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GROUNDWATER & THE CLEAN WATER ACT

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The Supreme Court Considers *County of Maui v. Hawai'i Wildlife Fund*

by Kathy Robb, Sive, Paget & Riesel (Washington, DC)

Introduction

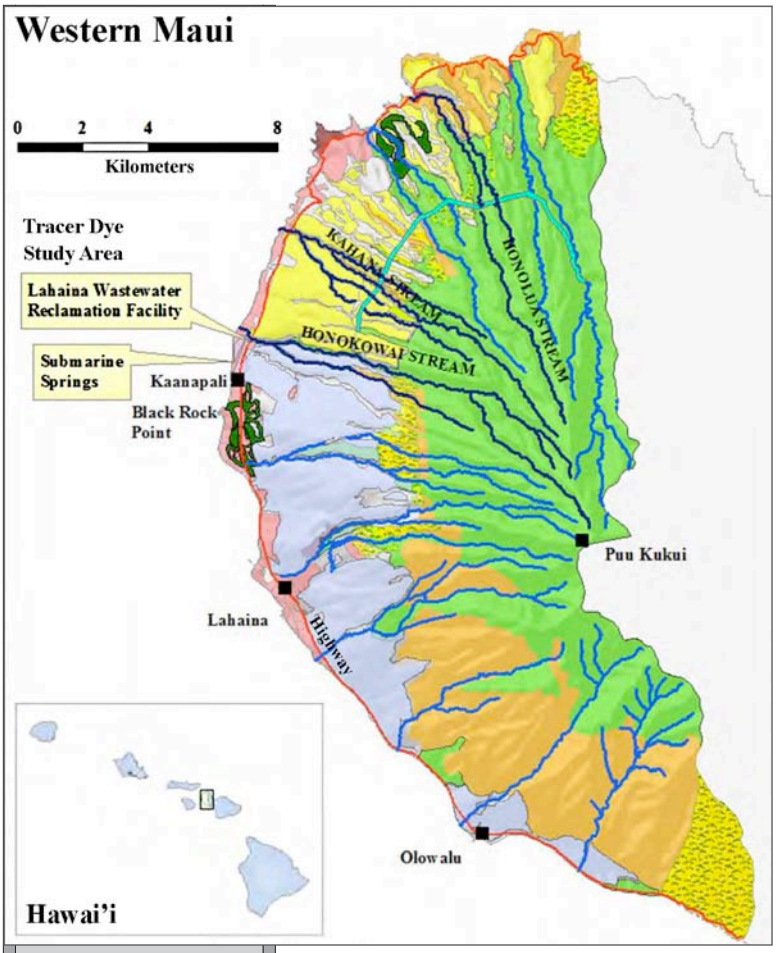
The federal Clean Water Act (CWA or Act) requires a permit for "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362 (12) (A). On November 6, 2019, the US Supreme Court (Supreme Court) heard oral argument in *County of Maui v. Hawai'i Wildlife Fund,* No. 18-260. The question before the Supreme Court is whether the CWA requires a permit for a discharge of a pollutant that is released from a point source to groundwater, travels through groundwater, and ultimately reaches navigable waters (defined as "waters of the United States").

Based on the oral argument, it appears that the answer may turn on what the Court determines the word "from" to mean in the statute. Does "from" mean directly from a point source to navigable waters? Or does it mean that the pollutant must originate at a point source but migrates to navigable waters through groundwater? If "from" means a direct discharge from the point source to navigable waters, no permit is required and the County wins. If "from" means the discharge originates at a point source and is subsequently delivered to navigable waters by groundwater, a permit is required and the plaintiff environmental groups win.

Background

Whether the CWA requires a permit for releases from a point source to groundwater that eventually makes its way to navigable waters has been debated for decades, with differing results. The federal circuit courts are split on the issue. The US Environmental Protection Agency (EPA) reversed its position mid-case in *County of Maui*, arguing in the lower courts that those groundwater discharges may require a permit if there is a "direct hydrological connection" between the point source and navigable waters — and then arguing before the Supreme Court that all releases to groundwater are excluded from the CWA permitting program, even where pollutants are conveyed to jurisdictional waters (navigable water, or "waters of the United States"). 84 Fed. Reg. at 16,814. The outcome in *County of Maui* will impact the interpretation of the Clean Water Act and its National Pollution Discharge Elimination System (NPDES) permit program for potentially millions, arguably including homeowners with septic tanks, making *County of Maui* the most significant CWA case to come before the Court in some time.

In *County of Maui*, the County injected three to five million gallons of recycled, treated wastewater daily for years into four injection wells located a half-mile inland from the Pacific Ocean, without an NPDES permit. The injection wells, installed in the 1980s, are long pipes that carry effluent about 200 feet underground into a shallow groundwater aquifer. The wastewater makes its way through groundwater, which is not regulated



generally under the Clean Water Act, to the Pacific Ocean, a "water of the United States" under the Act. A tracer dye study showed that dye was visible in the ocean 84 days after it was injected into the wells. Hawai'i Wildlife Fund argued that the County's effluent injections are discharges from a point source (the wells) through groundwater to navigable water without an NPDES permit, causing damage to water reefs and violating the CWA. The County argued that the discharge from the wells, a point source, to groundwater that subsequently makes its way to the ocean, is not a discharge from a point source regulated under the Act and therefore no NPDES permit is required.

The Ninth Circuit held that the indirect discharge through groundwater to the Pacific is subject to regulation under the CWA and requires an NPDES permit. *Hawai'i Wildlife Fund et al v. County of Maui,* 886 F.3d 737 (9TH Cir. 2018). They found that there was a "fairly traceable" connection established through the tracer dye studies, showing "the functional equivalent of a discharge into navigable waters" by the County. *Id*. at 748. In doing so, the Ninth Circuit considered "for its persuasive value" language from the late Justice Scalia's plurality opinion in *United States v. Rapanos*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed2d (2006), that the CWA does not prohibit the "'addition of any pollutant *directly* into navigable waters from any point source' but rather the 'addition of any pollutant *to* navigable waters.'" *Rapanos* at 723 (emphasis in original); 886 F.3d at 748. Thus, the Ninth Circuit rejected the County's argument that a point source must discharge directly into navigable waters to trigger permitting requirements under the CWA, holding instead that it is enough for the discharge to come *from* a point source (here, the wells.)

The Ninth Circuit "assumed without deciding" that the groundwater here was not a point source or navigable water under the CWA. (The district court had determined that groundwater was both). 886 F.3d 746, fn.2. For a fuller discussion of the lower court decisions, circuit splits, legislative history, and background on indirect discharges and the CWA, see "Groundwater & the Clean Water Act: Murky Waters — Are Indirect Discharges to Groundwater Regulated Under the Clean Water Act? *Hawai'i Wildlife Fund, et al v. County of Maui*", Kathy Robb & Christine Leas, *TWR* #170 (4/15/18), and its update, Water Briefs, *TWR* #186 (8/15/19).

Settlement Confusion

Rumors abounded last summer that the case was headed toward settlement, with some supporters of settlement saying the County wanted the discharges addressed and settlement was the way forward, and skeptics noting that the change in the makeup of the Supreme Court suggested a reversal was in store. Until just a few days before the November 6 argument, it was unclear whether it would go forward. In September, a Maui Council Committee agreed to settle the case, followed by a 5-4 vote by the full Council in support of the settlement. At the Council meeting, Corporation Counsel officials opined that under the County Charter, it is up to the Mayor to decide whether to settle, not the Council. The party named as defendant in the suit is "the County," which under municipal law means the Council and the Mayor and requires agreement by both for settlement.

Earthjustice, one of the plaintiffs that originally filed the complaint, wrote to the Supreme Court on October 3 to notify the court that the settlement had been adopted by the Council, and that the Council chair had directed the County's Corporation Counsel to file papers resolving the case. Earthjustice noted in the letter that Corporation Counsel had raised questions about whether the Council had authority to do so. Counsel of record for the County responded with a letter the next day stating that the case had not settled because the Mayor had not agreed to settlement. On October 9, the chair of the Council also wrote to the Court, taking the position that the Council had authority under the County Charter to settle the case, and requesting the Court to dismiss the case or postpone the oral argument at a minimum. On October 10, counsel of record for the County wrote again to the Court, attaching a letter from Corporation Counsel that offered "sincerest apologies" for the letter from the Council chair, and stating that Corporation Counsel, as the chief legal officer, represents the County in all legal proceedings and was not requesting delay or dismissal.

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Groundwater Regulation

Unanswered Issues

Maui Mayor Michael Victorino declined to accept the settlement, stating publicly on October 19, 2019 that he wanted taxpayers to obtain clarity from the Supreme Court. He said, "to allow this to go unanswered leaves us vulnerable to more lawsuits, to uncertain regulatory requirements and staggering costs — all for what would be a negligible environmental benefit. The legal exposure is immense, not only for the County but for private property owners as well. It goes far beyond injection wells. The Ninth Circuit's decision means that many County facilities — including Parks, Public Works, Environmental Management — are likely in violation of the federal law as it's interpreted by this court. Penalties can be imposed of nearly $55,000 per day per source. The effect on property values, and the associated property taxes which fund the majority of County operations, cannot be ignored."

A lawsuit was subsequently filed in state court and is pending, seeking to clarify the authority of the Mayor and the Council. Legislation also has been introduced to amend the County Charter to address duties of special counsel. The oral argument before the Supreme Court went forward as scheduled on November 6. (Of course, the County still could settle and withdraw the case before the decision is out, expected in June).

Oral Argument

All parties in the case agree that the wells are a point source, and the groundwater is not. The two sides disagree about whether the discharges are harming a nearby coral reef.

"From"

Meaning of "From"

At oral argument, the justices noted that both sides had strong arguments about the meaning of "from." November 6 Transcript at 17 (Nov. 6 Tr. at 17). The justices are grappling with identifying a "limiting factor" that would help them interpret "from" in the statute.

Direct Discharge

Counsel for the County Elbert Lin urged the court to require a permit only when pollutants are conveyed *directly* from a point source to navigable waters. The County argues that the releases from Maui's underground injection wells are already regulated under several existing federal and state programs, including the CWA's non-point source program. "The question is where the line falls between the CWA's federal point source program and its state law non-point source program. And the answer is in the text. The text defines a point source as a discernable, confined and discrete conveyance, and it thereby makes clear that the trigger point for point source permitting is not where a pollutant comes from but how it reaches navigable waters." Nov. 6 Tr. At 3.

Non-Point Source

When asked by the justices to provide "limiting factors" to determine the meaning of "from," Lin pointed to statutory context as the means to determine interpretation, and emphasized the separate point source and non-point source regulatory framework of the CWA. Nov. 6 Tr. 18-19. He argued that requiring a permit for groundwater delivery from a point source would eliminate any "meaningful role for the non-point source program." He also pointed to a need for regulatory certainty in advance about who must apply for a permit — which, he noted, the "after-the-fact" application of tracer dye studies cannot provide — and the steep penalties (up to $55,000 a day per source) that could apply under the CWA for failure to obtain a permit, not only for corporate entities and municipalities but also for "ordinary lay people."

Other Statutory Regulation

US Deputy Solicitor General Malcolm Stewart urged the Court to adopt the position of the April 23, 2019, "*Interpretive Statement on Application of the Clean Water Act National Pollution Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater.*" 84. Fed. Reg 16,810, which states that the CWA does not require permits for pollutants released to groundwater and subsequently making their way to navigable waters. In its amicus brief (supporting the County of Maui), the federal government argued that while the CWA permitting regime excludes groundwater, several other federal statutes address protection of groundwater, including the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA). In addition, many states have groundwater regulation.

Whiskey Analogy

At oral argument, Mr. Stewart offered an analogy to illustrate the government's position on the meaning of "from," noting that it wasn't so simple:

> "And, for example, if at my home I pour whiskey form a bottle into a flask and then I bring the flask to a party at a different location and I pour whiskey into the punch bowl there, nobody would say that I had added whiskey to the punch from the bottle. It would be true that the punch -- that the whiskey originated in the bottle, its route was fairly traceable from the bottle to the punch bowl, and it wound up in the punch bowl, but you wouldn't say it was added to the punch from the bottle."

Nov. 6 Tr. at 22.

Fairly Traceable

He further said "…the fairly traceable test that the Ninth Circuit adopted just can't be right. It would… encompass situations where I poured the whiskey from the bottle into the flask. Nobody would treat that as an addition of the whiskey to the punch from the bottle." Nov. 6 Tr. at 23.

Groundwater Regulation

Chevron Deference

Whiskey & Groceries

Septic Tanks

Middle Ground?

Road Map for Evasion

Causal Chain

Preventative Permitting

Small Sources

Agency Deference

Interestingly, the government did not suggest in its amicus brief or at oral argument that EPA's Interpretive Statement was entitled to *Chevron* deference. There has been much discussion of late about whether the Court will weaken or abandon *Chevron* deference, in light of a case that was decided earlier this year, *Kisor v. Wilkie*, 588 U.S. __ (2019). *Kisor* involved *Auer* deference — deference to an agency's reasonable interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997). The *Chevron* doctrine is a two-part test applied to determine when and whether a court gives deference to an agency's interpretation of the construction of a statute. *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). If the intent of Congress is clear, the court and the agency must give effect to the unambiguous intent of Congress. If the court determines that Congress has not directly addressed the precise issue at hand, and the statute is silent or ambiguous on the issue, the question for the court is whether the agency's answer is a permissible construction of the statue. In the Ninth Circuit, the government had urged the court to defer to EPA's prior articulation of scope of the CWA, "direct hydrological connection," as applied to groundwater.

Directly From a Point Source: Limiting Principles

Counsel for the environmental groups, David Henkin, urged a permit requirement, arguing that "from" meant from a point source, not "directly from" a point source. He distinguished the situation at Maui from Mr. Stewart's whiskey analogy: "…Congress was trying to prohibit whiskey in punch. So if all of a sudden you tasted the punch and you said this tastes like whiskey, you'd say, where does that come from?…you'd say it came from the whiskey bottle. That's how we know it's whiskey. And, here, we know we have whiskey, whiskey in the form of a injection well that is discharging 3 to 5 million gallons per day into the ocean." Nov. 6 Tr. at 64-65. He also offered an analogy earlier in his presentation: "When you buy groceries, you say they came from the store, not from your car, even though that is the last place they were before they entered the house." Nov. 6 Tr. at 33.

When asked for limiting principles to avoid requiring many small sources to obtain a permit, Mr. Henkin offered traceability and proximate cause. Nov. 6 Tr. at 35. The environmental groups argue that science allows well-defined traceability, so that the number of permits required would not be extraordinary if permits were required for point-source-to-groundwater-to navigable-water discharges, and suggested that the concept of proximate cause would also limit the situations where permits would be required. Mr. Henkin minimized the possibility of sweeping ordinary Americans into liability for items like leaking septic tanks, stating that it would be difficult to say the pollution was traceable to any one septic tank. Chief Justice Roberts responded: "So all you have to do is get a bunch of neighbors and all put the septic tanks in, and then you're scott-free?" Nov. 6 Tr. at 53. But Justice Kagan agreed, saying that if 20 different people could be responsible, you couldn't hold anyone in particular responsible. Nov. 6 Tr. at 54. This prompted Chief Justice Roberts to joke that "it's an Agatha Christie novel. You have 20 people and they shoot the gun at the guy at the same time." Nov. 6 Tr. at 54-55.

The justices were clearly interested in finding a middle ground that would protect water but not overwhelm the permitting program or small sources, expressing concern about the potential for polluters to evade regulation if the County's and government's reading of the CWA were adopted. Nov. 6 Tr. at 9. Justice Steven Breyer expressed concern that requiring a permit only when there is a discharge directly from a point source to navigable waters, as the County urges, offers "an absolute road map for people who want to avoid the point source regulation" — "All we do is we just cut off…the pipes or whatever, five feet from the ocean or five feet from the navigable stream… ." Nov. 6 Tr. at 9. Picking up on the Ninth Circuit's language, Justice Breyer suggested a test of whether a discharge was "the functional equivalent of a direct discharge" acknowledging that the term would need definition. Nov. 6 Tr. at 32.

Groundwater Breaking the Causal Chain

The Supreme Court turned its attention to the treatment of the groundwater, specifically EPA's conclusion that "groundwater in particular will break the causal chain so that it will no long be an addition from the point source to the navigable water… ." Nov. 6 Tr. at 23-24. Chief Justice John Roberts asked whether under the County's and government's argument, "any little bit of groundwater [between a point source and navigable waters] is enough to break the chain?" Even "two inches", would break the causal chain and eliminate the requirement for a permit? Nov. 6 Tr. at 24. Deputy Solicitor Stewart attempted to draw a distinction between discharging to groundwater versus discharging pollutants onto the land. Justice Elena Kagan commented that, "[Y]ou've just provided a roadmap. You know, put your pipe underground." Nov. 6 Tr. at 25-26. Justice Sotomayor distinguished the other statutes governing groundwater as "after the fact," and not preventive as a permit would be. "This statute [CWA NPDES permit] is preventative. We want to avoid having to clean it up. That's why we give a permit." Nov. 6 Tr. at 27.

The justices expressed concern for the environmental groups' interpretation of the statute as well, and asked whether it would require thousands of small sources to obtain permits. Justice Samuel Alito postulated that "the ordinary family out in the country that has a septic tank" and "not a lot of money" resulting in a cheap and shoddy installer and an unpermitted leaking tank in violation of the environmental groups' reading of the statute. Nov. 6 Tr. at 40-41. Justices Robert, Breyer, Kavanaugh, and Gorsuch expressed similar concerns. Chief Justice Roberts dismissed traceability and proximate cause as effective liming factors, because traceability is a "technological issue" and not a "significant limitation" for a permit

Groundwater Regulation

Proximate Cause

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Second Groundwater Case

requirement, and proximate cause is "notoriously manipulable." Nov. 6 Tr. at 35-36. He also wondered what Justice Breyer's suggested "functional equivalent" test would mean. Nov. 6 Tr. at 48-51.

As to proximate cause, Justice Gorsuch pointed out that "water runs downhill, and gravity tends to work its wonders with water" so that it is "foreseeable" that pollution from a septic tank will "wind up in waters of the United States." Nov. 6 Tr. at 43. Justice Kavanaugh asked "why are the states inadequate to do this [regulating this substantial source of pollution], and are they inadequately regulating in substantial numbers of states in your view?" Nov. 6 Tr. at 68.

Conclusion

A decision for the County could limit citizens' suits challenging certain CWA violations. A decision for the environmental groups could require permits for discharges from water supply, sanitation, and flood control services, among others. The decision could have far-reaching effects. Regulators in Alaska are awaiting the decision before determining whether to go forward on a mine exploration permit for a project that could result in groundwater discharges into rivers where salmon spawn. [Editor's Note: *see* Moon article, this *TWR* issue].

The case has also raised issues about the cooperative federalism that is the basis of the CWA. Among the 30 amicus briefs filed, 20 state attorneys general and two governors joined in a brief supporting the County's position, asserting that the Ninth Circuit's decision drastically expands CWA jurisdiction and would place a huge additional burden on states, most of which administer the NPDES permitting program. "All told, the Ninth Circuit's ["fairly traceable"] standard threatens to drown state environmental protection agencies in a myriad of new technologically challenging NPDES permits from a novel source of federal liability and leech away scarce [state] resources from other [state] programs better equipped to address groundwater pollution." Brief of Amici Curiae State of West Virginia, 17 Other States, and the Governors of Kentucky and Mississippi in Support of Petitioner County of Maui, Case No. 18-260, at 23. The states argue in the brief that the decision "infringes upon the sovereign prerogative of the States to manage their water resources — especially those, like groundwater, that often lie wholly *intrastate*." (emphasis in original.) *Id*. at 2.

A second groundwater case is now pending on a petition for certiorari before the Supreme Court, on appeal from the Fourth Circuit: *Upstate Forever v. Kinder Morgan Energy Partners, L.P*., 887 F.3d 637 (4th Cir. 2018); petition for certiorari pending, Case No. 18-268. In that case, the Fourth Circuit held that a petroleum pipeline spill resulting in a discharge of pollutants reaching navigable water through groundwater is regulated under the CWA. In 2014, a pipeline ruptured, spilling hundreds of thousands of gallons of gasoline in South Carolina. The rupture was repaired and much of the gasoline was recovered, but allegedly 160,000 gallons remain unrecovered. The district court had dismissed the case because the plaintiffs "failed to allege any facts to support the position that the pipeline discharged petroleum directly into navigable waters." *Kinder Morgan*, 887 F.3d at 649-651. The district court held that the migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA. The Fourth Circuit reversed and remanded, finding that an ongoing violation was established because the spilled gasoline was continuing to seep into navigable waters, that the discharge need not be directly from a point source, and that a "direct hydrological connection" to surface waters had been established. Kinder Morgan filed an amicus brief in the Maui case supporting the County's position that no permit is required.

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Oral Argument Transcript at:
www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-260_m6hn.pdf

Kathy Robb, Principal at Sive Paget & Riesel, PC (New York, NY), has a practice focusing on environmental litigation before federal district and appellate courts across the country and in the US Supreme Court. She also counsels on environmental issues in complex transactions from the bid process through closing, advising clients on corporate structuring to best manage environmental risk. Kathy represents water districts, developers, investors, lenders, energy companies, industrial and paper companies, and chemical manufacturers on water-related disputes, endangered species issues, environmental impact reviews, river sites with contaminated sediments, solid and hazardous waste issues, and sites with contaminated groundwater. Kathy has represented companies in many of the large Superfund sites across the United States, in CERCLA investigations, cleanups, and litigation. She has represented water districts in litigation about the Colorado River in the All-American Canal lining and Glen Canyon Dam cases; about the Rio Grande in the silvery minnow case; and about the Guadalupe and San Antonio Rivers in the whooping crane case. Those cases involved claims under NEPA, the Clean Water Act, the ESA, the Migratory Bird Treaty Act, and the Grand Canyon Protection Act, among other statutes and common law claims. She also advised energy companies on the CWA's implications when permitting cooling water intake structures, and litigated the licensing of a nuclear power plant. Kathy serves as an adjunct professor at the Elizabeth Haub School of Law at Pace University and is the president of the Leadership Council of the Environmental Law Institute in Washington, DC. She is a member of the American College of Environmental Lawyers.

Fish Consumption Rules

Letter to EPA

Cooperative Federalism

State Standards

State Review

Tribal Authority

Rate Per Day

WASHINGTON STATE FISH CONSUMPTION RULES

EPA "RECONSIDERS" 2016 STATE WATER QUALITY RULE ADOPTION

by Heather Bartlett, Water Quality Program Manager
Washington State Department of Ecology (Olympia, WA)

Introduction

Human health criteria — often referred to as "fish consumption rules" — are surface water quality standards for toxic pollutants. Their purpose is to protect people who consume fish and shellfish from local waters and drink untreated local water.

On May 7, 2019, Washington State Department of Ecology (Ecology) Director Bellon sent a letter to the US Environmental Protection Agency (EPA) expressing "significant concern" over EPA's intention to "reconsider" Washington's human health criteria. The Director noted that the standards had been in effect for nearly two and a half years and that "changing course now would only create regulatory uncertainty and confusion." The Director further noted that EPA had no legal basis to unilaterally amend the standards, and she expressed disappointment with EPA for failing to consult with the State or with any of Washington's 29 federally recognized tribes.

Adoption of Water Quality Standards Under the Federal Clean Water Act

The core objective of the 1972 federal Clean Water Act (CWA) is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end, the CWA announces several lofty goals including "that the discharge of pollutants into the navigable waters be eliminated by 1985" and that "the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(1), (3). The CWA seeks to accomplish these goals through a system of cooperative federalism whereby Congress has recognized "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

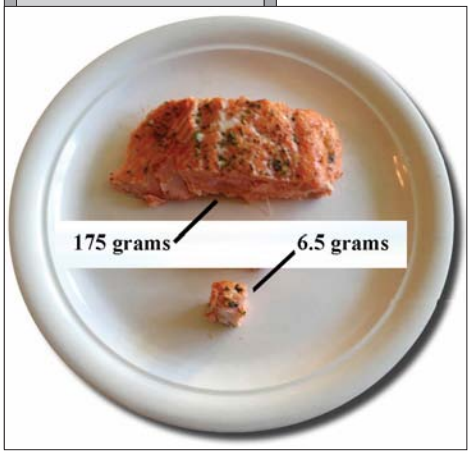
Under this system of cooperative federalism, each state develops water quality standards that apply to surface waters within state jurisdiction. States submit their standards to EPA. EPA then reviews the standards for compliance with the CWA. 33 U.S.C. § 1313(c). EPA will approve the state-submitted standards if EPA concludes that the standards comply. 33 U.S.C. § 1313(c)(3). If EPA concludes that the standards do not comply, EPA is required to promulgate its own water quality standards for the state. 33 U.S.C. § 1313(c)(4)(A).

States are required to review their water quality standards at least once every three years and, as appropriate, revise the standards to remain in compliance with the CWA. 33 U.S.C. § 1313(c)(1). Any revised standards must be submitted to EPA for review and approval. 33 U.S.C. § 1313(c)(2)(A) and (c)(3).

The Act also authorizes Indian tribes to assume delegated authority from EPA to implement certain water quality programs, including promulgation and implementation of water quality standards within reservation boundaries. 33 U.S.C. § 1377(e). Ten Washington tribes currently have authority to promulgate water quality standards under this provision.

Overview of Fish Consumption Rules in Washington

Human health criteria are based on two types of biological endpoints: 1) carcinogenicity; and 2) systemic toxicity (i.e., all adverse human health effects other than cancer). The standards are calculated separately for each of the 192 pollutants represented within the criteria using various inputs.



A key input is the fish consumption rate, which estimates the average amount of fish members of a defined population eat per day. Other inputs for carcinogenic effects include: a cancer risk level; a cancer slope factor; human body weight; a daily drinking water intake rate; and a bioaccumulation factor (how much of the contaminant stays within the body once consumed). Inputs for non-carcinogenic effects include a relative source contribution factor and a reference dose.

Prior to the adoption of new human health criteria in 2016, Washington's human health criteria were established by the 1992 National Toxics Rule promulgated by EPA. The National Toxics Rule was based on a 10^{-6} (one in one million) cancer risk level and a 6.5-grams-per-day fish consumption rate (6.5 grams is equivalent to about a one-quarter ounce serving of fish per day). Data shows that most Washingtonians eat more than an average 6.5 grams of fish per day and that members of high-consuming populations, such as Native American Tribes and Asian Pacific Islanders, eat much more than 6.5 grams per day. It was thus widely accepted that Washington's human health criteria had to be updated to adequately protect human health.

Fish Consumption Rules

Rulemaking

EPA Obligation

Cancer Risk Level

"Necessity Determination"

Health Criteria

Bioaccumulation

More Stringent Criteria

EPA Reconsideration

Ecology Begins a Rulemaking Process to Update Washington's Human Health Criteria

On September 13, 2012, Ecology began rulemaking to adopt new human health criteria. The official rulemaking announcement acknowledged a high-priority need for updated standards that "more accurately reflect the amount of fish and shellfish that people eat in Washington." *Preproposal Statement of Inquiry*, Sept. 13, 2012. Ecology also acknowledged that, until updated criteria are adopted, "Washington will continue using outdated federal standards that do not reflect current science on protection from toxic chemicals."

In 2013, the Puget Soundkeeper Alliance filed a lawsuit arguing that EPA was required to adopt its own human health criteria for Washington. Soundkeeper's argument was based on a series of letters exchanged between EPA and Ecology from 2010 through 2013. Soundkeeper alleged that the letters constituted a "necessity determination" under section 303(c)(4)(B) of the CWA, thereby triggering EPA's obligation to adopt human health standards for Washington State. The court rejected Soundkeeper's argument and dismissed the lawsuit. *Puget Soundkeeper Alliance v. U.S. Envtl. Prot. Agency*, No. C13-1839-JCC, 2014 WL 4674393 (W.D. Wash. Sept. 18, 2014).

In the meantime, Ecology continued with its rulemaking effort. In 2015, Ecology proposed a rule as part of a two-part toxics reduction strategy. Ecology's proposal would have established human health criteria based on a 175-grams-per-day fish consumption rate and a 10^{-5} cancer risk level. The second part of the toxics reduction strategy involved House Bill 1472 proposed by Governor Jay Inslee. House Bill 1472 would have reduced dangerous toxic chemicals at their source by granting Ecology authority to study and limit the allowable uses of these chemicals. The bill passed the House but failed in the State Senate. As a result, Ecology withdrew its proposed rule and began work on a more protective version of the human health criteria that included a 10^{-6} cancer risk level.

On September 14, 2015, EPA determined, under section 303(c)(4)(B) of the CWA, that revised human health criteria were necessary for Washington to meet the requirements of the Act. Once EPA makes a "necessity determination" under section 303(c)(4)(B), EPA is then required to "promptly" publish draft revised standards and to finalize those standards within 90 days unless the state first adopts revised standards that are deemed by EPA to comply with the Act. 33 U.S.C. § 1313(c)(4).

After making its necessity determination, EPA was again sued by environmental groups. This suit was successful. The court concluded that EPA had a nondiscretionary duty to promulgate human health criteria for Washington. The court ordered EPA to do so by September 15, 2016, if Washington did not submit its own standards to EPA by that date. *Puget Soundkeeper Alliance v. U.S. Envtl. Prot. Agency*, No. 2:16-cv-00293-BJR, 2016 WL 4127315 (W.D. Wash. Aug. 3, 2016). The Washington State Department of Ecology met the court-imposed deadline by submitting revised human health criteria to EPA on August 1, 2016.

EPA Partially Approves and Partially Disapproves Washington's Standards

Ecology's submission to EPA included 192 human health criteria for 97 priority toxic pollutants. On November 28, 2016, EPA approved 45 criteria, disapproved 143 criteria, and took no action on the remaining four. At the same time, EPA promulgated its own criteria for the 143 state criteria that it had disapproved. 40 C.F.R. § 131.45. Those federally promulgated criteria took effect on December 28, 2016.

The difference between the State's original submittal and the federally promulgated standards arose from the different inputs and methodologies used by Ecology and EPA. EPA used a bioaccumulation factor whereas Ecology used a bioconcentration factor. Also, EPA and Ecology used different relative source contribution values. After EPA compared its criteria to Ecology's, EPA concluded that 45 of the state-submitted criteria were equal to or more stringent than federally-derived criteria and 143 of the state-submitted criteria were less stringent. EPA thus replaced the 143 less stringent criteria with the more stringent criteria promulgated by EPA to establish a consolidated rule for Washington.

Since December 28, 2016, Washington's water quality standards have consisted of the 45 approved criteria and the 143 criteria promulgated by EPA. Under EPA regulations, these standards remain in place until EPA approves a change, deletion, or addition to the standards proposed by the State, or until EPA promulgates a more stringent water quality standard. 40 C.F.R. § 131.21(e). EPA does not have authority to unilaterally propose a less stringent standard for the State.

Industry Groups Petition for Reconsideration of the 2016 Standards

No party filed a lawsuit to challenge the final 2016 human health criteria. However, several industry groups led by the pulp and paper industry filed a "petition for reconsideration" with EPA on February 21, 2017. These groups urged EPA to "repeal or withdraw" the 2016 standards.

EPA did not act on the industry petition for 18 months. In the meantime, Ecology began implementing the 2016 standards that involved developing tools so dischargers could meet the standards within a reasonable timeframe. EPA then sent a letter to the industry groups on August 3, 2018. The letter stated that EPA had decided to reconsider the 2016 standards and that it would "move forward with its reconsideration as expeditiously as possible."

Fish Consumption Rules

Ecology Actions

Ecology Director Maia Bellon sent a letter to EPA four days later stating that Ecology opposed reconsideration of the 2016 standards. The letter noted that Ecology was working with dischargers "to develop clean water permits that are both protective and practical." Director Bellon expressed concern that EPA's decision to reconsider the current standards "only sets us back and is already causing confusion and unpredictability" and that reconsideration would give "no guarantee that the long-term outcome will move us toward cleaner water or provide the certainty that communities and businesses need."

EPA did not respond to Director Bellon's letter or otherwise communicate with Ecology on the reconsideration petition. However, on April 8, 2019, EPA posted a notice on its website seeking public comment on its "proposal to reverse the 2016 disapproval of Washington's human health criteria[.]" Three days later, EPA pulled the notice from its website and appeared to no longer be seeking public comment.

As noted above, on May 7, 2019, Director Bellon sent a letter to EPA expressing "significant concern" over EPA's intentions regarding Washington's human health criteria. On May 8, Washington Attorney General Bob Ferguson sent a similar letter arguing that EPA lacked legal authority for its proposed action and criticizing EPA for refusing to consult with Washington tribes or the State on its proposal.

EPA's Decision to Grant Reconsideration and the Resulting Lawsuit

"Inherent Authority"

Washington Lawsuit

On May 10, 2019, EPA issued a decision reversing its prior partial disapproval of the 2016 state-submitted human health criteria. In doing so, EPA rejected arguments made by Director Bellon and Attorney General Ferguson that EPA needed to comply with mandatory CWA procedures before revising Washington's water quality standards. In a technical support document supporting its decision, EPA stated that it did not need to comply with Clean Water Act procedures because EPA was instead relying on its "inherent authority" to reconsider prior agency decisions.

On June 6, 2019, the State of Washington filed a lawsuit in the Western District of Washington to challenge EPA's reconsideration decision. The lawsuit alleges that EPA issued its decision contrary to the plain language of section 303(c)(4) of the Clean Water Act. That section authorizes EPA to amend a state's water quality standards under two specific circumstances.

Standards Amendment

New/Revised Standards

First, EPA can promulgate new or revised water quality standards if new or revised standards submitted by a state are determined by EPA to be inconsistent with the requirements of the CWA. 33 U.S.C. § 1313(c)(4)(A). This is what occurred in November 2016, when EPA decided to partially disapprove the state-submitted human health criteria and promulgate its own standards for Washington.

Second, EPA can promulgate new or revised standards in any case where EPA determines that a new or revised standard is "necessary" to meet the requirements of the CWA. 33 U.S.C. § 1313(c)(4)(B). This is what occurred in September 2015 when EPA determined that Washington's human health criteria needed to be revised in order to satisfy CWA requirements. When it adopts new standards for a state, EPA is only permitted to adopt more stringent (rather than less stringent) standards. 40 C.F.R. § 131.21(e).

Inherent Authority?

EPA acknowledges that it did not rely on either one of these circumstances in deciding to revise the 2016 human health criteria. Instead, EPA takes the position that it has "inherent authority" to reconsider its decisions at any time after those decisions are made. Washington takes the contrary position that agencies lack "inherent authority" to ignore congressionally mandated procedures when making decisions. Whether EPA can revise a state's water quality standards based on alleged "inherent authority" is the key legal issue to be decided in Washington's lawsuit.

The Sauk-Suiattle Indian Tribe and the Quinault Indian Nation have filed motions to intervene as plaintiffs in Washington's lawsuit. Industry associations led by the Northwest Pulp and Paper Association have filed a motion to intervene as defendants. The parties currently await decisions from the court on the intervention motions. After the court rules on intervention, all involved parties will likely file briefings on the legal issues in the case.

EPA Is in the Process of Repealing Washington's Human Health Criteria

Formal Repeal Process

When it issued its decision on reconsideration, EPA announced that it would begin a process to formally repeal the federally promulgated 2016 human health criteria. On June 12, 2019, Ecology Director Bellon sent a another letter to EPA asking EPA to postpone its rulemaking process to allow the court to rule on the threshold legal issue in the State's lawsuit. Director Bellon noted, "Until we have a court decision, proceeding with a repeal would be inappropriate and further plunge our state's businesses and communities into regulatory limbo. It would also be an inappropriate use of public funds." Several tribes filed similar requests and pointed out that there had been no consultation with tribes prior to EPA issuing its reconsideration decision.

EPA again did not respond to Director Bellon's letter. Instead, EPA published a proposed rule to repeal the 2016 criteria. 84 Fed. Reg. 38,150 (Aug. 6, 2019). EPA simultaneously opened a 60-day public comment period that closed on October 7.

EPA held a public hearing in Seattle on September 25, 2019. Several people testified at the hearing, mostly in opposition to EPA's proposal. EPA also received over 450 written comments from state officials, tribes, members of the public, non-governmental organizations, and industry interests.

Fish Consumption Rules

Opposition

No

The majority of commenters oppose EPA's action. For example, Attorney General Ferguson commented that EPA's process was illegal, that it would upend a multi-year rulemaking process, and that EPA was undermining the cooperative federalism enshrined in the Clean Water Act. The Chair of the Puget Sound Partnership commented that EPA's action threatens a decade of hard work to develop the 2016 standards, including the negotiation of delicate compromises such as the fish consumption rate that underlies the standards. Director Bellon commented that EPA's actions will "spark new lawsuits and fan the flames of existing lawsuits" such that energy among interested parties will shift to litigation "rather than actually making progress on toxics reduction." And the Northwest Indian Fisheries Commission submitted an 83-page letter on behalf of its 20 member tribes outlining several problems with EPA's proposal.

EPA is now in the process of reviewing comments. The agency has given no timeline for when it expects to finalize its repeal. In the meantime, Ecology continues to implement the 2016 criteria and is working with dischargers to help them meet the more stringent criteria in a reasonable timeframe. For example, in response to applications from dischargers, Ecology started a rulemaking process to consider the adoption of temporary discharger specific variances from the standards for **p**oly**c**hlorinated **b**iphenyls (PCBs) for the Spokane River. A variance establishes a step-by-step process designed to achieve the water quality standard or the highest attainable condition in the receiving waterbody over a longer period of time. If EPA finalizes its repeal, it will disrupt this implementation work and future regulatory obligations will be uncertain.

For Additional Information:
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Heather Bartlett currently serves as the Water Quality Program Manager for the Washington State Department of Ecology. Heather has over 28 years of natural resource and public health experience and a degree in biology from Washington State University. She has a track record of working through complex and controversial issues. She came to Ecology in March 2014 from the state Department of Health, where she was deputy director of field operations for Washington State's drinking water program.

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CWA Section 401 Certification

State Authority

Section 401 Program

Coal Export Facility

EPA Proposal

401 Certification

Conditions for Dischargers

Point Source Limitation

WATER QUALITY CERTIFICATION

WASHINGTON STATE OPPOSES EPA CWA § 401 RULE PROPOSAL
WASHINGTON STATE DEPARTMENT OF ECOLOGY DIRECTOR'S LETTER TO EPA

Editors' Introduction: On October 21, 2019, Washington State Department of Ecology Director Maia Bellon sent a letter to US Environmental Protection Agency Administrator Andrew Wheeler opposing EPA's proposed rule to "streamline" Water Quality certification procedures administered under section 401 of the federal Clean Water Act (see Gerard, et al., *TWR* #187). The following is a slightly abbreviated version of that letter (see original at website included below). Footnotes have been omitted.

Dear Administrator Andrew Wheeler:

The state of Washington strongly opposes the U.S. Environmental Protection Agency's (EPA) proposed rule, *Updating Regulations on Water Quality Certification*, that attempts to subordinate states and unlawfully subvert our authority under Section 401 of the federal Clean Water Act. EPA's proposal amounts to no less than a rewrite of this important law that for decades has enabled states to protect and enhance water bodies within our borders. I urge EPA to drop this proposal immediately.

The Washington State Department of Ecology (Ecology) is the designated water quality authority and Section 401 certifying agency in Washington State. Our agency was the first in the nation to receive federal Clean Water Act delegation almost 50 years ago. Since then, we have a long and well-documented record of implementing a successful and fair Section 401 program.

Despite our record, EPA improperly cites in its Economic Analysis (Section 4.1.2 and 6.2), Ecology's denial of the Millennium Bulk Terminals coal export facility that was proposed along the Columbia River, as a reason for EPA to make radical and illegal changes to the Clean Water Act. Contrary to allegations that Ecology "abused its authority" in that decision, Ecology's basis for denial has been upheld by every court that has reviewed the decision.

EPA's rule will not change the facts in the Millennium decision. Even so, EPA is attempting to undo 50 years of successful, non-partisan, Section 401 implementation by state agencies because it disagrees with Washington, and a few other states, on recent decisions.

By the stroke of a pen, EPA is proposing to:

Diminish state authority to review and condition Section 401 certifications;
Grant federal agencies absolute veto authority over state conditions and decisions;
Impose arbitrary timelines on states, contrary to the Clean Water Act; and
Upend the Clean Water Act without a reasoned rationale.

If finalized, the rule would significantly hinder states' ability and authority to manage and protect the water our residents need for drinking, fishing, and recreation. Washington is home to 7.5 million residents and 29 federally recognized Native American tribes. These communities rely on our program to ensure that federally-permitted projects do not undermine federal treaty obligations, violate water quality standards or disrupt our way of life in the Pacific Northwest.

EPA's Rule Diminishes State Authority to Review and Condition Section 401 Certifications

In the amended Clean Water Act of 1972, Congress made clear that the authority for Section 401 certifications belongs with the states — not the federal government. It also made clear that states may regulate beyond federal standards.

Section 401 empowers states to approve, condition, or deny applications to ensure that construction and operation of a project will not degrade our waters. When an applicant seeks an individual Section 401 certification, any actions necessary to protect water quality are included as conditions in the certification, which are then incorporated into the federal permit. As Congress intended, the scope of this review goes beyond just point source impacts. Section 401 certifications address discharges from project operations that are not covered under other federal permits. For example, a pier with a conveyor belt component may have incidental discharges into water from operations such as moving gravel from a stockpile to a vessel. The Clean Water Act gives states the ability to condition Section 401 certifications for all discharges, without restriction from EPA.

Now, EPA proposes to unlawfully narrow the scope of the type of pollution states can review to only point source discharges. This would not only dramatically narrow the scope of what we can review within a specific project, it would exempt some projects from review altogether.

For example, this rule would exclude from federal permitting non-point source discharges, such as Army Corps of Engineers dredge and fill projects and point-source discharges into non-navigable headwater streams and wetlands. These potential sources of pollution are currently covered by Section 401 certifications and allow Washington to maintain the quality of our hundreds of water bodies across the state.

CWA Section 401 Certification

Scope Precedents

Project Activities

Federal Veto Authority

Obstacles

Cooperative Federalism

State Denial Override

Compliance Enforcement (Jurisdiction)

Arbitrary Timelines

Waiver

By allowing for more degradation of our waters, EPA's proposal could drastically impact Washington's endangered and threatened species, including the southern resident Orca and numerous salmonid species. As EPA's scientists know, activities that reduce stream flow or cause non-point discharges, such as urban run-off, have been shown to directly harm salmon and other aquatic species.

EPA's proposal to limit the scope of Section 401 is not just bad policy, it also directly conflicts with two seminal Section 401 court cases. In 1994, the U.S. Supreme Court unequivocally held that the scope of 401certification applies to the activity as a whole, not solely point source discharges. *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology,* 511 U.S. 700 (1994) (PUD No. 1). Twelve years later, the Court reiterated this principle in *S. D. Warren* Co. *v. Maine Bd. of Environmental Protection,* 547 U.S. 370 (2006). EPA ignores these binding precedents by narrowly interpreting the scope of Section 401 to apply only to point-source discharges. In doing so, EPA tries to prohibit states from prescribing conditions that address impacts from the project activities as a whole rather than only those impacts that result from a specific point source discharge. EPA's proposal attempts to overrule two Supreme Court cases. The Clean Water Act does not give EPA this authority.

EPA's proposal contravenes the spirit and plain language of the Clean Water Act, ignores Supreme Court precedent, and makes it impossible for states to protect water quality in our own backyard. EPA should cease work on this ill-advised and illegal proposal.

EPA's Rule Grants Federal Agencies Absolute Veto Authority over State Decisions

EPA's rule also gives federal agencies unprecedented veto authority over state Section 401 denials and conditions. This, EPA cannot lawfully do.

EPA's approach treats states like obstacles rather than regulators, requiring states to submit specific supporting information for each condition included in a Section 401 certification. This includes a statement of whether and to what extent a less stringent condition could satisfy water quality requirements. Federal agencies would then determine if the condition meets their criteria and if the state conditions will be included in the project license or permit. This is an insult to states, an affront to cooperative federalism, and is in no way supported by the plain language of Section 401. States are explicitly authorized to impose conditions necessary to meet water quality requirements and other applicable requirements of state law. There is no authority, explicit or otherwise, that allows federal agencies to veto certifying state agencies' conditions.

EPA's proposal also purports to give federal agencies authority to override a state denial of a Section 401 certification. EPA does this by deeming a state's authority waived — even if the state denies within the timeframe — if the federal agency decides the basis for denial is outside of what the federal agency determines to be appropriate. Nothing in the Clean Water Act supports this novel and expanded definition of waiver. Simply put, this is a power grab by EPA to subvert state authority so that projects can be built at lightning speed regardless of their environmental harms or consequences. Neither the language, nor the intent of the Clean Water Act, supports this astonishing overreach by EPA.

EPA also proposes that state certifying agencies would have no continuing jurisdiction to enforce compliance with conditions in the Section 401 certification. The rule language would shift enforcement of the state's conditions to the federal agency. However, history has shown that federal agencies do not enforce conditions in Section 401 certifications. In fact, it has been our experience that the federal agencies rely on Ecology to enforce the Section 401 conditions and provide information to the federal agencies for their own enforcement efforts. It is highly unlikely that federal agencies can now effectively assume an increased burden of monitoring state conditions in future Section 401 certifications. That is why states frequently include a state enforcement provision in certifications. This independent state enforcement provision is based on state law, which EPA has no authority to override.

Under the Clean Water Act, EPA cannot veto the conditions or denials that a state issues under Section 401. EPA must respect the cooperative federalism embodied in the Act and halt its current rulemaking process.

EPA's Rule Imposes Arbitrary Timelines on States

In crafting Section 401 (and its predecessor, Section 21(b) of the Water Quality Improvement Act of 1970), Congress recognized that the robust review, of federally licensed and permitted projects, reserved to states requires a reasonable period of time to accomplish. In balancing reasonable time with preventing permitting delays due to "sheer inactivity" by states, Congress expressly defined the reasonable period of time for Section 401 certifications as up to one year. *Id.*; *see also* 33 U.S.C. § 1341(a)(1). Despite this clear direction from Congress, EPA's proposed rule attempts to authorize federal permitting agencies to set deadlines for states to complete Section 401 reviews far short of this one-year timeline. More troubling still, EPA's proposed rule attempts to authorize federal agencies to find that states failing to meet these unreasonably short timelines to have constructively waived their Section 401 authority.

CWA Section 401 Certification

Expertise

Unique Certification

Real-World Knowledge

Arbitrary Timelines

Crucial Information Limit

Complete Application

Denial Impact

Questionable Motivation

Decisions as to the appropriate timeline for processing Section 401 certifications must be left to the states. While EPA and federal permitting agencies can suggest guidelines as to what they believe are appropriate timelines for state Section 401 certifications, they lack authority to mandate such timelines or find constructive waiver where those timelines are not met.

Furthermore, EPA's proposal to shorten timeframes is impractical and serves to emphasize that EPA and other federal licensing agencies simply do not have the years of expertise on Section 401 to understand review time needs. In fact, EPA is responsible for only a limited number of Section 401 applications and has little experience in running a robust Section 401 program — let alone a program that can manage the large volume and varied scope of projects processed on a routine basis by states like Washington.

For example, Washington State receives an average of 400 Section 401 water quality certification requests every year. It is important to note that not all certification requests under Section 401 are equal — each is different and each carries unique implications that must be examined based on the specific characteristics of the water bodies and federally-permitted activities in question. Those that do not require an individual Section 401, and are eligible to receive nationwide permits, take an average of 60 days for Ecology to process. For those that require an individual permit, Ecology averages 160 days to reach a decision. However, some Section 401 applications require more time because the proposed project is unusually complicated or the applicants fail to furnish sufficient information. EPA's approach to timing does not consider these individualized circumstances.

EPA's truncated deadlines demonstrate its lack of real-world knowledge over how the Section 401 certification process actually works. Section 401 decisions involve an iterative process of reviewing an application for necessary information and accuracy. Thorough reviews may even be dependent on the time of year and often include verifying an application's accuracy with seasonally-timed field investigations, which can sometimes take a few months to complete. For example, accurate wetlands delineation work typically cannot be accomplished in dry summer months. Thus, if a project that affects a wetland submits the required wetland delineation report in late summer, confirmation of the finding of that delineation report may need to occur months later, in early spring, when wetland hydrologic conditions are likely to be present.

These circumstances are common in Washington. Our state has a large number of wetlands, hundreds of lakes, hundreds of miles of marine shoreline, and thousands of miles of rivers and streams. We are proud to be home to the Columbia River, the fourth largest river in the country, and the Puget Sound, our nation's largest estuary. Washington residents are deeply reliant on clean water for their livelihood. Water quality is, therefore, a paramount concern of Washington State.

Imposing an arbitrary timeline for water quality review in Washington will prevent us from determining whether a project would result in degradation of our waters. Without adequate information to ensure a project will not harm water quality, we will be forced to deny Section 401 certification requests. While it is clear EPA intends for its rule to result in more approvals, placing arbitrary timelines on states will have the opposite effect.

The problem posed by short deadlines is further compounded by EPA's proposal to limit the ability of the states to obtain crucial information before making a decision. In its rule, EPA gives state certifying agencies only 30 days to request additional information from the applicant. EPA then limits the request for additional information to only information that can be collected or generated within the federal agency-established deadline.

The proposed rule goes further by preventing states from getting the information necessary to properly review Section 401 applications by starting the clock on state certifying agencies the moment a request is submitted — regardless of whether the application is complete. In fact, EPA does not require applicants to provide any information about the impact of the project on water quality, or demonstrate compliance with state water quality standards. This approach is fraught with problems. Proponents often intentionally submit applications with minimal or "draft" supporting materials in order to get their projects "in line" with the intent of using the iterative process described above to ensure that our agency has the information it needs to make an informed and defensible decision.

Faced with these information deficiencies and compressed review time, Ecology will be forced to deny Section 401 applications due to inadequate assurance that the project will meet water quality standards. This is an unfortunate but inevitable consequence of EPA's proposed rule, which will undermine our state's long record of success in issuing Section 401 certification decisions under the one year period allotted to states by the Clean Water Act.

Given Washington's proven ability to make certification decisions in a timely and appropriate manner, we question the administration's motivation for drastically reducing the deadline for Section 401 decisions. This rule seems to be less about streamlining the Section 401 process and more about letting the federal government seize control of these decisions and sideline states in the process. This ignores the intent of the Clean Water Act.

CWA Section 401 Certification

Blocking Conditions

Experience History

Coal Export Terminal Denial Cited

Heated Rhetoric

Incomplete Economic Analysis

Failed Justification

EPA Fails to Provide a Reasoned Rationale for its Rewrite of the Clean Water Act

EPA claims that the proposed rule would provide greater clarity and regulatory certainty for the water quality certification process, consistent with the April 2019 Presidential Executive Order (EO), 13868, *Promoting Energy Infrastructure and Economic Growth*. To the contrary, EPA's rule is a thinly veiled attempt to block states from conditioning or denying certifications, regardless of the water quality that states are seeking to protect. The stated purpose of EO 13868 is to promptly advance the construction of energy infrastructure. The rule, however, would apply to any and all Section 401 certification requests, not just energy projects. EPA's position takes a sledgehammer to the principles of cooperative federalism embodied in the Clean Water Act.

For almost 50 years, Ecology has issued thousands of Section 401 certifications, hundreds of certifications with conditions, and approximately 30 denials. Of these water quality decisions issued in the past half-century, only a small fraction have been appealed. We attribute this low number of legal challenges to our effective, fair, and thorough process.

Yet, in its economic analysis, EPA cites four high-profile Section 401 denials, including Washington's denial of the Millennium coal export terminal, as a basis for rewriting Section 401. What the economic analysis neglects to mention is that the proposed export terminal in Washington failed to demonstrate compliance with water quality standards and further failed to meet our state's environmental standards. The environmental analysis demonstrated that this project would have destroyed 24 acres of wetlands and 26 acres of forested habitat, as well as dredged 41 acres of riverbed. It would have contaminated stormwater from stockpiling 1.5 million tons of material onsite near the Columbia River. Washington's denial of the Section 401 to Millennium has been upheld by every court that has so far reviewed our decision.

It is also worth noting that two other entities have independently denied separate, required approvals for the Millennium project. A Cowlitz County hearings examiner denied a necessary land use permit for the project after concluding that the project would not meet the requirements of the state Shoreline Management Act. The Washington State Public Lands Commissioner denied a necessary aquatic sublease for the project because the company refused to provide information demonstrating that the project was financially viable. That decision was recently upheld by the state Court of Appeals.

Thus, even if Ecology had not denied the Section 401 certification for the project, the project would not be built due to the denial of other mandatory permits. The company has regretfully failed to point out these facts in its heated rhetoric around the Section 401 denial. As a result, EPA is poised to rewrite Section 401 based on the factually inaccurate complaints of a company that is displeased with the state for refusing to rubber stamp its permit applications.

Finally, EPA's economic analysis, which includes an analysis of the Millennium project, is incomplete because it fails to take into account the significant public health and environmental costs associated with this massive industrial proposal. A report prepared by an expert economist demonstrates that the 50-year costs of the project would range from approximately $4.72 billion to $10.11 billion. The 20-year costs would range from $2.44 billion to $3.34 billion. In other words, the economic costs of this project greatly exceed its economic benefits.

EPA's economic analysis, which is based on false assumptions and contains many deficiencies, utterly fails to provide justification for EPA to gut the Clean Water Act. It does not give EPA authority to overturn landmark U.S. Supreme Court decisions that assure federally licensed and permitted projects comply with state water quality standards and other applicable state laws. EPA's proposal is unlawful and unsupported considering the last 50 years of successful implementation of Section 401.

For the reasons detailed here, EPA should abandon this misguided attempt to diminish state authority and instead allow states to continue their long tradition of stewarding Section 401 responsibly, justly, and consistent with the law. The people of Washington deserve no less.

If you have any questions, please contact Sharlett Mena, my Special Assistant at (360) 688-6229 or by email at Sharlett.Mena@ecy.wa.gov.

Sincerely,

Maia D. Bellon Director

For Additional Information:

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The Ecology Director's October 21st letter to EPA is available at:
https://ecology.wa.gov/DOE/files/56/56611158-7f34-4e91-9e5f-6f294bf7327d.pdf

EPA's August 22, 2019 Federal Register publication of proposed rule *Updating Regulations on Water Quality Certification* available at: www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0025

Bristol Bay Mining

Fishery

Mine Impacts

Ecological Value

EPA Removal of Protections

PEBBLE MINE LAWSUIT FILED

EPA ACTIONS CHALLENGED BY BRISTOL BAY DEFENSE ALLIANCE

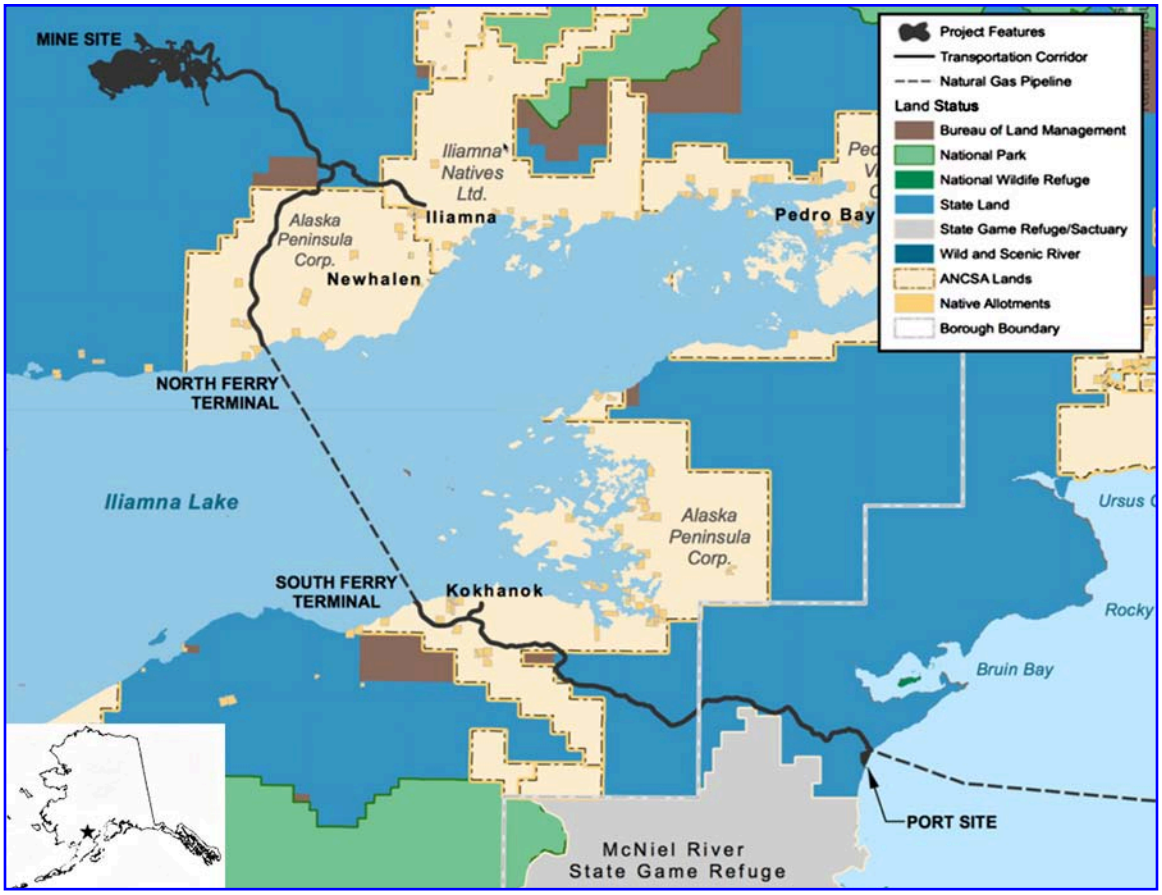
by David Moon, Editor

Introduction

Alaska's Bristol Bay watershed, and its streams, wetlands, lakes and ponds, provide habitat for the world's largest wild salmon runs, ranging from 30 to 60 million fish annually. "Bristol Bay salmon are economically, culturally and ecologically critical to Alaskan communities, generating $1.5 billion in annual revenue and supporting 14,000 jobs. Bristol Bay salmon have also been the foundation of Alaska Native cultures in the region for thousands of years and continue to sustain some of the last intact wild salmon-based cultures in the world. The proposed Pebble Mine would destroy thousands of acres of critical habitat and miles of salmon streams that are essential to Bristol Bay's commercial, recreational and subsistence salmon fisheries." *Complaint for Declaratory and Injunctive Relief*, Case No. 3:19-CV-00265-TMB, D. Alaska, (Oct. 8, 2019), page 3.

EPA issued its Proposed Determination in July 2014 pursuant to Section 404(c) of the federal Clean Water Act (CWA), 33 U.S.C. §1251 et. seq. In the 2014 Proposed Determination, EPA found that "Alaska's Bristol Bay watershed...is an area of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America." Proposed Determination at ES-1.

On July 30, 2019, however, the Trump administration's Environmental Protection Agency (EPA) announced that it would be *removing* the 2014 protections, which were put in place at the direct request of local tribes. Canadian owned, Pebble Limited Partnership is pushing to develop the immense pit mine for the Pebble copper-gold-molybdenum porphyry deposit (Pebble Deposit). Pebble Limited Partnership's press release from July 30th paints a far different picture from the plaintiffs' view, as Pebble Partnership CEO Tom Collier "hailed the decision by [EPA] to advance the removal of the proposed determination against the Pebble Project that has long been viewed as a preemptive veto of the project."



Bristol Bay Mining

Preemptive Veto?

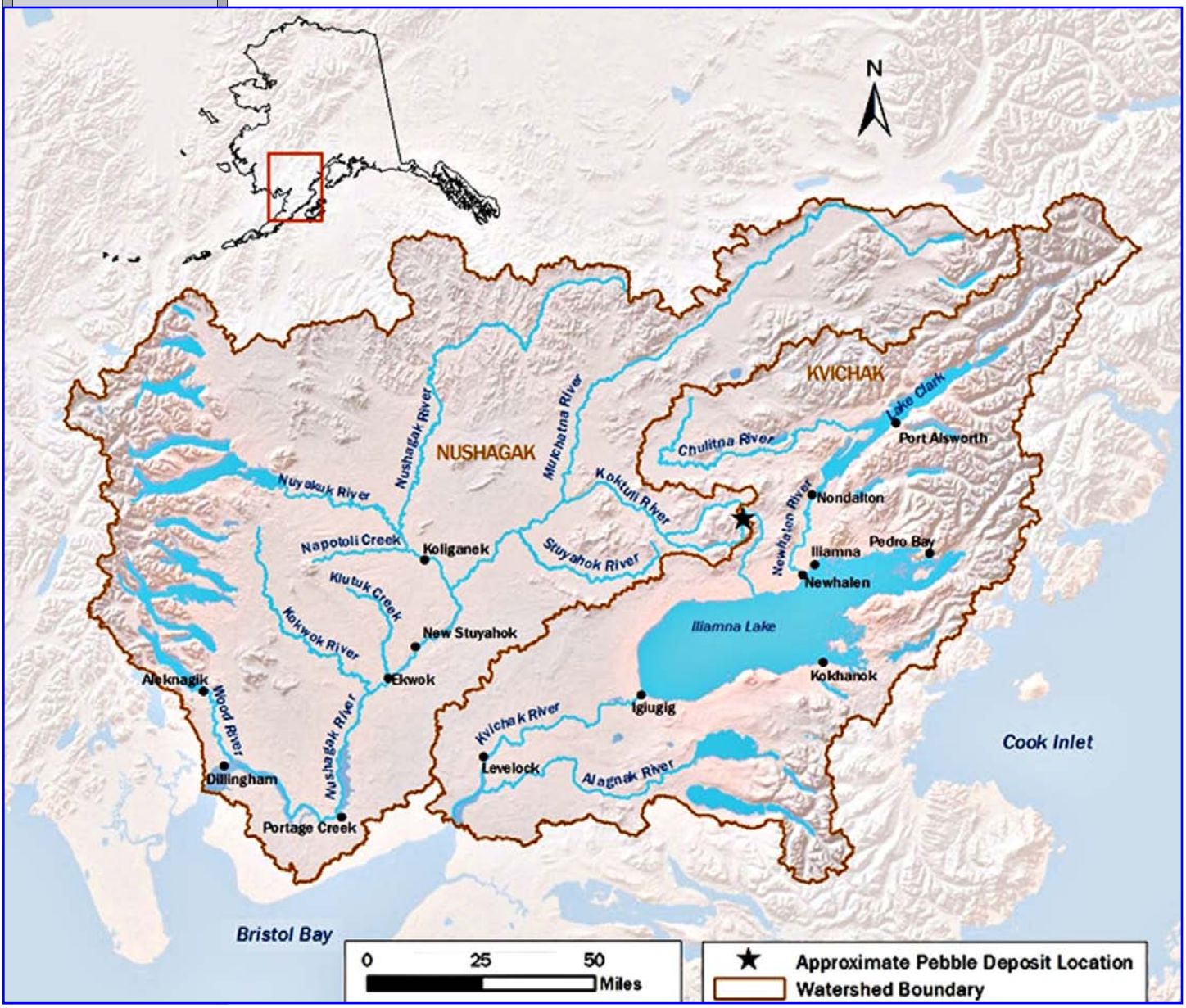
Lawsuit to Vacate EPA Decision

Collier was quoted as follows:

> Finally, this Administration has reversed the outrageous federal government overreach inflicted on the State of Alaska by the Obama Administration. The preemptive veto was an action by an Administration that sought to vastly expand EPA's authority to regulate land use on state, private and Native-owned lands throughout the United States, and in doing so kill one of America's most important mineral projects before a development plan was proposed or a comprehensive Environmental Impact Statement (EIS) permitting review was undertaken. The Proposed Determination ordered to be lifted today was a preemptive veto that had never before been attempted in the 45-year history of the Clean Water Act — a fact acknowledged by the former Administrator's senior staff.

EPA's decision to remove the environmental protections for Bristol Bay resulted in the United Tribes of Bristol Bay (Tribes) and other Bristol Bay organizations filing suit against EPA on October 8, 2019 to vacate the agency's decision to remove he 2014 protections. The Bristol Bay Defense Alliance, which consists of the Tribes, Bristol Bay Native Association, Bristol Bay Regional Seafood Development Association, Bristol Bay Reserve Association and Bristol Bay Economic Development Corporation, is taking legal action on behalf of the local people who rely on the Bristol Bay fishery and all it sustains.

"This case challenges [EPA's] unlawful withdrawal of its Proposed Determination that development of the Pebble deposit in the headwaters of Bristol Bay, Alaska could result in significant and unacceptable adverse effects on ecologically important streams, wetlands, lakes, and ponds and the world-class fishery they support. 84 Fed. Reg. 45,749 (Aug. 30, 2019)." Complaint at 3.



Bristol Bay Mining

Section 404(c)

2014 Proposed Determination

Protections Prevent Mining

PLP/EPA Settlement Agreement

Mining Development

Confusing Sequence

Withdrawal By EPA

Background

2014 PROPOSED PROTECTIONS

For over 15 years, local Bristol Bay residents, including tribes, have advocated for policies to manage their waterways and protect their pristine ecosystem. In 2010, six Bristol Bay Tribes (Tribes) petitioned the EPA to provide permanent protections for the region by applying section 404(c) of Clean Water Act. The EPA responded by launching the Bristol Bay Watershed Assessment in 2011. The Tribes requested protections for the area's waterways and unparalleled salmon runs, which are an integral part of the indigenous peoples' traditional life. The area's commercial and sport fisheries also rely on those waters and wild salmon and local fisheries organizations quickly joined the tribes' efforts. The protections being sought represented responsible, science-based management of the rivers, streams, and wetlands, according to the Tribes. Even with this strong local support, it was a multi-year process to gain the protections, involving a process that included input from a wide range of people and businesses that could be affected.

EPA's peer-reviewed watershed assessment was published in 2014. *See* U.S. Envtl. Prot. Agency, *Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act: Pebble Deposit Area, Southwest Alaska* (2014) (Proposed Determination). The Proposed Determination concluded that:

> …the mining of the Pebble deposit at any of these [mining scenarios] sizes, even the smallest, could result in significant and unacceptable adverse effects on ecologically important streams, wetlands, lakes, and ponds and the fishery areas they support. Proposed Determination at ES-5.

The Proposed Determination also found that "Alaska's Bristol Bay watershed...is an area of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America." *Id*. at ES-1.

The Proposed Determination called for protections that, due to the unique ecological importance of the area, would prevent large-scale hard-rock mining at the headwaters of the watershed. EPA's proposal restricted "discharge of dredged or fill material related to mining the Pebble deposit into waters of the United States. …" to protect the resources. Proposed Determination at 5-1. During the comment period that followed, "EPA received over 670,000 comments on the Proposed Determination with 99% of those comments supporting the Determination." Complaint at 20.

Adverse Litigation

MINING INTEREST SUES — EPA SETTLES

The protections outlined in the Proposed Determination were stalled in court proceedings and the protections were never put in place.

Pebble Limited Partnership (Pebble or PLP), the proponent of the Pebble mine, sued EPA in three separate lawsuits in 2014. EPA and PLP settled the litigation in 2017. *Settlement Agreement between EPA and Pebble Limited Partnership* (May 11, 2017) (Settlement Agreement). EPA committed itself under the Settlement Agreement to "initiate a process to propose to withdraw the Proposed Determination." Settlement Agreement, ¶ III.A.5. EPA issued a proposal to withdraw the Proposed Determination in July 2017 and requested public comments. *Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska*, 82 Fed. Reg. 33,123 (July 19, 2017). *See* Complaint at 21-23.

Pebble then filed its first development permit in late 2017, the 404(c) Clean Water Act Dredge and Fill permit, kick-starting the federal environmental review process, which is still underway today. In January 2018, EPA announced that it was *suspending the withdrawal proceeding* and leaving the 2014 Proposed Determination in place at that time pending further action by the Agency. EPA issued a Draft Environmental Impact Statement (DEIS) for the proposed Pebble Mine in February 2019. *See* U.S. Army Corps of Engineers, Pebble Project DEIS, Feb. 2019.

This was all part of an extremely confusing sequence of events — for the uninitiated — where EPA first considered withdrawing the Proposed Determination to satisfy its obligations under a Settlement Agreement with PLP (Complaint at 21-23). Then, "[A]fter receiving more than one million comments, with '[a]n overwhelming majority express[ing] opposition to withdrawal of the Proposed Determination," EPA decided not to withdraw the Proposed Determination." (Feb. 28, 2018; s*ee* Complaint at 24-26). On June 26, 2019, EPA General Counsel Matthew Z. Leopold directed EPA Region 10 to *resume* its consideration whether to withdraw the 2014 Proposed Determination (Complaint at 26-27).

On July 30, 2019, EPA withdrew the 2014 Proposed Determination. With the title of its press release — "*EPA Withdraws Outdated, Preemptive Proposed Determination to Restrict Use of the Pebble Deposit Area as a Disposal Site*" — EPA clarified its current view of the situation.

Bristol Bay Mining

EPA Rationale

The press release outlined EPA's rationale:

> This action removes the Agency's outdated, preemptive proposed veto of the Pebble Mine and restores the well-understood permit review process. EPA Region 10 reached this conclusion based on two primary reasons. First, the [US Army] Corps' DEIS [Draft Environmental Impact Statement] includes significant project-specific information that was not accounted for in the 2014 Proposed Determination and, based on that information, the Corps has reached preliminary conclusions that in certain respects conflict with preliminary conclusions in the 2014 Proposed Determination. The now-five-year-old Proposed Determination does not grapple with the currently available expansive record, including specific information about the proposed mining project that did not exist in 2014. Second, other processes are available and better-suited for EPA to resolve issues with the Corps as the record develops; specifically, the well-understood elevation process under CWA section 404(q) and the NEPA [National Environmental Protection Act] process. EPA believes these processes should be exhausted prior to any decision by EPA, based upon all information that has and will be developed, to exercise its section 404(c) authority. A detailed explanation of EPA's decision is available in the notice signed today by EPA's Region 10 Administrator, which will be published in the Federal Register.

See also Complaint at 27-29 for further assertions by the plaintiffs. Notice of the decision was published in the Federal Register on August 30, 2019. *See* 84 Fed. Reg. 45,749. For additional details and documents regarding EPA's actions, *see* EPA's website: www.epa.gov/bristolbay.

Political Influence Raised

Meanwhile, an October 31st press release by the Native American Rights Fund, counsel for plaintiff United Tribes of Bristol Bay, provided an explanation for the confusing sequence described above, as follows: "Despite widespread local support and extensive scientific research backing these policies, Trump's Environmental Protection Agency recently decided to remove the bay's protections. This reversal came after Governor Mike Dunleavy met briefly with the president on Air Force One, and told reporters that he was convinced that the president was 'doing everything he can to work with us on our mining concerns.'" (*See* Pebble CEO's statement of October 23rd rebutting this assertion, below).

Bristol Bay Defense Alliance Lawsuit

Plaintiff's Assertions

On October 8, 2019, the plaintiffs Bristol Bay Defense Alliance brought suit against the Trump Administration for its removal of environmental protections for Bristol Bay. The plaintiffs maintain that the decision to change course was political, arbitrary, capricious, and illegal. The suit is based on the plaintiffs' assertions that the agency changed its position without good reason or explanation, which are required by law. Plaintiffs are seeking to have the withdrawal of the Proposed Determination vacated, and seek additional declaratory and injunctive relief — including costs and attorney fees.

Two Claims

The First Claim in the Complaint was titled "EPA's Withdrawal Decision Is Not Supported by the Record and EPA Failed to Acknowledge and Explain Its Reversal (Violation of 33 U.S.C. § 1251 et seq. and 5 U.S.C. § 706)." *See* Complaint at 34-37. The plaintiffs' Second Claim was "EPA Improperly Relied on Factors which Congress Has Not Intended It to Consider and Failed to Consider Relevant Key Factors" (Violation of 33 U.S.C. § 1251 et seq. and 5 U.S.C. § 706). *See* Complaint at 37-38.

Complaint Details

The 40-page Complaint filed by Bristol Bay Defense Alliance is extremely detailed. It is quite thorough and recommended reading. It contains many citations to relevant documents, pertinent quotations from the Proposed Determination, and discusses the range of factual details involved in the mine proposal. Among other salient points raised in the Complaint are the following two sections which discuss some impacts of the proposed mine:

Hydrology Impacts

> 57. In the Proposed Determination, EPA found that loss of headwaters in Bristol Bay would: "fundamentally alter surface and groundwater hydrology and, in turn, the flow regimes of receiving — or formerly receiving — streams. Such alterations would reduce the extent and frequency of stream connectivity to off-channel habitats, as well as reduce groundwater inputs and their modifying influence on the thermal regimes of downstream habitats… . These lost streams also would no longer support or export macroinvertebrates, which are a critical food source for developing alevins, juvenile salmon, juvenile northern pike, and all life stages of other salmonids and forage fish." Proposed Determination at 4-9.

Tailings Storage

> 58. EPA found that "[t]he greatest impacts would be at the [tailings storage facility] location in the [North Fork Koktuli] watershed. Coho salmon spawn or rear in nearly 50% of the stream length within the [tailings storage facility] footprint." Proposed Determination at 4-4.

Complaint at 18; *see also* Complaint at 16-20 for a more complete discussion by plaintiffs of "The Proposed Determination Findings" (*See* web access information below).

Bristol Bay Mining

Mining's Position

No Harm to Fishery

Political Fix?

Governor's Leadership: "Open for Business"

De-Risking Plans: Size

Cyanide

Tailings

Positive Fishery Impacts

Pebble Limited Partnership's Position: CEO's Testimony & Statements

Testimony by the CEO of Pebble Limited Partnership, Tom Collier, before the US House of Representatives on October 23, 2019, page 1, describes PLP's view of the proceedings:

> For over 15 years, a battle bas been fought over whether building a copper mine over 200 river miles from Bristol Bay in Alaska would significantly damage the salmon fishery in that region. The debate is now over.
>
> In February of this year [2019], the U.S. Army Corps of Engineers ("the Corps") issued its draft Environmental Impact Statement (DEIS) for the proposed Pebble Mine and unequivocally concluded that the project will not harm the Bristol Bay fishery. We were confident that the Corps would reach this conclusion. Why? This conclusion was the result of several factors: First, the citizens of Alaska voiced concerns over the Pebble Project, and we have listened to them. Second, we have taken several steps to de-risk our mining plans. And finally, the Corps has led a process that to date has placed science over politics. It is certainly not because, as some have suggested, the Trump Administration orchestrated any sort of political fix. There is not a shred of evidence showing any inappropriate conduct in this process, which stands in stark contrast to what was uncovered from the EPA of the previous administration.

Collier "expressly thanked Alaska Governor Mike Dunleavy for his leadership in encouraging EPA to withdraw its Proposed Determination." PLP Press Release, July 30th. "As Governor Dunleavy clearly recognizes, major companies will not invest in resource development in Alaska if projects can be vetoed before they receive a fair review. Alaska has needed this kind of leadership for years. Governor Dunleavy appears to be fulfilling his pledge to make sure the world knows Alaska is open for business, and supports responsible resource development," Collier said.

In his House testimony, Collier went on to list several areas where Pebble altered its original plans, based on concerns raised by Alaskan citizens (*id*. at 2):

> Pebble's new mine, at an equivalent footprint of just 5.2 square miles, is 75% smaller than the largest mine in the Proposed Determination, 48% smaller than the medium mine, and slightly larger than the smallest mine evaluated. A significant factor in reducing Pebble's footprint is the elimination of permanent waste rock storage on the surface, which further substantially reduces post-closure water management requirements.
>
> ln response to public concerns, Pebble has also committed to using zero cyanide, thus there will be no secondary gold recovery. To be clear, cyanide is used safely at industrial facilities and mines throughout the world, including in Alaska. But Pebble has heard the community's concerns and has completely eliminated spill and post-closure cyanide risks. This means that Pebble is walking away from 15% of the gold that, at this time, cannot be recovered without using cyanide.
>
> In addition, Pebble has incorporated a drained storage method for its bulk tailings, eliminating concerns that a disaster such as that which occurred at Mt. Polley could happen here [tailings storage facility failure].

CEO Collier also addressed some fishery and water management aspects of Peebles plan, touting the potential "positive impact on some fish habitats" that will occur (*id*.):

> The Pebble Mine will feature an optimized water management strategy with the potential to have a positive impact on some fish habitats. Based on more than 75 years of high-quality hydrological records, Pebble has designed a system with enhanced management capacity to address both extreme climate events and long-term climate variations. The water management system will have multiple, redundant environmental safeguards and will meet the most stringent water quality guidelines.
>
> Pebble will utilize strategic water releases designed to optimize downstream fish habitat conditions.

The contentious nature of the process leading up to this point is emphasized by CEO Collier's 16-page written testimony and other parties' testimony before the US House of Representative on October 23 (*See* web access information below). Perhaps that is an inevitable and unfortunate consequence of a situation where so much is at stake, for both the people and environment of Bristol Bay and the economic plans of Pebble Limited Partnership.

Bristol Bay Mining

Science & Myths

Detailed Look

Tribal Testimony

Permanent Impact

Lip Service

Draft EIS Deficiencies

Thorough Review Needed

Timeless Landscape Source

The conclusion of Collier's testimony sums up PPP's view:

> In short, the Trump Administration has not overturned science with this decision. To the contrary, by withdrawing a shoddy and corrupt decision and allowing the statutorily-mandated federal permitting process to proceed, this Administration has in fact injected more — and better — science into the process. I appreciate the opportunity to testify before this committee and to address many of the myths that opponents are trying to build around the Pebble mine. We are dedicated to building a mine that can deliver the economic benefits that Alaskans so desperately need while ensuring that we do no damage to the fishery that is vital to the life of our State." *Id*. at 16.

PLP's website provides extensive further details about the project, with web pages on "The Plan" and "The Facts" (s*ee* https://pebblepartnership.com/).

Beyond the Lawsuit: Tribal Testimony Before the US House of Representatives

The October 23, 2019, testimony before the US House of Representatives Committee on Transportation and Infrastructure / Subcommittee on Water Resources and the Environment (House) by various interested parties provides a detailed look into what is at stake for Bristol Bay and reflects the long on-going battle between the mining company and its numerous opponents. A small sampling of the testimony is provided below (*see* Pebble's CEO testimony excerpts above; *see* House Testimony website below for access to all submitted written testimony).

United Tribes of Bristol Bay's Testimony

United Tribes of Bristol Bay (UTBB) is a tribal consortium of 15 Bristol Bay tribal governments representing over 80 percent of the region's total population. UTBB works to protect the Yup'ik, Dena'ina, and Alutiiq way of life in Bristol Bay.

Alannah Hurley, Executive Director of UTBB, provided testimony to the House, including the following:

> Pebble Limited Partnership is proposing to build…in the heart of the Bristol Bay watershed. As proposed, the mine would adversely and permanently impact Bristol Bay's extraordinarily productive system of streams, wetlands, and uplands that support the world's largest salmon fishery. Hurley at 1.
>
> Despite the Corps' statements that it is committed to a thorough, fair, and transparent review of the proposed Pebble mine, our Tribes' experiences participating in the environmental review process as cooperating agencies and interacting with the Corps on a government-to-government basis clearly demonstrate that the Corps is merely paying lip service to its statutory obligations and its trust responsibility to our Tribes. *Id.* at 2.
>
> In addition to process-related concerns, cooperating agencies submitted extensive comments on the draft EIS's substantive deficiencies, including insufficient analysis of impacts to watershed health, including impacts to fish and fish habitat; insufficient analysis of 'potential impacts to subsistence resources and the communities that depend on them;' and insufficient analysis of spill risk associated with tailing storage and other facilities. Based on these and other deficiencies, the DOI concluded that the draft EIS did not follow NEPA requirements and was so inadequate that it 'preclude[d] meaningful analysis.'" (footnotes omitted); *Id*. at 3-4.
>
> With so much at stake, the people of Bristol Bay, and all Alaskans, deserve a fair, thorough, and transparent review of the proposed Pebble mine. In contrast, the Corps' opaque process is moving toward a permit decision at an unprecedented pace, ignoring substantial criticism and concern from Bristol Bay Tribes, other federal agencies, and the public. Under the Corps' current timeline, it is planning to issue a final EIS in early 2020 and make a permit decision in mid-2020. The Corps has made clear that it will not listen to our voices, so we ask this Committee to act now and help us protect Bristol Bay.' (footnotes omitted) *Id*. at 7.

Tiffany & Company, Statement of Anisa Kamadoli Costa (Chief Sustainability Officer)

Tiffany & Co.'s Sustainability Chief offered an interesting perspective:

> After more than 180 years of experience in sourcing precious metals and gemstones, we have learned there are certain places where mining simply must not occur. We risk too much in altering timeless, treasured landscapes in pursuit of short-term financial gain. In Bristol Bay, we believe mining would ultimately destroy the lands and the watershed, causing irreparable harm to the communities who depend on this majestic place. It is our view that sourcing from mines that destroy economies and ecosystems are not good for our bottom line or our country. For these reasons, we have publicly opposed the proposed Pebble Mine for more than a decade. Costa at 1-2.

Bristol Bay Mining

Short-Term Value

Administrative Process

In particular, the Army Corps' Draft Environmental Impact Statement (DEIS) fails to consider the findings of the Environmental Protection Agency's (EPA) 2014 Watershed Assessment of the Bristol Bay region. *Id*. at 2.

We at Tiffany & Co. look forward to continuing to source materials and manufacture products in the United States. However, we can promise we will never use gold from the Pebble Mine should it be developed. The long-term threats to the Bristol Bay region far outweigh the short-term value of any precious metals which might be extracted there. For this generation and all those to follow, this majestic landscape simply must be protected. We know there are other copper and gold mines to develop, but there will never be another place so abundant and productive as Bristol Bay. *Id*. at 4.

Conclusion

An incredibly productive, unique, and irreplaceable ecosystem may well have its fate decided by this case. Will the Pebble Deposit be developed? Will Bristol Bay's environment remain intact?

The latest litigation, filed October 8th, will be fought and the issues determined primarily on the basis of the administrative process and its sufficiency under environmental law. The underlying ecosystem of Bristol Bay, however, lends a powerful incentive to approve a process that thoroughly considers the crucial scientific data and examines the potentially devastating consequences that could result from the mine's development.

For Additional Information:

Bristol Bay Defense Alliance's Complaint available at: www.narf.org/nill/documents/20191008bristol-bay-complaint.pdf;

EPA website: www.epa.gov/bristolbay

United Tribes of Bristol Bay blog: www.utbb.org/blog

House Testimony website: https://transportation.house.gov/committee-activity/hearings/the-pebble-mine-project-process-and-potential-impacts; PLP web site: https://pebblepartnership.com/

WATER BRIEFS

INNOVATIVE FISH SCREEN NV

LAHONTAN CUTTHROAT

In 1905, the predecessor of the US Bureau of Reclamation (Reclamation) unveiled its first large-scale water infrastructure project in Nevada. Derby Dam was constructed to divert water for irrigation from the Truckee River and Pyramid Lake. The dam's shift in water management, however, took its toll on one of Nevada's most prized native sportfish, the Lahontan cutthroat trout. The trout once roamed the waterways of Nevada, growing as large as 60 pounds and serving as an important predatory fish in northern Nevada. Operation of the dam reduced water levels in the Truckee River, straining habitat conditions, while the structure itself cut the trout off from spawning grounds on the other side of the dam. By the mid-1960s, the fish had been completely eliminated from Pyramid Lake.

Fish passage at Derby Dam has been a priority conservation project for Lahontan cutthroat trout recovery for over two decades. In 2001, the US Fish & Wildlife Service (USFWS) and Reclamation designed and completed a fish bypass around the dam. It wasn't used, though, because of the lack of a fish screen to prevent fish from being diverted to the Carson River. Since then, the two agencies have been working to implement the protection portion of the passage improvements.

The Lahontan cutthroat trout was listed under the federal Endangered Species Act in 1970 and agencies are investing in a fish-friendly infrastructure project to help bring back the legendary fish. Construction of a fish passage structure will allow the fish to complete their natural migration, swimming back and forth between Pyramid Lake and historic spawning grounds.

The fish screen is designed to work with the diverted flow of water rather than against it, providing fish protection by allowing fish and debris to move above and over the surface of the screen material. The horizontal fish screen coming to Derby Dam is the largest ever commissioned, and the first for Reclamation. Reclamation selected the horizontal fish screen technology and entered into a cooperative agreement with Farmers Conservation Alliance (FCA) for its design, construction and commissioning. Construction will be completed in fall 2020. (See Thalacker, *TWR* #101 regarding another FCA fish screen project).

According to USFWS, numbers of Lahontan cutthroat trout migrating in the Truckee River from Pyramid Lake are increasing every year. With a fish screen in place, USFWS anticipates that more fish will reach natural spawning grounds, improving population numbers in the area and the chance to see wild-spawned fish swimming through the Reno/Sparks area.

For info: USFWS website: www.fws.gov/cno/newsroom/Highlights/2019/derby_dam/; FCA website: https://fcasolutions.org/

AQUIFER SUSTAINABILITY ID

REVIEW OF INITIATIVES

The 2009 Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan (ESPA CAMP) was designed to restore the aquifer to sustainable levels. Ten years later, significant progress has been made to meet the ESPA CAMP's long-term goal of restoring 600,000 acre-feet water to the ESPA on an annual basis by 2030, staff officials reported to the Idaho Water Resource Board (Board) in mid-September. At the present time, more than 500,000 acre-feet of water is being restored to the aquifer on an annual basis as a result of multiple efforts by the board and stakeholders in the region.

During the Joint Aquifer Stabilization and Planning Committee meeting in mid-September, a number of groups testified in support of the Board's sustainability initiatives and complimented the Board, and other participants, for moving ahead aggressively on ESPA restoration initiatives. Lynn Tominaga, executive director of the Idaho Ground Water Appropriators (IGWA), noted that under the 2015 historic water settlement between IGWA and the Surface Water Coalition, an average of 240,000 acre-feet of water is being restored to the ESPA each year through reductions in groundwater pumping and reduced acres being irrigated.

"The CAMP is working; the science says it's working," added Brian Olmstead, general manager of the Twin Falls Canal Company and a spokesman for the Surface Water Coalition. "We are all working together." Olmstead, however, also said the state can not allow any further development of farmland in the ESPA region, and it should support improvements in water quality in the mid-Snake region.

Idaho Power Company officials also supported the board's multi-pronged efforts to restore the ESPA, including efforts to recharge an annual average of 250,000 acre-feet, but expressed concern about reduced winter flows for generating hydropower. Idaho Power is a net importer of energy in the winter months, which can increase the cost of electricity for customers, said Kresta Davis-Butts, senior manager of resource planning and operations hydrology for Idaho Power. It would be valuable to have some water flows passing Milner Dam in the winter months to help with hydropower production, and with water quality, fisheries and recreation, she said.

The Board has a decreed water right for its winter recharge program of the aquifer. Under state law, hydropower production is subordinate to other water rights. However, Water Board Chairman Roger Chase said the board would pay close attention to the issue and balancing aquifer-sustainability interests with Idaho Power's concerns.

For info: Brian Patton, Board, 208/287-4800 or Board website: https://idwr.idaho.gov/IWRB/

NITRATES ACTIONS CA

REPLACEMENT DRINKING WATER

On October 16, the California State Water Resources Control Board (SWRCB) approved a long-term plan to address the buildup of salt and nitrates in Central Valley groundwater basins and surface water, and ensure delivery of clean drinking water to disadvantaged communities impacted by nitrates until impaired aquifers are restored. Approved after more than 13 years in development by stakeholders and the Central Valley Regional Water Quality Control Board, the plan is the result of an unusual collaboration among agricultural interests, environmental justice advocates, water agencies, and residents from impacted communities to address one of the region's most challenging water quality problems.

The buildup of nitrates in Central Valley groundwater, due largely to decades of irrigating and applying fertilizer to some of the nation's most productive farmland, has made groundwater unsafe for consumption in many rural communities. Dairies, wastewater treatment plants, and other sources contribute to nitrate contamination, which can be harmful to human health, particularly for infants.

WATER BRIEFS

The first goal of the Central Valley-wide Salt and Nitrate Management Plan is to provide safe drinking water to residents whose water supplies are contaminated with nitrates. Over the longer term, the plan requires farms, dairies, and other sources to reduce nitrate discharges so they no longer contaminate groundwater. Ultimately, the goal is to clean up groundwater to meet water quality standards. The plan allows groups of dischargers to form nitrate management zones and develop implementation plans to provide safe drinking water to impacted residents and implement measures to reduce nitrate pollution. The Central Valley Board would issue permits to ensure dischargers are meeting their goals.

SWRCB directed the Central Valley Board to return in one year with revisions to strengthen the plan. Revisions include:

- Strengthening requirements to reduce nitrate contamination of groundwater.
- Accelerating the timeline for achieving this goal. Dischargers will be required to reach this goal within as short a time as practicable, but not to exceed 35 years.
- Requiring enforceable interim deadlines and a final compliance date for dischargers to meet their goal of reducing nitrate discharges.
- Requiring residential sampling programs that provide water quality testing for residents whose water supplies may be contaminated.
- Dischargers must identify a method for funding their implementation plans, including paying for replacement drinking water. They may seek funding from other public sources, including local, state and federal funds, but the dischargers are ultimately responsible for timely implementation of their plans.

Development of the Central Valley-wide Salt and Nitrate Management Plan began in 2006 when the Central Valley Water Board initiated a collaborative stakeholder initiative, known as Central Valley Salinity Alternatives for Long-Term Sustainability (CV-SALTS). Following input from stakeholders, state and federal agencies, and the public, the Central Valley Water Board adopted Basin Plan Amendments in May 2018 that implement the salt and nitrate management program across its three major basins — the Tulare Lake and the Sacramento and San Joaquin river basins.

The goals of the program are to sustain the Central Valley's lifestyle, support regional economic growth, retain a world-class agricultural economy, maintain a reliable, high-quality water supply and protect and enhance the environment. To support the goals, the amendments include recommendations for new policies and regulatory strategies.

For info: CV-SALTS resource page: www.waterboards.ca.gov/centralvalley/water_issues/salinity/

RIVER TOXICS MT

EPA/USGS TRANSBOUNDARY STUDY

The US Environmental Protection Agency (EPA), in cooperation with the US Geological Survey (USGS), has released the results of a water quality study indicating elevated levels of selenium in water and fish, and elevated nitrates in water, in the Kootenai River associated with upstream sources in Canada's Elk Valley and Lake Koocanusa.

The study, part of a collaborative effort between federal, state, and tribal agencies to assess the Kootenai River watershed, is based on water chemistry and fish tissue samples taken on the river in Montana and Idaho from immediately below Libby Dam to the Canadian border. Data contributing to the study were collected by USGS, the states of Idaho and Montana, and the Kootenai Tribe of Idaho. The data indicate upstream activities may be affecting water quality and aquatic resources in Montana and Idaho.

EPA has long been engaged in efforts to address water quality impacts to Lake Koocanusa, which straddles the border of British Columbia, Canada and the state of Montana. Selenium and nitrate concentrations entering the lake from British Columbia's Elk River have been increasing since data collection began several decades ago. EPA initiated this study in 2018 to address questions posed by state and tribal partners and to better understand the presence, sources and movement of selenium and nutrients in the Kootenai River watershed downstream of Libby Dam. USGS led the EPA funded study, in collaboration with EPA, state, and tribal partners. EPA conducted the fish tissue analysis.

Results

The sampling results show elevated selenium levels in some of the 142 fish evaluated in the study, with levels in some mountain whitefish eggs exceeding EPA's recommended criterion of 15.1 ug/L (the level at which fish reproduction may be harmed). Six of eight mountain whitefish exceeded the EPA criterion. In addition, one redside shiner exceeded EPA's whole-body criterion for selenium.

Selenium concentrations in water were elevated above background levels but did not exceed EPA recommended criteria for selenium in flowing waters. Selenium was not detected in water samples from Kootenai River tributaries unaffected by discharge from Lake Koocanusa, indicating that the source is the discharge of mine-related constituents from the lake. Nitrate was detected in water immediately below Libby Dam at nearly three times the concentrations observed in previous samples collected from 2000-2004, and significantly higher than those found on the tributaries. Previous studies show that most of the selenium and nitrate in Lake Koocanusa originates from coal mining in the Elk Valley.

Communities and tribes in Montana and Idaho depend upon good water quality and healthy fisheries. EPA's study indicates that the Kootenai River is being impacted by upstream mining in British Columbia and points to the need for continued monitoring to assess Kootenai River health and to track future trends. Tribes and state agencies will consider whether fish advisories are appropriate.

EPA issued revised national criteria recommendations in 2016 for selenium in water and fish. The Montana Department of Environmental Quality (MDEQ) is currently working with the British Columbia Ministry of Environment and Climate Change Strategies and other parties, including EPA, to develop site-specific water quality criteria for selenium in Lake Koocanusa. MDEQ expects to submit revised selenium criteria to EPA for review next year. Montana also plans to adopt EPA-recommended selenium criteria for the Kootenai River below Libby Dam. Idaho has water quality standards for selenium in the Kootenai River that are consistent with EPA's 2016 recommendations.

For info: Lisa McClain-Vanderpool, EPA, 303/ 312-6077 or mcclain-vanderpool.lisa@epa.gov)

EPA/USGS Study at: https://doi.org/10.5066/P9YYVV7R

CALENDAR

November 15 OK
Tribal Water Law Conference, Oklahoma City. Skirvin Hilton. For info: CLE Int'l, 800/ 873-7130, live@cle.com or www.cle.com

November 16 OR
17th Annual Celebration of Oregon Rivers, Portland. Leftbank Annex, 101 N. Weidler Street. Presented by WaterWatch of Oregon. For info: waterwatch.ejoinme.org/auction2019

November 18 CA
Groundwater Sustainability through Mandated Coordination - Environmental Forum, Stanford. Stanford Woods Inst. for the Environment. For info: https://woods.stanford.edu/events/upcoming-events

November 18-20 DC
Eastern Boot Camp - Environmental Law, Washington. Sidley Austin, LLP, 1501 K Street, NW. Presented by Environmental Law Institute. For info: www.eli.org/events/28th-annual-eli-eastern-boot-camp-environmental-lawr

November 19-20 WA
Lake Roosevelt Forum, Spokane. The Davenport Hotel. For info: www.lrf.org/conference

November 20-21 WA
12th Annual Washington Water Code: Past, Present & Future Seminar, Seattle. Hilton Seattle, 1301 6th Avenue. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

November 20-21 CO
Colorado Groundwater Issues Conference, Denver. DoubleTree by Hilton Denver, 3203 Quebec Street. Presented by American Ground Water Trust. For info: https://agwt.org/civicrm/event/info%3Fid%3D302%26reset%3D1

November 21-22 WA
The Lucrative Business of Marijuana in Washington State Seminar, Seattle. Washington Athletic Club, 1325 6th Avenue. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

November 21-22 NM
Tribal Energy in the Southwest Seminar, Albuquerque. Indian Pueblo Cultural Center, 2401 12th Street NW. For info: Law Seminars International, 206/ 567-4490 or www.lawseminars.com/

November 26-27 Netherlands
Smart Water Utilities 2019: Reducing Leekage Across the Network - 2nd Annual Conference, Amsterdam. For info: http://www.smart-water-utilities.com/

December 2-5 OR
Oregon Water Resources Congress - 2019 Annual Conference, Hood River. Best Western Hood River Inn. For info: www.owrc.org

December 3-4 DC
P3 Government Conference (Public Private Partnership), Washington. Marriott Marquis. For info: www.p3gov.com

December 3-5 TN
North American Water Loss Conference & Exposition - Approaches to Reducing Non-Revenue Water Loss, Nashville. Renaissance Nashville Hotel. Presented by American Water Works Assoc.. For info: www.awwa.org/Events-Education/Events-Calendar

December 3-5 BC
70th Annual Northwest Fish Culture Concepts Meeting & Workshops - "Fish Culture in a Changing Climate", Victoria. Victoria Conference Center. Presented by Freshwater Fisheries Society of BC. For info: www.gofishbc.com/nwfcc

December 3-6 CA
Association of California Water Agencies Fall Conference & Exhibition: Partnerships in Action, San Diego. Manchester Grand Hyatt. For info: www.acwa.com/events/2019-fall-conference-exhibition/

December 6 WA & WEB
Permitting Strategies Seminar, Seattle. Grand Hyatt Seattle, 721 Pine Street. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

December 9-10 CO
Migratory Bird Treaty Act & Bald and Golden Eagle Protection Act - Beyond the ESA: The Next Generation of Federal Wildlife Regulation, Denver. Embassy Suites. For info: CLE Int'l, 800/ 873-7130, live@cle.com or www.cle.com

December 9-10 TX
Hydraulic Fracturing Production Chemicals 2019 Exhibition & Conference, Houston. Marriott Westchase. For info: www.hydraulic-fracturing-chemicals.com

December 9-10 CA
PFAS Litigation Conference, San Diego. Hilton San Diego Gaslamp Quarter. For info: Law Seminars International, 206/ 567-4490 or www.lawseminars.com/

December 10 WY
Wyoming Cloud Seeding Activities and Update - Water Forum, Cheyenne. Water Development Office, 6920 Yellowtail Road, 10 am - Noon. Presented by Wyoming State Engineer's Office. For info: Jeff Cowley, WSEO, 307/ 777-7641, jeff.cowley@wyo.gov or https://sites.google.com/a/wyo.gov/seo/interstate-streams/water-forum

December 12-13 CA
CEQA Conference, San Francisco. Hilton Union Square. For info: CLE Int'l, 800/ 873-7130, live@cle.com or www.cle.com

December 16 WA
Fifth Annual Tribal Natural Resource Damage Assessments Seminar, Seattle. Crowne Plaza Hotel - Seattle Downtown. For info: Law Seminars International, 206/ 567-4490 or www.lawseminars.com/

January 26-29 IL
80th Midwest Fish & Wildlife Conference - "Bringing Science Back to the Forefront of Resource Management", Springfield. BOS Center. Presented by American Fisheries Society. For info: www.midwestfw.org/

January 10 WA
SEPA - NEPA Conference, Seattle. TBD. For info: Law Seminars International, 206/ 567-4490 or www.lawseminars.com/

January 14 WY
Colorado River Demand Management - Water Forum, Cheyenne. Water Development Office, 6920 Yellowtail Road, 10 am - Noon. Presented by Wyoming State Engineer's Office. For info: Jeff Cowley, WSEO, 307/ 777-7641, jeff.cowley@wyo.gov or https://sites.google.com/a/wyo.gov/seo/interstate-streams/water-forum

January 22-23 TX
11th TCEQ State of the Bay Symposium (Galveston Bay), Galveston. Moody Gardens Convention Center. Presented byTexas Commission on Environmental Quality. For info: www.tceq.texas.gov/p2/events/state-of-the-bay-symposium

January 23-24 WA
Electric Power in the West Conference, Seattle. John Davis Conference Center, 920 Fifth Avenue, Ste. 3300. For info: Law Seminars International, 206/ 567-4490 or www.lawseminars.com/

January 23-24 WA
Endangered Species Act Seminar, Seattle. Washington Athletic Club, 1325 6th Avenue. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

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CALENDAR

(continued from previous page)

January 23-24 CO
Project Management for Water and Wastewater Utilities, Greenwood Village. Plaza One Tower Conference Center. For info: www.euci.com/event

February 10-11 GA
International Symposium on Potable Reuse - Latest Innovations in Treatment & Technology, Atlanta. W Atlanta Downtown. American Water Works Assoc. Event. For info: www.awwa.org/Events-Education/Events-Calendar

February 11 WY
Crow Creek Restoration - Water Forum, Cheyenne. Water Development Office, 6920 Yellowtail Road, 10 am - Noon. Presented by Wyoming State Engineer's Office. For info: Jeff Cowley, WSEO, 307/ 777-7641, jeff.cowley@wyo.gov or https://sites.google.com/a/wyo.gov/seo/interstate-streams/water-forum

February 16-21 CA
Ocean Sciences Meeting 2020, San Diego. San Diego Convention Center. Presented by American Geophysical Union, Assoc. for the Sciences of Limnology and Oceanography and The Oceanography Society. For info: www2.agu.org/ocean-sciences-meeting

February 20-21 NV
Family Farm Alliance 2020 Annual Meeting & Conference, Reno. Eldorado Resort & Casino. For info: www.familyfarmalliance.org

February 25-28 CA
WEF/AWWA Water Utility Management Conference - Latest Approaches, Practices, Processes, Garden Grove. Hyatt Regency. Presented by World Environment Federation / American Water Works Assoc. For info: www.awwa.org/Events-Education/Events-Calendar

February 26 CA
Water & Environmental Law Program Speaker Series: Mark Arax, Water Journalist & Author, Sacramento. McGeorge School of Law. Presented by Water & Environmental Program. For info: Jennifer Harder at jharder@pacific.edu

February 27-28 CA
Business & Environmental Issues in Cannabis & Industrial Hemp Conference, Oakland. Oakland Marriott City Center. For info: The Seminar Group, 800/ 574-4852, info@theseminargroup.net or www.theseminargroup.net

March 2-3 CO
Special Institute for Young Natural Resources Lawyers & Landmen, Denver. The Oxford Hotel. Presented by Rocky Mountain Mineral Law Foundation. For info: www.rmmlf.org/conferences

March 2-3 TX
North American Shale Water Management 2020: Reducing the Cost of Water Recycling & Use (Exhibition & Conference), Houston. For info: www.shale-water-management.com/?join=VR

March 5 OR
Immerse 2020 - A Benefit for The Freshwater Trust, Portland. Redd on Salmon Street, 831 SE Salmon Street; 5:30 - 9 pm. For info: www.thefreshwatertrust.org

March 10 WY
Update on GIS Data Model Implementation Study & Water Supply Index - Water Forum, Cheyenne. Water Development Office, 6920 Yellowtail Road, 10 am - Noon. Presented by Wyoming State Engineer's Office. For info: Jeff Cowley, WSEO, 307/ 777-7641, jeff.cowley@wyo.gov or https://sites.google.com/a/wyo.gov/seo/interstate-streams/water-forum