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Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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LITIGATION
CWA §404 Assumption/Tribal Lands

On March 18, the U.S. District Court of the Southern District of Florida issued a stay of *Miccosukee Tribe v. U.S. Environmental Protection Agency (EPA)* (1:22-cv-22459) until April 17. The order comes after the U.S. District Court for the District of Columbia vacated EPA's approval of Florida's Clean Water Act (CWA) §404 assumption application (*Center for Biological Diversity et al. v. Regan, et al.,* 1:21-cv-00119) (see WSW #2599). The Florida federal court said it would not be able to grant meaningful relief if a final judgment upheld the vacatur in the *Center for Biological Diversity* case.

The Miccosukee Tribe filed its case in August 2022, alleging that (1) EPA's approval of Florida's CWA §404 permitting program (85 FR 83553) impermissibly disregarded and diminished the Miccosukee Tribe's sovereignty by subjecting more than 200,000 acres of Indian lands to the state's regulatory jurisdiction, and (2) tribal members have been prevented from obtaining permits to build homes on tribal lands in the Everglades. The complaint asserted that Miccosukee lands include more than the reservation lands, noting that the Tribe holds interests in lands held by the federal government, Miccosukee reserved areas, perpetually leased lands, reserved rights lands, and fee simple lands. EPA's approval transferred CWA §404 permitting authority over such lands to the State of Florida unless such lands are subject to the ebb and flow of the tide.

The complaint alleged that the state lacks legal authority to carry out the CWA §404 program on these Indian lands, and in the absence of that authority, EPA's regulations (40 CFR 233.2(b)) specify that §404 permitting authority will remain with the U.S. Army Corps of Engineers (Corps). Rather than describe all the waters within the state's jurisdiction and all the waters retained by the Corps, Florida's description said that "State-assumed waters...are all waters of the United States that are not retained waters," provided inconsistent definitions of Corps-retained waters, and although Florida noted that "Indian country, as defined in 18 USC 1151, is not included in Florida's 404 program," failed to include the other Indian lands. The Tribe sought five counts of relief under the Administrative Procedures Act, requesting that EPA's transfer of authority over certain waters be vacated.

As an intervenor defendant, Florida countered that "the Tribe's boundless view of 'Indian lands' as much broader than 'Indian country'" is erroneous and unprecedented. "Florida's Section 404 Program remains subject to continuous permit-by-permit oversight by the federal government and allows for full involvement by the Tribe at every stage. As such, there is no legal or factual basis to claim 'sovereignty' injuries here. The Tribe's decision to selectively forego participating in the Section 404 program for two proposed permits [the Tribe expressly asked Florida to suspend the processing of the two applications, and Florida consented to that request] is entirely self-inflicted and inconsistent with the Tribe's own past involvement in state permit programs."

Florida argued that Congress clearly did not intend the application process to include a canvass of the landscape on a parcel-by-parcel basis, allowing it to get bogged down in contentious disputes over jurisdictional line-drawing. "As set forth in the [Florida Department of Environmental Protection]-Corps MOA, any site-specific line-drawing determinations can be made as circumstances warrant, particularly since the precise boundaries of assumable waters are subject to change based on current conditions." Additionally, Florida expressly did not seek authority over Indian country (18 USC 1151). "If EPA correctly interpreted Indian lands synonymously with Indian country, Florida's program obviously does not cover Indian lands within the meaning of 40 CFR 233.11(h)."

Florida also argued against the Tribe's assertion that state-tribe interactions injure tribal sovereignty and cannot be government-to-government relations, noting that states are also sovereign, and that the BIA has acknowledged: "While federally recognized tribes generally are not subordinate to states, they can have a government-to-government relationship with these other sovereigns, as well… [T]ribes frequently collaborate and cooperate with states through compacts or other agreements on matters of mutual concern such as environmental protection and law enforcement."

PFAS/Drinking Water

On March 29, the U.S. District Court for the District of South Carolina approved a multidistrict litigation (MDL) class action settlement between nationwide public water systems and 3M, addressing alleged Per- and Polyfluorinated Substances (PFAS) related harms to drinking water systems and associated financial burdens (*In re Aqueous Film-Forming Foams Products Liability Litigation*, 2:18-mn-2873). MDL-2873 consolidated all federal court cases alleging that aqueous film-forming foam (AFFF) caused PFAS contamination of groundwater. Parties included water districts, municipalities, states, private companies, and individuals, comprising thousands of complaints against manufacturers 3M and DuPont.

An MDL class action lawsuit against 3M sought compensation for Public Water Systems (PWS) PFAS monitoring and mitigation costs. In recent years, PWSs have incurred growing costs to test water and mitigate water supply impacts where PFAS are found. The class action complaint sought damages for: (1) the costs of testing and monitoring of the ongoing contamination of their drinking water wells and supplies; (2) the costs of designing, constructing, installing and maintaining filtration systems to remove or reduce levels of PFAS detected in drinking water; (3) the costs of operating those filtration systems; and (4) the costs of complying with any applicable regulations requiring additional measures.

The initial settlement terms in July 2023 met with opposition from 23 attorneys general, including Arizona, California, Colorado, New Mexico, and Texas. The states and some state agencies opposed a broad indemnity clause, a lack of disclosure, and insufficient time for water systems to act. The parties to the class action lawsuit conferred with the states and amended the terms of the settlement. The final approved 3M settlement specifies that it does not apply to states and the federal government. Arizona and California joined an amicus letter outlining their concerns with the remaining terms, namely the amount to be paid and the timeframe of payment.

The settlement class included "Every Active Public Water System in the United States of America that – (a) has one or more Impacted Water Sources as of the Settlement Date; or (b) does not have one or more Impacted Water Sources as of the Settlement Date, and (I) is required to test for certain PFAS under UCMR-5, or (ii) serves more than 3,300 people, according to SDWIS." The parties anticipated that the settlement class would comprise over 12,000 PWSs. Approximately 7.5% of PWSs opted out. In exchange for releasing claims, 3M agreed to pay into a settlement fund in installments between $10.5B to $12.5B, to be distributed to qualifying class members across the U.S. pursuant to the terms of the settlement, with an additional $5M to cover the costs associated with notice. The Court's final order and opinion approving the settlement triggered the notice procedures.

WATER RESOURCES

California/State Water Plan

On April 2, the California Department of Water Resources (CDWR) released the final version of the 2023 California Water Plan. Updates to the plan are required by the State Water Code to reflect current water conditions and state priorities. The 2023 Plan provides an update on the conditions of the state's water resources, and outlines several objectives, including: (1) supporting watershed resilience planning and implementation; (2) improving resiliency of built and natural water infrastructure and provide guidance and support; (3) advancing equitable outcomes in water management; (4) supporting and learn from tribal water and resource management practices; and (5) supporting and increasing flexibility of regulatory systems.

The plan indicates that climate change is causing increased wildfires, extreme heat events, rising sea levels, and highly variable precipitation and runoff patterns. These stressors are resulting in increased flooding and drought. The State is experiencing higher risk of early spring runoff, flooding, and the resulting reduction of available water during summer months. Drought conditions in California have been increasing in intensity and duration, punctuated by more intense atmospheric river-driven storms and higher flood flows.

The plan recommended: (1) improving agency alignments; (2) addressing long-term watershed climate vulnerabilities and funding watershed resilience programs; (3) improving data development and dissemination, including exploring ways to modernize water rights data and implementation; (4) modernizing and expanding "backbone" water storage and conveyance projects; (5) increasing integration with the statewide water network; (6) increasing water use efficiency to reduce demand; (7) expanding ecosystem restoration and improving ecosystem resilience; (8) improving aquifer management and replenishment; (9) improving outreach and public access to state resources; (10) strengthening partnerships with Tribes, incorporating indigenous knowledge into water policy and planning, and coordinating with Tribes to understand tribal water quality and access; and (11) increasing the flexibility of regulatory programs throughout the state, including regulations from the California Natural Resources Agency, CalEPA, and CDWR.