in a trade association's suit seeking to force more frequent sales of oil and gas leases on federal lands. The court held the intervenors have a legally protectable interest not only in seeking to prevent environmental harms, but also specifically in leasing process reforms they had negotiated with the agency—reforms the trade association's complaint sought to revise or rescind. Further, the court held the agency would not adequately protect the public interest the intervenors sought to defend, relying in part of Executive Orders seeking to loosen restrictions on oil and gas leasing on federal lands issued after the trial court's hearing on the motion to intervene.

### Background

The Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1787 (FLPMA) grant the Department of the Interior's Bureau of Land Management (BLM) authority to manage public lands for multiple uses, including to lease public lands to private parties for oil and gas development. The Mineral Leasing Act, 30 U.S.C. §§ 181-287 (MLA) also provides authority for mineral leasing on public lands and specifies how and when leases are to be offered, including by providing for quarterly lease sales. 30 U.S.C. § 226(b)(1)(A) ("Lease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."), *see also*, 43 C.F.R. 3120.1-2(a).

In preparation for offering leases, BLM first develops and adopts Resource Management Plans (RMP) that, *inter alia*, identify parcels of public land that are open for, or closed to, oil and gas development. 43 U.S.C. § 1712; 43 C.F.R. Part 1600. RMPs must provide fo:

> . . .multiple use management of federal land by "striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.' *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58, (2004) (quoting 43 U.S.C. § 1702(c)). . . .The public must have a chance 'to become meaningfully involved in and comment on the preparation and amendment of' RMPs. 43 C.F.R. § 1610.2(a).

Once a RMP is adopted, the grant of an oil or gas lease and all other subsequent approvals for private use, and governmental management, of the land within the RMP must be consistent with and conform to the RMP. 43 C.F.R. § 1610.6-3(a).

Having adopted a RMP, the applicable BLM "State Office" (of which there are 12, with 11

> having jurisdiction over a single western state (including Alaska) and the twelfth covering the "Eastern States") identifies specific parcels that it will offer for lease via 12 competitive lease sale process mandated by FLPMA and the MLA. 43 C.F.R. Subpart 3120. The competitive lease sale process involves the posting of a public notice specifying the lands to be leased and a 30-day public protest period. 43 C.F.R. § 3120.4-2; BLM Manual 3120.
>
> While a protest is pending, the BLM can suspend a specific parcel from the offering. 43 C.F.R. § 3120.1-3. Although '[s]tate offices should attempt to resolve protests before the sale of the protested parcels,' protests unresolved by the lease auction date do not prevent bidding on the contested parcel. *BLM Manual* 3120.

In 2010, BLM revised its process for identifying specific parcels to be offered for lease to resolve "years of negotiation and litigation" by various conservation groups, including those seeking to intervene in this case. Instruction Memorandum 2010-117 (Leasing Policy Reform) As pertinent here, the Leasing Policy Reform provided that:

> . . .each State Office must still hold at least four total lease sales per year where eligible lands are available, the Leasing Reform Policy mandates that State Offices schedule lease sales on a rotating basis. . . .[Specifically] . . .[S]tate [O]ffices will develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review policy established in this IM. State offices will extend field office review timeframes, as necessary, to ensure there is adequate time for the field offices to conduct comprehensive parcel reviews.

Western Energy Alliance, a non-profit trade association, sued under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (APA) and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (DJA), alleging Leasing Policy Reform violate the MLA by "causing fewer than four lease sales per State per year to take place," and sought relief under the DJA including directing BLM "to revise or rescind all agency guidance and instruction memoranda," including the Leasing Reform Policy, "that directs BLM's lease sale program in a manner contrary to law."

Various conservation groups, including those that had negotiated and litigated with BLM in order to obtain the agency's implementation of the Leasing Reform Policy, sought to intervene in the litigation; their application was denied by the District Court.

## The Tenth Circuit's Decision

### Federal Intervention

Federal Rule of Civil Procedure 24(a) allows non-parties to intervene if:

> (1) the application is timely; (2) the applicant[s] claim[ ] an interest relating to the property or transaction which is the subject of the action; (3) the applicant[s'] interest may as a practical matter be impaired or impeded; and (4) the applicant[s'] interest is [not] adequately represented by existing parties.

### Timeliness

The District Court had found the conservation groups' application to intervene was timely and they:

> . . .had a legally protectable environmental interest in the lawsuit, *i.e.*, their interest in protecting public lands from the impacts of oil and gas drilling.

Following its own precedent, the Tenth Circuit agreed with the trial court that the application to intervene satisfied these two elements. As to the first, the application was filed within 60 days of the initiation of the trade group's lawsuit and the trade group was not prejudiced by any delay. *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001).

### Legally Protectable Interest

With regard to the second element, the court had previously "declared it indisputable that a prospective intervenor's environmental concern is a legally protectable interest." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). But

while the trial court had recognized only that the conservation groups have a "protectable interest[] [in] obviating and/or minimizing the environmental impact of oil and gas development on public lands," the lower court had rejected any protectable interest held by the groups in "preserving the reforms they had worked to implement, including the Leasing Reform Policy" because, based on representations made by the trade group at the motion on the application to intervene, the court "determined the [trade group] is not 'attempt[ing] to set aside or modify the'" Leasing Reform Policy. The Tenth Circuit disagreed, pointing out that "the Leasing Reform Policy. . .requires that State Offices conduct lease sales on a rotational basis" and the:

> . . .complaint vividly outlines a number of instances where it contends compliance with the Leasing Reform Policy has caused the BLM to fall short of holding quarterly lease sales. If the BLM's current procedures, including those dictated by the Leasing Reform Policy, serve as a roadblock in achieving quarterly lease sales, the BLM will presumably have to abandon both its existing procedures and underlying policies.

The court went on to further find that:

> . . .the complaint, which has not been amended, frames the issues before the court. And, among other relief requested in the complaint, the WEA explicitly asks the district court to '[d]irect ... BLM to revise or rescind all agency guidance and instructional memoranda, including [the Leasing Reform Policy,]. . .that direct implementation of. . .BLM's lease sale program in a manner contrary to law.

The court thus concluded the conservation groups had an interest in protecting the Leasing Reform Policy from being revised or rescinded.

### Interest Impaired or Impeded by Pending Litigation

The third element, "whether the conservation groups' interest may be impaired or impeded by the pending litigation," imposes a "minimal burden" on the environmental intervenor to show it is "possible" the litigation will impair their interests. *WildEarth Guardians*, 604 F.3d at 1199. Impairment is shown:

> . . .where the district court's decision would require the federal agency to engage in an additional round of administrative planning and decision-making that itself might harm the movants' interests, even if they could participate in the subsequent decision-making.

Here, if the trade group eventually prevails, BLM would have to engage in a process to revise or rescind the Leasing Reform Policy.

### BLM Cannot Adequately Represent the Interests of Government and the Intervenors

Lastly, the Circuit Court found the fourth element satisfied, as BLM cannot as a matter of law adequately represent both the government and public interests intervenors. *WildEarth Guardians v. United States Forest Service*, 573 F.3d 992, 996-997 (10th Cir. 2009) (*U.S. Forest Serv.*). This is because "[i]f the agency and the intervenors would only be aligned if the district court ruled in a particular way, then a possibility of inadequate representation exists," citing its unpublished opinion in *N.M. Off-Highway Vehicle All. v. United States Forest Serv.*, 540 Fed.Appx. 877, 881–82 (10th Cir. 2013). And while "if a case presents only a single issue on which the agency's position is quite clear, and no evidence suggests that position might be subject to change in the future, then representation may be adequate," (citing *Kane Cty., Utah v. United States*, 597 F.3d 1129, 1134–35 (10th Cir. 2010)), here "the change in the Administration raises 'the possibility of divergence of interest' or a 'shift' during litigation." Quoting *U.S. Forest Serv.*, 573 F.3d at 996–97.

Already:

> . . .[t]he conservation groups have specifically identified Executive Orders signed by President Trump which have directed the review of agency regulations that potentially burden the development of oil and gas resources. . . .In the face of these Executive Orders, we conclude that the interests and policy goals of the BLM and the conservation groups will possibly diverge. As a result, we determine that the BLM cannot adequately represent the conservation groups' interests.

### Conclusion and Implications

The many abrupt policy changes implemented as a result of the change in administrations continue to filter through pending cases, dictating or, as here, influencing previously unanticipated outcomes in a variety of procedural contexts. The Trump administration's Executive Orders—necessarily issued after the December 15, 2016 District Court hearing on the motion to intervene—provide a relatively rare example of a Circuit Court relying on evidence not before the trial court. The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=4322743133440206818&q=Western+Energy+Alliance+v.+Zinke&hl=en&as_sdt=2006&as_vis=1 (Deborah Quick)

## DISTRICT COURT HOLDS CLEAN WATER ACT NOTICE OF INTENT TO SUE INSUFFICIENT FOR NOT ACCURATELY STATING THE DATE OF VIOLATION

*Black Warrior Riverkeeper, Inc. v. Metro Recycling*, ___F.Supp.3d___, Case No. 2:17-cv-01050-LSC (N.D. Al. Dec. 18, 2017).

The parties have a history of litigation resulting in several settlement agreements between them. Here, plaintiff filed a federal Clean Water Act (CWA) notice of intent to sue based on plaintiff's evidence of a January 28, 2016 discharge of pollutants from defendant's landfill's retention basin. The parties agreed, however, that plaintiff's notice of intent stated that the CWA violation occurred on February 3, 2016—and not the date [January 28, 2016] on which plaintiff actually observed and collected run-off from defendant's retention basin. Defendant alleged that this error rendered plaintiff's notice of intent insufficient under 40 C.F.R. § 135.3. The U.S. District Court for Northern District of Alabama agreed holding that the Eleventh Circuit requires the court to follow the "strict compliance" standard, which required plaintiff to include in its notice of intent "the date or dates of such [CWA] violation." *See*, 33 U.S.C. § 1365(b).

### Background

Defendant owned and formerly operate a used-tire landfill, which discharged pollutants into tributaries of Whites Creek, which it itself a tributary of the Locust Fork of the Black Warrior River. Plaintiff filed its first lawsuit on August 21, 2007 to halt the discharge of pollutants from defendant's landfill without first obtaining a National Pollutant Discharge Elimination System (NPDES) permit as required under federal and state law. The parties settled this lawsuit on October 15, 2008, executing a settlement and consent decree (First Decree) under its terms requiring defendant to obtain an NPDES permit.

Defendant elected to close its landfill rather than to continue operating it. It was still obligated under the First Decree to obtain an NPDES permit and to cease releasing pollutants above a stated concentration. The parties continued negotiations on how to ensure compliance with the First Decree—culminating in a Second Decree.

The Second Decree further modified defendant's duties as originally stated. It required defendant to complete the closure of its landfill in accordance with the State's approved Modified Closure Plan. Under the Second Decree, defendant further agreed to construct a retention basin that would capture runoff or seeps from the landfill. Following closure, defendant further agreed to conduct quarterly water monitoring at the top of the retention basin spillway, and to take further corrective action if testing warranted.

On January 28, 2016, plaintiff witnessed a discharge from defendant's landfill's retention basin, which they sampled. Plaintiff's test results were returned on February 3, 2016, indicating further releases of pollutants from defendant's landfill's retention basin. Plaintiff issued a notice of intent to sue stating that the violation occurred on February 3, 2016, when it actually occurred on January 28, 2016.

### The District Court's Decision

The Administrator of the EPA specified that notice of intent:

> . . .shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in 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 and address of the person giving the notice. 40 C.F.R. § 135.3 (emphasis added).

The parties disputed the standard of review of the notice of intent's terms for compliance under 40 C.F.R. § 135.3. Under *National Parks & Conservation Ass'n, Inc. v. Tennessee Valley Authority*, 502 F.3d 1316, 1329 (11th Cir. 2007) "[t]he notice requirements are strictly construed to give the alleged violator the opportunity to correct the problem before a lawsuit is filed." The issue faced by this court is:

> . . .the somewhat contradictory task of attempting to 'strictly construe' a regulation that requires the notice of intent to '*include sufficient information* to permit the recipient to identify… the date or dates of such violation. *Id.*, 40 C.F.R. § 135.3.

The Eleventh Circuit has held that there are two purposed for the notice of intent requirement. First one is the give the alleged violator the opportunity to correct any violation and avoid suit. *See*, *National Parks*, *supra*, 502 F.3d at 1329. Another is to "…effectuate Congress's preference that the Act be enforced by governmental prosecution." *Nat'l Envtl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1099 (11th Cir. 1991).

In *National Parks*, *supra*, 502 F.3d at 1328, the court held that a notice of intent does not comply with 40 C.F.R. § 135.3 when its allegations of fact are overbroad. Here, plaintiff alleged that the court should adopt a more relaxed standard to uphold its notice as:

> . . .sufficiently specific to inform the allege violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.

But, the District Court here found that that ran contrary to the "strict compliance standard" adopted by the Eleventh Circuit.

The court also rejected plaintiff's argument that it could rely on defendant's actual knowledge of plaintiff's claim or presence during plaintiff's testing—as having on bearing on the sufficiency of the notice of intent letter. The court stated that:

> Plaintiffs cannot rely on defendant's participation in the EPA administrative action involving similar allegations to substitute for the lack of specificity in their letter. [citing to *National Parks*, *supra*, 502 F.3d at 1330.]

### Conclusion and Implications

Ultimately, the court found it must strictly construe the requirements of 40 C.F.R. § 135.3, and must hold that plaintiff's notice failed to have sufficient information to permit defendant to identify the date or dates of the violation.

In the realm of citizen suit notice precedent, exacting compliance with notice requirements are normally the rule and mistakes can doom the case from the outset. The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=4209233793860849157&q=Black+Warrior+Riverkeeper,+Inc.+v.+Metro+Recycling&hl=en&as_sdt=2006&as_vis=1

(Thierry Montoya)

# DISTRICT COURT ALLOWS MAJORITY OF CLASS ACTION CLAIMS TO PROCEED REGARDING CHEMICALS CONTAMINATING LOCAL GROUNDWATER AND LAND

*Brown v. Saint-Gobain Performance Plastics*, ___F.Supp.3d___, Case No. 16-cv-242-JL (D. N.H. Dec. 6, 2017).

In an ongoing environmental trespass action, the U.S. District Court for the District of New Hampshire granted in part and denied in part defendants' Saint-Gobain Performance Plastics Corporation (Saint-Gobain) and Gwenael Busnel (Busnel) motion to dismiss claims brought by a class of plaintiffs, finding that plaintiffs pleaded facts sufficient to maintain a majority of the claims related to toxic chemicals contaminating local ground water.

## Factual and Procedural Background

Since 2000, Saint-Gobain has owned and operated a manufacturing plant in Merrimack, New Hampshire, with Busnel serving as the general manager since 2012. The plant uses perflurooctonoate (AFPO), a derivative of perfluorooctanoic acid (PFOA), in its manufacturing process, and in early 2016, Saint-Gobain reported the presence of elevated levels of PFOA in the municipal water system. PFOA was also discovered in residential wells near the plant. PFOA is water-soluble, easily migrates into groundwater, remains present for long after released, and the kicker, increases the risk of cancer, as well as other illnesses.

Plaintiffs alleged that Saint-Gobain was aware of the potential for PFOA contamination arising from its manufacturing processes because of an earlier and similar contamination near its New York plant. Further, plaintiffs alleged that Saint-Gobain moved its operations to Merrimack because of tighter PFOA emission regulations at its former location and after moving to Merrimack, Saint-Gobain failed to install systems to limit PFOA emissions.

Plaintiffs brought claims under four common-law torts: trespass, nuisance, negligence, and negligent failure to warn. They also sought to recover under the equitable doctrine of unjust enrichment.

For those who *own* residential property within the contamination areas, plaintiffs sought damages for injury to their property, including diminished market value, costs incurred to remediate and mitigate the contamination, and loss of use and enjoyment of their property. For those who *resided* in the contamination areas and consumed water containing PFOA for at least one year, or were born to mothers who consumed the same, plaintiffs sought to recover the costs of monitoring for injuries related to PFOA exposure.

Defendants moved to dismiss the complaint in its entirety, contending that plaintiffs had not pleaded any present, physical injury to their property or persons, and that the economic loss doctrine precluded their recovery in tort for purely economic damages. They further argued that plaintiffs had failed to plead intentional trespass and that New Hampshire law does not recognize their claims for negligent failure to warn and unjust enrichment.

## The District Court's Decision

### Trespass-Economic Losses

For the two sub-classes of plaintiffs that claimed injury from chemical contamination of their real property the defendants moved to dismiss the negligence, trespass, and nuisance claims of these plaintiffs for failure to allege present and actual damages to their property. As to trespass and nuisance claims, despite the fact that plaintiffs' allegations were fairly general, the court found that the property-owning plaintiffs had an interest sufficient to state claims for, at the minimum, economic losses arising from the presence of contaminated groundwater by alleging diminished property values and pleading the presence of PFOAs in the groundwater.

### Negligence-Physical Injury to Property

As to the negligence claim, Saint-Gobain contended that the general allegations were not adequate as to alleging present, physical injury to their property and that the economic loss doctrine precluded them from recovering in negligence for economic losses. In a situation such as this, where the alleged losses arose

from negligence outside of the context of a contractual or purely economic relationship, it was unclear to the court whether the economic loss doctrine in New Hampshire would bar recovery of economic losses. In what will be a recurring theme, the court denied the motion to dismiss because it was disinclined to dismiss the plaintiffs' negligence claim at such an early stage in litigation where they had sufficiently pleaded damages to their property to maintain the trespass and nuisance claims.

### Medical-Monitoring Plaintiffs

For the two other sub-classes of plaintiffs, the medical-monitoring plaintiffs, whom sought damages in the form of costs to cover monitoring for potential medical conditions arising from their exposure to PFOA, even without a present, physical injury, Saint-Gobain moved to dismiss, arguing that the lack of any present physical injury to these plaintiffs precluded their recovery in tort. While some states do allow recovery for the costs of medical monitoring, other states have rejected an expansion of the negligence doctrine to encompass potential, not present, physical injury. Neither New Hampshire's Legislature nor its Supreme Court has spoken on this question. Again, the court denied the motion to dismiss, stating that it would consider whether to certify this question to the New Hampshire Supreme Court.

### Failure to Control or Abate PFOA

With regards to the trespass claim, defendants argued that plaintiffs' claim for trespass should be dismissed because plaintiffs had not alleged that Saint-Gobain intentionally invaded their property. The court noted that involuntary or accidental entry is not trespass, but at the same time, there does not necessarily have to be hostile intent or a desire to harm. Instead, the standard is whether there is an intent to bring about a result that will invade the interests of another. By alleging that Saint-Gobain knew of the risks of PFOA and that its manufacturing processes could result in contamination, plaintiff sufficiently alleged that Saint-Gobain failed to control or abate PFOA emissions and the court declined to dismiss plaintiffs' claim.

### Failure to Warn

Further, plaintiffs claimed that defendants negligently failed to warn them of the PFOA release and the likelihood of contamination. Defendants argued they had no duty to warn under New Hampshire law because when there is an omission of an action, there must be special relationship with plaintiffs, and here, there was none. Plaintiffs argued that by acting affirmatively by releasing PFOA, defendants were required to exercise the duty of a reasonable person and protect against the risk—by warning plaintiffs. The court acknowledged that this general duty to warn may really just be a general negligence claim but again declined to dismiss the claim because litigation was in its early stages.

### Unjust Enrichment

Leaving common-law torts and moving into the equitable remedy of unjust enrichment, plaintiffs claimed that Saint-Gobain was unduly enriched, not for any benefit bestowed, but because of the savings they incurred in not limiting or preventing the release of PFOA. This is sometimes known as "negative unjust enrichment." Unlike the tort claims, the court granted defendants motion to dismiss because the claim was not based on a specific legal principle or situation which equity had established or recognized in New Hampshire.

Finally, defendants moved to dismiss plaintiffs' residual claim against Saint-Gobain based on respondeat superior, but the court only granted the dismissal as to the unjust enrichment, in line with the decisions above.

### Conclusion and Implications

A theme throughout the court's decision was plaintiffs' fairly general allegations contained in its complaint. Because litigation is still in its early stages, the court denied all but one of plaintiffs' claims, but as litigation progresses, plaintiffs' could run into problems proving their claims if they cannot build upon the facts that they alleged in the complaint. The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=14284050403672086838&q=Brown+v.+Saint-Gobain+Performance+Plastics,+2017&hl=en&as_sdt=2006&as_vis=

(Danielle Sakai, Craig Hayes)

# DISTRICT COURT FINDS PLAINTIFFS FAILED TO SHOW ARBITRARY AND CAPRICIOUS ACTION BY THE U.S. ARMY CORPS OF ENGINEERS IN GRANTING MOSAIC FERTILIZER A CLEAN WATER ACT PERMIT

*Center for Biological Diversity v. U.S. Army Corps of Engineers*,
___F.Supp.3d___, Case No. 8:17-cv-618-T-23MAP (M.D. Fl. Dec. 14, 2017).

Plaintiffs sued the U.S. Army Corps of Engineers (Corps) alleging that its issuance to Mosaic Fertilizer of a federal Clean Water Act (CWA) permit violated the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), and the Administrative Procedure Act (APA). Under the permit, Mosaic Fertilizer may extract phosphate from several thousand acres in Hardee County, but must mitigate the environmental effect of the mining. "Exceedingly deferential to an agency's decision, the judiciary invalidates a decision only if the agency acted arbitrarily and capriciously." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541-42 (11th Cir. 1996). Applying this standard, the court held that plaintiffs failed to show arbitrary and capricious action.

## Background

In 2010, a predecessor of Mosaic Fertilizer applied for a Corps CWA permit—proposing to mine phosphatic rock in Hardee County. The Corps issued the permit some six years later for the mine called: South Pasture Extension. The Corps issued the permit following the preparation of a 700-page Environmental Impact Statement (EIS) discussing the environmental impact of Mosaic Fertilizer's four proposed mines: the subject mine, Ona, Wingate, and DeSoto mines. The Corps considered the four mines to be "similar" or "closely related," such that they could be studied in a single EIS.

The plaintiffs filed suit seeking an invalidation of the CWA permit for the subject mine. On cross-motions for summary judgment, the court addressed plaintiffs' claims.

## The District Court's Decision

As to the standard of review, the court stated that an agency acts arbitrarily and capriciously, for example:

> . . .if the agency relies on an impermissible factor, if the agency fails to consider an important aspect of an issue, if the administrative record belies the agency's explanation for a decision, or if the agency's explanation for a decision 'is so implausible that [the decision] could not be ascribed to a difference in view or [] agency expertise.' *Motor Vehicles Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983).

### A Site Specific EIS

Plaintiffs alleged that the Corps failed to prepare a "site specific" EIS, but the record confirmed the Corps' preparation of a single EIS based on Mosaic Fertilizer's four proposed mine sites. The Corps concluded that the four mines:

> . . .have similarities that provide a basis for evaluating [the four mines] direct, indirect, and cumulative environmental impacts in a single Area wide Environmental Impact Statement.

In this regard the court found that plaintiffs' failed to present any challenge to the Corps decision.

### Need Statement

Before approving a project, an agency must consider reasonable alternatives—with suitability of an alternative dependent on the project's purpose, which the agency defines. Here, the court found that the Corps defined the mine's purpose as providing 3.37 million metric tons of phosphatic rock annually for the South Pasture beneficiation plant. Plaintiffs' alleged that the Corps' identification of 3.37 million metric tons as the project's purpose preordained the rejection of any alternative "that did not guarantee the extraction of that exact amount of phosphate." *Id.*

However, in the end, the plaintiffs failed to show anything arbitrary or capricious about the Corps' definition of the project's need. The record confirmed that the South Pasture beneficiation plant could process 3.5 million metric tons annually, so Mosaic Fertilizer originally aspired to mine up to that amount—with the Corps eventually settling on a bit more conservative value for the project-specific need of 3.37 million metric tons.

### Project Alternatives

40 C.F.R. § 230.10 prohibits an agency's permitting a discharge of dredged and fill materials if a practicable alternative causes less harm to the environment. Under this regulation and under the CWA, the practicability of an alternative depends partially on the "cost, existing technology, and logistics" of the alternative. Plaintiffs alleged as arbitrary and capricious the Corps' exclusion of an alternative that contemplated mining phosphatic rock more than ten miles from the South Pasture beneficiation plant—as the exclusion of an alternative more than ten miles from the plant would predetermine the results and preclude analysis of alternatives involving imported rock.

The court, however found that the EIS:

> . . .cogently explained the impracticability of a phosphatic-rock mine more than ten miles from the South Pasture beneficiation plant as such would require the position of a million-dollar pump about every mile along the pipeline to prevent the [rock] slurry from 'settling to the bottom and chocking the pipeline. The cost of equipment, maintenance, and power for the pipeline increases exponentially as the length of the pipeline increases.

The court thus found that plaintiffs failed to identify anything arbitrary and capricious about the Corps' exclusion of a phosphatic-rock mine more than ten miles from the beneficiation plant.

### Violations of the ESA

Plaintiffs alleged that the U.S. Fish & Wildlife Service's (FWS) failure to account for the proposed DeSoto, Ona, and Wingate East mines tainted the environmental baseline for the proposed SPE mine. However, the court found that the Corps had adequately explained that the "action areas of the relevant species for Wingate East did not overlap with the corresponding action areas for the SPE project." The Corps had, justifiably, excluded the other proposed mines from the environmental baseline of the proposed SPE mine.

Plaintiffs also alleged that the FWS mischaracterized the permanent destruction of some unspecified species' habitat as "temporary," but failed to note that the FWS noted that Mosaic Fertilizer's reclamation efforts would adequately restore the affected land, and, in some instances, would improve the land's suitability for habitation by threatened and endangered species.

Finally, plaintiffs alleged that the FWS failed to quantify "take" for several species. The ESA requires the FWS to "quantify" take if practicable. *Miccosukee Tribe of Indians v United States*, 566 F.3d 1257, 1274-75 (11th Cir. 2009). Here, the FWS identified several snake species habitat and behavior that precluded quantifying the "take" from harassment.

### Conclusion and Implications

This case did not seem like a "close call" for the court as to any of plaintiffs' allegations. A common theme by the court was—"but you failed to consider the Corps' analysis on this…" The court's decision is accessible online at: https://www.courthousenews.com/wp-content/uploads/2017/12/MOSAIC-ORDER.pdf

(Thierry Montoya)

# DISTRICT COURT FINDS CAUSATION AND REDRESSABILITY ELEMENTS OF STANDING NOT MET WHEN CHALLENGED AGENCY REGULATIONS TRACK ENABLING STATUTE

*National Wildlife Federation v. U.S. Department of Transportation*, ___F.Supp.3d___, Case No. 15-cv-13535 (E.D. Mich. Dec. 12, 2017).

Applying Sixth Circuit Court of Appeals' precedent, the U.S. District Court for the Eastern District of Michigan dismissed an environmental group's challenge to regulations for review of spill response plans that are required to operate "onshore" oil pipelines. The plaintiff failed to establish that the federal Clean Water Act (CWA) requires review of plans for those portions of onshore pipelines that cross-navigable waters under separate "offshore" regulations.

## Background

Following the Exxon Valdez oil spill, Congress amended the Clean Water Act (33 U.S.C. § 1251 *et seq.*) by adopting the Oil Pollution Act, 33 U.S.C. § 2701, *et seq.*, requiring owners and operators of certain oil facilities from transporting oil via those facilities without prior approval of a spill response plan. 33 U.S.C. § 1321(j)(5)(F)(i)-(ii). Plan approval was vested in the President, and then delegated to the Department of Transportation (DOT) for onshore facilities, and the Department of the Interior (DOI) for offshore facilities.

The term, "Facilities," indisputably includes oil pipelines. The instant dispute centers on whether pipelines that traverse both land and inland waters are "onshore" along their entire length, or onshore only for those segments that traverse land, with segments laid over, in or under inland waters being "offshore."

DOT issued regulations "addressing land segments of oil pipelines" and "includ[ing] references to ... segments of pipelines that cross inland waters." *See*, *e.g.*, 46 C.F.R. § 194.115. DOI issued an "interim final rule" defining:

> . . .the term 'offshore' as 'the area seaward of the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the area seaward of the line marking the limit of inland waters.'
>
> Interim Final Rule, 58 *Fed. Reg.* 7489-01 (February 8, 1993).

DOI subsequently delegated to DOT "responsibility for transportation-related facilities, including pipelines, located landward of the coast line." 40 C.F.R. § Pt. 112, App. B. DOT has since:

> . . .reviewed the entirety of [land-based] interconnected pipelines under regulations promulgated for 'onshore' facilities, rather than reviewing separately the portions that traverse land under onshore regulations and the portions that traverse [inland] water under offshore regulations.

The plaintiff environmental advocacy organization brought suit under the Administrative Procedure Act (5 U.S.C. § 701, *et seq.*, the APA), alleging that the Secretary of Transportation had failed to perform a nondiscretionary duty under the CWA by: 1) failing, when evaluating spill response plans for interconnected pipeline networks, to "review[] separately the portions that traverse land under onshore regulations and the portions that traverse water under offshore regulations"; and 2) only considering whether spill response plans conform to the regulations, rather than to both the regulations and the CWA itself.

## The District Court's Decision

Prior to addressing the merits of plaintiff's claims the court concluded "the threshold doctrine of standing requires dismissal." *See, Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Faced with a motion for summary judgment on the

basis that it lacked standing, plaintiff was required to establish "the factual predicates of all aspects of standing ... through proper evidence of specific facts." *Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532, 537 (6th Cir. 2005). Article III standing requires that plaintiff establish:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000).

The APA adds two additional standing requirements, known as "prudential standing":

> First, the plaintiff's complaint must relate to agency action, which is defined to include failure to act... Second, the plaintiff must have suffered either legal wrong or an injury falling within the zone of interests sought to be protected by the statute on which his complaint is based. Lueckel, 417 F.3d at 536.

Lastly, as an organization the plaintiff had to establish representational standing, *i.e.*, that it could sue on behalf of its members, by demonstrating that:

> . . .its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. *Friends of the Earth*, 528 U.S. at 181.

### Organizational Standing

The District Court easily found that the plaintiff organization satisfied the requirements or prudential standing—the suit put at issue acts of the DOT, and the plaintiff organization asserted its purposes include "protecting wildlife and natural resources from the impacts of spills of oil or hazardous substances," and the Oil Pollution Act seeks to prevent or mitigate harms from oil spills. Likewise, with respect to the second and third elements of representational standing, the court found that "interests at stake are germane" to the organization's purpose and that the participation of individual members was not essential to resolve the purely legal issues contested by the parties.

### Article III Standing—Redressability

Thus, the only remaining issue was whether individual members would have Article III standing, and as to that test the court focused on causation and redressability:

> While [plaintiff] has satisfied the harm requirement, it cannot satisfy the special causation and redressability requirements applicable to challenges to agency action based on alleged procedural errors. '[A]n adequate causal chain in a case involving an agency's non-compliance with procedural requirements must contain at least two links: a link between the plaintiff's injury and some substantive decision of the agency, and a link between that substantive decision and the agency's procedural omissions.' *Lueckel*, 417 F.3d at 538.

Further, the *Lueckel* court "found 'substantial equivalence'" between causation and redressability, "observing that '[t]he question of the second causal link ... is hard to distinguish from the question of redressability.'" *Ibid.*

The plaintiff cleared the hurdle of the first causal link with ease, because it:

> . . .sufficiently allege[d] that its members' actual or threatened impairment of aesthetic, recreational, and property interests have resulted from the agency decision to allow oil pipelines to be operated with spill responses plans that allegedly do not comply with the CWA. . . .It is the second link that is [plaintiff]'s standing Waterloo.

The court went on the state that:

> While a plaintiff does not have to establish with 'any certainty' the challenged agency decision would have been different absent the allegedly wrongful conduct, the plaintiff nevertheless had to 'present 'evidence that their injuries. . .

> .reasonably could have been avoided' had the [agency] complied with its statutory duties.' *Lueckel*, 417 F.3d at 538, quoting *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003).

While plaintiff alleged DOT improperly reviewed spill response plans solely against its regulations, rather than the regulations *and* the CWA:

> . . .[t]he regulations faithfully track the statute. All of the requirements for spill response plans contained in the CWA are present in the regulations.

Thus, DOT's failure to recite that it had reviewed the plans for compliance with the statute could not have caused the harms plaintiff alleged, and conversely requiring the agency to review the plans against the statute—in substance identical with the regulations—would not redress any of the alleged harms. The court analogized to *Lueckel*, in which plaintiff environmental groups did not have standing to challenge U.S. Forest Service approval of management plans for logging in allegedly environmentally sensitive areas in contravention of standards found in the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271, *et seq.*, because:

> . . .there was no evidence that the Forest Service [approval] decision was made more likely by the failure to develop a comprehensive management plan, in contravention of the [Wild and Scenic Rivers Act], especially since the existing management plans were essentially equivalent to the plans required under the Act. *Id.* at 539–540.

### Alternate Standing Argument

Plaintiff's alternative standing theory was that DOT's "reviews and approvals were made pursuant to regulations which, by their terms, apply to onshore facilities rather than to offshore facilities," resulting in a failure to address harms particular to offshore facilities that could be redressed by requiring review under regulations specific to offshore facilities. This theory too failed. The court noted that the CWA "makes no distinction between the requirements for spill response plans for onshore and offshore facilities," citing 33 U.S.C. § 1321(j)(5)(D), which sets forth a unitary set of response plan requirements. And the onshore regulations under which DOT had reviewed spill response plans for many years "expressly cover navigable waters." Examples include: by requiring faster response times for spills occurring in "high volume area[s]," with high volume defined to include pipelines crossing "a major river or other navigable water" where "because of the velocity of the river flow and vessel traffic on the river, would require a more rapid response in case of a worst case discharge or substantial threat of such a discharge," 49 C.F.R. § 194.5; requiring that plans address operations in "environmentally sensitive areas," defined as an ""area of environmental importance which is in or adjacent to navigable waters," *ibid.*; and by the agency's expression of its intent in adopting the regulations to avoid "substantial harm to the environment" by preventing or mitigating the effects of "discharging oil into or on the navigable waters," a risk posed by onshore pipeline networks being "located adjacent to" and "often cross[ing]," navigable waters. 58 Fed. Reg. at 247.

### Conclusion and Implications

In the end, for the court, the congruence of the regulations with the statute established here, there was no causal link between the harms alleged and the agency's actions. This case is a good illustration of the interrelated nature of the inquiries into causation and redressability, as the *Lueckel* court noted, because for the same reason redressability was lacking—requiring the agency to review the spill response plans for compliance with the statute would not result in a different outcome. Further, the regulations alleged to be inadequate acknowledge and address risks associated with pipelines crossing navigable waters, taking even more steam out of plaintiff's causation argument. The District Court's decision is accessible online at: https://www.courthousenews.com/wp-content/uploads/2017/12/Pipeline-Ruling.pdf
(Deborah Quick)

# ENVIRONMENTAL GROUP'S EFFORT TO CLASSIFY RECYCLING BUSINESSES AS INDUSTRIAL FACILITIES REQUIRING CLEAN WATER ACT PERMITS REJECTED BY DISTRICT COURT

*Sierra Club v. Con-Strux, LLC*, ___F.Supp.3d___, Case No. CV 16-4960 (E.D. N.Y. Dec. 29, 2017).

Construing the U.S. Environmental Protection Agency's (EPA) regulations defining industrial facilities required to obtain storm water permits, the U.S. District Court for the Eastern District of New York determined that facilities producing construction aggregate from demolition debris are not "Scrap Recycling Facilities" requiring a storm water permit, and rejected the argument that all businesses engaged in recycling require such permits.

## Background

Defendant Con-Strux operates two facilities in the State of New York where it receives "recognizable uncontaminated concrete, asphalt pavement, brick, soil or rock," *i.e.*, "RUCARBS," which it then "crushes ... into different sizes for wholesale and re-use as road base, drainage stone, or as an aggregate replacement for certain [construction] applications." Con-Strux itself promotes the "benefit[s] of recycling RUCARBS as diverting otherwise useless demolition debris from landfills." Con-Strux's facilities are registered with the New York Department of Environmental Conservation (DEC), but under state law as they only accept RUCARBS they deemed "beneficial use facilit[ies]" within the meaning of 6 NYCRR 360-1.15(b)(11), and therefore Con-Strux is not required to obtain solid waste permit. Further, DEC staff orally communicated to Con-Strux that as registered beneficial use facilities, neither location is required to obtain a storm water runoff permit from New York's state-administered federal Clean Water Act (33 U.S.C. § 1251 *et seq.*, CWA) National Pollutant Discharge Elimination System (NYPDES) permitting program, DEC's State Pollutant Discharge Elimination Program (SPDEP).

Prior to filing a citizen's suit under 33 U.S.C. § 1365(a)(1), plaintiff notified DEC of their allegations and intention to file suit. DEC carried out an unannounced inspection of one of the facilities and subsequently sent a letter stating:

> . . .'that the only storm water runoff from Defendants' facility is discharged into on-site leaching pools, is contained on site, and that there is no discharge to surface waters.' ... Accordingly, the letter states the finding of the DEC that no storm water runoff permit is required.

## The District Court's Decision

The SPDEP issues two categories of storm water permits—Multi-Sector General Permits or individual NPDES Permits. "[A] Multi-Sector General Permit applies to a class of dischargers which involve similar operations or pollutants. Among those 'sectors' included in the Multi-Sector General Permit is sector 'N,' which is entitled 'Scrap Recycling Facilities;'" plaintiff alleged that Con-Strux's facilities fell within the Sector N definition of Scrap Recycling Facilities.

### The Clean Water Act

The EPA regulations controlling the SPDEP "identify the types of activities that are required by the CWA to obtain permits for storm water runoff, and which must therefore discharge run off water only in accord with a permit. 33 U.S.C. §§ 1311(a); 1342. Such regulated facilities are required either to refrain from any discharge, or to obtain permits to discharge storm water in accordance with the CWA," including certain facilities engaged in "industrial activity." 40 CFR § 122.26(a)(1)(ii). The regulations defining certain facilities as engaged in "industrial activity" reference:

> . . .'standard industrial classification' ('SIC') Codes[,]. . .a series of four digit codes created by the United States government in 1937 to categorize businesses. . .[by] refer[ring] to different types of 'establishments,' which are economic units, generally at a single physical location where a business is located and services are performed.

### The Code of Federal Regulation

The parties agreed that relevant here are the SIC Codes referenced in 20 CFR 122.26(b)(14)(vi), which are described as facilities involved in "the *recycling* of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards." 20 CFR 122.26(b)(14)(vi) (emphasis added). These "recycling" facilities are referred to in the EPA regulations as those "including but limited to those as Standard Industrial Classification 5015 and 5093." SIC Code 5015, which is not relevant here, refers to establishments engaged primarily in dismantling motor vehicles for scrap.

SIC Code 5093 "encompasses 'establishments primarily engaged in engaged in assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials.'"

> . . .[It] is specifically cross-referenced in the New York State Multi-Sector General Permit as describing those facilities falling within Sector N industrial activity.

Thus, the parties agreed that the dispositive issue in the litigation was whether Con-Strux's recycling of RUCARBS fits within SIC Code 5093 as an "industrial activity":

> Put simply, if Defendants are engaged in such activity, they are required to comply with the CWA, and must either contain all storm water runoff, or obtain a permit for the discharge thereof. If they do not engage in industrial activity, no such compliance is required, and this case is properly subject to dismissal.

Recycling activities falling within SIC Code 5093 are described by the Occupational Safety and Health Administration (OSHA)—the agency responsible for issuing SIC Codes—as:

> . . .[e]stablishments primarily engaged in assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials. This industry includes auto wreckers engaged in dismantling automobiles for scrap.

Con-Strux argued that it's RUCARBS processing facilities fell within SIC Code 5032—and thus is not an industrial activity requiring a storm water permit. SIC Code 5032 covers businesses "characterized as falling within the 'wholesale trade' industry," described by OSHA as:

> . . .[e]stablishments primarily engaged in the wholesale distribution of stone, cement, lime, construction sand, and gravel; brick (except refractory); asphalt and concrete mixtures; and concrete, stone, and structural clay products (other than refractories)."

The District Court agreed with Con-Strux that SIC Code 5032 more properly described its business of processing RUCARBS:

> All agree that Construx is engaged in the business of crushing materials such as stone, brick, asphalt and concrete to create an aggregate building material. These terms (stone, brick, asphalt, concrete and aggregate) are all specific terms that appear in the definition of SIC Code 5032, but not in the definition of SIC Code 5093 businesses. Instead, those businesses are described by terms such as automotive waste, scrap, oil and wiping rags—terms that plainly do not reflect the business in which Construx is engaged. Indeed, Defendants' business reflects much less the scrap and waste materials referred to in SIC Code 5093, and much more the brick and stone aggregate materials referred to explicitly in SIC Code 5032. Thus, the plain language of the CWA, and the SIC Codes to which it refers compels the conclusion that Construx is not a Section 5093 'recycler' that is subject to that statute's storm water runoff regulation.

### All Recycling Businesses Do Not Fall within SIC Code 5093

Further, the court noted that plaintiff's position that all recycling businesses should be deemed to fall within SIC Code 5093 "is too broad to define those businesses covered by the Act. This conclusion is not only supported by the plain language of the statute (which limits covered 'recycling' industrial facilities to those falling within SIC Code 5015 and 5093), but also by the statutory history preceding adoption of that definition," noting that EPA's proposed rule defining the term "industrial activity" had included

establishments "involved in *significant* recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards." 53 *Fed. Reg.* 49416, 49431 (emphasis added by the court). Responding to comments that the term "significant" "was ambiguous," EPA's final rule requires:

> . . .requires, as set forth above, a storm water runoff permit from 'facilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093.'

In addition, the court:

> . . .stresse[d]" that its conclusion did not depend on "whether or not Construx takes in 'contaminated' materials. While counsel speculated at oral argument that the materials crushed by Construx may contain a variety of materials picked up in their prior incarnation as part of a road surface, the inclusion of any such materials is not necessary to a holding as to whether Construx is an industrial facility within the meaning of SIC Code 5093. Instead, the parties agree, as they must, that it is not necessary that a business deal in 'contaminated' material for it to fall within the definition of SIC Code 5093.

### *De Novo* Review

The court further noted that it was not required to defer to DEC's opinion regarding whether Con-Strux's facilities required storm water permits, but rather was bound to review *de novo* Con-Strux's CWA compliance, citing *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 184 (2d Cir. 2010), *Soundkeeper, Inc. v. A & B Auto Salvage, Inc.*, 19 F.Supp.3d 426, 433-35 (D. Conn. 2014), and *San Francisco Baykeeper, v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007), and that even if such deference were required the record on the motion to dismiss did not include any written findings from DEC, but was rather limited to an affidavit reporting "a conversation alleged to have occurred between a DEC representative and Defense counsel."

### Conclusion and Implications

Plaintiff's aggressive interpretation of EPA's regulations was rejected here, and the court's thorough analysis of the SIC Codes at issue along with EPA's rulemaking process, although not precedential, provides useful guidance. The court's decision is accessible online at: https://scholar.google.com/scholar_case?case=15136665439886425539&q=Sierra+Club+v.+Con-Strux,+LLC&hl=en&as_sdt=2006&as_vis=1 (Deborah Quick)

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