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FEATURE ARTICLE

THE ENDANGERED SPECIES ACT AND AGENCY 'DISCRETION':
THE COURTS AND AGENCIES TAKE DIFFERENT DIRECTIONS

By Roderick E. Walston

The Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, enacted in 1973, is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The statute, among other things, prohibits federal agencies from taking actions that may jeopardize an endangered species. The Secretaries of Interior and Commerce, who administer the ESA, have adopted regulations defining the responsibilities of federal agencies under the ESA. Although the Supreme Court has held under the “*Chevron* doctrine” that the courts generally should defer to federal agency regulations interpreting ambiguous federal statutes, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Ninth and Tenth Circuit Courts of Appeals have recently declined to defer to the Secretaries’ regulations defining federal agency responsibilities under the ESA, or at least have interpreted the regulations narrowly. This article will describe how these courts have failed to defer to the Secretary’s regulations, contrary to the tenets of the *Chevron* doctrine.

The Endangered Species Act

Under the ESA, the Secretaries of Interior and Commerce (collectively: Secretary) are required to list endangered species and designate their critical habitats. 16 U.S.C. § 1533. Section 7(a)(2) of the ESA requires federal agencies to avoid taking actions that may jeopardize a listed endangered species. The provision requires that federal agencies “insure” that actions “authorized, funded or carried out” by them do not jeopardize endangered species or adversely affect their critical habitats. *Id.* at § 1536(a)(2). Before taking actions that may affect such species,

federal agencies must consult with the Secretary, who must determine whether the proposed agency action will jeopardize the species. *Id.* at § 1536(a)(3). If the Secretary determines that the proposed action will have this effect, the Secretary must issue a biological opinion setting forth alternatives to avoid jeopardy, and the federal action agency must comply with these alternatives. *Id.* at § 1536(b)(3)(A). The Secretary of the Interior has delegated the authority to prepare biological opinions to the Fish and Wildlife Service (FWS), and the Secretary of Commerce has delegated authority to the National Marine Fisheries Service (NMFS), now known as NOAA Fisheries.

In 1986, the Secretary adopted a regulation defining federal agency responsibilities under § 7 of the ESA. 50 C.F.R. § 402.03. The regulation provides that “Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.” (Emphasis added.) Under the regulation, the consultation and jeopardy-avoidance requirements of § 7 apply where the action agency has discretion under its governing statutes or other legal authority to comply with these requirements, and conversely the requirements do not apply where the agency lacks such discretion.

The Tenth Circuit’s *Silvery Minnow* Decision

In *Silvery Minnow v. Keyes*, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (2004), the Tenth Circuit narrowly applied the Secretary’s “discretion” regulation in holding that the Bureau of Reclamation (Bureau) must reduce water supplies promised to contractors in order to benefit endangered species.

The U.S. Bureau of Reclamation operates various water projects on the Middle Rio Grande in New

The opinions expressed in attributed articles in *Western Water Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *Western Water Law & Policy Reporter*.

Mexico, including the San Juan-Chama Project, which imports water from the Colorado River watershed to the Middle Rio Grande. The Bureau entered into contracts with several municipal water agencies (including the City of Albuquerque) and agricultural districts (including the Middle Rio Grande Conservancy District), which provide for water deliveries to the contracting agencies. An environmental organization brought an action alleging that the Bureau's operation of the Middle Rio Grande projects impair an endangered species, the silvery minnow, and therefore the Bureau is required under the ESA to reallocate a substantial portion of project water from the contractors to the minnow. Relying on the Secretary's regulation, the Bureau argued it had no discretion to reallocate the water because the contracts require that the water be delivered to the contractors and contain no provision authorizing its reallocation for other purposes.

The Tenth Circuit, in a 2-1 decision, rejected the Bureau's argument. The court held that the Bureau's contracts with the water users contain a shortage clause that immunizes the Bureau from liability for failure to provide water deliveries resulting from drought "or other causes," and that the ESA is one of the "other causes" contemplated in the contractual provision. 333 F.3d at 1127-1130. The court also held that other federal statutes, such as the Fish and Wildlife Coordination Act, provide discretion for the Bureau to reallocate the water to benefit endangered species. Additionally, the court held that the doctrine of "unmistakable terms" authorizes the Bureau to reallocate the water to benefit the endangered species. Under this doctrine, Congress retains the sovereign power to modify contracts by subsequent legislation, and does not waive this right unless it does so by "unmistakable terms." *Id.* at 1129; *U.S. v. Winstar Corp.*, 518 U.S. 839, 878 (1996).

The Tenth Circuit decision does not appear to properly apply the Secretary's regulation. Although the Bureau's contracts immunize it from liability for shortages beyond its control, the provision does not mandate that the Bureau reallocate contracted-for water supplies in order to benefit endangered species. The contractual provision is a shield protecting the Bureau from liability, not a sword mandating that it reallocate water. Under the Secretary's regulation, the Bureau cannot act beyond its discretion and the "other causes" provision of the contracts does not af-

ford such discretion. Moreover, the Fish and Wildlife Coordination Act requires only that the Bureau coordinate its management of water projects with the need to protect fish and wildlife resources, but not that it reallocate contracted-for water supplies to benefit endangered species. Finally, the doctrine of "unmistakable terms" does not mandate such water reallocations, because there is no indication that Congress intended that the ESA would require such reallocations and the Secretary's regulation interprets the statute as not having that effect.

Although the U.S. prepared to seek Supreme Court review of the Tenth Circuit decision, Congress subsequently passed legislation effectively mooting the litigation. The legislation, sponsored by Senator Pete Domenici of New Mexico, provided that the Secretary of the Interior lacks authority to transfer San Juan-Chama Project from the contractors to benefit the silvery minnow, and that FWS' earlier biological opinion—which the Tenth Circuit had overturned—shall be deemed to "fully" satisfy ESA requirements until 2013. Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, § 208(a), 117 Stat. 1827 (Dec. 1, 2003). The Tenth Circuit subsequently vacated that portion of its decision on mootness grounds. 355 F.3d 1215 (10th Cir. 2004).

The Ninth Circuit's Defenders of Wildlife Decision

In *Defenders of Wildlife v. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005), the Ninth Circuit recently held that the ESA creates "discretion" for federal agencies to avoid taking actions that jeopardize endangered species even though other federal laws may require the agencies to take such actions.

Under the Clean Water Act (CWA), Arizona applied to the Environmental Protection Agency (EPA) for authority to administer its own permit program, the National Pollutant Discharge Elimination System. The CWA mandates the EPA to approve such state programs if they meet specified criteria in the CWA, 33 U.S.C. § 1342(b), and the parties agreed that the Arizona program met these criteria. Nonetheless, the EPA consulted with the FWS before approving the Arizona program because, in EPA's view, the transfer of the federal permit program to Arizona might potentially jeopardize some endangered species in Arizona. After consultation, the EPA and FWS

concluded that EPA had no discretion to disapprove the Arizona program because it met the CWA criteria, and EPA accordingly approved the program. An environmental organization challenged EPA's approval on grounds that it jeopardized endangered species and therefore the EPA was required to consider jeopardy-avoiding alternatives, such as disapproving the Arizona program or imposing conditions on it.

The Ninth Circuit, in a 2-1 decision, invalidated EPA's approval of the Arizona program. The court reasoned that the transfer of the federal permit program to Arizona would potentially jeopardize endangered species in Arizona because the mitigation measures that had been adopted under the federal program would no longer apply once the program was transferred to Arizona.

The Ninth Circuit held that since the EPA action would cause jeopardy, EPA had a duty to consult and avoid jeopardy, for two reasons. First, the obligations of federal agencies to consult and avoid jeopardy under the ESA are "an obligation in addition to those created by the agencies' own governing statute." 420 F.3d at 967. Thus, the ESA itself requires federal agencies to avoid taking jeopardy-causing actions even though other federal laws—in this case, the CWA—may specifically require the agency to take the action. Under the decision, the ESA requirements override the requirements of other federal laws where the requirements are in conflict. The court cited the Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), which stated that Congress, in passing the ESA, had decided to give endangered species "priority over the 'primary missions' of federal agencies," and had purposefully excluded language that would have required federal agencies to avoid jeopardy only where "practicable and consistent with [an agency's] primary purpose."

Second, the Ninth Circuit held that the Secretary's "discretion" regulation does not change the outcome. The court stated that the regulation is "congruent" and "coterminous" with, and merely places a "gloss" on, the ESA; therefore, the regulation does not substantively affect the statutory interpretation. According to the court, an agency's "discretion" extends to all matters within its "exclusive decision-making authority," even where other laws might limit agency discretion.

The Ninth Circuit's interpretation of the Secretary's "discretion" regulation deprives it of any

practical meaning. If, as the court held, an agency's "discretion" under the regulation is "coterminous" with its statutory authority and the regulation merely places a "gloss" on the statute, then the regulation does not add anything of substance to the interpretation of the statute. The court reasoned that the ESA itself creates "discretion" for federal agencies to avoid taking actions harmful to endangered species, even though other statutes may direct such agency action. Under the decision, the ESA is a kind of federal "superlaw," in that its requirements trump those of other statutes defining agency missions and responsibilities. By holding that agencies have "discretion" under the ESA itself to avoid taking jeopardy-causing actions, the Ninth Circuit decision effectively interpreted the Secretary's regulation as a nullity.

After the Ninth Circuit—over the objections of six judges—declined to reconsider its decision *en banc*, 2006 U.S.App.LEXIS 14066 (2006), the Supreme Court granted the EPA's petition for writ of certiorari. The Court held oral argument on April 17, 2007, and its decision is pending.

The Ninth Circuit's National Wildlife Federation Decision

In *National Wildlife Federation v. National Marine Fisheries Service*, 2007 U.S. App. LEXIS 8181 (2007), the Ninth Circuit—relying on its above-described decision in *Defenders of Wildlife*—recently held that the ESA requires federal agencies to mitigate the effects of federal water projects as applied to endangered species, even though Congress may have authorized the projects causing such effects.

The Bureau and the U.S. Army Corps of Engineers operate several water projects on the Columbia and Snake Rivers that provide water supplies for domestic use and irrigation, hydroelectric power development, and navigation. The projects, collectively known as the Federal Columbia River Power System, to some extent impede the migration of salmon, a listed endangered species, to and from the ocean. The Bureau and the Corps consulted with NMFS under § 7(a)(2) of the ESA regarding the effect of project operations on the salmon. NMFS issued a biological opinion in 2004 concluding that the agencies' proposed operation of the projects would not jeopardize the continued existence of the salmon.

Under the Secretary's regulations, an ESA biological opinion must consider the effects of agency action

that will be “added to the environmental baseline,” but not the effects caused by the “environmental baseline” itself. 50 C.F.R. § 402.02. In its biological opinion, NMFS concluded that the “environmental baseline” includes the Columbia River projects, because Congress authorized the projects and the agencies have no discretion to remove them. Therefore, NMFS analyzed the effect of agency actions that were on top of the environmental baseline—that is, the discretionary actions of the agencies in operating the projects—but not the effects of the projects themselves on the salmon’s existence. Rather than aggregating the effects of the baseline and the agencies’ discretionary actions, NMFS segregated the baseline from the discretionary actions and analyzed the effects of the latter.

The Ninth Circuit, affirming the District Court decision, overturned the biological opinion. The court held that NMFS cannot properly segregate the baseline from discretionary agency actions in analyzing the projects’ effects, because—as the Ninth Circuit had held in *Defenders of Wildlife*—“any action taken by the agency is discretionary.” 2007 U.S. App. LEXIS 8181, at *21 (original emphasis). Since all agency action is discretionary, NMFS must consider all project effects on the salmon, whether caused by the projects themselves or the agencies’ operations. Although NMFS argued that the operating agencies do not have discretionary control over the “competing mandates for flood control, irrigation, and power production,” the court stated that Congress has not quantified these competing needs and thus the agencies have discretion in meeting them. *Id.* at *22. Although the agencies may have some nondiscretionary obligations, they nonetheless have discretion to “balance” the competing demands and thus meet their ESA obligations. *Id.* at *24.

The Ninth Circuit also stated that NMFS must incorporate the environmental baseline—the projects’ existence—into its jeopardy analysis, even though the agency may have no discretionary authority over the projects’ existence. *Id.* The biological opinion must consider whether the agencies’ proposed discretionary actions, when added to the baseline, will “tip” the species into jeopardy. *Id.* By considering the effect of the agency action without considering the baseline, the agency may allow an endangered species to be gradually destroyed, as long as each step on this path is “sufficiently modest.” *Id.* at *25. This conclu-

sion, the court stated, does not require the agency to include the entire environmental baseline in its analysis of the agency action, but instead requires that the agency consider the effects of its action within the “context” of the baseline. *Id.* at *26-27.

Finally, the Ninth Circuit held that NMFS’ jeopardy analysis improperly considered the effect of the agency action only on the species’ *survival* and not its *recovery*. *Id.* at *28. (The issue is important because it takes much more habitat to ensure a species’ recovery than its survival.) The ESA prohibits agency action that is “likely to jeopardize the continued *existence*” of a listed endangered species, 16 U.S.C. § 1536(a)(2) (emphasis added), and the Secretary has adopted a regulation interpreting this provision as prohibiting agency action that would “reduce appreciably the likelihood of *both* the survival and recovery” of the species. 50 C.F.R. § 402.02 (emphasis added). NMFS argued that the statute establishes a survival standard but not a separate recovery standard, because a species can “exist” if it survives regardless of whether it recovers. NMFS also argued that the regulation—by referring to “both” survival and recovery—establishes a survival standard but not a separate recovery standard, because an agency action that reduces the likelihood of the species’ survival will necessarily reduce the likelihood of its recovery, but not *vice versa*.

The Ninth Circuit rejected NMFS’ construction of the regulation, stating that its construction reads the phrase “and recovery” out of the regulation. 2007 U.S. App. LEXIS 8181, at *29. The court’s interpretation, however, appears to change the language of the regulation by prohibiting agency action that would reduce the likelihood of *either* survival *or* recovery, rather than *both* survival *and* recovery. The court did not separately address the interpretation of the statute, nor explain how its interpretation that the agencies must apply a “recovery” standard can be reconciled with the statutory language prohibiting only agency actions that jeopardize the “existence” of the species.

In summary, the Ninth Circuit’s *National Wildlife Federation* decision, similarly to its *Defenders of Wildlife* decision, appears to deprive the Secretary’s “discretion” regulation of any practical significance. The court held, in effect, that NMFS must consider the impacts not only of the agencies’ discretionary actions in operating the Columbia River projects, but also the impacts of Congress’ decision to au-

thorize the projects and mandate that they fulfill certain purposes, such as providing water supplies and producing hydroelectric power—subjects that are beyond the discretionary control of the agencies. Since Congress authorized the projects and required that they serve certain purposes, the effects of the projects on endangered species, such as they are, are caused by the congressional mandate rather than agency actions in fulfilling it—except of course to the extent the agencies have discretion to allocate water for endangered species without violating other congressional enactments. The ESA requires federal agencies to avoid jeopardy to endangered species in taking actions within their discretionary authority, not in taking actions mandated by Congress. If Congress wishes to ensure that its own mandates do not cause jeopardy to endangered species, Congress has the power to change its laws, but it has not done so. The Ninth Circuit, by concluding that all agency action is discretionary—even when undertaken pursuant to congressional mandates—appears to have misconstrued the Secretary’s regulation, similarly to its earlier decision in *Defenders of Wildlife*.

Conclusion and Implications

The Ninth Circuit decisions in *Defenders of Wildlife* and *National Wildlife Federation* and the Tenth Circuit decision in *Silvery Minnow* fail to apply the fundamental principle of statutory construction, laid down by the Supreme Court in *Chevron*, that the courts should defer to reasonable federal agency interpretations of ambiguous statutes. The decisions are different in a significant way—the Tenth Circuit decision applies and narrowly interprets the regulation and the Ninth Circuit decisions virtually disregard it altogether. All of these decisions, however, conclude that the agencies have discretion to comply with ESA requirements even though other federal laws and requirements do not in fact grant such discretion. The Secretary’s regulation provides a reasonable interpretation of the ESA in cases where the ESA and other statutes impose conflicting obligations on federal agencies, by distinguishing between discretionary and nondiscretionary agency actions. Under the *Chevron* doctrine, the courts should defer to the Secretary’s regulation in resolving conflicts between the ESA and other laws.

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WESTERN WATER NEWS

**GOVERNOR SCHWARZENEGGER'S WATER BOND REJECTED
BY SENATE NATURAL RESOURCES AND WATER COMMITTEE**

On April 24, 2007, the Senate Natural Resources and Water Committee voted down SB 59, a \$4 billion water bond measure, which would have asked voters to provide funding for two new dams and other water conservation projects. The Democratic members of the committee opposed the Republican-backed measure.

Governor Schwarzenegger first proposed the bill in January. The bill was largely backed by the Republican Party and if passed would have provided funding for construction of two new dams in the Central Valley and other conservation projects. The bill contemplated the construction of a dam at Temperance Flat above Lake Millerton in Fresno and Madera Counties, and a new reservoir near the town of Sites in Glenn and Colusa Counties. The construction of the dams would yield approximately 3.1 million acre-feet of new water storage.

SB 59 was an inclusive bill that provided for a comprehensive water plan in addition to the proposed new dams. Besides providing funding to build water infrastructure, the bond would have allocated \$1 billion for Delta sustainability. The bill provided that \$500 million be set aside for groundwater storage. Finally, SB 59 provided for \$250 million in environmental restoration and \$200 million for water efficiency programs.

The bill provided that construction costs would be split between the taxpayers and the users of the water, such as water agencies and farmers. Taxpayers would be asked to contribute \$2 billion while others would have to pick up the additional \$2 billion in construction costs. However, no agreements had been reached in regards to how such an arrangement would have been structured.

Environmental groups and Democrats opposed the bill from the onset for a variety of reasons. Among the reasons for not moving the bill forward, they cited the lack of finalized feasibility and environmental impact studies for the two reservoirs. Senator Darrell Steinberg stated that the timing of the dam proposals was inconsistent with environmental laws and "we should not be voting for or against a major water proj-

ects before the environmental review is completed." (Greg Lucas, "GOP Cites Warming in Bid for New Dams," SF Gate, Feb. 1, 2007.) Additionally, opponents argued that dams are not needed to address California's water concerns as long as water conservation efforts continue.

Opponents of SB 59, including Senate President Pro Tem Don Perata, countered that a better solution would not include construction of more dams but rather would allow for the ability to transport water and recharge water into groundwater basins for storage.

Republican supporters of the bill cited global warming, reduction in annual snowpack, and population increases as justification for SB 59.

Denial of this bill comes on the heels of concerns regarding reduction in Sierra snowpack due to global warming and renewed discussions regarding California water policy. According to the Department of Water Resources, snow water equivalents in the Sierra for the end of the 2006/2007 water year were 71 percent below normal. More specifically, northern Sierra levels were at 27 percent of normal, Central Sierra at 33 percent, and the southern Sierra at 24 percent. (DWR Advisory, "Low Snowpack Shows Critical Need for Water Storage and Conservation," (May 1, 2007).)

Both the Governor and Republican legislators expressed disappointment in the committee's decision. After the committee's vote Governor Schwarzenegger commented that he would continue to push for the construction of the new dams. Although the bill did not pass through the Senate committee it is clear that this is just the beginning of an important dialogue regarding California's water policy. In a press conference after the vote Governor Schwarzenegger stated in regards to the bill, "I don't think we will have to scale back." (Judy Lin, Sacramento Bee, "Defeated Dams Still Supported: Governor Isn't Backing Away from \$4 Billion in Bonds After Negative Vote by Senate Panel," (April 25, 2007).) It is expected that the Governor will re-submit a bill that will be largely in the same format as SB 59. Reconsideration of the bill is also under review. (SA)

REGULATORY DEVELOPMENTS

**'COLORADO WATER FOR THE 21ST CENTURY ACT'
RECEIVING MIXED REVIEWS**

It has been nearly one year since the authors first reported on the Colorado Water for the 21st Century Act (Water Act). See 10 *West. Water L. & Pol'y Rptr.* 217 (June 2006). The Water Act provides several procedural mechanisms aimed at creating a dialogue between representatives from the several river basins within the state, with the goal of reaching solutions to interbasin water conflicts. Interbasin water conflicts in Colorado date back to the turn of the century or before, when east slope water users began appropriating west slope water for use within growing cities and towns on the Front Range. Despite its exalted goal of ameliorating interbasin water conflicts, it appears that the Water Act has done little to date in terms of actually resolving interbasin conflicts, although some progress has been made.

Interbasin Committee and Basin Roundtables

In 2005, the Colorado Legislature passed House Bill 05-1177 (the Water Act), which created an Interbasin Compact Committee (Committee) and nine "Basin Roundtables." C.R.S., § 37-75-101 *et seq.* The goal of the Basin Roundtables is to facilitate negotiations between stakeholders regarding water management issues and to support collaboration on water supply issues for the future. The Roundtables have adopted by-laws to establish goals and objectives, and to identify the distinctive characteristics of their basins. The Basin Roundtables have also begun the process of creating basin-wide water needs assessments, analyses of availability of water for appropriation, and proposals for projects that would satisfy the identified water demands. The Roundtables represent stakeholders in the South Platte, Arkansas, Rio Grand, Gunnison, San Miguel and San Juan, Colorado, North Platte, and Yampa and White River basins, with a separate roundtable established for the Denver metropolitan area. Each Roundtable has also chosen two members to serve on the Committee.

The essential goal of the Committee is to negotiate interbasin water compacts between the several river basins of the state. Pursuant to its organic legislation,

the Committee has drafted an interbasin compact charter that governs all negotiations between basin roundtables. The newly elected governor's administration is, however, questioning the effectiveness of the Committee and the Roundtables.

Governor Ritter Steps In

Governor Bill Ritter was elected into office on November 7, 2006. He appointed Harris Sherman on January 5, 2007 as executive director of the Colorado Department of Natural Resources. Sherman formerly headed that agency from 1975-1980. The agency oversees the Colorado Division of Water Resources and State Engineer, among other things.

In his first key policy declaration on water issues, Governor Ritter said that the Water Act was getting mixed reviews and that he would like to look at ways to improve it. *Aspen Daily News*, Friday, January 26, 2007 at p. 9 "Ritter questions state water system." Along those lines, Sherman pointed out that proponents of three to four key water developments avoided the Water Act's procedures altogether, and are pursuing the projects independently. Critics of the Water Act lament that the system lacks teeth. Ritter informed the Colorado Water Congress, an association of water users, "We get differing opinions, differing views on whether this roundtable process is a successful one, whether it merits going forward.... There's a lot of people who think it really does, and then it has its detractors. We really want to spend some time and look at that process." *Id.* Sherman stated, "There are issues and concerns I have about this process," but supported the Water Act in that it has brought opposing parties to the table to discuss water issues. *Id.* "It may be a matter of concern if this is the best vehicle" *Id.*

Conclusion and Implications

While the Basin Roundtable and interbasin water compact process undoubtedly serves valuable goals of initiating dialogues between competing water users, because the process is not focused on specific water

projects, it may be too soon to know whether the process will produce results in the long run. The lack of real progress to date begs the question, are interbasin water compacts on an intrastate basis a good idea? To be sure, interstate water compacts have allowed water development to proceed in Colorado somewhat unimpeded by claims by downstream states, relative to the conflicts and litigation that would have occurred in the absence of such compacts. However, Colorado has been involved in protracted litigation over river basins that are subject to interstate compacts. For example, Colorado and Kansas have been litigating the Arkansas River Compact for over twenty years. Ever since Delph Carpenter, a Coloradan, conceived of the notion of interstate water compacts in the early 1920s, Colorado seems to have embraced the idea of water compacts as a panacea for all water disputes. Major water projects already take up to a decade or more to complete, due to lengthy permitting and adjudication requirements. Observers have argued

that it may be time to question whether subjecting future water projects to intrastate water compacts is worthwhile.

Colorado's water court process already provides a forum for *any* party to raise concerns with particular water projects. The *ad-hoc* water rights adjudication procedure allows water developments to respond to demands that change in amount and place over time. Interbasin water compacts could "cap" the amount of water available for use from a water basin, thereby decreasing the flexibility of the current system to respond to changing demands. Given the increased time and decreased flexibility that interbasin water compacts may subject water development to, perhaps, as the Governor has suggested, it may be time to weigh and balance the notion of interbasin water compacts. On the other hand, the Water Act has brought interested parties to the table on key water issues in Colorado, which most would agree is progress in and of itself. (SM/PLN)

WASHINGTON GOVERNOR ISSUES 'CLIMATE CHANGE CHALLENGE' EXECUTIVE ORDER TO ADDRESSES WATER RESOURCES— DEPARTMENT OF ECOLOGY GEARS UP

(Executive Order 07-02)

Governor Christine Gregoire recently issued Executive Order 07-02, launching a "Washington Climate Change Challenge" initiative to achieve ambitious goals of reducing greenhouse gas emissions, developing clean energy, and preparing for the impact of global warming. Among other things, the executive order directs the Washington Department of Ecology and other agencies to evaluate and prepare for the impact of global warming on water supply and management. In response, the Department of Ecology has begun to organize a climate change committee on water resources.

Background

Washington is especially vulnerable to climate change because of its dependence on mountain snowpack for summer stream flows and because of the threat to coastal communities posed by the expected rise in sea levels. Extreme weather patterns, a warming Pacific Northwest, reduced snowpack, and sea

level rise—each associated with climate change—will disrupt Washington's natural environment, population, and economy. For example, a 2006 report commissioned by the Department of Ecology and the Department of Community, Trade and Economic Development estimated that the costs of water conservation to offset anticipated impacts on water supplies for the city of Seattle and other large municipal water suppliers could exceed \$16 million per year by the 2040s.

Because of Washington's extensive hydropower resources, power generation is not as significant a source of greenhouse gas emissions as in other states. According to the Department of Ecology, more than 45 percent of greenhouse gas emissions in Washington are associated with transportation.

Executive Order 07-02

In her executive order, Governor Gregoire observed that the causes of climate change are global,

but the effects of climate change on Washington are:

local and unique, including our dependence on snowpack for fresh water, our reliance on hydro-power for energy, and our significant amount of shoreline.

Citing research by the Climate Impacts Group at the University of Washington, the executive order states that:

the effects of climate change are already being felt in the state of Washington in the form of average yearly temperatures rising faster over the 20th Century than the global average, mountain glaciers in the North Cascades losing up to a third of their area since 1950, snowpack in the Cascades declining by 35 percent, peak spring river runoff occurring 10 to 30 days earlier and the proportion of stream flow that arrives in summer decreasing as much as 34 percent in sensitive river basins.

The executive order notes that Washington has already taken significant actions to address climate change, including adoption of the Columbia River Management Act to “work toward meeting the water storage needs for agriculture, communities, and salmon.” According to the executive order, Washington’s vast hydroelectric system must be taken into account in any regional or national program to combat global warming, and the state “must continue its work to be prepared for the inevitable impacts of climate change.”

Governor Gregoire declared the state’s commitment to address climate change by establishing aggressive goals for reducing greenhouse gas emissions, including reducing emissions to 50 percent below 1990 levels by the year 2050, and for increasing “clean energy sector jobs” and reducing expenditures on imported fuels. The executive order also includes the implementation of “significant policy actions taken in 2005 and 2006 to reduce greenhouse gas emissions. These actions will move Washington State to at least 60 percent of the 2020 goal [of reductions in greenhouse gas emissions] and grow the clean energy economy” by, among other things “pursuing new water resources in Eastern Washington, including water conservation projects, developing new storage

and new creative water management alternatives.

This reference appears to be to the Columbia River Management Act enacted by the Washington State Legislature in 2006.

To implement these goals and to plan for the future, Governor Gregoire announced the “Washington Climate Change Challenge,” a broad-based climate change initiative to be developed within one year by the Department of Ecology and the Department of Community, Trade and Economic Development. Among other things, the Climate Change Challenge is supposed to “assess what further steps the state of Washington should take to be prepared for the impact of global warming to water supply and management.”

Conclusion and Implications

In response, Ecology has announced the formation of a committee on climate change and water resources, with the goal of shaping informed policy and planning decisions. The first question that has arisen is how many “stakeholders” will participate in this committee. Noting the need for “an appropriately sized stakeholder table,” Ecology’s website invites interested persons to volunteer for this committee in the hope that:

the table will be large enough to allow for the varied interests of stakeholders to be heard and debated, but not so large as to stall or prevent progress toward group consensus.

Although the committee membership has not yet been announced, it is anticipated that the water resources committee will be comprised of approximately twelve “stakeholders” in addition to agency staff. Meetings of the committee will be open to the public.

It is difficult to predict whether this climate change water resources committee will focus the bulk of its efforts on identifying impacts to water resources or on managing water resources in the face of climate change. It can be inferred from the governor’s executive order that new ideas for resource management may be welcomed, but it remains to be seen whether Ecology’s “stakeholder” consensus process will result in new, creative policy approaches that could respond effectively to climate change. A copy of the executive order can be found at http://www.governor.wa.gov/ex-corders/eo_07-02.pdf. (SM)

LAWSUITS FILED OR PENDING

NINTH CIRCUIT HOLDS FEDERAL LEGISLATION EXEMPTS ALL-AMERICAN CANAL-LINING PROJECT FROM ENVIRONMENTAL REVIEW

Consejo de Desarrollo Economico de Mexical v. U.S., ___F.3d___, Case No. 06-16345 (9th Cir. April 6, 2007).

The Ninth Circuit Court of Appeals cleared the way for commencement of the concrete lining of the All-American Canal by determining that an environmental challenge to halt the lining project was moot. Based upon Congressional legislation passed in December 2006 (2006 Tax Relief and Health Care Act) that instructed the Secretary of the Interior to move forward immediately with the Canal lining project, the Ninth Circuit concluded it could not provide any effectual relief in the pending appeal. The 2006 Act rendered the statutory environmental claims moot because to enjoin the lining project would be contrary to Congress's express instructions.

Background

The 82-mile long All-American Canal is one of the world's largest irrigation canals, carrying water from the Colorado River to the Imperial Valley in California. The Imperial Valley is a broad valley that lies between the Mexican border and the Salton Sea, bounded on the east by sand hills and on the west by the northern Peninsular Ranges. The Canal flows entirely within the valley in the U.S. and includes a 23-mile segment that is not lined with any kind of impervious barrier. As a result, the canal loses at least seven percent of its water as seepage recharge to the Mexicali Aquifer, which underlies the southern portions of the Imperial Valley and the northern Mexicali Valley across the border in Mexico. This recharge provides a source of groundwater for the roughly 1.3 million people living in the Mexicali Valley, including Mexican farmers who depend on groundwater to irrigate farmland.

On the California side of the border, the lining of the canal is anticipated to save upwards of 67,000 acre-feet of water annually lost to percolation. The salvaged 67,000 acre-feet represent enough water for one year for roughly 135,000 homes in San Diego

County. The lining project is estimated to cost approximately \$250 million.

In *Consejo de Desarrollo Economico de Mexicali*, plaintiffs, consisting of several California citizen groups and a group of Mexicali farmers, claimed the Mexicali Valley is dependent on well water from the Mexicali Aquifer for a large part of its irrigation and domestic needs. Plaintiffs asserted the Colorado and Alamo Rivers have always recharged the Mexicali Aquifer and, when the U.S. replaced the Alamo River with the All-American Canal in 1942, Congress deliberately decided the canal should be unlined to allow seepage to continue recharging the underlying aquifer for the benefit of the Mexicali Valley.

District Court Ruling and Appeal

In July 2006, the U.S. prevailed in the trial court phase of the lawsuit brought in Nevada. (*Consejo de Desarrollo, et al. v. U.S., et al.*, 438 F.Supp.2d 1207 (D. Nev. 2006).) The lawsuit raised two issues: (1) whether Mexico and Mexican citizens have claims to groundwater rights outside of the 1944 Colorado River Treaty; and (2) whether the environmental analysis performed for the canal-lining project satisfied both federal and state environmental laws. Seven of the eight claims in the lawsuit dealt with the Mexican citizens' claims to groundwater rights. The District Court dismissed all seven of those claims based on a lack of standing. The District Court determined the treaties between the U.S. and Mexico dictated the water rights between the two countries. Therefore, only the Country of Mexico, not the individual citizens, could bring suit. The District Court also held that supplemental environmental analysis was not needed to evaluate the project's impacts to the hydrology of the Salton Sea, the degradation of air quality during the construction of the canal's lining, or the impacts on wetlands and bird species in

Mexico. Finally, the District Court denied the request for a preliminary injunction.

With the project moving towards construction, Plaintiffs took the case to the Ninth Circuit Court of Appeals. The Ninth Circuit abruptly halted the lining project by issuing an August 25, 2006, emergency injunction to hear the pending appeal. However, prior to the appellate hearing, Congress passed the 2006 Tax Relief and Health Care Act, which included language directing the Secretary of the Interior to move forward with the lining of the All-American Canal.

2006 Tax Relief and Health Care Act

The Tax Relief and Health Care Act (2006 Act) is a massive piece of legislation focusing on existing tax breaks that would have expired at the end of 2006. However, buried within the measure is the directive that the Secretary of the Interior move forward “immediately with the lining of the All-American Canal.” The language was added to the tax bill on Friday, December 9, 2006 and the 2006 Act passed through the House and Senate the following day in the final hours of the 2006 Session. Representative Duncan Hunter from El Cajon, with instrumental support from Senators Feinstein (California), Kyl (Arizona), and Reid (Nevada), drafted the legislation regarding the canal. President Bush signed the 2006 Act into law on December 20, 2006.

Ninth Circuit Opinion

In light of the 2006 Act’s passage, the Ninth Circuit changed its focus from the alleged National Environmental Policy Act, Endangered Species Act, Migratory Bird Treaty Act, and San Luis Rey Indian Water Rights Settlement Act claims to one of

statutory construction and pre-emption. The Ninth Circuit held that the 2006 Act rendered moot the environmental groups’ challenges to commencement of the lining of the All-American Canal. The court based this holding on its determination that the express language of the 2006 Act could not be reconciled with the delay that compliance with the environmental statutes would cause. Moreover, the court followed previous decisions in concluding that because the 2006 Act passed constitutional muster, Congress was empowered to exempt the lining of the All-American Canal from the requirements of environmental laws. With respect to claims unrelated to the environmental challenges, the court held the District Court lacked jurisdiction over the claims because they were either brought before the wrong court, or were barred by the doctrine of sovereign immunity.

Conclusion and Implications

The temporary injunction on the lining of the All-American Canal has been lifted and construction will soon commence. The canal-lining project will provide an additional water source for the growing population in San Diego County, but also deprive Mexicali farmers of economic and farming opportunities. Congress’s affirmation of the 2006 Act makes its stance clear on this controversial project. It remains to be seen how the lining of the All-American Canal will affect the U.S.’ future relationship and dealings with Mexico. Regardless, Congress’s decision removed the Ninth Circuit’s opportunity to decide whether projects conducted wholly within the U.S. must consider environmental effects in neighboring countries. That determination will have to wait until another day. (SA)

CALIFORNIA SUPERIOR COURT'S ORDER BARRING PUMPING FROM BANKS PLANT IN DELTA STAYED PENDING APPEAL

Watershed Enforcers v. Department of Water Resources, Case No. RG06292124,
slip op. Apr. 17, 2007 (Alameda County Superior Court).

The widely reported Alameda County Superior Court decision issuing a peremptory writ of mandate barring the pumping of water to the State Water Project through the Harvey O. Banks Pumping Plant (Banks Plant) for failure of the Department of Water Resources (DWR) to obtain a take permit from the Department of Fish and Game (DFG) under the California Endangered Species Act (CESA) relating to the delta smelt, the spring run and the winter run chinook salmon is now subject to an automatic stay pending appeal to the First District Court of Appeal. Meanwhile, DWR, DFG, and the federal agencies responsible for a biological opinion under the Federal Endangered Species Act (ESA) took various steps to alter their activities affecting the Bay Delta and to move toward a coordinated federal and state biological opinion on the affected species.

On April 17, 2007, Alameda County Superior Court Judge Roesch issued a "statement of decision" making final a March 22, 2007, "proposed statement of decision" finding that DWR's pumping of the Banks Plant violated the CESA. The court concluded that none of three possible exceptions to the prohibition on the taking of California listed threatened or endangered species applied and that the operation of the Banks Plant therefore was resulting in an illegal take of the three species. The court rejected procedural arguments on standing, the applicability of CESA to state agencies, and the propriety of proceeding by writ under Code of Civil Procedure § 1085 raised by DWR and intervening water agencies.

On the substance, the court concluded that the take of the species was not "grandfathered" under Fish & Game Code § 2081.1, which requires, among other things, that DFG had approved a plan or agreement and that the application process commenced on or before April 10, 1997. The court also concluded that DFG had not issued a binding "consistency determination" finding that a federal biological opinion was consistent with the requirements of CESA under Fish & Game Code § 2080.1.

Because the court issued a writ under Code of Civil Procedure § 1085, its ruling is subject to automatic

stay during appeal. At the time of writing, notices of Appeal have been filed by DWR and Kern County Water Agency; additional notices may have been filed by other intervenors since then. In the Superior Court, counsel for the petitioners filed a "notice of nonopposition" to a stay.

As of the time of this writing, cross-motions for summary judgment as to the validity of a biological opinion under the Federal Endangered Species Act (ESA) that could form the basis for a "consistency" determination under CESA were under submission in the U.S. District Court for the Eastern District of California. Those motions, in *Natural Resources Defense Council v. Norton*, No. 05-cv-01207-OWW-NEW (E.D. Cal.), were heard on April 26 before Judge Oliver Wanger. Apparently seeking to achieve a new federal biological opinion anyway, DWR has withdrawn its request to DFG for such a determination, re-initiated its consultation with the federal agencies responsible under ESA—the National Oceanic and Atmospheric Agency (NOAA Fisheries) and the U.S. Fish and Wildlife Service (FWS)—and entered into a new "memorandum of understanding" with DFG (MOU). The purpose of the MOU, executed May 7, 2007, by the Directors of both agencies, declares the parties' goal to complete a biological assessment compliant with both state and federal law by October 2007, to maintain available water supplies for at-risk species use in the interim, and to amend the "Four Pumps Agreement" in sufficient time to include it in the project description for the October 2007 "biological assessment."

Conclusion and Implications

Under ESA, a biological assessment is the first step in a consultation. The biological assessment results in a determination whether or not a biological opinion is required; based on past history that next step probably is envisioned in this instance. Meanwhile, under the MOU DWR will provide water sufficient to meet the "fixed asset target" of 210,000-250,000 acre-feet of water to be maintained in the Delta for the listed species. (DP /HB)

IDAHO STATE DISTRICT COURT ISSUES TEMPORARY RESTRAINING ORDER THAT FORESTALLS HISTORIC CURTAILMENT ORDER AFFECTING AGRICULTURE AND MUNICIPALITIES

Idaho Ground Water Appropriators, Inc., et al. v. Idaho Department of Water Resources, et al.,
Case No. CV-2007-0000526, order issued May 8, 2007, Fifth Judicial District.

Fifth District Judge Jon K. Butler issued a restraining order on May 8, 2007, temporarily forestalling the potential drying up of over 33,000 acres of crop lands and the reduction of water supplies for dairies, food processing plants, and municipalities. A hearing was set for May 30, 2007, to determine whether the Idaho Department of Water Resources' proposed curtailment order will take effect.

The Proposed Curtailment Order

On April 30, 2007, the Director of the Idaho Department of Water Resources (IDWR) issued potential curtailment warning letters to the holders of 771 groundwater rights in connection with the Blue Lakes Trout Farm and Clear Springs Foods delivery calls. The proposed curtailment order is to implement phased curtailment schedules ordered in 2005 in response to the aquaculture surface water calls. The Blue Lakes order implicates consumptive groundwater rights with priority dates later than May 10, 1983, and the Clear Springs order implicates consumptive groundwater rights with priority dates later than June 7, 1975. While the proposed curtailment order does not affect non-consumptive water uses and domestic (in home) water uses, it does threaten to shut down pertinent irrigation, commercial, industrial, and municipal uses. The proposed curtailment order would span portions of Blaine, Butte, Gooding, Jerome, Lincoln, and Minnedoka counties, and reduce potable water supplies for 13 Idaho cities throughout the region. The proposed order would be the largest curtailment of water use in Idaho history. Blue Lakes and Clear Springs use water from naturally occurring springs in the Thousand Springs reach of the Snake River to commercially produce trout that is served throughout the nation and around the world. The respective delivery calls allege harm from junior priority groundwater pumping upstream of the springs on the Eastern Snake Plain Aquifer. The upstream groundwater use, combined with continued drought conditions and evolving irrigation techniques, have

depleted aquifer levels. This depletion has, in turn, negatively impacted discharge volumes from the hydrologically connected springs that discharge through the canyon walls into the Snake River.

The delivery calls and the resultant orders were made under the IDWR's conjunctive management rules (IDAPA 37.03.11), administrative rules drafted to manage hydrologically interconnected ground and surface waters more or less in accordance with Idaho's first in time, first in right prior appropriation doctrine. The conjunctive management rules themselves just recently narrowly survived the review of the Idaho Supreme Court as to their propriety in accordance with Idaho's constitution and corresponding water code.

In its curtailment warning letters, the IDWR acknowledged that curtailment is a last resort, but necessary nonetheless if the applicable groundwater users are unable or unwilling to come up with surface water delivery mitigation plans sufficient to satisfy Blue Lakes and Clear Springs' water needs. The IDWR further warned those subject to the proposed curtailment that issuance of the proposed curtailment orders would affect the eligibility of those lands to be enrolled in the U.S. Department of Agriculture's Conservation Reserve Enhancement (CREP) Program. This is because the CREP program requires that reserved or retired croplands be physically and legally capable of irrigation in a normal manner when offered for enrollment. The proposed curtailment orders would negate the eligibility of subject lands given their failure of being legally capable of irrigation in a normal manner. The Blue Lakes and Clear Springs curtailment orders were to take effect on May 14, 2007.

The Temporary Restraining Order

Three groundwater user groups, the Idaho Ground Water Appropriators, the North Snake Ground Water District, and the Magic Valley Ground Water District, filed the application for the temporary

restraining order to halt the water curtailment. At issue are two competing Idaho water law doctrines. On the one hand, Idaho's prior appropriation doctrine allocates water on a first in time, first in right basis. On the other hand, Idaho water law mandates the full economic development of the state's groundwater resources. In recently upholding the conjunctive management rules as constitutional, the Idaho Supreme Court acknowledged the potential conflict between the doctrines and held that the state has at least some discretion in balancing the needs of senior and junior priority right holders. The groundwater users seek to test the bounds of the Idaho Supreme Court's recently articulated balance concept.

In support of filing the application for the temporary restraining order, the president of the Idaho Ground Water Appropriators stated that its members had been backed into a corner by the threatened curtailment orders, and that they had no choice but to seek judicial intervention. Attorneys for the groundwater user groups stated that the crux of the problem is surface water user and spring water user attempts to secure water supplies in greater amounts and with greater reliability than has ever historically existed. Put another way, while surface and spring water users are technically seeking water in accordance and within the parameters of their state determined water rights, groundwater users allege that the quantities permitted by the state exceed what the sources can provide, or ever did provide. More recently, discharges from the springs have been further limited by drought conditions and widespread conversions from flood to sprinkler irrigation—a move spurred to conserve water that has had the negative effect of limiting groundwater recharge and, by connection, spring discharge. Groundwater users contend that surface water users have too often looked to them to mitigate for conditions that they believe they did not create, and for conditions, which groundwater users state they cannot control.

Surface Water User and Department Response

The Director of the Idaho Department of Water Resources expressed disappointment over the groundwater users' involvement of the courts. However, the

Director also noted the state's obligation to enforce the prior appropriation doctrine if the groundwater users fail to provide the necessary mitigation water to Blue Lakes and Clear Springs. The Director assured that the IDWR would adhere to whatever guidance the courts might offer based upon the IDWR's assessment of the law. An attorney for Clear Springs stated that the May 30 hearing would likely decide what many in Idaho's water user community have been wondering over the past few years—namely whether the prior appropriation doctrine's first in time is first in right underpinning is still the law in Idaho.

Future Implications

Many hold a pessimistic view of the ongoing dispute between surface and groundwater users on the Snake River and the hydrologically connected Eastern Snake Plain Aquifer. This is particularly true given that this litigation comes only a month after the completion of a water user summit convened by Idaho Governor C.L. "Butch" Otter. Many argue that drying up 33,000 acres would have a far greater economic impact upon the state than would buying out the spring users' senior rights. However, the spring users have rejected past offers seeking to buy them out. In 2004, the Idaho Legislature received a glimpse of the economics involved in curtailing groundwater uses that have developed on the Eastern Snake Plain Aquifer. A report produced by Utah State University researchers at the legislature's request stated that curtailing water rights junior to 1949 (when most groundwater pumping for agriculture began) would cost Idaho's economy over \$204 million. Curtailing rights junior to 1961 would cost up to \$130 million. According to many, these numbers are a very real possibility if other pending delivery calls filed by a number of Magic Valley irrigation companies and districts are enforced during a dry season. Fortunately, carryover from the wet winter and spring of two years ago will sustain most water use through this irrigation season. However, another dry winter like the winter of 2006-2007 could spell disaster.

A copy of the court's order can be viewed at http://www.idwr.idaho.gov/TRO_050807.pdf
(AW)

JUDICIAL DEVELOPMENTS

FOURTH CIRCUIT AFFIRMS CRIMINAL CONVICTION
FOR 'KNOWING' DISCHARGE UNDER THE CLEAN WATER ACT

U.S. v. Cooper, 482 F.3d 658 (4th Cir. 2007).

On March 28, 2007 the U.S. Court of Appeals for the Fourth Circuit affirmed a rare criminal conviction for knowingly discharging a pollutant, finding that the defendant does not have to know the discharge was to a navigable water under the Clean Water Act (CWA). This precise issue has not arisen in the Ninth Circuit, however, this case cites favorably to a Ninth Circuit decision where a knowing violation was not required to obtain a criminal conviction under the CWA. See *U.S. v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993).

Background

This case dealt with the discharge from a sewage treatment operation into a tributary of the Roanoke River in Virginia. Defendant Cooper operated a sewage lagoon for treatment of human waste at his trailer park in Bedford County, Virginia. The treated waste was ultimately discharged through a pipe, down a channel of a few feet, and into a small creek. The creek is a tributary of Sandy Creek, which is in turn a tributary of the Roanoke River. Cooper had a CWA permit for this operation, which was administered by the Virginia Department of Environmental Quality (DEQ).

The sewage lagoon was incapable of meeting the CWA standards resulting in numerous violations of the DEQ permit, leading ultimately to a criminal investigation and conviction. Between 1993 and 1998, DEQ recorded over 300 violations of the permit, prompting an enforcement action, which culminated in a 1998 Consent Order and a \$5,000 fine. The 1998 Consent Order gave Cooper until August 2000 to choose among several courses of remedial action: (1) upgrading the lagoon; (2) replacing the lagoon with a self-contained treatment plant or a septic field; or (3) closing the 22 trailer lots served by the lagoon. Cooper had until August 2002 to implement his chosen course of action.

Cooper violated the 1998 Consent Order by failing to elect a course of remedial action by the

established deadline, resulting in a \$2,000 fine. In March 2002, Cooper's discharge permit expired with Cooper having failed to file the necessary paperwork to receive a new permit. By August 2002, Cooper failed to complete the required upgrade to the lagoon and the lagoon was still operating exactly as it had at the time of the 1998 Consent Order. In response, the consent order was cancelled and the DEQ notified Cooper that he was no longer operating with a valid discharge permit. Nevertheless, discharges from the lagoon into the creek continued, prompting additional inspections and CWA violations. After an administrative hearing, DEQ in July 2003 issued an order imposing a \$10,000 fine and ordering Cooper to cease discharging. Even after the order, the discharges continued, and DEQ continued to send Cooper inspection reports and Notices of Violation.

In late 2003, the U.S. Environmental Protection Agency's Criminal Investigation Division (CID) began to investigate discharges from the lagoon. The completed inspection reports were mailed to Cooper. On October 29, 2003, in an interview with a CID special agent, Cooper admitted that he was discharging from the lagoon into the creek without a permit and that DEQ had notified him that these discharges were in violation of the CWA. On October 21, 2004, Cooper was indicted on 13 felony counts of knowingly discharging a pollutant into waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). After a three-day jury trial, on April 28, 2005 the jury found Cooper guilty on nine counts. The District Court sentenced Cooper to 27 months' imprisonment, plus a \$30,000 fine for each count of conviction, resulting in a total fine of \$270,000. Cooper appealed.

Decision on Appeal

In general, for criminal convictions the prosecution must prove the defendant's *mens rea*, or the state of mind/criminal intent of the defendant when committing the crime. See Black's Law Dictionary

(8th Ed. 2004) at p. 1006. Cooper was convicted of “knowingly” discharging a pollutant without a permit from a point source to navigable waters, which are defined as “waters of the United States.” See 33 U.S.C. §§ 1311(a), 1319(c)(2)(A), 1362(7). Cooper’s main argument on appeal is that the government failed to prove that he knew the waters into which he discharged pollutants were waters of the United States (a tributary of a navigable water). The premise of this claim is that the government had to prove that Cooper was aware of the facts that establish the federal government’s jurisdiction over the water for purposes of the CWA.

The Fourth Circuit first determined that the “waters of the United States” provision in the CWA statutory scheme operates as a jurisdictional element, or the basis of Congress’ authority to enact the statute and regulate the conduct at issue. Generally, the state of mind requirement for a criminal conviction does not extend to the jurisdictional elements of a crime and does not create additional statutory elements requiring the appropriate state of mind in order to break the law. However, it is possible that Congress might intend for a jurisdictional element to have both a jurisdictional and substantive component, rather than being jurisdictional only. Thus, the Fourth Circuit had to determine whether Congress has expressed in the CWA an intention that “waters of the United States” serve more than a jurisdictional function. In other words, did Congress intend for the purposes of violating the CWA that the discharger know that the discharge was into “waters of the United States” in order to be liable? Or, is it enough that the discharger know he was discharging in violation of the CWA, and the waters impacted were in fact “waters of the United States”?

The question, then, was whether Congress intended for the term “knowingly” in § 1319(c)(2)(A) to extend, via § 1311(a), to “navigable waters” in § 1362(12), and thus to “waters of the United States” in § 1362(7), with the result that the government must prove that Cooper was aware of the facts connecting the small creek to the regulatory definition of “waters of the United States.” The Fourth Circuit found that this string of provisions hardly compels such a reading. If Congress meant to overcome the customary understanding that *mens rea* requirements do not attach to jurisdictional elements, it would have spoken much more clearly to that effect. Fur-

ther, of the four other circuits to have considered the scope of “knowingly” in § 1319(c)(2)(A), three have not extended it to “waters of the United States,” but applied “knowingly” only to the underlying conduct prohibited by the statute. One such case is the Ninth Circuit’s decision in *U.S. v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993), holding that for a criminal prosecution under the CWA the government did not need to prove the discharger knew that their act violated their permit or the CWA.

The court also found that the stated purpose of the CWA provides further support for the view that the “waters of the United States” merely establishes jurisdiction. As articulated by Congress, the principal goal of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). This purpose would be severely undermined if polluters could only be prosecuted for knowingly polluting the nation’s waters when the government could prove they were aware of the facts conferring federal jurisdiction. Here, the court found that Cooper knew his treatment facilities were inadequate, and he knew he was acting without a permit, and deliberately discharged human sewage into running waters. The court held it was unlikely that Congress intended for culpability in such an instance to turn upon whether the defendant was aware of the jurisdictional nexus of these acts. Congress clearly intended to provide strong protection to the nation’s waterways and to attach a *mens rea* to the jurisdictional element would undermine this intent.

Ultimately, the court found that the government proved that Cooper knowingly discharged the sewage into the creek. Further, the creek’s status as a “water of the United States” is simply a jurisdictional fact, the objective truth of which the government must establish but the defendant’s knowledge of which it need not prove.

Conclusion and Implications

This case provides strong support that the CWA does not require the government to establish the discharge’s knowledge as to the jurisdictional status of the affected waters. Although the Ninth Circuit has not reached this specific jurisdictional issue, its decision in *U.S. v. Weitzenhoff*, that knowledge of a permit violation is not required for a conviction under the CWA, is in line with the Fourth Circuit’s

decision here. Therefore, it is likely that for criminal liability to be established under the CWA, the *mens rea* element of the charged offense does not require

knowledge that the water into which discharge was made was part of the navigable waters of the United States. (MVZ)

DISTRICT COURT CLARIFIES APPROPRIATE METHOD FOR CALCULATING VIOLATIONS UNDER THE CLEAN WATER ACT

Sierra Club v. City and County of Honolulu, ___F.Supp.2d___, Case No. 04-00463 (D. Haw. April 16, 2007).

The Sierra Club filed a motion seeking reconsideration of an order denying summary judgment in its favor on two of its claims that alleged violations of the Clean Water Act by the City and County of Honolulu. The Sierra Club contended that the U.S. District Court for the District of Hawaii inappropriately denied summary judgment on the claims, which pertained to the number of alleged violations by Honolulu of its National Pollution Discharge Elimination permit (NPDES permit), on a mistaken belief that the claims involved material factual issues rather than presenting purely legal issues. Although the motion for reconsideration raised similar arguments made in the summary judgment motion, the court found it to be properly before the court because Federal Rule of Civil Procedure 60(b) provides that a court may relieve a party from an order for reason of the court's own mistake or inadvertence. Finding that determining the number of violations of the NPDES permit was in fact a legal issue, which once resolved would eliminate any factual dispute, the court granted the motion for reconsideration and set out to determine the appropriate method for calculating violations.

Background

On September 30, 2005, the court denied the Sierra Club's motion for partial summary judgment. Among the Sierra Club's claims that were denied were its third claim, which was based on alleged violations by Honolulu of monthly effluent limitations in the NPDES permit, and its fourth claim, which was based on alleged violations of NPDES permit deadlines to construct and operate a disinfection facility. The city acknowledged it had not achieved full compliance with the terms of its NPDES permit but argued that there were factual and legal disputes as to the number and extent of violations depending on how the violations are counted, and whether the

court could factually assume that a violation occurred on any particular day. Specifically, the city argued that the court could only count daily violations when there is data to document such violation. The Sierra Club, on the other hand, argued that since there was evidence of monthly violations, as a matter of law the court must assume a violation on each and every day, and thereby impose a penalty for each and every day of the representative time period.

The court originally agreed with Honolulu and denied summary judgment as to the third and fourth claims because it found material factual disputes regarding the number of times and the extent to which the Clean Water Act had been violated. The Sierra Club immediately filed a motion for reconsideration of the court's order arguing that the decision was in error because the method of calculating violations is purely a legal issue. Before the court could rule on the motion for reconsideration, however, the parties filed a joint stipulation staying the case in order to attempt to reach a mutually agreeable settlement. When the parties failed to reach a settlement agreement, the court lifted the stay and allowed the Sierra Club to refile its motion for reconsideration. On March 2, 2007, Sierra Club refiled its motion and reasserted its contention that summary judgment as to its third and fourth claims was inappropriately denied. Specifically, the Sierra Club argued that reconsideration of the court's September 30, 2005 order as to these claims was appropriate because the court made a mistake in law by not considering the method of calculating violations to be a purely legal issue, which once determined, would result in the number of violations no longer being a material disputed fact. The court agreed with the Sierra Club, granted the motion for reconsideration and sought to resolve the legal issue of determining the appropriate method of calculating violations under the Clean Water Act.

The District Court's Decision

In deciding the appropriate manner in which to determine the number of violations, the court turned first to the language of the statute itself and noted that the Clean Water Act imposes a maximum penalty “per day for each violation.” 33 U.S.C. § 1319(d). The court agreed with the reasoning of the Fourth Circuit in *Chesapeake Bay Found Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), that this language “strongly suggests” that where a violation is defined in terms of a time period longer than a day—such as the monthly average limits in the city’s NPDES permit—that the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period. In other words, it did not make sense to treat a monthly violation as one day of violation because such an approach is inconsistent with the language of § 1319(d) in that it would set a maximum penalty per violation, rather than per day of violation. The court noted that courts consistently have rejected any attempt at limiting civil penalties to the actual number of days in which violations occur because such a policy would encourage individuals to stack all their violations into one “pollution day,” in which innumerable offenses occur.

Therefore, with respect to claim three, the court found that a violation of a monthly average should be counted as a violation of every day of the month. With respect to claim four, while the city admitted it did not complete the disinfection facility by the deadline, it argued this should count as only one violation. The court rejected this argument, reasoning that if it counted the violation as only one violation, rather than a violation for each day the facility was not in operation after the deadline, then there would be absolutely no incentive for the city to ever construct the facility because a one-day maximum fine would be far less than the costs of construction. Accordingly,

the court found that continuous failure to construct and operate the facility constituted a continuous daily violation.

Having decided the legal issue of determining the appropriate method of calculating violations with respect to the NPDES permit violations, the court concluded that the assessment of the actual number of violations and civil penalties should be dealt with at a later date due to the pendency of yet another claim, which was based on violations of a 2002 EPA order that required Honolulu to take specific measures to correct its NPDES permit violations and to ensure compliance.

Conclusion and Implications

The decision of the District Court to reexamine its prior ruling is noteworthy alone for the fact that motions for reconsideration rarely are granted due to the compelling interest in the finality of judgments. That the court did so here indicates that it agreed that it was in error in not considering the method of calculating issues under the Clean Water Act to be a legal issue. This case also is important because it reinforces that under the Clean Water Act, in instances where a NPDES permit sets limits for time periods longer than a day, such as the monthly limits here, that where such a limit is not met, courts will consider the offender to be in violation for each day of that time period. Consequently, that offender will be subject to a penalty for each day of that time period for each violation. Needless to say, these penalties can add up very quickly and an individual in violation of its NPDES permit can be subject to very steep fines if it continues to fail to come into compliance with the requirements of its permit. Companies and other entities should keep this in mind when they realize they are in continuous noncompliance with the requirements of their permits under the Clean Water Act (TH)

DISTRICT COURT FINDS CHALLENGE TO PROPERTY FALLING WITHIN 'NAVIGABLE WATERS' DEFINITION CANNOT BE THE BASIS FOR DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

U.S. v. Sea Bay Development Corp., ___F.Supp.2d___, Case No. 2:06cv624 (E.D. Va. April 18, 2007).

Defendant filed a motion to dismiss a federal action for alleged violations of the Clean Water Act (CWA) stemming from the discharge of dredge materials into a series of ditches. Defendant argued that the District Court lacked subject matter jurisdiction over the case because the property at issue fell outside the regulatory reach of the CWA. In the alternative, if the property was technically within the Army Corps of Engineers' (Corps) jurisdiction, it fell within the CWA's ditch maintenance exemption. The District Court denied the motion, holding that a decision regarding the breadth of the Corps' jurisdiction over the property did not implicate the District Court's subject matter jurisdiction.

Background

Defendant Sea Bay Development Corp. (Sea Bay) purchased approximately 1,600 acres of land in Chesapeake, Virginia. Much of the property was forested, although portions had been cleared for farming, and parts had been used for silviculture in the past. At some point prior to Sea Bay's acquisition of the property, an extensive system of drainage ditches were constructed on the property. The ditches were apparently designed to drain the entire property. The U.S. argued that these ditches were directly connected to Bells Mill Creek, which flows into the southern branch of the Elizabeth River.

The conduct at issue in the case involved excavation work on the system of ditches. Sea Bay maintained that a tenant farmer had advised that water was backing up onto the farm fields, preventing cultivation. Sea Bay hired contractors to perform excavation work on the ditches, which had apparently become blocked with vegetation and other material. The U.S. disputed that account, arguing that the work was done to increase drainage in order to facilitate a new housing development. Regardless of the justification for the work, the principal allegation was that the excavation caused dredged material to be discharged into the ditches in violation of the CWA. The U.S. filed suit on November 2, 2006.

Sea Bay filed a motion to dismiss for lack of subject matter jurisdiction. Sea Bay argued that under the Supreme Court's recent opinion in *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006), the property at issue was outside the regulatory reach of the CWA. In the alternative, Sea Bay argued that the District Court lacked subject matter jurisdiction because the property fell within the CWA's ditch maintenance exemption.

The Court's Decision

The CWA makes illegal the "discharge of any pollutant by any person." "Pollutant" is defined broadly and includes "dredged soil." The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." "Navigable waters" is defined as "the waters of the United States, including the territorial seas." The construction of the phrase "waters of the United States" was the primary point of contention in Sea Bay's jurisdictional argument.

Impact of the *Rapanos* Decision

The *Rapanos* decision produced two tests for whether a body of water falls within the reach of the CWA. Four justices held that the phrase "the waters of the United States" included only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as "streams...oceans, rivers [and] lakes." This plurality held that normally ditches, channels and conduits carrying an intermittent flow of water were not "waters of the United States." Justice Kennedy concurred in the judgment, but proposed a different test for "waters of the United States." Justice Kennedy wrote that the Corps' jurisdiction over wetlands depended upon a "significant nexus" between the wetlands in question and navigable waters in the traditional sense. This nexus existed under Justice Kennedy's test if the wetlands significantly affected the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." Justice Stevens noted in dissent

that, because the four dissenting justices would have found that the Corps had jurisdiction in *Rapanos*, if either the plurality or Justice Kennedy's test were satisfied the Corps would have jurisdiction. Sea Bay argued, therefore, that the property in question fell outside of both tests.

The District Court passed on the issue of which *Rapanos* test would apply, or if both would apply. The District Court cautioned against conflating subject matter jurisdiction with the plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief. The latter, the District Court wrote, was a merits-based determination.

Bell v. Hood

The District Court noted that the Supreme Court held, in *Bell v. Hood*, 327 U.S. 678, 682 (1946), that jurisdiction was not defeated by the possibility that the averments might fail to state a cause of action on which the plaintiff could actually recover. Courts had subject matter jurisdiction if the right of the plaintiff to recover under the complaint would be sustained if federal laws were given one construction and would be defeated if they were given another.

Applying *Bell*, the District Court noted that the issue of whether the property in question was covered by the CWA depended on the court's construction of the CWA. In order to prevail on its CWA Claim, the U.S. had to show that Sea Bay discharged dredged material into the waters of the United States. The District Court's construction of "waters of the United States" might determine whether the U.S. had a valid cause of action, but this question of statutory construction did not implicate subject matter jurisdiction. In other words, whether the property fell under

the purview of the CWA's "navigable waters" definition went to the merits of the case.

Sea Bay's alternative argument that the court lacked subject matter jurisdiction because the property fell within the ditch maintenance exemption failed on the same reason. Whether the excavation activity performed by Sea Bay fell within the exemption involved the application of facts to an appropriate construction of the exemption. Whether the exemption argument succeeded or failed went to the viability of the cause of action, not to the power of the District Court to adjudicate the case.

The District Court also held that a factual attack on the jurisdictional allegations of a complaint are permissible only if it does not involve the merits of the case. Therefore, even if Sea Bay's argument that the definition of "waters of the United States" went to subject matter jurisdiction, it would still be appropriate to deny the motion to dismiss. As noted repeatedly by the District Court, whether the property was subject to the CWA went straight to the merits of the U.S.' case.

Conclusion and Implications

This case demonstrates that, in at least some jurisdictions, the narrow view of the Corps' jurisdiction announced in the *Rapanos* decision does not provide an additional avenue to attack a CWA action at the pleading stage. While the *Rapanos* decision provides another weapon for a defendant's summary judgment arsenal, unless an allegation of a CWA violation is clearly immaterial and made solely for the purpose of obtaining jurisdiction, a motion to dismiss is the wrong vehicle to challenge application of the CWA to the property at issue. (MA)

OREGON COURT OF APPEALS NARROWS SCOPE OF EXEMPTIONS IN OREGON'S REMOVAL-FILL PERMITTING LAWS REGARDING ESSENTIAL HABITAT

Bridgeview Vineyards, Inc. v. State Land Board of the State of Oregon,
Case No. 99CV0132, A120754 (Or. App. 2007).

The Oregon Court of Appeals recently settled a long-standing battle between one of Oregon's prominent vineyards, Bridgeview Vineyards (Bridgeview) and the Oregon Division of State Lands (DSL) regarding Oregon's removal-fill law (ORS 196.800 to 196.990), with respect to the placement of material in a non-navigable stream designated "essential salmon habitat." Faced with a situation where the plain meaning of the law was seemingly at odds with the public policy behind the statute, the Court of Appeals reversed the Josephine County Circuit Court's 2002 decision. The Court of Appeals clarified and officially narrowed what could be read as a very broad exemption for removal and fill activities related to agricultural activities in streams with essential habitat.

Background

Oregon's removal-fill statutes generally require a permit for the removal of 50 cubic yards or more of material from a stream or the placement of a like amount of fill in a stream. ORS 197.810(1)(a). But, if the stream is designated as "salmonid habitat" (meaning that salmon spawn in the waters at issue) the permit requirements are more stringent and a permit is required before any materials are removed or used as fill. ORS 196.810(1)(b).

The statute, however, provides exemptions to the permitting requirements in certain circumstances. ORS 197.810 provides an exemption to the general permitting requirement for state waters, pertaining to specific activities related to forestry and farming, such as road maintenance on farm lands and maintenance of riprap. *Bridgeview*. As for the stricter salmonid habitat requirement, the permitting requirements are not applicable to fill or removal for "activities customarily associated with agriculture." ORS 196.810(1)(b). It is the interpretation of these particular exemptions that were at issue in *Bridgeview*.

Factual and Procedural Background

Bridgeview's property is located in Josephine County, Oregon and is zoned exclusive farm use. The

property lies along Sucker Creek, which is a non-navigable stream designated as salmonid habitat. In 1998, Bridgeview began removing over 50 cubic yards of rock and gravel from the creek to use as riprap in an attempt to prevent loss of its farmland to erosion. DLS ordered Bridgeview to stop this activity, claiming that Bridgeview had violated the removal-fill laws by not first obtaining a permit. In January 1999, Bridgeview requested emergency authorization from DSL to place riprap in Sucker Creek to stop erosion and shore up the stream bank. *Id.* DSL denied authorization. Bridgeview petitioned for review of that decision to the circuit court. On summary judgment, the Circuit Court ruled in favor of Bridgeview, agreeing that Bridgeview's proposed activities were exempt under the removal-fill laws, reversing the DSL order denying the application.

A Matter of Statutory Interpretation

Determining whether or not Bridgeview was exempted from Oregon's removal-fill laws was a question of statutory interpretation for the court of appeals. Bridgeview argued that it was not required to obtain DSL authorization for a permit for its activities in Sucker Creek because the removal-fill laws did not apply. Bridgeview claimed that its requested erosion control work was excepted from the more stringent salmonid permitting provisions, which Bridgeview interpreted to allow unlimited fill and removal so long as the activity was that "customarily associated with agriculture." DSL argued that the circuit court's reading of the statute was too broad. *Id.* at 18.

Exemption Related to Salmonid Habitat Removal-Fill Requirements

Bridgeview claimed that the circuit court properly interpreted the law by applying a plain meaning interpretation of ORS 196.810(1)(b). Both the circuit court and appellate court recognized that this interpretation would allow virtually limitless removal of fill from salmonid streams for agricultural activities.

In determining the scope of the exception in ORS 196.810(1)(b), the Court of Appeals examined the legislative history to ascertain the intent of the legislature. The court recognized that the legislative intent in enacting the removal-fill law was to “protect salmon habitat and to prohibit ‘unregulated’ fill in and removal from the waters of this state.” The Court of Appeals disagreed with Bridgeview’s interpretation because such a broad exemption for agricultural activities would, according to the Court of Appeals, be inconsistent with the statute’s underlying policy. The court instead held that the exemption in ORS 196.810(1)(b) was limited to agricultural fill and removal activities involving less than 50 cubic yards of material.

based on examination of the text in context and a review of the pertinent legislative history, we conclude that ORS 196.810, even in connection with activities customarily associated with agriculture, a permit is required to fill or remove 50 cubic yards or more of material in a salmonid stream.

Because there was no evidence in the record as to the volume of material Bridgeview sought to fill in its 1999 request, the Court of Appeals held that Bridgeview failed to establish that it was excepted from ORS 196.810’s permitting requirement.

Exception For Fill and Removal Related to Repair and Maintenance Activities

The court went on to determine whether Bridgeview could find protection under three other excep-

tions under ORS 196.905. (ORS 196.905(3) (exemption for removal and fill activities associated certain farm activities “on converted wetlands”); ORS 195.905(4) (exemption for activities “on exclusive farm use zoned land”); and ORS 195.905(6) (exemption for maintenance or reconstruction of qualifying structures where such activity would not significantly affect wetlands)). The Court of Appeals held that the scope of each of these exemptions was narrower than that argued by Bridgeview, and held that none of the exemptions applied to the fill work for which Bridgeview approval.

Conclusion and Implications

Although the Court of Appeals’ decision did not change the way the removal-fill law had previously been interpreted and applied by DSL, it did officially clarify and narrow the scope of the statute’s exemptions. This holding may impact other landowners who, like Bridgeview, find themselves in a situation where they need to fill or remove material from streams designated as salmonid habitat in order to prevent erosion and land loss. Because the permitting process is slow and expensive and landowners have limited control over the scope of the permitted repair work, landowners could find themselves without recourse for saving from erosion land situated near protected streams. On the other hand, the decision was a victory for DSL and conservation groups who can rely on an authoritative ruling that will protect streams designated as essential habitat from limitless removal and fill for any and all agricultural purposes. (RS)

EDITOR'S ERRATA

While accuracy is the benchmark against which all publishers measure their initial success, mistakes are made. We erred in the May 2007 Issue of *Western Water Law & Policy Reporter* with the author attribution for the Feature Article: "Idaho Supreme Court Suggests that First in Time Is Not Necessarily First in

Right." This article was authored by Andy J. Waldera, of the firm of Moffatt, Thomas, Barrett, Rock & Fields, Chtd., Boise, Idaho. Mr. Waldera most ably covers the great State of Idaho in all things "water" as an Editor for *Western Water Law & Policy Reporter*.

Andy: Our sincerest apologies. Great Article!

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