Top Clean Water Act Cases
November 2017

Sam Brown, Hunton & Williams LLP, San Francisco, CA
Mickey Conway, Metro Wastewater Reclamation District, Denver, CO
Roberta Larson, California Association of Sanitation Agencies, Sacramento, CA
Hilary Meltzer, New York City Law Department, New York, NY
Brooks Smith, Troutman Sanders, Richmond, VA

Direct Hydrological Connection Theory of Clean Water Act Liability

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26 Crown Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority, No. 3:15-cv-1439 (JAM), 2017 U.S. Dist. LEXIS 106989, 2017 WL 2960506 (D. Conn. July 11, 2017)

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 hydrologic connection through groundwater.

The District Court granted defendants' motion to dismiss the CWA claims 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 hydrologic connection between the groundwater beneath the property and the Sound could establish CWA liability based on passive migration of pollutants through groundwater.

Relevance to Public Utilities:

This is the first case in which plaintiffs have sought to apply the "hydrologic 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:

Plaintiffs appealed the District Court's dismissal to the Second Circuit, where it is currently being briefed. NACWA (and numerous regional associations and individual utilities) joined an *amicus* brief submitted by New York City, which urges the Second Circuit to affirm. Oral argument has not yet been scheduled.

Hawai'i Wildlife Fund v. County of Maui, *appeal pending*, No. 15-17447 (9th Cir.)

Issues and Holding:

County of Maui is a case pending in the Ninth Circuit that has been discussed at length at prior NACWA events. As a reminder, 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. That is, it does not matter that pollutants travel through unconfined groundwater mixing with a host of other sources of similar pollutants, or that pollutants are estimated to diffusely enter navigable waters along more than two miles of coastline, but only that there is a discharge of pollutants from the wells and pollutants from two of the wells were shown to reach navigable waters via a tracer dye study.

The County appealed the District Court decisions to the U.S. Court of Appeals for the Ninth Circuit. The matter is fully briefed on the merits and oral argument was in October 2017. 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. However, while the United States supports the 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.

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[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 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 WL 3903918, at *6 (D. Haw. June 25, 2015) (finding the County had "fair notice" an NPDES permit was required by the CWA).

Relevance to Public Utilities:
The district court decisions and the pending appeal raise fundamental CWA legal issues and 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 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.

NACWA joined an *amicus* brief in the Ninth Circuit supporting the County of Maui.

Relevance to Public Utilities:
Oral argument in the Ninth Circuit was in October 2017. A decision on the merits is likely in the first half of 2018.

Sierra Club v. Va. Elec. & Power Co., 247 F. Supp. 3d 753 (E.D. Va. 2017)

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 four-day trial on the merits, the federal district court judge ruled that the impoundments and landfill were "point sources" and that the discharge of arsenic from these sources through groundwater that was hydrologically connected to surface water constituted an unpermitted discharge in violation of the Clean Water Act. The judge reached this conclusion even though VEPCO was already subject to a corrective action requirement under a separate waste permit for the site to remediate arsenic-impacted groundwater, and even though there was no evidence of any harm in the river.

Although the judge found VEPCO liable for unpermitted discharges through groundwater, he rejected Sierra Club's claims that VEPCO was also violating its NPDES permit, deferring to the state agency's interpretation that the permit did not proscribe impacts to groundwater. The judge also rejected Sierra Club's claim for penalties and excavation, finding that VEPCO had been a good corporate citizen, that VEPCO had done everything required of it by the state agency, and that excavation was a draconian remedy not borne out by the facts in the case. In lieu of Sierra Club's requested remedy, the judge ordered additional monitoring of surface, pore, and groundwater, as well as fish, mussels and crabs in the vicinity of the site. The judge also ordered VEPCO to apply for a new waste permit requiring a more active remedy than monitored natural attenuation, apparently concluding that if VEPCO remediated the groundwater, this would also resolve any unpermitted impacts to surface water.

Relevance to Public Utilities:

Like other cases in this section of the outline, 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. With similar issues pending in the 6th and 9th Circuits, there is an increasing potential for circuit splits that will end up in the Supreme Court for resolution.

Other issues to watch in this case include the proper scope of the remedy for CWA violations, and whether citizen suits can be used to enforce state-only permit conditions. With respect to remedy, the conventional view is that at worst, an unpermitted discharge can and must be remedied by obtaining permit coverage.

Requiring complete removal of the source (as requested by Sierra Club) would mark a dramatic shift in the remedy analysis under the CWA. Likewise, while the enforcement of state-only conditions has been addressed in the past by the 2nd, 9th and 11th circuits, no appellate decision has addressed whether state-based conditions that exceed the scope of the CWA (such as those proscribing impacts to groundwater) can be enforced through a citizen suit.

Next Steps:
Both parties timely appealed the trial court decision, and the appeal is now pending in the Fourth Circuit Court of Appeals. Briefing will be complete by December 2017, and argument is expected in the first quarter of 2018.

Tennessee Clean Water Network v. Tennessee Valley Authority, *appeal pending*, No. 17-6155 (6th Cir.)

Issues and Holding:
This CWA citizen suit is almost identical to the VEPCO case summarized above, with a citizen group alleging CWA violations for the migration of pollutants from coal ash through groundwater into hydrologically connect surface water. In a dramatic turn, however, the trial judge found TVA liable on all counts (including unpermitted discharges and violations of certain boilerplate conditions in the NPDES permit for the site), and ordered complete excavation and removal of the ash at a cost projected to be in the billions of dollars.

Relevance to Public Utilities:
Like VEPCO, this 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. But there are other important issues to watch, as well.

First, in this case, TVA was already subject to a state remedial order. This raises questions about the scope of the diligent prosecution bar and whether (and to what extent) the state order bars the citizen suit.

Second, the issue of seepage of coal ash pollutants into groundwater was squarely raised in the NPDES permit proceeding for the site, and the permit record reflects that the state agency was well aware of such seepage when it wrote the permit, including specific provisions related to seepage. This raises questions about the scope of the permit shield as a defense to the alleged violations.

Next Steps:
TVA timely appealed the trial court decision, and the appeal is now pending in the 6th Circuit Court of Appeals. A briefing schedule has not yet been set.

In re Town of Marion, Wastewater Treatment Plant, NPDES Appeal Nos. 17-01 & 17-02 (EPA Environmental Appeals Board)

Issues:

On May 15, 2017, the Town of Marion, MA and eNGOs filed petitions for review to the EPA Environmental Appeals Board (EAB) regarding Marion's municipal wastewater NPDES permit issued by EPA Region 1. The appeal is relevant because a focus of the appeal, in part, is on EPA's authority to regulate pollutants that enter groundwater and migrate towards surface waters (i.e., the hydrologic connection theory of liability). In this matter, the pollutant is nitrogen that leaches from the town's unlined lagoons and allegedly migrates 1.5 miles to the ocean over an approximate 20-year period.

The briefing schedule for the petitions was stayed over the summer for a period of time to allow the parties to enter into mediation. On October 26, 2017, motions were granted to voluntary dismiss the petitions for review. In part, this was in response to an Administrative Order on Consent (AOC) entered into by Marion and EPA Region 1. The AOC did not change the permit, but effectively gave Marion a compliance schedule to complete work necessary to comply with the permit.

Relevance to Public Utilities:

The concern with this permit and the petitions for review is that this would further entrench EPA's interpretation related to the direct hydrologic connection theory of liability, including in any briefs filed before the EAB. The AOC solves Marion's concerns, but it does not address the larger concerns of NACWA, and, in fact, is another example that could be cited demonstrating EPA's use of the direct hydrologic connection theory of liability.

Next Steps:

No further next steps.

Upstate Forever v. Kinder Morgan Energy Partners, L.P., 252 F. Supp. 3d 488 (D.S.C. 2017), appeal pending, No. 17-1640 (4th Cir.)

Issues and Holding.
On April 20, 2017, a district court issued an order dismissing an eNGO citizen suit based on a leak from a petroleum pipeline into groundwater. The eNGOs alleged that the petroleum migrates through the subsurface into various creeks and wetlands and is an ongoing discharge of pollutants without an NPDES permit in violation of the CWA.

The District Court granted Kinder Morgan's motion to dismiss the CWA allegations. The basis for the court's decision is: (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. While the District Court reached the correct and favorable conclusion, the Order is not always consistent with key CWA concepts. However, it is not unique to this Order, as district courts around the country have struggled with consistently addressing this type of fact pattern under the CWA.

The District Court acknowledges that a pipeline can be a "point source" and that "it is undisputed that the leak from the underground pipeline discharge has contaminated the soil and groundwater at the spill site." However, it held that "the Plaintiffs must allege more than stating that pollutants ultimately may reach navigable waters." For the District Court, it matters how the pollutants reach navigable waters; the point source must "add" them to navigable waters.

Within a few days of discovering the leak, Kinder Morgan fixed the pipeline. The leak resulted in the release of 369,000 gallons of petroleum. There is no continuing discharge from the pipeline, but there is ongoing remediation at the site. The South Carolina Department of Health and Environmental Control is involved in the oversight and enforcement of ongoing remediation efforts. The court states: "[I]n the case at bar, there is no continuing discharge from the pipeline and the Plaintiffs have failed to allege any facts to support the position that the pipeline discharged petroleum directly into navigable waters." The court further explains:

> To find that the pipeline directly discharged pollutants into navigable waters under the facts alleged would result in the CWA applying to every discharge into the soil and groundwater no matter its location. All groundwater potentially flows downstream and will possibly at some point enter navigable waters. . . . At best, with respect to the pipeline, the Plaintiffs have alleged a past discharge of pollutants into the soil and groundwater that may migrate into navigable waters, which is

> insufficient to state a plausible claim that the pipeline is a point source in this case or that the pipeline will discharge pollutants into navigable waters.

The District Court held that the "the migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA."

The eNGOs also argued that the spill site and the seeps, flows, and fissures from the spill site (as opposed to the pipeline) are point sources. They rely on case law that says point sources "need not be the original source of the pollutant; it need only convey the pollutant to navigable waters." The District Court rejected that argument, finding that the facts of this case are "distinguishable from the line of cases cited by the Plaintiffs involving 'discernible, confined and discrete conveyance[s]' such as pits, holding ponds, cesspools, and coal plants."[1] The court says in this case "there is no allegation that the Defendants have affirmatively undertaken any action to channel or direct contaminants to navigable waters and there is no discrete mechanism conveying the pollutants to navigable waters." It also repeated that migration of pollutants through soil and groundwater is nonpoint source pollution and the spill site and the seeps, flows, and fissures from the spill site are not point sources because there are no factual allegations of a "discernible, confined and discrete conveyance" of pollutants to navigable waters. According to the court, the eNGOs have "identified a discrete source for the pollution, but have failed to allege a discrete conveyance of pollutants into navigable waters."

The eNGOs argued that the CWA applies to pollutants that have flowed into surface waters through hydrologically connected groundwater. The District Court held that CWA jurisdiction does not exist over the eNGOs' claim based on hydrological connection between groundwater and surface water. The District Court reached that conclusion by relying on prior court decisions that focused on whether groundwater with a hydrologic connection to surface water is itself a "navigable water." The District Court concluded that "navigable waters" does not include groundwater that is hydrologically connected to surface waters.

The District Court acknowledges the courts are split on this issue, but it does not acknowledge that the split is because the courts have examined the issue through very different frameworks. The direct hydrologic connection theory of liability—at least as explained by EPA and some courts—is focused on whether the hydrologic connection is so direct that the discharge into groundwater is practically a direct discharge into the surface water, and therefore a prohibited "discharge of a pollutant." This court, and the prior decisions it relies on, focus on examining the question of whether groundwater is a navigable water. Groundwater is never a

[1] The District Court cites *Sierra Club v. Va. Elec. & Power Co.*, discussed above, among other cases, as an example.

navigable water, whether or not it has a direct hydrologic connection to surface water, which is a position shared by EPA.

What the District Court did not do was examine the direct hydrologic connection theory of liability in the same way as the court in *Sierra Club v. Va. Elec. & Power Co.*, or address it as part of the point source discussion in the earlier part of the Order. The bottom line is that while the result is favorable and correct, the District Court's reasoning may be subject to challenge, particularly in its analysis of the hydrologic connection theory of liability.

Relevance to Public Utilities.
This is a similar fact pattern to the *County of Maui* case and thus of concern as part of developing law on whether discharges to groundwater give rise to CWA liability. It is impossible to distinguish the pipeline in this case from other critical infrastructure that may contribute pollutants into soil and groundwater, such as groundwater recharge systems, green infrastructure, treatment ponds, landfills, and other sources above or below ground. Pipelines that could leak due to age or episodic failures include public water supply pipelines, recycled water pipelines, and sanitary sewer pipelines.

Next Steps.
In May 2017, eNGOs filed a notice of appeal to the U.S. Court of Appeals for the Fourth Circuit. The appeal is fully briefed and oral argument will be in December 2017. NACWA joined an *amicus* brief in the Ninth Circuit supporting Kinder Morgan that was filed in August 2017. Additionally, there was a State *amicus* brief on behalf of 11 States filed in support of Kinder Morgan. A decision is expected in in the first half of 2018.

Center for Regulatory Reasonableness v. U.S. EPA, 849 F.3d 453 (D.C. Cir. 2017)

Issues and Holding:
In 2014, the Center for Regulatory Reasonableness filed a petition in the D.C. Circuit seeking review of EPA's contention that the 2013 *Iowa League of Cities* decision was applicable only in the Eighth Circuit.

In 2013, in *Iowa League of Cities v. U.S. EPA*,[1] the Eighth Circuit Court of Appeals granted a petition for review of two letters sent by EPA to Senator Charles Grassley (R IA), setting forth interpretations of the CWA. The Iowa League of Cities argued that these interpretations constituted improper rulemaking, in that EPA had not adopted rules, but yet was applying these interpretations generally to utilities.

With respect to EPA's revocation of its 2003 policy that blending would not be considered a bypass under certain specified conditions, the Eighth Circuit not only agreed that EPA's policy constituted improper rulemaking, but also rendered a substantive decision. The Court characterized EPA's position on blending as imposing secondary treatment requirements on flows within treatment facilities, which the CWA gives EPA no authority to do. Rather, since secondary treatment effluent limitations apply only at the final point of discharge, EPA's policy was improper not only because it had not been adopted pursuant to a notice and comment rulemaking process, but also because it is inherently inconsistent with the CWA itself.

EPA declined to seek a writ of certiorari, but instead, in various public statements, indicated that it viewed the Eighth Circuit's decision on blending as binding only in the states within the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota).

EPA opposed the 2014 petition for review on various grounds, including that it has taken no final agency action subject to judicial review. NACWA filed an *amicus* brief in this case to provide the national utility perspective on the issue of blending. NACWA's brief explained why the 2013 *Iowa League of Cities* decision should be applied nationally. The brief also emphasized the importance of the Eighth Circuit's holding that if a POTW is meeting its permit limits at the point of discharge, EPA has no legal authority to apply secondary treatment requirements internal to the plant or dictate what kinds of treatment techniques are used within the plant's boundaries, including the use of blending.

The D.C. Circuit denied the petition in a short decision finding that it did not have jurisdiction. The court characterized EPA's statements about the limited

[1] 711 F.3d 844 (8th Cir. 2013).

applicability of the *Iowa League of Cities* decision as a "non-acquiescence statement," which the court noted is not an effluent limitation or any other determination that would be reviewable by a circuit court under CWA Section 509(b). Rather, review of EPA's "non-acquiescence statement" would properly be sought under the APA in a federal district court.

Relevance to Public Utilities:
Public utilities outside of the Eighth Circuit should be able to rely on the *Iowa League of Cities* decision on blending. Given the procedural posture of this litigation, however, it is not clear whether the D.C. Circuit will address that fundamental question.

Next Steps:
This litigation was dismissed. Because the DC Circuit's ruling was purely procedural, application of the *Iowa League of Cities* decision, and EPA's authority to regulate blending, outside of the Eighth Circuit remains an open judicial question.

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

Issues and Holding:
NACWA is one of four wastewater associations challenging 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 methodology, and although NACWA and other stakeholders have raised significant technical questions about the validity of the TST.

The first amended complaint filed in December 2016 alleges 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, is an underground regulation contrary to law.[2] Plaintiffs seek an order pursuant to 28 U.S.C. §2202 and Federal Rule of Civil Procedure 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 amended complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). EPA's motion asserts the court does not have jurisdiction over the claims on several grounds:

- EPA characterizes 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

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 argues 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 argues that a document that provides an option is, by its very nature, not binding.
- EPA also argues the case is time barred, because the six-year statute of limitations to a facial challenge of the guidance ran prior to the filing of the action.

NACWA and its fellow Plaintiffs urged the court to deny EPA's motion. The opposition brief contends that Plaintiffs are not challenging the permits but rather, EPA's mandated use of the TST in these documents and other contexts. The opposition cites 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

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Control Board) providing comments on a draft California-issued NPDES permit, the Tesoro Refining permit.

[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.

to challenge the guidance as applied did not accrue until EPA began using the TST as a rule in 2012.

Relevance to Public Utilities:
The litigation directly challenges the TST, the use of which will result in an increased cost to wastewater agencies to undertake the additional replicate samples necessary to reduce the likelihood of being found in violation; an increased frequency of false failures in toxicity testing; and, as a result, a higher alleged incidence of noncompliance with NPDES permits, potentially resulting in civil and even criminal liability.

NACWA is concerned that once the TST is used in California POTW permits, it will be more broadly applied in other states. NACWA's participation provides a national perspective on the concerns over use of the TST method, the manner in which unpromulgated guidance is being imposed, 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. A hearing originally scheduled for August 2017 was taken off calendar and has not been rescheduled as of this writing.

Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA, 846 F.3d 492 (2d Cir. 2017)

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

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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).

2, however, the Second Circuit found EPA's reliance on its "holistic approach" 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 prohibits 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 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]

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 has participated as an *amicus curiae* several times in related litigation over the past twelve years.

Next Steps:
Many, but not all, of the original plaintiffs have filed petitions for a writ of certiorari. At the request of the Department of Justice, oppositions to those petitions are not due until mid-January 2018, so the Supreme Court will likely decide whether or not to take the case in the spring.

[4] 486 F.3d at 501.

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)

Issues and Holding:
Des Moines Water Works supplies drinking water to the metropolitan area of Des Moines, Iowa. The source of the drinking water is two rivers. Des Moines has difficulty meeting the 10 mg/L maximum contaminant level (MCL) for nitrates established by the federal Safe Drinking Water Act. Des Moines alleges it would cost hundreds of millions of dollars to install the necessary treatment technology to consistently meet the nitrates MCL.

In March 2015, Des Moines filed a Clean Water Act citizen suit in federal district court against a number of drainage districts outside the Des Moines metropolitan area, alleging that the nitrates in the rivers come from artificial subsurface drainage systems, e.g., tile drains, associated with agricultural operations and fertilizer application. The subsurface drainage systems discharge into ditches that are managed by the counties and those ditches discharge into the rivers.

Des Moines alleged that the discharges from the tile drains and ditches into the rivers are discharges of pollutants in violation of CWA § 301(a) and require NPDES permits. The CWA exempts "agricultural stormwater" and "irrigation return flow" from the definition of "point source."[1] However, Des Moines argued that in this case, the rainwater that infiltrates into the groundwater is no longer stormwater or irrigation return flow and therefore not exempt under the CWA.

In January 2016, the District Court certified several questions of Iowa state law – including questions regarding whether the drainage districts are entitled to "unqualified immunity" – to the Supreme Court of Iowa, and suspended discovery related to the tort claims pending decision. The State Supreme Court subsequently ruled that Iowa law does in fact immunize drainage districts from damages claims, as well as claims for injunctive relief. On that basis, the District Court ruled that even if the drainage districts were "point sources" (a decision the court did not reach), Des Moines lacked standing to bring its citizen suit because the alleged injuries were not redressable. According to the Court, "[Des Moines] may well have suffered an injury, by the drainage districts lack the ability to redress that injury." Thus, the Court granted summary judgment for defendants and dismissed the citizen suit.

Des Moines had raised due process and equal protection arguments, as well, but the District Court rejected those arguments in similar fashion.

[1] CWA § 502(14); 33 U.S.C. § 1362(14).

Relevance to Public Utilities:
Agriculture is a significant contributor of nutrients to surface waters and water quality impairment. Des Moines' decision to go after the drainage districts, instead of individual farmers, proved to be fatal to its efforts to compel NPDES permits for agriculture-related discharges.

Next Steps:
No appeal was filed, so the case is functionally at an end. However, it is possible that Des Moines or other water utilities could take account of the decision and file new suits against individual farmers.

In re EPA, 803 F.3d 804 (6th Cir. 2015), *petition for cert. granted sub nom. National Association of Manufacturers v. U.S. Dep't of Defense*, 137 S. Ct. 811 (2017) and 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 final "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.[2]

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.[3] Several petitioners believe the panel erred in assuming jurisdiction, and filed petitions for rehearing en banc, which the Sixth Circuit rejected on April 21, 2016. These petitioners filed a petition for certiorari with the Supreme Court, seeking review of the jurisdictional question, which was granted on January 13, 2017.[4] The Sixth Circuit has held briefing in abeyance pending review by the U.S. Supreme Court.

On February 28, 2017, the President issued Executive Order 13778, directing EPA and the Corps to either rescind or revise the WOTUS rule. The U.S. asked that briefing before the Supreme Court be held in abeyance to allow for that rulemaking process, but the Supreme Court denied that request. The question of whether district courts or circuit courts have jurisdiction to hear the challenge to the WOTUS rule was briefed over the summer and argued on October 11, 2017.

In the meanwhile, on July 27, 2017, consistent with Executive Order 13778, EPA and the Corps initiated the first phase of its effort to replace the WOTUS rule by proposing to rescind the rule and recodify the rule that had been in place prior to the WOTUS rule – language that does not resolve the issues raised by the *Rapanos*

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[1] 80 Fed. Reg. 37,054 (June 29, 2015).

[2] The Rule was also challenged in at least 11 federal district courts; these proceedings were not consolidated. Before the Sixth Circuit stay order, preliminary injunction motions were filed in three of the district court cases, only one of which was successful. The North Dakota District Court found "the States are likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule." *North Dakota v. U.S. EPA*, 127 F. Supp.3d 1045 (D. N.D. 2015).

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

[4] 137 S. Ct. 811.

decision.[5] Moreover, the prior language does not include the protections for wastewater treatment infrastructure and stormwater management practices that were incorporated into the 2015 WOTUS rule.

Comments were due on the rescission rule on September 27. EPA and the Corps has stated their intention to follow this first rulemaking with a second, proposing a new definition that takes into consideration the standard Justice Scalia outlined in the *Rapanos* plurality opinion, which would require jurisdictional waters to have a continuous hydrological connection to waters that are "Water of the United States" in their own right.

Relevance to Public Utilities:
Due to the Sixth Circuit stay, the 2015 WOTUS rule is not in effect. Accordingly, even in advance of the rescission rule being adopted, federal jurisdiction is determined according to prior regulations and guidance.

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 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.

Separate from the merits of the WOTUS rule itself, if the Supreme Court grants certiorari, review by the Supreme Court on the question of Clean Water Act subject matter jurisdiction could have significant impacts on which venue reviews this and potentially other jurisdictional rules under the Clean Water Act.

Next Steps:
The Supreme Court will issue a decision by the end of this term deciding which courts have jurisdiction to review the WOTUS rule. In the meanwhile, EPA and the Corps will continue with the two-step rulemaking process they have announced, which will undoubtedly lead to further litigation. No resolution seems likely in the near future.

[5] *Rapanos v. United States*, 547 U.S. 715 (2006).

Northwest Environmental Advocates v. U.S. EPA, No. 3:12-cv-01751-AC, 2017 U.S. Dist. LEXIS 56505 (D. Or. 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 the State'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 trial 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:

Briefing on the remedy is underway and will continue through the first quarter of 2018. The issue of whether the existing temperature TMDLs, which took several years to develop, will be left in place in the interim, or vacated, will be a key issue. 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. Fola Coal Company, LLC, 845 F.3d 133 (4th Cir. 2017).

Issues and Holding:

On January 4, 2017, the Fourth Circuit Court of Appeals issued its decision upholding the lower court's finding that boilerplate references to compliance with WQSs in NPDES permits are enforceable permit conditions, which can be violated even if a permittee's discharge meets the permit's numeric effluent limitations. NACWA participated in the Fourth Circuit litigation as part of an amici coalition opposed to the lower court's decision.

The issue in this case was whether boilerplate language in a West Virginia Pollutant Discharge Elimination System (WVPDES) permit prohibiting discharges from causing violations of state water quality standards created enforceable limits and, if so, whether the court's engaging in a three-day evidentiary trial to determine if a violation had occurred (without giving any deference to the West Virginia Department of Environmental Protection) was proper.

The Fourth Circuit asked the United States and West Virginia to file *amicus curiae* briefs in the appeal. While the United States and West Virginia provided generally consistent answers regarding the relationship of water quality standards and effluent limits, the United States and West Virginia disagreed as to whether the provision of Fola's permit at issue constituted a permit requirement enforceable against Fola. They disagreed as to whether the Clean Water Act's and West Virginia's permit shield applied at all. They disagreed about whether the West Virginia Stream Condition Index and EPA's conductivity guidance can or should be used to measure compliance, and whether Fola's permit even imposed a conductivity limit in light of the fact that West Virginia reviewed Fola's conductivity discharges and chose not to impose a specific limit thereon. In short, the United States' and West Virginia's positions on all of the key issues in the case for which the Court sought guidance were at odds with each other.

The Fourth Circuit had no trouble rejecting Fola's arguments on appeal and affirmed the District Court decision. Specifically, they rejected Fola's argument that the boilerplate was ambiguous or otherwise served as a requirement, limitation, or reminder to WVDEP, and not an effluent limit on Fola's discharge. The Court found the boilerplate straight forward and unambiguous, clearly imposing a duty on the discharger not to allow its effluent to cause or contribute to violations of water quality standards (in this case, narrative water quality standards). The Court also rejected Fola's argument that extrinsic evidence made clear that WVDEP never intended the boilerplate to serve as an enforceable effluent limit, noting that both EPA and WVDEP had in fact enforced that very provision on other dischargers and that Fola was aware of that fact.

Relevance to Public Utilities:
A large number of public utilities around the country have boilerplate "cause or contribute" language in their NPDES permits. This ruling likely will embolden environmental groups and some regulators to bring similar enforcement suits. As such, members are advised to re-review their current permits and operating conditions to determine whether they are subject to similar boilerplate requirements and, if so, whether their discharges of pollutants that they disclosed to regulators – but did not receive numeric effluent limits – may be causing or contributing to violations of water quality standards in their respective receiving waters.

Next Steps:
None.

Ohio Valley Environmental Coalition v. Pruitt, Case No. 17-1430 (4th Cir.)

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 Total Maximum Daily Load (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.

On cross motions for summary judgment in February 2017, the District Court agreed with OVEC and held that West Virginia's failure to issue TMDLs for conductivity (which is 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 filed a notice of appeal to the Fourth Circuit and a contested motion to stay the District Court's order pending appeal. On May 30, 2017, the Fourth Circuit denied EPA's motion, requiring EPA to act within 14 days to either approve or disapprove of West Virginia's decision not to submit TMDLs.

On June 13, 2017, EPA took the following actions in accordance with the order:

- EPA fully approved the "constructive submission" of "no TMDLs" for biological impairment for six water bodies that were no longer listed as impaired;
- For another 100 water bodies for which ionic toxicity wasn't identified as a stressor, EPA fully approved the "constructive submission" of "no TMDLs" for biological impairment on the grounds that WVDEP has addressed biological impairment through pollutant-specific TMDLs; and
- For the remaining water bodies, EPA "conditionally approved" WVDEP's submission of "no" TMDLs for the relevant water bodies "at this time." EPA and WVDEP entered into a Memorandum of Agreement (MOA) setting forth dates for submission of TMDLs for the relevant water bodies, identifying 150 waters for biological impairment TMDLs to be submitted by the end of 2021. The MOA also states that there will be an addendum within 30 days to address other outstanding waters.

Relevance to Public Utilities:
The OVEC litigation represents yet another attempt by environmental groups to disrupt this balanced relationship between EPA and the states, and to force EPA to needlessly step in and impose regulations where the state is working toward a solution. As to conductivity, the practical implications of the District Court's decision are deeply problematic. Conductivity presents complex scientific issues and implicates sources from a broad array of economic activities, including road salt, as well as municipal wastewater treatment, agriculture, mining, and oil and gas development. Many states are grappling with these issues under significant resource constraints, and relatively few conductivity TMDLs have been adopted nationwide. EPA is poorly positioned to develop TMDLs for the large number of water bodies that are the subject of the District Court's order, let alone those in other states that may be similarly situated. Moreover, if this decision is upheld environmental groups would be emboldened to force EPA to issue TMDLs for other complex pollutants, such as nutrients, where states are already attempting to address the issue but making slow progress.

This case represents a significant expansion of the constructive submission doctrine that, if upheld, could open the door to similar litigation nationwide on a wide variety of pollutants, particularly those (such as nutrients) for which the underlying science is complex and development of TMDLs may take many years. This will be a case of first impression in the Fourth Circuit.

Next Steps:
EPA has filed an appeal with the Fourth Circuit, which is currently being briefed. Oral argument has not yet been scheduled.

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 Clean Water Act 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 have asked the court to determine whether, under the Clean Water Act, these existing fecal coliform bacteria standards must be revised to be consistent with the enterococcus standards set forth in EPA's 2012 Recreational Water Quality Criteria. If the court finds that the State's existing water quality standards are not consistent with the Clean Water Act, plaintiffs ask that the court require the State or EPA to issue revised 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 has invested more than $10 billion in upgrades to wastewater treatment plants and related efforts to reduce CSOs since 2002, and has committed over $4 billion for additional measures to implement its Long Term Control Plans. The LTCPs 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 – beyond these already substantial investments – 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.

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*.)

Next Steps:
At EPA's request, the court extended defendants' time to answer or otherwise respond, to November 14, 2017. That date may be extended further.

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

Issues and Holding:

The Upper Missouri Waterkeeper sued EPA on May 31, 2016, 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, the 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 publicly-owned wastewater treatment plants, 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 and stating that the Waterkeeper lacks standing and has not stated a claim on which relief can be granted.

NACWA has intervened in this litigation to represent the interests of utilities across the nation.

Plaintiff has moved for summary judgment. The Upper Missouri Waterkeeper's key arguments include the variance "was based almost entirely on a 'cost' analysis," and that Montana "did not analyze data for each specific nutrient pollutant discharger, for classes of dischargers, or the highest attainable condition for each receiving water in deciding to adopt the weaker replacement standard. Additionally, Montana did not consider whether the replacement standard would protect receiving waterways' designated use(s)" Waterkeeper also argued that as a result of EPA's approval of the variance, "the science-based numeric nutrient criteria are not the actual applicable water quality standards in Montana. Rather, the actual nutrient standard in Montana is the replacement standard, a standard that is not based on science, but is based solely on the cost of pollutant treatment."

Cross motions for summary judgment have been filed by the other parties, including NACWA, and a hearing has been set for Thursday, November 16.

Arguments on the cross motions include support for variances, which are authorized by the Clean Water Act and are essential and appropriate implementation tools. In addition, EPA embraces and encourages the use of general variances. Montana's general variance approval needs to be upheld so that it can serve as a model for other states to follow where particular categories of dischargers needing additional time to come into compliance with water quality standards are identified, should states adopt

water quality standards that are recognized as unattainable in the near term by a group of dischargers.

Defendants also argue that analyzing data for each specific discharger is not required for a group variance. MTDEQ appropriately analyzed data for classes of dischargers. In adopting the variance, the State evaluated the variance for both public wastewater discharges and private, non-POTW permittees; the State provided different analyses and conditions for the separate groups under the variance. Finally Defendants argue that Waterkeeper's allegation on protection of designated uses fundamentally misconstrues the nature of variances. The whole point of a variance is that the use may not be attainable in the near-term.

Relevance to Public Utilities:
If successful, the Waterkeeper's suit could provide a means by which other citizens groups could challenge similar general nutrient variances for public wastewater treatment plants and instead force a lengthy and expensive review, which might result in some plants failing to qualify for such variances.

Next Steps:
Hearing on summary judgment motions is set for Thursday November 16, 2017.

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 and Holding:

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.

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[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).

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 Conservation Law Foundation and other eNGOs 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, EPA, joined by the Center for Regulatory Reasonableness and other petitioners, has moved to hold briefing of both proceedings in abeyance; eNGOs have opposed those motions.

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 are litigated to decision, the D.C. Circuit may be the first federal court to address this issue head on.

Next Steps:
EPA has announced its intention to reconsider these permits; the D.C. Circuit has not yet issued a decision on either opposed motion to hold briefing in abeyance.

Conservation Law Foundation v. U.S. EPA, Case No. 15-165-ML, 2016 WL 7217628, 2016 U.S. Dist. LEXIS 172117, (D. R.I. Dec. 13, 2016), *appeal pending*, No. 17-1166 (1st Cir.)

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).

This case is really about stormwater runoff from impervious surfaces (e.g., parking lots, roofs, etc.) and EPA's authority under the Clean Water Act § 402(p)(2)(E) to determine that a stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to a waterbody and to require an NPDES permit, generally referred to as EPA's residual designation authority.

CLF identified 6 EPA-approved TMDLs in Rhode Island that identified stormwater runoff from impervious surfaces as a source of impairment and violate water quality standards. The notable pollutants were phosphorus, bacteria, and metals. CLF argued that EPA's approval of the TMDLs constitutes a determination by EPA that the stormwater discharges from the impervious surfaces into those waters contribute to violations of water quality standards. That determination is in effect an exercise of EPA's residual designation authority under 40 C.F.R § 122.26(a)(9)(i)(C) and (D), and, therefore, those sources of stormwater runoff are now required to obtain NPDES permits.

The District Court clearly identified that CLF was attempting an end run around EPA's discretion when utilizing its residual designation authority. The court noted that EPA's approval of the Rhode Island TMDLs was limited to "reviewing and ascertaining that and how the respective TMDL Report meets the statutory and regulatory requirements of TMDLs in accordance with Section 303(d) of the CWA."[1] EPA did not conduct its own analysis or fact finding, make an independent determination that the stormwater discharges contribute to a violation of water quality standards, or that additional NPDES permits should be required for stormwater discharges into the impaired waters.[2] In dismissing the case, the court concluded that:

> In the absence of an independent determination by the EPA that the stormwater discharges contribute to a violation of a water quality

[1] 2016 WL 7217628 at *8; 2016 U.S. Dist. LEXIS 172117 at *22.

[2] 2016 WL 7217628 at *8-9; 2016 U.S. Dist. LEXIS 172117 at *22-23.

> standard or that they are significant contributors of pollutants to the waterbodies at issue, i.e., in the absence of EPA's exercise of its 'residual designation authority,' the EPA's election not to require permitting for stormwater discharges does not constitute a failure to perform a nondiscretionary duty under the CWA.[3]

The District Court notes that CLF is not without a remedy to its concerns. CLF may petition EPA Region 1—similar to the residual designation authority petitions recently denied by EPA Regions 3 and 9 (discussed below)—and if CLF is not satisfied with EPA's response it may challenge EPA's decision under the Administrative Procedure Act.[4]

Relevance to Public Utilities:
The District Court decision makes clear that to directly address stormwater discharges associated with impervious surfaces the RDA process is necessary. If CLF's argument is successful on appeal, it could set precedent for permitting requirements for those receiving waters that are impaired due to loadings from stormwater from impervious surfaces. Depending on the receiving water, this has the potential to benefit public utilities that discharge to those impaired waters as additional sources of pollutants would be required to obtain and comply with NPDES permit requirements. However, a wastewater utility may itself own or operate some of the impervious surface.

Next Steps:
The First Circuit is scheduled to hear oral argument on December 5, 2017.

[3] 2016 WL 7217628 at *9; 2016 U.S. Dist. LEXIS 172117 at *24-25.

[4] 2016 WL 7217628 at *9, n. 5; 2016 U.S. Dist. LEXIS 172117 at *25, n. 5.

Residual Designation Authority Litigation

Issues and Holdings:
On July 10, 2013, EPA Regions 1, 3, and 9 received petitions from environmental organizations seeking designation under EPA's stormwater regulations to require NPDES permits for currently unregulated stormwater discharges from commercial, industrial, and institutional sites that discharge non-*de minimis* amounts of certain pollutants to waters that are impaired by those pollutants. EPA Regions 3 and 9 responded to the petitions by declining to designate these stormwater discharges because the Regions did not have sufficient data available to link discharges from the sites to specific water quality impairments and there are existing programs underway to address these discharges. Region 1 neither granted nor denied the petition, but said it would evaluate specific watersheds to determine whether site-specific information will support such designations.

Environmental organizations followed up on those EPA responses with various actions. In EPA Region 1, the Conservation Law Foundation filed complaints in the federal district courts in Massachusetts and Rhode Island (see above) and on September 17, 2015, NRDC and American Rivers filed new RDA petitions in Regions 3 and 9. The new Region 3 and 9 petitions narrowed the geographic scope of the watersheds. The petitions attempt to address the rationale EPA used to deny the 2013 petitions. The petitions seek a determination that commercial, industrial, and institutional sites and facilities contribute to water quality standards violations and, thus, should be designated as sources that must obtain CWA stormwater permits. eNGOs want EPA to exercise its RDA.[1]

In evaluating the RDA petitions, the EPA Regions 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.

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

These are similar factors as those used by EPA as part of the 1999 Phase II stormwater rulemaking when it considered the designation of additional categories of stormwater sources.[2]

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." EPA Region 3 also denied the petitions and its underlying rationale is very similar to the related Region 9 denial of two similar RDA petitions in California. The primary difference between the EPA Region 3 and 9 denials is that EPA Region 3 took a harder position on the data, other available evidence, and its meaning in the context of water quality impairment. EPA Region 3 found that the data did not support using its RDA authority, whereas the EPA Region 9 denial relied exclusively on its discretion

The eNGOs challenged EPA's denials. The eNGOs filed complaints in federal district court.[3] The eNGOs also filed protective petitions in the Fourth and Ninth Circuits given the uncertainty associated with what court(s) the CWA action should be heard.[4] The Fourth Circuit stayed the petition pending a decision in the District of Maryland; the Ninth Circuit has not yet ruled on EPA's stay motion, but the proceedings have not moved forward.

On November 2, 2017, the Central District of California issued an order in *Los Angeles Waterkeeper* granting in part and denying in part EPA's motion to dismiss. 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 the eNGOs' 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."

Relevance to Public Utilities:
EPA is relying on its position that it has the discretion to decide what categories of stormwater discharges should be designated under the CWA. If the petitions had

[2] See 64 Fed. Reg. 68,722, 68,780 (Dec. 8, 1999).

[3] *Los Angeles Waterkeeper v. Pruitt*, No. 2:17-cv-03454-SVW-KS (C.D. Cal.); *Blue Water Baltimore, Inc. v. Pruitt*, 1:17-cv-01253-JFM (D. Md.).

[4] *Los Angeles Waterkeeper v. Pruitt*, No. 17-70570 (9th Cir.); *Blue Water Baltimore, Inc. v. Pruitt*, No. 17-1258 (4th Cir.).

been granted, the practical impact would be that stormwater from facilities that to-date haven't needed NPDES permits (i.e., non-industrial sites with certain amounts of imperious surface) would be subject to the requirements of the CWA, in particular, the imposition of flow-based design and/or performance standards.

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. In particular, the latest RDA petitions appear designed either to convince EPA to grant the petitions or to support any litigation associated with EPA denial(s). If granted, the RDA petitions 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), 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:
Los Angeles Waterkeeper will proceed on the eNGOs' APA claims and likely motions for summary judgment by the parties, unless the eNGOs seek an interlocutory appeal to the Ninth Circuit. A decision on EPA's motion to dismiss in *Blue Water Baltimore* is still pending before the District Court.

United States v. City of Colorado Springs, Case No. 1:16-cv-02745 (D. Co.)

Issues:

The Department of Justice (DOJ) and State of Colorado (CDPHE) filed a lawsuit against the City of Colorado Spring alleging violations of the Clean Water Act and Colorado Water Quality Control Act. Specifically Plaintiffs allege that the City failed to comply with the Terms and Condition of its discharge permit.

The City is subject to the Phase I MS4 (municipal separate storm sewer) regulations because it serves a population of 100,000 or more. Pursuant to its discharge permit the City is required to develop, implement and enforce a Stormwater Management Program (SMP). The complaint alleges that the City is in violation of its discharge permit because it is not operating in accordance with its SMP. According to DOJ and CDPHE, by failing to provide adequate resources to implement the SMP and other provisions of its discharge permit since at least 2009, and to properly operate and maintain facilities used to achieve compliance with permit conditions, the City has allowed discharges that are not in accordance with the SMP and other provisions of the Permit.

All of the issues essentially stem from the City of Colorado Springs' not having a dedicated revenue stream to deal with stormwater. Colorado Springs is one of many cities in the nation without a dedicated stormwater revenue stream.

Relevance to Public Utilities

This case will test the funding requirements for municipalities under the MS4 program and address the issue of what levels of compliance can be required of entities that lack funding sources.

Next Steps

The case is in the discovery phase at present. No motions are pending as of the date of this review. Colorado Springs is focusing on attempting to pass an ordinance that would establish a dedicated stormwater fee, proposed at $5/household. This fee will be used to address the City's deficiencies in implementing, overseeing and enforcing the City's MS4 program and would likely be proposed as part of a settlement of the suit.

Department of Finance v. Commission on State Mandates, 1 Cal.5th 749, 378 P.3d 356 (Cal. 2016)

Issues and Holding:

The California Constitution[1] requires the state to reimburse municipal governments for the cost to comply with programs mandated by State law. One important exception to this requirement is when the program is a "federal mandate" (*i.e.*, a requirement imposed by State law but that is also required by federal law). The Commission on State Mandates (Commission) is a quasi-judicial body in California that receives "test cases" from entities that believe there is a State unfunded mandate.

The CWA is a federal statute based on cooperative federalism. Congress encouraged states to assume the authority to implement the NPDES permitting program. California was the first state in the nation to obtain that authority from EPA and the "direct federal regulatory role largely ceases following EPA approval of a state program." In 1987, Congress amended the CWA, adding Section 402(p), which established a comprehensive program to address stormwater discharges. The CWA requires operators of MS4s — cities, counties and other public bodies — to obtain an NPDES permit to, among other things, "reduce the discharge of pollutants to the maximum extent practicable [(MEP)]." When EPA adopted regulations implementing the new CWA stormwater requirements, it did not define MEP or identify the specific action(s) an MS4 must take in order to achieve the MEP standard. Reflecting the strong preference of most utilities, EPA designed the MS4 application requirements to be "sufficiently flexible to allow the development of site-specific permit conditions" and recognized that "controls may be different in different permits."[2]

The Los Angeles Flood Control District and a number of other Los Angeles-area municipal entities filed a test claim alleging provisions of their 2001 MS4 NPDES permit were unfunded mandates. The Commission found the permit provisions were unfunded state mandates, relying on "the plain language of the federal statute [33 U.S.C. Section 402(p)(3)(B)] and regulations [40 C.F.R. Section 122.26(d)]," finding federal law does not *specifically* require the permit provisions at issue. On appeal, the lower courts overturned the Commission's decision and held the permit provisions were federal mandates under the CWA. The lower courts viewed CWA Section 402(p) and EPA's implementing regulations as establishing a flexible regulatory program that allowed the permitting authority the discretion to determine what permit conditions are necessary to meet the MEP standard.

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[1] Article XIII B, Section 6(a).

[2] 55 Fed. Reg. 47,990, 48,038 (Nov. 16, 1990).

The case was appealed to the California Supreme Court and, in a contentious 4-3 decision, the Court upheld the Commission's decision. The majority opinion framed the issue as:

> how to apply that [federal] exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard.[3]

In other words, "whether federal statutory, administrative, or case law imposed, or compelled the Regional Board to impose, the challenged requirements [in the permit]." The majority held that "[i]t is clear [that] federal law did not compel the Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its own permitting system rather than allowing the EPA do so under the CWA."[4] Instead, "the state chose to administer its own program, finding it was 'in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation' under state law." The Court goes on to say that "EPA's regulations gave the board discretion to determine which specific controls were necessary to meet that standard … [and] the State was not compelled by federal law to impose any particular requirement."

The dissenting opinion disagreed strongly with the majority's interpretation of the CWA, its relationship to state unfunded mandates law, and the implications for regulatory programs in California. The dissent argued that the majority's

> [i]nterpretation of the CWA failed to account for the complexities of the statute … [and the] implementation of the federal mandate requires the state agency—here, the Regional Board—to exercise technical judgments about the feasibility of alternative permitting conditions necessary to achieve compliance with the federal statute.[5]

The Dissent strongly objected to the standard that "[u]nless the requirement in question [in the permit] is referenced explicitly in a federal statutory or regulatory provision … the requirement cannot be a federal mandate." Practically, the dissent found:

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[3] 1 Cal.5th at 763; 378 P.3d at 366.

[4] 1 Cal.5th at 767; 378 P.3d at 369.

[5] 1 Cal.5th at 773; 378 P.3d at 373.

> …[the] overly narrow approach to determining what constitutes a federal mandate [a] risk[] [to] creating a standard that will never be met so long as the state retains any shred of discretion to implement a federal program. It cannot be that so long as a federal statute or regulation does not expressly require every permit term issued by a state agency, then the permit is a state, rather than a federal, mandate.[6]

Finally, the dissent found that:

> given the nature of the relevant CWA provisions—and particularly the maximum extent practicable standard—it is wrong to assume that the conditions [in the permit] at issue in this case exceed what is necessary to comply with the CWA simply because neither the statute nor its regulations explicitly mention those conditions. The consequence of that assumption, moreover, risks discouraging the state from assuming cooperative federalism responsibilities—and may even encourage the state to withdraw from administering the NPDES.[7]

Relevance to Public Utilities:
There are numerous potential implications of this decision, both in California and nationally. California may be limited in the future in what it can require in MS4 NPDES permits. Many MS4 NPDES permits in California have pending challenges on unfunded mandates grounds and those test cases are broader, covering the majority of the permit provisions. How those test cases are addressed will signal the impact of the decision.

Further, a large focus of MS4 NPDES permitting has been on compliance with water quality standards, as opposed to MEP.[8] For example, compliance with water quality standards was the central issue in the CWA citizen suit litigation associated with the same Los Angeles MS4 that reached the U.S. Supreme Court. However, according to the Ninth Circuit, the CWA does *not* require MS4s to comply with water quality standards. As a result, water quality-based effluent limitations in California-issued MS4 NPDES permits will likely be a focus of future test cases.

EPA Region 9 has already informed the State Board that, in light of this decision, EPA has concerns about California's ability to continue to implement the MS4 NPDES program. The State Board itself has echoed those concerns and, on September 13, 2016, filed a petition for rehearing of the decision to "avoid

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[6] 1 Cal.5th at 776; 378 P.3d at 375.

[7] 1 Cal.5th at 779; 378 P.3d at 377.

[8] *See* discussions of *Md. Department of the Environment v. Anacostia Riverkeeper* and *Center for Regulatory Reasonableness v. U.S. EPA, Conservation Law Foundation, Intervenors*, above.

unnecessary uncertainty and future litigation about the Court's intent, and to help preserve this important example of cooperative federalism."

The logic of the decision could be applied outside California where there are similar unfunded mandates laws. For example, in Hawaii, the state Constitution includes a provision that states "[i]f any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost." Likewise, in New Jersey, there are similar Constitutional and statutory provisions, with an exception for those requirements "which are required to comply with federal laws or rules." The related principle of "no more stringent than" could also utilize the logic of this decision. There are at least 28 states that have adopted state laws or policies that limit the authority of state environmental agencies to regulate the discharge of pollutants more stringently than would otherwise be required under existing federal law. This restriction is not limited to municipalities or cost allocation, but touches on the legal authority of the state to take a specific action (*e.g.*, issue an NPDES permit).

For both "unfunded mandates" and "no more stringent than" state law provisions, the critical issue is what does federal law "require," which necessitates interpreting the CWA or other federal environmental statutes and regulations. Any legal inquiry will be state- and statute-specific, but if other state courts adopt the majority's interpretation of what federal law "requires" — and the state has a "no more stringent than" or "unfunded mandates" provision — there could be implications for states' ability to include certain requirements in NPDES permits.

Next Steps:
On November 16, 2016, the California Supreme Court denied the State Water Board's petition for rehearing and the case is now final.

Center for Biological Diversity v. City of San Bernardino Municipal Water Department, San Bernardino County Superior Court Case No. CIVDS1706284 (Filed April 6, 2017)

Issues:
Two environmental groups brought this suit challenging a recycled water project proposed by the City of San Bernardino, California, alleging that the project will have "significant impacts on imperiled species" including the Santa Ana sucker. The planned project will utilize up to 22 million gallons per day of treated wastewater for groundwater replenishment to augment the local water supply. Plaintiffs allege that in the absence of the project, this water would continue to be discharged into the Santa Ana River, and that removing these flows would have significant adverse impacts on riparian ecosystems and special status species.

The case is brought not pursuant to the federal or state endangered species acts,[1] but under California's environmental review law, the California Environmental Quality Act. The petition claims the environmental impact report (EIR) prepared by the City is inadequate as it fails to disclose, analyze or mitigate the project impacts on special status species. The final EIR identified the selected project alternative as the "environmentally superior alternative," which includes the proposed use of groundwater pumped from existing wells at the treatment facility to keep the impact on river flows "less than significant."

Relevance to Public Utilities:
Though this case is brought under a California statute, it is an example of the trend in environmental litigation to use other laws and constitutional provisions (e.g. the public trust) to challenge recycled water and wastewater projects and permits outside the Clean Water Act. For instance, in four related cases, filed in September, the Los Angeles Waterkeeper is challenging the State and Regional Water Boards' renewal of permits for four major Los Angeles region wastewater treatments plants: Hyperion, Tillman, LA-Glendale, and Burbank. Waterkeeper contends that the Water Boards should have conducted a waste and unreasonable use analysis pursuant to Article X, Section 2 of the California Constitution to assess the potential to maximize water reclamation from these treatment plants.[2] Those cases are seeking to increase water

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[1] CBD did provide notice in 2016 of its intent to file a case under the federal Endangered Species Act related to alleged take of Santa Ana sucker through maintenance and emergency shutdowns of the City's current tertiary treatment and disinfection facility. (See CBD press release: https://www.biologicaldiversity.org/news/press_releases/2016/santa-ana-sucker-08-22-2016.html.) The parties are currently engaged in settlement discussions on this matter as well.

[2] *Los Angeles Waterkeeper v. State Water Resources Control Board*, Los Angeles County Superior Court Case Nos. BS171009, BS171010, BS171011, BS171012.

recycling, where this case seeks to prevent water recycling and essentially require that all treated wastewater from a public utility continue to be discharged into surface water.

CEQA is largely procedural, requiring disclosure to the public the significant environmental effects of a proposed discretionary project. The burden to comply with CEQA rests with the approving agency—the city, county, or special district. CEQA does not require a particular decision or outcome. There is continuing controversy over this signature environmental law, which was enacted as a way to inform and empower the public by requiring developers to disclose the environmental effects of their projects in detailed reports and to mitigate any harm they may cause. Unfortunately, despite spending hundreds of thousands of dollars on consultants and lawyers, it is virtually impossible to prepare a "bullet proof" EIR. This complex body of law is increasingly becoming another tool in the arsenal of environmental laws that plaintiffs draw on when seeking substantive relief.

Next Steps:
The case is currently stayed while the parties engage in settlement discussions. If settlement discussions break down, briefing on the merits is expected sometime in spring 2018.

Deschutes River Alliance v. Portland General Elec. Co., 249 F. Supp. 3d 1182 (D. Or. 2017)

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.

Denying the motion to dismiss, the District Court held that the CWA citizen suit provision allows third parties to challenge compliance with conditions contained in a state CWA section 401 water quality certification.

In reaching its decision, the Court examined a Ninth Circuit decision holding that the CWA allows third parties, though citizen suits, to enforce the need to obtain a 401 certification before issuance of a federal permit.[1] The Court reasoned that the "failure to follow a certificate is no less a violation than a failure to obtain a certificate in the first place." Thus, the Court concluded that reading the CWA to allow third parties to use the CWA citizen suit provision to enforce conditions of 401 certifications "is the only construction that is consistent with the text of the statute and the purpose and policy of the CWA, while also upholding the state's authority to enforce its own water quality standards."

The Court noted that EPA may not enforce conditions of 401 certifications. While not addressed in the decision, it is implied that EPA could enforce conditions in 401 certifications when the certification is to an EPA-issued federal NPDES permit.

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

[1] *See Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998).

401, on any federal license or permit may be enforced through a citizen suit. The practical impact of this decision is an additional avenue for third party enforcement.

Next Steps:
On April 6, 2017, PGE filed a motion for certification with the District Court, seeking to file an interlocutory appeal to the Ninth Circuit. Plaintiff has opposed PGE's motion. The District Court certified the issue and a decision from the Ninth Circuit on whether to accept the appeal is currently pending. The District Court has scheduled a settlement conference for November 17, 2017.

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

Issues:
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.

Relevance to Public Utilities:
This case will test whether the labeling laws for wipes, which are critical to keeping these highly destructive materials out of the sanitary wastewater system, are 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:
Kimberly-Clark has filed a motion for preliminary injunction to try to stop the implementation of the NDPA while the merits of the case are being resolved. The arguments on the motion for preliminary injunction are scheduled for late 2017.

[1] D.C. Law 21-220, §§ 2(1), 3.

Northwest Environmental Advocates (NWEA) v. U.S. Department of Commerce, No. C16-1866-JCC, 2017 U.S. Dist. LEXIS 152273, 2017 WL 4168251 (W.D. Wash. Sep. 19, 2017)

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.

Relevance to Public Utilities:

Ultimately, this case may put more teeth into nonpoint source programs under CZRA, but in the near term, it threatens to deprive States of federal funding absent official EPA and NOAA approval of their programs. In many states, such funding is one of the few tools available to address nonpoint source pollution.

Next Steps:

Having survived the motion to dismiss stage of the case on most of its claims, NWEA is now proceeding toward to merits.

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 state 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

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[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 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.

Next Steps:

The motions to dismiss were denied in February. Plaintiffs filed an amended complaint and Defendants have answered. Trial is set for March of 2019.

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