Top Clean Water Act Cases
November 2018

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Direct Hydrological Connection Theory of Clean Water Act Liability and Related Cases

Clean Water Act Jurisdiction and EPA Authority

Water Quality Standards and TMDLs

Stormwater: Residual Designation Authority

Constitutional / Administrative Law Developments

Other Updates

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26 Crown Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority, *appeal pending*, No. 17-2426 (2nd Cir.)

Issues and Holding:

Plaintiffs, the owners of an apartment building at 26 Crown Street in downtown New Haven, brought a Clean Water Act citizen suit against the City of New Haven and the Greater New Haven Regional Water Pollution Control Authority, alleging that back-ups into the building's basement from defendants' combined sewer system have led to releases of untreated sewage directly into the Long Island Sound, via a hydrological connection through groundwater.

The District Court granted defendants' motion to dismiss the CWA claims[1] for two reasons. First, the Court found that plaintiffs had not plausibly alleged that backflows to their basement could have reached the Long Island Sound, more than half a mile away. Second, the Court rejected the theory that a hydrological connection between the groundwater beneath the property and the Sound could establish CWA liability based on passive migration of pollutants through groundwater.

Plaintiffs appealed. NACWA (and numerous regional associations and individual utilities) joined an *amicus* brief submitted by New York City, which urged the Second Circuit to affirm. At the argument in April 2018, the panel seemed disinclined to reach the merits of the Clean Water Act claim, focusing instead of whether plaintiffs had standing to sue. In August 2018, at the parties' request, the Second Circuit stayed decision in this matter to allow for continuing settlement discussions, and requested updates from the parties by January 24, 2019.

Relevance to Public Utilities:

This is the first case in which plaintiffs have sought to apply the "direct hydrological connection" theory to ordinary operations of a publicly owned treatment works. An extension of this theory of liability to POTWs, subjecting backflow to basements to independent CWA jurisdiction, would be unworkable. Taking the principle to its extreme, utilities could be required to address each potential backflow location, rather than prioritizing improvements to the system as a whole. Limited municipal and public utility resources are better spent addressing overall system needs.

Next Steps:

It appears unlikely that this case will result in an appellate decision on the direct hydrological connection issue; if the parties do not settle, the decision seems more likely to focus on standing than on the merits.

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[1] *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 U.S. Dist. LEXIS 106989, 2017 WL 2960506 (D. Conn. July 11, 2017).

Hawai'i Wildlife Fund v. County of Maui, 886 F.3d 737 (9th Cir. 2018), *petition for cert. filed* (No. 18-260)

Issues and Holding:
The County of Maui operates four injection wells to dispose treated municipal domestic wastewater into groundwater. Environmental organizations brought a citizen suit alleging the County was required to obtain a NPDES permit for the injection wells because the groundwater migrates to the ocean. The County's injection wells operate under Safe Drinking Water Act Class V injection well permits issued by both the Hawaii Department of Health and EPA.

On motions for summary judgment, the District Court found the County liable for discharging pollutants without a NPDES permit in violation of CWA Section 301(a).[1] The District Court found the County liable under an admittedly novel "conduit" theory of liability, where a release of pollutants into groundwater that migrates to hydrologically connected navigable waters violates the CWA.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's finding of liability against the County. However, the Ninth Circuit disagreed with the District Court's "conduit theory," finding that "liability under the Clean Water Act is [not] triggered when pollutants reach navigable water, regardless of how they get there." Instead, the Ninth Circuit held the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis.

Notably, the United States on behalf of EPA, without request from the Ninth Circuit, filed an *amicus curiae* brief in support of the environmental organizations in the appeal. While the United States supported the District Court's holding, EPA disagreed with the District Court's reasoning. Instead of the "conduit" theory of liability identified by the District Court, EPA in its *amicus* brief argues for the "direct hydrologic connection" theory of liability.

In its opinion, the Ninth Circuit also rejected EPA's interpretation of the CWA. The Ninth Circuit held that

[1] *See Haw. Wildlife Fund v. Cnty. of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014) (finding the County liable for violating the CWA on motion for summary judgment for wells 1 and 2); *Haw. Wildlife Fund v. Cnty. of Maui*, No. 12-00198, 2015 U.S. Dist. LEXIS 8189, 2015 WL 328227 (D. Haw. Jan. 23, 2015) (finding the County liable for violating the CWA on motion for summary judgment for wells 3 and 4); *see also Haw. Wildlife Fund v. Cnty. of Maui*, No. 12-00198, 2015 U.S. Dist. LEXIS 82395, 2015 WL 3903918, at *6 (D. Haw. June 25, 2015) (finding the County had "fair notice" an NPDES permit was required by the CWA).

> [r]egardless of whether [EPA's] standard is entitled to any deference, it reads two words into the CWA ('direct' and 'hydrological') that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a "fairly traceable" connection . . .

Without irony, the Ninth Circuit rejected EPA's interpretation for reading words into the statute, while at the same time creating a new legal standard under the CWA that similarly relies on words that do not exist in the statute.

On March 30, the Ninth Circuit rejected the County's petition for rehearing *en banc*. NACWA filed an *amicus curiae* brief in support of rehearing. On August 27, the County filed a petition for a *writ of certiorari* to the U.S. Supreme Court. NACWA filed an *amicus curiae* brief in support of the petition for *certiorari.* The questions presented to the Supreme Court in the petition are:

- Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

- Whether the County of Maui had fair notice that a CWA permit was required for its underground injection control wells that operated without such a permit for nearly 40 years.

Environmental groups are opposing the petition, arguing that review is not appropriate at this time, in part, because the Supreme Court should allow other cases to be "definitively resolved"[2] and await guidance from EPA "on the circumstances under which point source discharges via groundwater require NPDES permit."

Relevance to Public Utilities:
The Ninth Circuit opinion raises fundamental CWA legal issues and could have far reaching implications, potentially requiring a NPDES permit for any source – including cesspools, septic systems, underground storage tanks, surface impoundments, landfills, and pipelines to name a few – that may release pollutants to groundwater that is hydrologically connected to navigable waters.

The uncertainty associated with this theory of CWA jurisdiction could create disincentives for critical private and public infrastructure. For example, groundwater recharge systems are used to convey stormwater or recycled wastewater (which contain "pollutants") into shallow subsurface aquifers to augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls, among other benefits. This infrastructure can include spreading basins, natural

[2] See accompanying discussions of *26 Crown Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority*; *Ky. Waterways All. v. Ky. Utils Co.*, and *Tennessee Clean Water Network v. Tennessee Valley Authority*.

treatment systems, and injection wells, among others. Another example is green infrastructure, which is used to retain, percolate and infiltrate stormwater into the ground to minimize discharges of municipal stormwater and combined sewer overflows.

Next Steps:

The *County of Maui* petition for *certiorari* (along with the *Kinder Morgan* petition) will be distributed to the Supreme Court on November 17 and considered in conference on November 30, 2018.

Kentucky Waterways Alliance v. Kentucky Utilities Co., 905 F.3d 925 (6th Cir. 2018)

Issues and Holding:

This is one of three court of appeals decisions issued in September involving citizen suits challenging discharges to groundwater from coal ash ponds and landfills at older electric generating stations. *See also Tennessee Clean Water Network v. TVA* and *Sierra Club v. Virginia Electric & Power Co.*, discussed in these materials.

In this case two environmental groups filed citizen suits under the CWA and RCRA alleging that coal ash ponds at the E.W. Brown electric generating station in western Kentucky were releasing pollutants, especially selenium, into the groundwater which then reached nearby navigable waters. Plaintiffs claimed the discharge to groundwater added pollutants to Lake Herrington, a navigable water, and therefore required an NPDES permit. Plaintiffs also alleged the utility's management of the coal ash ponds constituted storage or disposal of solid waste in a manner that posed an imminent and substantial endangerment to human health and the environment in violation of RCRA.

The District Court dismissed both of plaintiffs' claims. The Court held that the CWA did not regulate discharges to groundwater. On the RCRA claim, the Court held plaintiffs lacked standing: because the utility had entered into an agreed order with the State to address the coal ash ponds, the Court was reluctant to interfere with the agreed order's remedial plan, and therefore plaintiffs' RCRA claim was not redressible.

On appeal, a divided panel of the Sixth Circuit affirmed the dismissal of the CWA claims. The majority concluded that the coal ash ponds could not be considered point sources because they were not discrete conveyances. The majority also concluded there was no discharge "into" navigable waters. The majority rejected the environmental groups' reliance on Justice Scalia's opinion in *Rapanos* on grounds that it was only a non-binding plurality opinion and, in any event, the environmental groups were reading the opinion's discussion of CWA jurisdiction over indirect discharges out of context. In deciding the CWA claim, the majority expressly embraced the Fourth Circuit's recent decision in *Sierra Club v. Virginia Electric & Power Co.,* discussed in these materials. The majority also argued that its rejection of CWA jurisdiction was necessary to avoid nullification of EPA's 2015 Coal Combustion Rule, issued under RCRA.[1] The dissent disagreed and concluded that the utility's addition of pollutants to navigable waters required an NPDES permit even though the discharge from the ponds may not have been directly into the lake.

[1] See discussion below of *Utility Solid Waste Activities Group v. U.S. EPA*.

On the RCRA claim, all members of the Sixth Circuit panel agreed to reverse. The panel concluded that the agreed administrative order between the State and the utility was not grounds for a diligent prosecution defense under the RCRA citizen suit section, and the Sixth Circuit concluded that barring the environmental groups' ability to pursue a claim for relief that differed from the remedy in the agreed order would inappropriately limit the citizen suit remedy Congress expressly authorized.

Relevance to Public Utilities:
This case is one of several that present issues of CWA jurisdiction over discharges to groundwater. It seems very likely the Supreme Court will take up the question in the current term in light of the number of cases presenting the issue and the conflicts in results in the courts of appeals.

Next Steps:
It seems likely this case and the other recently decided discharge to groundwater cases will soon join the two cases already pending on cert. petitions before the Supreme Court, *Hawai'i Wildlife Fund v. County of Maui* and *Upstate Forever v. Kinder Morgan.*

Sierra Club v. Va. Elec. & Power Co., 903 F.3d 403 (4th Cir. 2018)

Issues and Holding:
Sierra Club filed a citizen suit against VEPCO alleging that arsenic in coal ash stored in impoundments and a landfill at a power plant was leaching through groundwater into surface water in violation of the Clean Water Act. Sierra Club alleged both "unpermitted discharges," as well as violations of certain boilerplate provisions of VEPCO's NPDES permit. Sierra Club sought to remedy these alleged violations through penalties and by excavation and removal of the coal ash. After a trial, the District Court found that rainwater and groundwater were indeed leaching arsenic from the coal ash in the landfill and settling ponds, polluting the groundwater, which carried the arsenic into navigable waters. And because the District Court determined that the landfill and settling ponds constituted "point sources" as defined by the Act, it found VEPCO liable for ongoing violations of the CWA because the groundwater was hydrologically connected to surface water and therefore constituted an unpermitted discharge.

VEPCO filed an appeal challenging the District Court's conclusions (1) that the CWA regulates discharges into navigable waters through hydrologically connected groundwater and (2) that the coal ash piles and ponds constitute "point sources" under the CWA. The Fourth Circuit reversed the District Court, concluding that the landfill and settling ponds do not constitute "point sources" as that term is defined in the CWA and reversed the District Court's ruling that VEPCO was liable under the Act. The Fourth Circuit did not independently analyze the hydrological connection question because the *Kinder Morgan* decision in the Fourth Circuit—by a different panel—held the CWA regulates discharges into navigable waters through hydrologically connected groundwater, establishing binding precedent in the Fourth Circuit.

The Fourth Circuit framed the point source question as whether the landfill and settling ponds serve as "point sources" because they allow precipitation to percolate through them to the groundwater, which then carries arsenic to navigable waters. The Fourth Circuit concluded that while arsenic from the coal ash stored on the site was found to have reached navigable waters — having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters — that simple causal link does not fulfill the CWA's requirement that the discharge be *from a point source*.

In this case, the arsenic was found to have leached from static accumulations of coal ash on the initiative of rainwater or groundwater, thereby polluting the groundwater and ultimately navigable waters. In this context, the landfill and ponds were not created to convey anything and did not function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel. The actual means of conveyance of the arsenic was the rainwater and groundwater flowing diffusely

through the soil. This diffuse seepage, moreover, was a generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula. Thus, the Fourth Circuit held that the landfill and settling ponds could not be characterized as discrete "points," nor did they function as conveyances. Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them. Accordingly, the Fourth Circuit concluded that the District Court erred in finding that the landfill and ponds were point sources as defined in the Clean Water Act.

Relevance to Public Utilities:
Like other cases in this section of the materials, the VEPCO case raises fundamental CWA legal issues about (1) what constitutes a point source, and (2) whether discharges through hydrologically connected groundwater are actionable under the CWA.

Next Steps:
On September 25, 2018, environmental organizations filed a petition for rehearing *en banc* with the Fourth Circuit, arguing that the decision (1) conflicts with Supreme Court precedent, *Kinder Morgan* in the Fourth Circuit, and other Fourth Circuit cases; (2) fails to enforce the NPDES permit as written; and (3) presents questions of exceptional importance. A decision on the petition for *en banc* is pending. The *Kinder Morgan* case has a pending petition for *certiorari* before the Supreme Court. If the Supreme Court takes *Kinder Morgan*, it will impact the final resolution of this other Fourth Circuit case.

Tennessee Clean Water Network v. Tennessee Valley Authority, *appeal pending*, 905 F.3d 436 (6th Cir. 2018)

Issues and Holding:
This is one of three court of appeals decisions issued in September involving citizen suits challenging discharges to groundwater from coal ash ponds and landfills at older electric generating stations. *See also Kentucky Waterways Alliance v. Kentucky Utilities Co.* and *Sierra Club v. Virginia Electric & Power Co.*, discussed in these materials.

In this case two environmental groups filed citizen suit claims under the CWA alleging that coal ash ponds and a landfill at TVA's electric generating station near Gallatin, Tennessee were releasing pollutants, primarily dissolved metals and minerals, into the groundwater which then flowed subsurface to nearby navigable waters. Plaintiffs claimed the discharge to groundwater added pollutants to navigable waters, namely Old Hickory Lake reservoir on the Cumberland River, and therefore required an NPDES permit. Plaintiffs also alleged the discharge of coal ash pollutants to groundwater violated two provisions in the Gallatin plant's NPDES permit: (i) the removed substances provision, which requires disposal of removed substances in a manner that "prevents [their] entrance into or pollution of any surface or subsurface waters"; and (ii) the sanitary sewer overflow provision, which prohibits "the discharge to land or water of wastes from any portion of the collection, transmission, or treatment system other than through permitted outfalls."

Following a bench trial, the District Court found in favor of plaintiffs and ordered TVA to excavate and remove the coal ash ponds. In its findings, the District Court held the ponds and landfill constituted point sources and the Court concluded that pollutants traveled from the ponds and landfills through karst subsurface to the Cumberland River immediately adjacent to the plant. The District Court also found that the discharges to groundwater violated the removed substances and SSO provisions in TVA's NPDES permit.

On appeal a divided panel of the Sixth Circuit reversed. Relying heavily on the opinion the panel issued on the same day in *Kentucky Waterways Alliance v. Kentucky Utilties Co.*, the majority held that discharges to groundwater were not subject to CWA jurisdiction. The majority quoted at length from its opinion in *Kentucky Waterways* that concluded CWA jurisdiction attached only if there was a discharge directly into navigable waters. The majority rejected the environmental groups' reliance on Justice Scalia's opinion in *Rapanos* on grounds that it was only a non-binding plurality opinion and, in any event, the environmental groups were reading the opinion's discussion of CWA jurisdiction over indirect discharges out of context. In deciding the CWA claim, the majority expressly refrained from addressing the District Court's findings that the coal ash ponds and landfill constituted point sources, but the majority included a footnote in its opinion noting that the Fourth

Circuit had rejected a similar claim. The majority also argued that its rejection of CWA jurisdiction was necessary to avoid nullification of the Coal Combustion Rule. [1] Finally, the majority rejected plaintiffs' claims that the discharges violated TVA's NPDES permit, holding that the removed substances provision only applied to discharges through the permitted outfalls and the SSO provision did not apply because leakage of coal ash water into karst geology was not the same as a sewage overflow.

The dissent disagreed with the majority's view of the CWA and concluded that the utility's addition of pollutants to navigable waters required an NPDES permit even though the discharge from the ponds may not have been directly into the Lake.

Relevance to Public Utilities:
This case is one of several that present issues of CWA jurisdiction over discharges to groundwater. It seems very likely the Supreme Court will take up the question in the current term in light of the number of cases presenting the issue and the conflicts in results in the courts of appeals.

Next Steps:
It seems likely this case and the other recetntly decided discharage to groundwater cases will soon join the two cases already pending on cert. petitions before the Supreme Court, i.e., *Hawai'i Wildlife Fund v. County of Maui* and *Upstate Forever v. Kinder Morgan.*

[1] See discussion below of *Utility Solid Waste Activities Group v. U.S. EPA*.

Toxics Action Center Inc., v. Casella Waste Systems, Inc., No. 4:17-cv-40089, 2018 U.S. Dist. LEXIS 169197, 2018 WL 4696750 (D. Mass, Sept. 30, 2018), modified by unpublished order (D. Mass, October 3, 2018)

Issue and Holding:
Environmental organizations brought a citizen suit alleging CWA, RCRA, and state law claims regarding a municipal landfill. On September 30, 2018, the District Court entered an order dismissing the CWA and RCRA allegations based on releases of pollutants from a landfill to hydrologically-connected groundwater. Citing recent "detailed guidance" from the Fourth Circuit's opinion in *VEPCO* (as well as the Sixth Circuit's recent decisions in *Kentucky Waterways Alliance v. Kentucky Utilities* and *Tennessee Clean Water Network v. TVA*), the District Court found that the landfill in question was not a "point source" under the CWA. With respect to the RCRA claim, which alleged imminent and substantial endangerment, the Court found that the actions by the state were adequate to address the issues and that any action by the District Court "would be duplicative and unnecessary."

Based on the decision, it appears that most of the actions by the state were taken before the citizen suit was filed and included administrative orders, the filing of a complaint, and entry of a consent judgment. As part of the administrative relief, the operator of the landfill agreed to pay $5 million toward the establishment of a $10 million water line that will connect affected neighbors to a public water system. The District Court initially remanded the remaining state law claims (nuisance, trespass, and unjust enrichment) to state court, but a few days later, issued a modified order finding that "judicial economy, convenience and fairness to the litigants do favor my retaining pendant jurisdiction over the state law claims."

Relevance to Public Utilities:
Like other cases in this section of the outline, this case raises fundamental CWA legal issues about what constitutes a point source, and whether discharges through hydrologically connected groundwater are actionable under the CWA.

Next Steps:
Plaintiffs have moved for certification of the District Court's orders so that they can pursue an appeal. As of this writing, that motion has not been fully briefed or decided.

Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018), *petition for cert. filed* (No. 18-268)

Issues and Holding.

This Clean Water Act citizen suit is based on a leak from a petroleum pipeline into groundwater. Plaintiffs alleged that petroleum is migrating subsurface into various creeks and wetlands and thus constitutes an ongoing discharge of pollutants without an NPDES permit, in violation of the CWA.

Granting Kinder Morgan's motion to dismiss the CWA allegations, the U.S. District Court for the District of South Carolina held: (1) the subsurface migration of pollutants is not a point source discharge and the CWA does not authorize a citizen suit for nonpoint source pollution, and (2) groundwater that has a direct hydrological connection to surface water is not navigable water, and therefore any discharge into the groundwater is not regulated under the CWA.

On appeal, a divided panel of the Fourth Circuit vacated the District Court and remanded, finding that the District Court had jurisdiction to decide the citizen suit on the merits, and that plaintiffs had plausibly alleged a direct hydrological connection between the ground water and navigable waters.

Deferring to EPA statements from 1991 and 2001, the majority found that CWA liability may be triggered based upon release of pollutants to groundwater that has a "direct hydrological connection" to surface water. Although the majority did not define the term "direct," it found that the allegations in the complaint were sufficient to state a claim under the CWA: "an alleged discharge of pollutants … reaching navigable waters located 1000 feet or less from the point source by means of ground water … falls within the scope of the CWA."[1]

In so holding, the majority found that a point source need not *convey* the pollutants to navigable waters to trigger NPDES permitting requirements: "to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters."[2] Rather, a discharge to groundwater may trigger liability so long as the groundwater is "sufficiently connected" to navigable waters.

Relevance to Public Utilities.

All of the cases concerning whether discharges to groundwater give rise to CWA liability are potentially relevant to public utilities. *Kinder Morgan* arises in the context of an inadvertent discharge and thus may be more akin to *26 Crown Associates* than to the *County of Maui* case, both discussed above. On the other hand,

[1] 887 F.3d at 652.

[2] *Id.* at 651.

many types of municipal infrastructure have potential to contribute pollutants into soil and groundwater analogous to a leaking pipe, including groundwater recharge systems, green infrastructure, treatment ponds, landfills, and other sources above or below ground, and of course municipal pipelines themselves can leak. The ultimate resolution of all of these cases could have a significant impact on a wide range of municipal infrastructure.

Next Steps.
Plaintiffs filed a petition for a writ of certiorari on August 28, 2018. The petition, along with the cert. petition in *County of Maui*, will be distributed to the Supreme Court on November 17 and considered in conference on November 30, 2018.

Utility Solid Waste Activities Group v. U.S. EPA, 901 F.3d 414 (D.C. Cir. 2018)

Issues and Holding:
In 2015 EPA promulgated a rule that for the first time subjected coal ash generated by electric generating utilities to regulation under RCRA, the Coal Combustion Residual Rule ("CCR Rule"). The new rule refrained from regulating CCR (coal ash) as a hazardous waste under RCRA Subtitle C. Instead, the CCR Rule was based on Subtitle D which regulates disposal of non-hazardous solid waste. RCRA Subtitle D distinguishes between open dumps, where disposal of solid waste is not allowed, and sanitary landfills, where disposal of non-hazardous solid waste is allowed. The standard for qualifying as a sanitary landfill is that there is "no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility."[1]

Environmental organizations and industry groups filed petitions for review of the CCR Rule in the D.C. Circuit. After the 2016 election, the Trump Administration announced plans to reconsider the rule, and the Agency asked the D.C Circuit to hold all proceedings in abeyance. The Court asked for clarification of the provisions EPA planned to reconsider. EPA then filed a motion to remand six specific issues. The Court deferred action on EPA's motion to hold all proceedings in abeyance until after hearing oral argument. Following oral argument, the Court denied the motion to hold proceedings in abeyance, granted remand in part, granted the environmental groups' petition in part, and denied the industry petitions.

The petitioners' claims sustained by the Court challenged three provisions of the CCR Rule:

(i) the provisions in the Rule that allowed continued disposal of CCR in unlined surface impoundments, subject to periodic groundwater monitoring;

(ii) the provisions that allowed continued disposal of CCR in clay lined surface impoundments, subject to monitoring for leaks and a requirement to repair leaks when detected; and

(iii) the exemption of impoundments at inactive facilities (so-called "legacy ponds") until environmental harm is imminent or has already occurred.

In each instance, the Court concluded that the administrative record and EPA's own findings demonstrated that the challenged provisions of the CCR Rule did not satisfy

[1] 42 U.S.C. § 6944(a).

the applicable criterion, i.e., "no reasonable probability of adverse effects on health or the environment[.]"

The environmental groups also challenged the adequacy of CCR Rule provisions that require owners of CCR units to publish specified information about their facilities on the internet. The D.C. Circuit refused to consider these arguments because they had not been raised during the public comment period.

EPA's motion for remand addressed several issues challenged by industry petitioners. The industry petitioners did not oppose EPA's motion with respect to specific issues and the Court granted the motion as essentially unopposed.

The D.C. Circuit addressed the merits of three of the industry groups' challenges, rejecting all three. First, the industry groups argued that EPA did not have statutory authority under RCRA to regulate inactive ponds. RCRA authorizes EPA to regulate open dumps, and the statute defines an "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill." The industry groups argued that the phrase "is disposed of" limited EPA's authority to facilities where waste is continuing to be disposed of. The majority of the panel disagreed, holding that the plain language of the statute encompassed sites that currently contain waste that was previously disposed of. One member of the panel concurred in this judgment, but did so on the basis of Step Two Chevron analysis, i.e., the concurrence found the statutory language ambiguous (Chevron Step One), but deferred to EPA's interpretation as reasonable (Chevron Step Two). The majority also rejected on the merits the industry groups' challenges to restrictions on new and existing CCR units in seismic impact zones.

Relevance for Utilities:
EPA's CCR Rule applies only to coal fired electric generating units, but the success of that rule in addressing the very serious problem of coal ash ponds and landfills may indirectly affect utilities by resolving, or failing to resolve, one of the most serious categories of pollution to navigable waterways that usually involves an intervening groundwater connection.

Some stakeholders who might otherwise oppose the "direct hydrological connection" theory of Clean Water Act liability – including some environmental advocacy organizations – have been uncomfortable based on the implications for these significant sources of pollution, which have received a lot of attention recently in connection with Hurricanes Florence and Michael. This decision could ultimately support a more appropriately targeted regulatory framework for these sources.

Next Steps:
EPA will address the remand issues via additional rulemaking in light of changed administration viewpoints and new legislation addressing CCR disposal.

Waters of the United States: *Nat'l Ass'n of Manufacturers v. Department of Defense*, 138 S.Ct. 617 (2018); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); and other related litigation

Issues and Holding:

On June 29, 2015, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers released the final "waters of the United States" regulation.[1] The 2015 "Clean Water Rule" or "WOTUS Rule" was the Obama Administration's attempt to codify the scope of CWA jurisdiction in light of the *Rapanos* decision interpreting the term "waters of the U.S." as used in the CWA.[2] Among other things, the 2015 WOTUS rule included exemptions for wastewater and stormwater treatment practices, as NACWA and other municipal utilities and associations had advocated.

The 2015 WOTUS rule was challenged by 19 petitions in eight different Circuit Courts of Appeals. The Judicial Panel on Multi-District Litigation consolidated all petitions in the Sixth Circuit, and the Sixth Circuit granted a stay on October 19, 2015, preventing the WOTUS rule from becoming effective nationwide.[3] On February 22, 2016, a three-judge panel held that the Sixth Circuit (rather than district courts) had jurisdiction over the petition for review of the final rule.[4] Petitions were filed for certiorari with the U.S. Supreme Court, seeking review of the jurisdictional question, which was granted on January 13, 2017.[5]

In January 2018, the Supreme Court issued a unanimous (9-0) decision finding that the district courts have jurisdiction over challenges to the 2015 WOTUS rule.[6] The Court wholly rejected the government's claim that the WOTUS Rule is subject to exclusive appellate court jurisdiction under CWA § 509(b)(1). In response to this decision, the Sixth Circuit lifted its nationwide stay of the 2015 WOTUS Rule in February 2018.[7]

The practical result was that the 2015 WOTUS rule would go into effect in some parts of the country and remain stayed in others based on district court stays that went into effect before the Sixth Circuit held it had authority to review the 2015 WOTUS rule in February 2016. EPA and the Corps, anticipating a defeat at the Supreme Court and wanting to avoid different jurisdictional rules in different parts of the

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[1] *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015).

[2] *Rapanos v. U.S.*, 547 U.S. 715 (2006).

[3] *Ohio v. U.S. Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804 (6th Cir. 2015).

[4] *Murray Energy Corp. v. U.S. DOD (In re United States DOD)*, 817 F.3d 261 (6th Cir. 2016).

[5] *Nat'l Ass'n of Mfrs. v. Dept. of Defense*, 137 S.Ct. 811 (2017).

[6] *Nat'l Ass'n of Manufacturers v. Dept. of Defense*, 138 S.Ct. 617 (2018).

[7] *Murray Energy Corp. v. U.S. DOD (In re United States DOD)*, 713 F. App'x 489 (6th Cir. 2018).

country, took steps through rulemaking to extend the applicability date of the 2015 Rule, which would delay implementation of the 2015 Rule for two years from the date of any final proposal while the Agencies undertake a new rulemaking to define WOTUS.[8] (The Agencies refer to this rule as the "Applicability Rule"; critics generally refer to it as the "Delay" or "Suspension" rule.)

The Applicability Rule was quickly challenged by a number of states and environmental groups. In August 2018, the U.S. District Court for the District of South Carolina granted the environmental groups' motion for summary judgment and denied the government's cross-motion for summary judgment on the Applicability Rule.[9] First, the eNGOs asserted that the Agencies violated the APA by refusing to solicit public comment on the merits of suspending the 2015 WOTUS Rule and replacing it with the previous regulations and guidance. Second, the groups argued that the Agencies violated the APA by refusing to consider the substantive implications of suspending the WOTUS Rule for two years. Finally, the groups claimed that the Agencies failed to publish the prior regulatory text. The District Court agreed with the eNGOs that the Agencies' refusal to consider comment on the substance of the 2015 WOTUS Rule or the prior regulations violated the APA because it did not provide a meaningful opportunity for comment. The District Court noted that the Agencies' public notice soliciting comment on the proposal specifically stated that the Agencies were not soliciting comment on the prior regulations, or the scope of the definition of WOTUS that the Agencies should ultimately adopt. The proposal acknowledged that the request for comment was "narrow," and thus concluded that a short comment period was reasonable.

The District Court thus found that the Agencies refused to engage in a substantive reevaluation of the definition of WOTUS, even though the legal effect of the Applicability Rule is to delay application of the 2015 Rule and revert to the prior definition. The District Court also expressed frustration with the limited comment period. The Court noted that, while "different administrations may implement different regulatory priorities," the APA requires that "a pivot … be accomplished with at least some fidelity to law and legal process." The Agencies' failure to follow that required fidelity rendered the notice and comment rulemaking for the Applicability Rule infirm under the APA. As such, the Court concluded that the Agencies were arbitrary and capricious in promulgating the Applicability Rule.[10]

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[8] *Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule,* 83 Fed. Reg. 5200 (Feb. 6, 2018).

[9] *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018).

[10] In separate litigation, ten states and the District of Columbia challenged the Applicability Rule. *State of New York et al. v. Pruitt et al.*, Case No. 1:18-cv-1030 (S.D.N.Y). Cross motions for summary judgment in that litigation will be argued on December 12, 2018.

As a result of the *South Carolina Coastal Conservation League* decision, the 2015 WOTUS rule is suddenly reinstated in over 20 states. However, in 21 states – subject to prior or subsequent orders by three separate district courts blocking the 2015 WOTUS rule – a different legal jurisdictional framework remains applicable. Determining what legal standard applies to identify if a water, wetland, or other feature is subject to the CWA now depends on where a property is situated.

EPA and the Corps are seeking an expedited appeal in the U.S. Court of Appeals for the Fourth Circuit and a stay of the District Court's order.[11] In addition to arguing that the District Court's decision is erroneous on the law, EPA and the Corps argue that the decision will result in confusion and uncertainty by imposing varying legal standards in different states, and that the "patchwork" nature of CWA jurisdiction will burden regulators. In its motion to stay the District Court's decision, EPA and the Corps argue "the burdens associated with applying different jurisdictional analyses in different states, and the agencies' concern that the analysis applicable to some states may change if additional injunctions are granted (potentially requiring the agencies to redo an ongoing jurisdictional determination or permit review), are not insubstantial."

States and outside parties are not putting all of their eggs into the Fourth Circuit basket. Motions previously filed in district courts for injunctions against the 2015 WOTUS rule are being renewed. For example, in Texas, after the *South Carolina Coastal Conservation League* decision, a District Court blocked the 2015 rule in three additional states[12] and there is a pending motion in Ohio which, if granted, would further shrink the number of states subject to the 2015 rule even if the *South Carolina Coastal Conservation League* decision survives appeal.[13] Additional orders from district courts would apply to the states engaged in those cases, which could stay the 2015 rule in additional states or, potentially, nationwide.

Relevance to Public Utilities:
For now, the legal test for whether a feature is a WOTUS depends on the state where it is located. Absent a nationwide stay from a district court, this will continue to be the case until EPA and the Corps adopt a rule that survives the inevitable challenges any such rule will face. The Agencies have indicated their intention to finalize their "Phase I" rule, which rescinds the 2015 WOTUS Rule, and then to issue a "Phase II" rule that will replace the 2015 WOTUS Rule.

The definition of WOTUS – in particular, how expansive federal jurisdiction is over wetlands – can have a significant effect on a wide range of regulated entities. While the primary impacts are on construction activities – concerning where construction

[11] *S.C. Coastal Conservation League v. Wheeler*, *motions pending*, No. 18-1964 (4th Cir.).

[12] *American Farm Bureau Fed'n v. U.S. EPA*, No. 3:15-cv-00165 (S.D. Tex. Sep. 12, 2018).

[13] *Ohio v. U.S. EPA*, 2:15-cv-02467 (S.D. Ohio).

may be prohibited without a 404 permit, the WOTUS definition has a direct impact on public utilities in several ways, including the exemptions noted above for wastewater and stormwater infrastructure. Additionally, as NACWA noted in its June 2017 comments to EPA, narrowing WOTUS jurisdiction could increase the burden on downstream dischargers if unregulated discharges to tributaries that would no longer be subject to CWA jurisdiction contribute to pollutant loading in downstream receiving waters.

Beyond WOTUS, the 2017 *Nat'l Ass'n of Manufacturers* Supreme Court decision is relevant to venue for other CWA litigation, including reviews other EPA and/or Corps rules.

Next Steps:
As noted, there are several pending motions relating to the Applicability Rule, including in the Fourth Circuit, which will affect which states are currently subject to the 2015 WOTUS rule. EPA and the Corps are pursuing the announced Phase I and II rulemaking, which will result in additional rounds of litigation. Because of the *Nat'l Ass'n of Manufacturers* decision, that litigation will be brought in federal district courts around the country, leading to the likelihood of continuing confusion, with conflicting district and appellate court decisions.

Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA, 846 F.3d 492 (2d Cir. 2017), *cert. denied sub nom. New York v. U.S. EPA*, 138 S. Ct. 1164 (2018)

Issues and Holding:
EPA's 2008 Water Transfers Rule[1] provides that transfers of water do not require NPDES permits, so long as the transfers themselves do not subject the transferred water to intervening commercial, industrial, or municipal use. Many entities – including the environmental advocacy organizations that had previously challenged water transfers operated by New York City[2] and the South Florida Water Management District,[3] and a group of states led by the State of New York – challenged the Rule.

All of these proceedings were stayed for several years during related litigation. Ultimately, they were all dismissed or withdrawn except for the proceeding brought under the Administrative Procedure Act in the U.S. District Court for the Southern District of New York. By the time that proceeding was briefed and argued, the parties included all three sets of plaintiffs, EPA, and many intervenor-defendants (New York City, a group of western states led by Colorado, and a group of western water suppliers). The South Florida Water Management District also intervened, making arguments both in support of and opposing the Rule.

In March 2014, the Court granted plaintiffs' motions for summary judgment and remanded the Rule to EPA. The Court held that the Rule was inconsistent with the statute and, in particular, with how the term "navigable waters" was interpreted by the U.S. Supreme Court in *Rapanos.* While the Court found that the statute is ambiguous and therefore that EPA had authority to make the Rule under Chevron Step 1, the Court concluded that EPA did not provide a "reasoned explanation" for interpreting the statute to exclude water transfers.

In January 2017, the Second Circuit reversed. Like the District Court, the Second Circuit found that the phrase "addition of any pollutant to navigable waters" is ambiguous as to whether "waters" should be interpreted, as EPA did in several documents supporting the Rule, as a singular whole—in which case water transfers would not require permits—or as individual waterbodies. In applying Chevron Step 2, however, the Second Circuit found EPA's reliance on its "holistic approach"

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[1] 40 C.F.R. § 122.3(i).

[2] *Catskill Mountains Ch. of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *aff'd following trial*, 451 F.3d 77 (2d Cir. 2006).

[3] *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), *vacated and remanded by S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *cert denied*, 131 S. Ct. 643 (2010).

interpreting the statute to be reasonable. In particular, as EPA explained in its 2005 interpretive memo announcing its intention to pursue this rulemaking, EPA considered the language, structure, and legislative history of the statute in concluding that Congress had not intended to regulate water transfers. The Court also acknowledged the arguments made by the intervenor-defendants that application of the NPDES program to mere transfers of untreated water would have significant consequences for routine water management activities where the water being transferred doesn't happen to meet applicable water quality standards in the receiving water.

The dissenting judge concluded that the Clean Water Act unambiguously requires NDPES permits for water transfers, finding that the term "navigable waters" in the definition of "discharge of a pollutant" clearly refers to individual water bodies. Accordingly, the dissent argued that the Rule should be struck down at Step 1. And even the majority was clearly ambivalent about its conclusion:

> While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the Clean Water Act, Chevron tells us that so long as the agency's statutory interpretation is reasonable, what we might prefer is irrelevant.[4]

Plaintiffs petitioned for a writ of certiorari, but the U.S. Supreme Court denied the petition on February 26, 2018.

Relevance to Public Utilities:
Numerous public utilities – particularly those involved in water supply and stormwater management – were concerned about the decisions issued prior to EPA's adoption of the WTR that water management agencies needed NPDES permits to transfer untreated water from one water body to another "meaningfully distinct" body of water. In support of its member agencies, NACWA participated as an *amicus curiae* several times in related litigation over the past twelve years.

Next Steps:
None – this litigation, which spanned nearly 20 years, is finally over.

[4] 486 F.3d at 501.

City of Imperial Beach v. International Boundary & Water Commission – U.S. Section, Case No. 3:18-cv-00457, 2018 U.S. Dist. LEXIS 147501, 2018 WL 4104235 (S.D. Cal. Aug. 29, 2018)

Issues and Holding:
Plaintiffs, local government entities in and around San Diego, filed a lawsuit in March 2018 seeking to compel the U.S. International Boundary & Water Commission to improve infrastructure designed to limit contaminated surface water from Mexico from entering U.S. surface waters, including portions of the Tijuana River and the Pacific Ocean within the U.S. – notably the beachfront in Imperial Beach. The infrastructure and waterbodies at issue in the litigation are extremely complex, but there is no dispute that the portion of the Tijuana River in Mexico receives discharges of untreated sewage and other waste, and that water from the Mexican portion of the River enters the U.S. waters via infrastructure operated by the Commission.

The infrastructure at issue includes the South Bay International Wastewater Treatment Plant, in San Diego, which is designed to "to treat sewage generated in excess of the capacity" of facilities in Mexico, up to 25 million gallons per day. There is no dispute that the infrastructure does not capture all of the untreated sewage and other waste flowing from Mexico, and that contaminated flows enter U.S. surface waters at various points along the international border.

Accordingly, plaintiffs assert that the Commission is discharging pollutants to waters of the U.S. without a NPDES permit and that the Commission and Veolia Water U.S – West, the South Bay Plant's contract operator, are violating the South Bay Plant's NPDES permit. Plaintiffs also asserted a claim under RCRA that the discharges of waste substantially endanger human health and the environment.

On August 29, 2018, the District Court granted defendants' motions to dismiss the RCRA claim, with leave to amend, and denied defendants' motions to dismiss the two Clean Water Act claims. The core CWA issues are related to those addressed in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA*, described immediately above.

First, the District Court considered whether a segment of the Tijuana River in the U.S., created in connection with the Commission's infrastructure, which plaintiffs characterize as the "New Tijuana River," is "meaningfully distinct" from the Tijuana River. For purposes of the motion to dismiss, the District Court accepted plaintiffs' allegations that there is no natural or historical hydrological connection between the New Tijuana River and the Tijuana River. Accordingly, the District Court found that whether the water bodies are meaningfully distinct is a factual question, not appropriately resolved on a motion to dismiss.

The District Court then addressed the Commission's contention that, even if the two water bodies are meaningfully distinct, no NPDES permit is required based on the Water Transfers Rule.[1] Plaintiffs argue that the Rule does not apply because the transfer is from a water of Mexico into a water of the U.S., rather than a transfer from one water of the U.S. to another. The Commission disagrees, asserting that because the conveyance is tributary to the water of the U.S., it should be treated as a water of the U.S. for purposes of the Rule. The District Court again declined to reach that question at this stage of the litigation, in the absence of a factual record.

Relevance to Public Utilities:

The issues in this lawsuit are highly fact- – and location- – specific, and thus unlikely to have broad applicability. On the other hand, as in other litigation seeking to hold structures that convey pollutants accountable for causing or contributing to exceedances of water quality standards, plaintiffs are aligned with municipal utilities seeking to avoid sole responsibility for cleaning up messes caused by others. This lawsuit can thus be viewed in light of broader efforts to impose Clean Water Act obligations on traditionally unregulated sources of pollutants, as in requirements to reduce pollutant runoff from agriculture in the Chesapeake Bay TMDL,[2] the "residual designation authority" cases discussed below,[3] and the (unsuccessful) claim brought by the City of Des Moines that discharges conveying agricultural nutrients from tile drains and ditches into drinking water sources required NPDES permits.[4]

Next Steps:

As allowed by the District Court's decision, plaintiffs filed an amended complaint on September 12, 2018. Defendants again moved to dismiss, focusing on the amended RCRA claim; that motion has been fully briefed but not argued or decided. Accordingly, it will be some time before the CWA issues are addressed.

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[1] 40 C.F.R. § 122.3(i).

[2] *American Farm Bureau Federation v. U.S. EPA*, 792 F.3d 281 (3rd Cir. 2015).

[3] *Blue Water Baltimore v. Pruitt*, *Conservation Law Foundation v. Pruitt*, and *Los Angeles Waterkeeper v. Pruitt*.

[4] *Board of Water Works v. Sac County Board of Supervisors*, No. C15-4020-LTS, 2017 WL 1042072, 2017 U.S. Dist. LEXIS 39025 (N.D. Iowa Mar. 17, 2017).

Southern California Alliance of POTWs v. U.S. EPA, Case No. 2:16-cv-02960-MCE-DB (E.D. Cal.)

Issues:

NACWA is one of four wastewater associations that initially joined in the legal challenge to EPA's use of guidance relating to toxicity testing as a regulation, in violation of the federal Administrative Procedures Act.[1] EPA has pressured state agencies to adopt the Test of Significant Toxicity (TST) for measuring whole effluent toxicity, although the applicable regulations do not identify the TST as an acceptable statistical approach. The TST relies on just two concentrations (control sample compared to effluent sample) instead of using a five-concentration dose response, reverses the null hypothesis to presume the sample is toxic, and utilizes a pass/fail endpoint not recommended by EPA's 2002 promulgated methods. Since the issuance of the TST guidance by EPA in 2010, NACWA and other stakeholders have raised significant legal and technical questions about the validity of the TST.

The first amended complaint, filed in December 2016, alleged that EPA's use and approval of the TST for use as a statistical procedure, with a Pass/Fail endpoint, for analyzing WET test results or determining compliance with NPDES permit requirements, represents an underground regulation contrary to law.[2] Plaintiffs sought an order pursuant to 28 U.S.C. § 2202 and Federal Rule of Civil Procedure (FRCP) Rule 65 to enjoin EPA from using or authorizing the use of the unpromulgated TST and its associated methods and procedures for water quality regulation, permitting, and compliance determination purposes.

EPA moved to dismiss the complaint, and plaintiffs filed an amended complaint rather than oppose the motion. On June 13, 2017, EPA moved to dismiss the first amended complaint for lack of jurisdiction under FRCP Rule 12(b)(1). EPA's motion asserts the court does not have jurisdiction over the claims on several grounds:

- EPA characterized the challenge to the inclusion of the TST as a requirement in NPDES permits as a challenge to the validity of those permits.[3] Challenges

[1] 5 U.S.C. § 701 *et seq.*

[2] *Inter alia*, the APA, 40 C.F.R. Part 136, 40 C.F.R. § 122.41(j) and § 122.44(1).

[3] The First Amended Complaint alleges that eight final agency actions violate the APA: a January 2010 Toxicity Training Tool; a June 2010 TST Guidance; two jointly issued EPA-California individual NPDES permits that include the TST (an Orange County NPDES permit issued on June 15, 2012 and a Hyperion Treatment Plant NPDES permit issued on February 2, 2017); one EPA-issued individual NPDES permit to a federally recognized tribe that includes the TST (a Table Mountain Rancheria NPDES permit issued on June 18, 2015); a March 6, 2015 draft NPDES Permit Fact Sheet for the Guam Waterworks Authority; a March 18, 2015 draft Permit Quality Review for the State of Hawaii; and a May 7, 2015 e-mail from Becky Mitschele (EPA Region 9) to Cassandra Owens (Los Angeles Regional Water Quality Control Board) providing comments on a draft California-issued NPDES permit, the Tesoro Refining permit.

to EPA issued permits must be made to the Environmental Appeals Board and then the appropriate court of appeals. Challenges to state issued NPDES permits must be made in state court.

- EPA argued that the 2010 TST Guidance is not final agency action subject to the APA under the *Bennett* Test. EPA's motion characterizes the guidance as an "implementation document," which describes "another statistical option" to analyze WET test data for compliance purposes. In order to be final under *Bennett*, the action "must mark the 'consummation' of the agency's decision-making process" and not be "merely tentative or interlocutory."[4] In addition, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[5] EPA argued that a document that provides an option is, by its very nature, not binding.
- EPA also argued the case is time barred, because the six-year statute of limitations to a facial challenge of the 2010 guidance ran six months prior to the filing of the action.

NACWA and its fellow plaintiffs urged the District Court to deny EPA's motion. The opposition brief contended that plaintiffs are not challenging the permits but rather, EPA's mandated use of the TST in these documents and other contexts. The opposition cited numerous examples of EPA's reference to the TST as a requirement.[6] Plaintiffs argue that, regardless of the language in the document, the guidance is final agency action because it has been applied to communicate the agency's position and impose obligations.[7] Plaintiffs argue their claims are timely, because the right to challenge the guidance as applied did not accrue until EPA began using the TST as a rule in 2012.

The District Court agreed with EPA but allowed plaintiffs to again amend the complaint. The Second Amended Complaint was filed on April 8, 2018.[8] The complaint cited Ninth Circuit case law on *ultra vires* actions, which allows the statute

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[4] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), overruled in part on other grounds.

[5] *Id.* at 178.

[6] For example, an email from EPA to the California State Water Resources Control Board (State Water Board) where EPA mandated that "[a]ll NPDES effluent compliance monitoring . . . shall be reported using the 100% effluent concentration and negative control, expressed in units of EPA's TST statistical approach (pass or fail, % effect)." ECF No.18 at 17, 18.

[7] A guidance document combined with a series of "agency pronouncements" may constitute final agency action within the scope of the APA. In *Barrick Goldstrike Mines Inc. v. Browner* the D.C. Circuit held that a guidance document combined with "a series of agency pronouncements" constituted a "final agency action with APA § 704's meaning." 215 F.3d 45, 48-49 (D.C. Cir. 2000). The court reasoned that while the guidance contained "non-binding" language, there was "not the slightest doubt that EPA directed regulated entities to comply with the . . . Guidance regarding their treatment of waste rock." Id. at 48 n.3.

[8] NACWA is not a party to the second amended complaint.

of limitations to essentially be tolled until the action impacts a plaintiff. The rationale for the rule is to preclude an agency from adopting guidance and later, after the statute has run, implement it as a rule.

EPA filed another motion to dismiss, and plaintiffs requested a delay of the briefing schedule to allow time for a meeting with the new Regional Administrator. The meeting did not take place, but EPA staff and counsel held a "listening session" that did not lead to any change in the positions of the parties. The motion is now fully briefed and awaits a final ruling.[9]

Relevance to Public Utilities:
The litigation directly challenges the continued use of the TST, which has been incorporated into many POTW and tribal permits and has resulted in increased costs to wastewater agencies to undertake the additional replicate samples necessary to reduce the likelihood of being found in violation and increased liability due to a higher incidence of noncompliance with NPDES permits. At least one NACWA member lost its platinum compliance status due to new numeric effluent limitations for chronic toxicity based on the TST.

NACWA is concerned that because the TST has been used in California, Hawaii, Guam, and tribal POTW permits in EPA Region 9, it will be more broadly applied in other states. NACWA's participation in the initial stage of this litigation provided a national perspective on the concerns over use of the TST method, the manner in which unpromulgated guidance is being utilized as if it were a promulgated rule, and the implications this case could have on clean water utilities nationwide.

Next Steps:
The motion to dismiss is pending in the Eastern District of California. The hearing originally scheduled was taken off calendar and has not been rescheduled as of this writing. A decision could be issued at any time.

[9] On the day plaintiffs' brief was due to be filed, the State of California released for public comment the latest draft of its proposed new toxicity water quality standards and implementation provisions reflecting the TST guidance.

Environmental Law & Policy Center v. U.S. EPA, Case No. 3:17CV1514, 2018 U.S. Dist. LEXIS 61569, 2018 WL 1740146 (N.D. Ohio April 11, 2018) (remanding action to EPA) and 2018 U.S. Dist. LEXIS 170921, 2018 WL 4773553 (N.D. Ohio October 3, 2018) (granting summary judgment)

Issues and Holding:
The Western Basin of Lake Erie has experienced recurrent Hazardous Algae Blooms attributable largely to unregulated nutrient pollution from nonpoint sources, particularly agricultural runoff from northwest Ohio and Northeast Indiana. In August 2014, a large Hazardous Algae Bloom in Lake Erie forced the Water Department of the City of Toledo to notify its users not to drink the water or use it for any other purpose for a three-day period due to microcystin toxicity. Despite the recurring Hazardous Algae Blooms, Ohio EPA did not collect data, assess conditions, or list the open waters of Lake Erie on the State's 303(d) lists for 2012, 2014, or 2016. Although EPA repeatedly questioned the State's failure to collect data and assess conditions in the open waters of Lake Erie, on March 31, 2017, EPA sent the State a letter indicating that approval of the State's 2016 list would be forthcoming in a separate letter. Two months later, EPA still had not sent a letter formally approving Ohio's 2016 list, and environmental groups filed suit challenging EPA's failure either to approve or disapprove the Ohio list within the 30-day period specified in its regulations.[1] Two days after the complaint was filed, EPA issued a letter formally approving the Ohio 2016 list. The environmental groups voluntarily dismissed their first action and then filed a new action challenging EPA's approval of Ohio's 2016 list.

The environmental groups' complaint challenging EPA's approval of Ohio's 2016 303(d) list relied on the language in EPA's regulations, contending that EPA could approve Ohio's 303(d) list "*only* if it meets the requirements of [40 CFR] § 130.7(b)." One of the requirements of § 130.7(b) is that the state must "assemble and evaluate all existing and readily available water quality-related data and information." 40 CFR § 130.7(b)(5). Ohio plainly had not satisfied this requirement with respect to the open waters of Lake Erie. Indeed, Ohio's list expressly stated that it had intentionally refrained from doing so.

The District Court set a briefing schedule for summary judgment motions. The day before the deadline for filing summary judgment motions, EPA notified plaintiffs that it was "withdrawing the . . . approval [decision] specifically with respect to the open waters of Lake Erie." EPA directed Ohio to evaluate all existing and readily available data "and submit the results of that evaluation . . . including, if appropriate, an

[1] *Environmental Law & Policy Center, et al. v. United States Environmental Protection Agency*, Case No. 3:17CV01032 (N.D. Ohio).

assessment of whether the waters are meeting the applicable water quality standards" in three months so EPA could reconsider its prior approval of the list.

In light of EPA's last-minute change of position, the District Court called for supplemental briefing. EPA argued it was entitled to summary judgment because there was no final agency action for the Court to review. Plaintiffs argued that EPA's "withdrawal" of the prior approval should be treated as a *de facto* final action of disapproval because EPA's regulations require the agency to approve or disapprove a state list within 30 days. The Court rejected plaintiffs' argument on the ground EPA had an inherent authority to reconsider its prior position. Plaintiffs argued in the alternative that if the withdrawal letter was not a reviewable final agency action, then the environmental groups should be able to challenge EPA for its failure to approve or disapprove the Ohio list within the 30-day timeframe set by the regulations. The Court concluded that plaintiffs could not pursue that line of attack because it was not alleged in the complaint and there had been no 60-day notice letter. Although the Court plainly viewed Ohio as recalcitrant and EPA as acting in bad faith, it concluded there was no final agency action that was reviewable under the APA. The Court remanded the action to EPA, but deferred ruling on EPA's motion for summary judgment and the Court retained jurisdiction and directed the parties to submit a status report 36 days after Ohio's submittal to EPA was due.

On remand to EPA, Ohio submitted an amended 2016 303(d) list that added three new assessment units for Lake Erie's open waters and declared all three impaired. Ohio's submittal stated that it would not start the development of a TMDL. Instead, Ohio said that in light of the complexity of the algae bloom problem it "believe[d] the best approach" for remedying the water quality violation "is through the collaborative process established under Annex 4 of the Great Lakes Water Quality Agreement." Ohio acknowledged that if this collaborative effort failed to restore water quality, "a TMDL or other approach allowed by [EPA]" may be required. EPA approved Ohio's amended list.

After EPA's approval of Ohio's amended 2016 list, plaintiffs sought leave to amend their complaint to challenge the agency's approval decision. First, plaintiffs sought to pursue a claim that EPA's approval was arbitrary and capricious because it approved not only the list but also Ohio's refusal to develop a TMDL. Plaintiffs argued this violated the CWA requirement that each state must establish TMDLs for its impaired waters. EPA argued that its approval of Ohio's amended list was only an approval of the list, not an approval of Ohio's statement of intent regarding development of any TMDL. The District Court agreed. In doing so the Court stressed that EPA's approval letter spoke only of approving the list; and the Court noted that approvals of TMDLs are separate decisions. Plaintiffs also sought to add a claim that Ohio's statement regarding its intent to follow the Great Lakes Water Quality Agreement should be viewed as a constructive submission of no TMDL. The Court rejected this argument as not consistent with the elements courts had relied upon in

constructive submission cases. The Court concluded by granting EPA's motion for summary judgment.

Although EPA ultimately prevailed on the merits, the Court was unsparingly critical of Ohio EPA's recalcitrance in addressing the algae blooms in Lake Erie and EPA's bad faith in dealing with the plaintiffs and the Court. The Court stated expressly that it would address its concerns regarding EPA's conduct in its consideration of plaintiffs' motion for attorneys' fees.

Relevance to Public Utilities:
The development of 303(d) lists and the relationship of the lists to development of TMDLs have major significance for all point sources in impaired watersheds. States and EPA frequently stray from the seemingly simple requirements and deadlines established by EPA's regulations. Suits by third parties to force action by states and EPA on listing water bodies as impaired and development of TMDLs can gain significant traction, especially if governmental entities have strayed from the ostensible procedural requirements. In this case EPA can claim a technical legal victory – the complaint was thrown out on summary judgment – but the Agency was forced to reverse its position on the basic question in dispute, it was publicly rebuked by a federal judge, and it will undoubtedly pay plaintiffs' counsel attorneys' fees well into six digits.

Next Steps:
The District Court is currently considering plaintiffs' motion for $288,000 in attorneys' fees and costs under the Equal Access to Justice Act. The District Court's findings regarding Ohio EPA recalcitrance and EPA bad faith lay a significant factual foundation for future actions if Ohio fails to make progress in reducing nutrient loading to the Western Basin of Lake Erie.

Northwest Environmental Advocates v. U.S. EPA, No. 3:12-cv-01751, 2017 U.S. Dist. LEXIS 56505 (D. Or. Apr. 11, 2017)

Issues and Holding:

In 2012, Northwest Environmental Advocates (NWEA) filed suit against EPA alleging that its approval of temperature TMDLs submitted by Oregon to EPA was arbitrary and capricious under the Administrative Procedure Act because the TMDLs do not require the attainment of applicable water quality standards and do not include adequate margins of safety. NWEA also claimed that EPA was required to conduct a Section 303(c) review of the TMDLs, alleging that the TMDLs are in fact revisions to water quality standards and that EPA is required to approve or disapprove of all new or revised water quality standards. NWEA later amended its complaint to include several claims of failure to consult with U.S. Fish and Wildlife Services under the Endangered Species Act.

NWEA's case centered on Oregon's use of temperature criteria for the TMDLs that were valid and applicable when used, but which were subsequently invalidated in a separate NWEA case.[1] In a classic "fruit of the poisoned tree" decision, the District Court ruled that the TMDLs were invalid because the criteria on which they were based had been invalidated in the prior ruling. The Court rejected EPA's arguments against retroactive application of the criteria case to the TMDL case. The Court also ruled that the targets used in the TMDL were de facto water quality standards subject to the Section 303(c) review process, as well as consultation under the Endangered Species Act.

Relevance to Public Utilities:

The decision marks a significant, lurking threat to the tens of thousands of existing TMDLs across the country. Whenever the standards on which those TMDLs were based change (whether as a result of litigation or the normal triennial review process), there is now a risk that the TMDLs themselves are vulnerable to challenge. In addition, whenever a State or EPA sets a TMDL target that is different than the applicable water quality standard (e.g., where a narrative standard is translated into a numeric target), that target may be deemed to be a change that is subject to EPA review and approval under Section 303(c) of the CWA.

Next Steps:

The District Court heard oral argument on the issue of remedies on September 11, 2018. As of this writing, no decision had been issued. Any appeal will be to the 9th Circuit Court of Appeals.

[1] *Northwest Envt'l Advocates v. U.S. EPA*, 855 F. Supp. 2d 1199, 1216 (D. Or. 2012).

Ohio Valley Environmental Coalition v. Pruitt, 893 F.3d 225 (4th Cir. 2018)

Issues and Holding:
The Ohio Valley Environmental Coalition sued EPA in 2015, claiming that it had violated the Clean Water Act by failing to address the West Virginia Department of Environmental Protection's (WVDEP) delay in producing certain TMDL limits for streams designated as biologically impaired. The complaint alleged that WVDEP's failure to issue TMDLs for biologic impairment since 2012, or any TMDLs for ionic toxicity at all, constituted a constructive submission of "no action" TMDLs for ionic toxicity and EPA was therefore required by the CWA to issue the TMDLs instead. It alleged that WVDEP's position that it could not to develop TMDLs for biological impairment until it developed a new testing methodology constituted a constructive submission which triggered EPA's duty to approve or disapprove of the submission of no TMDLs for biologically impaired bodies of water.

Procedural History
The District Court held that West Virginia's failure to issue TMDLs for conductivity (a surrogate for salinity) for several hundred state water bodies constituted a constructive submission of "no action" TMDLs, and that EPA was therefore required to approve or disapprove the constructive submission for the relevant bodies of water within 30 days of the order. Based on this holding, the Court ordered EPA to act within 30 days to approve or disapprove these purported TMDL submissions.

EPA appealed and sought a stay, which was denied by the Fourth Circuit. After failing to obtain the stay, EPA issued a decision in which it conditionally approved the State's "constructive submission" of no biological impairment TMDLs, conditioned on a memorandum of agreement in which the State agreed to complete all of the TMDLs at issue by 2026.

The Appeal
After agreeing with the District Court that plaintiffs had standing, the Fourth Circuit reversed the District Court's grant of summary judgment to the environmental groups. The Fourth Circuit noted the rationale for the constructive submission doctrine: without it, states could simple refuse to promulgate TMDLs and frustrate federal law. In reviewing prior decisions applying the doctrine, the Fourth Circuit noted it has been invoked only where a state "clearly and unambiguously" expresses a decision not to adopt TMDLs. Where states have produced some TMDLs and have a "credible plan" to produce others, courts have declined to find a constructive submission.

Here, West Virginia had established some TMDLs addressing biological impairments, and even though the State did not address the particular impairment at issue (ionic toxicity), there was no "clear abdication" of responsibility under the

Clean Water Act. The 2017 memorandum of agreement between the State and EPA was a credible plan to develop and implement TMDLs for biological impairment, including ionic toxicity.[2]

Relevance to Public Utilities:
The decision is good news for public utilities and a victory for good science in the regulatory process. The Court declined to significantly expand the constructive submission doctrine beyond the limited application articulated by the majority of circuit courts. It is critical that states and EPA have adequate time to develop the right tools and targets when addressing challenges such as nutrients, (or as here, conductivity) for which the underlying science is complex and development of TMDLs may take many years.

Next Steps:
Plaintiffs have moved for attorneys' fees under the "catalyst" theory, arguing that but for this lawsuit, the State would not have entered into the memorandum of agreement committing to develop the TMDLs. As of this writing, that motion has not yet been fully briefed.

[2] In contrast, in a separate case where EPA had entered into a memorandum of agreement with states, the U.S. District Court for the Western District of Washington recently found that the MOA was sufficient indication that the states had no intention of developing the TMDLs at issue and therefore that the MOA, entered in 2000, was sufficient evidence of construction submission to warrant a finding that EPA had violated the CWA by failing to develop the TMDLs itself. *Columbia Riverkeeper v. U.S. EPA*, Case No. 2:17-cv-00289 (W.D. Wash. Oct. 17, 2018).

Riverkeeper v. Pruitt, Case No. 17 CV 4916 (S.D.N.Y)

Issues:
In June 2017, Riverkeeper, NRDC, and several other environmental advocacy organizations brought a CWA citizen suit challenging the water quality standards for certain urban waterbodies in New York City, which have been the basis for some elements of the City's CSO Long Term Control Plans. Plaintiffs allege that EPA failed to perform a nondiscretionary duty under CWA § 303(c) to adopt enterococcus standards consistent with the 2012 Recreational Water Quality Criteria after EPA allegedly disapproved the State's newly adopted fecal coliform standards. Plaintiffs seek an injunction requiring EPA to adopt the enterococcus standards.

The waterbody designations that are the subject of the lawsuit apply to a number of urban waterbodies in and around New York City, many of which serve as industrial waterways and/or serve commercial shipping traffic and are therefore not suitable for swimming. For a number of these waterbodies, the City is the predominant point source discharger, either through permitted CSO outfalls or through its municipal separate storm sewer system. None of these waterbodies is designated for primary contact recreation. New York City's Long Term Control Plans are designed to achieve the waterbody-specific water quality standards that are currently in place, consistent with the CSO Control Policy.

If plaintiffs were to prevail in this litigation, the revised standards could require additional costly measures to comply. Even more troublingly, the nature of the City's urban tributaries would make it extremely challenging, if not impossible, to meet an enterococcus standard in some or all of these waterbodies. Most of these waterbodies are bulkheaded, with little to no flushing with harbor waters, and receive CSO and stormwater discharges as their main source of flow inputs. Even complete elimination of CSOs from these waterbodies might not appreciably improve compliance with an enterococcus standard.

Accordingly, both New York City and New York State intervened as defendants in the litigation. In March 2018, plaintiffs moved for judgment on the pleadings. All defendants cross-moved for judgment on the pleadings; those motions are pending.

EPA maintains that it had not disapproved the State standards prior to the litigation, but has since issued a determination disapproving the water quality standards earlier this year. In June 2018, New York State sent a letter requesting that EPA reconsider that disapproval, but EPA has not responded to that request.

Relevance to Public Utilities:
While utilities cannot, as a matter of law, rely entirely on existing standards as a basis for retaining current compliance programs, utilities need regulatory certainty

in order to plan for extremely expensive infrastructure improvements. In the absence of predictable standards, setting goals can be frustrating.

Even more importantly, this case has the potential to establish standards that the regulators know are not achievable, setting up a situation in which variances may be the only solution, even as long-term variances have been subject to challenges. (See, for instance, *Upper Missouri Waterkeeper v. U.S. EPA,* discussed below.)

Next Steps:
The cross-motions for judgment on the pleadings are pending.

Upper Missouri Waterkeeper v. U.S. EPA, Case No. 4:16-cv-00052 (D. Mont.)

Issues:
The Upper Missouri Waterkeeper sued EPA alleging that EPA's approval of Montana's generic nutrient variance rule violates the CWA and is arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act. Specifically, the complaint alleges that EPA's approval of the variance is contrary to the CWA and EPA regulations because it fails to consider whether the variance standard reflects the highest attainable use in a particular water body. Finally, Waterkeeper alleges that EPA's approval is arbitrary and capricious because Montana did not scientifically evaluate the replacement standards on a case-by-case or water body-by-water body basis, instead asserting that for all POTWs, meeting scientific and record-based numeric nutrient water quality standards would be too expensive. EPA, the State of Montana, the Montana League of Cities and Towns, and Treasure State Resources of Montana all filed answers generally denying the allegations.[1]

NACWA intervened in the litigation to represent the interests of utilities across the nation. Variances are authorized by the Clean Water Act and are essential and appropriate implementation tools. Montana's general variance can serve as a model for other states to follow.

A hearing on cross motions for summary judgment is set for December 12, 2018.

Upper Missouri Waterkeeper argues that the Montana variances approved by EPA, which are expressed as higher effluent conditions for TN and TP in discharge permits for wastewater treatment plants and industries for a time limited period, have improperly supplanted the State's numeric nutrient criteria, and are not protective of the receiving waters. Waterkeeper argues that EPA improperly approved the general variances based on technological and cost constraints. Waterkeeper claims that even if general variances could be adopted, EPA's approval of the specific variances was arbitrary, capricious, contrary to law, and not supported by the administrative record.

EPA's brief contends plaintiff's argument is invalid because it fundamentally misunderstands the legal construct for variances, which under EPA's long-standing regulations *can be* approved based on economic and social impacts, and the general

[1] This is the second variance at issue in the litigation. In 2016, Plaintiffs challenged the original 2015 general variance which expired on July 1, 2017. Prior to expiration, Montana established a new general variance on June 24, 2017, which was approved by EPA on October 31, 2017. EPA, MTDEQ, NACWA and the other intervenors argued that this approval rendered the litigation moot. In February, the judge allowed Waterkeeper to amend its complaint to challenge the 2017 variance.

purpose of variances as a tool to achieve incremental progress towards meeting long-term water quality goals. EPA argues its approval of Montana's variances was reasonable and based on "substantial and widespread economic and social impact" pursuant 40 C.F.R. Part 131.

In addition to the legal argument, NACWA's brief points out that if Waterkeeper's claims are successful, there would be have a direct impact on NACWA's members and their ratepayers. The legality of NPDES permit variances is of paramount importance to POTWs throughout the nation, as variances are a recognized tool used by regulators to allow dischargers to work toward meeting stringent discharge limits when immediate compliance cannot be achieved due to economic or technological limitations.

Relevance to Public Utilities:
If the District Court strikes down EPA's approval of the variance, the precedent will have immediate impacts in Montana and could severely limit or eliminate the availability of water quality variances nationwide. A negative decision would have a chilling effect on other states contemplating general variances that may be needed by utilities.

Next Steps:
Hearing on summary judgment motions is set for December 12, 2018.

Blue Water Baltimore, Inc. v. Pruitt, Case No. 17-1253, 2018 U.S. Dist. LEXIS 18456, 2018 WL 704847 (D. Md. Feb. 5, 2018)

Issues and Holdings:

Section 402(p) of the Clean Water Act establishes when discharges consisting solely of stormwater require NPDES permits. In addition to requiring NPDES permits for municipal separate storm sewer systems (MS4s) and stormwater discharges from industrial activities and certain construction activities, the CWA gives EPA "residual designation authority" to require a permit for "[a] discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."[1] Environmental advocacy organizations have filed a number of petitions in the past five years asking EPA to exercise its residual designation authority.

Plaintiffs in *Blue Water Baltimore* petitioned EPA in 2015 to determine that stormwater discharges from certain commercial, industrial and institutional sources contributed to violations of water quality standards in Baltimore's Back River watershed. EPA denied the petition in 2016.

Because of some uncertainty as to which federal court had jurisdiction, plaintiffs filed a petition for review of EPA's denial in the Fourth Circuit, along with a motion to hold that case in abeyance pending review by the District Court. The Fourth Circuit granted that motion, over EPA's objection.[2]

In the District Court, plaintiffs brought a CWA citizen suit and two causes of action under the Administrative Procedure Act. EPA moved to dismiss all three claims for lack of subject matter jurisdiction.

In February 2018, the District Court granted EPA's motion to dismiss the Clean Water Act claim but allowed plaintiffs to pursue their APA claims. With respect to the CWA citizen suit, the District Court found that EPA does not have a nondiscretionary duty to determine whether the stormwater discharges at issue contribute to a violation of water quality standards under either the statute or the implementing rules. In particular, the District Court deferred to EPA's interpretation of 40 C.F.R. § 122.26(a)(9)(i)(D) as imposing a duty on a regulated entity *if* EPA determines that a discharge contributes to a violation of a water quality standard, but no nondiscretionary duty on EPA to make such a determination, even when presented with facts supporting it.

[1] 33 U.S.C. 1342(p)(2)(E); 40 C.F.R. §§ 122.26(a)(1)(v), (a)(9)(i)(D).

[2] *Blue Water Balt. v. Pruitt*, No. 17-1258 (4th Cir. April 21, 2017).

The District Court, however, allowed plaintiffs to proceed with their APA claims, which allege that EPA's denial of their petition was arbitrary and capricious. In denying EPA's motion to dismiss these claims for lack of subject matter jurisdiction, the District Court focused not on the merits but on whether the matter should instead be reviewed by the Fourth Circuit pursuant to Section 609(b)(1)(E) of the Clean Water Act, which confers jurisdiction to federal circuit courts for "[r]eview of the Administrator's action … in issuing or denying" any NPDES permit. The District Court found the U.S. Supreme Court's recent opinion in *National Association of Manufacturers v. Department of Defense*, discussed above, to be controlling authority.

Relevance to Public Utilities:
Environmental advocacy organizations have argued that EPA's exercise of its residual designation authority would be helpful to municipal utilities in that it would require pollutant reductions from currently unregulated sources, relieving the burden on POTWs and MS4s to achieve compliance with water quality standards. Imposing stormwater retrofit or green infrastructure requirements for certain existing impervious surfaces could benefit some utilities – particularly regulated MS4s with dense historic development.

Next Steps:
The parties have briefed cross motions for summary judgment on the APA claims; those motions have not been yet argued.

Conservation Law Foundation, Inc. v. Pruitt, 881 F.3d 24 (1st Cir. 2018)

Issues and Holding:
In December, the District Court of Rhode Island granted EPA's motion to dismiss a case brought by the Conservation Law Foundation (CLF) that alleged that EPA violated a nondiscretionary duty by failing to notify commercial and industrial facilities that their stormwater runoff required NPDES permits (and by failing to provide them with NPDES permit applications). The First Circuit Court of Appeals affirmed the dismissal, holding that EPA's role in developing the TMDLs did not trigger a duty to notify sources of stormwater discharges from impervious surfaces (e.g., parking lots, roofs, etc.) that they must obtain NPDES permits.[1]

The 1987 amendments to the Clean Water Act addressing stormwater include specified categories of discharges required to obtain NPDES permits. In addition, Congress authorized EPA to determine that certain other stormwater discharges also require permits. 33 U.S.C. § 1342(p)(2)E). This additional power is generally referred to as EPA's "residual designation authority."

CLF identified six EPA-approved TMDLs in Rhode Island that identified stormwater runoff from impervious surfaces as a source of impairment that caused or contributed to violations of water quality standards. The notable pollutants were phosphorus, bacteria, and metals. CLF argued that EPA's approval of the TMDLs constituted a determination by EPA that the stormwater discharges from the impervious surfaces into those waters contribute to violations of water quality standards.

In affirming the District Court decision, the First Circuit held that approval of the TMDLs did not equate to a decision that an individual permit was required under the CWA and its implementing regulations.[2] Concluding that the TMDL approval alone triggered this duty was a bridge too far for the Court:

> Plaintiffs ask us to conclude that EPA must send notice and application forms to specific "identified" dischargers, even though the TMDLs do not identify who those dischargers are.... Importantly, though, the TMDLs do not identify by name or address any individual dischargers, nor do they attempt to designate which specific properties within the studied [geographic] areas actually discharge stormwater.

Plaintiffs argued that the regulations do not require this level of detail (reference to a category of discharges is sufficient) and that EPA had the information needed to

[1] The appeal also resolved a consolidated case involving TMDLs in Massachusetts, which had been dismissed on similar grounds. *Conservation Law Foundation, Inc. v. EPA*, 223 F. Supp. 3d 124 (D. Mass 2017).

[2] 40 CFR §124.52(b).

identify particular dischargers in its possession. The Court was unpersuaded, finding "[t]hese arguments do not get the horseshoe close to the stake. … There is nothing in the TMDLs themselves that even suggests an undertaking to make individual determinations." The Court also opined that the "[p]ractical consequences and past practice in this highly regulated arena counsel against treating the approval of TMDLs as drive-by permitting determinations." The Court suggested that plaintiffs could have sought a residual designation from EPA via citizen petition. Instead, they asked the Court to find that in approving state developed TMDLs, EPA had implicitly done what it typically does through a separate process.

> It has been said that Congress does not hide elephants in mouseholes. [citations omitted.] Here, we think it even less likely that the EPA hid a herd of elephants in a mousehole, much less a herd that remained unnoticed for several decades.

Relevance to Public Utilities:
The decision is a welcome recognition that proceeding through the RDA process is necessary to directly address stormwater discharges associated with impervious surfaces. A victory for the plaintiffs would have set precedent for permitting requirements for those receiving waters that are impaired due to loadings from stormwater from impervious surfaces. This would be a mixed bag for utilities: On the one hand, municipal stormwater programs might benefit from additional sources of pollutants being required to obtain and comply with NPDES permit requirements. On the other, the utility may itself own or operate some of the impervious surface.

Next Steps:
This litigation is over.

Los Angeles Waterkeeper v. Pruitt, 320 F. Supp. 3d 1115 (C.D. Cal. 2018)

Issues and Holdings:
On September 17, 2015, NRDC and American Rivers submitted residual designation authority (RDA) petitions to EPA Region 9. The petitions sought a determination that commercial, industrial, and institutional sites and facilities (CII sources) contribute to water quality standards violations and, thus, should be designated as sources that must obtain CWA stormwater permits. In evaluating the RDA petition, EPA Region 9 considered the following factors:

- likelihood of exposure of pollutants to precipitation at sites in the categories identified in the Petition;
- sufficiency of available data to evaluate the contribution of stormwater discharges to water quality impairment from the targeted categories of sites:
    - data with respect to determining causes of impairment in receiving water quality;
    - data available from establishment of Total Maximum Daily Loads; and
- whether other federal, state, or local programs adequately address the known stormwater discharge contribution to a violation of a water quality standard.

On October 17, 2016, Region 9 denied the two petitions to designate stormwater discharges from impervious surfaces in the Los Angeles area. EPA Region 9 concluded that "effective programs are already in place to address the water quality impairments in the watershed, and that these [existing] programs should be afforded adequate time for implementation before pursuing a new, resource-intensive [regulatory] program." The EPA Region 9 denial relied exclusively on EPA's discretion, not challenging petitioners' water quality data.

Petitioners challenged EPA's denial of the RDA petition—in both the Central District of California and in the Ninth Circuit,[1] given the uncertainty associated with which court had jurisdiction to hear the matter. In November 2017, the District Court issued an order in granting in part and denying in part EPA's motion to dismiss.[2] The judge agreed with EPA that the CWA's statutory language doesn't create a mandatory, nondiscretionary duty in this case to grant the RDA petitions. However, the judge did not dismiss petitioners' Administrative Procedures Act claim that it was arbitrary and capricious for EPA to deny their petitions. The judge said that the District Court has jurisdiction to review EPA's decision to refuse "to require permitting in response to a citizen petition."

[1] *Los Angeles Waterkeeper v. Pruitt*, Case No. 17-70570 (9th Cir.). That matter was administratively closed in July 2018, pending completion of the District Court proceedings.

[2] *Los Angeles Waterkeeper v. Pruitt*, Case No. 2:17-cv-03454 (C.D. Cal. Nov. 2, 2018)

On subsequent motions for summary judgment, the District Court held that the CWA unambiguously requires EPA either to issue NPDES permits for or to prohibit the discharges of stormwater from the CII sources. EPA's refusal to regulate these discharges was held to be the equivalent to exempting an entire category of point sources from NPDES permit requirements, which the CWA does not authorize. The District Court also held that the CWA does not authorize EPA to consider whether other governmental programs adequately address known stormwater discharges that contribute to a violation of water quality standards.

The District Court reasoned that CWA Section 402(p)(2)(E) is akin to a Clean Air Act provision that requires EPA to prescribe standards for air pollutants "which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." This provision was at issue in *Massachusetts v. EPA*,[3] where EPA pointed to the existence of other voluntary executive branch programs as a basis for declining to regulate carbon dioxide and other greenhouse gases. The Supreme Court found EPA's actions to be arbitrary and capricious, because EPA rested on reasoning "divorced from the statute." Consequently, just as EPA's reasons to refrain from regulating carbon dioxide were not grounded in the Clean Air Act, EPA's reasons to refrain from regulating CII sources were likewise not grounded in the CWA.

The District Court decision is a big win for the petitioners. They have been using litigation associated with RDA to exert pressure on EPA to address urban stormwater and stormwater from impervious surfaces. They put this RDA-based litigation strategy in place after EPA's refusal to address these issues through national rulemaking. This decision gives them precedent to take this strategy to any watershed in the country where there is evidence of stormwater "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," which can often be easily found in EPA and state documents (e.g., total maximum daily loads for highly developed watersheds).[4]

A further complication is that the state agencies, not EPA, are the permitting authorities in California and 46 other states. While the District Court's order focused on EPA, it is the states that will be forced to address the fallout from this decision on how to address CII sources.

Relevance to Public Utilities:
The focus of the petitions is on impervious surface. The RDA petitions are primarily focused on bringing those sources of stormwater that are not currently directly regulated by NPDES permits into the regulatory program. EPA's and/or the California regulatory agencies' response to the District Court decision—and

[3] 549 U.S. 497 (2007).

[4] See discussion of *Conservation Law Foundation v. Pruitt* above.

nationwide ripple effects—may indirectly benefit utilities — both POTWs and MS4s — since sources of pollutants from impervious surfaces into the MS4, and the same surface waters that POTWs discharge into, would need to be addressed through NPDES permits. Arguably this would improve water quality and relieve pressure on the POTWs and MS4s. However, any commercial, industrial (based on impervious surface, not industrial processes – that is, not limited to the POTW itself), institutional, or other impervious surfaces owned or operated by a utility in a watershed addressed by any RDA petition may require NPDES permit authorization for any discharge of stormwater.

Next Steps:

EPA is seeking clarification from the District Court. For example, it ordered EPA to make a decision and issue NPDES permits, but EPA does not issue NPDES permits in California. Beyond short-term clarification, it is unclear if EPA is going to appeal this decision. On the one hand, this decision establishes a significant adverse precedent for EPA and is counter to how EPA and the states implement the stormwater program under the CWA. Further, environmental advocacy organizations can use this precedent to file similar RDA petitions throughout the country. On the other hand, the administrative record associated with the petition in this case showing the impact of pollutants in stormwater on water quality was particularly strong in this case, and EPA likely would prefer to avoid an adverse Ninth Circuit opinion. Either way, advocacy organizations are likely to use this win to take their strategy on a tour of the nation's impaired watersheds, and EPA, the states, and CII and other sources will need to consider how to respond.

In re Department of Commerce, Opinion of Justice Gorsuch on Application for Stay, No. 18A375, 586 U. S. ____ (October 22, 2018)

Issues and Holding:
This concurring opinion arises in the context of the consolidated challenges brought by a number of immigration advocacy organizations and numerous states and municipalities challenging the Trump Administration's decision to add a question about citizenship to the 2020 U.S. Census, for the first time in nearly 70 years.[1] The Supreme Court granted the Commerce Department's application to stay the requested deposition of Commerce Secretary Wilbur Ross, but denied the government's application to stay other discovery. The trial in the underlying litigation began on November 5.

We include this decision in the materials because of the language in Justice Gorsuch's concurring opinion, joined by Justice Thomas, relating to deference to an executive agency in administering a program as directed by Congress. The opinion arises not in the context of *Chevron* deference,[2] which requires courts to defer to the reasonable exercise of discretion by executive agencies in making rules to administer ambiguous statutes, but in connection with the Commerce Department's administration of the statute that directs the Department to implement the census clause in the Constitution.[3] As Justice Gorsuch explains:

> Normally, judicial review of an agency action like this is limited to the record the agency has compiled to support its decision. But in the case before us the district court held that the plaintiffs—assorted States and interest groups—had made a "strong showing" that Secretary Ross acted in "bad faith" and were thus entitled to explore his subjective motivations through "extra-record discovery," including depositions of the Secretary.

Justice Gorsuch goes on to suggest that the Commerce Secretary is entitled to essentially complete deference, at least in this context where he is "coming to office inclined to favor a different policy direction," notwithstanding the claims in the litigation that he has acted arbitrarily and capriciously and in excess of his statutory authority.

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[1] *State of New York v. U.S. Department of Commerce*, Case No. 1:18-cv-02921 (S.D.N.Y filed April 3, 2018).

[2] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

[3] 13 U.S.C. §141(a) directs the Secretary of Commerce to take censuses in accordance with Article I, § 2, cl. 3 of the U.S. Constitution.

Relevance to Public Utilities:
The opinion is not directly relevant to public utilities. The allegations in this case, like allegations in much of the ongoing and anticipated litigation challenging EPA rules proposed to be adopted, modified, or withdrawn by the Trump Administration, relate fundamentally to whether the administrative agency has exceeded its authority. In the census case, as in many environmental cases, the issues focus on the agency's consideration of data and technical information within its area of expertise.

Justice Gorsuch's opinion provides an interesting frame for anticipating future decisions from this Court concerning both the future of *Chevron* deference and also deference to the Trump Administration's policy reversals of prior EPA positions – whether in rules or, as seems likely to arise in *Hawai'i Wildlife Fund v. County of Maui*, discussed above, in litigation.

Next Steps:
The lawsuit against the Department of Commerce will proceed. It does not appear likely to provide opportunity for the Supreme Court to consider *Chevron* deference because the legal relate to administration of statutory and Constitutional provisions rather than to rulemaking.

United States v. Gundy, 804 F.3d 140 (2nd Cir. 2015), *aff'd following remand*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted sub nom. Gundy v. United States*, 138 S. Ct. 1260 (2018)

Issues and Holding:
Herman Gundy was convicted in Maryland on state charges of a sexual offense in the second degree. After Gundy's state court conviction, Congress passed the Sexual Offender Registration and Notification Act ("SORNA"). SORNA requires persons convicted of specified sex crimes to register as sex offenders and give notice of changes in their current address. SORNA provides that:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders[.][1]

Pursuant to this provision, the Attorney General issued a regulation which declared that SORNA registration requirements would apply to all persons with pre-SORNA sex crime convictions. Gundy failed to register as required by the Attorney General's SORNA regulations. Gundy was convicted of violating SORNA and he appealed, arguing among other things that SORNA impermissibly delegated to the Attorney General the power to define what constituted a crime under the Act. (The administrative law principle that Congress cannot delegate its legislative powers to agencies is known as the "nondelegation doctrine.") The Second Circuit affirmed the conviction in an unpublished opinion that summarily dismissed Gundy's nondelegation argument.

Gundy filed a petition for certiorari arguing four separate issues. The last issue presented in Gundy's petition was the nondelegation argument. The Solicitor General opposed Gundy's petition for certiorari. On the nondelegation issue, the Solicitor General argued that eleven courts of appeals had rejected nondelegation challenges to SORNA, the Supreme Court had denied certiorari on the issue more than a dozen times in the last seven years, and there was no reason for a different result in Gundy's case.

On March 5, 2018, the Court granted certiorari limited to the following question:

> Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under [SORNA] violates the nondelegation doctrine.

[1] 34 U.S.C. 20913(d).

Relevance to Public Utilities:
The case is potentially very significant because only two prior Supreme Court decisions have invalidated federal statutes on nondelegation grounds, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) – both cases overturning core elements of the Roosevelt Administration's New Deal.

For many years conservative legal advocates have argued for a revival of the nondelegation doctrine to restrict broad grants of discretionary authority to federal administrative agencies. To date, Clarence Thomas is the only Justice who has shown strong interest in reinvigorating the nondelegation doctrine. All of the current Justices agree that Congress may not delegate its legislative law-making function to the Executive Branch, but at least since the "Switch in time that saved Nine,"[2] a large majority of the Court has routinely found broad statutory grants of discretion to be permissible on the ground that the statutes in question provided an "intelligible principle" to guide the Executive Branch in its exercise of the discretionary power at issue. The fact that at least four Justices voted to grant certiorari to review Gundy's nondelegation challenge may portend a significant shift in application of the nondelegation doctrine.

In the merits briefing, thirteen separate *amici* briefs were filed in support of Gundy, many of them by conservative and libertarian groups, including the Cato Institute, the Competitive Enterprise Institute, the Reason Foundation, the Cascade Policy Institute, the Pacific Legal Foundation, the Downsize DC Foundation, and the Conservative Legal Defense and Education Fund. Excitement over the case in conservative legal circles is exemplified in a recent article published by the Federalist Society, which concluded:

> *Gundy* may well be the case that revitalizes the Non-Delegation Doctrine. Or, it could give the Doctrine one good leg, making it very important in criminal cases but still ineffectual in virtually all civil ones. Either way, there is a good chance that it will be one of the most important criminal and administrative law cases of the early twenty-first century.[3]

[2] This term refers to Justice Owen Roberts' jurisprudential shift in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which is perceived to have been a strategic political move to protect the Court's integrity and independence from President Roosevelt's "court packing plan" to save the New Deal. *West Coast Hotel* is often described as having ended the *Lochner* era, a forty-year period in which the Supreme Court struck down a lot of legislation regulating business activity.

[3] Matthew Cavedon & Jonathan Skrmetti, *Party Like It's 1935: Gundy v. United States and the Future of the Non-Delegation Doctrine*, 19 FEDERALIST SOCIETY REV. 42, 53 (2018).

Next Steps:
The Supreme Court heard oral argument in the case on October 2, 2018, four days before Brett Kavanaugh assumed office as an Associate Justice. A decision is expected before the Supreme Court term ends next summer.

Weyerhaeuser v. U.S. Fish & Wildlife Service, *reported below sub nom. Markle Interests, LLC v. U.S. Fish & Wildlife Service*, 827 F.3d 452 (5th Cir. 2016), *cert. granted*, 138 S. Ct. 924 (2018)

Issues and Holding:
The dusky gopher frog is a listed endangered species. Historically the species was found in open canopy longleaf pine forests in southern Alabama, Mississippi, and Louisiana. Currently only three small population groups of the species, all located in Clark County, Mississippi, are known to exist. The species requires habitat with three elements to survive and reproduce: (i) ephemeral ponds for breeding, (ii) open canopy upland forest for non-breeding habitat; and (iii) forest habitat connecting the ephemeral pond with the upland habitat. The species is endangered primarily by habitat destruction due to fragmentation and conversion of land use.

The Fish & Wildlife Service did not designate critical habitat for the frog when it originally listed the species as endangered. After a lawsuit and settlement requiring designation of critical habitat, the Service designated locations in Mississippi where the frog is known to exist and another location in Louisiana where the frog was known to have existed up until 1965. The Louisiana location consisted of 1544 acres of privately owned commercial timberland that included five ephemeral ponds suitable for the frog's breeding, but the upland forest was no longer suitable for non-breeding habitat because it had been converted to closed canopy loblolly pine forest. The Service concluded that the non-occupied Louisiana area was essential to the survival of the species because the Mississippi locations occupied by the frog were so small and close to one another that all the populations could be extirpated by localized events such as drought and disease.

The ESA expressly authorizes the Service to designate areas not occupied by a species, including privately owned land, as critical habitat "upon a determination by the [Service] that such areas are essential for conservation of the species." At all times relevant to the case, the Service's regulations provided that areas not occupied by the species could be designated as critical habitat only "when a designation limited to [a species'] present range would be inadequate to ensure the conservation of the species."[1]

The tenant and owners of the land designated in Louisiana challenged the designation of their property as critical habitat, arguing that the land could not be considered "habitat" or "essential for conservation of the species" when none of the species occupied the land and none could successfully survive there in the land's current condition. The tenant and owners did not challenge the Service's decision

[1] 50 C.F.R. 424.12(e)(2012).

that limiting the critical habitat designation to areas occupied by the frog would be inadequate to assure the conservation of the species.

The tenant and owners also argued that the Service should have exercised its discretion to exclude the Louisiana land from the critical habitat designation based on the economic burden they said they would suffer by reason of the designation. The Service concluded that the economic burden arising from the designation was highly uncertain, because the designation itself had no impact on their current use of the land. The Service acknowledged the designation could affect some future uses if the owners sought federal agency action or permits in the course of any future development. Depending on what permits or federal agency action the landowners might have to obtain for a future use, the Service concluded that the economic impact of the critical habitat designation could be $0, it could be $33.9 million, or it could be something in between.

The District Court openly acknowledged its distaste for the ESA, but nonetheless upheld the critical habitat designation as a proper exercise of the Service's discretion.[2] The District Court also refused to review the Service's decision not to exclude the Louisiana land from designation based on economic considerations because the court concluded that issue was committed to agency discretion and therefore not subject to judicial review. A divided panel of the 5th Circuit affirmed. On petition for rehearing, six judges dissented from denial of rehearing *en banc*.[3]

The Supreme Court granted certiorari and oral argument was heard on October 2, 2018, four days before Brett Kavanaugh assumed office as an Associate Justice.

Relevance to Public Utilities:
The addition of Neil Gorsuch and Brett Kavanaugh to the Supreme Court raises significant questions whether the Court will continue to afford administrative agency decisions the same degree of deference that has been true in the recent past.[4] *Weyerhaeuser* will present an early and potentially dramatic test for the Court's current posture on deference to agency action. It also presents another deference issue, namely when courts should consider agency actions to be committed to agency discretion and therefore not subject to judicial review.

Next Steps:
A decision by the Supreme Court is expected by the end of the term next summer.

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[2] *Markle Interests, LLC v. United States Fish & Wildlife Serv.*, 40 F. Supp. 3d 744 (E.D. La. 2014).

[3] *Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, 848 F.3d 635 (5th Cir. 2017).

[4] In connection with the question of the future of *Chevron* deference, we will also consider Justice Kennedy's concurring opinion and Justice Alito's dissent in *Pereira v. Sessions*, 138 S.Ct. 2105 (2018).

Center for Regulatory Reasonableness v. U.S. EPA, *Conservation Law Foundation*, *Intervenors*, Case No. 16-1246 (D.C. Cir.); *Center for Regulatory Reasonableness v. U.S. EPA*, No. 17-1060 (D.C. Cir.)

Issues:

EPA, the primacy agency in Massachusetts, issued an updated general permit for small MS4s[1] in April 2016, which applies to all regulated MS4s in the State other than Boston and Worcester. A number of entities, including the City of Lowell, the Massachusetts Coalition for Water Resources Stewardship and the Town of Franklin, the National Association of Home Builders, and the Conservation Law Foundation, petitioned for review of the permit pursuant to CWA Section 509. In October 2016, the proceedings were consolidated in the D.C. Circuit. The primary issues raised by the municipal challengers relate to permit terms that seek:

(a) to regulate flow from newly developed and redeveloped sites, and

(b) to establish water quality-based pollutant reductions for MS4 discharges, even to water bodies for which no TMDLs have been established.

In particular, the Massachusetts General Permit includes provisions prohibiting or restricting "increased discharges, including increased pollutant loadings," from the MS4 to certain receiving waters, which entities have challenged as an unlawful regulation of flow.[2]

In addition, while the Clean Water Act sets reducing pollutants in stormwater to the "maximum extent practicable" (or MEP) as the standard for MS4s,[3] the Massachusetts General Permit also sets forth water quality-based requirements. While TMDLs can include pollutant reductions from MS4s, the Massachusetts General Permit also requires pollutant reductions – separate from the requirements based on MEP – in discharges to water bodies without TMDLs.

The Conservation Law Foundation and the Charles River Watershed Association intervened in support of the Massachusetts General Permit.

While that matter was being briefed, the Center for Regulatory Reasonableness filed a similar petition for review in the D.C. Circuit challenging the New Hampshire General MS4 Permit, which is similar to the Massachusetts Permit. The

[1] The EPA NPDES General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts, dated April 4, 2016, is available at https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/final-2016-ma-sms4-gp.pdf.

[2] In *Va. DOT v. U.S. EPA*, 2013 U.S. Dist. LEXIS 981, 2013 WL 53741 (E.D. Va. 2013), the U.S. District Court for the Eastern District of Virginia held that EPA does not have authority under the CWA to issue a TMDL for flow.

[3] CWA Section 402(p)(3)(b)(iii).

Conservation Law Foundation and other advocacy organizations challenged the New Hampshire Permit in the First Circuit; EPA has moved to consolidate those matters in the D.C. Circuit.

Under the Trump Administration, EPA has indicated its intention to settle these matters by modifying the General Permits. Accordingly, the respondents moved to hold briefing of both proceedings in abeyance. The Court granted that motion, requesting status reports every 90 days. The most recent report, filed on August 14, 2018, indicates that settlement discussions are continuing.

Relevance to Public Utilities:
While several state courts have issued decisions concerning authority under the Clean Water Act to require water quality-based effluent limitations for discharges from MS4s, in light of the MEP standard, if these matters were to be litigated to decision, the D.C. Circuit would be the first federal court to address this issue head on.

Next Steps:
Briefing is suspended for settlement discussions; the outcome is still unknown.

Deschutes River Alliance v. Portland General Elec. Co., No. 3:16-cv-1644, 2018 U.S. Dist. LEXIS 130689, 2018 WL 3715706 (D. Or. Aug. 3, 2018)

Issues and Holding:
Portland General Electric (PGE) operates a hydroelectric project that underwent relicensing by the Federal Energy Regulatory Commission (FERC). As part of the relicense, the Oregon Department of Environmental Quality (DEQ) issued a water quality certification under CWA section 401. The DEQ certification imposed a Water Quality Management and Monitoring Plan on the project, which set forth "management plans" to ensure compliance with certain water quality standards, with a focus on pH, temperature, and DO levels.

Plaintiff filed a CWA citizen suit alleging that PGE violated several of the requirements contained in the water quality certification. PGE moved to dismiss, arguing that the District Court lacked subject matter jurisdiction because the citizen suit provision does not allow challenges to compliance with conditions contained in a water quality certification issued under section 401 of the CWA. Rather, PGE argued that only the licensing entity, FERC, has the authority to enforce certification conditions. The District Court denied the motion, holding the CWA citizen suit provision allows third parties to challenge compliance with conditions contained in a state CWA section 401 water quality certification.[1]

The parties then filed cross motions for summary judgment. Plaintiff argued that defendants had violated conditions of the state-issued 401 certification relating to operations of a selective water withdrawal facility designed to restore fish passage at their hydroelectric facility. Defendants contended that none of the exceedances alleged by Plaintiff constituted a violation of the certification. The District Court analyzed the provisions of the certification as it would a contract and concluded that plaintiff had failed to show a genuine dispute of material fact to support its contention that the hydro facility was operating in violation of the project's 401 certification. The District Court denied plaintiff's motion and granted defendants' cross motion for summary judgment.

Relevance for Public Utilities:
This decision is noteworthy because it appears to be the first case to squarely examine the issue and conclude that conditions incorporated by a state, through CWA section 401, on any federal license or permit may be enforced through a citizen suit. Though here plaintiff did not prevail on its claims, the practical impact of this decision is an additional avenue for third party enforcement.

[1] *Deschutes River All. v. Portland GE*, 249 F. Supp. 3d 1182 (D. Or. 2017).

Next Steps:
Both plaintiff and defendants appealed to the Ninth Circuit. The appeal is docketed as Case Number 18-35932, but has not yet been briefed or argued.

Kimberley-Clark v. District of Columbia, Case No. 1:17-cv-01901 (D. D.C. Dec. 22, 2017)

Issue and Holding:

The District of Columbia enacted the "Nonwoven Disposable Products Act of 2016" (NDPA) in March of 2017, which will be enforceable starting on January 1, 2018. The NDPA is essentially a labeling law, prohibiting manufacturers of nonwoven disposable products, such as moist wipes, from labeling those products as flushable unless they "[d]isperse[] in a short period of time after flushing in the low-force conditions of a sewer system," are not "buoyant," and are free of "material that does not readily degrade in a range of natural environments."[1] The Dallas-based Kimberly-Clark Corporation has challenged the NDPA on constitutional grounds, requesting declaratory and injunctive relief. Kimberly-Clark's arguments include challenges based on the Commerce Clause (discriminatory effects, undue burden on interstate commerce), First Amendment (unlawful restraint of speech and compelled speech), and Fifth Amendment (law imposes civil sanctions under impermissibly vague and ambiguous standards).

Kimberly-Clark filed a motion for preliminary injunction on October 9, 2017. The corporation argued that it is likely to prevail on the merits based on the same constitutional arguments that were included in its complaint. NACWA filed an amicus brief in support of the District of Columbia's opposition to motion for preliminary injunction.

On December 22, 2017, the District Court issued an order granting the motion for a preliminary injunction. The District Court notes that the District has thus understandably embarked on a "Protect Your Pipes" campaign, encouraging consumers to rethink their flushing habits, but it said the question in this case is how far it can go in enlisting wipes manufacturers to help fight that battle.

The District Court granted the preliminary injunction because it agreed that the District of Columbia legislation likely treads impermissibly on the Plaintiff's First Amendment rights. The District Court did not examine the Commerce Clause or other potential grounds for preliminary injunction. Since the District of Columbia was still in the process of promulgating regulations to implement the legislation, the Court noted that it would subsequently reassess whether the injunction remains appropriate once those regulations become final.

Relevance to Public Utilities:

This case tested whether the labeling laws for wipes, which are critical to keeping these highly destructive materials out of the sanitary wastewater system, are

[1] D.C. Law 21-220, §§ 2(1), 3.

constitutional. It will inform whether this type of legislation could be used nationally as part of the solution to address the negative effects of wipes in sewer systems.

Next Steps:
The parties entered into settlement negotiations and the case was stayed in January 2018. No further action has been reported in the litigation.

Northwest Environmental Advocates (NWEA) v. U.S. Department of Commerce, 322 F. Supp. 3d 1093 (W.D. Wash. 2018)

Issues and Holding:

NWEA, a perennial litigant in the Pacific Northwest and outspoken critic of governmental efforts to meaningfully address nonpoint source agricultural and silvicultural pollution, sued EPA and NOAA for failing to protect the coastal waters of Washington State from nonpoint source pollution. Under the Coastal Zone Reauthorization Amendments of 1990 (CZRA), any State with a Coastal Zone Management Program must also have a Coastal Nonpoint Program, subject to review and approval by EPA and NOAA. NWEA alleged that EPA and NOAA failed to formally act on the State's Coastal Nonpoint Program, improperly dispensed funds to the State absent such approval, and acted arbitrarily and capriciously by approving the State's program update in 2015 and determining that the State was making satisfactory progress toward its implementation schedule.

The District Court granted the agencies' motion to dismiss the first claim, but rejected the others, finding as follows. First, nothing in the statute mandated that EPA and NOAA affirmatively disapprove a program not meeting applicable criteria. Second, absent formal approval, the agencies lacked authority to dispense funds to the State program (in this case, $83M through 2016). Third, NWEA could proceed with its other claims, finding that the agencies' grounds for dismissal were unsupportable.

The parties filed cross-motions for partial summary judgment. The District Court granted the federal government's motion, in part, finding NWEA did not have standing to challenge NOAA and EPA's failure to withhold funds from Washington's CZMA Section 306 and CWA Section 319 grants pursuant to the Coastal Zone Reauthorization Amendments of 1990. Plaintiff failed to provide sufficient evidence to support its assertion that NOAA and EPA's failure to withhold funds from Washington's CZMA Section 306 and CWA Section 319 grants represents a redressable procedural injury and therefore the District Court found that it does not have subject matter jurisdiction to adjudicate these claims.

Relevance to Public Utilities:

This case may, in part, put more teeth into nonpoint source programs under CZRA, though the chances of a sweeping decision appear less likely given the elimination of some of NWEA's claims. However, this case may result in the federal government viewing their risk on these issues as greater, which could result in a change in federal review and approval procedures associated with state programs.

Next Steps:

There are other claims made by plaintiff that survived the federal government's motions to dismiss and summary judgment, including claims concerning Washington State's CWA Section 319 Nonpoint Source Management Program. The parties are

currently in discovery, which is scheduled to end in February 2019, with a trial date set for May 2019.

Tennessee Riverkeeper v. 3M Company, 234 F. Supp.3d 1153 (N.D. Ala. 2017)

Issues and Holding:
Tennessee Riverkeeper sued 3M company, BFI Waste Systems of Alabama and the City of Decatur, alleging that facilities owned and operated by Defendants had caused contamination of groundwater, sediments, drinking water supplies and the river. The suit seeks declaratory and injunctive relief under the Resource Conservation and Recovery Act (RCRA).[1] Riverkeeper alleges that manufacturing facilities and landfills operated by Defendants have released hazardous and solid waste containing perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS), and related chemicals, which may cause cancer and other health effects.

All defendants moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). These motions assert two primary contentions: first, that the State of Alabama is already addressing Riverkeeper's concerns under an EPA-approved permit program; and second, that the substances at issue do not constitute "solid" or "hazardous" waste under RCRA. All three motions were denied.

BFI's Motion to Dismiss
BFI argued that the Court lacks subject matter to jurisdiction because the solid waste facility permit it holds from the State Department of Environmental Management is a shield to liability. Because the permit only authorizes BFI to accept nonhazardous waste, the court deemed the crux of the dispute to be whether the chemicals PFOA and PFOS are hazardous wastes, a point disputed by the parties. The Court declined to dismiss for lack of jurisdiction to allow discovery and briefing of this issue at summary judgment.

BFI alternatively argued that the leachate discharged from its landfill is not a solid or hazardous waste under RCRA. Applying the RCRA definition of hazardous waste, the court deemed it an open question as to whether PFOA and PFOS are hazardous wastes, despite the fact that they do not constitute hazardous waste under Alabama law.

BFI further maintained that the "anti-duplication" provisions of RCRA barred the suit.[2] RCRA expressly excludes from the definition of solid waste an industrial discharge from a point source subject to regulation under the Clean Water Act. BFI argued that its leachate fells within this definition. Interestingly, the Court looked

[1] 42 U.S.C. § 6972(a)(1)(B). Alabama is a delegated state and issues solid waste permits.

[2] 42 U.S.C. § 6905(a) & (b)(1).

not to the Clean Water Act but to RCRA, and rejected BFI's claim because RCRA itself does not define these terms.

The Court wasted little time with BFI's final contention, that Riverkeeper was barred from seeking relief "inconsistent" with the terms of their state issued permit. Citing a 2015 case from the 4th Circuit, the District Court stated

> To be "inconsistent" for purposes of § 6905(a), then, the [Clean Water Act] must require something fundamentally at odds with what RCRA would otherwise require. RCRA mandates that are just different, or even greater, than what the [Clean Water Act] requires are not necessarily the equivalent of being "inconsistent" with the [Clean Water Act].[3]

The Court, again citing *Goldberg*, noted that "the maze of cross-references to exhibits and interpretations of specific provisions within them makes this case particularly ill-suited to adjudication at the motion to dismiss stage."[4]

3M's Motion to Dismiss

3M joined BFI in arguing that the discharges at issue do not constitute solid waste under RCRA, and as with BFI's claim, the Court declined to dismiss on this ground, while noting that 3M might ultimately prevail on this issue on summary judgment. The Court also rejected 3M's assertion that Riverkeeper failed to plead facts giving rise to a reasonable inference of "imminent and substantial endangerment" to health and the environment.

3M alternatively moved to dismiss for lack of subject matter jurisdiction on mootness grounds. The company argued that a judicially enforceable 2008 Remedial Action Agreement between the state and 3M adequately addresses the violations alleged in the complaint. The Court held the case did raise live controversies, because the terms of the agreement do not encompass all of the relief sought by Riverkeeper (e.g. a specific order to abate its disposal of PFOA and PFOS.)

3M's final contention was that the court should abstain from considering the claims at issue which involve highly technical or scientific knowledge within the purview of the Alabama Department of Environmental Management. The Court was (perhaps unsurprisingly) not persuaded, stating "upon the presentation of evidence, this court

[3] *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 509–510 (4th Cir. 2015) (citations omitted).

[4] *Id.* at 510-511.

is quite capable of determining whether a danger exists, and certainly may rely upon the assistance of experts to resolve such issues."[5]

The City's Motion to Dismiss

The City of Decatur also moved to dismiss on both subject matter jurisdiction and failure to state a claim. Riverkeeper claims the City is violating RCRA through its ownership and operation of a landfill. The City argued that its valid state issued solid waste facility permit and "indirect discharge" permit specifically authorizes the city to discharge leachate which contains the chemicals at issue. The City also relied on its NPDES permit, which allows the discharge of these substances into the river.

In declining to dismiss on this ground, the District Court again stated the key is whether the PFOA and PFOS are nonhazardous waste authorized by the permits, or hazardous waste, which is not. The Court also went on to suggest that there is in fact no such thing as a permit shield:

> Finally, the City fails to direct the court to any authority stating that a citizen cannot bring an RCRA claim to try to impose stricter limits on the disposal of hazardous waste than those imposed by an EPA-approved State permit or to supplement the terms of such a permit.

Relevance to Public Utilities:

As with several of the other cases this year, this lawsuit is an example of environmental plaintiffs using all the environmental laws to obtain a desired result—if a discharge is authorized under the Clean Water Act, challenge it as unlawful under RCRA. Given that the order is on motions to dismiss, where all the factual allegations are taken as true, the decision is not particularly troubling for its conclusions. However, the Court's interpretations of governing law should give agencies pause with regard to the viability of the permit as a shield principle. The case can be read to say that as long as plaintiffs can show they are asking for requirements that are different or more stringent, the case can proceed—at least under RCRA. Also, when the case reaches the summary judgment stage, it is important for the court to apply the definitions in the Clean Water Act to determine whether discharges from a point source properly regulated under the CWA and thus outside of RCRA's jurisdiction. The Court here looked for—and not surprisingly did not find—these terms defined in RCRA and so concluded that BFI could not conclusively establish that the required elements were met.

[5] Citing *Gamble v. PinnOak Res., L.L.C.*, 511 F. Supp. 2d 1111, 1127 (N.D. Ala. 2007).

Next Steps:
After the motions to dismiss were denied, plaintiffs filed an amended complaint and defendants answered. Trial had been set for March of 2019, but has recently been stayed pending mediation.

United States v. City of Colorado Springs, Case No. 1:16-CV-02745 (D. Colo., filed Nov. 9, 2016)

Issues:
On November 9, 2016, the United States and the State of Colorado filed suit against the City of Colorado Springs alleging multiple violations of the city's MS4 permit, including failure to enforce stormwater requirements for new developments, failure to properly operate and maintain existing stormwater controls, and a wide variety of neglect and non-feasance. Shortly after the suit was filed, Pueblo County and the Lower Arkansas River Valley Water Conservancy District intervened as additional plaintiffs. The suit followed two EPA audits of the City's stormwater program in 2013 and 2015, both of which noted a variety of deficiencies. Shortly after the inspections, a new mayor took office who made efforts to revitalize the City's stormwater program, including major increases in the City's stormwater staff, commencement of several major stormwater projects, and execution of a $460 million, 20-year intergovernmental agreement with Pueblo County to build 71 stormwater projects.

The District Court ordered that the case be tried in segments, with the first segment to address three exemplar locations. Although there were some discussions of settlement, the trial of the first group of three exemplar locations was held in September 2018. The District Court has not yet issued a decision following trial of the first segment of the case.

Relevance to Public Utilities:
This case stands as a marker that serious enforcement actions may follow neglect of MS4 programs, but the roles and positions of the State and federal governments as co-plaintiffs also demonstrates that the pursuit of such claims may wind up being politically fraught.

Next Steps:
The parties are waiting for a ruling from the trial court.