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EASTERN WATER NEWS

MICHIGAN ATTORNEY GENERAL FILES CRIMINAL CHARGES AGAINST PUBLIC OFFICIALS IN FLINT WATER SUPPLY CALAMITY

In the continuing saga of the Flint Michigan water system crisis, Michigan Attorney General Bill Schuette filed a total of 13 felony charges and five misdemeanor charges against two state officials and one city official. The Michigan Attorney General, William "Bill" Schuette filed charges on April 20, 2016 against Stephen Busch, Michigan Department of Environmental Quality District 8 Water Supervisor (three felonies, two misdemeanors), Michael Prysby, Michigan Department of Environmental Quality District 8 Water Engineer (four felonies, two misdemeanors), and Michael Glasgow, City of Flint Laboratory and Water Quality Supervisor (one felony, one misdemeanor). The maximum sentences for each of the felonies range from four-five years in prison, with fines for each in a range between $5,000-$10,000.

Background

The Flint water crisis reportedly started in April 2014 when Flint changed its water source from treated water from the City of Detroit to the Flint River. The corrosiveness of the river water caused lead in aged water pipes to elevate the heavy metal levels so that up to 12,000 children were exposed to drinking water with excessive lead levels, with medical experts reporting that children—unborn and up to age five—bearing the greatest risk of significant health problems. Testing in Flint was reportedly done improperly by either the tests themselves or the handling of testing results. While the fallout and rebuilding in Flint occurs, water agencies around the country are either reviewing protocols or being evaluated publicly.

The *Corporate Crime Reporter* stated that Schuette noted the investigation remains fully active and that the charges filed today do not preclude additional charges at a later date. State officials alleged that Busch and Prysby committed misconduct in office by willfully and knowingly misleading federal regulatory officials. They were also charged with tampering with evidence. Glasgow was charged with tampering with evidence and willful neglect of duty. The justice system in Michigan is not rigged," the Attorney General said:

> Anyone that says Michigan has a wink and nod justice system is wrong. It doesn't matter who you are, what you do, if you break the law there will be consequences.

The charges were filed in the Genesee County 67th District Court in Flint.

The Charges Filed

Any number of questions will come to the minds of experienced environmental and criminal law attorneys whenever there is news about officials charged with criminal activity in the environmental regulatory arena. While bribery and self-dealing are plainly crimes (and these are *not* being alleged here), whether specific decisions or conduct in office are criminal is a different sort of situation. In part this is because there is generally at least qualified immunity from prosecution afforded to people who work for the government, whether state or federal, provided the actions in question are judgments that fall within the range of their duties, even if they make mistakes.

The Schuette charges are all made under state law. There is some evidence tampering charges. (Falsification of reports required under state or federal law has generally been known to be subject to prosecution.) However, Schuette's allegations also include a monitoring and treatment violation, which may well have involved regulatory interpretation and technical judgment. There are also allegations of the "common law" crime of "misconduct in office."

Coincidentally, in a decision issued Tuesday April 19, US District Court Judge John Corbett O'Meara ruled that he lacks federal jurisdiction in one of the several class actions filed on behalf of affected citizens. In *Boler v Early*, ___F.Supp.3d___, Case No.16-10323 (E.D Mich.) the plaintiff class is seeking damages on account of constitutional rights deprivation due to being deprived of a safe water supply. Judge O'Meara's Slip Opinion indicates the plaintiffs did not plead a proper cause of action due to the preemp-

tive effect of the Safe Drinking Water Act (SDWA) regulatory regime.

The *Boler* case was a plaintiff's class action claiming federal jurisdiction for violation of civil rights filed under 18 U.S.C.A. §1983. The judge ruled that because the case directly alleges deprivation of safe drinking water, and since the delivery of safe drinking water is the central concept and reason for the SDWA, he was compelled to conclude that the enforcement scheme in that law preempts any jurisdiction under Section 1983.

He cited to the Supreme Court's opinion on federal preemption in the *National Sea Clammers* case:

> When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex Cty. Sewarage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 20 (1981). In *Sea Clammers*, the Court found that the Federal Water Pollution Control Act (FWPCA) and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), contained comprehensive enforcement mechanisms.

The Court held that these enforcement schemes demonstrated Congress's intent "to supplant any remedy that otherwise would be available under § 1983."

The court went on to cite *Matoon v. Pittsfield*, 980 F.2d 1 (1st Cir. 1992), which held that the SDWA is preemptive of federal common law claims in a case where plaintiffs contracted a disease from drinking water. Judge O'Meara noted the Flint plaintiffs have a remedy under the SDWA. He also noted they have rights under state law because the SDWA expressly does not preclude any state or common law claims. The SDWA, in fact, per the court, indicates:

> Nothing in this section shall restrict any right which a person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief.

Conclusion and Implications

In the wake of the Flint, Michigan disaster with contaminated drinking water, regulators, public agencies and stakeholders from various walks of life around the country are questioning how such catastrophic consequences could result given some of the most rigorous treatment and monitoring requirements in the world, coupled with a strong history of protecting against this sort of disaster. One impact from Flint, if ever a positive impact could be gleamed, is that the microscope used to test water quality has morphed into the proverbial microscope for better transparency and accountability to the public so as to better protect against another water quality event of any scale compared to what occurred in Michigan.

The interplay between state and federal law, both statutory and common law, is present and is becoming increasingly prominent in the legal aftermath of the Flint water crisis. It should lead to some reexamination of the scope of responsibility and immunity that is or is not enjoyed by government personnel in the conduct of their duties. For three officials in Michigan, their ordeal has shifted into high gear, and other water distribution officials around the country are bound to see the criminal charges as a very cautionary development in their conduct of public water supply related business.

(Harvey M. Sheldon)

REPORT DETAILING CLIMATE CHANGE IMPACTS ON WATER RESOURCES RELEASED BY U.S. DEPARTMENT OF THE INTERIOR

On March 22, 2016, the U.S. Department of the Interior (Interior) and the Bureau of Reclamation (Bureau) released a basin-by-basin report that characterizes the impacts of climate change and details adaptation strategies to better protect major river basins in the West that are fundamental to the health, economy, security and ecology of 17 states. The report identifies climate change as a growing risk to western water management and cites warmer temperatures, changes to precipitation, snowpack and the timing and quality of streamflow runoff across major river basins as threats to water sustainability. The report concludes that water supply, quality and operations; hydropower; groundwater resources; flood control; recreation; and fish, wildlife and other ecological resources in the western states remain at risk. In addition to the report, Interior launched an online tool enabling the public to visualize the regional impacts and potential adaptation options. The tool allows users to check, by basin, how temperature, precipitation and snowpack are projected to be impacted by climate change and how climate change may affect runoff and water supplies.

The 'SECURE' Water Act Report

The Science and Engineering to Comprehensively Understand and Responsibly Enhance (SECURE) Water Act Report (Report) responds to requirements under the SECURE Water Act of 2009 (*see*, http://www.usbr.gov/climate/secure/docs/2016secure/2016SECUREReport.pdf) and addresses major western river basins including the Colorado, Columbia, Klamath, Missouri, Rio Grande, Sacramento-San Joaquin and Truckee river basins, in addition to other western river basins.

Specific Report Projections

Specific projections of the Report include:

1). a temperature increase of 5-7 degrees Fahrenheit by the end of the century;

2). A precipitation increase over the northwestern and north-central portions of the western United States and a decrease over the southwestern and south-central areas;

3). A decrease for almost all of the April 1st snowpack, a standard benchmark measurement used to project river basin runoff; and

4). a 7 to 27 percent decrease in April to July stream flow in several river basins, including the Colorado, the Rio Grande, and the San Joaquin.

Identifying Specific Basin Impacts

These Report states that the projections will have following specific basin-level impacts:

1). **Southern California**: In Southern California, warming and population growth are projected to increase water demand, reliance on imported water and the use of groundwater in the area, leading to development of alternative water supplies, such as recycled water.

2). **Colorado River Basin**: Reductions in spring and early summer runoff could translate into a drop in water supply for meeting irrigation demands and adversely impact hydropower operations at reservoirs.

3). **California's Central Valley**: For the Central Valley Project in California, projected earlier seasonal runoff will cause reservoirs to fill earlier, thereby reducing overall storage capability, as current flood control constraints limit early season storage in these reservoirs. End-of-September reservoir storage is projected to decrease by 3 percent over the course of the 21st century.

4). **Sacramento and San Joaquin River Basins**: Earlier season runoff combined with a potential for increasing upper watershed evapotranspiration may reduce the capacity to store runoff in Reclamation's Central Valley Project and state water resources reservoirs.

5). **Rio Grande Basin**: Reduced snowpack and decreased runoff likely will result in less natural groundwater recharge. Additional decreases in groundwater levels are projected due to increased reliance on groundwater pumping.

Conclusion and Implications

In many regions of the West, projected climate-driven changes in water supply, along with increased demands for water, are expected to strain the ability of existing infrastructure and operations to meet water needs—not only for consumptive uses such as agricultural, municipal, and industrial activities, but also for hydropower, flood control, fisheries, wildlife, recreation, and other largely nonconsumptive water-related benefits. Tasked with water management, the Bureau of Reclamation will use this Report to address vulnerabilities through adaptation strategies identified in the Report. The Bureau states that it is has "forged collaborative relationships in 15 of the 17 western states with a diverse group of non-Federal partners, including state water resource agencies, tribal governments, regional water authorities, local planning agencies, water districts, agricultural associations, environmental interests, cities and counties" to address climate change. Anyone connected to water issues should become familiar with this Report as it likely will form a basis for how major water issues are handled in the future. The Report is accessible online at: http://www.usbr.gov/climate/secure/ (Jonathan Shardlow)

ATTORNEYS GENERAL INVESTIGATE EXXON MOBIL ON CLIMATE CHANGE—WHAT DID THEY KNOW AND WHEN DID THEY KNOW IT?

At least 17 Attorneys General from American states and territories have agreed to cooperate in investigating Exxon Mobil and other fossil fuel companies regarding allegations that the public companies misled investors regarding human-induced climate change. New York Attorney General Eric Schneiderman was the first to investigate, followed closely by California's own Kamala Harris. Further, a bill pending in the California Legislature would extend the statute of limitations for a potential cause of action to prosecute any deception or fraud from four years to 30.

Background

According to reports, Mr. Schneiderman's investigation began last fall with subpoenas to Exxon Mobil for financial records and emails. At the heart of the investigation are allegations that statements from the company to investors conflicted with Exxon Mobil's own research and findings regarding climate change. According to the *New York Times*, the investigation into Exxon Mobil's finances is looking specifically at whether the company financed outside groups organized to dispute the reported science offered as support that the climate change phenomenon is real.

The Investigations Begin

The genesis of the allegations against Exxon Mobil appear to be reports by the *Los Angeles Times* and Inside *Climate News*, citing Exxon Mobil archives, of climate change research and later statements that were inconsistent with what that research was showing. Twitter, among others, erupted. One prominently emerging hashtag was "#ExxonKnew."

In response to statements by Exxon Mobil that the investigations are "politically motivated" and an issue of Exxon Mobil's right to free speech, Mr. Schneiderman responded, according to the *NY Times*, "The First Amendment, ladies and gentlemen, does not give you the right to commit fraud."

California Statutory Solution?

Legal experts have many opinions as to potential statutory options for prosecution of any actual fraud. In California, we may have a hint based on pending legislation. SB 1161 (Allen), the California Climate Science Truth and Accountability Act of 2016, would extend the statute of limitations for prosecutions alleging unfair competition by the Attorney General or "certain public prosecutors" from four years to 30 years.

Included within the legislative findings of the February 18, 2016 version of the bill are:

> There is broad scientific consensus that anthropogenic global warming is occurring and changing the world's climate patterns, and that the primary cause is the emission of greenhouse gases from the production and combustion of fossil fuels, such as coal, oil, and natural gas.

•Reports and documentation published by researchers, public interest nongovernmental organizations, and media in recent years show that some fossil fuel companies were aware by the late 1970s of scientific studies showing that carbon dioxide emissions from fossil fuel combustion pose significant risk of harmful global warming. The reports and documents also indicate that by the mid-1980s fossil fuel company scientists were confirming in internal documents intended for company management that emissions from fossil fuel were contributing significantly to climate change, and companies were factoring global warming into their own business investments.

•Because of the highly public dissemination of information, congressional discussion, and extensive media coverage of the robust scientific evidence of the risks of continued burning of fossil fuel products, major fossil fuel producers knew or should have known the risks of continued burning of their products by 1988.

•More than half of all industrial carbon emissions have been released since 1988, after the fossil fuel businesses knew of the harm their products might cause, and have substantially increased risks from climate change impacts to life, health, and property.

•Since at least 1989, published reports indicate that some of these same entities have put sustained and significant efforts and resources into creating public doubt on the science related to climate change caused by anthropogenic sources.

•Misleading and inaccurate information disseminated by organizations and representatives backed by fossil fuel companies, along with advertising and publicity casting doubt on scientific understanding of climate change, have led to confusion, disagreement, and unnecessary controversy over the causes of climate change and the effects of emissions of greenhouse gases. This type of misinformation, widely and broadly disseminated in the media, has long delayed public understanding of the risks of continuing to emit high levels of greenhouse gases, confused and polarized the public on the need to aggressively reduce emissions to limit risks from climate change, and increased damage to public safety, health, and property in California as well as nationally and globally.

•It is the intent of the Legislature to retroactively revive and extend the statute of limitation for actions that may or may not be barred by the applicable statute of limitation existing before January 1, 2017, that seek redress for unfair competition practices committed by entities that have deceived, confused, or misled the public on the risks of climate change or financially supported activities that have deceived, confused, or misled the public on those risks.

The operative provision of SB 1161 provides that for actions "against a corporation, firm, partnership, joint stock company, association, or other organization of persons that has directly or indirectly engaged in unfair competition . . . with respect to scientific evidence regarding the existence, extent, or current or future impacts of anthropogenic induced climate change," the statute of limitations for such claims is "30 years of an act giving rise to the cause of action." The revised statute of limitations applies only "to actions brought by the Attorney General, a district attorney, or a city attorney of a city having a population in excess of 750,000."

New York State Investigation

As for New York, the current investigation is being pursued based on a state securities law, the "Martin Act." The *NY Times* states, however, that "the attorneys general have a range of laws to work with, including Racketeer Influenced and Corrupt Organizations Act, or RICO." This was the law used by the Justice Department in the unprecedented lawsuit against "Big Tobacco" regarding its ongoing promotion of smoking all the while having knowledge of smoking's health effects and addictiveness.

Conclusion and Implications

With least 17 Attorneys General from 17 states cooperating or pledging cooperation in investigating Exxon Mobil and other fossil fuel companies regarding alleged investor disinformation this issue is not going away any time soon. The opposite sides of an investigation like this naturally produce dichotomous

declarations of intent and purpose. Whether motivated by the need to protect investors or by political interest (or possibly financial interest to the states and territories) this will undoubtedly play out in the public forum for some time to come.
(David Smith)

NEWS FROM THE WEST

In this month's News From the West we report on an update of Bills in the U.S. Congress, which address drought and water supply in California. We also have a decision out of the Colorado Supreme Court finding inaccurate or weak proof of historic consumptive water use would not support a change application—with specific detailed analysis of how to assess historic evidence. Finally, we report on a ruling from the U.S. District Court in Oregon, denying a motion for preliminary injunction filed by environmental groups seeking to protect a state-specific frog which, by virtue of Bureau of Reclamations planned actions, would, in the view of plaintiffs, jeopardize the frog.

Colorado Supreme Court Finds Inaccurate Historical Consumptive Use Analysis Fatal to Application for Water Right Change of Use

County of Boulder v. Boulder & Weld County Ditch Co., 2016 CO 17, ___P.3d___ (Colo. 2016).

On March 21, 2016, the Colorado Supreme Court affirmed the Division 1 Water Court's decision dismissing Boulder County's (County) application for changes of water rights. The Supreme Court agreed with the Water Court that the County failed to meet its burden of proof to show its claimed historical consumptive use (HCU) for a proposed change of water right was accurate and affirmed the judgment denying the application. The Court later denied a petition for rehearing on April 11, 2016.

Background

This case began with the County's plan to develop a public open-space park out of a piece of land historically known as the Bailey Farm, a 290 acre property, and its proposed change of use of a portion of the Martha M. Matthews Ditch (MM Ditch) water right. Later, in 1882, the owner formally adjudicated the water right. The decree specified that the MM Ditch was capable of carrying 4.6 cubic feet of water per second (cfs) for irrigation use on 120 acres of land lying below the ditch. The decree, however, never identified the location of the 120 acres, and the owner of the ditch, Ms. Matthews, only owned 47 acres lying below the ditch. In 1903, Ms. Matthews contracted with Boulder and Weld County Ditch Company (BW Ditch Co.), a mutual ditch company, which operates the Boulder and Weld County Ditch (BW Ditch), to carry 2.5 cfs of her water right to another downstream user. In 1907, Matthews was granted a change in the point of diversion to the BW Ditch headgate, after the MM Ditch headgate was destroyed in a flood. Over time, the MM Ditch water was divided and transferred to other owners in fractional interests described in inches rather than cfs. The parties to the transfers agreed that the 4.6 cfs of MM Ditch water rights amounted to 185 inches. The County acquired 100 of those inches (Bailey Farm Inches) in the 1990s as part of its acquisition of the Bailey Farm, which included many of the acres originally owned by Ms. Matthews.

The plans for the park include several ponds formed from abandoned gravel pits filled with groundwater. Because these pits-turned-ponds exposed groundwater after January 1, 1981, the County is required to replace the out-of-priority depletions caused by evaporation. *See,* Colo. Rev. Stat. § 37-90-137(11)(a)-(b) (2016). To meet this obligation, the County filed an application for underground water rights, approval of a plan of augmentation, a change of water rights, and for an appropriative right of substitution and exchange. When a party in Colorado proposes to change an irrigation water right to another purpose–in this case augmentation–they must analyze the water right's historical consumptive use based upon a reasonable period of historical record of diversions and use. The BW Ditch Co. opposed the application and challenged the County's HCU quantification.

At the Water Court

After trial, the Division 1 Water Court dismissed the application without prejudice. The Water Court's written decision perceived several flaws in the County's HCU analysis. one. The County then appealed.

The Colorado Supreme Court's Decision

The Colorado Supreme Court affirmed the Division 1 Water Court's determinations. At the outset, the Court examined and accepted two of the three crucial deficiencies in the County's HCU analysis as identified by the Water Court.

First, the Court agreed that the County failed to prove how much of the Bailey Farm Inches was historically used on Bailey Farm. Because the County was pursuing a change of use, it bore the burden of proving actual historical usage of the Bailey Farm Inches. The County attempted to meet this burden through the use of a proration formula, which estimated water deliveries. The BW Ditch Co.'s diversion records, however, showed the County's formula overestimated the amount of water delivered by thirty-seven percent between 1973 to 2000. The County then revised its quantifications for those years, but retained the original estimates for the years 1950 to 1972 without explanation. Delivery records for 1950 to 1972 were not available, and the County provided no adequate explanation for why a similar reduction was not done for those years. The Water Court reasoned that since the last 27 years were overestimated by 37 percent, it stands to reason that the estimates for the first 22 years should similarly reduced unless further explanation is put forth. The Supreme Court found no basis in the record to reject the Water Court's finding.

Distinguishing the *Wagner v. Allen* Decision

In so finding, the Court rejected arguments based upon its prior decision in *Wagner v. Allen*, 688 P.2d 1102 (Colo. 1984), and distinguished the *Wagner* holding from the current case. In *Wagner*, a case involving several mutual ditch companies and an application for a change of water rights, there was no dispute that each shareholder in the ditch company received the amount of water that they were entitled to despite the lack of records. The Court therefore found that under those limited circumstances each applicant was entitled to a presumption that the shareholders had historically used the water in the amount and manner in which they were legally entitled. By contrast, in the present case, the Court found the ditch records were clear evidence that the historical use differed from the amount legally endowed and directly contradicted the County's claim. The Court therefore found the *Wagner* presumption was inapplicable.

Failing to Meet the Burden of Showing Historical Irrigation by the Bailey Farm Inches

In addition to proving the amount historically used, the County was also required to show the claimed acreage was historically irrigated by the Bailey Farm Inches. The Court also agreed that the County failed to meet this burden. The Supreme Court found that simply showing that the Bailey Farm Inches were diverted at the headgate does not, without more, establish that the water was applied to the 70-acre parcel. The Court also rejected the County's aerial photograph evidence. The Court therefore concluded absent evidence of actual application of the Bailey Farm Inches to the 70-acre parcel, the Water Court properly determined the County failed to carry its burden of proving the claimed 101 acres were historically irrigated with the Bailey Farm Inches.

Despite Ignoring the Third Rationale, Court Finds Failed to Prove Historical Consumptive Use

Lastly, the Court found it unnecessary to address the Water Court's third rationale that a ditch-wide HCU analysis was necessary. The Court pointed out that the record amply supported the latter two grounds and reliance on a third rationale, even if erroneous, would not provide basis for reversal.

Denial of Change of Use and the Application as a Whole

The Court then briefly looked into the issue of the denial of an appropriative right of substitution and exchange. Having concluded that the County failed to carry its burden of proving HCU, the Court affirmed the denial of the change of use and the application as a whole.

Conclusion and Implications

Colorado water law establishes that the pivotal consideration in change of water right cases is whether the applicant carried its burden of proving HCU. The Colorado Supreme Court's holding reinforces this principal emphasizing that without concrete evidence accurately proving HCU, an applicant cannot

show a lack of injury to other water users, which is the principle showing a change applicant must make.
(Chris Stork, Paul Noto)

Still Waiting for a Federal Response to the Drought in California: A Legislative Update

For a third year, U.S Congressional leaders are attempting to formulate a response to California's drought. Currently, two major drought-related bills are pending in the 114th Congress and each takes a very different approach to addressing drought-related impacts.

The first bill is House of Representatives Bill 2898, the Western Water and American Food Security Act of 2015, introduced by Representative David Valadao and co-sponsored by every Republican Representative from California and Democrat Jim Costa of the San Joaquin Valley (HR 2898). The second is Senate Bill 2533, introduced by Senator Dianne Feinstein and entitled the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act (S 2533).

Each bill seeks to increase water supply reliability, although through substantially different methods. Key points of difference include whether the scope of federal Endangered Species Act (ESA) protections in the Sacramento-San Joaquin Delta (Delta) should be reduced to allow for more pumping south of the Delta and whether funds should be used to increase water storage or encourage water use efficiency.

As California enters its fifth year of unprecedented drought, Congress continues to formulate its response. To date, Congress has taken no action in response to the ongoing crisis.

The House of Representatives passed HR 2898 on July 16, 2015, and the legislation has remained pending corresponding action in the Senate ever since. In the Senate, multiple bills have been introduced yet none have passed out of the chamber. (S 2533 was introduced by Senator Feinstein in lieu of her prior bill, S 1894, the California Emergency Drought Relief Act of 2015. S 2533 represents Sen. Feinstein's third proposal in as many years to address California's drought.) The Senate's current effort is S 2533, and was introduced by Senator Diane Feinstein on February 10, 2016.

House Resolution 2898—The Western Water and American Food Security Act

David Valadao introduced HR 2898, the Western Water and American Food Security Act, on June 25, 2015. Notably, the bill revises regulatory standards for managing Central Valley Project (CVP) and State Water Project (SWP) conveyances under the ESA. Specifically, the bill directs that the CVP be operated to maximize Delta export pumping rates while avoiding only "negative impact on the long term survival" of protected species. This term is defined as "to reduce appreciably the likelihood of the survival of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Thus, the protection standard under this bill is lower than the current no-jeopardy standard under the ESA.

The bill also alters current ESA procedures by requiring use of updated data to determine incidental take levels, water export restrictions, and other conservation measures contained in the smelt and salmonid Biological Opinions. The goal is to increase water exports without causing a "significant negative impact on the long-term survival of certain species listed as threatened or endangered." H.S 2898 further establishes operational criteria for Old & Middle River (OMR) flows in the Delta under the smelt and salmonid Biological Opinions. With regard to storage, the bill establishes deadlines for Interior to complete and submit to Congress water storage feasibility studies concerning specified dams and reservoirs under the Calfed Bay-Delta Authorization Act. Among other things, HR 2898 further provides for: 1) temporary barriers or operable gates in the Delta to be designed so that formal consultations under the ESA are not necessary; 2) adoption of a 1:1 inflow to export ratio from the Delta under specified conditions; 3) approval of all water transfers through the Delta the from April 1 to November 30 if the transfers comply with California law; 4) a nonnative predator fish removal program in the Stanislaus River by Oakdale and South San Joaquin Irrigation District; 5) the repeal of the San Joaquin River Restoration Settlement Act and related settlement; 6) expansion of the CVP's authorized service area to include the Kettleman City Community Services District; and 7) transfer of New Melones to local agencies.

Senate Bill 2533: The California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act

On February 20, 2016, Senator Dianne Feinstein introduced S 2533 with the stated goal of increasing water supplies. S 2533, the bill directs the Secretaries of Interior and Commerce to provide the most water possible through the CVP/SWP within the confines of existing law and the Salmonid and Delta Smelt Biological Opinions (BiOps)—in other words, unlike HR 2898, under S 2533 the current environmental framework remains unaltered.

Specifically, under S 2533, the Interior and Commerce Departments must—until the drought is declared over or September 30, 2017, whichever is later—take certain actions designed to alleviate drought conditions including: 1) using the "best scientific and commercial data available to implement, continuously evaluate, and refine or amend, as appropriate, the reasonable and prudent alternative described in the smelt biological opinion"; 2) conducting real-time monitoring of fish species relative to Delta conditions in order to identify opportunities to increase water pumping without violating the ESA or the BiOps; 3) completing studies on the location, abundance and distribution of Delta smelt and determining methods to minimize the effects of CVP/SWP operations on the Delta smelt; 4) managing OMR flows to maximize CVP/SWP water supplies while still operating in accordance with the BiOps; 5) requiring, if OMR reverse flows are required to be less than 5,000 cubic feet per second (cfs) for compliance with the BiOps, documentation in writing that uses real-time conditions relevant to the flow rates as well as an explanation in writing that takes into account whether any alternative measures could have a lesser impact on supply; 6) reviewing whether the current method for calculating OMR reverse flow is warranted, and implement any potentially revised flow number.

Continuing to vary averaging periods of the maximum percent of Delta export-inflow ratios.

Interior is directed to confer with the California Department of Fish and Wildlife (CDFW) regarding implementation of any potential changes to the smelt or salmonid BiOps. If the CDFW determines that SWP operations are inconsistent with California law, or requires take authorization in a manner that reduces water supply to the SWP in comparison to supply available under the Biological Opinions, and CVP yield is greater than it otherwise would have been as a result, that additional yield must be made available to SWP contractors to offset any reduction in water supply. Importantly, S 2553 also mandates that Interior and Commerce shall take no action that: "…diminishes, impairs, or otherwise affects in any manner any water rights or water rights priorities under applicable law."

Regarding storage, the bill authorizes $600 million and mandates the completion of previously approved feasibility studies for Temperance Flat, Los Vaqueros, Sites, and San Luis Reservoirs.

Conclusion and Implications

The current Senate bill addresses impacts of the drought in broad fashion and includes directives and funding to maximize water deliveries within the existing environmental framework, provide funding for storage projects, increase water efficiencies, and increase water recycling. The House bill, on the other hand, seeks to modify CVP operations to maximize water supply and water exports from the Delta by modifying the current ESA standard to a more flexible one regarding species protection.

While all sides express a desire to provide a comprehensive federal response to the ongoing drought, it remains to be seen whether the widely acknowledged need for action can overcome deep differences in preferred response methods.

S 2533 was referred to Senate Energy and Natural Resources Committee on February 20, 2016, but a hearing has not been set. In the House, HR 2898 has been passed and is awaiting reconciliation with any effort passed by the full Senate body. For its part however, the Obama administration has explained that it "strongly opposes" the House bill because it "…directs operations inconsistent with the Endangered Species Act, thereby resulting in conditions that could be detrimental to the Delta fish and other species listed under [federal/state] endangered species laws.

(David E. Cameron, Meredith Nikkel)

District Court Denies Preliminary Injunction Sought by Environmental Groups over Impacts to Oregon Spotted Frog

Center for Biological Diversity v. U.S. Bureau of Reclamation, Case No. 6:15-cv-02358-TC (D. Or.); *WaterWatch of Oregon v. U.S. Bureau of Reclamation et al.*, Case No. 6:16-cv-00035-TC (D. Or).

The U.S. District Court for the District of Oregon has denied a motion for a preliminary injunction that would have dramatically altered water management in the Deschutes Basin in Oregon. The injunction was sought by two environmental groups as part of a federal Endangered Species Act (ESA) challenge alleging impacts to the threatened Oregon spotted frog from U.S. Bureau of Reclamation (Bureau) and irrigation district operations. In denying the injunction, the court found that plaintiffs had failed to demonstrate a likelihood of irreparable harm to the Oregon spotted frog from continued operations or that the requested injunction was in the public interest. The court did not, however, assess the plaintiffs' likelihood of success on the merits of their ESA claims, and the parties have been ordered to engage in mediation before proceeding with the litigation.

Background

Two lawsuits have been filed under the Endangered Species Act alleging impacts to the recently-listed Oregon spotted frog from the operations of the Bureau and several local irrigation districts in Oregon's Deschutes Basin. The lawsuits seek to dramatically alter the operation of three major storage reservoirs. If successful, these lawsuits could potential require significant operational changes that could pose a serious threat to the viability of irrigated agriculture in the basin.

The first lawsuit, brought by the CBD, alleges violations of both Section 7 (consultation) and Section 9 (take) of the ESA. *Center for Biological Diversity v. U.S. Bureau of Reclamation*, Case No. 6:15-cv-02358-TC. CBD alleges that the Bureau should have reinitiated consultation with the Service after the frog was listed as threatened, and that the Bureau's operations harm frogs. The CBD specifically "challenges the U.S. Bureau of Reclamation's continuing operation and maintenance of Crane Prairie Dam and Reservoir and Wickiup Dam and Reservoir" based on alleged impacts to Oregon spotted frog populations in the Upper Deschutes Basin of central Oregon.

The second lawsuit, filed by WaterWatch of Oregon, names as defendants not only the Bureau, but also three irrigation districts. *See*, First Amended Complaint, *WaterWatch of Oregon v. U.S. Bureau of Reclamation et al.*, Case No. 6:16-cv-00035-TC. The WaterWatch lawsuit also alleges ESA violations related to Bureau operations of a third facility in the basin, the Crescent Lake dam. The cases have been consolidated in a single action.

The Preliminary Injunction Motion

In February 2016, plaintiffs filed a motion for preliminary injunction, seeking the immediate alteration of Bureau operations, starting the first week of April 2016. For management of Crane Prairie and Wickiup reservoirs, plaintiffs presented two options, a "Regulated Option" and Run-of-the-River Option." Under the Regulated Option, minimum flow values would be set for both winter and summer conditions, with winter flows to be "maintained at a higher level than current operations in order to ensure frogs have suitable overwinter habitat," limiting the Bureau's ability to store winter flows. A minimum level in Crane Prairie would also be established, affecting the Bureau's ability to draw down the reservoir to meet summer irrigation demand. For Crescent Lake, plaintiffs sought to set a fixed year-round minimum flow value for releases from the reservoir.

According to plaintiffs, the "Run-of-the-River Option":

> …simply requires that Crane Prairie and Wickiup reservoir controls be left open (or in the case of Crane Prairie set to maintain [the desired reservoir level] and left in this condition throughout the year.

This option, however, would effectively eliminate the Bureau's ability to store water and use the reservoirs for their intended purposes until the completion of consultation with the Service and development of a formal Biological Opinion—which is likely to take years.

The District Court's Ruling

At the outset of the hearing for oral argument, Judge Ann Aiken indicated that she planned to deny

the preliminary injunction, telling attorneys for the environmental groups, "You have a long way to go to persuade me." At the close of the hearing, Judge Aiken affirmed her inclination and denied the injunction. Over plaintiffs' objections, Judge Aiken subsequently issued a formal written opinion explaining her reasons for denying the preliminary injunction.

In her written opinion, Judge Aiken did not reach a conclusion regarding likelihood of success on the merits—*i.e.* whether operation of the reservoirs results in a violation of the ESA. Instead, the court found that even if an ESA violation were likely, plaintiffs had failed to make a showing of irreparable harm. While plaintiffs' argued that the likelihood of an ESA Section 9 violation is by itself enough to establish irreparable harm, the court disagreed, distinguishing between the showing required for a prohibitory injunction maintaining the status quo and the mandatory injunction sought by plaintiffs.

The court also held that an injunction would not be in the public interest. Critically, Judge Aiken concluded that plaintiffs failed to show their proposed injunction would "benefit the spotted frog pending resolution of this case," questioning the limited analysis relied on by plaintiffs to support the proposed injunction.

The court concluded that "[t]his fact alone renders the requested relief questionable," particularly given that "biologists and other experts disagree with plaintiffs' proposals."

Judge Aiken also noted several other harms likely to result from plaintiffs' proposed relief. For example, the proposed injunction "would disrupt the ongoing, collaborative efforts" by various stakeholders, including Reclamation, irrigation districts, the State of Oregon, and the Confederated Tribes of the Warm Springs Reservation to address long-term changes to the dams' operations. As the court noted, a disruption to this collaborative process "would not assist the spotted frog in the long term or benefit the public interest." The court ordered the parties to schedule a settlement conference prior to scheduling further litigation proceedings.

Conclusion and Implications

The court's denial of a preliminary injunction in the Oregon spotted frog litigation means that irrigated agriculture can continue in the Deschutes Basin this summer. It also means that ongoing ESA consultation and development of a basin-wide Habitat Conservation Plan will proceed towards development of a coherent, scientifically-based plan to balance the instream water needs of various species, including frogs and fish, as well as the out-of-stream needs of irrigators and other water users. It remains to be seen whether a negotiated settlement of the litigation can be reached, but for now at least, the decision averts dramatically altering reservoir operations in the Deschutes Basin and major negative economic repercussions.
(Daniel Timmons)

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

•On March 22, 2016, the U.S. Environmental Protection Agency (EPA) announced an administrative settlement with the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) covering violations of the federal Clean Water Act (CWA). EPA inspectors found ABCWUA experienced several sanitary sewer overflows and exceeded its permit limit for the amount of E. Coli bacteria in the discharged effluent. ABCWUA was also cited for discharging about six million gallons of sewage into the Rio Grande on February 27, 2015. ABCUWA will pay a civil penalty of $33,500 and build a pipeline to provide water to the Valle del Oro National Wildlife Refuge. The project will expand water-reuse opportunities in the South Valley east of the Rio Grande, and will provide irrigation to landscaping along a bike path and at a local elementary school.

•On March 22, 2016, EPA announced settlement of Clean Water Act violations by the City of Osceola, Iowa, that requires the city to stabilize stream banks of a tributary flowing into White Breast Creek, and pay a cash penalty of $8,400. EPA investigations from 2012 through 2015 found several violations of the Clean Water Act. The settlement resolves violations of the city's Clean Water Act permit effluent limitations for carbonaceous biological oxygen demand, ammonia, and total suspended solids. Inspectors also found operational issues such as a discharge due to an inoperable or out-of-service shut-off valve, and discharge overflows of some equipment. The city's wastewater treatment plant, which is subject to the permit, discharges to a tributary of White Breast Creek in Clarke County, Iowa, and thereafter to the Des Moines River. The cited violations could potentially impact downstream water quality. The Supplemental Environmental Project to stabilize stream banks is intended to reduce and prevent erosion of the tributary banks, and prevent and reduce sediment from entering downstream waters. The estimated cost for this project is $20,000.

•On April 7, 2016, EPA announced a settlement with Advance Coatings Co. in Westminster, Massachusetts. On Sept. 30, 2014 employees of Advance Coatings were filling containers with Styrene, a chemical compound used in making resins and accidentally over-filled one container and an unknown amount spilled on the floor. Advance Coatings then discovered the Styrene had run into the East Fitchburg publicly-owned sewer treatment system because a concrete berm surrounding a floor drain leading to the sewer was compromised. The Styrene interfered with East Fitchburg's treatment process and some of the Styrene passed through the treatment system, resulting in an unauthorized discharge into the Nashua River. Advance Coatings was fined $38,860.

•On April 11, 2016, EPA announced that Gateway Parks LLC, a ski and snowboard park owner and developer based in Boise, Idaho, will pay a $10,000 penalty to settle a claim of a violation of federal asbestos regulations designed to protect public health. EPA alleged that the company violated asbestos rules when it failed to notify the EPA before asbestos-containing buildings were demolished at the former Lazy J Tavern complex in Eagle, Idaho, northwest of Boise. Notification is required to give EPA inspectors an opportunity to check on buildings before demolition to make sure asbestos has been removed and to protect the public from exposure to harmful asbestos dust.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•On March 28, 2016, EPA announced a settlement with Brenntag Northeast, Inc., the owner and

operator of a chemical repackaging and distribution plant in Reading, Pennsylvania. Under the settlement, Brenntag will pay a $55,000 penalty, and donate $30,000 of emergency response equipment to a local fire department, to settle alleged oil and hazardous waste storage violations of regulations designed to protect public health and the environment. EPA cited the company for violating the federal Resource Conservation Recovery Act (RCRA), the federal Clean Water Act, and Pennsylvania's hazardous waste regulations are designed to protect public health and the environment, and avoid costly cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste and oil.

•On March 28, 2016, EPA announced a settlement with Connecticut Oil Recycling Services in Middletown, Connecticut, a waste oil transporter and recycler. The company paid $20,000 to settle an EPA claim that it failed to properly prepare a hazardous waste manifest for waste containing PCBs when transporting waste that included PCBs. Connecticut Oil Recycling Services, at 27 Mill Street in Middletown, picked up waste from a customer and transported it to Active Oil, an oil processing facility in New Haven, Connecticut, for disposal or recycling. Neither the company nor its customers who provide the oil did sampling for PCB contamination. In April 2015, Active Oil found PCB contamination in its storage tank, which was traced back to a shipment made by Connecticut Oil Recycling Services. EPA alleged that the company violated TSCA by failing to properly prepare a hazardous waste manifest for waste containing PCBs in a shipment on April 13, 2015. By adding PCB-contaminated waste oil to its tanker truck, combining it with waste oil collected from other customers, and then adding it to a tank at Active Oil, these actions led to the PCB contamination of about 15,000 gallons of waste oil.

•On March 28, 2016, EPA announced settlement with G&S, a scrap metal recycling facility in South Windsor, Connecticut, will clean up an on-site lagoon that became polluted with toxic chemicals, and paid a penalty of $22,500, settling EPA claims that it violated the federal Toxic Substances Control Act (TSCA). G&S buys and consolidates scrap metals, which it sorts inside the building or on concrete pads to reduce the chance of soil contamination. A system of oil/water separators and retention ponds are designed to capture any contaminants. The federal Clean Water Act permit issued to G&S requires the company to periodically sample discharges for PCBs. G&S conducted the required sampling and detected no PCBs in 2012 or 2013. In 2014, however sampling found PCBs in surface water and sediments. On discovering this, G&S started a cleanup and has submitted a cleanup plan to deal with the remaining contamination.

Indictments Convictions and Sentencing

•On March 29, 2016, the pest control corporation Terminix International Company LP (TERMINIX LP) and its U.S. Virgin Islands operation Terminix International USVI LLC (TERMINIX, USVI), were charged with multiple violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for illegally applying fumigants containing methyl bromide in multiple residential locations in the U.S. Virgin Islands, including a condominium resort complex in St. John where a family of four fell seriously ill last year after the unit below them was fumigated. In a plea agreement, TERMINIX LP and TERMINIX, USVI agreed to pay a total of $10 million in criminal fines, community service and restitution payments. Except for completing one government contract at the Port of Baltimore, TERMINIX LP has stopped using pesticides containing methyl bromide in the United States and U.S. Territories. Under the agreement TERMINIX, USVI will pay $5 million in fines and $1 million in restitution to the EPA for response and clean-up costs at the St. John resort. TERMINIX LP will pay a fine of $3 million and will fund a $1 million community service project in the U.S. Virgin Islands. The plea agreement is subject to approval by the District Court.

•On April 7, 2016, DOJ announced the indictment of the owner and captain of the commercial F/V Native Sun, on charges of conspiracy, and violations of the Clean Water Act and Act to Prevent Pollution from Ships (APPS). According to the indictment, starting in 2011 and continuing into 2013, Bingham and Randall Fox discharged and caused other crewmembers to illegally discharge oil and other pollutants into coastal waters near Blaine, Washington, and the open ocean where the ship operated. The discharge of oil and other bilge wastes are regulated

by the CWA and APPS to protect the nation's waterways, port and ocean water quality. The discharge of oils and other pollutants in waters of the United States is prohibited absent a CWA permit. Open ocean discharges are also prohibited without using the oil-water separation (OWS) equipment specified in APPS. The indictment describes that Bingham Fox owned the Native Sun and, as part of its dockside maintenance, ordered crew members to discharge oil and other bilge wastes overboard into the harbor and adjoining shorelines of Blaine. Bingham Fox's son, Randall Fox, served both as a crewmember and later a captain aboard the Native Sun and ordered crewmembers to discharge oil and bilge wastes overboard while the vessel was underway on fishing trips. The Native Sun had neither a CWA permit to discharge wastes nor the OWS equipment on-board, as required by APPS.

•On Aril 8, 2016, the Norwegian shipping company DSD Shipping (DSD) was sentenced to pay a total corporate penalty of $2.5 million as a result of its convictions in Mobile, Alabama, for obstructing justice, violating the Act to Prevent Pollution from Ships (APPS), tampering with witnesses and conspiring to commit these offenses. The company was ordered to pay $500,000 of the penalty to the Dauphin Island Sea Lab Foundation to fund marine research and enhance coastal habitats in the Gulf of Mexico and Mobile Bay. In addition, DSD was placed on a three-year term of probation and was ordered to implement an environmental compliance plan to ensure the company's vessels obeyed domestic and international environmental regulations in the future. (Andre Monette)

JUDICIAL DEVELOPMENTS

TENTH CIRCUIT ALLOWS SIERRA CLUB TO INTERVENE IN REVERSE FREEDOM OF INFORMATION ACT LAWSUIT SEEKING TO PREVENT EPA FROM DISCLOSING DOCUMENTS

Entergy Gulf States Louisiana LLC v. U.S. Environmental Protection Agency, ___F.3d___, Case No. 15-30397 (10th Cir. Mar. 17, 2016).

The Court of Appeals for the Tenth Circuit overruled the decision of the U.S. District Court for the Eastern District of Louisiana which denied the Sierra Club's motion to intervene in the reverse Freedom of Information Act (FOIA) lawsuit brought by Entergy Gulf Louisiana LLC to prevent the U.S. Environmental Protection Agency (EPA) from disclosing documents in response to Sierra Club's FOIA request. The Tenth Circuit ruled that the Sierra Club could intervene as a matter of right. While the case is centered around the Clean Air Act, it is one to watch for all practitioners who deal with EPA under any number of federal statutes—including the Clean Water Act.

Factual and Procedural Background

In November 2011 and January 2013, Sierra Club submitted two FOIA requests to EPA, requesting documents provided by Entergy pursuant to the federal Clean Air Act that relate to three of Entergy's power plants. When Entergy provided these documents to EPA, Entergy designated many of the documents as containing Entergy's confidential business information (CBI) subject to FOIA Exemption 4. FOIA Exemption 4 exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

After receiving Sierra Club's FOIA requests, EPA provided Entergy with the opportunity to substantiate its CBI claim. In June and July 2014, EPA issued "final determination" letters in regard to the November 2011 and January 2013 FOIA requests, respectively. In those letters, EPA found that none of the 21,685 pages of requested documents contain Entergy CBI and thus none satisfy FOIA Exemption 4 on that basis alone. However, EPA also found that approximately 18,000 pages out of the 21,685 pages of documents contain third-party contractual information that may be subject to confidential treatment under FOIA Exemption 4. Therefore, EPA stated it:

> …will temporarily maintain this third-party contract information as CBI" until it makes the third-party CBI determination or until the third parties waive their confidentiality interests.
> EPA also stated that it "will release the approximately 3,685 pages of documents, which do not include the third-party contract documents, [to Sierra Club].

On August 11, 2014, Entergy filed the underlying reverse-FOIA suit against EPA. A reverse-FOIA suit is one in which "a plaintiff seeks to prevent a governmental agency from releasing information to a third party in response to the third party's request for information under FOIA." In the underlying reverse-FOIA suit, Entergy seeks a reversal of EPA's determination that the requested documents do not contain Entergy CBI, a declaration that the documents are exempt from public disclosure under FOIA Exemption 4, and an injunction prohibiting EPA from disclosing the documents.

Upon the filing of the lawsuit, Entergy and EPA filed a series of joint motions to stay the litigation to "allow the parties to discuss the disputed documents and potential ways to streamline the litigation moving forward," and to provide for "completion of the EPA administrative review process" in order "to allow EPA to render a determination on the confidentiality of the third-party documents."

Sierra Club filed a motion to intervene of right, alleging its interests will not be adequately represented by EPA. In the alternative, Sierra Club sought permissive intervention. Sierra Club's motion was granted by the magistrate judge, but that decision was overturned by the District Court. The instant interlocutory appeal followed.

The Tenth Circuit's Decision

Sierra Club sought to intervene of right pursuant to Federal Rule of Civil Procedure 24(a)(2). To intervene pursuant to Rule 24(a)(2), an applicant must satisfy four requirements: 1) the application for intervention must be timely; 2) the applicant must have an interest relating to the property or transaction which is the subject of the action; 3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; 4) the applicant's interest must be inadequately represented by the existing parties to the suit.

"Failure to satisfy any one requirement precludes intervention of right." The inquiry under Rule 24(a)(2) "is a flexible one, which focuses on the particular facts and circumstances surrounding each application," and "intervention of right must be measured by a practical rather than technical yardstick." The rule "is to be liberally construed," with "doubts resolved in favor of the proposed intervenor." Entergy did not dispute that Sierra Club satisfies the first three requirements to intervene of right. At issue was the fourth requirement: whether Sierra Club's interest is inadequately represented by EPA.

Presumptions and the Burden of Proof

"The applicant has the burden of demonstrating inadequate representation, but this burden is 'minimal.'" The applicant "need not show that the representation by existing parties will be, for certain, inadequate." Rather, the burden "is satisfied if the applicant shows that representation of his interest 'may be' inadequate." There are two presumptions of adequate representation. The first arises where one party is a representative of the absentee by law. The second presumption:

> …arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit, in which event 'the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption.

Adequate Representation of Interests

In order to overcome the presumption that EPA would adequately represent its interest, Sierra Club argued that it and EPA have divergent interests regarding the timing of document disclosure, as evidenced by their opposing positions on stay and bifurcation. Specifically, Sierra Club claimed it is interested in prompt disclosure of the requested documents, while EPA was interested only in eventual disclosure. In addition, Sierra Club contends that it did not share EPA's interests in protecting third-party CBI and cooperating with Entergy.

Entergy did not dispute that Sierra Club and EPA have divergent interests. Rather, Entergy claimed that the matters of stay and bifurcation concern mere litigation tactics that are within the District Court's broad discretion to regulate and do not warrant intervention. As to protection of third-party CBI and cooperation with Entergy, Entergy argued that EPA was timely fulfilling the legal requirement of identifying third-party CBI, that Entergy's assistance in identifying third-party CBI was necessary, and that such third-party CBI interests and cooperation did not have any material bearing on the Entergy CBI issue in this case. In short, Entergy seems to contend that these divergent interests are not germane to the case.

Upon considering both Sierra Club and Entergy's positions, the Tenth Circuit determined that the differences between Sierra Club and EPA were not mere litigation strategy and were germane to the timing and outcome of the case and therefore concluded that Sierra Club had the right to intervene in the matter.

Conclusion and Implications

Although the specific right of intervention may be limited to the facts of the case, the result can be duplicated in other contexts. Where EPA's litigation tactics that may result in delays to the ultimate resolution of the case, an environmental group can now seek to intervene as a matter of right and proclaim that EPA is not adequately representing its interest. The result may be more interventions by environmental groups.
(Danielle Sakai)

D.C. CIRCUIT FINDS PLAINTIFFS LACKED STANDING TO PURSUE ESA, CLEAN WATER ACT AND NATIONAL ENVIRONMENTAL POLICY ACT CLAIMS

National Wildlife Federation v. U.S. Army Corps of Engineers, ___F.3d___, Case No. 14-1701 (D.C. Cir. Mar. 14, 2016).

Environmental groups (plaintiffs) challenged a U.S. Army Corps of Engineers' (Corps) decision to reissue a nationwide permit authorizing the discharge of dredged and fill material to build bank stabilization projects. Plaintiffs filed suit alleging that the Corps' decision violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), the federal Clean Water Act (CWA), and the federal Endangered Species Act (ESA). Plaintiffs alleged that the construction of bulkheads (an erosion-prevention structure) marred the natural beauty of the Georgia coast—an area frequented by several members of plaintiffs' groups. The D.C. Circuit Court of Appeals dismissed plaintiffs complaint with prejudice for lack of standing.

Background

There are two types of CWA Corps issued permits: i) individual permits tailored for specific projects [33 U.S.C. § 1344(a)]; and, ii) General Permits that authorize categories of actions [1344(e)]. The bulkheads at issue were authorized pursuant to General Permit. "General permits may be promulgated by the Corps pursuant to General Permit." General permits may be promulgated by the Corps for a category of action when that activity will cause only minimal adverse environmental effects on both an individual and cumulative level. (*Id.*, citing to § 1344(e)(1).) Prior to issuing a General Permit, the Corps "conducts the impact analysis specified in Subparts C through F of the …[CWA] Section 404(b)(1) guidelines." (*Quachita Riverkeeper, Inc. v. Bostick*, 938 F.Supp.2d 32, 35 (D. D.C. 2013).) Once a General Permit has been issued, individual activities falling within its purview and meeting general conditions may usually proceed without additional authorization. (33C.F.R. §§ 330.1(c)(i); 330.2(c).)

Here, plaintiffs challenged Nationwide Permit 13 (NWP13), authorizing bank stabilization activities such as the bulkheads in the Ogeechec River and Savannah River basins:

> In issuing NWP13, the Corps estimated that between 2012 and 2017 approximately 17,500 projects would be authorized under its auspices…One example important to this case is a 177-foot NWP13 bulkhead that was constructed on the relatively undeveloped 8.1-mile Bull River in the Savannah River Basin.

This specific bulkhead is the sole evidence of harm caused by NWP13 as cited to by plaintiffs. Plaintiffs alleged that this bulkhead causes erosion, impairs water quality, and destroys wildlife—including habitat for threatened and endangered species. Plaintiffs alleged that the Corps failed to adequately evaluate these environmental impacts prior to issuing NWP13.

The NEPA and Clean Water Act Claims

The Corps' NEPA and CWA Environmental impact analysis concluded that the "…individual and cumulative adverse effects on the aquatic environment resulting from the activities authorized by this NWP will be minimal."

Plaintiffs allege that this conclusion was inadequately justified and warranted the preparation of an environmental impact statement pursuant to NEPA.

The Endangered Species Act Claim

Plaintiffs alleged that the Corps violated the ESA by improperly concluding that:

> NWP will not jeopardize the continued existence or [sic] any listed or endangered species or result in the destruction nor adverse modification of critical habitat.

As its remedies, plaintiffs asked the court to vacate NWP13 as well as the Bull river bulkhead authorization, and to enjoin the Corps from authorizing future projects under the General Permit. Plaintiffs' lawsuit represented a "facial challenge to NWP13 and an

as-applied challenge to the Bull River bulkhead approval." Plaintiffs, therefore, asserted both:

> …a substantive injury caused by the application of NWP13 to the Bull River bulkhead and other bank stabilization projects in the Savannah and Ogeechee Rivers; and…a procedural injury, caused by the Corps' failure to adequately evaluate the environmental impact of NWP13 projects.

For its part, the Corps filed a motion for summary judgment alleging that plaintiffs lacked standing despite their member declarations demonstrating injury arising from the Corps reissuance of NWP13.

The D.C. Circuit's Decision

Article III Standing

An Association has standing to sue under Article III of the Constitution of the United States *only* if:

> (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." (*Id.*), quoting from *AM Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013).)

At issue in this case is requirement no. 1—whether at least one of the plaintiffs' members have standing.

Article III standing requires satisfaction of three elements:

> (1) a concrete and particularized and actual or imminent injury-in-fact that is (2) fairly traceable to the challenged action of the defendant…and (3) likely to be redressed by a favorable decision. (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).)

Where a plaintiff is alleging a procedural injury—an injury resulting from a violation of a procedural right created by statute—to establish standing a plaintiff must show "some concrete interest…[that is] adversely affected by the procedural deprivation." (*Wild Earth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).)

Here, plaintiffs' alleged both substantive injury arising from the application of NWP13 to the Bull River bulkhead and other bank stabilization projects in the Savannah and Ogeechee rivers; and a procedural injury caused by the Corps' failure to adequately evaluate the environmental impact of NWP13 projects.

Standing under the ESA

The court pointed out that the injury-in-fact test requires that one of plaintiffs' members have such an interest directly affected by agency action—*i.e.* that viewing of animal species take place in the area affected by the challenged activity. The court found plaintiffs' declarations only established a general enjoyment in viewing wildlife in areas other than the Bull River area which is the subject of this litigation, therefore plaintiffs' failed to meet the substantive inquiry-in-fact standing requirement.

Standing under NEPA and the CWA

Plaintiffs presented one member stating a substantive injury-in-fact claim:

> …[w]hen she visits areas where bulkheads exist, the structures lessen her enjoyment of these activities because of their 'unsightly appearance'.

This plaintiff member further alleged that she visits areas where NWP13 bulkheads currently exist and experiences a decreased enjoyment due to their unsightly appearance.

The court, however, found plaintiffs' declarations did not state "…'a concrete and particularized and *imminent* injury threatened by future bulkheads—and fails as such."

The court found the situation similar to the one in *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009) where environmental plaintiffs' standing declarations failed to show "…that they use the area affected by the challenged activity and not an area roughly in the vicinity of a project site…."

Here, the court found plaintiff's declarations did not show that their members' activities take place along any portion of the shoreline about to be altered by a NWP13 structure, or that any NWP13 structure is present in the area or anywhere.

As to plaintiffs' claims of an actual ongoing harm to their recreational and aesthetic interests. The

court found that plaintiffs' standing failed to meet the requirement that a favorable decision on their claim would "ameliorate the harm alleged.

Conclusion and Implications

In the end, the D.C. Circuit Court of Appeals found that plaintiffs remedy seeking to vacate NWP13 and enjoin all future authorizations under the General Permit could not help plaintiffs "who suffer…ongoing aesthetic harm caused by existing NWP13 bulkheads."

The court also found that plaintiffs' standing declarations were limited to alleging specific injuries tied to completed NWP13 projects that would remain completed despite alleged procedural errors. Plaintiffs' failure to seek removal any of the existing NWP13 bulkheads, proved fatal at their attempt to establish standing.

(Thierry Montoya)

DISTRICT COURT HOLDS STATE WATER QUALITY STANDARD ENACTED PURSUANT TO THE FEDERAL CLEAN WATER ACT IS ENFORCEABLE IN CITIZEN SUITS

Harpeth River Watershed Association v. City of Franklin, Tennessee, ___F.Supp.3d___, Case No. 3:14-1743 (M.D. Tenn. Mar. 3, 2016).

Harpeth River Watershed Association (HRWA) filed a citizen suit pursuant to the federal Clean Water Act (CWA) against defendant, the City of Franklin (Franklin), which owns the Franklin Sewage Treatment Plant. HRWA's suit alleged that since 2009, Franklin discharged pollutants (untreated sewage, ammonia, and toxic wastewater) into the Harpeth River and its tributaries in violation of its National Pollutant Discharge Elimination System (NPDES) permit issued through Tennessee's EPA approved NPDES program. Franklin filed a motion to dismiss HRWA's allegations, in part, alleging that Tennessee's permit requirement called for a greater scope of coverage than required by federal court. Franklin alleged if federal law did not require compliance with Tennessee's NPDES permit requirements than such requirements could not be the subject of a citizen suit under the CWA. The court rejected Franklin's "beyond the scope" defense.

Background

States may request permission from the U.S. Environmental Protection Agency (EPA) to administer a state NPDES program after EPA promulgates certain guidelines that govern monitoring, reporting, enforcement, funding, personnel, and manpower. (*See, Askins v. Ohio Dept of Agrie*, 809 F.3d 868, 872 (6th Cir. 2016).) Pursuant to the Clean Water Act, when administering a state NPDES program, "states are free to treat the EPA's pollution limits as a floor and impose more stringent requirements." (*W.V. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159,162 (4th Cir. 2010).)

EPA provides procedures it will follow when approving, revising and withdrawing state programs and the requirements state programs must meet to be approved by the EPA. These regulations include 40 C.F.R. §123.1, which states:

> (1) nothing in this part precludes a state from: (a) Adopting or enforcing requirements which are more stringent or non-extensive than those required under this part; (b) Operating a program with a greater scope of coverage than that required under this part. If an approved state program has a greater scope of coverage than required by Federal law the additional coverage is not part of the federally approved program.

Franklin alleged that although permit holders are subject to state and federal enforcement actions, as well as citizen suits, when states adopt requirements with a greater scope of coverage not part of the federally approved program such are not subject to citizen suit enforcement under the CWA.

The District Court's Decision

Franklin challenged three permit conditions based on the "beyond the scope" defendant: 1) overflows that are not discharges; 2) nutrient management

plans; 3) in-stream monitoring and receiving stream investigations. In reliance on § 123.1, Franklin argued that:

> …whether the NPDES regulations can somehow be stretched to authorize the permit condition is not the issue… [rather] the issue is what is required by Federal law? For instance, does the federal law require that non-discharging over flows be prohibited? Similarly, does the federal program require nutrient management plans for POTWS [publicly-owned treatment works] or ambient monitoring.

Franklin cited to cases as support for the proposition that a beyond the scope permit condition, which is included in a state-issued permit "… does not magically make that condition subject to a CWA citizen suit."

In *Atlantic States Legal Foundation, Inc. v. Kodak*, 809 F.Supp. 1040 (W.D. N.Y. 1992), aff'd, 12 F.3d.353 (2nd Cir. 1993) a case revolving a New York SPDES permit prohibiting the discharge of any pollutant that was not subject to a numerical effluent limitation. The court in *Atlantic* rejected plaintiff's argument that, under state law, a pollutant not identified and authorized by the SPDES represented a permit violation, the court held:

> Accepting plaintiff's view of the reach of the act would effectively circumvent the permit system and expand the scope of a citizen suit under the [CWA]; it would change the nature of the citizens' role from interstitial to potentially intrusive… I cannot agree that congress intended such a result. (*Id.*, 809 F.Supp.at 1048.)

In affirming that conclusion, the Second Circuit held;

> …[s]tate regulations, including the provisions of SPDES permits which mandate 'a greater scope of coverage than that required' by the federal CWA and it's implementing regulation are not enforceable through a citizen suit under 33 U.S.C. ? 1365, 40 C.F.R. § 123. (*Id.*, 12F.3d 358-59.)

Franklin's second case, *Long Island Soundkeeper Fund v. New York City Department of Environmental Protection*, 27 F.Supp.2d 380 (E.D. NY 1998) was not particularly impactful as this court was bound by the *Atlantic* holdings.

Analysis under the *Parker v. Scrap Metal Processors* and *Ohio Valley* Decisions

The District Court here however, found the *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004) and *Ohio Valley Environmental Coalition, Inc. v. FOLA Coal Co.*, 82 F.Supp.3d 673 (S.D. W.VA. Dec. 19, 2013) more persuasive.

In *Parker*, the court noted that:

> …the Supreme Court apparently has incorporated state law standards under the CWA into federal environmental law for jurisdictional purposes… [and that] the plain language of the CWA and the relevant case law dealing with the CEA convinces us that there is a federal jurisdiction over citizen-suit claims that allege violations of state-issued NPDES permit.

Ohio Valley was citizen suit under both the CWA and the Surface Mining Control and Reclamation Act-based on allegations that a coal mine discharged excessive selenium into West Virginia waters. The court rejected defendant's reliance on *Atlantic* rejecting this holding in light of *Parker, supra* finding that "that state law standards are incorporated into the CEA and are enforceable in citizen suits." (*Id.*, 82 F.Supp.3d 682.) The *Ohio Valley* court further held:

> All NPDES permits must comply with the applicable water quality requirements of all affected states…. As explained by the Supreme Court, '[t]his regulation effectively incorporates into federal law those state-law standards the Agency reasonable determines to be applicable.' In such situations, then, state water quality standards promulgated by the states with substantial ordinance from the EPA and approved by the Agency are part of the federal law of water pollution control. (*Id.* at 9, internal quotations omitted.)

Conclusion and Implications

In *Parker, supra*, the Eleventh Circuit noted that:

> …the Supreme Court apparently had incorporated state law standards under the CWA into federal environmental law for jurisdictional purposes,…[and that] the plain language of the CWA and the relevant case law dealing with the CWA convince us that there is federal jurisdiction over citizen-suit claims that allege violations of a state-issued NPDES permit. (*Id.*, 386 F.3d at 1008.)

As such, the issue comes down to "whether a state standard enacted pursuant to the CWA is an 'effluent standard or limitation' under the CWA." The EPA Administrator can prescribe conditions to the issuance of permits, providing the basis for the court to reject Defendant's "BTS" defense on overflow provisions and permit provision requiring monitoring and nutrient management.
(Thierry Montoya)

DISTRICT COURT CERTIFIES CLASS ACTION IN SECURITIES LITIGATION ALLEGING FALSE STATEMENTS ABOUT ENVIRONMENTAL COMPLIANCE

In re Barrick Gold Securities Litigation, ___F.Supp.3d___, Case No. 13-cv-3851 (S.D. N.Y. Mar. 23, 2016).

Individuals and organizations that held stock in Barrick Gold Corporation (Barrick) filed suit against Barrick, alleging violations of securities laws based on misstatements about, among other things, compliance with environmental obligations. Barrick moved to dismiss the claims against it, arguing with respect to the statements about environmental compliance that plaintiffs had failed to allege facts indicating the statements were false when made, had failed to allege facts indicating that Barrick knew the statements were false when made, and that Barrick warned of the risks posed by environmental litigation that resulted in an adverse decision. The U.S. District Court for the Southern District of New York denied the motion, concluding that plaintiffs alleged sufficient facts concerning the falsity of the statements, alleged sufficient facts concerning Barrick's knowledge of the same, and that Barrick's statements about environmental compliance concealed the risks posed by the litigation. Subsequently, plaintiffs moved for class certification on behalf of all persons and entities that purchased Barrick stock during the class period. The District Court granted class certification.

Background

Barrick is one of the world's largest gold mining companies. In 1994, it acquired an untapped gold mine on the border between Chile and Argentina, which was expected to be one of the largest and most difficult industrial ventures in the world. To mine the gold, Barrick planned to dig an open-pit goldmine in the peaks of the Andes Mountains.

Because of possible negative impacts on surrounding glaciers, Barrick was required to secure various environmental approvals from the governments of Chile and Argentina before the project could begin. After years of discussions, Barrick secured the requisite approvals, which required that it comply with four hundred environmental conditions focused on addressing environmental concerns related to the Andean glaciers and water management. The required measures included using irrigation systems to minimize the spread of dust and particulates from mining trucks and the construction of canals to capture and treat run-off.

From the outset, the project did not have enough water to comply with the requirement to keep roads wet to prevent dust from being blown onto nearby glaciers. Barrick was sanctioned for its failure to reduce particulate emissions in January 2010. Barrick also changed plans for the construction of the canals to manage water runoff without prior government approval.

During this time period, Barrick stated in earnings calls that the project was not impacting the surrounding glaciers and that it was in compliance with its environmental obligations. Barrick also stated in its securities filings that the project was undertaken pur-

suant to existing environmental approvals and that it had measures in place to protect sensitive environmental areas.

In April 2013, an appeals court in Chile issued an order halting work on the project and subjecting Barrick to potentially millions in fines as a result of alleged failures to comply with environmental obligations. Barrick stopped construction to address the environmental requirements, and a short while later, Chile's Environmental Superintendent suspended the project for noncompliance with environmental permits, imposed the maximum fines allowed under Chilean law and noted that Barrick had admitted 22 of 23 identified environmental violations. Each of these developments were accompanied or followed by a drop in Barrick's stock price.

After the District Court denied Barrick's motion to dismiss plaintiffs securities fraud claims, plaintiffs moved for class certification on behalf of all persons and entities who purchased Barrick's publicly traded common stock listed on the New York Stock Exchange during the period May 7, 2009 through November 1, 2013. Barrick opposed the motion principally arguing that class certification was not proper under Federal Rule of Civil Procedure 23(b)(3).

The District Court's Decision

The District Court noted that certification is appropriate under Rule 23(b)(3) where "questions of law or fact common to the members of the class predominate over any questions affecting any individual members" and a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." According to the court, "…the predominance inquiry focuses on whether 'a proposed class is sufficiently cohesive to warrant adjudication by representation'."

Barrick argued in opposition to plaintiffs' motion that class certification was not proper because individualized damages issues would predominate under the damages theories plaintiffs advanced and that plaintiffs could not meet their obligation to establish a presumption of reliance on the alleged misstatements because plaintiffs' theories required a showing that individual investors would not have purchased the stock had they known the true risk. The court summarily rejected both arguments, stating that defendants mischaracterized plaintiffs' claims and that plaintiffs had met their burden of showing common questions predominated.

Conclusion and Implications

The U.S. District Court's decision applied settled legal principals to the facts before it to determine that class certification was appropriate. The court's decision nonetheless is notable because many of the underlying misrepresentations alleged involved statements about compliance with environmental obligations, a subject that often is complex and not clear cut, and because it raises the specter of potentially significant liability for misstatements about environmental compliance.
(Duke K. McCall, III)

DISTRICT COURT GRANTS INTERLOCUTORY APPEAL OF DECISION FINDING INSURER HAS NO DUTY TO DEFEND AGAINST ENVIRONMENTAL CLAIMS

The Jorgensen Forge Corp. v. Illinois Union Insurance Co.,
___F.Supp.3d___, Case No. 13-1458 (W.D. Wa. Mar. 15, 2016).

Jorgensen Forge Corporation (JFC) brought an insurance coverage action against its insurer, Illinois Union Insurance Company (IUIC), seeking insurance coverage for environmental claims that state and federal agencies filed against JFC. On JFC's motion for partial summary judgment, the U.S. District Court for the Western District of Washington initially held that IUIC had a duty to defend JFC against four claims asserted against JFC. After discovery, both parties moved for reconsideration. On reconsideration, the court held that IUIC did *not* have a duty to defend JFC against any of the claims at issue because two of the claims were excluded under the contamination exclusion in the insurance policy and two of the claims were first asserted outside the policy period. Concluding that its order involved a controlling issue of law, that its order determined the central issue in the case (*i.e.*, that JFC's claims were excluded from coverage), and that an immediate appeal would speed the resolution of the case, the court granted JFC's motion for an interlocutory appeal to the U.S. Court of Appeals to the Ninth Circuit.

Background

JFC operated a metal forging and manufacturing facility in Tukwila, Washington (the JFC Site). IUIC issued an insurance policy to JFC, providing coverage against environmental claims asserted with respect to the JFC Site. The policy, however, limited coverage to "claims" "first made" during the policy period, which began on July 31, 2008 and ended on July 31, 2015. The policy also excluded coverage for claims falling within the policy's "Contamination Exclusion," which barred coverage for claims related to two pre-existing obligations at the site: 1) a 2003 Administrative Order on Consent (AOC) with the U.S. Environmental Protection Agency (U.S. EPA); and 2) a 2007 Agreed Order with the Washington State Department of Ecology (Washington DOE).

During the time period covered by the policy, federal and state agencies contacted JFC about various claims related to the possibility that the JFC Site was a source of contamination to the Lower Duwamish Waterway, including: 1) a Second Modification for Administrative Order on Consent for Removal Action U.S. EPA issued to JFC on June 2013 (2013 AOC Modification); 2) an Administrative Order Washington DOE issued to JFC in August 2011; 3) a December 2009 notice various natural resource trustees provided to JFC advising JFC that they were seeking to recover for natural resource damages; and 4) a 2014 request by Washington DOE that JFC sign an Agreed Order related to the Site.

JFC provide notice of each of these claims to IUIC between June 2013 and January 2014. In August 2014 IUIC issued a determination of non-coverage, concluding that the claims were not first made during the policy period and that several claims were barred by the Contamination Exclusion because they arose from the 2003 AOC and 2007 Agreed Order. JFC, which had previously filed a coverage action against IUIC, asked the District Court to find that IUIC was obligated to defend it against these claims.

The District Court's Decision

The District Court began its analysis by noting that an insurer's duty to defend arises if there are any facts presented that "could conceivably impose liability upon the insured within the policy's coverage." Courts must construe ambiguous allegations "liberally in favor of triggering the insurer's duty to defend" and if there are any genuine disputes of fact regarding coverage, the insured is entitled to judgment in its favor. The insurer is not relieved of its duty to defend unless the claims presented "clearly are not covered by the policy."

The Contamination Exclusion

Tracing the regulatory history that predated U.S. EPA's issuance of the 2013 AOC Modification, the court concluded that U.S. EPA's 2013 AOC Modification claim addressed pollution arising from the

2003 AOC and arose from work performed under the 2007 Agreed Order. JFC argued that this claim nevertheless was not barred by the Contamination Exclusion because that exclusion only barred costs incurred pursuant to those orders. The court disagreed, noting that the policy excluded coverage for all costs "arising from" the work required under the 2003 AOC and 2007 Agreed Order and construed that language as extending to the additional work required by the 2013 AOC Modification because the 2013 AOC Modification was "…designed to remedy contamination subject to the 2003 Order and was incurred as a result of the 2007 Order's investigations."

The court similarly concluded that the 2014 request by Washington DOE that JFC sign an Agreed Order related to the Site arose from the investigation performed under the 2007 Agreed Order, and thus, fell within the Contamination Exclusion.

Claims First Filed Before the Policy Period

In assessing when the Washington DOE first made the claim that was the subject of the August 2011 Administrative Order, the court examined when JFC first became obligated to perform the work that was the subject of the order. Because it concluded that JFC first became obligated to undertake the work required by the 2011 Administrative Order in May 2008, before the policy period began on July 31, 2008, the court concluded it concerned "a legal right asserted prior to the Policy period…and is barred from coverage." The court also concluded that natural resource trustees first provided JFC notice of their natural resources damages claim in a 2007 PowerPoint presentation, and thus, the claim addressed in the December 2009 notice was first made prior to the date the policy began in July 2008, and therefore, fell outside the policy's coverage.

Conclusion and Implications

The District Court's decision to grant an interlocutory appeal of its decision determining that IUIC has no duty to defend JFC makes clear the court understands the both the import of its decision and the significance of the duty to defend to policyholders faced with environmental claims. The cost to defend against such claims can, in many instances, exceed the indemnity coverage provided by the policy. While the court's analysis turns on the specific coverage provisions presented, the level of scrutiny the court applies in determining the absence of a duty to defend could have implications for other policyholders as well.

(Duke K. McCall, III)

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