

2020 Cases of Interest to the Clean Water Community

Scope of Clean Water Act NPDES Program –

- *County of Maui v. Hawaii Wildlife Fund*, U.S. Supreme Court, 18-260 – articulated new “functional equivalence” test to determine whether discharges originating from a point source reaching navigable waters indirectly require coverage under the NPDES program. Case now back at the Hawaii District Court for application of Supreme Court test.
 - 4th Circuit *Upstate Forever v. Kinder Morgan* – case involving pipeline spill reaching nearby navigable waters settled for \$1.5 million in Oct. 2020
 - 7th Circuit *Prairie Rivers Network v. Dynegy Midwest Generation* – Appellate Case No. 18-3644 – litigation involving seepage from coal ash impoundment into navigable waters, oral argument heard in Nov. 2020, whether *Maui* test applies only where there is a “regulatory gap” is a question at issue
 - EDNY *Peconic Baykeeper v. Harvey*, No. 13-cv-06261 – application of *Maui* test to alleged nitrogen discharges from large septic systems reaching Long Island Sound in briefing stage
 - D. Ma. *CLF v. Longwood Venues*, No. 18-11821-WGY – case involving discharges from sewage disposal system at Cape Cod resort reaching local waterways settled in May 2020

Scope of Clean Water Act Jurisdiction (WOTUS) –

- *California et al. v. Andrew Wheeler*, 3:20-cv-03005, U.S. Dist. Ct. Northern Dist. of CA – preliminary injunction against Navigable Waters Protection Rule denied 6/19/20. On Feb. 17, 2021, the court granted a motion made by the Biden administration to stay the proceedings for 60 days to allow for EPA to review the rule.
- *State of Colorado v. EPA et. al.*, 1:20-cv-01461, U.S. Dist. Ct. Dist. of CO – preliminary injunction against Navigable Waters Protection Rule granted 6/19/20. That injunction was overturned on March 2, 2021 by the U.S. Court of Appeals for the Tenth Circuit – Appellate Case No. 20-1238 – which found that CO had failed to show the requisite irreparable injury to support a preliminary injunction. In light of that decision, the Navigable Waters Protection Rule is now in place throughout the country, though it continues to be subject to legal challenges in multiple districts, and to review by EPA.

Scope of EPA Authority (Post-LTCP) –

- *City and County of San Francisco v. EPA*, Docket No. 21-70282, Ninth Circuit Court of Appeals – challenge to San Francisco’s NPDES permit which, among other things, requires updates to San Francisco’s Long Term Control Plan which has been approved and implemented.

Climate –

- *Conservation Law Foundation v. Shell*, No. 17-00396 (D. R.I.) – CWA and RCRA claims brought against oil company for failure to adapt terminal to prepare for incremental effects of climate change, including that the company failed to address impacts such as sea level rise, increased precipitation, and increased severity and frequency of storm events in its Storm Water Pollution Prevention Plan (SWPPP) for its bulk storage and fuel terminal situated on the banks of the Providence River. Motion to dismiss most claims denied in Sept. 2020 – case proceeding.
- *Conservative Law Foundation v. ExxonMobil*, No. 1:16-11950 (D. Ma.) - Citizen suit alleging violations of RCRA and CWA for failure to take action to prepare marine terminal for climate change. In March 2020 a Massachusetts federal judge put the suit on hold, deciding that the U.S. Environmental Protection Agency should be given time to act on a related permit. CLF appealed that decision to the First Circuit – oral argument set for Dec. 7, 2020.

Agency Deference –

- *Dept. of Homeland Security v. Regents of Univ. of California*, 140 S. Ct. 1891 (2020) – Agency was required to assess the existence and strength of any reliance interests and weigh them against competing policy concerns in DACA decision. Failure to do so was arbitrary and capricious.
- *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) – in the context of litigation over a Department of Veterans Affairs rule concerning the availability of retroactive benefits, the Supreme Court affirmed the narrowness of *Auer* deference (that is, deference to an agency’s interpretation of its own rules), finding that deference is appropriate only when the rule is “genuinely ambiguous.”

Wastewater as a Resource –

- *Los Angeles WaterKeeper v. State Water Resources Control Board* (CA 2nd District Court of Appeal, Case No. B309151.) Superior Court determined State Water Resources Control Board had a mandatory duty under the state constitution to analyze whether it is “wasteful” and “unreasonable” to discharge treated wastewater instead of recycling it for beneficial use. Cross appeals have been filed.

PFAS Litigation

- *Orange County Water District, et al. v. 3M Company, et al.*, Orange County (CA) Case No. 30-2020-01172499-CU-PL-CXC (Filed December 1, 2020). Water districts and cities sued 3M, Dupont and other manufacturers alleging the companies are responsible for water contamination from PFAS in the region’s groundwater and water systems.
- *Pennsylvania-American Water Co. v. 3M Company et. al.*, Cumberland County (PA) Case No. 1:21-cv-00258-JPW (Filed Feb. 11, 2021). Pennsylvania water district providing drinking water to approximately 2.4 million people sued 3M, Dupont, and other manufacturers of PFAS for damages, contribution, abatement, and/or reimbursement of costs incurred to address and remediate the presence of PFAS in its water supplies.

- Note that previous state lawsuits brought against PFAS manufacturers in recent years have resulted in multi-million-dollar settlements, including an \$850 million MN and \$4 million AL settlement in 2018, \$35 million AL and \$2.7 million MN settlement in 2019, and two MI settlements for \$55 million and \$113 million respectively in 2020.

Nationwide Permit 12 –

- *Northern Plains Resource Council et. al. v. U.S. Army Corps of Engineers*, U.S. Dist. Ct. Dist. of Montana, 4:19-cv-00044-BMM (5/11/20), now on appeal to U.S. Court of Appeals for the Ninth Cir. (20-35412) – Judge Morris vacated NWP 12, which covers linear projects including water infrastructure development and maintenance, for failure to comply with the ESA, then limited his decision to vacating use of NWP 12 for new oil and gas pipelines. U.S. Supreme Court stayed the decision pending the 9th Circuit’s review except for the Keystone XL pipeline. Briefing at the 9th Circuit is ongoing.

Pretreatment –

- *City of Cabool, Missouri v. Dairy Farmers of America*, No. 6:20-cv-03003 (W.D. Mo.) - City of Cabool brought suit against dairy farmers under CWA citizen suit provision for alleged unlawful discharges related to untreated or inadequately pretreated wastewater from treatment plant run by dairy farmers into city’s wastewater system. Case settled in Nov. 2020

Stormwater –

- *County of Commissioners of Carroll County, MD v. MD Dept. of the Environment*, No. 19-592 – Sup. Ct. denied cert Mar. 2020 on issue of whether NPDES permit that made County responsible for nonpoint source runoff and other third-party stormwater discharges that neither flow into nor discharge from the County’s MS4 permissible under CWA.

Statutory Exclusions/Burden of Proof –

- *Pacific Coast Federation of Fishermen's Association v. Glaser*, No. 17-17130 (9th Cir 2019) – Ninth Circuit held in part that burden of demonstrating eligibility for statutory permit exemption found at 33 USC 1342(l)(1) was on defendants, not plaintiffs.

TMDL Constructive Submission –

- *Columbia Riverkeeper v. Wheeler*, No. 18-35982 (9th Cir 2019) – Ninth Circuit held that constructive submission will be found where a state has failed over a long period to submit a TMDL and clearly and unambiguously decided not to submit any TMDL. Because Washington and Oregon failed to develop and issue a TMDL for a prolonged period and failed to develop a schedule or credible plan for producing it, there has been a constructive submission of no TMDL which triggers EPA’s mandatory duty to act.