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ARIZONA v. NAVAJO NATION

HISTORICAL HARDSHIPS AND THE UNQUENCHED THIRST FOR WATER JUSTICE

by Heather Whiteman Runs Him, University of Arizona (Tucson, AZ)

Introduction

Throughout many areas of Indian Country, and certainly on many of the larger Indian Reservations within the more arid regions of the western United States, water security remains a fleeting goal. The increasingly evident realities presented by climate change add additional elements of uncertainty. Increased awareness of climate change and the normalization of longer, drier droughts also deepen the urgency to secure access to an already overallocated and scarce resource. This struggle pulls in a diverse set of stakeholders, some of whom benefit from at least a century of priority and access to funding and authorization to build water infrastructure. The resulting reliance on water by such privileged interests can be politically difficult to disrupt, despite being increasingly nonviable in the face of mounting evidence of climate change impacts.

In contrast to those parties who have enjoyed long-standing access and priority are the Tribal Nations whose rights have, until recently, been overlooked at best, and actively opposed in far too many instances.

The Colorado River is a critical waterway in a region where permanent and plentiful sources of surface waters are few. It serves the needs of millions of people within the basin, and supports the agricultural and industrial development of millions of acres of land. It is managed as two discrete geographic units — the upper basin and the lower basin. Pursuant to the Boulder Canyon Project Act of 1928, the Secretary of the Interior holds significant authority to allocate the water in the lower basin held in Lake Mead (45 Stat. 1057, 43 U.S. C. §§ 617-619b).

The entitlements to water in the lower basin remain contentious, even with an established federal referee at the helm of water allocation decisions. The State of Arizona sued the State of California in 1952 in an original action brought before the United States Supreme Court after many years of disagreement about the states' relative entitlements to the waters within the lower basin (*Arizona v. California*, 373 U.S. 546 (1963)). As the Court worked to address the competing claims of the States with mainstream rights in the Lower Colorado River basin, the United States intervened to assert claims on behalf of several Indian Tribes with lands on or near the mainstream of the river, but did not include the Navajo Reservation — despite its landholdings adjacent to the Colorado River. Indeed, when the Navajo Nation sought to intervene in the *Arizona v. California* litigation to protect its interests, the United States opposed the intervention and the Court ultimately denied it. However, in its 1964 decree, the Court expressly stated that nothing therein affected the water rights of any Indian Reservation other than the five tribes whose rights were specifically decreed in that ruling.

The lands of the Navajo Nation (Nation) lie mostly in the Colorado River Basin — within both the upper and lower basins — overlying lands within the current-day boundaries of the states of Arizona, New Mexico, and Utah. The Navajo Reservation was

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set aside as a "permanent home" for the Navajo people in an 1868 Treaty with the United States after a large portion of the citizens of the Nation were forcibly relocated and held at Fort Sumner, New Mexico. The boundaries of the Reservation were expanded and defined by various acts and agreements over several decades following the 1868 Treaty. The Reservation is the largest in the United States in terms of acreage and is home to over half of the Nation's approximately 300,000 citizens.

The amount of water needed to support a permanent homeland within this vast landbase is, obviously, substantial. As recognized by the United States Supreme Court in 1908 in the case *Winters v. United States*, 207 U.S. 564 (1908), when the United States set aside permanent homelands for Tribal Nations, it also impliedly reserved appurtenant water sufficient to meet the needs associated with that purpose (*Winters* Doctrine). The extent of the waters reserved for the Navajo Reservation remains undetermined, although the Nation completed settlements of its water rights within the States of Utah and New Mexico.

In Arizona, however, attempts at settlement of the Nation's water rights have been unsuccessful to date and there is no agreement in place. Attempts by the Navajo Nation to adjudicate the question of its mainstream Colorado River rights have yet to yield a resolution, although the Nation participates in state basin adjudications of tributaries of the Colorado River within the Reservation.

Procedural Background

In 2003, attorneys for the Nation filed suit against the United States Department of Interior and other federal officials and entities in the federal District Court in and for the District of Arizona (District Court). The case was filed in an attempt to spur the federal government to address ongoing water insecurity within the areas of the Navajo Reservation most readily served by the same water source already managed to meet the water needs of much of the general population of Arizona — i.e., the Colorado River.

The 2003 Complaint and the Nation's Second Amended Complaint asserted claims under the National Environmental Policy Act and the Federal Administrative Procedure Act. The Complaints challenged the federal government's issuance of various plans, guidelines, and agreements managing the flow of the lower Colorado River, and associated environmental review documents. The Nation's claims asserted that the federal government was using its authority to manage and allocate the waters of the Colorado River without ensuring or considering "the availability of Colorado River water to satisfy the Navajo Nation's rights and needs" (*Navajo Nation v. U.S. Dep't of the Interior*, 34 F. Supp. 3d 1019, 1024 (D. Ariz. 2014)). Finally, the Nation asserted that the establishment of the Navajo Reservation as a permanent homeland implied there would be sufficient water reserved to meet that purpose, that fulfillment of that purpose required water in the Lower Colorado River, and that by failing to assess needs and act in furtherance of the Nation's rights, the United States violated its fiduciary obligations to the Nation (*Id*. at 1021-1022).

The Nation's claims supported a prayer for injunctive relief — rather than monetary damages — from the United States. The relief requested from District Court was to compel the United States to determine the water needs of the Nation's lands in Arizona and to formulate a plan to meet those needs. Thus, the requested relief sought to prevent the United States from continuing to manage the lower Colorado River basin in the absence of an assessment and acknowledgement of the water rights of the Nation within the basin.

The United States moved to dismiss, asserting that the Nation lacked standing, arguing that it didn't have legal interests and/or that it hadn't suffered provable injuriesinjuries — to bring most of its claim — and that its claim for violation of fiduciary obligations failed to identify any specific statute or other provision giving rise to an enforceable duty on the part of the United States. They also argued that there was no waiver of the United States' sovereign immunity identified as to that claim.

The District Court agreed with the United States, granting its motion to dismiss in 2014. The Nation appealed to the Ninth Circuit Court of Appeals, which affirmed the District Court in part, reversed in part, and remanded the case back to the District Court. After a stay of the litigation to allow for an attempt at settlement, the Nation then moved to file a Third Amended Complaint asserting breach of trust claims based not on federal statutes as in the earlier complaints, but rather on the terms of the Treaties between the Navajo Nation and the United States. This complaint again sought essentially the same injunctive relief — a needs assessment and formulation of a plan to meet those needs.

The States of Arizona, Utah, and Colorado, along with other non-Indian stakeholders including irrigators, agriculture, and water districts and authorities (State Intervenor parties), intervened in the litigation, concerned about potential disruption to their entitlements under *Arizona v. California*. The requested relief did not include an actual quantification of the Nation's water rights and did not seek a decree of such rights. The United States and the intervenor-defendants opposed the Nation's motion

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to file a third amended complaint. The District Court again granted the federal defendants' motion to dismiss, ruling that the proposed Third Amended Complaint was futile. The Nation again appealed to the Ninth Circuit Court of Appeals.

Petitions for Certiorari

The Ninth Circuit issued its decision to reverse and remand the case to the District Court on April 28, 2021. The Ninth Circuit, in remanding the case, ordered the District Court to allow the Nation to file its proposed Third Amended Complaint (*Navajo Nation v. U.S. Dep't of Interior,* 996 F. 3d 323 (9th Cir. 2021)). Defendants petitioned for an en banc review of that decision before all the judges sitting on the Ninth Circuit Court of Appeals (*Navajo Nation v. U.S. Dep't of Interior,* 26 F. 4th 794 (9th Cir. 2022)). Petitions for Certiorari, or review by the United States Supreme Court, were filed soon thereafter by both the State Intervenor parties, and separately by the Federal Defendants. The Supreme Court combined the separate petitions filed by the United States and the State Intervenors and granted Certiorari — to hear the case — on November 4, 2022.

Questions

Though characterized and described variously by parties, the two questions before the Court were essentially: (1) whether the United States has a judicially enforceable, treaty-based duty — consistent with its general trust responsibility to Tribes — to assess the Navajo Nation's water needs and develop a plan to meet them; and (2) whether the United States Supreme Court's exclusive jurisdiction over questions of rights to water in the mainstream of the lower Colorado River in *Arizona v. California* preclude any other court from considering the claims asserted by the Nation in this case.

Oral argument was heard by the United States Supreme Court (Court) on March 20, 2023. The Court issued its decision on June 22, 2023 (*Arizona v. Navajo Nation*, 143 S. Ct. 1804 (2023)).

The Supreme Court Decision

The majority opinion — authored by Justice Kavanaugh — was joined by Chief Justice Roberts and Justices Alito, Thomas, and Barrett. Justice Thomas authored a concurring opinion. Justice Gorsuch wrote a dissent, joined by Justices Kagan, Sotomayor, and Jackson.

Majority Opinion

The majority opinion recognized that the Treaties between the Nation and the United States are at the heart of the questions to be addressed in the case and focused its analysis on the terms of the 1868 Treaty providing for the return of the Nation from the barren area of Fort Sumner to its homelands further west. The Court held that nothing in the terms of the 1868 Treaty requires the United States to take affirmative steps to assess water rights, water needs associated with the establishment of the Navajo Reservation, or to develop water infrastructure or plans for any of these. Thus, according to the Court's relatively brief discussion of the 1868 Treaty and terse analysis of its specific terms, there is no enforceable duty requiring the United States to do any of these things. Because of the Court's ruling on the general trust responsibility, it declined to address the issue of the extent of its exclusive jurisdiction in *Arizona v. California* and whether the claims asserted by the Nation fell within the limitations associated with the Court's ongoing and exclusive jurisdiction in that case.

Historical Perspectives

Reading the majority opinion, it is immediately clear that the historical perspective of the Navajo Nation, and its assertion of clearly established expectations based on the terms of its treaties will not be the focus of the Court's legal analysis. Rather than a *McGirt*-esque opening sentence acknowledging historical hardships enforced against Tribal Nations, recalling a trail of tears, a long walk, or acknowledging a promise (*McGirt v. Oklahoma,* 591 U.S. ___ (2020) — *see* below), the majority opinion in *Arizona v. Navajo Nation*, authored by Justice Kavanaugh, opens with a recitation hearkening back to conquest itself:

> [i]n 1848, the United States won the Mexican-American War and acquired vast new territory from Mexico in what would become the American West. The Navajos lived within a discrete portion of that expansive and newly American territory. (*Arizona v. Navajo Nation*, 599 U.S. ___ (2023), *Slip Op.* at 1).

McGirt v. Oklahoma

McGirt v. Oklahoma, 591 U.S. ___ (2020), was a landmark United States Supreme Court case which ruled that, as pertaining to the Major Crimes Act, much of the eastern portion of the state of Oklahoma remains as Native American lands of the prior Indian reservations of the Five Civilized Tribes, never disestablished by Congress as part of the Oklahoma Enabling Act of 1906. As such, prosecution of crimes by Native Americans on these lands falls into the jurisdiction of the tribal courts and federal judiciary under the Major Crimes Act, rather than Oklahoma's courts. The majority opinion was written by Justice Gorsuch, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

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Discrete Portion

Indeed, the minimization of the Navajo Nation and homeland into a nameless, faceless "discrete portion" of new American lands (the future "American West") is consistent with the acts and attitudes of willful neglect and disregard that led to this litigation from its outset. However, the Court acknowledges the rights of the Nation to water under the *Winters* Doctrine and further recognizes that the Nation can "assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests…" (*Id*. at 12).

Trust Doctrine

Justice Thomas's concurrence focused on his well-known concerns about the origins of, and basis for, the federal trust responsibility, as well as his discomfort with the canons of statutory construction favoring the interests of Indian Tribes. In a relatively idiosyncratic passage, Justice Thomas suggested that perhaps the trust doctrine "could refer to the trust that Indians have placed in the Federal Government" (*Id*., Justice Thomas, concurring, *Slip Op*. at 2). If that's all the trust doctrine is, Thomas writes, then he has no problem with it. Indeed, Thomas's concurrence gives little acknowledgement to the role that treaties play with respect to these legal questions, instead characterizing the Nation's treaty-based claims as "general moral obligations" rather than "specific fiduciary obligations." *Id*.

Under that approach, the ability and responsibility of Courts to uphold and enforce treaty terms is abdicated and any other approach is rendered judicial overreach, as an attempt by a court to rewrite terms of a treaty. As many Tribal Nations are well aware, the need to hold the federal government accountable for its failures and transgressions against tribal interests and tribal resources exists to this day.

Dissenting Opinion

The dissent, authored by Justice Gorsuch and joined by Justices Kagan, Sotomayor, and Jackson, begins with a careful assertion that the Court's opinion neglects "at least three pieces of context" necessary to understand the case. First, a proper understanding would require an understanding of the historical background of the Treaty of 1868; second, it would require insight into the discussions surrounding the Treaty of 1868; and third, it would require "an appreciation of the many steps the Navajo took to avoid this litigation" (*Slip Op.* at 2). From there, the dissent recites detailed historical background and context, including specific accounts from the negotiation minutes of the 1868 Treaty reflecting the degree to which water security and access was a key concern driving the decisions of the Navajo leaders at the time. The dissent does not rely solely on the significant history leading to and surrounding the 1868 Treaty, but also provides a detailed account of modern-day development and management of the Colorado River and the many barriers and challenges facing the Nation's citizens in the present day, as well as noting the disparities in use of water and access to water.

Potential Impacts of the Decision

***Winters* Doctrine**

While the *Winters* Doctrine was not directly implicated in the questions presented before the Supreme Court in this case, there was understandable concern about the potential for the Court to limit or diminish some of the more significant aspects of the doctrine in its disposition of the case. Much of the current framework of western water law and the footholds that Tribal Nations are able to maintain in asserting and protecting their water rights in the face of overwhelmingly powerful and water-intensive non-Indian uses rests in large part on the viability of the *Winters* Doctrine. Thankfully, the *Winters* Doctrine remains strong.

Preferred Pathways

The Court's decision leaves intact the *Winters* Doctrine. *Winters* was not overruled, however, the Court's refusal to recognize a common-law duty on the part of the United States to take any affirmative steps to protect, decree, or develop *Winters*-based rights may prove problematic. In question is the separate, but related, context of the current preferred pathways towards asserting, establishing, developing, and using tribal reserved rights to water. Certainly, any case involving the construction of treaty terms is fact-specific. As recognized by Justice Gorsuch in his dissent, resolving questions about the relative duties of the parties to treaties between the United States and Tribal Nations should involve a fact-intensive analysis of the historical background of the treaty and the surrounding circumstances of the negotiation of the treaty. But the Court, in the majority opinion, fails to consider the context of the 1868 Treaty and the negotiations, and thus fails to recognize that the Nation's understanding of the Treaty would require some obligations on the part of the United States with respect to the most precious of resources in an arid region — i.e., water.

Settlements v. Litigation

Because the current policy of the federal government strongly encourages tribes to enter into negotiated settlements rather than litigating their rights to water in protracted court proceedings — whether through state-based basin adjudications or claims brought in federal court — the process for negotiating and determining the federal government's support for negotiated settlements of tribal water rights may be impacted by the obvious implications of the rationale behind the Court's decision in the case. The process for evaluation and approval of tribal water rights settlements requires an analysis of the monetary benefits of the settlement that will be realized by the United States. A review of the

financial value of the settlement, including the waivers of potential claims that Tribes agree to forego as a requirement of the settlement, is a required component of the formulation of federal positions to support and appropriate significant sums of money to achieve these settlements. And, absent an enforceable duty to take *affirmative acts* on the part of the United States, the monetary value of those waivers may be evaluated as significantly lower going forward.

What might this mean in practice? Reduced financial benefits for the federal government will ultimately result in less favorable terms in negotiated tribal water rights settlements. That will mean less incentive for Tribal Nations to enter into negotiated settlements of water rights. Ultimately, Tribal Nations will be more likely to decide to litigate their rights to water. This will have an impact on the financial and human resources of tribal, federal, and state governments. While critics of tribal water rights settlements will assert that an increased reliance on litigation is not necessarily negative — difficult concessions and limitations are characteristic of nearly any given settlement — the ability of Tribal Nations to choose to negotiate rather than litigate provides timely and important benefits improving the quality of life for tribal citizens in many instances.

In the few instances where Tribal Nations have fully litigated their water rights, it is often impractical or even impossible to put decreed water rights to use without the federal financial contributions driving most settlements. Funding for infrastructure and development of water governance programs are the key reason most Tribal Nations agree to settle rather than litigate their water rights. But it remains patently unfair that Tribal Nations have been forced to make significant concessions when settling water rights claims, just to secure funding for the types of infrastructure provided freely to mainstream America and the non-Indian interests — agricultural and municipal, as well as others — to incentivize the development of the American West.

Conclusion

In *Arizona v. Navajo Nation,* the Court foreclosed the Nation's two-decade long attempts to compel the United States to take basic and cursory actions to address historic and increasingly severe water insecurity on the Navajo Reservation. Indeed, many observers questioned the federal government's failure to provide the relief requested in the case, even in the face of increased awareness of water scarcity and climate change, as well as the COVID-19 pandemic where water insecurity and the lack of water and sanitation infrastructure contributed to devastating mortality rates on the Navajo Reservation.

Even as the majority decision was a clear disappointment in its limitation of the federal trust responsibility, the legal basis for the Nation's water rights — the *Winters* Doctrine — remains intact. Clearly, the Navajo Nation has water rights, although it cannot require the United States to assist with their assessment or development. Further, the Court acknowledged, the Nation can assert its rights in various settings going forward.

The severe water insecurity faced by the Navajo Nation cannot be denied, even if a majority of Justices on the Supreme Court sees fit to deny the Nation's claims seeking to compel the federal government to take affirmative steps towards water justice for the Nation. The alarming disparity between the availability and use of water for and by Navajo citizens in contrast to that of the average American outside of the Reservation — particularly so on the Arizona portion of the Reservation where water rights remain unresolved — needs to be addressed. The political and geographical barriers contributing to this disparity can be overcome, but require commitment and respect from all stakeholders.

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Sackett v. EPA

SACKETT v. EPA: DEFINING "ADJACENT" WETLANDS

NARROWING THE JURISDICTION OVER WETLANDS AS "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

by Kathy Robb, Robb Water Partners LLC (New York, NY)

Introduction

On May 25, 2023, in *Sackett v. EPA*, 598 U.S.__ (2023), the Supreme Court held that under the Clean Water Act (CWA or Act), "waters of the United States" refers "only to geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes' and to adjacent wetlands that are 'indistinguishable' from those bodies of water due to a continuous surface connection." After nearly 16 years of litigation, Chantell and Michael Sackett now may develop their 2/3 acre residential lot near Priest Lake, Idaho — without a Section 404 permit under the Act — as their property does not meet this test (*Rapanos v. United States*, 547 U.S. 715, 755, 742, 739 (2006)).

Wetlands Regulation

Some have hailed the decision as bringing much-needed clarity to the question of the permissible scope of wetlands regulation under the Act, which has been debated and litigated since the CWA was passed over 50 years ago. Others estimate that the ruling will cut in half the wetlands previously regulated, putting US waters at risk of further pollution.

Opinions

Perhaps one of the most notable aspects of the decision is that all nine Justices agreed that the Ninth Circuit applied the wrong test for determining whether wetlands "adjacent" to navigable waters are considered waters of the United States. (The statutory reference to "adjacent" wetlands can be found at 33 U.S.C.A. Section 1344(g)(1)). While the Court was unanimous in the judgment for the Sacketts, it split on the appropriate test. Justice Alito wrote the opinion of the court, in which Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett joined. A concurring opinion was written by Justice Thomas, joined by Justice Gorsuch. Separate opinions concurring in the judgment were filed by Justice Kagan, joined by Justices Sotomayor and Kavanaugh; and by Justice Kavanaugh, joined by Justices Kagan, Sotomayor, and Jackson.

WOTUS

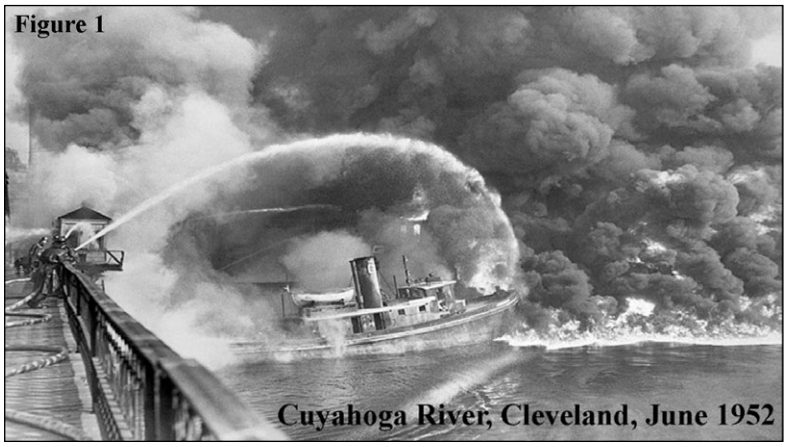
Justice Alito, writing the opinion of the court, largely adopted the approach taken by the four-Justice plurality in the 2006 *Rapanos* case (*See* Robb *TWR* #218). Under the *Sackett* majority's test, jurisdictional "waters" under the Act are limited to relatively permanent bodies of water connected to traditional navigable water and to wetlands that are considered "**w**aters **o**f **t**he **U**nited **S**tates" (WOTUS) due to a continuous surface connection to jurisdictional water with no clear demarcation between them.

History of the Clean Water Act and Jurisdictional Waters

Cuyahoga Fires

The bundle of laws commonly referred to as the Clean Water Act is made up of a statute first passed in 1972 and last amended in 1987, with antecedents as far back as the Rivers and Harbors Act of 1899. It is well to remember that in the beginning, US rivers literally were on fire. The Cuyahoga River alone had fires every decade between 1868 and 1972. Iconic photos from those fires (*see* Figure 1), published on the cover of Life magazine in 1969 galvanized political support for passage of the Act three years later. Congress overrode a presidential veto to the initially-named "Federal Water Pollution Control Act Amendments of 1972" by 52 to 12 in the Senate and 247 to 23 in the House, with members of both parties casting votes on each side, in a bipartisan atmosphere we now can only marvel at.

Congress set audacious goals in the CWA in 1972: "To restore and maintain the chemical, physical, and biological integrity of the nation's waters; to make waters fishable and swimmable by 1983; and to eliminate



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CWA Goals

CWA Jurisdiction

WOTUS Definition

Navigable Water

Navigable-In-Fact

the discharge of pollutants by 1985. Unsurprisingly, these target dates were not met. But by 1998, the United States had doubled the waters clean enough for fishing and swimming; more than doubled the number of people served by modern sewage treatment plants; and drastically reduced wetlands losses. In 1972, less than a third of the nation's waters met the CWA's goals; by 2016, it was estimated that over 65% did.

Tensions inherent in the CWA from the beginning, however, remain 50 years later. Three jurisdictional aspects of the Act have been the subject of debate and litigation since its passage: (1) What are "navigable waters" which demark the jurisdictional waters under the Act?; (2) What does the "cooperative federalism" that is a hallmark of the Act mean for jurisdiction between the federal government and the states?; (3) What is the regulatory scope of the Act for groundwater? (*See* Robb *TWR* #189 & #218).

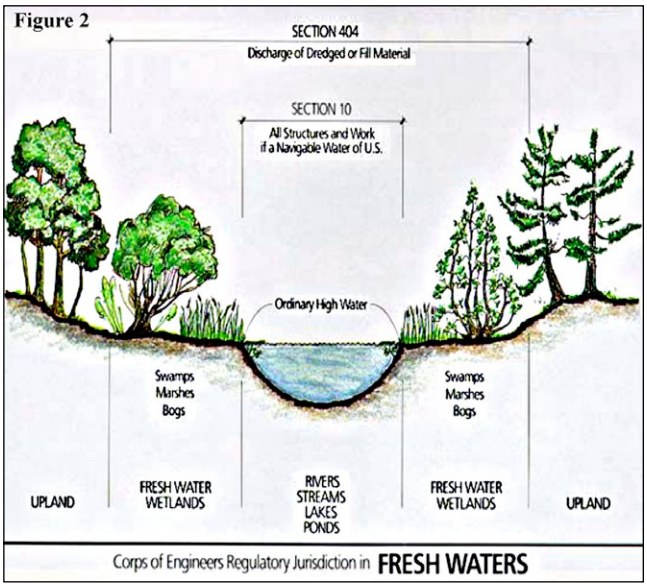
The CWA prohibits persons, broadly defined, from discharging listed pollutants into "navigable waters" — defined in the CWA as "waters of the United States, including the territorial seas" — without a permit. The definition of WOTUS applies to all sections of the Act to define jurisdiction, including the Section 402 permitting program for discharges of pollutants from point sources into WOTUS, and the Section 404 regulation of discharges of dredged or fill materials into WOTUS, including wetlands. The US Environmental Protection Agency (EPA) and 46 delegated states administer the 402 permits (Idaho, Massachusetts, New Mexico, and New Hampshire do not have delegated authority). The US Army Corps of Engineers (Corps) largely administers Section 404 permits, although three states (Michigan, New Jersey, and Florida) have assumed administration of the 404 program.

Before 2015 — and dating back to 1977 — the definition of WOTUS included jurisdictional determinations on 404 permits on a case-by-case basis by the Corps, based on individual sites and specific facts. The determinations sometimes were viewed as inconsistent from district to district, and even within districts. The Corps uses a graphic of its jurisdiction under the pre-2015 law (*see* Figure 2) which reflects its administration of the 404 permitting process for wetlands.

Despite numerous proposed and final WOTUS rules in the past three administrations, this pre-2015 regulatory program was in effect for many years leading up to the *Sackett* decision, due to challenges and litigation affecting the many prior CWA rules and regulations promulgated by EPA and the Corps.

The Supreme Court Has Considered the Boundaries of 404 Permit Jurisdiction Before

Between 1985 and 2006, the Supreme Court (Court) considered CWA jurisdiction in three cases: *United States v. Riverside Bayview*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001); and *Rapanos v. United States,* 547 U.S. 715 (2006). All three cases addressed issues of surface water and 404 permits for wetlands.



In *Riverside Bayview,* the Court considered the jurisdiction of wetlands adjacent to traditional navigable waters and concluded that those wetlands required a 404 permit for discharges. This was in 1985, when, after much debate between the Corps and EPA, the agencies had reached a consensus definition about the proper scope of WOTUS. The wetlands in that case directly abutted the navigable water. Counsel for the Sacketts explained in oral argument in the *Sackett* case that the wetlands in question in *Riverside Bayview* edged the navigable water such that one could plunge from the navigable water through to the wetlands while immersed in a continuous body of water. The Court deferred to the Corps' regulations and held that a 404 permit was required to discharge dredge and fill material into the adjacent wetlands.

In 2001 in *SWANCC,* the Court held that isolated ponds formed by excavated trenches from abandoned sand and gravel pits were not jurisdictional under the Clean Water Act. The Corps argued that use of the water by migratory birds, crossing state lines, established a sufficient connection to interstate commerce to be regulated, and under the Corps' "Migratory Bird Rule," a 404 permit was required, which the Corps denied. Unlike the wetlands in *Riverside Bayview*, the ponds were isolated and there were no navigable

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waters on the property. The Court declined to give deference to the Corps' rule and held that the use by migratory birds did not provide jurisdiction to isolated ponds that were not adjacent to open water. The Court did not focus so much on the legislative history of the Clean Water Act, but instead emphasized the Corps' original interpretation of the 1972 CWA amendments, which limited the Corps' jurisdiction to navigable-in-fact waters. Navigable-in-fact means that in the water body's natural state you can float a boat on it for commerce.

Adjacent Wetlands

In 2006, *Rapanos* raised the question of jurisdiction over "adjacent" wetlands that do not abut a navigable water. The Corps asserted it had permitting jurisdiction. While many hoped that the Court would provide clarity on wetlands jurisdiction after *SWANCC*, the Justices were not able to agree in *Rapanos* on a single test to apply to jurisdictional disputes, and instead issued a 4-1-4 opinion laying out two alternative tests for evaluating jurisdictional waters.

WOTUS Tests and Rules

Bright-Line Rule

In *Rapanos*, Justice Scalia wrote for the four-justice plurality, stating a bright-line rule. Under the Scalia test, "waters" in "waters of the United States" means only "relatively permanent, standing, or continuously flowing bodies of water", like streams, rivers, and lakes. Wetlands are included when they have a "continuous surface connection" to other "waters of the United States."

Justice Kennedy wrote a separate concurring opinion describing a more flexible approach, calling for the Corps to decide on a case-by-case basis whether the water in question has a "significant nexus" to waters that are navigable-in-fact. (*Rapanos* at 782). A significant nexus exists when a wetland, either alone or in connections with other properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody. (*Id*. at 780). The Scalia and Kennedy opinions combined resulted in a 5-4 decision in *Rapanos*, under two distinct approaches to determining the Corps' jurisdiction under the CWA to consider Section 404 permits.

Significant Nexus

After *Rapanos*, lower courts struggled to apply the decision, many using the Kennedy "significant nexus" test or applying both tests. Courts generally did not apply the Scalia plurality "relatively permanent" test alone. Some courts, and many in the regulated community, found the Kennedy "significant nexus" test vague and difficult to apply. In 2008, the Corps and EPA issued guidance to field officers, stating that jurisdiction exists over any waterbody that meets either the relatively "permanent test" or the "significant nexus" test.

Clean Water Rule

In addition, three federal rules were issued by the Corps and EPA after *Rapanos*, redefining WOTUS in the agencies' regulations and resulting in almost a decade of continuous litigation on the definition of WOTUS. In 2015, the Obama administration issued the Clean Water Rule. In 2019, the Trump administration rescinded the Clean Water Rule, and in 2021 issued a new definition in the Navigable Waters Protection Rule. A federal district court vacated that rule in 2021. During periods when no rule was in effect, the agencies reverted to the pre-2015 regulatory framework, much of which dates back to 1977.

WOTUS Rule

On January 18, 2023 under the Biden administration, the Corps and EPA issued a new rule — the 2023 WOTUS Rule — providing that certain wetlands are jurisdictional based on their adjacency to other covered waters. The 2023 WOTUS Rule, like prior regulations, defines "adjacent" as "bordering, contiguous or neighboring." The Rule includes jurisdictional wetlands that are adjacent to a traditional navigable water, the territorial seas, or an interstate water, and wetlands adjacent to jurisdictional impoundments or tributaries and that meet either the "relatively permanent" or the "significant nexus" standard. The 2023 WOTUS Rule is largely viewed as less expansive than the Clean Water Rule, and less restrictive than the Navigable Waters Protection Rule. Litigation challenging the 2023 WOTUS Rule continues.

Section 404 permitting decisions have largely driven the decades-long controversy about the definition of WOTUS under the Clean Water Act. But in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.,* 590 U.S.__ (2019), the Court considered jurisdictional issues under the CWA in the context of point source discharges under Section 402 — the Section regulating the National Pollution Discharge Elimination System (NPDES) permit process. The NPDES program largely is administered by the states through delegation from EPA. (*See* Robb, *TWR* #170, #189 and #196).

Sackett Litigation Background

Sackett Property

In 2004, the Sacketts purchased a 2/3 acre residential lot near Priest Lake in Idaho. They began backfilling the property with dirt and rock to build a home on the property in 2007. The lot has no surface connection to any body of water. EPA asserted that the wetlands on the Sacketts' lot were "adjacent to" an "unnamed tributary" on the other side of a 30-foot road. That tributary fed into a non-navigable creek, which fed into Priest Lake, which EPA designated as traditionally navigable.

A few months later, EPA sent the Sacketts an administrative compliance order stating that the wetlands on their property were a WOTUS and the backfilling violated the Clean Water Act. EPA claimed that the

lot, when considered with all other "similarly situated" properties in the area, had a "significant nexus" to the jurisdictional Priest Lake, making the Sacketts' lot a water of the United States. EPA demanded that the Sacketts restore the property and threatened them with civil penalties of $40,000 a day if they did not comply.

The Sacketts sued EPA and the Corps under the Administrative Procedure Act, alleging that EPA lacked jurisdiction because their property was not a WOTUS. Initially, the trial court dismissed their suit, finding the compliance order was not a final agency action — an issue that found its way to the Supreme Court in 2012, when the Court held that the Sacketts could bring their suit.

The trial court granted summary judgment to EPA, finding the Sacketts' lot was a WOTUS. The United States Court of Appeals for the Ninth Circuit affirmed, holding that because the Sacketts' lot was an adjacent wetland with a significant nexus to a traditionally navigable water, the Clean Water Act applied.

The Sacketts sought review from the United States Supreme Court on this question: "Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?"

The Supreme Court Decision in *Sackett*

WOTUS Test

The Court granted the Sackett's petition "limited to the following question: Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act" (33 U.S.C.1362(7)). The Ninth Circuit had applied the Kennedy significant nexus test under *Rapanos* and held that the Sacketts required a 404 permit. The Sacketts argued that the test should be whether the wetland is "adjacent" to waters of the United States, which they defined as touching such that the water is continuous; EPA and the Corps argued that the test essentially should be the Kennedy significant nexus test as the Ninth Circuit had held.

About 50 amicus briefs in total were filed — reflecting support for each side — from Congressmen, states, academics, and numerous organizations, some interested in wetlands protection and others in individual rights to use their property. Advocates of wetlands protection stated that they are critical to water quality, and destroying them would affect the physical, chemical, or biological health of the waters of the United States — exactly what the CWA was meant to prevent. The argument of proponents concerned about property rights was best summed up in one brief in a sentence: "Complying with the law should not be this hard." (*Sackett v. EPA*, Brief of Amicus Curiae Southeastern Legal Foundation in Support of Petitioners, at 9 https://www.supremecourt.gov/DocketPDF/21/21-454/220936/20220413140721867_20220413%20SLF%20Amicus%20Sackett%20Brief.pdf).

Impacts

It was clear in oral argument that the Justices were considering the impact — on the Act and the US — of their choice of the test to be applied to designate wetlands as jurisdictional. Counsel for the Sacketts argued that while wetlands were not necessarily excluded entirely from the definition of WOTUS, "adjacent wetlands" must be touching jurisdictional waters as in *Riverside Bayview* to be jurisdictional, with continuous water in the wetlands. Justice Kavanaugh said, "Let's put aside the facts of this case…because this case is going to be important for wetlands throughout the country and we have to get it right. So why *wouldn't* a wetland separated by a berm, dune, levy or dike be covered, contrary to what the last 45 years have suggested?" (Tr. Oral Arg.Oct. 3, 2022 at 17) (emphasis added).

Consensus

The Supreme Court unanimously reversed the Ninth Circuit's decision. All nine Justices agreed on the outcome — that the Ninth Circuit had applied the wrong test to determine whether the Sackett property was considered waters of the United States, and that EPA and the Corps did not have jurisdiction over the Sackett's property. They also unanimously rejected the "significant nexus" test from *Rapanos*. But the Court was split five to four on what standard should be applied.

Justice Alito, writing the opinion for the Court, was joined by Chief Justice Roberts, and Justices Thomas, Gorsuch, and Barrett. The opinion characterized Justice Kennedy's "significant nexus" test in *Rapanos* as "particularly implausible," stating "[t]his freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are 'left to feel their own way on a case by case basis.'"

Navigable

Instead, the majority looked to the text of the Act, noting the use of the plural "waters" and that the continuous connection test is consistent with the use of "waters" elsewhere in the CWA and in other statutes. The majority adopted the Scalia plurality test from *Rapanos*, applying CWA jurisdiction to a particular wetland only if it is adjacent to WOTUS, which is defined "as a practical matter, indistinguishable" from WOTUS. Wetlands separated from waters by manmade structures such as roads, berms, and impoundments are no longer jurisdictional. The majority acknowledged that the CWA has extended to "more than traditional navigable waters", but noted that "the use of 'navigable' signals that the definition principally refers to bodies of navigable waters like rivers, lakes, and oceans.

Adjacent

The majority rejected a broader reading of "adjacent" that would have included "neighboring" as inconsistent with the text of the Act. The Court noted that given the sweep of the CWA and the federalism

Sackett v. EPA

Opinions

principles at stake, Congress must enact "exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property" (*Sackett*, 598 US at ___ (2023) (*Slip Op.* at 23) www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf). The Court found no clear Congressional intent for a broader definition of WOTUS under the CWA.

While agreeing that the Sackett property is not wetlands falling under the jurisdiction of the CWA and does not require a permit, four of the Justices in two opinions concurring in the judgment explicitly disagreed with the "continuous surface connection" test. Justice Kavanaugh — joined by Justices Kagan, Sotomayor, and Jackson — challenged the majority's substitution of "adjoining" for "adjacent" as being contrary to 45 years of consistent regulatory practice. Justice Kavanaugh found that limiting CWA coverage to adjoining wetlands with a continuous surface connection "will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States."

Justice Kagan — joined by Justices Sotomayor and Jackson — agreed that the Sacketts did not need a permit, but found that the majority had strayed from the purpose and the text of the CWA by not including "adjacent" wetlands that may not have a continuous surface connection with navigable waters. She emphasized the broad purposes of the Act and rejected "the Court's appointment of itself as the national decision-maker on environmental policy" (*Sackett*, 598 U.S. __(2023) (Kagan Concurring *Slip Op.* at 5) www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf).

Commerce Clause

Justice Thomas wrote a concurrence — joined by Justice Gorsuch — arguing that the Court did not go far enough. In his view, "navigable" and "of the United States" limit "waters of the United States," so that Congress can regulate only traditional navigable waters and only to protect international and interstate commerce. Under this approach, wetlands are not jurisdictional, and intrastate lakes like Priest Lake also do not fall under federal authority. He ends the concurrence by noting an issue he has raised before, the "deeper problems with the Court's Commerce Clause jurisprudence" which he states "has significantly departed from the original meaning of the Constitution" — noting that "perhaps nowhere is this deviation more evident than in federal environmental law, much of which is uniquely dependent on an expansive interpretation of the Commerce Clause" *Id.* (Thomas, J concurring, *Slip Op.* at pp.25-27).

Impacts of the Decision

There is no doubt that the *Sackett* decision will dramatically reduce the number of wetlands that are subject to the Clean Water Act, lessening the burden of time-consuming and costly regulatory activities for many projects. The exclusion of wetlands separated from waters by man-made or natural barriers also will result in fewer regulated wetlands by EPA or the Corps.

Change

The decision also will require immediate changes in the regulatory programs that EPA and the Corps use to implement the Clean Water Act. The Army Corps of Engineers issued a statement on June 27, 2023 stating that EPA and the Corps "are interpreting the phrase "waters of the United States" consistent with the *Sackett* decision. The Corps also stated that the agencies will issue an amended 2023 WOTUS Rule (referring to it as a "final rule"), consistent with the *Sackett* decision, by September 1, 2023 (*see* WOTUS Water Brief on page 22 for an update).

Status of the 2023 WOTUS Rule

The 2023 WOTUS Rule extended CWA jurisdiction to waters that meet the "significant nexus" test or the *Rapanos* plurality test for tributaries, streams, wetlands, and intrastate lakes and ponds. It also required that wetlands be "reasonably close such that the wetland can modulate water quantity or quality" in a jurisdictional water. These aspects of the rule, if not others, will require modification to be consistent with *Sackett*.

The 2023 WOTUS Rule has been delayed in implementation since it went into effect in March, 2023. In April, 2023, President Biden vetoed Congress's disapproval of the Rule. Litigation challenging the rule has resulted in it being preliminarily enjoined — or stayed — in at least 27 states. President Biden has said that in light of this status and the *Sackett* decision, the administration is reviewing the decision and will use "every legal authority" available to address changes from the decision, perhaps including additional rulemaking.

Distance-Based Rule

According to EPA's Unified Agenda, EPA and the Corps will issue a proposed rulemaking on the WOTUS definition in November 2023, with a final rulemaking expected around July 2024 (in addition to the amended final rule announced by the Corps on August 29). Some suggest that a distance-based requirement for wetlands, as discussed in oral argument in *Sackett*, would bring clarity and certainty to the treatment of wetlands as WOTUS, and could be a feature of future rules. Distance-based regulations have been challenged in the past as arbitrary.

Sackett v. EPA

Future Decisions

Conclusion

All courts will be required to adjust their approaches to cases involving WOTUS under the CWA. Precedents in jurisdictions that applied the *Rapanos* significant nexus test will need rethinking. There are also legislative considerations. A coalition of 199 Members of Congress filed briefs in support of the Sacketts, and a coalition of 167 current and former Members filed a brief in support of EPA. While some have suggested that Congressional action may further address WOTUS, this is a challenge that Congress has declined to take up for decades, and it seems unlikely that it will now.

While some have hailed the *Sackett* decision as providing much-needed clarity around the definition of WOTUS under the CWA and wetlands permitting, much remains to be determined.

The following questions will need to be addressed:

- How will the agencies, the states, and the regulated communities address the issue of adjacent but not adjoining wetlands?
- Where does *Sackett* leave regulation of briefly interrupted connection?
- How will federal and state regulators address previously jurisdictional — and regulated — wetlands separated by man-made structures, which now are no longer jurisdictional under the *Sackett* decision?
- What is a "relatively permanent" or "continuously flowing" water?
- What is a "continuous surface water connection," and how will it be established as sufficiently "indistinguishable" from covered waters?
- How will connections to a non-navigable tributary be treated?

There are many additional issues left that will need to be determined in the coming months and years.

It is also unclear how the *Sackett* decision — involving 404 permitting — will be considered in light of the *County of Maui* decision (*See* Robb, *TWRs* #189 & #218). In that case, the Court held that a pollutant entering the ocean by traveling about 100 days through groundwater was the "functional equivalent" of a discharge to navigable waters and required a permit. *Id*. Would the same test apply to fill material deposited in unregulated wetlands that makes its way to navigable water?

It has been estimated that perhaps half the wetlands in the US will not fall under federal jurisdiction as a result of *Sackett*. As a practical matter, those wetlands will be left to the states and the Tribes to regulate. At least 28 states — including all coastal and Great Lakes states — have regulations controlling activities in coastal areas and wetlands. Twenty-four states currently regulate freshwater wetlands with a varying scope of coverage. Most states provide some regulation of structures and fills in larger lakes and streams as a result of public water, dam safety, or pollution control statutes. It is likely that there will be more regulation by the Tribes and states as a result of the *Sackett* case. On the other hand, there is no doubt that the *Sackett* decision will ease the regulatory burden for many, eliminating costly and time-intensive CWA permits.

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PFAS

PFAS LITIGATION AND SETTLEMENTS

WATER PROVIDERS "ON-THE-CLOCK" FOR MAJOR DECISIONS

by Jeff Kray, Jessica Ferrell, and Victor Xu (Marten Law, Seattle, WA)

Introduction

3M & DuPont

All eyes are on Judge Richard Gergel of the US District Court for the District of South Carolina, the presiding judge in the aqueous film-forming foam multi-district litigation (AFFF MDL), as he decides whether to give final court approval to two class settlements worth up to a combined $13.6 billion. In late August 2023, the court preliminarily approved proposed settlement agreements between water providers nationwide and PFAS manufacturers 3M and DuPont. Together, these two agreements constitute some of the most consequential settlements for drinking water in US history. By early November 2023, water providers nationwide — including those that have not filed claims in the MDL or even tested for PFAS in their drinking water supplies — will be forced to make hard decisions about whether to participate in the settlement agreements, object, or opt out.

PFAS, AFFF, and Drinking Water

Pervasive Pollutants

By now, many water providers have at least heard about per- and polyfluoroalkyl substances (PFAS), a group of synthetic organic chemicals that are known for their unique water- and oil-repellant properties and used in a wide array of industries (*see* Kray et al., *TWR* #182 & *TWR* #216). But because they do not easily break down — and because many PFAS are toxic — PFAS have become pervasive organic pollutants that are now present in nearly every environment in the world and the blood of nearly every American.[1]

While PFAS can and do turn up in unexpected places, according to the US Geological Survey (USGS), most exposure is "observed near urban areas and potential PFAS sources."[2] US drinking water systems are among the entities most seriously impacted by PFAS. The USGS estimates that at least 45 percent of the nation's drinking water is contaminated with one or more PFAS.[3] The most heavily affected regions include the Great Plains, Great Lakes, Eastern Seaboard, and Central/Southern California regions.[4]

AFFF

The historic use of AFFF is one significant cause of PFAS contamination in the nation's drinking water supplies.[5] For decades, PFAS was used in AFFF as a surfactant, acting to extinguish fires by cutting off the flammable liquid from oxygen in the air.[6] In addition, PFAS is durable, heat-resistant, dissolves easily in water, and spreads quickly.[7] Unfortunately, these same qualities make it a serious pollutant. The historical use contexts of AFFF in airports, fire stations, and military bases led to huge volumes of PFAS being discharged into the environment without containment, contaminating soil, groundwater, surface water, and other natural areas surrounding the discharge areas.[8] As the National Fire Protection Association puts it, "wherever AFFF is extensively used and not recaptured — be it in training, in a fire, or washed down a drain in a fire truck bay — the PFAS compounds it contains tend to remain."[9] According to the Washington State Department of Ecology, "AFFF is the leading cause of PFAS contamination in drinking water."[10]

Litigation – AFFF MDL

Early Case

Plaintiffs began filing groundwater contamination cases against PFAS and AFFF manufacturers in September 2016. In one of the earliest filed cases, three residents living near Peterson Air Force Base just east of Colorado Springs, Colorado brought a federal suit against 3M Company, The Ansul Company, and National Foam, Inc.[11] The plaintiffs alleged that the defendants had for decades manufactured and sold AFFF to the US Air Force, including Peterson Air Force Base, causing PFAS contamination of drinking water in the area. The plaintiffs further alleged that the defendants "knew or should have known that the inclusion of [PFAS chemicals] in AFFF presented an unreasonable risk"; that PFAS "are highly soluble in water, and highly mobile and highly persistent in the environment, and highly likely to contaminate water supplies if released to the environment"; and that the defendants "marketed and sold their products with knowledge that large quantities of toxic AFFF would be used in training exercises and in emergency situations at Air Force bases in such a manner that dangerous chemicals would be released into the environment."[12] The claims included negligence, product defect, and unjust enrichment, with compensatory damages sought for harms to property, provision of alternative water supplies, and loss of enjoyment. Dozens more similar cases — including many brought by water utilities and local governments — were filed over the next two years.

PFAS

Consolidated Actions

5,600 Cases

Govt.-Contractor Defense

Nation-Wide Class Settlement

Liability Resolution

In December 2018, the US Judicial Panel on Multidistrict Litigation, at the request of foam manufacturers Tyco Fire Products and Chemguard, Inc., consolidated 75 actions, including the Colorado suit, in an MDL.[13] As justification, the panel noted that "[i]n each of these actions, plaintiffs allege that AFFF products used at airports, military bases, or certain industrial locations caused the release of PFOA or PFOS into local groundwater and contaminated drinking water supplies."[14] [*Editor's Note:* PFOA and PFOS are two PFAS chemicals that are classified as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (*see TWR* #216).] Furthermore, "[w]ith some minor variations, the same group of AFFF manufacturer defendants is named in each action" and many "likely will assert identical government contractor defenses."[15] At bottom, each case "involve[d] the same mode of groundwater contamination caused by the same product," so centralization was proper, according to the panel. Notably, the panel declined to aggregate cases that concerned PFAS-contamination pathways other than the AFFF-to-groundwater pathway.

The panel consolidated the cases in the US District Court for the District of South Carolina, in MDL No. 2873, under presiding judge Richard Gergel. As of August 2023, based on Marten Law's internal recordkeeping, the MDL comprises about 5,600 cases. Those cases involve over 22,000 plaintiffs, including individuals, local governments, states, tribes, water districts, airports, companies, and colleges. The approximately 200 defendants include suppliers of precursor chemicals, manufacturers, distributors, and government actors such as the US Air Force, Army, and Navy.

The plaintiffs in the MDL have cleared some important pretrial hurdles. In November 2021, the defendants moved for partial summary judgment on the government-contractor defense. That defense confers immunity on a federal contractor when the contractor's provision of military equipment conforms with the United States' reasonably precise specifications, and the contractor otherwise warned the United States of any known dangers associated with the equipment.[16] In their motion, the defendants claimed that the federal government issued precise specifications for a specific type of AFFF (MilSpec AFFF) and that defendants manufacturing this AFFF should be protected from state tort liability. In September 2022, Judge Gergel rejected their assertion of the government-contractor defense.[17] The court observed that the MilSpec AFFF was not so precise that it dictated that PFOS or PFOA be used as ingredients in the foam, and that defendants had withheld information from the federal government about AFFF's health risks.

Proposed 3M and DuPont Settlements

Days before a bellwether trial for water providers was scheduled to begin, 3M and DuPont, among the largest and most well-known defendants in the MDL, reached proposed settlement agreements to attempt to resolve all water-supplier claims against them.[18] [*Editor's Note:* A bellwether trial is an initial test-case trial in an MDL by which plaintiffs and defendants can gauge the strength of their cases.]

The announcement of the 3M agreement was especially significant, as 3M is thought to have the largest potential liability share in the AFFF MDL.[19] Central to each agreement is the concept of a nationwide class settlement with American water providers impacted by AFFF. The proposed 3M settlement agreement (3M Settlement) was reached on June 22, 2023.[20] In return for an aggregate payment over time of between $10.5 and $12.5 billion, 3M is asking over 12,000 water providers to forever release their PFAS-related water supply claims against 3M, and to indemnify 3M for any future related claims against it.[21] The proposed DuPont settlement agreement (DuPont Settlement) — between DuPont and several companies related to DuPont by prior corporate transactions, including The Chemours Company, Corteva, Inc., and EIDP, Inc.)[22] — is also a proposed settlement with water providers, promising $1.185 billion in exchange for a release of claims against the DuPont-related defendants.[23]

The settlements are designed to resolve as much of the companies' PFAS-related water supply liability from drinking-water providers as possible. The DuPont Settlement's stated purpose is to "comprehensively resolve all PFAS-related drinking water claims of a defined class of public water systems that serve the vast majority of the [US] population... [which] includes water systems with a current detection of PFAS at any level and those that are currently required to monitor for the presence of PFAS under EPA monitoring rules or other applicable laws. This includes but is not limited to systems in the... AFFF MDL."[24] The 3M Settlement similarly seeks to achieve "a broad class resolution to support PFAS remediation for public water suppliers... that detect PFAS at any level or may do so in the future."[25]

The settlements assert that they do not resolve various other types of claims at issue in the MDL (*e.g.*, personal injury claims by individuals and natural resource and other damages claims by states).[26] They would also not affect any water-supplier claims against the remaining several dozen defendants that they have also sued in the MDL, or their claims against the United States.

PFAS

Water Providers

The MDL includes 400-some water-supplier plaintiffs, but over 12,000 water suppliers are part of the proposed settlement classes defined in these agreements. Presumed members of the proposed settlement class encompass water providers in two phases: Phase One comprises those providers that have already detected PFAS in their drinking water supplies; Phase Two comprises those that lack known PFAS detections but either must test for PFAS under EPA regulations by the end of 2025 or serve over 3,300 people.[27] Many of these water suppliers may know very little about the ongoing litigation. Some may not even know whether there is PFAS in their drinking water supplies. Nevertheless, they all may be eligible to share in the settlement funds, and they will all be bound by the agreement by default unless they affirmatively act to opt out.

Procedure for Settlement Approval

Under the rules of civil procedure, a class settlement agreement like these must pass several hurdles before it fully resolves the encompassed claims.

Process

The process is as follows:

Preliminary Approval: The plaintiffs seeking a class settlement must propose an agreement for the court's review and demonstrate that the agreement is facially "fair, reasonable, and adequate" such that the notice and approval process should be started in earnest.[28] There is an opportunity at this stage to object, as discussed further below.

Conditional Certification of a Settlement Class: The court must make a preliminary determination that a class could be certified under the applicable criteria of numerosity of parties, commonality of questions of law or fact, typicality of claims and defenses, and whether the proposed class representatives would fairly and adequately protect class interests.[29]

Notice to Class: If the court preliminarily approves the agreement and conditionally certifies a class, it will order delivery of notice to the class which must provide comprehensive information on the case, the class to be certified, the claims at issue, the right to object and opt out, and the binding effect of the settlement agreement on all class members who do not opt out.[30]

Objection and Opt-Out Period: The notice will specify deadlines by which class members must object to final approval (*i.e.,* alert the court to problems with the fairness or adequacy of the settlement) or opt out (*i.e.,* forego settlement and continue litigating against 3M and/or other PFAS manufacturers).

Final Approval: Finally, the court will hold a hearing and determine whether the agreement is fair, reasonable, and adequate, with consideration to the substantive and procedural fairness of the agreement.[31]

3M Settlement Preliminarily Approved Over Opposition

The Court granted preliminary approval of the 3M Settlement on August 29, 2023, following lengthy negotiations that resulted in several amendments to address various concerns that had been raised by states, territories, and water providers regarding the original settlement agreement.[32]

Motions to begin the settlement approval process were filed in July, requesting that the district court preliminarily approve the 3M and DuPont Settlements, notify the water utilities in the proposed classes, and require from them a decision to participate, object, or opt out.[33]

Opposition

The Agreement had faced significant early opposition. Nearly two dozen states and territories (Sovereigns) — along with a number of municipalities and water districts, the California State Water Board, and the California Department of Corrections and Rehabilitation — filed briefs opposing preliminary approval of the 3M Settlement. The Sovereigns sought to intervene in the case for the purpose of objecting to the terms of the settlement.[34]

Indemnity Provision

The Sovereigns argued that:

- The indemnity provision in the 3M Settlement would impose unlimited obligations on water providers to indemnify 3M for amounts that cannot be quantified and that could exceed the settlement amount they are eligible to receive.
- Water providers could be required to indemnify 3M for, among other things, suits the states and territories have brought against 3M to protect those very water providers, and any suits brought by water providers' customers.
- Water providers could additionally be forced to indemnify 3M for regulatory liability, citizen suits, and personal injury claims arising from exposure to PFAS.
- The foregoing provisions would be prohibited by many states' laws: Municipalities cannot indemnify 3M as a matter of law because an indemnity by a local government of a private company is illegal and void under state constitutional and statutory provisions restricting local governments from assuming debt.

PFAS

Time Constraints

- The proposed release could be read to encompass even the claims of the Sovereigns and other entities over which water providers have no authority.
- The proposed 60-day period after the mailing of notice for water utilities to object or opt out would not provide sufficient time to: (1) evaluate the 3M Settlement terms or PFAS treatment costs; (2) calculate a potential settlement award with a reasonable degree of accuracy; (3) gain approval from relevant municipal authorities; or (4) otherwise weigh the myriad factors relevant to the decision of whether to participate in a settlement that would release and indemnify the company that "began manufacturing PFAS in 1940s" and, before "withdrawing from the market [in 2002, was]... the predominant global manufacturer of PFAS" for nearly 50 years.[35]

Concerns

Water providers and other governmental entities in several states (California, Colorado, New Mexico, New York, Pennsylvania, and Washington), including water providers represented by this article's authors, have likewise voiced their concerns about the 3M Settlement to the court, supporting intervention by the Sovereigns and joining in their opposition to its approval. They include the City of Philadelphia (PA), the California State Water Board and Department of Corrections and Rehabilitation, the City of Airway Heights (WA), the City of DuPont (WA), the City of Moses Lake (WA), the City of Newburgh (NY), Lakewood Water District (WA), Roosevelt County Water Coop, Inc. (NM), Security Water District (CO), and the Town of New Windsor (NY).[36]

Objections

Four of the Sovereigns (California, the District of Columbia, Pennsylvania, and Puerto Rico) filed a separate opposition to inform the Court of their additional objections to the 3M Settlement: namely, that the settlement, by apparently forcing certain state-owned water providers to be part of the settlement class, violates sovereign immunity; that the settlement amount is inadequate; and that the protracted payment schedule over the course of over a decade shifts bankruptcy risk from 3M to class members.[37] The States of Maine and Vermont filed a supplemental brief in opposition to preliminary approval because of the possibility that an anti-suit injunction the Court was considering would inappropriately delay lawsuits against 3M brought by those states' attorneys general.[38]

Preliminary Approval

On August 28, 3M and proposed class counsel moved by consent to amend the 3M Settlement to purportedly address some of these concerns, removing the strongly opposed indemnity provision, extending the time to opt out from 60 days after the mailing of notice to 90 days, clarifying the scope of the release, and clarifying various definitions that had been cited as ambiguous.[39] Shortly thereafter, the Court granted preliminary approval to the 3M Settlement, as amended.

DuPont Settlement Also Receives Preliminary Approval

On August 22, 2023, the Court granted preliminary approval to the DuPont Settlement and ordered dissemination of notice to class members, thus initiating the approval process for the DuPont agreement.[40]

Negotiations

There had been less commotion as to the terms of the DuPont Settlement compared to the 3M Settlement. DuPont's Settlement does not, for example, contain the indemnity provision present in 3M's. Still, there has been criticism of the adequacy of its consideration. The States of Arizona, California, Pennsylvania, Wisconsin, and the District of Columbia (Subset of Sovereigns) recently informed the Court that they would not oppose preliminary approval of the DuPont Settlement. They took this step after DuPont negotiated certain terms with them after the motion for preliminary approval was filed, which led to changes to the DuPont Agreement.[41]

The Subset of Sovereigns argued the DuPont Settlement as originally proposed would have:

1) Required class members to make opt-out decisions with no information about the amount of money they might receive from the Settlement Agreement.
2) Asked the Court to enjoin other PFAS lawsuits against DuPont — including those prosecuted by Sovereigns — even before final approval of the Settlement Agreement.
3) Required agreement to a convoluted and conflicting claims-over provision that appeared to act as an indemnity.
4) Hamstrung Sovereigns' ability to recover PFAS remediation costs from DuPont.[42]

Amendments

In a motion on consent, proposed class counsel, the DuPont entities, and the Sovereigns sought court approval of amendments to the DuPont Settlement addressing these concerns.[43] At the behest of the Sovereigns, the timeframe between "commencement of dissemination of the Notice" of the DuPont Settlement and the deadline to opt out would now be 90 rather than 60 days.[44] The parties also agreed to revise the definition of a "Releasing Person," amend the claim-over provisions, and amend the requested stay order and injunction, primarily through changes that limited the agreement's applicability to states.[45] Finally, the Sovereigns confirmed with proposed class counsel that class members would be able to derive a good faith estimate of their potential recovery under the DuPont Settlement through a forthcoming website.[46] The motion to amend the settlement agreement was granted by the Court on August 9, 2023.[47]

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Nevertheless, the Subset of Sovereigns wrote separately in a letter response filed with the Court to voice their remaining concern that the total amount of the DuPont Settlement — $1.185 billion — "falls far short of what is needed to address the harm DuPont's products have caused public water systems" and "should not serve as a point of reference for future PFAS resolutions."[48] They supported this criticism with two main points: (1) the DuPont Settlement releases claims related to all PFAS in all products, not just in the AFFF products at issue in the MDL; and (2) current estimates for PFAS regulatory compliance costs for water systems are orders of magnitude higher than the settlement amount, given the high cost of compliance and the ubiquity of contamination. Given these concerns, the Subset of Sovereigns questioned whether the consideration in the DuPont Settlement justifies the value of the scope of release provided. While they did not oppose approval of the DuPont Settlement, they cautioned that it should not provide a template for future PFAS-related settlements in light of this deficiency.[49]

What's Coming

Timeline

The following are important dates relating to the 3M Settlement:[50]

- September 12 (or earlier): Putative class counsel will begin mailing settlement notices to water providers, including every water provider in the US with over 3,300 connections.
- November 11: Deadline for water providers to object to the 3M Settlement.
- December 11: Deadline for water providers to opt out from the 3M Settlement.
- February 2: Final Fairness Hearing on 3M Settlement.

And for the DuPont Settlement:[51]

- September 5 (or earlier): Putative class counsel will begin mailing settlement notices to water providers, including every water provider in the US with over 3,300 connections.
- November 4: Deadline for water providers to object to the DuPont Settlement.
- December 4: Deadline for water providers to opt out from the DuPont Settlement.
- December 14: Final Fairness Hearing on DuPont Settlement.

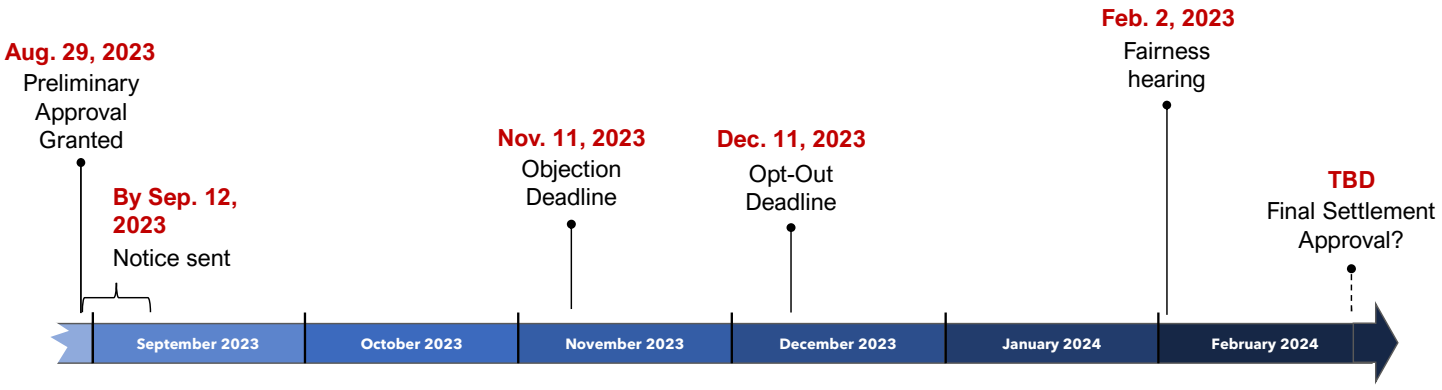
Objection Stage

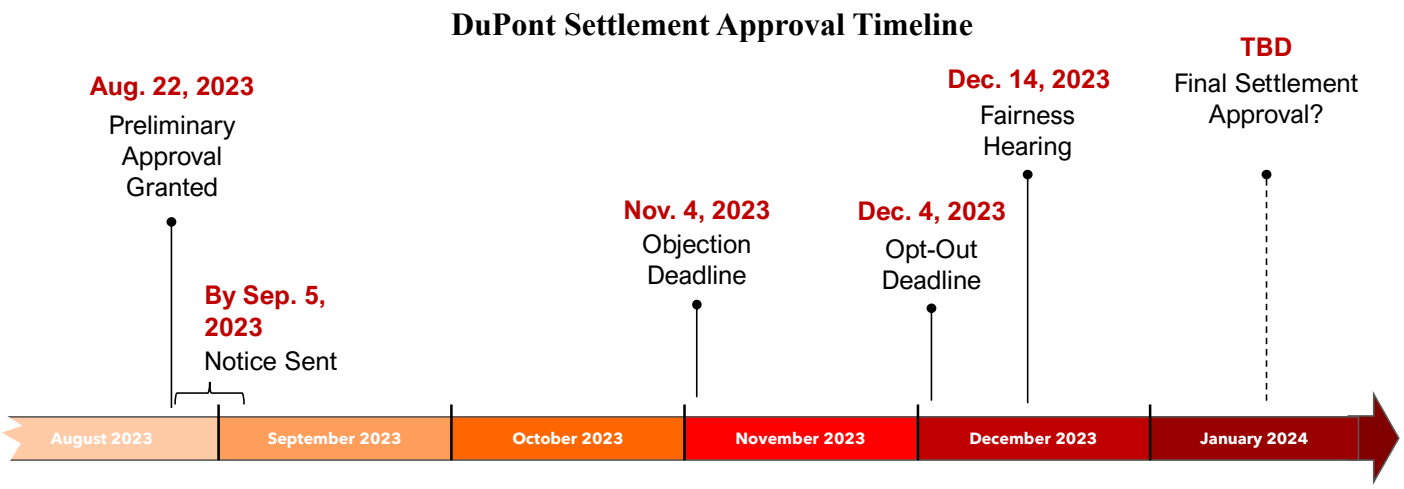
Preliminary approval is entrusted to the district court's discretion. Orders regarding notice and preliminary approval are not subject to interlocutory appeal.[52] Accordingly, parties that take issue with a settlement may have to wait until the formal objection stage to again object to the substance of the agreement, and they may not be permitted to object unless they take part in the settlement (as opposed to affirmatively opting out).[53]

If the Court finally approves either settlement agreement, the deadlines to file claims will begin 60 days after the time to seek appellate review of the Court's order granting final approval expires.[54]

The timelines below depict (1) significant dates in the 3M Settlement process, and (2) significant dates in the DuPont Settlement process:

3M Settlement Approval Timeline





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Participation

PFAS Testing

Estimated Costs

Decisions, Decisions, Decisions

Now comes the hard part: determining whether to participate in the settlements. Rising remediation costs and complicated routes for recovering costs already incurred leave water suppliers with difficult decisions to make, in complex circumstances and with incomplete information.

Given the preliminary approvals, settlements-related decisions loom for water suppliers nationwide. From a water supplier's perspective, the core choice involves three broad questions:

1) How much money do we need, if any, to treat our water for PFAS?
2) How much money might we get from the settlement and how much could we get from the settling defendant at trial?
3) What other sources of funding are available?

Each question raises many concerns.

How much money do we need?

The first step is understanding the scope of the problem for any given water provider. Many water providers have not yet tested their water supplies for PFAS — although the EPA's Unregulated Contaminant Monitoring Rule 5 (UCMR 5) requires testing for 29 different PFAS, the deadline for sample collection is December 31, 2025.[55] The timeline that the Court has imposed, or will impose, on the DuPont and 3M Settlements, however, requires action earlier than that. Among the steps many water providers will need to take as soon as possible are sampling each and every water source, getting samples tested for PFAS, and discussing treatment costs (if any) with technical staff and environmental consultants.

These are all individual considerations, idiosyncratic to each water provider. At a broader level, however, it is unlikely that the $1.185 billion and $10.5–12.5 billion available from the DuPont and 3M Settlements is enough by itself to fix the PFAS problem in drinking water. Various figures have been given for the total cost of remediating PFAS in drinking water nationwide. By most estimates, however, the settlement funds from these major defendants will not be enough to remediate PFAS in drinking water supplies across the country — even when combined with federal funding recently made available through a variety of initiatives such as the $10 billion allocated to PFAS by the 2021 Infrastructure Investment and Jobs Act.[56] Early estimates of the cost to clean up PFAS in drinking water nationwide exceed $400 billion.[57] The DuPont and 3M Settlement amounts would cover less than three percent of that figure. In Orange County, water managers estimated that technology alone to filter PFAS from wells serving over two million people will cost $1 billion.[58] The City of Stuart, Florida (which had been selected for the bellwether trial against 3M) — with a population of under 20,000 — has already incurred $120 million in PFAS costs just to replace its wells, and faces ongoing cleanup costs to address groundwater contaminated by PFAS.[59] Many more public water suppliers than MDL plaintiffs have found PFAS in their water systems from AFFF. For example, 170 water systems in Massachusetts alone have found PFAS above the state limit for concentrations in drinking water, and not all are parties to the MDL.[60]

The uncertainty about how much money is sufficient is compounded by an evolving regulatory landscape that continues to increase water filtration costs.[61] Water suppliers are particularly concerned about EPA's proposed national drinking water standards for six PFAS expected to be finalized by the end of 2023.[62] EPA has estimated annual costs of compliance with its new proposed standards for utilities

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nationwide at between $772 million and $1.2 billion.[63] The Association of Metropolitan Water Agencies and other water providers and associations consider that estimate far too low, noting that costs already incurred to address PFAS likely exceed that estimate.[64] On the American Water Works Association's request, a private consulting firm developed a national cost estimate for water systems to reduce just two types of PFAS to EPA's recently proposed primary drinking water regulatory levels.[65] It estimated compliance costs to reduce PFOA and PFOS only to under four parts per trillion at over $3.8 billion annually, with a life cycle cost of $40 billion.[66]

How much money might we get from the settlement, and how much could we get at trial?

Award Model

The exact amount a water supplier can receive is not possible to calculate until all water suppliers have filed claims with the respective claims administrators of the 3M and DuPont Settlements — however, the proposed class counsel have created a settlement award model that attempts to provide a potential recovery range under each settlement.[67] Factors that will be relevant to each water supplier's award amount include: the extent of PFAS contamination in their water supplies (taking into account flow rate and PFAS concentrations of each water source); whether the water supplier has filed a complaint in the MDL (and when); and whether the water supplier has been involved in a bellwether trial.[68]

Bellwether Trial

As for how much might be available at trial, it is difficult to say. The AFFF-to-water contamination pathway is well studied, as discussed above, and the cases against 3M and DuPont resemble the kinds of toxic torts cases plaintiff's lawyers have brought against polluters successfully for decades. But litigation can be unpredictable. One method of ascertaining the viability of cases in an MDL is a bellwether trial. Bellwethers test the strength of representative cases and provide practical guidance on how similar cases would fare. The first bellwether trial in the AFFF MDL was scheduled to begin on June 5, 2023. Shortly after the settlement agreements became public, however, the bellwether plaintiff, the City of Stuart, reached confidential settlements with 3M and DuPont, which the City announced will allow it "to continue providing clean drinking water to its residents."[69] A bellwether trial may still occur at some point among opt-out plaintiffs. But the lack of a bellwether result right now means that water providers lack a benchmark by which they can gauge their own potential recoveries against 3M or DuPont.

What other sources of funding are available?

Another key consideration in deciding how to approach the settlements is the availability of other possible sources of funding to remediate PFAS contamination. Despite the face value of the 3M and DuPont Settlements, they may fall well short of cleanup cost estimates, even when combined with other resources.

Defendants

3M and DuPont are among the most significant contributors to PFAS contamination in US drinking water. But they are not the only defendants. Over 80 other manufacturer and supplier defendants named by water provider plaintiffs remain in the AFFF MDL. Those include, among others: Dynax Corp.; Arkema, Inc.; Raytheon Technologies Corp.; Honeywell International; Buckeye Fire Equipment Co.; AGC Inc.; Clariant Corp.; Archroma US Inc.; BASF Corporation; and related subsidiaries. These and dozens of additional companies of varying sizes and industries played a variety of roles, differing in duration and degree of involvement, in PFAS manufacture, distribution, and other levels of PFAS or AFFF supply chains over the years. Many of these have long been, and remain, independently viable financially — not to mention their insurers. BASF, for example — an international chemical company dating back to 1865 that reported over $95 billion in global sales last year — is and has been for several years running the largest chemical company in the world, by sales.[70] Raytheon — one of the largest aerospace and defense manufacturers in the world — anticipates $73 billion in sales this year.[71] Honeywell, another multinational conglomerate operates in aerospace, performance materials, and other sectors, and forecasts $36–37 billion in 2023 sales.[72] AGC Inc., a 115-year old Japanese corporation, yields most of its billions in profits from chemicals.[73] Arkema, a global chemicals company whose specialty materials (including surfactants) accounted for the majority of its sales last year, anticipates $11–12 billion in 2024 sales.[74] Dynax continues to bill itself as "[a] major global supplier of C6 telomer-based fluorosurfactants and fluorochemical foam stabilizers to firefighting foam manufacturers[.]"[75] Smaller companies — such as Buckeye which manufactured a variety of AFFF types for nearly 30 years and reports annual sales of $114 million[76] — also remain defendants in the AFFF MDL. These are all potential further targets for cost recovery, the 3M and DuPont Settlements notwithstanding.

Cost Recovery

One risk that must be mentioned is that PFAS liabilities could bankrupt some defendants, complicating recovery. On May 14, 2023, Kidde-Fenwal became the first defendant in the MDL to file for bankruptcy

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when it sought Chapter 11 protection in a Delaware court.[77] Kidde is one of several dozen AFFF manufacturers and suppliers facing thousands of legal claims in the MDL by water suppliers alleging that AFFF contaminated groundwater. Kidde is also one of hundreds of defendants that individuals claim caused them personal injury or induced a need for medical monitoring. The amount Kidde claims it has available to its creditors (about $318 million)[78] is an order of magnitude less than the 3M and DuPont Settlements. Still, it will have financial implications for claimants. All claims in the AFFF MDL against Kidde and an entity called "New National Foam" were automatically stayed by the bankruptcy filing.[79] The bankruptcy court has not yet set a proof of claim deadline, but it will likely do so soon. Any individual or entity impacted by PFAS contamination from a Kidde or related entity's product (including but not limited to water suppliers) may wish to file a proof of claim in the bankruptcy proceedings. For potential claimants, it is important to gather relevant evidence to perfect their claim. Evidence may include documentation that an implicated product was purchased and/or used (*e.g.,* purchase orders, service records), as well as data showing contamination, harm, or damages (*e.g.,* PFAS testing results).[80] [*Editor's Note:* Perfecting a claim in the context of a bankruptcy proceeding means submitting a claim and notifying all other possible creditors against the bankrupt entity that you are claiming an interest in the entity's assets.]

Beyond litigation and proofs of claim against the companies involved in the AFFF supply chain, other sources of funding may include, at least for some water providers, state and federal grants. But in some instances, a water provider could have to compete with thousands of other providers for a relatively small amount of funding. And of course, if all else fails, water providers facing PFAS levels in their drinking water supplies above federal or state thresholds may be forced to increase the rates they charge to customers.

Conclusion

The approval process for the DuPont and 3M Settlements is well under way, with preliminary approvals having been granted for both in late August 2023, and deadlines for objecting and opting out set over the next few months. Difficult decisions loom for water providers nationwide before the upcoming final approval hearings in late 2023 and early 2024 — and the stakes for human health could not be greater.

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22 These companies emerged after a complex series of transactions over the last decade involving, among others, the original DuPont and Dow Chemical Company. Many litigants have challenged these transactions as attempts to shield DuPont from PFAS liability. *See, e.g.,* Compl. ¶¶ 4.103–4.199, *State of Washington v. 3M Co.,* No. 23-2-09821-8 SEA (King Cnty. Sup. Ct. May 30, 2023).

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25 *"3M Resolves Claims," supra* n.18.

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33 Pls.' Mot. for Prelim. Approval of Class Settlement, Dkt. No. 3370, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.,* 2:18-mn-2873-RMG (D.S.C. July 3, 2023).

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38 Suppl. Memo. Of Law by States of Maine and Vermont, Dkt. No. 3465, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.,* 2:18-mn-2873-RMG (D.S.C. July 26, 2023).

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60 WBUR News, *Toxic 'forever chemicals' force Mass. towns to face 'true cost of water'* (Feb. 14, 2023), https://www.wbur.org/news/2023/02/14/pfas-pfoa-massachusetts-drinking-water-clean-up.

61 Pat Rizzuto, *US Plan to Limit PFAS in Water Draws Concern Over Cost, Science,* Bloomberg News (Mar. 15, 2023), https://news.bloomberglaw.com/environment-and-energy/us-plan-to-limit-pfas-in-water-draws-concern-over-cost-science.

62 EPA, PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 16,162 (Mar. 29, 2023) (to be codified at 40 C.F.R. pt. 141). The rulemaking for drinking water maximum contaminant levels is not affected by EPA's recent announcement that it would delay rulemaking to designate certain PFAS as "hazardous substances" under CERCLA. EPA is now expecting to propose its CERCLA rule in December 2023, and finalize it in November 2024, a delay of seven and nine months from the original targets, respectively.

63 *Id.*

64 *"US Plan to Limit PFAS in Water Draws Concern Over Cost, Science" supra* n.65.

65 Black & Veatch, *WITAF 56 Technical Memorandum PFAS National Cost Model Report,* prepared for AWMA (March 7, 2023).

66 *Id.* at 31-32, figures 7-1 and 7-2.

67 Consent Mot. to Am. Exhibits to Mot. for Prelim. Approval of DuPont Settlement at 3, Dkt. No. 3521, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.,* 2:18-mn-2873-RMG (D.S.C. Aug. 7, 2023).

68 Pls.' Mot. for Prelim. Approval of Class Settlement, Ex. 2, Dkt. No. 3370-3, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.,* 2:18-mn-2873-RMG (D.S.C. July 3, 2023); Pls.' Mot. for Prelim. Approval of Class Settlement, Ex. 2, Dkt. No. 3393-2, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.,* 2:18-mn-2873-RMG (D.S.C. July 10, 2023).

69 *See* G. Harrell, *Stuart city reaches settlement with 3M over groundwater contamination lawsuit,* CBS 12 News (June 23, 2023), https://cbs12.com/news/local/stuart-contamination-lawsuit-settlement-3m-groundwater-lawsuit-pfas-2018-florida-june-23-2023 (quoting counsel for the City of Stuart).

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73 *See generally* AGC*, AGC Company Overview,* https://www.agc.com/en/ir/library/outline/pdf/c_overview.pdf (May 2023).

74 Arkema, *Investor Relations: Arkema at a Glance,* https://www.arkema.com/global/en/investor-relations/arkema-overview/ (last visited June 28, 2023).

75 Dynax, *Company Overview,* https://dynaxcorp.com/our-company/ (last visited June 28, 2023).

76 Dun & Bradstreet 2023 (Buckeye) (*available by subscription*). For context, Kidde claims $318 in assets, $200 million in annual revenue last year, and expenditures of $6 million on the AFFF MDL alone in 2023. D. Knauth, *Fire Protection Company Kidde Fenwal Files for Bankruptcy Citing PFAS Lawsuits,* Reuters (May 15, 2023), https://www.reuters.com/legal/fire-protection-company-kidde-fenwal-files-bankruptcy-citing-pfas-lawsuits-2023-05-15/.

77 *In re Kidde Fenwal Inc.,* No. 1:23-BK-10638 (Bankr. D. Del. filed May 14, 2023).

78 "*Fire Protection Company Kidde Fenwal Files for Bankruptcy Citing PFAS Lawsuits," supra* n.80.

79 11 U.S.C. § 362(a). While the automatic stay does not extend to non-bankrupt co-defendants, as a practical matter the stay of proceedings against Kidde may slow other proceedings.

80 *See generally In re Jensen,* 995 F.2d 925, 931 (9th Cir. 1993) (finding that "tests revealing a contamination problem" give rise to a contingent claim in bankruptcy).

WATER BRIEFS

WOTUS US

AMENDED RULE

On Aug. 29, the US Environmental Protection Agency (EPA) and the US Department of the Army (the agencies) announced a final rule amending the 2023 definition of "waters of the United States" to conform with the recent Supreme Court decision in *Sackett v. EPA.* The agencies are committed to following the law and implementing the Clean Water Act to deliver the essential protections that safeguard the nation's waters from pollution and degradation. This action provides the clarity that is needed to advance these goals, while moving forward with infrastructure projects, economic opportunities, and agricultural activities.

"While I am disappointed by the Supreme Court's decision in the *Sackett* case, EPA and Army have an obligation to apply this decision alongside our state co-regulators, Tribes, and partners," said EPA Administrator Michael S. Regan. "We've moved quickly to finalize amendments to the definition of 'waters of the United States' to provide a clear path forward that adheres to the Supreme Court's ruling. EPA will never waiver from our responsibility to ensure clean water for all. Moving forward, we will do everything we can with our existing authorities and resources to help communities, states, and Tribes protect the clean water upon which we all depend."

"We have worked with EPA to expeditiously develop a rule to incorporate changes required as a result of the Supreme Court's decision in *Sackett*," said Michael L. Connor, Assistant Secretary of the Army for Civil Works. "With this final rule, the Corps can resume issuing approved jurisdictional determinations that were paused in light of the *Sackett* decision. Moving forward, the Corps will continue to protect and restore the nation's waters in support of jobs and healthy communities."

While EPA's and Army's 2023 rule defining "waters of the United States" was not directly before the Supreme Court, the decision in *Sackett* made clear that certain aspects of the 2023 rule are invalid. The amendments issued Aug. 29 are limited and change only parts of the 2023 rule that are invalid under the *Sackett v. EPA* decision. For example, the final rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected.

The Supreme Court's Decision in *Sackett v. EPA,* issued on May 25, 2023, created uncertainty for Clean Water Act implementation. The agencies are issuing this amendment to the 2023 rule expeditiously — three months after the Supreme Court decision — to provide clarity and a path forward consistent with the ruling. With this action, the Army Corps of Engineers will resume issuing all jurisdictional determinations. Because the sole purpose of this rule is to amend specific provisions of the 2023 Rule that are invalid under *Sackett*, the rule will take effect immediately.

The agencies will host a public webinar on September 12, 2023 to provide updates on the definition of "waters of the United States." For registration information, please visit EPA's webpage for the amendments rule. The agencies also plan to host listening sessions this fall with co-regulators and stakeholders, focusing on identifying issues that may arise outside this limited rule to conform the definition of "waters of the United States" with the *Sackett v. EPA* decision.

FOR INFO: www.epa.gov/wotus or www.epa.gov/wotus/amendments-2023-rule

PFAS DATA US

NATIONAL MONITORING

On Aug. 17, the US Environmental Protection Agency (EPA or Agency) released the first set of data collected under the fifth Unregulated Contaminant Monitoring Rule (UCMR 5). In the latest action to deliver on EPA's PFAS Strategic Roadmap, UCMR 5 will provide new data that will improve EPA's understanding of the frequency that 29 PFAS and lithium are found in the nation's drinking water systems, and at what levels. The monitoring data on PFAS and lithium will help the Agency make determinations about future actions to protect public health under the Safe Drinking Water Act. This action advances the Biden-Harris Administration's commitment to combat PFAS pollution and safeguard drinking water for all people.

The data collected under UCMR 5 will ensure science-based decision-making and help EPA better understand national-level exposure to these 29 PFAS and lithium, and whether they disproportionately impact communities with environmental justice concerns. This initial data release represents approximately 7% of the total results that EPA expects to receive over the next three years. The Agency will update the results quarterly and share them with the public in EPA's National Contaminant Occurrence Database (NCOD) until completion of data reporting in 2026. EPA continues to conduct research and monitor advances in techniques that may improve its ability to measure these and other contaminants at even lower levels.

In March 2023, EPA proposed standards to limit certain PFAS in drinking water. The proposal — if finalized — would allow public water systems to use results from UCMR 5 to meet the rule's initial monitoring requirements and to inform communities of actions that may need to be taken. In the interim period before the PFAS drinking water standard is final, EPA has established Health Advisories for four PFAS included in the UCMR 5. EPA continues to advance the science on the potential health effects of a wide range of PFAS, including many of those monitored for under this program.

EPA is moving forward to expand the investigation and cleanup of PFAS contaminated sites, including by finalizing new safeguards under Superfund to hold polluters accountable for contamination from two widely used PFAS chemicals. The Agency also recent issued its third order to require PFAS manufacturers to conduct testing under EPA's National Testing Strategy to help EPA better confront these forever chemicals.

EPA is also deploying an unprecedented $9 billion, included in President Biden's Bipartisan Infrastructure Law, specifically to invest in communities with drinking water impacted by PFAS and other emerging contaminants. This includes $4 billion via the Drinking Water State Revolving Fund (DWSRF) and $5 billion through EPA's "Emerging Contaminants in Small or Disadvantaged Communities" grant program. States, Tribes, and communities can further leverage an additional nearly $12 billion in BIL DWSRF funds and billions more in annual SRF funds dedicated to making

drinking water safer. These funds will help communities make important investments in solutions to remove PFAS from drinking water.
FOR INFO: https://www.epa.gov/pfas

CLEAN WATER ACT AK

HOMEBUILDER PENALTY

The US Environmental Protection Agency announced on Aug. 3 that Robert Yundt Homes, LLC and Mr. Robert Yundt, based in Wasilla, Alaska, were penalized $107,000 for violations of the Clean Water Act.

From 2019 through 2021, Robert Yundt Homes, LLC and Mr. Yundt are accused of using heavy earthmoving equipment to relocate and discharge material into Wasilla Lake and Cottonwood Lake, resulting in environmental impacts along the shorelines and adjacent wetlands.

In response, EPA issued multiple administrative compliance orders on consent requiring Robert Yundt Homes, LLC to perform certain restoration and mitigation activities to remedy the harms to the environment. Robert Yundt Homes, LLC also agreed to pay $29,500 in penalties.

After Robert Yundt Homes, LLC failed to comply with the administrative compliance orders on consent, the US Department of Justice filed a complaint in the US District Court for the District of Alaska against Robert Yundt Homes, LLC and Mr. Yundt. To resolve the violations of the administrative compliance orders and the underlying Clean Water Act violations, Robert Yundt Homes, LLC, Mr. Yundt, EPA, and the US Department of Justice have agreed to a Consent Decree that requires the Defendants to conduct fill removal and habitat restoration activities along the shoreline of Wasilla Lake, restore and preserve wetlands adjacent to Cottonwood Lake in perpetuity through an environmental covenant, and pay an additional $77,500 in penalties.

Wasilla Lake and Cottonwood Lake are catalogued by the Alaska Department of Fish and Game as waters important for anadromous fish, including spawning habitat for coho and sockeye salmon.
FOR INFO: https://www.federalregister.gov/documents/2023/07/31/2023-16084/notice-of-lodging-of-proposed-consent-decree

GRANT PROGRAM CA

NATURE-BASED SOLUTIONS

Building on the Newsom Administration's commitment to strengthen partnerships with California Native American tribes, the California Natural Resources Agency launched a $101 million grant program on July 31 to support tribal initiatives that benefit their communities while helping to achieve the state's world-leading climate and conservation goals.

Developed with tribal input and backed with funding approved by Governor Newsom and the Legislature, the new Tribal Nature-Based Solutions Grant Program will support tribes to reacquire ancestral land, address impacts of climate change on their communities, and conserve and protect biodiversity. Funding can be used by tribes to purchase land, train workforce, expand and communicate traditional knowledge, build tribal capacity, and build projects and programs to protect culturally important natural resources and protect climate change.

"We are really excited to establish this first-of-its-kind state program to support tribally led solutions to our biggest environmental challenges," California Secretary for Natural Resources Wade Crowfoot said. "This program was shaped with tribes through conversations and consultations that our agency held with tribal leadership to develop California's Natural and Working Lands Climate Smart Strategy and Pathways to 30x30 Strategy. It is a concrete example of our progress supporting tribal leadership to steward our natural resources."

Governor Newsom announced a $100 million budget proposal for a tribal nature-based solutions program during the March 2022 California Truth & Healing Council meeting. Funding to establish the program was approved in the 2022-'23 and 2023-'24 state budgets. In addition, earlier this year the California Ocean Protection Council (OPC) directed $1 million to establish a Tribal Small Grants Program to provide dedicated funding to California Native American tribes and tribally led entities to advance tribes' priorities for conservation, management, and stewardship. The OPC Tribal Small Grants program will be part of the Tribal Nature-Based Solutions program to assist California Native American tribes in advancing multi-benefit nature-based solutions in the coast and ocean.

Preliminary project proposals for non-time sensitive projects are due September 29, and the deadline for submitting full project proposals is February 6, 2024.
FOR INFO: https://resources.ca.gov/Initiatives/Tribalaffairs/Tribal-Nature-Based-Solutions-Program

SAN JUAN RIVER WEST

MITIGATION

On Aug. 5, 2015, contractors for the US Environmental Protection Agency (EPA) were monitoring seepage in the abandoned Gold King Mine near Silverton, Colorado, when it breached and released three million gallons of toxic waste into a tributary of the Animas River. This breach contaminated the San Juan River and affected many Navajo farmers' ability to irrigate their crops, triggering a chain reaction of financial losses.

The Navajo Nation filed a lawsuit on Aug. 16, 2016, against the EPA and its contractors along with several mining companies in the US District Court for the District of New Mexico. In June 2022, the Navajo Nation Department of Justice announced a settlement with the EPA totaling $31 million.

In February 2023, Delegate Rickie Nez (Nenahnezad, Newcomb, San Juan, Tiis Tsoh Sikaad, Tse'Daa'Kaan, Upper Fruitland) introduced Legislation No. 0033-23 to create the "San Juan River Mitigation Fund" to deposit all net proceeds and earnings awarded to the Navajo Nation through litigation settlements resulting from the Gold King Mine spill.

The Council tabled the legislation in April to allow time to meet and receive input directly from the farmers that were affected. A great number of Navajo farmers along the San Juan River were affected as the spill contaminated irrigation canals from Upper Fruitland, New Mexico, all the way to Aneth, Utah.

On May 4, 2023, several ranchers and farmers met with Speaker Curley, Delegates Nez, Eugenia Charles-Newton (Shiprock), and Curtis Yanito (Mexican Water, Aneth, Teec Nos Pos, Tółikan, Red Mesa) in Nenahnezad, New Mexico.

During the meeting, Navajo farmers recommended utilizing the funds for various projects along the river including the rehabilitation of irrigation canals,

infra-structure improvements, operations and maintenance, materials and equipment, culvert diversion, pump station/ insulation, rodent control, and research for the cost of proper operations, maintenance, and construction of a filter station and reservoirs.

Attorney General Ethel Branch also explained during the May 4 meeting that of the $31 million, $3 million is in the form of grant funding which is deemed restricted funds, and $14.5 million is for legal fees and expenses, which leaves $13.5 million that will be deposited into the San Juan River Mitigation Fund.

Branch stated the funding amount could potentially be increased due to ongoing settlements adding another $10 million totaling approximately $41 million dollars. Branch also indicated that she anticipates those additional funds to be increased within the next six months to a year.

Speaker Curley said the legislation was passed on Aug. 9 in the 25th Navajo Nation Council by unanimous vote.

"Thank you, Delegate Nez for being a voice for your community members and President Nygren for signing this legislation into law. This gives a clear message that we are behind the farmers and the families in those communities," said Speaker Curley.
FOR INFO: nnlb.communications@gmail.com

PIPELINE SPILLS MT/ND

COMPLIANCE PENALTIES

Belle Fourche Pipeline Company and Bridger Pipeline LLC — affiliated companies that own and operate a network of crude oil pipelines — have together agreed to pay a $12.5 million civil penalty to resolve claims under the Clean Water Act, pipeline safety laws, and North Dakota state laws relating to oil spills in Montana and North Dakota.

In 2015, Bridger's Poplar Pipeline ruptured where it crosses under the Yellowstone River near Glendive, Montana. The pipeline crossing had been installed using the "trench-cut" method. The pipeline failed after being exposed due to river scour. Bridger has completed its cleanup of the Montana spill site, and Bridger and the State of Montana separately resolved claims under Montana state law.

"As the longest free-flowing river in the Lower 48, the Yellowstone River not only is a national treasure for its historic significance, ecosystems and recreational opportunities, but it also is an important economic resource for communities along its banks and the state of Montana," said US Attorney Jesse Laslovich for the District of Montana. "It is essential for pipeline companies operating in and around our rivers to comply with environmental protection and public safety regulations. This agreement holds these companies accountable for their significant oil spills, and more importantly, will help protect the iconic Yellowstone River from future damage."

Belle Fourche's Bicentennial Pipeline ruptured in 2016 in Billings County, North Dakota. The pipeline traversed a steep hillside above an unnamed tributary to Ash Coulee Creek — which feeds into the Little Missouri River — when the slope failed. The size of the North Dakota spill was exacerbated by Belle Fourche's failure to detect the spill until it was reported by a local landowner. Belle Fourche's cleanup of the North Dakota spill site is ongoing with oversight by the North Dakota Department of Environmental Quality. The State of North Dakota is a co-plaintiff in this case, and it has worked closely with the United States; both are signatories to the consent decree.

In addition to the $12.5 million civil penalty, the companies are required to implement specified compliance measures including meeting certain control room operation requirements and related employee training, implementing their water crossings and geotechnical evaluation programs and updating their integrity management program. Belle Fourche will also pay the state of North Dakota's past response costs.
FOR INFO:
https://www.justice.gov/enrd/consent-decree/us-et-al-v-belle-fourche-pipeline-company

TRIBAL AGREEMENT OR

HUNTING/FISHING PERMITS

After hearing several hours of testimony from members of Grand Ronde and other Tribes — both for and against — the Oregon Fish and Wildlife Commission voted 4-3 to adopt a Memorandum of Agreement with the Confederated Tribes of Grand Ronde (Tribe).

The agreement is similar to agreements adopted with four other Tribes in western Oregon and advances the government-to-government relationship between the Tribe and the State of Oregon. Tribal members will be able to participate in subsistence and ceremonial hunting, fishing, shellfishing, and trapping licensed by the Tribe — within a limited geographic area — in partnership with the Oregon Department of Fish and Wildlife (ODFW) and the Oregon State Police. Annual harvest limits and areas for harvest by tribal members would be set by mutual consent between the Tribe and ODFW. The state and the Tribe would also work as partners to develop and implement plans to protect, restore and enhance fish and wildlife populations and their habitats.
FOR INFO: Michelle Dennehy, 503/931-2748 or Michelle.N.Dennehy@odfw.oregon.gov

KLAMATH BASIN WEST

FUNDING

Building on months of close collaboration and engagement with Klamath Basin stakeholders, Tribes, and federal, state and local leaders, the Department of the Interior today announced that nearly $26 million from President Biden's Bipartisan Infrastructure Law has been allocated for Klamath Basin restoration projects, including nearly $16 million for ecosystem restoration projects in the Basin and $10 million to expand the Klamath Falls National Fish Hatchery.

Additionally, the Bureau of Reclamation, in collaboration with the National Fish and Wildlife Foundation, will fund 10 grants totaling $2.2 million to improve fish and wildlife habitat as part of two programs: the Klamath River Coho Restoration Grant Program, and the Trinity River Restoration Program. The grants will generate $777,000 in matching contributions for a total conservation impact of almost $3 million.

Over the past 20 years, the Klamath Basin has met unprecedented challenges due to ongoing drought conditions, limited water supply, and diverse needs. As drought conditions persist throughout the region, the Klamath Basin's fragile ecosystem will depend on collaborative partnerships among a wide variety of stakeholders and the development of holistic solutions.

As part of the Interior Department's ongoing commitment to partnership and collaboration, senior Department leaders have held several in-person and virtual engagement sessions with Tribes, state and county officials, interagency partners, and water users to discuss near-

and long-term solutions related to drought impacts in the Basin.

The Bipartisan Infrastructure Law makes a $1.4 billion down payment in the conservation and stewardship of America's public lands that will lead to better outdoor spaces and habitats for people and wildlife for generations to come, with the Klamath Basin set to receive $162 million over the next five years to restore the regional ecosystem and repair local economies. The funding announced on Aug. 23 represents an historic effort dedicated to restoring the Basin.

FOR INFO: https://www.nfwf.org/mitigating-impacts/klamath-river-coho-enhancement-fund

CREEK POLLUTION WA

FARM FINED

A berry farm in Whatcom County faces a $20,000 fine for allowing water contaminated with manure to discharge into local waterways that flow to British Columbia.

Sarbanand Farms, LLC, which operates a farm at 4625 Rock Road in Sumas, applied manure solids as a mulch on fields of newly planted blueberry shrubs that were not yet producing berries. Applying manure in late fall without appropriate best management practices has a high risk of causing polluted runoff.

Last week, the Washington Department of Ecology issued a penalty notice for two separate discharges that occurred on Nov. 17 and Dec. 9, 2015. Samples taken of the runoff contained high concentrations of fecal coliform bacteria, which ultimately flowed into Saar Creek, a tributary of the Sumas River. The samples showed fecal coliform amounts up to 175 times greater than the acceptable level. Water polluted with manure can contain pathogens that can make people sick.

The company received a $4,000 penalty for a similar discharge from the same field in fall 2013.

"Manure can be a valuable fertilizer, soil amendment or mulch when properly managed — but timing is everything," said Doug Allen, manager of Ecology's office in Bellingham. "Applying manure in the fall, at the start of our rainy season, is always risky."

Cliff Woolley, representing Sarbanand Farms, commented, "Unfortunately, runoff was caused by heavy rains that flooded our fields. We are working with the Department of Ecology to develop a plan to avoid future problems."

Ecology is part of a community-wide effort to reduce fecal coliform bacteria in Whatcom County waterways.

"Fecal coliform pollution is not just an agriculture issue, it's a community issue," said Allen. "Cities, pet owners, berry growers, dairies, residents in Whatcom County, and in Canada – we all need to work together to achieve clean, safe water. Everybody has a role."

The company has 30 days to pay the penalty or file an appeal with the state's Pollution Control Hearings Board.

FOR INFO: Krista Kenner, 360/ 715-5205 or krista.kenner@ecy.wa.gov

CONSERVATION CA

NEW REGULATIONS

Moving to bolster California's water supplies and resilience to climate change through long-term water conservation practices, the California State Water Resources Control Board released a proposed regulation on Aug. 18 that would establish water efficiency goals for urban retail water suppliers in California.

Water conservation is an important component of the state's all-of-the-above Water Supply Strategy to address an anticipated 10% reduction in water supply by 2040, which includes expanding storage, recycling, desalination, and stormwater capture projects.

The proposed regulation was developed to implement 2018 legislation, known as the "Making Conservation a California Way of Life" framework, which directed the board to adopt standards for more efficient urban water use along with performance measures for commercial, industrial, and institutional water use.

Each goal — called an urban water use objective — would take into consideration unique local conditions and special circumstances. Water suppliers, not individual households or businesses, would be held to the specified water use objectives.

If the State Water Board adopts the proposed regulation, the overall estimated reduction in water use would reach 8% in 2030, saving 414,000 acre-feet of water, and 9% in 2035, saving 446,000 acre-feet of water, enough to supply 1.3 million households for a year.

"We're building on lived and learned experiences from the last drought to prepare for increasing extremes in weather throughout the West," said Eric Oppenheimer, chief deputy director for the State Water Board. "Climate change challenges us to build conservation into how we manage, supply and use water daily going forward. This regulation proposes to do that in a way that's balanced and achievable. It would set unique objectives for each water supplier while allowing significant flexibility to implement locally appropriate ways to meet them."

The proposed regulation reflects and builds upon information that water suppliers and others provided to the Department of Water Resources, which later submitted recommendations to the State Water Board.

Statewide, there are over 400 urban retail water suppliers — publicly and privately run agencies that deliver water to 95% of Californians. The proposed regulation would require suppliers to annually calculate their objective, which is the sum of efficiency budgets for a subset of urban water uses: residential indoor water use, residential outdoor water use, real water loss, and commercial, industrial and institutional landscapes with dedicated irrigation meters. Each efficiency budget will be calculated using a statewide efficiency standard and local service area characteristics, such as population, climate and landscape area.

To meet their objectives, suppliers are encouraged to use a wide variety of tactics to equip their customers with information and resources to foster wise water use, indoors and outdoors. Examples include education and outreach, leak detection, incentives to plant "climate ready" landscapes, and rebates to replace old and inefficient fixtures and appliances.

The state's Save Our Water website offers templates that suppliers can adapt for their needs. After the California Office of Administrative Law publishes the draft regulation — expected on Aug. 18 — the rulemaking process officially begins, and the board will consider adoption of the proposed regulation within one year. The rulemaking process includes opportunities for public comment, which the board will consider and may lead to changes to the regulation.

FOR INFO: https://www.waterboards.ca.gov/conservation/regs/water_efficiency_legislation.html

HYDROPOWER US

NEW BILL

The National Hydropower Association (NHA) and American Rivers applaud the United States Senate Committee on Energy and Natural Resources' Water and Power Subcommittee for holding a hearing on July 19, on the bipartisan S. 1521 *Community and Hydropower Improvement Act,* jointly introduced in May 2023 by US Senators Steve Daines (MT) and Maria Cantwell (WA).

The *Community and Hydropower Improvement Act* proposes amendments to the Federal Power Act (FPA), which would streamline and modernize the hydropower licensing and re-licensing process. The Federal Power Act, originally enacted in 1920, authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses to build, operate, and maintain hydropower facilities.

The proposed updates would improve cooperation among FERC and resource agencies, coordinate federal decision-making, and add transparency to the hydropower licensing process.

Proposed changes include:

- Expediting the licensing process by directing FERC to establish a two-year process to grant licenses for hydropower additions to non-powered dams and a three-year process for lower-impact closed-loop and off-stream pumped storage projects.
- Improving coordination between FERC, federally recognized tribes, and resource agencies in the hydropower licensing, relicensing, and license surrender processes.
- Shifts Federal Power Act (FPA) § 4(e) mandatory conditioning authority from the US Department of the Interior to a Federally Recognized Tribe for any project located on land held in trust within the exterior boundaries of a Tribal reservation.
- Clarifying the scope of environmental effects that may be considered in hydropower relicensing and ensuring that mandatory conditions submitted by certain federal agencies under sections 4(e) and 18 of the Federal Power Act address effects of the licensed project.
- Improving the processes for surrendering licenses and removing non-operating dams.
- Coordinating federal decision-making by directing FERC to convene a conference between agencies with conditioning authority and establish a joint schedule, allowing for the timely completion of all federal authorization decisions.

This legislation was informed by years of negotiations across a wide range of stakeholders convened under Stanford University's Uncommon Dialogue on Hydropower, River Restoration and Public Safety, administered by the Woods Institute for the Environment and led by Dan W. Reicher. Members of the hydropower industry, environmental organizations, conservation groups, and Tribes came together to develop a legislative package to address and reform hydropower licensing.

In May, the White House expressed support for hydropower permitting reform, including it on the Administration's priority sheet for clean energy.

For more information, please contact Amy Souers Kober with American Rivers at akober@americanrivers.org.
FOR INFO: Kelly Rogers, NHA, kelly@hydro.org

TRIBAL FUNDING WEST

CLIMATE CHANGE

The Department of the Interior announced on Jul. 19 the availability of $120 million in funding through President Biden's Investing in America agenda to help Tribal communities plan for the most severe climate-related environmental threats to their homelands. Tribal communities can use this funding to proactively plan to adapt to these threats and safely relocate critical community infrastructure. This is one of the largest amounts of annual funding made available to Tribes and Tribal organizations in the history of the Bureau of Indian Affairs' (BIA) Tribal Climate Annual Awards Program.

President Biden's Investing in America agenda and "Bidenomics" strategy is deploying record investments to provide affordable high-speed internet, safer roads and bridges, modern wastewater and sanitations systems, clean drinking water, reliable and affordable electricity, and good paying jobs in every Tribal community. The funding announcement is part of a nearly $440 million investment for Tribal climate resilience programs achieved through the Bipartisan Infrastructure Law, Inflation Reduction Act, and annual appropriations. The Department's Voluntary Community-Driven Relocation Program launched at the 2022 White House Tribal Nations Summit with an initial $135 million commitment to advance relocation and planning efforts for Tribal communities severely impacted by climate-related environmental threats.

"Devastating storms, increased drought and rapid sea-level rise disproportionately impact Indigenous communities. Helping these communities remain on their homelands in the midst of these challenges is one of the most important climate related investments we could make in Indian Country," said Secretary Deb Haaland. "Through President Biden's Investing in America agenda, we are making transformational commitments to assist Tribal communities to plan for and implement climate resilience measures, upholding our trust and treaty responsibilities, and safeguarding these places for generations to come."

The announcement includes $23 million from the Bipartisan Infrastructure Law, $72 million from the Inflation Reduction Act, and $25 million from fiscal year 2023 annual appropriations. With this transformational funding, Tribes and Tribal organizations will be eligible to apply for grants to help safeguard communities. Grants will be available in planning and adaptation categories. These categories encompass a range of activities affecting every Tribe, such as climate adaptation planning, drought measures, wildland fire mitigation, community-driven relocation, managed retreat, protect-in-place efforts, and ocean and coastal management. This historic funding also advances the Biden-Harris Administration's Justice40 Initiative, which sets the goal that 40% of the overall benefits of certain federal investments flow to disadvantaged communities that are marginalized, underserved, and overburdened by pollution and environmental hazards.
FOR INFO: https://www.bia.gov/service/tcr-annual-awards-program

CALENDAR

September 18-19 NM

New Mexico Water Law Conference (30th Annual): Latest Updates on Water Law & Water Quality, Santa Fe. La Fonda on the Plaza. For info: CLE International: 800/ 873-7130 or www.cle.com

September 19 CO

RiverBank Celebration, Denver. Denver Botanic Gardens. Presented by Colorado Water Trust. For info: https://coloradowatertrust.org/riverbank/

September 19 TX

2023 Texas Rainmaker Award Dinner, Austin. Bullock Texas State History Museum. Presented by the Texas Water Foundation. For info: www.texaswater.org

September 20 TX

Pollution Prevention Waste Management Workshop, Austin. J.J. Pickle Research Campus. Presented by Texas Commission on Environmental Quality. For info: https://www.tceq.texas.gov/p2/events/pollution-prevention-waste-management-workshop

September 20 WEB

Resilience Hubs as Community Superheroes of Climate Preparedness and Disaster Recovery, Virtual. Presented by Urban Waters Learning Network. For info: https://urbanwaterslearningnetwork.org/

September 20-21 CAN

Smart Water Utilities Canada 2023: Reducing Water Leakage Across the Network, Toronto. TBD. Presented by WateReuse. For info: https://canada.smart-water-utilities.com

September 20-22 TX

2023 WateReuse Texas Conference, Frisco. Hyatt Regency Frisco. Presented by WateReuse. For info: www.watereuse.org

September 21 VA

One River's Perspective on a Changing Climate: Potomac River Conference, Lorton. Fairfax Water's Griffith Treatment Plant. Hosted by The Interstate Commission on the Potomac River Basin; 9am-2:30pm Eastern Time. For info: www.potomacriver.org

September 21 WA

Celebrate Waters - Center for Environment & Policy Annual Event, Seattle. Ivar's Salmon House. Celebrating Water Hero Award. For info: www.celp.org

September 21-22 WA

Water Law in Central Washington Seminar, Ellensburg. Central Washington University. For info: The Seminar Group: 206/ 463-4400, info@theseminargroup.net or theseminargroup.net

September 21-22 CA

P3 Electrified: Strategies to Modernize Energy, Water, and Other Utilities, San Diego. Grand Hyatt. For info: https://www.p3electrified.com/

September 23 OR

2023 Celebration of Oregon Rivers, Portland. The World Forestry Center. Hosted by WaterWatch of Oregon. For info: www.waterwatch.org

September 25-27 CO

WaterPro Conference, Aurora. Gaylord Rockies Resort & Convention Center. Industry Event for Networking, Technology & Education. For info: www.WaterProConference.org

September 25-28 CA

WTW 2023 Annual Conference & Exhibition, Saskatoon. TCU Place, Hilton Garden Inn. Presented by Working Together for Water. For info: www.wcwwa.ca

September 26-27 CO

Interstate Council on Water Policy's 2023 Annual Meeting, Denver. SpringHill Suites Denver Downtown. Optional Field Tour Sept. 25th. Presented by Working Together for Water. For info: www.icwp.org

September 27-28 CA

Future Water World Congress, Anaheim. Anaheim Convention Center. For info: https://www.futurewatercongress.com/

September 27-28 NM

Southwest Drought Learning Network 2023 Annual Meeting, Albuquerque. Southwestern Indian Polytechnic Institute. For info: https://docs.google.com/forms/d/e/1FAIpQLSfO-V1zrw2oloyAg7duN6XMuR4fnpbuytl0GERBArSh6eDuGQ/viewform

September 28 WA

AWRA Washington Chapter State Conference, Seattle. Mountaineers Seattle Program Center. Presented by American Water Resources Association - Washington Chapter. For info: Jessica Kuchan, 206/ 755-4364, or www.waawra.org

October 3-5 CO

The Sustaining Colorado Riversheds Conference, Avon. The Westin. For info: https://www.coloradowater.org/scw-conference-registration-2023

October 3-5 NV

WaterSmart Innovations Conference & Trade Show, Las Vegas. South Pointe Hotel & Casino. Founded by Southern Nevada Water Authority (SNWA). For info: www.awwa.org/Events-Education/WaterSmart-Innovations

October 12 WEB

Clean Water, Complicated Laws: How to Effectively Work With the Army Corps - 2023 Water Quality Webinar Series, Free Webinar on Water Quality Issues, Laws & Regulations; 10:00-10:30am Pacific Time. Presented by Best, Best & Krieger. For info: https://bbklaw.com/resources/clean-water-complicated-laws

October 17-18 MT

Montana Water Law Seminar, Helena. Delta Hotels Helena Colonial. For info: The Seminar Group: 206/ 463-4400, info@theseminargroup.net or theseminargroup.net

October 18 WEB

Investing in Local Leadership to Advocate for Equitable Climate Resilience, Virtual. Presented by Urban Waters Learning Network. For info: www.urbanwaterslearningnetwork.org/

October 18-20 CA

Northern California Water Tour: Water Education Foundation Event, Sacramento. Tour Across the Sacramento Valley From Oroville to Shasta Lake Examining the State Water Project & the Central Valley Project. Presented by Water Education Foundation. https://www.watereducation.org/tour/headwaters-tour-2023

October 19 WEB

Living River: The Promise of the Mighty Colorado, Virtual. Presented by the Wallace Stegner Center. For info: https://sjquinney.utah.edu/events/

October 23-25 OR

Oregon Brownfields & Infrastructure Summit, Bend. Riverhouse on the Deschutes. Presented by the Northwest Environmental Business Council. For info: https://theoregonsummit.com

October 24 DC

Environmental Law Institute Annual Award Dinner, Washington. Omni Shoreham Hotel. For info: https://www.eli.org/award-ceremony-registration

October 25 CA

Water Summit: Taking On the Improbable in Western Water, Sacramento. Kimpton Sawyer Hotel. For info: https://www.watereducation.org/foundation-event/water-summit-2023

October 26-27 OR

Oregon Water Law Conference, Portland. Mark Spencer Hotel. For info: The Seminar Group: 206/ 463-4400, info@theseminargroup.net or theseminargroup.net

October 30 UT

Utah Water Law Conference - 29th Annual, Salt Lake City. UT Marriott University Park. For info: https://www.cle.com/

October 30-31 CO

Upper Colorado River Water Forum, Grand Junction. Colorado Mesa University.Hosted by Hutchins Water Center. For info: https://www.coloradomesa.edu/water-center/forum/

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CALENDAR

November 2-3 **IL**

PFAS: Navigating Legal, Financial and Technological Challenges, Chicago. Hilton Chicago. Presented by the American Water Works Association. For info: https://engage.awwa.org/PersonifyEbusiness/Events/AWWA-Events-Calendar/Meeting-Details/productid/210090565

November 2-3 **AZ**

Water Law Institute, Chandler. Wild Horse Pass Resort. Presented by The Foundation for Natural Resources and Energy Law. For info: https://www.fnrel.org/programs/wl23/overview

November 5-7 **CA**

2023 WateReuse California Annual Conference, Indian Wells. The Hyatt Regency. Presented by WateReuse. For info: www.watereuse.org

November 5-9 **TX**

Water Quality Technology Conference, Dallas. Sheraton Dallas Hotel. Presented by American Water Works Association; Practical Forum for Water Technology Professionals to Exchange Latest Research & Information. For info: www.awwa.org/Events-Education/Water-Quality-Technology