



Cases to Watch

Colorado River Ecosystem v. State of Colorado **(U.S. Dist. Court, District of Colorado)**

This litigation asserts a novel theory in U.S. environmental law that the Colorado River Ecosystem is a “person” capable of possessing and defending certain rights to exist, flourish, regenerate, and naturally evolve. An environmental group called Deep Green Resistance and several of its members filed the case on behalf of plaintiff Colorado River Ecosystem in U.S. District Court in Colorado against the State of Colorado. The complaint alleges that unless U.S. law recognizes that the Colorado River possesses rights similar to a person, existing environmental laws will continue to fail to protect the Colorado River and the human and natural communities that depend on the River. The complaint alleges that certain actions and inactions by the State of Colorado violate the rights of the Colorado River, including the Gold King Mine spill into the River, the over-allocation of water from the River, and the operation of dams on the River. The State of Colorado has filed a motion to dismiss based on the following: the 11th Amendment bars suits in federal court against non-consenting states; the ecosystem, environmental group, and its members lack standing to file suit in this case; and that Congress, rather than the courts, has the power to define the ecosystem as a person. The Court has not yet set a hearing or decision date on the motion to dismiss.

Federal Appeals Courts to Decide Whether Discharges to Groundwater Connected to WOTUS Require Clean Water Act Permits

On October 12, 2017, the U.S. Court of Appeals for the Ninth Circuit heard oral arguments in *Hawaii Wildlife Fund v. County of Maui*, a case regarding whether the County of Maui (County) must have a Clean Water Act (CWA) permit to inject wastewater into groundwater which reaches the Pacific Ocean. The CWA requires National Pollutant Discharge Elimination System (NPDES) permits for discharges of pollutants to navigable waters (defined as “waters of the United States” (WOTUS)) from any point source. Although the Pacific Ocean is considered a navigable water or WOTUS, groundwater is excluded from the

definition of WOTUS. The district court held that the County violated the CWA based on a “conduit” theory that any release of pollutants into groundwater which migrates to hydrologically connected navigable waters violates the CWA. In an amicus brief filed with the Ninth Circuit, the United States agreed with the district court’s decision that a NPDES permit is required because the discharges from the County’s wastewater treatment facility are from a point source (injection wells) to WOTUS (the Pacific Ocean).

Two other federal appellate courts are also deciding whether wastewater that travels through underground sources and ends up in WOTUS require NPDES permits. The Second Circuit in *26 Crown Street Assocs., LLC v. Greater New Haven Regional Water Pollution Control Auth.* is reviewing whether the Greater New Haven Regional Water Pollution Control Authority (Authority) in Connecticut is liable for untreated sewage backflows that reach the Long Island Sound through groundwater. The district court found the Authority was not liable under the CWA and dismissed the Complaint. Similarly, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* is considering whether Kinder Morgan is liable for a gasoline leak from a pipeline in South Carolina which contaminated groundwater that is hydrologically connected to the tributaries of the Savannah River (which is considered a WOTUS). Citing two circuit court cases that have already addressed this issue -- *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), and *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) -- the district court in *Upstate Forever* held that the CWA does not apply to discharges of pollution to groundwater that is hydrologically connected to surface waters. The Seventh Circuit in *Dayton Hudson Corp.* and the Fifth Circuit in *Rice* both concluded that the term “navigable waters” does not include groundwater that is hydrologically connected to surface waters.

These cases demonstrate that whether the CWA regulates discharges to groundwater that reaches WOTUS remains an unresolved issue. Depending on how the Ninth, Second, and Fourth Circuits rule, this issue could end up before the U.S. Supreme Court.



Matters Received by the Legal Department

<u>Category</u>	<u>Received</u>	<u>Description</u>										
Actions in which MWD is a party	1	Complaint for a Civil Case, served in <i>James Lee Williams v. State of Arizona, et al.</i> , United States District Court, District of Arizona, case no. 2:17-cv-03390-DJH. Plaintiff is one of the Yuma Island lessees, who has an agricultural lease with Arizona State Lands Department. Acting without counsel, the plaintiff alleges that he is denied a guaranteed water right, and alleges that Metropolitan’s settlement with the Quechan Tribe may be contributing to the issue.										
Government Code Claims	1	Claim submitted by a former MWD employee alleging wrongful termination										
Subpoenas	2	(1) Deposition Subpoena for Personal Appearance and Production of Documents and Things served by defendant in <i>Christian and Dominique Griffin, et al. v. Black Mountain Ranch LLC</i> , San Diego County Superior Court, case no. 37-2015-00033538. The subpoena notices the deposition of MWD Person Most Knowledgeable and seeks the production of records relating to water quality data, water treatment, copper corrosion, and corrosivity of water; and (2) subpoena for employment-related records for a workers’ compensation matter										
Requests Pursuant to the Public Records Act	17	<table border="1"> <thead> <tr> <th><u>Requestor</u></th> <th><u>Documents Requested</u></th> </tr> </thead> <tbody> <tr> <td>Bick Law LLP</td> <td>Records dated January 1, 2012 to present relating to California WaterFix and/or Bay-Delta Plan Amendments</td> </tr> <tr> <td>California Data Collaborative</td> <td>EGIA data on paid rebates for turf removal and water saving devices from June 2016 to present</td> </tr> <tr> <td>Center for Contract Compliance (5 requests)</td> <td>Contractor records relating to (1) Landscape and Tree Trimming Services (2 requests), (2) Irrigation Repairs and Incidental Response, (3) Landscape Maintenance and Weed Abatement, (4) Landscape Maintenance and Irrigation Repairs</td> </tr> <tr> <td>EFI Global Inc. (2 requests)</td> <td>List of consultants on the pre-qualified lists for (1) Industrial Ventilation and Grade D Breathing Air Services, and (2) General Industrial Hygiene Services</td> </tr> </tbody> </table>	<u>Requestor</u>	<u>Documents Requested</u>	Bick Law LLP	Records dated January 1, 2012 to present relating to California WaterFix and/or Bay-Delta Plan Amendments	California Data Collaborative	EGIA data on paid rebates for turf removal and water saving devices from June 2016 to present	Center for Contract Compliance (5 requests)	Contractor records relating to (1) Landscape and Tree Trimming Services (2 requests), (2) Irrigation Repairs and Incidental Response, (3) Landscape Maintenance and Weed Abatement, (4) Landscape Maintenance and Irrigation Repairs	EFI Global Inc. (2 requests)	List of consultants on the pre-qualified lists for (1) Industrial Ventilation and Grade D Breathing Air Services, and (2) General Industrial Hygiene Services
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			<u>Documents Requested</u>
		George S. Hall, Inc.	Winning proposal for Building Engineering Services
		Laurentian Bank Securities	Request for quotation for Large Diameter Concrete and Metallic Pipeline Inspection Services
		Omega Engineering Consultants	Substructure map for project near Moreno Valley Freeway
		One Step Lien Service	Outstanding water service invoices for property in Anaheim, CA
		Private Citizen	Off-stream storage agreements and DVL operational agreements
		San Diego County Water Authority (3 requests)	(1) Power related agreements, (2) conservation-related and cyclic agreements, (3) lease agreement with Semitropic Water Storage District
Other Matters	1	Wage garnishment	



California WaterFix Litigation	
Subject	Status
<p>Validation <i>DWR v. All Persons Interested</i> Sacramento County Superior Court</p>	<p>Hearing on Save the California Delta Alliance’s motion to dismiss November 17, 2017</p> <p>Hearings on DWR’s and MWD’s motions to dismiss/motions to strike affirmative defenses December 5, 14, 15, 2017</p> <p>Case Management Conference February 8, 2018</p>
<p>CEQA 18 cases/4 County Superior Courts: Sacramento (15), Alameda (1), Placer (1), San Joaquin (1)</p>	<p>Petition to coordinate pending in Sacramento (no deadline)</p> <p>DWR completing administrative record (ETA end of 2017); likely to be disputed</p>
<p>ESA/BiOps <i>Golden Gate Salmon Ass’n v. Ross (NMFS)</i> <i>Bay.org v. Zinke (USFWS)</i> Eastern District of California (O’Neill)</p>	<p>SWC/MWD & DWR granted intervention</p> <p><i>Golden Gate</i>: Plaintiffs’ motion for summary judgment (MSJ) – all briefing to occur by October 2018</p> <p><i>Bay.org</i>: Plaintiffs’ MSJ – all briefing to occur by December 2018</p>
<p>CESA/Incidental Take Permit <i>Bay.org v. DFW</i> <i>North Delta Water Agency v. DFW***</i> Sacramento County Superior Court</p>	<p>Answers/Motions to Dismiss due 30 days after administrative record is lodged</p>
<p>Breach of Contract <i>City of Antioch v. DWR</i> Sacramento County Superior Court</p>	<p>Answer or Motion to Dismiss due November 20, 2017</p> <p>Case Management Conference March 1, 2018</p>

***CESA claims also alleged in the CEQA petitions filed by County of San Joaquin, et al. and California Sportfishing Protection Alliance, et al.