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FEATURE ARTICLE

THE *TUCSON HERPETOLOGICAL SOCIETY V. SALAZAR* DECISION AND ITS PROGENY: A MOVE AWAY FROM BLIND DEFERENCE TO AGENCY DECISION-MAKING

By K. Eric Adair and Rebecca R. Akroyd

With its 2009 decision in *Tucson Herpetological Society v. Salazar*, 566 F.3d 870 (9th Cir. 2009), the U.S. Court of Appeals for the Ninth Circuit signaled that courts should not blindly defer to scientific decisions made by federal agencies when those agencies fail to adequately explain or justify those decisions. The significant deference afforded federal agencies notwithstanding, *Tucson Herpetological* established a judicial willingness to look behind the decision-making process to ensure that agency decisions are consistent with and supported by the best available science.

In the three years since *Tucson Herpetological*, courts have taken this direction seriously. Six recent Administrative Procedure Act (APA) cases reflect a new trend in case law that gives teeth to the concept that federal agencies must explain their scientific decisions regarding endangered or threatened species. These cases confirm a move away from blind deference to agency decisions and a move toward transparency. In this article, we consider the implications of recent jurisprudence on this topic, particularly for resources users who are in the position of challenging federal agency decision making pertaining to listed species.

Background

In *Tucson Herpetological* and its progeny, courts evaluate federal agency actions under the framework for judicial review of such actions established in the APA. These evaluations occur pursuant to APA mandate that reviewing courts must:

> …hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

This standard is highly deferential. The Ninth Circuit has explained that reviewing courts should defer to "an agency's scientific or technical expertise," particularly when "the agency's decision involves a high level of technical expertise." *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 798 (9th Cir. 2005 (quoting *R-CALF v. U.S. Dept. of Agriculture*, 415 F.3d 1075, 1093 (9th Cir. 2005)); *see also, The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (courts are to be "'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science'" (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)). Where agency action requires expert scientific decisions, however, federal agencies are required to "state a rational connection between the facts found and the decision made" to survive APA review. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 10656 (9th Cir. 2004).

Agency decisions made in accordance with some environmental statutes are also subject to the "best available science" requirements. The Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) require federal agencies to make their listing and consultation determinations on the

bases of, respectively, "the best scientific and commercial data" and "best scientific evidence" available. 16 U.S.C. § 1533(b)(1)(A) (ESA § 3); 16 U.S.C. § 1536(a)(2) (ESA § 7); 16 U.S.C. § 1373(a) (MMPA). Thus, although agencies are entitled to significant deference in their expert scientific decisions, they are still obligated to rationally explain their scientific decisions and to make their decisions on the basis of the "best available science." Failure to satisfy these obligations exposes agency decisions to successful challenges by resource users who can demonstrate agency failure to identify and apply best available science.

New Case Law Developments

Tucson Herpetological Society v. Salazar

In *Tucson Herpetological*, the Ninth Circuit considered whether it was arbitrary and capricious for the Secretary of the Interior (Secretary) to withdraw a rule proposing to add the flat-tail horned lizard to the endangered species list. Plaintiffs, a group of conservation organizations and individual biologists, contended that the decision violated a prior remand order requiring analysis of the species' lost historical range. In support of that contention, they pointed to evidence in the administrative record that purportedly undermined the finding that lizard populations were persisting throughout most of their range.

In response, the Ninth Circuit analyzed support for the agency's finding, acknowledging that:

> …[w]hile [its] deference to the agency is significant, [it] may not defer to an agency decision that 'is without substantial basis in fact.' 566 F.3d at 878 (quoting *Sierra Club v. U.S. EPA*, 346 F.3d 955, 961 (9th Cir. 2003)).

Applying the APA standard of review, the court stated that:

> …[a]n action will be deemed arbitrary and capricious where the agency offers an explanation for an action 'that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' 566 F.3d at 878 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The court noted that in previous litigation on the agency's ESA listing decision, the Secretary had admitted that existing population studies were "limited and inconclusive." The Secretary had, nonetheless:

> …infer[red] from the uncertainty in the population studies that lizard populations 'remain[ed] viable throughout most of [the lizard's] current extant range.' *Id.*

The court explained the problem with that approach:

> If the science on population and trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence….The Secretary affirmatively relies on ambiguous studies as evidence of persistence (i.e., stable and viable populations), and in turn argues that this 'evidence' of persistence satisfies *Defenders*' mandate and proves that the lizard's lost range is insignificant for purposes of the ESA. This conclusion is unreasonable. The studies do not lead to the conclusion that the lizard persists in a substantial portion of its range, and therefore cannot support the Secretary's conclusion. *Id.* at 879.

Consequently, the court determined that it did not owe deference to the agency's conclusion:

> [A] single attenuated finding represent[ed] the extent of the agency's evidentiary support for its sweeping conclusion that viable lizard populations persist[ed] throughout most of the species' current range. *Id.*

This, in the court's opinion, was simply not enough. This holding marked a shift in the court's presumed deference to an agency's scientific expertise, particularly where science is underdeveloped or unclear, reducing the likelihood of blind deference to scientific decisions in future cases.

Smelt and Salmon OCAP Litigation

While the *Tucscon Herpetological* decision was pending, federal agencies issued biological opinions regarding the Delta smelt and salmonid species in December 2008 and June 2009, respectively. The colloquially-known Smelt Biological Opinion (BiOp) and Salmon BiOp are the culmination of § 7 consultations on the Operations Criteria and Plan (OCAP), a document governing coordinated operations of California's Central Valley Project (CVP) and State Water Project (SWP). Both BiOps concluded that OCAP operations would jeopardize the target species and adversely modify their critical habitats. As a result, both opinions included reasonable and prudent alternatives (RPAs) to modify CVP and SWP operations.

Many water districts dependent on CVP and SWP supplies challenged the BiOps and RPAs in federal court. The U.S. District Court for the Eastern District of California consolidated these suits into the *Delta Smelt Consolidated Cases* and the *Consolidated Salmonid Cases* (collectively, the OCAP cases). (E.D. Cal. Lead Case Nos. 1:09-CV-407 and 1:09-CV-1053, respectively). Among the many challenges to the BiOps, plaintiffs alleged that the federal agencies had failed to use the best available science in support of their conclusions.

In both cases, the water districts successfully defeated agency claims to sweeping deference to agency conclusions. First, in June 2010, in the *Consolidated Salmonid Cases*, 713 F.Supp.2d 1116 (E.D. Cal. June 1, 2010), the U.S. District Court granted plaintiffs' motion for preliminary injunction to enjoin implementation of several RPA actions. The court held that plaintiffs were likely to succeed on the merits of their claim that federal defendants had failed to use the best available science. *See, e.g.*, 713 F.Supp.2d at 1165-1168. In its decision, the court acknowledged that courts are typically required to defer to agencies' evaluation of "[w]hat constitutes the 'best' available science," but noted that:

> …[c]ourts routinely perform substantive reviews of record evidence to evaluate the agency's treatment of best available science. The judicial review process is not one of blind acceptance. 713 F.Supp.2d at 1158, 1159 (internal citation omitted).

The court went on to explain that "[t]he presumption of agency expertise may be rebutted if the agency's decisions, although based on scientific expertise, are not reasoned" (*id.* (citing *Greenpeace v. Nat'l Marine Fisheries Service*, 80 F.Supp.2d 1137, 1147 (W.D. Wash. 2000)), and that "[a]gencies cannot disregard available scientific evidence better than the evidence on which it relies." *Id.* (citing *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006); *S.W. Ctr. For Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)). Further, the court reiterated that:

> …[c]ourts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area. *Id.* at 1160.

With the Salmon BiOp, the failures of the agency to use best available science resulted in decisions that that did not warrant deference.

Next, in December 2010, in the *Delta Smelt Consolidated Cases*, 760 F.Supp.2d 855 (E.D. Cal. 2010), *appeal docketed*, Case No. 11-15871 (9th Cir. Apr. 11, 2011), the U.S. District Court issued a memorandum decision on cross motions for summary judgment, ultimately requiring remand of the Smelt BiOp and RPA. As in the *Consolidated Salmonid Cases*, the court relied on *Tucson Herpetological* for its conclusion that "[t]he deference afforded under the best available science standard is not unlimited." 760 F.Supp.2d at 872. Similarly, the court identified circumstances in which deference would not be warranted. For example:

> …[a] court should 'reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation.' *Id.* at 873 (quoting *N. Spotted Owl v. Hodel*, 716 F.Supp 479, 483 (W.D. Wash. 1988)).

The court identified several instances where the U.S. Fish and Wildlife Service (FWS) failed to utilize the best available science (*e.g.* its decision in the BiOp to use gross salvage numbers instead of normalized salvage data) and then failed to explain that decision. *Id.* at 890, 894. The court described the latter failures as:

> …an abdication of the duty to satisfy the basic APA requirement that the agency 'articulate[ ] a rational connection between the facts found and the choice made.' *Id.* at 894 (quoting *Ariz. Cattle Growers' Ass'n*, 272 F.3d at 1236).

Ultimately, the court found the Smelt BiOp and RPA "arbitrary, capricious, and unlawful," and remanded to FWS. *Id.* at 970.

Recent developments in the OCAP cases further evidenced the court's willingness to scrutinize the scientific underpinnings of agency action. During a September 16, 2011, hearing on defendants' motion to stay pending appeal in the *Delta Smelt Consolidated Cases*, the U.S. District Court reiterated its frustration with agency failures of explanation and utilization of the best available science. In an oral statement of decision that has subsequently received substantial media attention, the court criticized the testimony of two witnesses for the federal government, discounting their conclusions that the injunctive relief previously granted would jeopardize the continued existence of the Delta smelt. The court found agency bad faith, noting that:

> …the only inference that the Court can draw is that [the testimony] is an attempt to mislead and to deceive the Court into accepting what is not only the best science, it's not science. (Reporter's Transcript of Proceedings (Sept. 16, 2011), at 17:20-25.)

Also in September 2011, the U.S. District Court issued a memorandum decision on cross motions for summary judgment in the *Consolidated Salmonid Cases*, ___F.Supp.2d___, 2011 (E.D. Cal. Sep. 20, 2011) requiring remand of the Salmon BiOp and RPA. The court again cited *Tucson Herpetological* as authority "for the proposition that, while a court must be deferential in areas where there is scientific uncertainty, such deference is not unlimited." 2011 WL 452293 at *11 n.6. As in the *Delta Smelt Consolidated Cases*, the court identified multiple instances where the National Marine Fisheries Service failed to use the best available science (e.g. in the BiOp's conclusions about the connection between Project operations and pollution and/or food limitations) and then failed to explain that decision. *Id.* at *139-40.

Together, the *Consolidated Salmonid Cases* and *Delta Smelt Consolidated Cases* represent successful efforts by resource users to challenge agency action. While litigation on the Salmon and Smelt BiOps is far from finished, the decisions to date demonstrate that the agency decision-making process is subject to judicial scrutiny, even where that process implicates the particular area of the agency's scientific expertise, and irrespective of whether the ultimate agency decision appears to favor or disfavor protected species.

Other Decisions

Three other decisions in 2010 follow from *Tucson Herpetological* and confirm that scientifically unsupported agency action may be successfully challenged. While each of the cases involves a challenge to agency action brought by environmental organizations rather than resource users, the holdings confirm the authority of courts to scrutinize and overturn agency decisions that are not supported by good science.

In *South Yuba River Citizens League v. NMFS*, 723 F.Supp.2d 1247 (E.D. Cal. July 8, 2010), the court emphasized that the deference due an agency's scientific expertise did not eliminate the obligation of the agency to explain its conclusions on the record. The U.S. District Court explained:

> Even for scientific questions, … a court must intervene when the agency's determination is counter to the evidence or otherwise unsupported. 723 F.Supp.2d at 1256 (citing *Sierra Club v. United States EPA*, 346 F.3d 955, 962 (9th Cir. 2003), amended by 352 F.3d 1187 (9th Cir. 2003)).

Environmental plaintiffs attacked the agency's vague justifications for a no-jeopardy BiOp. The court agreed, holding that it:

> …'cannot simply take the agency's word that the listed species will be protected under the planned operations: 'If this were sufficient, the NMFS could simply assert that its decisions were protective and so withstand all scrutiny.' *Id.* at 1267 (quoting *Nat'l Wildlife Fed'n v. Natl' Marine Fisheries Service*, 524 F.3d 917, 935 n. 16 (9th Cir. 2007)).

The lack of adequate explanation and/or rational connection between the facts and conclusion reached in this case made the BiOp's conclusion arbitrary and capricious.

In *Humane Society of the United States v. Locke*, 626 F.3d 1040 (9th Cir. Nov. 23, 2010), the agency's failure to satisfactorily explain its finding that sea lions were having a "significant negative impact" on listed salmonid populations led the Ninth Circuit to confirm the bite in the requirement of agencies to explain their scientific determinations. The court characterized the lacking explanations as "procedural errors" serious enough to warrant vacating the agency's MMPA and NEPA decisions. 626 F.3d at 1048. "Without an adequate explanation," the court explained, it was "precluded from undertaking meaningful judicial review" and unable to "ascertain whether NMFS has complied with its statutory mandate under the MMPA." *Id.* at 1049, 1052.

With *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. Dec. 7, 2010), the Ninth Circuit again confirmed the obligation of the wildlife agencies "to articulate a rational connection between the facts found and the conclusions made." 628 F.3d at 529 (internal quotations omitted). As in *South Yuba*, plaintiffs alleged agency failure to explain a no-jeopardy determination. Even in a context where the wildlife agency was due some degree of deference, the court recognized its duty to "engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." *Id.* at 521 (quoting *Nat'l Wildlife Fed'n*, 524 F.3d at 927). Following its review, the court agreed with plaintiffs that the agency's failure to explain the no-jeopardy determination warranted remand of the § 7 BiOp at issue. The court pointed to multiple failings by the agency in support of its holding, including the failure to explain individual findings (i.e., "that the action would not affect the 'current distribution and abundance of the bull trout in the action area'") and the bigger failure to "articulate a rational connection between its findings and its ultimate conclusion – that the action would not cause jeopardy at the recovery unit scale." *Id.* at 528.

Most recently, in *Greater Yellowstone Coalition, Inc. v. Servheen*, ___F.3d___, Case No. 09-36100 (9th Cir. Nov. 22, 2011), the Ninth Circuit affirmed the U.S. District Court's judgment vacating a decision to delist the Yellowstone population of grizzly bears, because FWS did not adequately explain why a trend of decline in an important food source was not a threat to the grizzly population. The court acknowledged "that scientific uncertainty generally calls for deference to agency expertise," but noted that it "nonetheless [had] a responsibility to ensure that an agency's decision is not arbitrary." Going further, the court stated that:

> …[i]t is not enough for the Service to simply invoke 'scientific uncertainty' to justify its action. … The Service must rationally explain why the uncertainty regarding the impact of whitebark pine loss on the grizzly counsels in favor of delisting now, rather than, for example, more study. *Id.*

Without further explanation of the FWS' decision to delist, the Ninth Circuit explained, it "might as well be deferring to a coin flip."

Conclusion—What This Means for Resource Users

Together, the cases described above create a body of law that puts teeth in the concept that federal agencies have to explain their scientific decisions regarding endangered or threatened species, and will be required to comply with statutory mandates to use the best available scientific data. This concept applies regardless of the type of determination – jeopardy or no-jeopardy – and is available for use by environmental organization and resource user plaintiffs alike.

Knowing that agencies' scientific decisions regarding listed species may now be subject to more intensive judicial analysis, it is increasingly important for resource users to preserve their objections and lay the groundwork for possible litigation by participating in the decision-making process. Resource users can ensure that agencies have relevant scientific information before a decision is made, by providing information in comment letters, by actively participating in public forums, and through other modes of public participation. They may retain their own experts, conduct their own research, provide the results of that research to the agency, critique agency science and provide better science. Parties should become involved early in the decision-making process so their information is in front of the agency well before a decision is made. In so doing, resource users can

effectively force agencies to address such scientific information, or be placed in the uncomfortable position of explaining to a reviewing court why the provided scientific information was not considered. Resource users may find more success in litigation when they have assisted the agency by providing the "best available science." They will have a better opportunity to persuade a federal judge to overturn agency action if they have provided the best available science during the decision-making process.

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EASTERN WATER NEWS

CHESAPEAKE BAY FOUNDATION ISSUES STUDY TO SHOW BAY CLEANUP WILL STIMULATE JOB GROWTH—OTHER DEVELOPMENTS WITH THE BAY TAKING SHAPE

The battle is on over whether measures designed to save Chesapeake Bay actually hurt the regional economy. The Chesapeake Bay Foundation (CBF) in December 2011 released a study to "debunk" claims that environmental regulations aimed at cleaning up the bay actually destroy jobs.

Chesapeake Bay Foundation Jobs Report—'Debunking the Myth'

The CBF jobs report, entitled "Debunking the 'Job-Killer' Myth—How Pollution Limits Encourage Jobs in the Chesapeake Bay Region," seeks to refute arguments that environmental regulations hurt the economy. The report estimates that wastewater treatment plant upgrades and other federally mandated requirements aimed at restoring the bay would create at least 230,000 jobs.

The CBF jobs report declared that the bay is an "engine for the region's economy estimated to be worth more than $1 trillion." However, the report stated:

> …pollution continues to cause serious damage to the nation's largest estuary, as shown by beach closures, fish consumption advisories, harmful algal blooms, and other afflictions.

The CBS jobs report is intended to provide support for the U.S. Environmental Protection Agency's (EPA) new Total Maximum Daily Load (TMDL) limits for the bay, issued in December 2010, which require watershed states to reduce pollution flowing into the estuary by 25 percent by 2025 and pushes the states to follow through with clean-up promises. The TMDL—or "pollution diet"—sets limits on the amount of nitrogen, phosphorous and sediment pollution discharged into the bay and all of its tributaries by different kinds of pollution sources.

Combating 'Unsubstantiated Rhetoric'

CBF states that "unsubstantiated rhetoric" by politicians such as U.S. Rep. Andy Harris (R-Md.) have claimed that such TMDL limitations were destroying poultry jobs on Maryland's Eastern Shore. CBF states that such attacks are part of a broader assault on environmental regulations in general, typified by arguments advanced by U.S. Rep. Eric Kantor (R-Va.) in his August 2011 memo to House Republicans, that environmental regulations enacted by the Obama administration are destroying jobs.

A Study of Job Growth from Environmental Compliance

As examples of job growth projected to result from bay cleanup efforts, the CBF study estimates that work to construct stormwater pollution control projects could provide work for about 178,000 people across the region over the next five years, including 36,000 jobs in Maryland, 10,000 in the District of Columbia, 80,000 in Pennsylvania and 52,000 in Virginia. The study also projects sewage plant upgrade projects could result in 20,000 construction-related jobs. Another 11,751 temporary jobs may be created in implementing farm runoff control projects.

The CBF jobs report also stated that pollution control innovations could spark job growth in a wide variety of new firms "that will hire employees for everything from pollution-credit trading to building high-tech barns, low-runoff housing developments, green roof, and stormwater-control systems that look like gardens beside the road." Finally, the report also concluded that cleaner bay water would "mean more fish, crabs, and oysters, which will translate to more work and income for fishermen, processors, packers, restaurateurs, and people in tourism-related industries. If history is any guide, environmental regulations will once again nourish job creation, not bury it."

Other Recent Developments in the Chesapeake Bay

University Study Finds Bay 'Dead Zone' Diminishing

In another recent development, a study released in November 2011 found some hopeful, albeit small, signs that efforts to restore the bay may be succeeding. Researchers from Johns Hopkins University and the University of Maryland released a study that found that the average size of the "dead zone" in the bay—which harms fish and shellfish—may be shrinking. The study countered other recent studies that found that the bay's summer dead zone had expanded.

Draft Proposals from Bay States

In December, the Chesapeake Bay watershed states Maryland, DC, Virginia, West Virginia, Delaware and Pennsylvania filed detailed draft proposals—Watershed Improvement Plans Phase II – for meeting the TMDLs for the bay.

Conclusion and Implications

The spectre of lost jobs and a diminishing economy has been promulgated before and in a nationally bad economy, will likely not go away. The Chesapeake Bay Foundation is attempting, in its new report to combat these claims with studies to the contrary—that environmental compliance is a job-creating boon to the local economies of the bay. No one can predict just how much spotlight this issue will continue to generate—but what is clear is that legal battles over the Chesapeake Bay cleanup will likely continue—and continue to generate plenty of spotlight upon which to focus most observer's attentions. (William Wilcox, Jr.)

NATIONAL WATER RESEARCH INSTITUTE RELEASES WHITE PAPER ON WASTEWATER REUSE

The National Water Research Institute (NWRI) recently a new white paper on direct potable reuse (DPR), the practice of introducing purified municipal wastewater into a water treatment plant intake or directly into the water distribution system for use as potable water. The white paper focuses on the role of DPR in the future management of water resources.

Background

NWRI is a non-profit organization founded by a group of California water agencies and the Joan Irvine Smith and Athalie R. Clarke Foundation to promote the protection, maintenance, and restoration of water supplies and to protect public health and improve the environment. It regularly issues papers, reports, and other publications related to issues regarding water management, water efficiency, and environmental protection. The DPR white paper was written by members of the Department of Civil and Environmental Engineering at University of California at Davis.

DPR involves the reuse of treated wastewater in potable water supplies, as a method of conserving virgin water supplies. The reuse of treated wastewater for potable purposes relies on the technical ability to reliably produce treated wastewater that meets all drinking water standards and is best accomplished in areas with limited or challenged water supplies.

White Paper Examines Southern California Case Study

The NWRI white paper first details various benefits of DPR, including reduced demands upon shrinking groundwater supplies and on environmentally-sensitive ecosystems. For urban water supplies, DPR represents one of a handful of solutions to address increasing demands. The white paper notes that the other solutions, including inter-basin water transfers and desalinization, are presently challenged. DPR can provide relatively energy-efficient source of water and are less subject disruption from natural disasters. Because potable water demand in urban areas is greater than wastewater volumes, DPR would need to be combined with sustainable local freshwater sources. With regard to agricultural operations, the white paper notes that domestic wastewater from a commu-

nity of 1 million people could potentially result in the annual production of 2.3 million pounds of beef, 114 million pounds of soybeans, or 253 pounds of wheat. The energy benefits from reducing inter-basin water transfers can be very significant—the movement of water via the Colorado River Aqueduct, for example, requires a net power input of 2,300 gigawatt hours per year per acre-feet.

Looking specifically to the four counties in southern California that import the major portion of their water, the authors note that the region has, since 2000, utilized approximately 69 percent of the maximum allotment provided by the various water distribution systems. Southern California has responded to water supply limitations through use restrictions, increased emphasis on conservation, and water recycling projects emphasizing groundwater recharge. In the agricultural San Joaquin Valley, the water districts have responded by improving irrigation management and planting crops with low water requirements, but the primary response has been the reduction in the amount of cultivated land. Climate change predictions for the region include an overall reduction in precipitation, greater annual variability, and linger droughts.

Treated domestic wastewater in the four counties is recycled for urban usage, used to recharge groundwater (and to prevent seawater intrusion), or discharged to the Pacific Ocean. Overall, approximately 18 percent of wastewater in the region is recycled.

Increasing DPR Could Provide Significant Benefits to the Region

1,259 million gallons of wastewater per day are currently discharged to the ocean and any sizeable percentage of reuse of this volume would materially reduce the demands upon the water transfer facilities. In addition, DPR would provide a substitute water supply in the event of a disruption of the transfer facilities. Just as importantly, treated wastewater for DPR use would actually improve the water quality of the input flow into the public water treatment systems, which contain higher total dissolved solids and trace organic compounds from agricultural runoff. The cost for treated domestic wastewater for reuse is slightly higher than normal potable water, but is approximately 25-30 percent higher than the cost for untreated water brought into the region. Compared to the cost of additional development of water sources, however, the cost of water treated for DPR is modest compared to costs of other alternatives.

The benefits in agricultural areas are even more acute, as DPR could be used to counterbalance water supply limitations in drought years, possibly to completely eliminate such limits. In addition, the white paper notes, that the additional development of water transfer systems in the Sacramento-San Joaquin Delta faces significant hurdles due to endangered species, particularly the Delta smelt and winter-run salmon, that could be avoided through the use of DPR. Lastly, the white paper estimates that DPR of 0.70 million acre-feet per year would result in net energy savings of 0.7 to 1 terawatt-hours per year, which equates to savings of between $50 and $87 million per year at $0.075 per kilowatt-hour.

Conclusion and Implications

As noted in the white paper, DPR is technically feasible and would provide significant benefits, but would raise political issues related to the ownership of the resulting water. The white paper relies on previous studies that show that there is strong support for DPR and calls for initiation of a planning process to examine the potential of DPR and impediments thereto, including involvement with the development of the water transfer system and studies regarding appropriate blending rates.

The white paper presents a summary of the costs and benefits of DPR in southern California. If, as the white paper suggests, there is public support for the practice, the water constraints in the region require that DPR be examined. Given the cost and energy savings of DPR, and its environmental benefits, one must imagine that it will inevitably become an even more integral part of the water supply system in southern California, and be adopted in other areas faced with water supply challenges. (Patrick Zaepfel)

NEWS FROM THE WEST

This month's News from the West includes cases from the States of California, Texas and Colorado. First, in California a state Court of Appeal upheld California's landmark Quantification Settlement Agreement (QSA), an agreement that had attempted to settle long-standing disputes about the allocation of Colorado River water in California. Next, in the aftermath of flooding in a desert town, a Texas state Court of Appeal found that an individual had improperly diverted water and damaged his neighbor's property. Lastly, the Supreme Court of Colorado reversed a decision of a Water Court and found that a 100-year-old water rights settlement was valid.

California Court Upholds California's Landmark Quantification Settlement Agreement

Quantification Settlement Agreement Cases, 201 Cal.App.4th 758 (2011).

In December 2011, the California Court of Appeal upheld California's landmark "QSA," a series of more then three-dozen agreements with the purpose of reducing California's reliance on more than its normal-year share of Colorado River water. Specifically, the court found that the QSA Joint Powers Agreement did not violate the California Constitution, and rejected arguments that the other QSA-related agreements were invalid, found that the state court lacked jurisdiction to hear claims under the National Environmental Policy Act and the Clean Air Act, and refused to hear the merits of California Environmental Quality Act (CEQA) claims for the first time on appeal.

In 2003, numerous southern California water agencies and other stakeholders attempted to end California's long dispute over Colorado River water by entering into the QSA and more than three dozen other, related agreements. The QSA was intended to budget California's 4.4 million acre-feet share of Colorado River water among the stakeholders, provide a framework for conservation measures at the Salton Sea, and make the water conserved in the Imperial Valley available to the Coachella Valley and to urban areas of southern California, including San Diego. One of the many QSA-related agreements, the QSA Joint Powers Agreement was intended to ensure complete funding for the mitigation of the QSA by requiring the state to pay all mitigation costs above the $133 million that three of the water agencies that were party to some of the QSA-related agreements agreed to cover.

In 2003, Imperial Irrigation District had brought a validation action in state court, asking the court to determine that 13 of the QSA-related agreements were valid under the law. A number of parties answered the validation action, some in favor of validation, some against it, and several other cases were filed challenging the legality of certain of the QSA-related agreements and associated actions. After years of pre-trial motions, in 2009 a trial court finally ruled on the validation action and determined that twelve of the thirteen QSA agreements at issue in the validation action were invalid. Specifically, the trial court found that the QSA Joint Powers Agreement contained a contractual obligation that the court found was in violation of the appropriation requirement of the California Constitution, which provides that money may be drawn from the treasury only through an appropriation enacted by the legislature. The trial court found that 11 of the other agreements were invalid because they were interrelated with the QSA Joint Powers Agreement. Multiple parties appealed.

The appellate court reversed the trial court, finding that the QSA Joint Powers Agreement did not violate the debt ceiling provision in the California Constitution because the state's commitment to pay any mitigation costs above $133 million in the agreement was contingent on there being excess costs to pay. The appellate court also rejected other claims of invalidity and remanded the remaining portions of the validation action and some of the other QSA cases to the trial court for determination. For this reason, the QSA, related agreements, and associated water transfers and environmental review remain valid for now, but issues remain to be determined by the trial court at a later date.

Texas Flood Results in Damaged Homes and Litigation

Contreras v. Bennett,
Case No. 08-09-00321-CV (Tex.App. Dec. 22, 2011).

In the summer of 2006, more than 15 inches of rain engulfed the desert city of El Paso, Texas. The downpour resulted in mudslides that destroyed as many as 300 homes and caused an estimated $100 million in damage. James and Hilda Bennett bought a home in the Richmar Subdivision in 1972. Their home is located on a slope. At the foot of the slope, near the edge of the Bennetts' property, there was a rock wall, which enclosed the backyard. On August 1, 2006, after a severe rainstorm in El Paso, a significant portion of the rock wall collapsed and caused severe damage to the wall and the backyard.

The Bennett family alleged that their neighbor, Mr. Contreras, altered the natural flow of water, causing the water to flow to the Bennetts' property, and the altered water flow caused damage on their property. The Texas Water Code provides that no person may divert or impound the natural flow of surface waters, or permit a diversion to continue in a manner that damages the property of another. The trial court found that Contreras had poured a cement slab in his backyard, built a wall and placed large stones that diverted the flow of water and subsequently destroyed a wall on the Bennetts' property. The trial court entered judgment for the Bennetts and ordered Contreras to pay $68,000 in damages.

On appeal, Contreras argued that, even without the alterations he had made, the downpour would have nevertheless caused damage to the Bennetts' property. The court of appeals disagreed, finding that a rational juror could conclude that Contreras' wrongful diversion of surface water was a substantial factor of the damage to the Bennetts' property. However, the court did decrease the damage award to the Bennetts, finding that there was no evidence to support the value of their property.

Supreme Court of Colorado Upholds 100 Year Old Water Rights Settlement

LoPresti v. Brandenburg,
Case No. 10SA191 (Colo. Dec. 12, 2011).

The water rights at issue in this case are located in Alvarado Creek in central Colorado. The southern channel of the stream is called Alvarado Creek, and the northern channel is called the North Fork of Alvarado Creek. In 1908, George Beardsley sued Allen Bates to resolve a dispute over the use of the creek's water. Beardsley alleged that Alvarado Creek and the North Fork were distinct stream systems with separate water rights, while Bates argued that Alvarado Creek and the North Fork was one stream and that the water rights should be administered in priority. However, prior to trial the parties entered into the Beardsley Decree, which declared that the Creek should be treated as one stream and gave both parties an alternating four day right to use all the water of the stream. The Beardsley Decree prevented litigation over the Creek's water rights for over eighty years. However, in 2000, a Colorado Water Court declared the Beardsley Decree void for allowing the Beardsley and Bates successors to switch water back and forth between streams, while changing the points of diversion from those specified in decree.

On appeal, the Supreme Court of Colorado reversed the Water Court's order and held that the Beardsley Decree was a valid rotational no-call agreement because it did not sanction a change in water rights. Opposers of the Beardsley Decree had argued that the decree constituted an illegal change of water rights because it permitted the applicants to divert and use all the water in the stream system at any point they desired when permitted by the rotation call. However, the Court rejected this argument because the plain language of the Beardsley Decree only permitted the use of water as rotated by the call. Further, the call was limited to the maximum amount given to each right. Additionally, the court found that the Beardsley Decree was not an illegal water loan agreement because it did not change a junior right holder's priority on the stream system or permit diversion of more water than given to a specific point of diversion. Accordingly, the state Supreme Court upheld the Beardsley Decree as valid. (Jill Willis)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

Civil Enforcement Actions and Settlements—Water Quality

EPA, DOJ, and the State of Illinois announced a Clean Water Act (CWA) settlement with the Metropolitan Water Reclamation District of Greater Chicago (MWRD) to resolve claims that untreated sewer discharges were released into Chicago area waterways during flood and wet weather events. Under the settlement, the MWRD, which services the city of Chicago and 51 communities, will work to complete a tunnel and reservoir plan to increase its capacity to handle wet weather events and address combined sewer overflow discharges. The settlement also requires MWRD to control trash and debris in overflows using skimmer boats to remove debris from the water so it can be collected and properly managed, making waterways cleaner and healthier. MWRD is also required to implement a green infrastructure program that will reduce stormwater runoff in areas serviced by MWRD by distributing rain barrels and developing projects to build green roofs, rain gardens, or use pervious paving materials in urban neighborhoods. MWRD has also agreed to pay a civil penalty of $675,000.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

EPA has reached a settlement with respect to the Davis Liquid Waste Superfund Site located on approximately ten acres in a rural section of Smithfield, Rhode Island. The settlement agreement was signed by multiple settling defendants, EPA, the State of Rhode Island and the DOJ. In 1992, the Office of Attorney General on behalf of the state initiated a suit against William Davis requiring the removal of millions of tires that had been disposed at the site as far back as the 1970s. Although the last of the tires were removed in 2000, the Office of Attorney General remains committed to the remediation of the environmental hazards that exist on the site as a result of decades of solid and hazardous waste storage. The Settling Defendants include: Ashland Inc.; the Black and Decker Corporation; FKI Industries, Inc. f/k/a Acco-Bristol Division of Babcock Industries, Inc.; Bristol, Inc.; Morton International, LLC; Rohm and Haas Company; and Life Technologies Corporation. Specifically, the Settling Defendants agree to perform the groundwater remedial design/remedial action at the site for "Operable Unit 2" and will pay all future response costs including oversight costs. EPA will contribute up to $9.5 million of Special Account funds to the groundwater cleanup. The major contaminants of concern in the overburden and bedrock groundwater that exceed federal and state standards are: volatile organic compounds (VOCs), such as tetrachlorethene, trichloroethene, vinyl chloride and benzene; semi-volatile organic compounds (SVOCs), including bis (2-chloroethyl)ether; pesticides, such as aldrin and dieldrin; and metals, including arsenic and maganese. In 2010, EPA signed a Record of Decision (ROD) Amendment to the cleanup remedy for the site. The ROD required: performing pre-design investigations to gather additional information to support the design of the remedy; injecting a treatment reagent into the plume core to chemically and biologically degrade contaminants in the overburden aquifer; injecting reagent into the bedrock in the former source area to address the most contaminated part of the bedrock plume; implementing institutional controls to prevent future use of the groundwater; and performing long-term monitoring and five-year reviews to ensure the remedy is protective of human health and the environment. Pursuant to the settlement, work on the remedy design can commence. The design process is expected to take approximately a year and a half, including investigations to support the design. Construction at the site is expected to begin in 2013. Throughout the 1970s, the site accepted liquid and chemical wastes, such as paint and metal sludge, oily wastes, solvents, acids, caustics, pesticides, phenols, halogens, metals, fly ash, and laboratory pharmaceuticals. Liquid wastes were transported in drums and bulk tank trucks, and were dumped

directly into unlined lagoons and seepage pits. The operator periodically excavated the semi-solid lagoon materials, dumped these materials at several locations on the site, and covered them with soil. Other operations included the collection of salvaged vehicles and machine parts, metal recycling, and tire shredding. In 1983, EPA added the site to the Superfund National Priorities List.

Indictments, Convictions, and Sentencing

John R. Wiehl and Franklin Non-Ferrous Foundry, Inc., pleaded guilty to unlawfully storing hazardous waste under the Resource Conservation and Recovery Act (RCRA). Wiehl, 64, is the president of the Foundry, which is located in Franklin, New Hampshire. The company manufactures a variety of metal parts for various industrial applications. A byproduct of the foundry's operation is the generation of waste containing hazardous or toxic concentrations of lead and cadmium. In April and August 2009, two workplace inspections conducted by the Occupational Safety and Health Administration (OSHA) found that the foundry was illegally storing hazardous waste. Under RCRA, a generator may not store hazardous waste at its facility for more than 90 days without a permit. In December 2009, EPA executed a search warrant at the Foundry and discovered drums of hazardous waste stored on the premises. In August 2010, a federal grand jury indicted Wiehl and the Foundry for unlawfully accumulating and storing lead and cadmium hazardous waste at the facility since July 2005. Neither Wiehl nor the company had been issued a permit to store hazardous waste for more than 90 days. The company was cited by EPA for similar violations in 2002 and 2005, but neither the company nor Wiehl previously faced criminal charges. Although Wiehl faces a possible maximum sentence of two years in prison and a maximum fine of $250,000, pursuant to the terms of a plea agreement filed with the court, the United States Attorney's Office has agreed to recommend that Wiehl serve two years of probation, six months of house arrest, and that he publish a public apology. Franklin Non-Ferrous Foundry, Inc is facing a possible maximum fine of $500,000. (Melissa Foster)

LAWSUITS FILED OR PENDING

IDAHO COUPLE'S CLEAN WATER ACT ARGUMENTS SEEMINGLY WELL RECEIVED BY U.S. SUPREME COURT IN *SACKETT V. U.S. ENVIRONMENTAL PROTECTION AGENCY*

Chantell and Michael Sackett sought review of an U.S. Environmental Protection Agency (EPA) wetlands jurisdiction decision halting their construction of a home near Priest Lake, Idaho. The Sacketts filled what the EPA contends are jurisdictional wetlands in order to develop the parcel. The EPA issued an administrative compliance order requiring that the Sacketts halt their development activities and directing them to restore the wetlands they already filled. The Sacketts requested EPA to review its jurisdictional wetlands determination, and the agency refused. Both the U.S. District Court for Idaho and the Ninth Circuit sided with EPA in denying the Sackett's requested review of the EPA's wetlands determination holding that the Clean Water Act bars pre-enforcement review of administrative jurisdictional wetlands determinations and the compliance orders resulting therefrom. The U.S. Supreme Court accepted review of the Sackett's case, and oral argument occurred on January 9, 2012. If the Court's line of questioning from the bench is any indication, it appears that the Sackett's will likely prevail. (*See*, *Sackett v. U.S. EPA*, Case No. 10-1062 (U.S.); 622 F.3d 1139 (9th Cir. 2010).)

Background

The Sacketts, small business owners in Priest Lake, Idaho, purchased a 0.63 acre parcel of land in a platted lakefront subdivision on which to build their first home. The Sackett's lot was not lakefront, rather their lot was separated from the lake by a road and other homes that were lakefront. The lot cost was $23,000, and like the other lots platted in the subdivision, already possessed water, sewer, and other utility hookups.

After securing all necessary building permits, the Sackett's began to import gravel and fill to grade the lot for building. After a few days of grading activities, the EPA arrived at the Sackett's property and issued them a cease and desist compliance order contending that the Sackett's were filling jurisdictional wetlands without a § 404 permit. The order required the Sacketts to immediately halt their lot development activities, to remove the fill gravel and dirt imported, and to restore the property as near as possible to its pre-development state. Removing the gravel and fill alone would cost $27,000—more than the Sacketts paid for the lot in the first place. The compliance order also warned that violations could total upwards of $75,000 per day (double penalties; $37,500 per day for violating § 404 of the CWA, and $37,500 per day for violating the EPA's order).

The Sacketts disagreed with EPA's wetlands determination. No portion of the lot contained any standing or flowing water. The Sackett's own consulting engineers disagreed with the EPA's determination and concluded that wetlands did not exist on the property because wetlands soils and vegetation were not present. The Sacketts also determined from prior EPA wetlands mapping that their lot had not previously been considered or mapped as wetlands. Finally, speaking with neighbors revealed that no one else had been required to obtain a § 404 permit prior to building. Armed with this information, the Sacketts wanted to challenge the EPA's wetlands determination, but EPA refused contending that the CWA and the Administrative Procedure Act barred so-called pre-enforcement review of EPA's wetlands determinations.

Pre-Enforcement Review

"Pre-enforcement review" is the judicial review of the legitimacy/propriety of an agency determination without first being sued by the agency in an enforcement action. While it is logically prudent to seek review of an agency determination before violating the corresponding compliance order and being sued as a result, judicial review of agency decisions under

the Administrative Procedure Act (APA) generally requires two things: (1) a final agency action (the consummation of the agency's decision making process); and (2) the action must be determinative of legal rights or obligations, or amount to an action from which legal consequences will follow.

Under the Administrative Procedure Act, agency actions are judicially reviewable when the agency action is "made reviewable by statute" and when "there is no other adequate remedy in a court." Agency actions are not reviewable, however, when they are made pursuant to a statute that expressly precludes judicial review. The Clean Water Act does not expressly preclude judicial review of administrative compliance orders (*e.g.*, jurisdictional determinations), but the CWA does not expressly provide for the judicial review of such actions either. With respect to the Sackett's situation, the Ninth Circuit filled the statutory gap (the Clean Water Act's silence regarding pre-enforcement review) by deciding that the legislative intent of the act bars pre-enforcement review. In holding as much, the Ninth Circuit joined the Fourth, Sixth, Seventh, and Tenth circuits stating that the Clean Water Act's compliance order procedure is designed to remedy and mitigate environmental problems quickly. Pre-enforcement-based litigation would frustrate (by delay) quick responses and, according to the Ninth Circuit, negate EPA's statutory choice between choosing to address a problem by litigation in District Court from the outset or by more immediately addressing the problem via an administrative order instead.

In addition to arguing that the Clean Water Act does authorize pre-enforcement review of agency actions, the Sacketts also argued that holding otherwise amounted to a violation of their due process through the effective taking of their property without review. The Ninth Circuit disposed of the Sackett's due process arguments largely by holding that: (1) judicial review of the EPA's jurisdictional wetlands determination would *eventually* be available upon EPA's filing of an enforcement action; and (2) nothing precluded the Sacketts from obtaining a Clean Water Act § 404 permit in order to fill the wetlands on their property (the denial of such an application would also be a judicially reviewable agency action).

The Sackett's *Certiorari* Petition

In petitioning for *certiorari*, the Sacketts raised two main arguments. First, the Sacketts renewed their due process arguments contending that delaying judicial review until after an agency brings an enforcement action is untenable given the Clean Water Act's significant penalty scheme that accrues violations and penalties by the day. Second, the Sacketts argued that the Ninth Circuit's decision potentially conflicts with an Eleventh Circuit decision involving a similarly situated compliance order (*see, TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003)).

Regarding the Clean Water Act's penalty provisions, the Sacketts argued that few members of the regulated community can risk defying compliance orders when civil penalties under the act accrue at up to $25,000 per day. One month of non-compliance risks a penalty of $750,000, while an entire year of non-compliance risks a penalty of upwards of $9 million. Though such penalties would likely be avoided after an enforcement action in which the agency's jurisdictional determination is ultimately defeated, an unsuccessful challenge would bring certain financial ruin.

In citing *TVA v. Whitman*, the Sackett's arguments further questioned whether financial penalties accruing under violation of a compliance order would actually be waived should a defendant successfully prevail in fending off an agency enforcement action. In *TVA*, the Eleventh Circuit considered an administrative compliance order scheme under the Clean Air Act similar to that contained within the Clean Water Act. The Eleventh Circuit found that the plain language of the Clean Air Act strongly suggests that violation of a compliance order is a crime in and of itself subject to penalty regardless of whether the compliance order should have issued in the first place. Finding such a result a "repugnant" violation of due process, the Eleventh Circuit held that the Clean Air Act was unconstitutional to the extent that the Act provides that mere non-compliance with the terms of an administrative compliance order can serve as the sole basis for the imposition of "severe" criminal and civil penalties.

Despite the marked similarities between the compliance order schemes under both the Clean Air and Clean Water Acts, the Ninth Circuit rejected the Sackett's *TVA*-based arguments below. The Ninth

Circuit held that the Clean Water Act authorizes the imposition of criminal and civil penalties for violation of a compliance order only when the EPA first successfully proves that the issuance of the order was legitimate and proper (*i.e.*, only after EPA successfully proves that there was a viable underlying violation supporting the issuance of the order).

The U.S. Supreme Court granted certiorari to consider the following: (1) whether the regulated community seek pre-enforcement review of administrative compliance orders under the Administrative Procedure Act; and (2) if such pre-enforcement review is not available, whether a pre-enforcement bar violates the Due Process Clause.

The Justices Grill EPA Counsel During Oral Argument

During oral argument, the entire panel seemed troubled by EPA's position that the Sacketts do not have the right to challenge the agency's wetlands determination in court unless and until the EPA chooses to file a formal, judicial enforcement suit against the Sacketts as a threshold matter. However, two themes appeared most troubling to the Justices regarding the case: (1) the David versus Goliath posture, pitting a small family/single homeowner against the massive EPA and its comparatively limitless resources; and (2) EPA's contention that it is authorized for seeking essentially double penalties under the act—penalties and fines associated with violations of the act itself, and penalties and fines associated with a recalcitrant's failure to obey compliance orders issued under the act.

For example, Justice Alito asked EPA counsel (Solicitor General Malcolm Stewart):

> If you related the facts of this case . . . to an ordinary homeowner, don't you think most ordinary homeowners would say that this kind of thing can't happen in the United States? You don't - - you buy property to build a house. You think maybe there is a little drainage problem in part of your lot, so you start to build the house and then you get an order from the EPA which says: 'You have filled in wetlands, so you can't build your house; remove the fill, put in all kinds of plants, and now you have to let [EPA] on your premises whenever [the agency] wants to . . . and for every day that you don't do all this you are accumulating a potential fine of $75,000 [per day]. And, by the way, there is no way you can go to court to challenge [EPA's] determination that this is a wetlands until such time as [EPA] choose[s] to sue you.

After expressly asking EPA counsel regarding the double penalties question, and EPA conceding its position that it is authorized to seek such penalties under the act (one for violating the act, two for violating the compliance order), Chief Justice Roberts pointedly asked EPA counsel what he would have done if he were the Sacketts and received EPA's heavy-handed compliance order. Mr. Stewart responded that one option he might pursue would be to apply for an after-the-fact permit to bring the activities into compliance with the act. Chief Justice Roberts seemed unimpressed:

> You wouldn't do that, right? You know you will never get an after-the-fact permit if the EPA has sent you a compliance order saying you've got wetlands.

Mr Stewart also suggested that he might spend the estimated $27,000 necessary to satisfy the compliance order and restore the property, and then apply for a new permit as if the property owner was starting with a clean slate. Again, Chief Justice Roberts appeared incredulous:

> That's what you would do? You would say, I don't think there are wetlands on my property but EPA does, so I'm going to take out all the fill, I'm going to plant herbaceous trees or whatever it is, and I will worry about whether to - - that way, I'll just do what the government tells me I should do.

In response, Mr. Stewart acknowledged: "It may be that the Sacketts at that point were in an unattractive position." Perhaps, this was an understatement.

Even Justice Breyer seemed uncomfortable with EPA's arguments, stating:

For 75 years, the courts have interpreted statutes with an eye toward permitting judicial review, not the opposite.

Conclusion and Implications

Should the Justices ultimately agree with the Sacketts—which it appears from oral argument they do—it remains to be seen what kind of test and process the Court fashions for purposes of allowing pre-enforcement review. As noted earlier, the Clean Water Act does not expressly provide for pre-enforcement review, but the act does not expressly preclude such review either. In the meantime, several members of the regulated community likely took at least some pleasure out of the Court's questioning of the EPA during oral argument. (Andrew J. Waldera)

JUDICIAL DEVELOPMENTS

DISTRICT COURT DISMISSES STATE LAW CLAIMS ON NOTICE GROUNDS—DENIES MOTION TO DISMISS CERCLA AND RCRA CLAIMS

Fitzgibbons v. City of Oswego, ___F.Supp.2d___, Case No. 5:10-CV-1038 (N.D. N.Y. Dec. 13, 2011).

Plaintiff John Fitzgibbons sought to recover past and future environmental investigation and remedial costs and an injunction requiring further investigation and cleanup of his property, which he claimed defendants contaminated. Plaintiff brought 11 causes of action against the defendant County of Oswego (county defendant): (1) the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107, (2) the Resource Conservation and Recovery Act (RCRA) § 7002(a)(1)(B), (3) New York Environmental Conservation Law (ECL) Article 37 and various state law actions. Before the court were two motions: the county defendant's motion to dismiss the complaint and plaintiff's cross-motion to amend the complaint and strike the affidavits submitted by county defendant.

Factual Background

Plaintiff is the owner of the allegedly contaminated property on George Street in Oswego, New York (George Street property). A landfill located adjacent to the George Street property, which the county defendant acquired from Niagara Mohawk Power Corporation (NiMo), has been used as a waste disposal facility since the 1940s.

According to plaintiff, approximately 1.22 acres of the northeast portion of the George Street property (trespass area) were used as a portion of the landfill during the 1960s and 1970s and hazardous wastes were dumped there. Plaintiff became aware of this dumping of hazardous wastes in 2009. The county defendant still owns and operates the landfill. According to plaintiff, because of the dumping, the value of the George Street property has diminished and plaintiff has incurred, and will continue to incur, environmental investigation and clean up costs.

The District Court's Decision

Plaintiff's Motion for Leave to Amend the Complaint

Plaintiff's proposed amended complaint was identical to its initial complaint, except that it addressed two alleged deficiencies raised by county defendant: (1) plaintiff's failure to join a necessary party, NiMo, and (2) plaintiff's nonexistent or deficient notice of claim (notice of claim). The court granted plaintiff leave to amend his complaint to add NiMO as a defendant. As to the notice of claim, the court found that plaintiff timely served a notice of claim on the county defendant, but found that plaintiff failed to sufficiently notify the county defendant of several state law claims. Because notice of claim requirements are construed strictly by New York state courts, the court granted the county defendant's motion to dismiss several of plaintiff's state court claims. The court also granted plaintiff's motion for leave to file an amended complaint consistent with the court's decision.

Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction

The county defendant also moved to dismiss plaintiff's claims for lack of subject matter jurisdiction. The county defendant argued that plaintiff lacks standing to sue and submitted affidavits asserting that plaintiff could not show a causal connection between the county defendant's ownership of the landfill and plaintiff's alleged injury. Plaintiff alleged that county defendant owns the landfill, which it acquired from NiMo in or around 1975, and that approximately 1.22 acres of the George Street property had been used as a portion of the landfill during the 1960s

and 1970s and wastes were dumped there. Given the liberal threshold applied to standing challenges in environmental citizen suits, the court concluded that there was a sufficient nexus between the county defendant's ownership of the landfill and plaintiff's alleged injury. Thus, the court denied the defendant's motion to dismiss based on lack of subject matter jurisdiction.

Strict Liability under CERCLA § 107

The county defendant argued that plaintiff could not maintain a CERCLA cause of action because the county defendant is not a covered person and is exempt. The county defendant also argued that plaintiff's CERCLA claim was barred by the applicable statute of limitations among other arguments. Plaintiff argued that the county defendant is strictly liable for the investigation and cleanup of the George Street property.

As to the statute of limitations, the court assumed discovery of the harm caused by the hazardous substance was in 2009 and thus found plaintiff's claim was timely under the three-year statute of limitations for removal actions and the six-year statute of limitations for remedial actions. In sum, the court denied the county defendant's motion to dismiss.

The court went on to determine CERCLA liability and outlined the elements of a prima facie CERCLA claim. First, the court concluded that since plaintiff alleged that the county defendant is the current owner of the landfill, it is a potentially responsible party under § 9607(a), even if it did not own the landfill at the time of the alleged disposal of hazardous substances on the George Street property. The court also denied the sovereign municipality defense because the allegations tended to show that the county defendant did not obtain title to the landfill involuntarily. Second, the court determined that given the broad definition of "facility" in CERCLA § 101(9), 42 U.S.C. § 9601(9), that both the landfill and the George Street property appeared to be facilities. Third, the court stated that at this stage, it was sufficient that plaintiff has pled that the county defendant disposed of wastes containing hazardous substances while the county defendant owned the landfill and that the actual quantity or concentration of hazardous substance was insignificant. Fourth, the court decided that the allegation that the contamination led to the decrease in value of the George Street property, and that plaintiff has and will incur costs for investigation and response actions was sufficient to withstand a motion to dismiss. Fifth, the court determined that it was sufficient that plaintiff has alleged that he has incurred response costs in connection with the contamination, all of which appear consistent with the National Contingency Plan. In sum, because plaintiff alleged facts establishing a prima facie case of CERCLA liability, the court denied the county defendant's motion to dismiss plaintiff's first cause of action under CERCLA.

The RCRA Claim

The court also outlined the elements for a prima facie cause of action under RCRA, 42 U.S.C. § 6972(a)(1)(B): (1) defendant was or is a generator or transporter of solid or hazardous waste or owner of operator of a solid or hazardous waste treatment, storage or disposal facility, (2) defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, and (3) the solid or hazardous waste may pose an imminent and substantial endangerment to health or the environment.

First, the court determined that plaintiff's allegation that the county defendant contributed to the handling of hazardous or solid waste and that the contaminants at the George Street property included hazardous substances sufficiently pled that the material at issue constituted "solid or hazardous waste" for purposes of the motion to dismiss. Second, the court found that whether the county defendant's conduct actually constituted active human involvement with the disposal of waste is a question of fact, and that discovery is required to make this determination. Third, the court decided that plaintiff had adequately alleged the existence of containments and potentially hazardous substances emanating from the George Street property and the landfill, which may pose an imminent and substantial endangerment to health and the environment. Thus, the court denied the county defendant's motion to dismiss plaintiff's RCRA claim.

The ECL Article 37 Claim

As discussed, the court granted the county defendant's motion to dismiss as against the county defen-

dant because plaintiff failed to include this state law cause of action in his notice of claim. Additionally, the court *sua sponte* dismissed this cause of action as to the city defendant and the John Doe defendants because the weight of authority in New York supported a determination that no such private cause of action exists. Because plaintiff could not maintain a private cause of action under the ECL, the court dismissed the third cause of action against all defendants in its entirety.

Negligence and Nuisance

As to the fourth cause of action for negligence, plaintiff alleged that the county defendant owed a duty of care in operating the landfill and that county defendant breached that duty by the dumping of wastes on the trespass area, among other things. The court denied the county defendant's motion to dismiss the negligence claim because the facts, as alleged, supported a plausible negligence claim.

As to the sixth cause of action for public nuisance, plaintiff alleged that by causing the contamination, the county defendant interfered with the rights common to all, including ground and surface waters. Because the court found that nothing in the amended complaint would allow the court to determine that enough people were affected by this groundwater contamination to qualify as a public nuisance, the court dismissed this claim against all defendants.

As to the ninth cause of action for private nuisance, plaintiff alleged that the county defendant caused an unreasonable and substantial interference with his right to use and enjoy the George Street property. The court noted that without discovery, it was impossible to ascertain the extent of the interference to plaintiff's property rights and thus, denied the county defendant's motion to dismiss the private nuisance action.

Conclusion and Implications

In sum, the court granted the county defendant's motion to dismiss plaintiff's third, fifth, sixth, seventh, tenth, and eleventh causes of action. The court further ordered the plaintiff's third cause of action, pursuant to New York ECL Article 37, and sixth cause of action, alleging nuisance, are *sua sponte* dismissed as to the city defendant and the John Doe defendants. The court did, however, grant plaintiff's motion for leave to file an amended complaint. Although it was an open question as to whether plaintiff would ultimately be able to establish CERCLA and RCRA liability, this decision highlights the difficulty in dismissing CERCLA and RCRA claims prior to the discovery stage. This case also emphasizes the importance for plaintiffs to strictly adhere to state notice-of-claim requirements. (Rebecca Couch, Cathy Lee)

U.S. COURT OF FEDERAL CLAIMS REJECTS TAKINGS CLAIM IN THE CONTEXT OF CLEAN WATER ACT PERMITTING

Mehaffy v. U.S., Case No. 09-8601, (Fed. Claims Ct. Jan. 10, 2012).

Judge George W. Miller of the U.S. Court of Federal Claims rendered an interesting decision this month that provides both a guide to the law of regulatory taking and insight into what is needed to prove a regulatory taking has occurred in the context of Clean Water Act permitting. The case arose out of river navigation and flood control project and rights retained by landowners for development of land near the river.

Background

Back in 1970, an Arkansas family was faced with impending condemnation of flowage easements on a portion of some 73 acres of land they owned bordering the Arkansas River, north of Little Rock. The U.S. Army Corps of Engineers (Corps) needed the riverside land to allow for overflows due to construction and future operation of the Arkansas River Navigation System under a new federal law. A lock and dam were to be in the immediate vicinity of the land in question, and flooding was an expected occasional occurrence. The patriarch of the family negotiated a sale to the United States of a flowage easement over the land. The patriarch, a judge in fact, was careful to describe the extent of the flowage rights conveyed, limiting permanent flooding of the land to

elevations below 249 feet mean sea level, with rights to occasionally overflow above that elevation. The conveyance and sale agreements also reserved to the landowner, and its successors and assigns, all rights of ownership that did not interfere with the river project, including the right to fill lands on the parcel and to place non-habitable structures there above 252 feet of elevation. Another paragraph required that no structures for human habitation be built on the land, and that "no other structures shall be constructed or maintained except as may be approved in writing" and "no alterations of the contour of the land shall be made" without written approval of the representative of the United States in charge of the river project.

The land apparently consists of both river lowland and upland acreage, with most of the upland acreage being along a road that paralleled the river. Subsequent to the conveyance occurring, the federal Clean Water Act was passed. In 1980, the Corps notified the landowner (a family owned corporation) that the subject property and the easement deed were subject to the Clean Water Act. The letter also stated that a § 404 permit for dredging or filling would be required in the future should the landowner desire to place fill in any of the wetlands portions of the site. The letter indicated, too, that the reservation of rights in the easement deed would not by itself be sufficient to authorize work there that required Clean Water Act authorization.

In 1987 the family corporation landowner was dissolved and the land was sold to a family owned construction company for fair value. Sometime later the plaintiff, Mike Mehaffy, the son of the judge, took personal title to the land from the company. Then, in 2001, when the Corps performed a wetlands delineation, it designated some 43 acres of the land as wetlands. Most of the non-wetland potion had road frontage, but some of it was interspersed among wetland areas. In 2004, with input from the Corps on where the wetlands were, the Mehaffys cleared and leveled some nine or ten acres of uplands along the road. They began using the cleared land as a storage yard for their construction business.

In September 2006, the plaintiff asked the Corps for a § 404 permit to fill about 48 acres of the parcel. The details of the proposal were sparse. In response to the plaintiff's permit application, the Corps asked for additional information, including a narrative of the project, a map with profiles of the land and project, and an indication whether alternatives existed to the filling of the wetlands.

At this point, although plaintiff did respond with more information, it became clear that he was relying on the reservation of rights in the easement deed, and he provided no justification otherwise. His purpose was to fill the land, as he deemed his right. No analysis of alternatives was provided. Despite some extended attempts to get added input from plaintiff by the Corps, and the transmittal of comments from other agencies indicating additional problems and data needs, Plaintiff pretty much appears to have let the record stand, and he refused to respond to requests in detail. The Corps denied his application in August 2007. The Corps said that placing fill in the wetlands would interfere with the floodway of the Arkansas River and would compromise a "high quality forested wetland," and that no adequate technical or practical justification was provided. Plaintiff was told he could appeal, and he did appeal. His appeal was denied in due course, in 2008.

In late 2009, plaintiff filed a complaint in the Federal Court of Claims, alleging that the government had taken his property without due process or just compensation.

The Federal Court Decision

After a discussion in which the court determined that a trial of disputed facts was not needed, given the existence of an extensive fact stipulation, the Court of Federal Claims described why and in what manner there may be a compensable property interest under the U.S. Constitution. The court approached the situation with care, and laid out the factors first enunciated in the Pennsylvania coal mining cases. *Penna. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Limits are placed on what regulations can do, because regulations taken too far can wipe out private property. *Lucas v S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992).

The court proceeded to make a "two tiered inquiry," with the initial question being whether the right allegedly taken is one of those that inhere to property under existing legal rules and expectations. Citing a Federal Circuit case, the question is whether the right in question is one of the "sticks in the bundle of sticks" analogy to the nature of fee interests in property. The plaintiff must show the right abused is fundamental in that basic sense, or else he has no case.

The second tier of the analysis is based on factors the U.S. Supreme Court enunciated in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978). These include: the economic impact of the rule, the extent to which the rule interferes with discernible investment expectations, and the character of the government action.

Did Plaintiff Have a Discernible Reasonable Investment Backed Expectation?

The government argued that since the right of future filling and development was conditioned on written approval, there was no property right abused. The plaintiff argued that the written approval required could not include subsequent law such as the Clean Water Act. The court found it need not decide the compensability issue, if it could determine the case on the basis of the second prong of the second tier analysis *Penn Central* factors. For this proposition it cited cases including *Ruckelshaus v Monsanto Co.*, 467 U.S. 986, 1005-06, (1984), and *Norman v. U.S.*, 429 F.3d 1081, 1092-94 (Fed. Cir. 2005). In other words, if there is no discernible reasonable investment backed expectation, there is not going to be a property taking due to a requirement to comply with regulation.

The court then analyzed the expectations of the landowner at the time of the sale of the easement and at the present time. It only considers what reasonable expectations would be, not actual expectations in a given case. Thus the plaintiff's apparent faith in the power of the words negotiated by his father, the judge to guarantee fill rights, is put to the test of "reasonableness."

The court decided that plaintiff's date of acquisition of the property is highly relevant to the issue of reasonable expectation. This date is subsequent to the passage of the Clean Water Act and the letter from the Corps indicating § 404 permitting would be required for the parcel's wetlands. Even though the 1970 expectations might have been pretty free reign to fill the land, the court found that the expectations of the original landowner when the easement was created was "irrelevant." The court deemed the implications of property rights being set a given time in the past and then not being changed by subsequent statutes and rules "startling." The court found that the plaintiff could not reasonably ignore the strictures of the § 404 program.

The court proclaimed the Clean Water Act § 404 program a reasonable scheme for public benefit, and ruled that the plaintiff has no claim for compensation. Summary judgment was granted in favor of the government.

What the Court Did Not Decide

The only question the court did not answer and perhaps plaintiff did not pointedly ask, was what the reservation of rights so deliberately negotiated in 1970 means today. Was plaintiff supposed to file a declaratory judgment when the Corps stated its position years back? Would such an action even have been justiciable then, in the absence of any specific fill request or other plan to affect the land? And what good would the judgment do years later?

Conclusion and Implications

The decision is an interesting reminder of the applicable legal analysis that will usually pertain to regulatory takings. But if time and the passage of regulations generally subsume actual expectations, and if ever-bigger government makes it unreasonable to expect much in the way of private rights, then has not the court fallen into the very pit the *Lucas v. S. Carolina Coastal Council* court sought to avoid, *i.e.* that private property disappears? Moreover, did the plaintiff fail to articulate or press a pertinent argument? Why is not the question of his rights based on the language of the easement deed? The argument would be that the United States agreed that as to this specific parcel, the issue for purposes of obtaining permission is whether the proposed filling could occur: "without interfering with the use of the [Arkansas River] project for the purposes authorized by Congress or abridging the rights and easement hereby conveyed." In other words, reliance of the Corps on there being "high quality forested wetland" at the site would not serve as a proper reason to reject permission if the flood and navigation project is not interfered with. From the court's discussion it appears that this argument was not put at issue. (Harvey M. Sheldon)

DISTRICT COURT HOLDS STATE COMPLAINT WHICH DOES NOT PURSUE CWA ENFORCEMENT OF SELENIUM MINING LIMITS CANNOT MEET 'DILIGENT PROSECUTION' REQUIREMENTS

Ohio Valley Environmental Coalition, Inc. v. Patriot Coal Corporation, ___F.Supp.2d___, Case No. 3:11-0115 (S.D. W.V. Dec. 7, 2011).

Plaintiffs comprise three environmental groups seeking enforcement of the effluent selenium limitations contained in West Virginia's National Pollutant Discharge Elimination System (NPDES) and Surface Mining Coal Reclamation Act (SMCRA). Both 33 U.S.C. § 1365(a) and SMCRA contain citizen suit provisions allowing citizens to file a suit to enforce compliance under the Clean Water Act (CWA) and SMCRA. Plaintiffs filed suit alleging that the West Virginia Department of Environmental Protection (WVDEP) was not diligently prosecuting defendants' selenium violations on the basis that: WVDEP's complaint excluded selenium from their claims for civil penalties, WVDEP acquiesced to Stay Orders forcing selenium compliance, WVDEP's complaint was seeking to delay compliance-delays that were already rejected by the U.S. Environmental Protection Agency (EPA). Defendants filed a motion to dismiss plaintiffs' action on grounds that WVDEP's complaint constituted a government enforcement action that should be considered diligent prosecution as it:

> …is capable of requiring compliance with the Act [Clean Water Act and SMCRA] and is in good faith calculated to do so.

The U.S. District Court denied the motion holding that the regulatory climate for violations of selenium limitations was best defined by continuing extensions and enforcement actions that were not designed to enforce selenium limits, rather designed to delay the enforcement of such over EPA's objection.

Background

Environmental groups have pursued actions against various coal mining operations in the Appalachia area based on selenium violations. Studies conducted by environmental groups allege that selenium poses no threat to humans when present in low levels, but when it exceeds Safe Drinking Water Act threshold levels of 0.05 ppm, selenium exposure can cause damage to vital organs, and to the nervous and circulatory systems. Sierra Club, "Toxic Selenium: How Mountaintop Removal Coal Mining Threatens People & Streams," (April 2009). Toxic levels of selenium can also affect the reproductive systems and organs of fish and other wildlife. *Id.* The dispute over selenium gained steam following EPA's 2003 Draft Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia, a report that identified violations of selenium water quality standards. Ken Ward Jr., "Selenium showdown: Key hearing over coal's water pollution begins today before Judge Chambers," *The Coal Tattoo* (August 9, 2010). Prior to this ruling, Judge Chambers held in *Ohio Valley Environmental Coalition, Inc. v. Hobet Min, LLC* and *Ohio Valley Environmental Coalition, Inc. v. Apogee Coal Co., LLC* that the coal mining defendants failed to meet compliance deadlines for selenium cleanup.

The District Court's Decision

Diligent Prosecution Bar

Here, Judge Chambers examined selenium deadlines from the standpoint of whether WVDEP's complaints constitute diligent prosecution in terms of requiring defendants' good faith compliance with selenium cleanup deadlines, seeking to enforce specific selenium limits that were not in effect during the government's initial action. The Apogee, Catenary and Hobet permits were all the subject of WVDEP litigation preceding plaintiffs' action to raise the issue of proving non-diligence with new selenium permit limitations.

Citizen-plaintiffs must meet a high standard to demonstrate that [a government agency] has failed to prosecute a violation diligently. *Piney Run Pres. Ass'n v. Cnty. Commis of Carroll Cnty., Md.*, 523 F.3d 453, 459 (4th Cir. 2008).

In addition to requiring pre-suit notice, the diligent government prosecution bar operates to pre-

clude citizens from enforcing if the government "has commenced and is diligently prosecuting" an action involving the same violations "to require compliance." 42 U.S.C. § 7604 (b)(1)(B). The analysis for whether a state court action bars a federal citizen suit is a two-step process. First, is a comparison of the facts and repeated violations alleged in a citizen's complaint with those alleged by the state. One decision held that a court:

> …must examine each individual count or claim of plaintiffs' complaint…in order to determine whether the state's civil enforcement action sought compliance with the particular standard, limitation or order which provides the basis of that claim. *Frilling v. Village of Anna*, 924 F.Supp. 821, 837 (S.D. Ohio 1996).

The second step is focused on the matching facts and violations. "Diligent prosecution" is only a bar to a citizen suit for the precise same claims that have been "prosecuted," and is normally determined as of the time of the filing of the complaint.

The permits at issue have a common thread, selenium cleanup deadlines were being extended, over EPA's objection. WVDEP's complaints were seeking, in part, to have the court grant new compliance deadlines for selenium cleanup. The requested orders sought interim deadlines for construction of selenium treatment facilities. WVDEP's complaints also dropped claims for civil penalties with regard to the Apogee and Catenary permits.

A Failure to Enforce Selenium Limits

Plaintiffs' alleged that WVDEP's complaint merely references the Apogee and Catenary permits that make no reference to any Compliance Orders requiring installation of selenium treatment facilities, and that if such Orders are not incorporated in the permits, WVDEP's actions do not preclude plaintiffs' claims regarding construction deadlines for selenium treatment. Although the court disagreed with plaintiffs on the issue of whether the permits at issue did contain Compliance Orders, it agreed with plaintiffs that neither WVDEP complaint sought to enforce any selenium limits whatsoever. Instead, "both actions seek vague relief from the …Circuit Courts that specifically excludes selenium from the request for immediate relief on the grounds that the selenium limitations area subject to stay orders…" the same stay orders rejected by EPA. Moreover, WVDEP's complaints excluded selenium from the state's claims for civil penalties on the basis of the Compliance Orders. Based on the context, timing and relief sought, the court held that WVDEP's complaints were not diligent prosecutions of defendants' selenium violations.

As to the Hobart permits, the court held that the permit modifications reflected a pattern of continued extension and enforcement actions that did not seek to enforce selenium limits, but merely designed to "… accomplish in state courts the delays already rejected by the [EPA]."

Conclusion and Implications

This case emphasizes that although citizen plaintiffs bear the burden of proving that the government is not diligent, that evidence can come in the form of narrow scrutiny of the consent decree language to permit the citizen plaintiffs to continue with their action.

This District Court relied heavily on a previous decision interpreting the scope of a Consent Decree in the *Sierra Club v. Elk Run Coal Co., Inc.* decision, holding that the government's action in that matter did not amount to the diligent prosecution of the claims being pursued by the citizen plaintiffs. In *Elk Run*, the court focused on the government's claim that the Consent Decree did not bar future actions relating to permit violations that occurred after the date in which the Consent Decree was lodged. The court held, therefore, that this indicated the potential for future violations and concluded that the threat of subsequent enforcement actions, citizen suits included, represented an important tool to secure future Clean Water Act compliance.

The citizen plaintiffs in this action fulfilled the state role of securing future Clean Water Act compliance with selenium limitations that were not the subject of the government's action. (Thierry Montoya)

ANOTHER SETBACK FOR EPA'S CONSTRUCTION GENERAL PERMIT NUMERIC EFFLUENT LIMITATION IN THE WEST MAY PORTEND TROUBLE IN THE EAST

California Building Industry Association v. State Water Resources Control Board, Case No. 34-2009-80000338 (California Super. Ct., Sacramento County, Dec 2, 2011).

On December 2, 2011, a California Superior Court invalidated the numeric effluent limits for turbidity and pH that the State Water Resources Control Board (SWRCB) had developed for California's recently issued Construction General Permit (California CGP). In *California Building Industry Association v. State Water Resources Control Board*, the court determined the SWRCB failed to provide substantial evidence to support imposing the turbidity and pH limits as a condition of the California CGP. The court's ruling could have implications far outside of California and into the East, however. It could signal further trouble for the U.S. Environmental Protection Agency (EPA) in its ongoing struggle to develop a numeric effluent limitation for turbidity for the federal CGP.

Background

Pursuant to § 402 of the Clean Water Act (CWA), EPA prohibits any person from discharging pollutants to navigable waters without a permit. Beginning in 1990, EPA established regulations under the National Pollutant Discharge Elimination System (NPDES) program for owners and operators to obtain permits for stormwater discharges associated with construction activity. Since that time, EPA has carried out the NPDES program, first by promulgating permit application requirements, and later by creating a series of general permits for construction stormwater discharges. The current CGP took effect in 2008.

When EPA develops a NPDES permit, the CWA requires EPA to incorporate into it conditions for meeting technology-based effluent limits established under §§ 301 and 306 of the statute. Prior to the promulgation of an effluent limitations guideline (ELG), EPA permit writers establish these technology-based limitations using their Best Professional Judgment. It was their exercise of that Best Professional Judgment that supported the effluent limitations (primarily expressed as Best Management Practices or BMPs) contained in EPA's 2008 CGP.

On December 1, 2009, EPA issued its Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry (C&D Rule). *See*, 74 *Fed. Reg.* 62,996. EPA designed the C&D Rule, which took effect February 1, 2010, to control sediment pollution from construction for all sites that disturb one or more acres and, for the first time, to impose nationally-applicable numeric effluent limitations on stormwater discharges from sites that disturb greater than 20 or ten acres based on a schedule established by the rule. Under the C&D Rule, construction sites must implement BMPs (non-numeric effluent limits) to control stormwater discharges, such as erosion and sediment controls, soil stabilization requirements, dewatering requirements, pollution prevention measures, prohibitions on certain discharges, and use of surface outlet structures.

The C&D Rule was challenged before it took effect on February 1, 2010. During the course of litigation in the U.S. Court of Appeals for the Seventh Circuit, EPA discovered that the data it had used to calculate its 280 NTU numeric effluent limit for turbidity were misinterpreted. Ultimately, EPA sought a voluntary remand of the numeric turbidity limit so it could recalculate the limit. All other portions of the C&D Rule remained in effect and subject to implementation in any new permit. Since the remand took effect on January 4, 2011 EPA has been working to develop a recalculated limit with the goal of proposing and promulgating that revised limit in time for it to be incorporated into a reissued CGP along with the un-remanded, non-numeric requirements of the C&D Rule.

On April 25, 2011, EPA published notice of its new draft CGP. The agency now expects to issue the final CGP by February 15, 2012. As proposed, the draft permit incorporates the C&D Rule's non-numeric effluent limits as prescriptive requirements and design standards, but includes only a placeholder for inclusion of the numeric effluent limit for turbidity, which EPA continues to develop. EPA has repeatedly pushed back its timetable for issuing the revised tur-

bidity limit for the CGP, and it is widely speculated that EPA is struggling to generate sufficient data to support imposition of the numeric limit.

The California State Water Resources Control Board

In the absence of EPA-promulgated ELGs, the CWA requires states to develop technology-based effluent limitations that meet very specific requirements for their respective NPDES permits. States must develop such limitations based on a case-by-case analysis of existing conditions and available technologies. Limitations that meet those requirements may then be incorporated into a state's NPDES permit. California is one state that has tried to develop such technology-based effluent limitations for stormwater discharges from construction activities.

In 1999, the SWRCB adopted a NPDES general permit for construction stormwater discharges. The 1999 California CGP incorporated a technology-based effluent limitation requiring permittees to employ best conventional pollutant control technology to reduce pollutants in stormwater discharges. It also set forth narrative limits that focused on BMPs for controlling turbidity and pH.

In 2009, the SWRCB issued a revised California CGP. This time it included numeric limits for turbidity and pH for stormwater discharges from certain "high risk of discharge" (Level 3) construction sites. Those limits were challenged almost immediately.

The Superior Court's Decision

In *California Building Industry Association v. SWRCB*, the plaintiff trade association (CBIA) challenged California's revised CGP on numerous grounds, most notably for incorporating the numeric effluent limits for turbidity and pH into the permit. Those limitations required permittees to employ technological controls to ensure that discharges of stormwater from Level 3 construction sites met the turbidity limit of 500 NTU or lower and the pH limit of 6-9 units acidity. But CBIA argued that the numeric limits were not supported by the evidence in the administrative record and that SWRCB had failed to properly evaluate the control technologies that would be used to comply with the limits. As a result, CBIA asserted that permittees were being forced to implement stringent and expensive technological controls without any assurance that those measures could achieve compliance with the effluent limitations. The absence of that assurance, CBIA added, meant that permittees would be exposed to extensive penalties for non-compliance with the CGP even if they implemented the control measures that SWRCB recommended.

The Superior Court of California agreed and ruled that the numeric limits were invalid and unenforceable under the CWA. To establish numeric limits, the court said, the CWA required the SWRCB to identify available control technologies, collect performance data for those control technologies, and set numeric limits consistent with that data. The statute also required a multi-factor analysis to assess the effectiveness of the identified control technologies to identify best control treatments and determine whether the California CGP's new effluent limits would increase the compliance requirements of the previous permit. But the SWRCB had not met those requirements.

Adoption of 500 NTU Turbidity Limit Violated the Clean Water Act

First, the court held that the SWRCB's adoption of the 500 NTU turbidity limit violated the CWA's requirements. The court explained that the turbidity limit was not supported by substantial evidence in the record because the SWRCB failed to provide adequate performance data for the technological control measures (*i.e.*, the BMPs) that it used to develop the numeric limitation. Rather than providing data generated at construction sites in California, the SWRCB had submitted data from highway construction projects in Washington State to support its turbidity limit. Accordingly, the court concluded that the record failed to demonstrate that technologies are available that are:

> …capable of controlling erosion and reducing sediment discharges from construction sites [in California] with a variety of soils, climates and topographies to a turbidity of 500 NTU or lower.

The court therefore held that the SWRCB must collect performance data for the different control technologies under a range of site conditions in California and develop a numeric turbidity limit consistent with that data.

PH Effluent Limitations also Violated the Clean Water Act

For similar reasons, the court held that the SWRBC's 6-9 pH unit effluent limitation violated the CWA's requirements for developing numeric limits. For the pH limit, the SWRBC relied on a California Department of Transportation study that determined the mean pH of runoff from highway construction sites in California. That study identified the BMPs that were in place, but failed to analyze the effects of those management practices on pH levels in stormwater discharges from the site. The court therefore determined that the pH limit had "no demonstrated relationship to management practices" and that the SWRCB had not derived its pH limit from best control treatment performance data. As a result, the court found that the SWRCB could not evaluate the technical aspects of those treatments or perform the cost-benefit analysis that the CWA requires for best control treatments. Without those analyses, the court concluded that there was insufficient evidence to support the SWRBC's conclusion that the pH limit would not increase the compliance requirements of the previous permit.

Conclusion and Implications

The California Superior Court's ruling in *California Building Industry Association v. SWRCB* reflects just one state court's opinion concerning numeric effluent limitations for stormwater discharges from construction activity, and it still may be appealed. But the decision sheds light on the variety and specificity of data and other evidence that the CWA requires for a numeric effluent limitation to be imposed on discharges of construction stormwater. As a result, the ruling may well have broader ramifications and signal the beginning of even more problems for EPA as it struggles to develop a new turbidity limit for construction stormwater under the national CGP. And it appears that EPA is taking note.

On January 3, 2012, EPA published notice in the *Federal Register* seeking public comments and additional data to support its development of the numeric turbidity limitation for the federal CGP. 77 *Fed. Reg.* 112 (Jan. 3, 2012). EPA's notice requests that stakeholders opine about the types of technology that constitute passive and semi-passive treatment systems to reduce turbidity and provide information about which such systems represent the best available technology to meet turbidity limits. The agency further requested data "on the performance of passive and semi-passive treatment approaches" and data measuring pre- and post-treatment turbidity levels. EPA also asked stakeholders to provide information about the costs, effectiveness, and feasibility of the various different technologies for treating stormwater discharges from construction sites. The agency even cited the *California Building Industry Association* decision in a footnote of the notice.

Whether EPA ultimately is able to compile the necessary data and other evidence to legally support a turbidity limit remains uncertain. It is certain, however, that EPA will continue working on the issue. And if a final turbidity limit is issued for the CGP, affected parties now have a roadmap for challenging it. (Parker Moore, Richard Davis)

NEW YORK STATE COURT FINDS CONSTRUCTION OF AN UNPERMITTED BOAT HOUSE DID NOT CONSTITUTE A CRIME

Grimditch v. Nardiello, Case No. 5527 (Essex County Ct Jan. 5, 2012).

The State of New York Essex County Court was faced recently with an issue of first impression—namely whether an owner of real property or a building contractor is criminally liable because they allowed construction of an unpermitted boat house within the waters of Lake Placid. Fortunately for building owner, the court found that there was no criminal liability.

Background

Both the owner (Wayne H. Grimditch) and his contractor (Daniel Nardiello and Robert Scheefer) were prosecuted in a three-count indictment by the Town of North Elba, New York. The charges were that they failed to obtain a construction permit prior to construction of a boat house within the waters of the Town of North Elba, Lake Placid, New York. For good measure, the Town of North Elba also filed criminal charges under its land use law.

The matter proceeded to a Grand Jury and the special district attorney read to the Grand Jury portions of the Executive Law relative to state building codes mandating a building permit. In addition, he also read to the Grand Jury three separate portions of the Town of North Elba's land use laws requiring building permits before construction on "any shoreline" belonging to the village. Additional evidence consisted of the testimony of the town's Code Enforcement Officer (CEO), a "stop work order," photographs of the construction, and architectural drawings of the boathouse.

The CEO testified that contractor Scheefer had spoken openly about constructing the boathouse. When the CEO went to his office, prepared a stop construction order, Scheefer refused to accept the letter because Scheefer explained that he was only a subcontractor and was working for Mr. Nardiello. When Scheefer confronted Nardiello, Nardiello refused to accept the letter as well.

A New York Department of Environmental Conservation Officer was called as well but, after inspection, the Conservation Officer refused to determine that a DEC permit was required because the caissons were less than ten inches in diameter. Finally, Grimditch's daughter accepted the stop work order but advised that she was going to give it to counsel. Critically, the stop work order specifically referred only to a violation of the Town of North Elba's land use law and architectural review guidelines, which require review of proposed construction projects by the Joint Village of Lake Placid/Town of North Elba Review Board. The following day, the CEO returned and observed that construction continued.

The Opinion of the New York County Court for Essex

The New York Essex County Court found that the indictment presented had to be dismissed as a matter of law because the indictment was deficient.

The Ways Criminality Might Have Been Established

Assuming that the statute was valid, the court noted that there are two possible ways a defendant can be found criminally liable for violating the town's statute.

First, the defendant must have been served with an order "to remedy any condition found to exist in" any building constructed. The stop work order failed this test because it did not require that the building be repaired but rather that a review by the joint town committee must be undertaken. Second, the builder or contractor must knowingly violate a government standard for construction, maintenance, or fire protection system. Again, the stop work order failed to satisfy these criteria because the stop work order required only a review, not a standard.

A Lack of Evidence of a Code Violation—A Lack of Proper Service—Jurisdiction Issues

The court went on to observe that no evidence was presented of any condition of the building that violated a standard or code. Nor was there any evidence that the parties were ever properly served, as the only copy of the stop work order was given to the owner's

daughter—not to a party. The court also found that the Town of North Elba's indictment failed because the boathouse stricter was located within the waters of Lake Placid lake was exempt from the town land use law because local zoning laws are preempted in navigable waters.

Conclusion and Implications

In observing the facts surrounding the prosecution of this matter—it would certainly look like this case represented a calamity of errors. It would be conjecture—but interesting conjecture nevertheless—to imagine a different result if the prosecutor had not used a cannon (criminal prosecution) to address what many jurisdictions would claim is at most a civil construction problem. (Jeffrey Pollock)

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