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Injunction Junction, What’s Your Function? Northern Plains Research Council v. U.S. Army Corps of Engineers and Federal Courts’ Use of Nationwide Injunctions.

By Amanda Nichols

Introduction

On April 15, 2020, the U.S. District Court for the District of Montana, Great Falls Division, issued its opinion in *Northern Plains Research Council v. U.S. Army Corps of Engineers*—a case challenging the Army Corps of Engineers’ (Corps) reissuance of Nationwide Permit 12 (NWP 12) in 2017 as well as its use of NWP 12 to authorize the Keystone XL Pipeline crossings of the Yellowstone and Cheyenne Rivers.¹ Among other things, the case: (1) remanded NWP 12 back to the Corps for compliance with the Endangered Species Act (ESA); (2) vacated NWP 12 pending completion of ESA consultation and compliance with all environmental statutes and regulations; and (3) enjoined the Corps from authorizing any dredge or fill activities under NWP 12 pending completion of the ESA consultation process and compliance with all environmental statutes and regulations. As a result of these holdings, Corps districts nationwide are not verifying any pending pre-construction notifications for compliance with NWP 12 under 33 C.F.R. § 330.6 until further notice.

As the Court’s ruling regarding the Corps’ future administration of NWP 12 is written to have nationwide impact, it is, in effect, a “nationwide injunction.” In general, an

“injunction” is an equitable remedy that functions to control a party’s conduct. A “nationwide injunction,” in particular, is an injunction that a federal district court can issue at any stage of litigation that functions to bar a defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action.² Because the court’s ruling in *Northern Plains Research Council v. U.S. Army Corps of Engineers* functions to prevent the Corps from authorizing *any* projects under NWP 12 until it completes the ESA consultation process, it impacts all those potential permittees across the United States who may wish to avail themselves of NWP 12’s expedited permitting process—not just those directly involved in the lawsuit at issue. Therefore, it functions as a nationwide injunction.

Over recent years, nationwide injunctions have become increasingly utilized by federal district and circuit courts—spurring controversy within the legal community as well as the creation of a robust body of related legal scholarship. The U.S. Supreme Court has not definitively ruled on the question of whether federal courts’ use of nationwide injunctions is permissive under the courts’ Article III Constitutional powers. As a result, federal courts have continued

to issue nationwide injunctions that have done things such as: (1) halt former President Obama’s initiative granting deferred action to undocumented parents of U.S. citizens and lawful permanent residents,³ and (2) enjoin President Trump’s ban on entry into the United States by refugees and nationals of six predominantly Muslim countries.⁴ Nationwide injunctions are not patently prohibited and therefore are typically allowed to stand unless invalidated for other reasons. However, the Supreme Court has been critical of the practice in the past, and the issue is ripe for adjudication by the high court.

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From the Chair

by Jon Harris Maurer

We find ourselves in unprecedented times, but like they always say: The only certainties in life are death, taxes, and the *ELULS Section Reporter!* Our authors and editors have worked hard to bring you this issue of the *Reporter* amid the COVID-19 pandemic. We briefly considered a shift to Zoom format but abandoned it. You're welcome.

Like many of you, the Environmental and Land Use Law Section (ELULS) has adapted to new ways of doing business. For practical purposes, that has meant postponing in-person events like our Long Range Planning Retreat and our annual June Update as part of the Florida Bar Annual Convention. We look

forward to being able to get together again in person soon for these events and more networking opportunities like our last mixer hosted by the Office of Erin L. Deady, P.A., in Delray Beach.

We have also adjusted our content to meet current needs. Section members reported a number of local governments moving to virtual meetings to accommodate social distancing, with multiple impacts on quasi-judicial hearings. On May 6, we teamed up with the Florida Bar Real Property, Probate, and Trust Section and the City, County, and Local Government Section to host a free webinar, "Virtual Meetings – Statewide Best Practices for Local Government and

Land Use Hearings," moderated by ELULS CLE Co-Chair, Robert Volpe (Hopping Green & Sams). Be sure to find it online for a discussion of the challenges and opportunities in this new way of doing business.

Of course, some things never change. ELULS still welcomes your ideas and submission for *Reporter* articles, CLE topics, and ELULS Treatise articles (http://eluls.org/elul_treatise).

Keep safe and keep washing your hands,

Jon Harris Maurer
Chair, Environmental & Land
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Magazine Program

ON APPEAL

by Larry Sellers, Holland & Knight, LLP

Note: Status of cases is as of June 10, 2020. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

Classy Cycles v. Panama City Beach, Case No. SC20-118. Notice of intent to seek review of 1st DCA decision affirming trial court order upholding two City of Panama Beach ordinances restricting and then prohibiting the rental of scooters effective September 2020. 44 Fla. L. Weekly D2729a (1st DCA Nov. 13, 2019). Judge Makar filed a dissenting opinion. Status: Notice of intent to seek review filed January 23, 2020.

Donna Melzer v. SFWMD, et al., Case No. SC19-1993. Notice to invoke discretionary jurisdiction to review 4th DCA decision affirming in part and reversing in part the Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim. 44 Fla. L. Weekly D2356a (4th DCA September 18, 2019). The Everglades Law Center sought to require disclosure of the transcripts of a "shade" meeting held by the SFWMD Governing Board involving discussions regarding mediation between the District and its Governing Board in attorney-client sessions. The district court

held that the trial court did not err in determining that statutory mediation communication exemption under Sections 44.102(3) and 44.405(1) preclude disclosure of the full transcript of the shade meeting conducted between SFWMD and its attorneys for the purpose of discussing settlement terms and appending litigation which mediation was ordered; to the extent that the transcript memorialized mediation communications, such portions of the transcript constituted mediated communications, and these communications disclosed by governmental attorney during a shade meeting are to be redacted from the transcript of the shade meeting when it becomes a public record. The district court also held that the trial court erred when it failed to conduct an in camera review of the transcript based on the parties' agreement that one was not necessary; it is fundamental error for trial court to rule on an exemption to public access to the full shade meeting transcript by redacting mediation communications without conducting an in camera review to determine if the claimed exemption applies. Accordingly, the court remanded for an in camera inspection of the full transcript to assess whether redactions proposed by the District have been appropriately applied. Status: Petition for review denied on April 16, 2020.

Florida Wildlife Federation, Inc., et al. v. Jose Oliva, Bill Galvano and The Florida Legislature, Case No. SC19-1935. Notice to invoke discretionary jurisdiction to review 1st DCA decision affirming in part, reversing in part and remanding the trial court's Final Judgment for Plaintiffs: (1) interpreting Amendment 1 to limit the use of funds in the Land Acquisition Trust Fund created by Article X, Section 28 to the acquisition of conservation lands for other property interests the state did not own on the effective date of the amendment and thereafter, and to approve, manage, restore natural systems thereon, and enhance public access or enjoyment of those conservation lands; and (2) determining the numerous specific appropriations inconsistent with that interpretation are unconstitutional. 44 Fla. L. Weekly D2268a. Status: Notice to invoke discretionary jurisdiction filed November 15, 2019.

Maggie Hurchalla v. Lake Point Phase I, LLC., et al., Case No. SC19-1729. Notice to invoke discretionary jurisdiction to review the 4th DCA decision upholding jury verdict finding Ms. Hurchalla liable for \$4.4 million in damages on a claim of tortious interference with a contract for a public project, due to her public comments

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ON APPEAL

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in opposition to the project. 44 Fla. L. Weekly D1564a (Fla. 4th DCA 2019). Status: Petition for review denied on April 13, 2020.

FIRST DCA

Uhlfelder v. DeSantis, Case No. 1D20-1178. Appeal from trial court order granting motion to dismiss with prejudice plaintiff's amended complaint for emergency injunctive relief, which sought to compel Governor DeSantis to close all of Florida's beaches. Status: Notice of appeal filed April 9, 2020.

Vickery v. City of Pensacola, Case No. 1D19-4344. Appeal from trial court order denying motion to dissolve a temporary injunction to prevent a property owner from removing a live oak tree located in the Northern Hill Preservation District, part of Pensacola governed by specific ordinances to protect Heritage trees. Status: Notice of appeal filed December 3, 2019.

John S. Donovan, et al., v. DEP and City of Destin, Case No. 1D19-4101. Appeal from DEP final order issuing consolidated joint coastal permit and sovereign submerged land authorization to the City authorizing periodic maintenance dredging of the federally-authorized East Pass in Destin Harbor navigation channels. Status: Notice of appeal filed November 13, 2019.

GI Shavings, LLC v. Arlington Ridge Community Association, Inc. and Florida Department of Environmental Protection, Case No. 1D19-3711. Petition for review of DEP final order approving a consent order between GI Shavings and DEP but denying the application for revisions to its air permit for a wood chip dryer. Status: Notice of appeal filed October 14, 2019.

Crystal Bay, L.L.C. v. Brevard County Utilities Service Department and Florida Department of Environmental Protection, Case No. 1D19-3700. Appeal from DEP Final Order of Dismissal with Prejudice, dismissing a second amended petition seeking to challenge the notice of intent to issue a permit for a wastewater treatment facility owned and operated by Brevard County. The final

order concludes that the petition does not demonstrate standing to request a hearing. Status: Motion for voluntary dismissal granted on April 30, 2020.

MarineMax, Inc. v. Larry Lynn & Department of Environmental Protection, Case No. 1D19-2247. Petition to review DEP final order approving Lynn's qualification for an ERP exemption and dismissing MarineMax's challenge. Status: Notice of appeal filed June 20, 2019. Motion for voluntary dismissal granted on January 28, 2020.

City of Jacksonville v. Dames Point Workboats, LLC and Florida Department of Environmental Protection, Case No. 1D19-1728. Petition to review DEP final order granting consolidated ERP and sovereign submerged lands lease for a commercial/industrial tugboat and marine barge loading facility on the St. Johns River. Status: Oral argument scheduled for April 2, 2020 (cancelled).

Imhof, et al. v. Walton County, et al., Case No. 1D19-980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the Second District's decision in *Heine v. Lee County*, 221 So.3d 1254 (Fla. 2nd DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. (Regular readers will recall that the Third District recently affirmed *per curiam* a similar ruling in *Cruz v City of Miami*, Case No. 3D17-2708.) Status: Oral argument held January 15, 2020.

SECOND DCA

Kochman v. Sarasota County, et al., Case No. 2D20-18. Petition for writ of certiorari by an adjacent property owner to review a trial court's denial of the petition for certiorari with respect to the County's approval of the Siesta Promenade, a mixed-use project on Siesta Key. Status: Oral argument set for June 23, 2020.

Julio Lleras v. Florida Department of Environmental Protection, Case No. 2D19-4138. Petition to review DEP final order relating to

the unauthorized use of state owned lands in Placida Harbor, including order requiring removal of unauthorized dock structure and payment of \$2,500 administrative fine. Status: Notice of appeal filed October 25, 2019; motion to relinquish jurisdiction filed January 15, 2020; notice of voluntary dismissal filed March 30, 2020.

Denlinger v. Southwest Florida Water Management District and Summit View, LLC, Case No. 2D19-3835. Appeal from a SWFWMD final order dismissing a petition challenging the extension of an ERP pursuant to section 252.363, F.S., which provides for the tolling and extension of certain permits and other authorizations following the declaration of a state of emergency. Status: Notice of appeal filed October 7, 2019.

FOURTH DCA

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Waterfront ICW Properties, LLC and Wellington Arms, A Condominium, Inc., Case No. 4D19-3240. Petition to review final judgment quieting title in the name of the appellee and against the Trustees as to certain submerged lands constituting a part of Spanish Creek located in the Town of Ocean Ridge. Status: Notice of appeal filed October 18, 2019.

Citizens for Thoughtful Growth-West Palm Beach, Inc. v. The City of West Palm Beach and Flagler Residential, LLC, Case No. 4D19-3316. Petition for writ of certiorari from a trial court discovery order compelling the petitioner to disclose the identity, contact information, and property address of all its members and supporters who would be adversely affected by the development order, for the purpose of determining plaintiff's standing to sue pursuant to section 163.3215, F.S. The petitioners contended that the disclosure would violate the right of privacy of its members. Status: Petition granted and order quashed based upon *NRA v. City of South Miami*, 774 So. 2d 815, 816 (Fla. 3d DCA 2000) on March 11, 2020.

Haver v. The City of West Palm Beach, et al., Case No. 4D19-1537. Appeal from circuit court's final order

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dismissing with prejudice a five-count complaint in a zoning enforcement action, alleging that the defendants failed to enforce zoning codes. Status: On June 10, 2020, the court reversed the dismissal of the first three counts, citing the Florida Supreme Court's decision in *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958), in which the court held that "where municipal officials threaten or commit a violation of municipal ordinances which produces an injury to a particular citizen which is different in kind from the injury suffered by the people of the community as a whole[,] then such injured individual is entitled to injunctive relief in the absence of an adequate legal remedy." The court also certified conflict with the Third District's opinion in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3rd DCA 2013), and the Second District's opinion in *Chapman v. Town of Reddington Beach*, 282 So. 3d 979 (Fla. 2nd DCA 2019).

Great American Life Insurance Co. v. The Buccaneer Commercial Unit A, etc., et al., Case No. 4D19-868. Petition to review DEP final order granting consolidated ERP and sovereign submerged land lease for commercial unit A dock, after ALJ determined that the applicants met all applicable navigational criteria. Status: Notice of appeal filed March 27, 2019.

Benjamin K. Sharfi, et al. v. Great American Life Insurance Co. and Florida Department of Environmental Protection, et al., Case No. 4D19-112. Petition to review DEP final order issuing consolidated ERP and sovereign submerged lands lease for replacement dock, after ALJ determined that the applicant met all applicable navigational criteria. Status: Affirmed *per curiam* March 12, 2020.

FIFTH DCA

Glenda Mahaney v. Garber Housing Resorts, LLC and DEP, Case No. 5D19-3517. Appeal from DEP final order denying appellant's petition for administrative hearing with prejudice and approving a site rehabilitation completion order. Status: Notice of appeal filed November 27, 2019.

11th CIRCUIT COURT OF APPEAL

Florida Defenders of the Environment, et al., v. U.S. Forest Service, Case No. 20-12046. Appeal from order granting the federal defendant's motion to dismiss a complaint alleging that the state has operated the Rodman Dam without a permit. Status: Notice of appeal filed June 3, 2020.

UNITED STATES SUPREME COURT

County of Maui, Hawaii, v. Hawaii Wildlife Fund, Case No. 18-260. Petition to review decision by the U.S. Court of Appeals for the 9th Circuit upholding a district court ruling,

rejecting the County's argument that a "discharge" only occurs when pollutants are released directly into navigable waters. The County operates a wastewater treatment plant that injects the treated wastewater through wells into the groundwater; some of that groundwater eventually enters the Pacific Ocean. Issue: whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a non-point source, such as groundwater. Status: On April 23, 2020, the Court held that the statutory provisions at issue require a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.

Atlantic Richfield Co. v. Christian, et al., Case No. 17-1498. Petition to review Montana Supreme Court decision that allows state residents to sue Atlantic Richfield Co. for clean-up costs related to the Anaconda Smelter Superfund site's pollution despite remediation work that had already occurred. Status: On April 20, 2020, the Court held that Montana residents can sue Atlantic Richfield Co. under state law for money to clean up their properties on a Superfund site that is already covered by a settlement agreement with the EPA, but any additional remedial action must be approved by the EPA.



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The Need for Speed: Velocity, Algae, and Florida's Springs

Shannon Boylan, Dan Ward, and Thomas T. Ankersen, Esq.¹

Introduction

Florida has more than 1,000 springs, one of the highest concentrations in the world.² These springs are a vital ecological, cultural, and economic resource. Recognizing this, in 2016 the Florida Legislature enacted the Florida Spring and Aquifer Protection Act, declaring that springs are a unique part of Florida's scenic beauty and embody immeasurable natural, recreational, economic, and inherent value.³ The Legislature also recognized that Florida springs offer a window into the status and health of the Floridan Aquifer,⁴ which supplies the majority of the State's drinking water.⁵

Unfortunately, Florida springs increasingly face anthropogenic stressors contributing to declining spring discharges and diminished water quality.⁶ A 50-year retrospective evaluation of the ecological health of Silver Springs, one of Florida's most iconic springs, showed that fish populations had decreased by 92%, nitrate-nitrogen concentrations had increased by 200%, flows had decreased, water clarity had declined, great masses of filamentous algae now covered the sand and limestone bottom, and overall ecosystem productivity had declined by 27%.⁷ Silver Springs is not alone. Springs across the state have experienced declines in flow attributed to decreased rainfall and increased groundwater pumping.⁸ Some, such as Kissengen and White Sulfur Springs, have ceased to flow altogether, turning once popular swimming holes into dried-up sinkholes.⁹

For springs ecosystems especially, water quantity and water quality are profoundly linked. Florida's Water Resources Act and implementing regulations recognize this link through the provision requiring establishment of minimum flows and levels, or "MFLs."¹⁰ The statute requires MFLs be established to limit further withdrawals that would be significantly harmful to the water resources or ecology of the area.¹¹ To implement

this mandate uniformly, the Department of Environmental Protection (DEP) adopted a "super rule," the Water Resources Implementation Rule, intended to guide DEP and water management district rulemaking, including the establishment of MFLs.¹² The portion of the rule addressing MFLs sets out a series of water resource values to be protected when setting MFLs.¹³ One such value is water quality,¹⁴ explicitly linking water quantity and quality.

A key indicator of water quality in Florida's springs is the prevalence of filamentous algae. While excess nutrients have been shown to lead to excess algae and hence degraded water quality, springs science has also made the link between one key feature of water quantity crucial to algal accumulation—the velocity of the water that flows from the spring. This relationship has been acknowledged by some water management districts in the technical reports accompanying the establishment of certain MFLs, and at least one administrative law judge has found that the evidence supports the relationship, though he declined to require that it be addressed in the MFL at issue. No district has yet used velocity as a basis to establish an MFL.¹⁵ This article describes the state of the science and applicable law regarding the relationship between velocity and algae in Florida's springs. It argues that velocity should be included as an indicator of water quality in the criteria for establishing MFLs in all flowing waters, and that this may best be achieved by incorporating it into the Water Resources Implementation Rule, to be applied uniformly for flowing waters across water management districts.

Algae Accumulation and Water Velocity

One major sign of ecological harm observed in Florida springs is the accumulation of filamentous algae, which can smother habitat occupied by other organisms and native

aquatic vegetation.¹⁶ In many of Florida's spring-fed rivers, the abundance of filamentous algae has increased over recent decades, and in some cases replaced the once-dominant aquatic rooted plant communities.¹⁷ These nuisance algae reduce the recreational, aesthetic, and overall water quality of these resources.¹⁸ A 50-year retrospective study of Silver Springs found that the prevalence of filamentous blue and green algae had increased from undetected to half of the overall plant biomass.¹⁹ These changes have not gone unnoticed by long-time visitors to Florida's springs. John Moran, a renowned nature photographer, has documented the algae colonization in Florida's springs over many decades.²⁰ His photographs illustrate how the once crystal-clear blue waters of many springs have turned murky and clogged with green mats of algae. The growth in algae cover and decline in submerged aquatic vegetation ("SAV")—rooted, underwater plants such as native river grasses—has occurred contemporaneously with observed increases in nitrogen concentration and declines in the discharge of many springs.²¹

The increase in algae abundance in spring-fed rivers has long been attributed to increased levels of nutrients in the water, such as nitrates derived from fertilizers, manure and sewage.²² However, long-term nitrogen enrichment does not fully explain the relatively recent increases in macroalgal abundance.²³ More recent scientific studies have shown that nitrate reduction alone is unlikely to restore the plant community structure in springs.²⁴ Rather, these studies have shown that the velocity of water flow²⁵ in springs is a significant determinant of algae growth and in general is inversely related to algal cover.²⁶ For example, in several Florida spring systems, filamentous algal abundance increased with lower velocities and lower spring discharge.²⁷ Higher water velocities act

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as a limiting factor on filamentous algal growth by inhibiting its ability to attach or cling to submerged aquatic vegetation (SAV).²⁸ Constant high velocities, however, are not required. Episodic high velocity can flush out existing filamentous algae that has already attached to vegetation.²⁹

Most recently, modeling and analysis of algal cover, SAV cover, and velocity data sets from several Florida springs have identified critical velocities and shear stresses that predict algal and SAV prevalence.³⁰ This study also found that decreased velocity due to reduced spring discharge increases the abundance of SAV and algae, and that the consequent friction created by this increased biomass can exacerbate algal proliferation by sustaining lower velocity even as spring discharge recovers.³¹ Although scientific debate continues over the exact cause or causes of algal proliferation in springs (and the relationships/feedbacks among causes), there is a growing consensus among springs scientists that when flow velocities are high, algal cover is low.³² These scientific findings suggest that water quantity indicators, in this case velocity, can be just as relevant to macroalgal proliferation in Florida spring-fed rivers as water quality indicators such as excessive nutrients.³³ In light of these findings, addressing velocity in regulatory determinations would seem to be a necessary consideration in maintaining springs water quality and ecosystem health.

Minimum Flows and Levels (MFLs)

Since velocity is directly linked to, but distinct from, the stage (level) and discharge (flow) of a river, existing Florida law regulating the MFLs is well suited to implement a minimum velocity threshold. The Florida Water Resources Act of 1972 requires the establishment of MFLs by rule, stating in relevant part:

373.042: Minimum flows and minimum water levels—

(1) Within each section, or within the water management district as a whole, the department or the governing board shall establish the following:

(a) Minimum flow for all surface watercourses in the area. The minimum flow for a given watercourse is the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.

(b) Minimum water level. The minimum water level is the level of groundwater in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources or ecology of the area.

The minimum flow and minimum water level shall be calculated by the department and the governing board using the *best information available*. When appropriate, minimum flows and minimum water levels may be calculated to reflect seasonal variations. The department and the governing board *shall consider*, and at their discretion may provide for, *the protection of nonconsumptive uses* in the establishment of minimum flows and minimum water levels.³⁴

Section 373.042's requirement to consider non-consumptive uses serves as a source of authority to protect instream uses. Pursuant to Section 373.042(2), Water Management Districts must have established MFLs for all Outstanding Florida Springs by July 1, 2017.³⁵ And under Section 373.042(3), Districts must adopt a priority list and schedule for adopting MFLs for all other springs with an existing or potential threat to spring flow from consumptive uses. MFLs must be reevaluated periodically and may be revised as needed.³⁶ If flows or levels of a watercourse fall below the adopted MFL, or are projected to fall below the adopted MFL within 20 years, the water management district must adopt and implement a recovery or prevention strategy for that watercourse.³⁷ For watercourses in "recovery," districts may still issue consumptive use permits, but "only if they meet applicable District rules, including those implementing the recovery or prevention strategy."³⁸

MFLs have primarily focused on ecological resources such as fish passage, aquatic habitat and floodplain inundation.³⁹ However, given the documented impact of velocity on algae prevalence, MFLs for Florida springs should be adopted that prevent groundwater withdrawals from reducing velocity below the critical

threshold that allows algae to thrive. Because velocity inhibits macroalgal proliferation, it can be an effective regulatory metric to protect non-consumptive uses in springs in its own right.

Water Resources Implementation Rule

The Water Resources Implementation Rule (WRIR) in Florida's Administrative Code is a fitting place to add a velocity criterion for water management districts to consider when setting MFLs for Florida springs. The intent of the WRIR is to "provide water resource implementation goals, objectives, and guidance for the development and review of programs, rules, and plans relating to water resources, based on statutory policies and directives."⁴⁰ The WRIR states a general policy to "promote the availability of sufficient water for natural systems, and sufficient and affordable water for all existing and future reasonable-beneficial uses."⁴¹

The WRIR states that "MFLs should be expressed as multiple flows or levels defining a minimum hydrologic regime, to the extent practical and necessary, to establish the limit beyond which further withdrawals would be *significantly harmful to the water resources or the ecology of the area*."⁴²

In setting MFLs, the WRIR also requires the districts to consider the protection of water resources; natural seasonal fluctuations in water flows or levels; and environmental values associated with coastal, estuarine, aquatic, and wetlands ecology, including:

(a) *Recreation* in and on the water; (b) Fish and wildlife habitats and the passage of fish; (c) Estuarine resources; (d) Transfer of detrital material; (e) Maintenance of freshwater storage and supply; (f) *Aesthetic and scenic attributes*; (g) Filtration and absorption of nutrients and other pollutants; (h) Sediment loads; (i) *Water quality*; and (j) Navigation.⁴³

At least three of these water resource value—(a) Recreation in and on the water, (f) Aesthetic and scenic attributes, and (i) Water quality—are severely compromised by algal proliferation, and perhaps all ten values are impacted.⁴⁴ However, Districts

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have been reluctant to apply the relationship between algae proliferation and water velocity to the development of MFLs. For example, in the 2017 Rainbow River MFL report, algae proliferation is only cursorily addressed under the “water quality” resource value and is entirely absent in the discussion under the “recreation” and “aesthetic and scenic attributes” resource values.⁴⁵

Even when addressed in MFL reports, most Districts do not connect algae proliferation to fluctuations in water flow or velocity. For example, in the Rainbow River MFL report, an increase in nitrogen is hypothesized to be the primary source of the imbalance of algae and is implicated as the cause of impairment.⁴⁶ In discussing the water quality resource value, the 2017 Silver River MFL report states that “recent research suggests there is little evidence that variations in spring flow rates will demonstrably affect spring water quality.”⁴⁷ In discussing the aesthetic and scenic attributes resource value, the Silver River MFL report does not address algae proliferation while concluding that reduced flow contributes positively to aesthetic values because water clarity increases with lower flows due to less tannic inflow from the floodplain.⁴⁸ Outside of the discussion of water resource values, the Silver River MFL report does discuss the velocity/algae link, but concludes that the anticipated reduction in flows under the rule would not appreciably impact in-stream velocities.⁴⁹ This conclusion was reached despite data showing that velocity in the Silver River exceeded the 0.25 m/s threshold necessary for limiting algae growth only 20% of the time after year 2000, as compared to 70% of the time prior to 2000.⁵⁰ In spite of a growing consensus among scientists who study springs hydrology and hydrodynamics, most springs’ MFL reports do not adequately address, if at all, the relationship between velocity and algae.⁵¹ Even assuming more study is appropriate, districts should systematically address this relationship in MFL reports for springs so that MFLs can be promptly revised as further research develops.

In fact, in response to the emergent research demonstrating that velocity plays a significant role in algal cover, the Peer Review of the Recommended Flow for the Rainbow River System concluded that it was, “surprising to see consideration of this algal proliferation issue [velocity-algae relationship] not mentioned. Given that the link with discharge is direct, it warrants explicit mention in the report.”⁵² The SWFWMD addressed the velocity issue in their Revised Final MFL Draft for the Rainbow River by including the following paragraph:

Flow strongly influences algae communities in rivers and streams (Biggs 1996, Stevenson 1996). Filamentous algae may be particularly responsive to higher flows because larger algae experience increased drag (Biggs et al. 1998). In several Florida spring systems, filamentous algal abundance increased with lower flow velocities and spring discharge (Hoyer et al. 2004, King 2014). Preliminary work by Cohen et al. (2015) found that flow velocity was inversely related to algal cover in the Rainbow River. The District will continue to evaluate the relationship between hydrology and filamentous algae for the Rainbow River System during the reevaluation period.⁵³

Acknowledging that the science on issues related to algae in springs is evolving, the Rainbow River MFL Peer Review Panel recommended employing a precautionary approach as the causal relationships become more certain.⁵⁴ In light of the lack of key data on the relationship between nutrient loading and flows, for example, the Panel recommended capping consumptive use withdrawals at current levels due to its perception that the Rainbow River system “is substantially overused to the point that any reduction in flow could impact water quality and should be of concern.”⁵⁵ Thus, even as research continues to develop the velocity/algae link, a precautionary approach should be employed in the interim given the science that already exists.

Rainbow River MFL Rule Challenge

On May 14, 2019, Rainbow River Conservation, Inc. filed a petition

to invalidate the Southwest Florida Water Management District (SWFWMD) Proposed Rainbow River MFL Rule.⁵⁶ The petitioners challenged the rule as an “invalid exercise of delegated legislative authority” based on the following:

- i. The rule enlarges, modifies, or contravenes the specific provisions of law implemented.
- ii. The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.
- iii. The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts. A rule is capricious if it is adopted without thought or reason or is irrational.⁵⁷

Among other claims, Petitioners alleged that the proposed rule’s failure to consider the relationship between algae and velocity before setting the MFL was arbitrary and not supported by necessary facts, and that the proposed rule contravened section 373.042 of the *Florida Statutes* which requires the SWFWMD to give significant weight to the Peer Review’s concerns about the ecological impact of filamentous algae.⁵⁸ After a three-day hearing, the presiding administrative law judge issued a final order granting the petition in part, and denying in part.⁵⁹ While the judge’s order did not invalidate the Proposed Rule for its failure to consider velocity, the Judge did hold that “a preponderance of the evidence established that a relationship between algal accumulation and flow velocity exists.”⁶⁰ The judge found that while SWFWMD is required to use the best information available when establishing the MFL, he agreed with SWFWMD that “the existing information regarding the relationship between algal accumulation and water velocity is not sufficient to enable the District to incorporate any such criteria into the development of an MFL.”⁶¹

Another issue addressed in this case was whether SWFWMD failed to adequately address the “water resource” values pursuant to the Water Resource Implementation Rule because it failed to consider the impact of algal accumulation and its relationship to velocity.⁶² While

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finding that the SWFWMD's decision to not address the impact of algal accumulation and its relationship to water velocity before adoption of the proposed rule was not arbitrary, the judge noted in a footnote that a rule challenge proceeding is not the proper forum to determine whether a proposed rule is consistent with the Water Resource Implementation Rule, and that such a determination is within the exclusive jurisdiction of DEP.⁶³ The footnote refers to section 373.114(2) of the Florida Statutes which vests DEP with the exclusive authority to review rules of Water Management Districts to ensure consistency with the WRIR. Any affected person may request a hearing with DEP within 30 days after adoption of a rule to address the consistency of a proposed rule with the WRIR.⁶⁴ If the

department determines that the rule is inconsistent with the WRIR, it may order the Water Management District to initiate rulemaking proceedings to amend or repeal the rule.⁶⁵ While a DEP ruling that an MFL rule is consistent with the WRIR may be subject to judicial review as a final agency action under the Florida Administrative Procedure Act, such a challenge would appear to go to an appellate court.⁶⁶ Thus, any challenge to an MFL rule that contained elements both relevant to a consistency challenge under the WRIR and those that would be under the jurisdiction of an administrative law judge would have to be adjudicated in separate venues – despite their interrelationships. This presents a challenge when considering how best to incorporate velocity criteria in MFL rulemaking such that any failure to consider velocity can be adequately and efficiently challenged in a single administrative forum.

Potential for Rulemaking to Incorporate Velocity into the WRIR

Challenges to water management districts' MFL rules based on their failure to adequately protect Florida springs have routinely failed.⁶⁷ This may be due more to the deference that courts and administrative tribunals accord to administrative agency decisions rather than to any lack of legitimacy in the rule challengers' claims. For example, in the Rainbow River MFL challenge, the Petitioners challenged the period of historical record of flows and levels applied by SWFWMD when setting the MFL for Rainbow River.⁶⁸ The judge found that "while the positions of both parties as to the appropriate period of record have merit, the issue in this proceeding is not whether one position is more meritorious than the other but whether the District's determination of what period would provide the 'best' information was arbitrary and

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capricious.”⁶⁹ The judge’s finding that the SWFWMD’s determination was not arbitrary or capricious illustrates judicial reluctance to decide between the merits of opposing experts’ scientific claims.

As the judge noted in his final order, water management districts are required to use the best information available when setting MFLs.⁷⁰ As discussed in this article, the best information available today suggests a strong link between velocity and algal accumulation. While more research can and should be conducted, this should not delay districts from incorporating velocity criteria into their MFL rules.

One rule that could easily accommodate velocity, and require it to be considered by all Districts, is the Water Resource Implementation Rule.⁷¹ A velocity criterion could be added as a new “water resource value” in subsection (1) of the MFLs section of the rule which would require Water Management Districts to “consider” velocity when establishing MFLs for flowing surface waters.⁷² As noted above, however, according to two recent ALJ rulings, an affected party wishing to challenge an MFL rule based on its inconsistency with the WRIR would have to request a hearing with the DEP outside of the normal Chapter 120 rule challenge procedures.

Conclusion – The Need for Speed is Now

As scientific understanding of springs ecology increases, so does the obligation of regulatory authorities to incorporate these advances to best protect these ecosystems. Ongoing research continually refines the inextricable relationship between water quantity and quality issues affecting Florida springs. Probably the most obvious and visible manifestation of ecological harm to springs is filamentous algae. While nitrate pollution has received the most attention, multiple factors likely contribute to algal proliferation in spring. The velocity of water that flows from the spring is now recognized as a significant factor in determining algae establishment, survival, and growth. Despite these advances in our understanding,

velocity has yet to be significantly addressed in springs MFLs or in regulation of water withdrawals in general. The determination of flows and levels for MFLs should guarantee that velocity thresholds are periodically met in order to prevent

Endnotes

1 Shannon Boylan is a third-year law student at the University of Florida Levin College of Law and a Student Associate in the College’s Conservation Clinic. Daniel Ward is a 2018 graduate of the University of Florida Levin College of Law and was a Student Associate in the Conservation Clinic. Thomas T. Ankersen is a Legal Skills Professor at the University of Florida Levin College of Law and directs the Conservation Clinic.

2 New springs are being discovered all the time. The Florida Geologic Survey maintains the State’s official count. See <https://ca.dep.state.fl.us/mapdirect/?webmap=07f160c92ea94770ae3a892539e61a83>.

3 Fla. Stat. §373.801(1).

4 University of Florida Water Institute, Collaborative Research Initiative on Sustainability and Protection of Springs, CRISPS Final Report 1-2 (2017), https://www.sjrwatermanagement.districts.com/static/waterways/springs-science/CRISPS_Final_Report-All_Sections.pdf [hereinafter “CRISPS Final Report”].

5 See generally, U.S. Geological Survey, Floridan Aquifer System Groundwater Availability Study, <https://fl.water.usgs.gov/floridan/intro.html>.

6 CRISPS Final Report, supra note 4, at 1-2.

7 Robert L. Knight, *Silenced Springs* xxi (2015).

8 Sean A. King, *Hydrodynamic control of filamentous macroalgae in a sub-tropical spring-fed river in Florida, USA*, 734 *Hydrobiologia* 27, 35 (2014).

9 Knight, supra note 7, at 38–41.

10 Fla. Stat. §373.042(1).

11 *Id.*

12 Fla. Admin. Code R. 62-40.

13 Fla. Admin. Code R. 62-40.473(1)(i).

14 *Id.*

15 *Rainbow River Conservation Inc. v. Sw. Fla. Water Mgmt. Dist.*, Case No. 19-2517RP 37–38 (DOAH Jan. 31, 2020); see also *St. Johns Riverkeeper v. St Johns River Water Mgmt. Dist.*, Case No. 17-2543RE 34 (DOAH May 24, 2017) (challenge to Silver River MFL Rule where judge found critical velocities related to algae scour were considered).

16 R. Jan Stevenson, et al., *Ecological Condition of Algae and Nutrients in Florida Springs: The Synthesis Report* 7 (2007).

17 Nathan G. F. Reaver, *Linking Landscape Hydrologic Processes to Spring Ecosystem Dynamics* 17 (2018) (unpublished Ph.D. dissertation, University of Florida) (on file with the University of Florida George A. Smathers Libraries); King, *Hydrodynamic control*, supra note 8, at 27.

18 Stevenson, supra note 16, at 8.

19 Knight, supra note 7, at 45.

20 John Moran, *John Moran Press Photos*, Florida Springs Council, <https://www.floridaspringscouncil.org/john-moran-press-photos> (depicting the declining quality of several Florida springs).

21 Reaver, *Linking Landscape*, supra note 17, at 17.

22 Sean A. King, *Effects of Flow on Filamentous Algae and Nutrient Limitation in Lotic Systems* 13 (2012) (Ph.D. dissertation, University of Florida) (on file with the University of Florida George A Smathers Libraries).

23 King, *Hydrodynamic control*, supra note 8, at 37 (For example, in Gum Slough Springs, nitrate concentrations reached saturation levels 40 years ago, whereas macroalgal proliferation has only been observed over the past decade).

24 CRISPS Final Report, supra note 4, at ES-4.

25 Water velocity and flow rate are correlated. Higher flows will yield higher velocities, but the two metrics are distinct. Flow measures the volume of water moving per unit time (e.g., cubic feet per second) whereas velocity measures the distance the water moves per unit time (e.g. feet per second). Treating them synonymously may confuse the matter. See, e.g., Southwest Florida Water Management District, *Proposed Minimum Flows and Levels for the Gum Slough Spring Run Final Report* 16 (2011), https://www.swfwmd.state.fl.us/sites/default/files/documents-and-reports/reports/Original-Gum_MFL_Report_0.pdf (stating that the term “flow” may most legitimately equate to water velocity).

26 See, e.g., CRISPS Final Report, supra note 4; King, *Effects of Flow*, supra note 22; Nathan G. F. Reaver, et al., *Hydrodynamic Controls on Primary Producer Communities in Spring-Fed Rivers*, 46 *Geophysical Research Letters* 4715 (2019).

27 See King, *Hydrodynamic control*, supra note 8, at 31; Mark Hoyer, et al., *Vegetative characteristics of three low-lying Florida coastal rivers in relation to flow, light, salinity and nutrients*, 528 *Hydrobiologia* 31 (2004).

28 Miki Hondzo & Hong Wang, *Effects of turbulence on growth and metabolism of periphyton in a laboratory flume*, 38 *Water Resources Research* 1277 (2002) (A laboratory study on filamentous algae growth concluded that the only algae growth-limiting factor was the effect of fluid motion, and other environmental factors, such as light, temperature, and nutrients were not growth-limiting).

29 CRISPS Final Report, supra note 4, at 7-79 (“higher velocities can limit algal biomass by creating sheer stress on algal communities that scours algal biomass”); King, *Hydrodynamic control*, supra note 8, at 35 (velocity may have to exceed a certain threshold for a period of weeks to months before drag and shear forces result in a reduction in algal abundance).

30 Several springs ecosystems were found to have an overall mean algae-inhibiting velocity threshold of approximately 0.215 m/s, a value also indicated by earlier studies. See CRISPS Final Report, supra note 4, at 5-3.

31 *Id.*

32 Generally, springs water quality decline has been chiefly attributed to an increase

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in nitrates, a documented decrease in water transparency, and a concomitant increase in attached algae. Other factors such as light, oxygen, and the prevalence of algae foragers such as snails are also linked to algae abundance. See generally, CRISPS Final Report, *supra* note 4.

33 See King, Hydrodynamic control, *supra* note 8, at 35.

34 Fla. Stat. §373.042(1) (emphasis added).

35 Northwest Florida Water Management District has until July 1, 2026.

36 Fla. Stat. §373.0421(5).

37 Fla. Stat. §373.0421(2).

38 Fla. Admin. Code R. 62-40.473(8).

39 See generally Clifford P. Neubauer et al., Minimum Flows and Levels Method of the St. Johns River Water Management District, Florida, USA, 42 *Envtl. Mgmt.* 1101 (2008).

40 Fla. Admin. Code R. 62-40.110(2).

41 Fla. Admin. Code R. 62-40.310(1)(a).

42 Fla. Admin. Code R. 62-40.473 (emphasis added); see generally Kathryn Slattery, et al., Where's the Harm in This? Defining "Harmful to the Water Resources" in the 2016 Outstanding Florida Springs Legislation, *ELULS Reporter*, April 2019, at 1.

43 Fla. Admin. Code R. 62-40.473 (emphasis added).

44 See Petitioners' Proposed Final Order, Rainbow River Conservation, Inc. V. Sw. Fla. Water Mgmt. Dist., DOAH Case No. 19-002517, filed Sep. 18, 2019, at 20, available at https://www.doah.state.fl.us/DocDoc/2019/002517/19002517_237_09182019_16302422_e.pdf (District expert testimony that all water resource values could be affected by algal proliferation).

45 Southwest Florida Water Management District, Recommended Minimum Flow for the Rainbow River System Revised Final Draft 70-73 (2017), https://www.swfwmd.state.fl.us/sites/default/files/documents-and-reports/reports/Rainbow_MFL-Revised_Final_Draft.pdf [hereinafter "Recommended MFL for Rainbow River"].

46 *Id.* at 64.

47 Andrew B. Sutherland, et al., Bureau of Resource Evaluation and Modeling, St. Johns River Water Management District, Minimum Flows Determination for Silver Springs, Marion County, Florida 109 (2017).

48 *Id.* at Appendix E 5-50.

49 *Id.* at 104.

50 *Id.* at 100.

51 The authors reviewed all published District MFL reports for flowing waterbodies to determine whether the link between algae and velocity was addressed.

52 Matt Cohen, et al., Peer Review of the Recommended Minimum Flow for the Rainbow River System (Nov. 21, 2016), https://www.swfwmd.state.fl.us/sites/default/files/documents-and-reports/reviews/Rainbow_Peer_Rev_Rpt_2016.pdf. https://www.districts.state.fl.us/projects/mfl/reports/Rainbow_Peer_Rev_Rpt_2016.pdf.

53 Recommended MFL for Rainbow River, *supra* note 45, at 64.

54 Cohen, *supra* note 52, at 3.

55 *Id.*

56 Petition to Invalidate Proposed Rule 40d-8.041(22) of the Southwest Florida Water Management District, Rainbow River Conservation, Inc. V. Sw. Fla. Water Mgmt. Dist., DOAH Case No. 19-002517, filed May 14, 2019, available at <https://www.doah.state.fl.us/DocDoc/2019/002517/19002517PFAH-051419-16261826.pdf>.

57 Fla. Stat. §120.52(2), (8).

58 Amended Petition to Invalidate Proposed Rule 40d-8.041(22) of the Southwest Florida Water Management District, Rainbow River

Conservation, Inc. V. Sw. Fla. Water Mgmt. Dist., DOAH Case No. 19-002517, filed May 20, 2019, at 10, available at https://www.doah.state.fl.us/DocDoc/2019/002517/19002517_237_05202019_16233940_e.pdf.

59 Rainbow River Conservation Inc. v. Sw. Fla. Water Mgmt. Dist., Case No. 19-2517RP (DOAH Jan. 31, 2020).

60 *Id.* at 37.

61 *Id.* at 38; Michael Voss, The Central and Southern Florida Project Comprehensive Review Study: Restoring the Everglades, 27 *Ecology L.Q.* 751, 766 (2000) (using the "best information available" approach, agencies gather sufficient data about a proposed action to make a decision with a reasonable amount of certainty).

62 Rainbow River Conservation Inc., Case No. 19-2517RP at 35-36.

63 Rainbow River Conservation Inc., Case No. 19-2517RP at 65, fn. 13.

64 Fla. Stat. §373.114(2).

65 Fla. Stat. §373.114(2)(a).

66 See Fla. Stat. §120.68. Where the DEP finds a rule to be inconsistent with the WRIR and orders the repeal or amendment of the rule, a separate procedure exists for water management districts or other parties to appeal the ruling to the Land and Water Adjudicatory Commission. Fla. Stat. §373.114(2)(c).

67 For example, challenges to the MFL Rules for Rainbow River, Silver Springs, and the Sante Fe/Ichetucknee River have all failed.

68 Rainbow River Conservation Inc., Case No. 19-2517RP, at 28.

69 Rainbow River Conservation Inc., Case No. 19-2517RP, at 34.

70 Fla. Stat. §373.042(1).

71 Fla. Admin. Code R. 62-40.473(8).

72 Springs, including Outstanding Florida Springs, are found in 4 out of 5 water management districts, however velocity may be relevant to other flowing waterbodies as well.



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The Forever REC: PFAS

Aaron Getchell, CPG, P.G., Gannett Fleming

INTRODUCTION

Environmental attorneys, scientists, engineers, regulators, activist groups, and chemical manufacturers are working to address the latest and arguably the most widespread emerging contaminant: per- and polyfluoroalkyl substances (PFAS). PFAS have been used in household and industrial products for decades, and toxicological studies have shown adverse health effects to humans. While the United States Environmental Protection Agency (EPA) works PFAS into the regulatory framework of disposal and reporting, how will environmental due diligence practitioners classify PFAS? There has been litigation over PFAS, and the guidance that govern environmental due diligence were developed to provide legal and monetary relief to a prospective purchaser of commercial property. If identified at a site, are PFAS a Recognized Environmental Condition (REC)? With no promulgated standards, at what level would they be considered a REC? Are PFAS a REC if identified regionally? If PFAS are as widespread and pervasive in our environment as it appears, will they stand as a forever REC?

PFAS OVERVIEW

PFAS are here to stay. In case you have been living under a rock (or now hiding under it in terror) PFAS are a group of man-made chemicals that include perfluorooctane sulfonate (PFOS), perfluorooctanoic acid (PFOA) that were invented in the 1930s, then used for non-stick coatings starting in the 1940's. Stain and water-resistant products were developed in the 1950's, followed by firefighting foam in the 1960's. In the 1970's waterproof fabrics were developed, followed by architectural resins in the 1980's.¹ Do you not like your morning eggs sticking to your pan or did the kids spill grape juice on the couch? PFAS have you covered. Petroleum fires have you feeling the heat? PFAS have your back. Did red wine get sloshed on your living room carpet or did you slop a coffee in the car during your morning commute? PFAS are there for you. Going camping and it is supposed to rain? PFAS will keep you dry. Do not like the cheese on your pizza sticking to the box, or your microwave popcorn sticking to the bag? PFAS are here for you...and PFAS will continue to be here for you far into the unforeseeable future. PFAS have been dubbed "the forever chemical," because they are very stable and very resistant to break-down in the environment.

Because PFAS were manufactured to be resistant to break-down and have been used in numerous products for decades, they are pervasive in the environment (rainwater, stormwater, groundwater, and soil), have been detected in flora and fauna (human bloodstream, plants, and animals in the food-chain), and are associated with many industrial processes (wastewater, biosolids, landfills, and manufacturing).² PFAS have been linked to high cholesterol, liver damage, kidney damage, immune system disorders, thyroid disease, low birthweight, developmental problems, liver cancer, pancreatic cancer, testicular cancer, and kidney cancer.³ PFAS appear to be living up to their name as the "forever chemical" and may likely become the "forever REC" during environmental due

diligence of commercial properties.

RULE EVALUATION, DEVELOPMENT, AND INTERPRETATION

The EPA has not developed a Maximum Contaminant Level (MCL) for PFAS through the Safe Drinking Water Act (SDWA). The agency has, however, added the regulatory framework for PFAS tracking and reporting in the Toxic Substances Control Act (TSCA). The EPA has also begun adding PFAS to the Clean Air Act (CAA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴ It has not officially adopted PFAS as a "hazardous chemical" which is critical for PFAS to be identified as a REC in accordance with ASTM International (ASTM), E1527-13.⁵

PFAS must be listed as a "hazardous substance" by the CWA, CERCLA, CAA, or be listed as a hazardous waste by the Resource Conservation and Recovery Act (RCRA) (E1527-13, X1.1.2) to be considered by ASTM as a REC. EPA has issued a groundwater screening level recommendation of 40 nanograms per Liter (ng/L) or parts per trillion, a preliminary remediation goal for groundwater of 70 ng/L, and a drinking water recommendation where groundwater is being used (not an official MCL) of 70 ng/L.⁶

Some conservative environmental practitioners may rely on "Other Federal, State, and Local Environmental Laws" (E1527-13, 1.1.4) to classify PFAS as a REC. For example, Florida Department of Environmental Protection (FDEP) has issued provisional PFOA and PFOS cleanup target levels for soil, groundwater, irrigation water, and surface water.⁷ However, these provisional cleanup target levels have not been promulgated into the Contaminant Cleanup Target Levels.⁸ FDEP's provisional groundwater cleanup target level for PFAS is 70 ng/L with a twenty-two congener analyte list.⁹ Besides Florida, nine other states have issued drinking water guidelines for PFAS in groundwater that range from 8-70 ng/L.¹⁰ Within this complex regulatory framework, PFAS are chemicals not officially adopted by EPA as hazardous substances, have no promulgated MCL, and not every state has developed provisional screening levels. Additionally, there is no recognized standard for laboratory testing, congener lists vary, and the laboratory analysis is expensive.

ASTM is currently working on a revision to E1527-13 that should be complete within the next year and is evaluating ways to incorporate emerging contaminants, such as PFAS.¹¹ Meanwhile, FDEP has included a Fire Training Facilities Assessment for PFOA and PFOS on Map Direct (<https://ca.dep.state.fl.us/mapdirect/>) which would be considered a reasonably ascertainable regulatory agency file and records review (E1527-13, 8.2.2), even though it is not listed by ASTM on the standard federal, state, and tribal environmental record source (E1527-13, 8.2.1). In some areas of Florida where PFAS may be found to be a regional contamination issue, and database development would be similar to Map Direct's Ground Water Contamination

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Areas. This database includes thirty-eight Florida counties where ethylene dibromide (an agricultural pesticide), volatile organic compound, and petroleum impacted groundwater has been delineated for the purpose of siting water supply wells.¹²

LITIGATION AGAINST PFAS MANUFACTURES

It is absolutely critical to properly identify these emerging contaminants as a REC (or not) during environmental due diligence for commercial properties due to highly visible ongoing and new litigation against chemical companies that currently or previously manufactured PFAS. In 2004, Rob Bilott triumphed over DuPont in a class-action settlement that funded a six-year study about the health effects of PFAS. Then, in 2017, Mr. Bilott won a settlement worth millions of dollars against DuPont for personal injury claims that ran in the thousands.¹³ Mr. Bilott's story of advocating for the public against DuPont inspired the 2019 movie *Dark Waters* by Focus Features starring Mark Ruffalo.

Recently, a former fire-fighter, Kevin Hardwick filed a lawsuit in Ohio federal court against 3M Co., DowDuPont, Chemours, Solvay, Daiken America, and AGC Chemicals.¹⁴ The national class action lawsuit stems from Mr. Hardwick's exposure to firefighting foam containing PFAS, evidenced by the detectable PFAS concentrations in his blood and others in the public. The lawsuit asserts that these companies knowingly marketed these PFAS-containing products as safe to use to the general public and mislead regulators and EPA about the adverse health effects of these products.¹⁵

In response to the litigation, companies such as 3M and DuPont have set up websites to educate the public on the historic and current use of PFAS in products; PFAS health and toxicological studies; PFAS testing, remediation, and treatment; PFAS regulations; and company statements. As the scope of litigation grows against companies that have or are currently manufacturing PFAS, identifying the rationale for identifying PFAS as a REC during environmental due diligence for commercial property transactions is critical.

CONCLUSION

It is the opinion of the author that PFAS could be identified as a REC in accordance with E1527-13. A rationale for identifying PFAS as a REC would include site specific or regional testing identifying PFAS above a state or EPA provisional screening level recommendation; the data or summary of the data would be publicly available on a data-base (such as an interactive map or document repository). If PFAS contamination is suspected, or if no sampling data is available for the site, then it is the opinion of the author that PFAS would be listed as a non-REC finding. While this is a conservative opinion, it could help avoid future litigation against a prospective purchaser and the environmental due diligence provider. However, naming a PFAS as a REC, or even describing PFAS as a finding, must be consistent with the User's

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risk tolerances, corporate culture, and proposed land use of the property.

Endnotes

- 1 ITRC, History and Use of PFAS, November 2017.
- 2 Martin Shafer, PhD, UW-Madison-WSLH, PFAS Initiatives, WDNR PFAS Technical Advisory Group, Water Quality Subgroup, September 6, 2019 Meeting.
- 3 FDOH, Bureau of Environmental Health, Chemicals in Drinking Water Fact Sheet, August 2006.
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- 6 EPA, Interim Recommendations to Address Groundwater Contaminated with PFOA and PFOS, December 19, 2019.
- 7 FDEP, Provisional PFOA PFOS Screening Levels Table, September 15, 2019.
- 8 Chapter 62-777, Florida Administrative Code, April 17, 2005.
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- 12 Chapter 62-524, Florida Administrative Code, New Potable Water Well Permitting In Delineated Areas, February 16, 2012.
- 13 Carey Gillam, The Guardian, Why a corporate lawyer is sounding the alarm about these common chemicals, December 27, 2019.
- 14 Bloomberg Law, 3M, DowDuPont, Chemours Must Face PFAS Class Action, September 30, 2019.
- 15 Kevin D. Hardwick v. 3M Company, *et al.*, Case No. 2:18-cv-1185, September 30, 2019.

Florida State University College of Law Spring 2020 Update

by David Markell, Steven M. Goldstein Professor

This column highlights recent accomplishments of our College of Law students and alumni. It also lists the rich set of programs the College of Law hosted this semester and reviews recent faculty activities.

The U.S. News and World Report (2021) has ranked **Florida State University** as the nation's **15th best Environmental Law Program**, tied with George Washington University. FSU College of Law ranked 50th overall.

Recent Alumni Accomplishments

- Congresswoman Kathy Castor (FSU Law '91) chairs the Select Committee on the Climate Crisis.
- **Matthew Leopold** (FSU Law '04) serves as the General Counsel for the Environmental Protection Agency.
- **Travis Voyles** (FSU Law '17) is the Deputy Associate Administrator at EPA.



(L-R) Kathy Castor, Matthew Leopold, Travis Voyles

Recent Student Achievements and Activities



(L-R) Ashley Englund, Alex Purpuro, Steven Kahn

- The FSU Moot Court Team won first place in the 2020 Jeffrey G. Miller Environmental Law Moot Court Competition held last February 20-22, 2020 at Pace University in New York. Winning team members are third year law students Ashley Englund, Alex Purpuro, and Steven Kahn. FSU Professor Shi-Ling Hsu, and Segundo Fernandez coached the team to victory. Ashley Englund and Steven Kahn were also named best oralists.

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- A multi-disciplinary team comprised of FSU Law student Sordum Ndam and FSU Urban & Regional Planning students Brittany Figueroa and Jonathan Trimble earned second place in a recent Student Environmental Challenge hosted by the Florida Air and Waste Management Association. The team's task was to select a rural coastal city in Florida and persuade the selection committee, through a written and oral presentation, that this community should be selected for funding of sea-level rise resiliency and adaptation measures. The team presented sea-level rise resiliency solutions for Alligator Point, Florida, to an AWMA Selection Committee comprised of representatives from the private sector, not-for-profit associations, and the public sector.
- The Environmental Law Society (ELS) has concluded elections and finalized the new 2020-2021 executive board. The officers are as follows: Macie Codina as President; Cameron Polomski as Vice President; Catherine Awasthi as Secretary; Rachel Akram as Treasurer; and Taylor Reaves as Mentor Chair. If any readers would like to reach out to the new board, please email fsuenvironmentallawsociety@gmail.com.



Florida Air and Waste Management Association Student Environmental Challenge Team

Faculty Achievements

- Professor **Shi-Ling Hsu** published "Natural Gas Infrastructure: Locking in Emissions?" 34 Nat. Res. & Env't. 3 (2020). Forthcoming publication includes the "Climate Triage: A Resources Trust to Address Inequality in a Climate-changed World".
- **David Markell** has a forthcoming publication entitled "An Empirical Assessment of Agency Mechanism Choice, 71 Ala. L. Rev.
- **Erin Ryan** published "Federalism as Legal Pluralism," in THE OXFORD HANDBOOK ON LEGAL PLURALISM (2020); and "Environmentalists: Brace for Preemption, Propertization, and Problems of Political Scale," in ENVIRONMENTAL LAW, DISRUPTED (Owley & Hirokawa, 2020).

- Professor **Hannah Wiseman** published "Rethinking Municipal Corporate Rights," 61 B.C.L. Rev. 591 (2020). Other forthcoming publications include "The New Oil and Gas Governance," 129 Yale Law Journal Online __ (2021) (with Tara Righetti and James Coleman), "Taxing Local Energy Externalities, 96 Notre Dame L. Rev. __ (2021), and Coequal Federalism and Federal-State Agencies, 55 Georgia L. Rev. __ (2021) (with Dave Owen).

Environmental Law Lecture

The College of Law hosted a full slate of impressive environmental law events and activities this semester.

Spring 2020 Environmental Distinguished Lecture: The Scapegoating of Environmental Regulation

Cary Coglianese, Edward B. Shils Professor and Professor of Political Science, University of Pennsylvania Law School, presented the FSU College of Law's Spring 2020 Environmental Law Distinguished Lecture on Wednesday, March 11. His lecture cast light on a type of political and policy strategy that goes beyond mere criticism of environmental regulation. A recording of the lecture is available here: <https://mediasite.capd.fsu.edu/Mediasite/Play/f27528233af04e46bbf37ac8f920aeac1d>

Reynolds v Florida Panel Discussion

On January 8, a panel discussed Florida climate change litigation in relation to the *Reynolds v. Florida* hearing. Panelists included **Andrea Rodgers**, Senior Staff Attorney with Our Children's Trust, and plaintiffs of the *Reynolds v. Florida* lawsuit **Delaney Reynolds**, **Valholly Frank**, **Isaac Augspurg**, and **Levi Draheim**. *Reynolds v.*



Professor Cary Coglianese

Florida is a case filed by eight young people asserting that the State of Florida violated fundamental rights to a stable climate system. A recording of the panel is available here:

<https://mediasite.capd.fsu.edu/Mediasite/Play/9a8496fb1b81480e93e947ce0def402e1d>.



Andrea Rodgers

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FSU COLLEGE OF LAW

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Sustainable Business and Environmental Law

Inara Scott, Assistant Dean for Teaching and Learning Excellence and Associate Professor, Oregon State University College of Business, shared a lecture on how business law can obstruct sustainability efforts by corporations on January 29.

Local Autonomy and Energy Law Symposium

The FSU Environmental Law Program hosted a symposium on Local Autonomy and Energy Law last February 21 with scholars from across the nation. Members of the panel included **Nestor Davidson** of Fordham Law, **Alexandra Klass** of the University of Minnesota Law School, **John Nolon** of Pace University Law, **Ashira Ostrow** of Hofstra University Law, **Erin Scharff** of Arizona State University Law, **Rick Su** of the University of North Carolina College of Law, **Shelly Welton**, South Carolina Law and **Visiting Professor**, Stanford University, **Michael Wolf** of the University of Florida Levin College of Law, and FSU Law Professor **Sarah Swan**. **Richard Briffault** of Columbia University



Inara Scott

provided the keynote address. The symposium focused on the rapid energy transition in the United States and explored limits on local government authority to address pressing regulatory issues, both generally and in the area of energy law. A recording of the symposium is available here: <https://mediasite.capd.fsu.edu/Mediasite/Play/67f5944c209b489aba186d9327bf7c331d>



(L-R) Professor Alexandra Klass, Ashira Ostrow, Professor Richard Briffault, Keynote Speaker, and Professor Michael Wolf



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Spring Updates from Stetson's Institute for Biodiversity Law and Policy

U.S. Supreme Court Cites Stetson Law Biodiversity Institute Brief

Last summer, Professor Royal Gardner (Director of Stetson's Institute for Biodiversity Law and Policy), Erin Okuno (the Institute's Foreman Biodiversity Fellow), and a team of attorneys filed an amici curiae brief on behalf of aquatic scientists and scientific societies in the Supreme Court of the United States in the case of *County of Maui v. Hawai'i Wildlife Fund* (No. 18-260). The question before the Supreme Court was whether the Clean Water Act applies to a point source discharge of a pollutant that reaches navigable waters through groundwater. The amici curiae brief explained why the consideration of science is required to achieve the Clean Water Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In particular, the brief provided the Court background on different types of groundwater and how scientists study groundwater-surface water connections through physical measurements, chemical tracers, and groundwater models.

On April 23, 2020, the Supreme Court ruled 6-3 that the Clean Water Act covers the "functional equivalent" of direct discharges of pollutants to navigable waters. In doing so, the Court rejected the County of Maui and the Trump administration's attempt to restrict the Clean Water Act to direct discharges of pollutants, which would have categorically excluded pollutants conveyed through groundwater. Instead, the Court selected a "functional equivalent" test that heavily relies on science. Justice Breyer, who had mentioned the amici curiae brief of the aquatic scientists and scientific societies during oral arguments ("the scientists . . . really convinced me they're geniuses and they can trace all kinds of things"), cited the brief in his majority opinion.

The Supreme Court's opinion is available here: https://www.supremecourt.gov/opinions/19pdf/18-260_5i36.pdf.

The brief of the aquatic scientists and scientific societies is available here: <https://www.stetson.edu/law/international/biodiversity/media/Amici%20Curiae%20Brief%20for%20Aquatic%20Scientists%20and%20Scientific%20Societies.pdf>.

Stetson International Environmental Moot and International Wildlife Law Conference

Despite the COVID-19 pandemic, Stetson Law moved forward—virtually—with the 24th Annual Stetson International Environmental Moot Court Competition (IEMCC) on April 2–4. The Stetson IEMCC is the world's largest moot court competition devoted exclusively to global environmental issues, and this year's theme was "Reintroduction of Bears." Hundreds of students participated in national and regional rounds throughout the world between November 2019 and March 2020, and we invited the top teams from the national and regional rounds to participate in the International Finals, which were scheduled to be hosted at Stetson Law's Gulfport campus.

Due to the pandemic, in-person rounds were canceled. Fortunately, however, we were able to hold the oral rounds entirely online. Seventeen teams from ten jurisdictions

(Armenia, Colombia, India, Ireland, Nepal, the Philippines, the Republic of Korea, Singapore, Taiwan, and the United States) competed in the virtual rounds.

Two teams from India advanced to the championship round. The team from National University of Advanced Legal Studies (NUALS), Kochi was the champion, and the team from National Law Institute University, Bhopal was the runner-up. NUALS also received the award for the best written memorial, and all of the teams that participated in the virtual rounds received the Spirit of Stetson Award. The teams from George Washington University Law School and Law Society of Ireland were semifinalists.

We are grateful to the Environmental and Land Use Law Section for providing a block grant to Stetson Law to support the competition. Photos and video clips of the virtual rounds are available on the competition's Facebook page at www.facebook.com/StetsonIEMCC/. For more information about the competition, please visit www.stetson.edu/iemcc.

In conjunction with the Stetson IEMCC, we also held the (online)

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Students participated remotely in the 24th Annual Stetson International Environmental Moot Court Competition.

SPRING UPDATES

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20th International Wildlife Law Conference (IWLC-20), which included speakers and attendees from around the world. Presentations and panels discussed topics such as trophy hunting, fisheries, marine biodiversity, invasive species, and wildlife and animal welfare.

As part of the conference, Dr. Arie Trouwborst, Associate Professor at Tilburg Law School, Tilburg University, the Netherlands, presented the Edward and Bonnie Foreman Biodiversity Lecture on domestic cats as invasive species. Some of the other speakers were Dr. Wil Burns, American University; Dr. Mar Campins Eritja, Universitat de Barcelona; Professor Linda Malone, Marshall-Wythe School of Law at the College of William & Mary; Prof. Dr. Tianbao Qin, Research Institute of Environmental Law (RIEL), Wuhan University, and Visiting Scholar, Duke University; and Professor David Wirth, Boston College Law School.



Photo: Dr. Arie Trouwborst presented at the virtual International Wildlife Law Conference in April.

The IWLC-20 was co-sponsored by the Environmental Law Center at the University of Cologne, the Institute of Environment Education and Research at Bharati Vidyapeeth University, Tilburg University, and the University of Barcelona Faculty of Law. Additional information about the conference is available at www.stetson.edu/law/conferences/wildlife.

To support our programs or learn more about the Institute for Biodiversity Law and Policy at Stetson University College of Law, please visit www.stetson.edu/law/biodiversity or email okuno@law.stetson.edu.

INJUNCTION JUNCTION

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In response to the nationwide injunction recently issued in *Northern Plains Research Council v. U.S. Army Corps of Engineers*, this article discusses the legal and policy arguments surrounding nationwide injunctions as well as the general effectiveness of nationwide injunctions issued by federal district courts.

Recent Treatment of Nationwide Injunctions

As briefly noted above, nationwide injunctions have recently been issued against both the Obama and Trump administrations to enjoin implementation of a number of federal laws and policies. As federal courts' issuance of these injunctions grows in popularity, all three branches of the government have commented on the trend in some way. In the context of the executive branch, former Attorney General Jeff Sessions was openly critical of the practice in 2018—issuing new

litigation guidance meant to assist Department of Justice (DOJ) attorneys in fighting unconstitutional orders up to the U.S. Supreme Court.⁵ Current Attorney General William Barr has also criticized judges for issuing nationwide injunctions on multiple occasions, stating that they're a modern invention that violates the separation of powers between the judicial and executive branches. Vice President Mike Pence and Assistant Attorney General Jeffrey Bossert Clark (who oversees DOJ's Environment and Natural Resources Division) are also on the record opposing nationwide injunctions.

The legislature has expressed similar dissatisfaction with federal courts' issuance of nationwide injunctions. Members of both the Senate and House have proposed the "Nationwide Injunction Abuse Prevention Act of 2019" in order to limit the

authority of district courts to provide this sweeping injunctive relief.⁶

Some of the most extensive commentary, however, has come from the U.S. Supreme Court. First, Justice Clarence Thomas critiqued nationwide injunctions in his concurrence to the 2018 case, *Trump v. Hawaii*.⁷ This appeal to the Supreme Court involved a challenge to President Trump's ban on entry to the United States of people from certain Muslim-majority countries. A U.S. district court in Hawaii issued a nationwide injunction preventing the ban from going into effect. The district court found the plaintiffs were likely to succeed on their argument that the proclamation violated the Establishment Clause of the First Amendment to the U.S. Constitution and exceeded the president's powers under the

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Immigration and Nationality Act. The nationwide injunction was affirmed by the U.S. Court of Appeals for the Ninth Circuit, which did not rule on the constitutional issue, but held that the proclamation was likely a violation of the Immigration and Nationality Act. On June 26, 2018, the U.S. Supreme Court reversed the Ninth Circuit's holding in a 5-4 decision, vacating the injunction and remanding the case for further proceedings. Though the court did not rule on the legality of nationwide injunctions, Justice Thomas's concurrence questioned the need and immediacy of the nationwide injunction at issue as well as the ability of district courts to issue such injunctions.

Justice Thomas stated in his concurrence, "I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts."⁸ He further stated, "No persuasive defense has yet been offered for the practice."⁹ After offering additional commentary decrying courts' use of nationwide injunctions, Justice Thomas concluded by stating, "In sum, universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so."¹⁰

Justice Neil Gorsuch, too, was openly critical of federal courts' issuance of nationwide injunctions in 2020 in his concurrence to *Department of Homeland Security v. New York*.¹¹ In this case, the U.S. Supreme Court voted 5-4 to stay a preliminary nationwide injunction against the Trump administration's controversial "public charge" immigration rule that was originally enjoined by a New York District court and affirmed by the Second Circuit. The Court again refused to directly address the legality of nationwide injunctions, however, Justice Gorsuch noted, "The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions

of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case."¹² Thus, in Justice Gorsuch's view, nationwide injunctions raise serious questions about the scope of courts' equitable powers under Article III. Justice Gorsuch concluded by stating his hopes that the Supreme Court might, at an appropriate juncture, take up some of the underlying equitable and constitutional questions raised by nationwide injunctions.¹³

Until the Supreme Court or Congress definitively acts in favor of or against nationwide injunctions, the practice is legally permissible and will likely continue. Therefore, the ruling against the Corps' administration of NWP 12 in *Northern Plains Research Council v. U.S. Army Corps of Engineers* is currently valid and enforceable across the United States—not merely in the specific Corps district at issue. However, if the Corps appeals the district court's recent ruling to the U.S. Court of Appeals for the Ninth Circuit and the court upholds the district court's decision, the U.S. Supreme Court could take up the issue. Consequently, it is important to understand some of the most prevalent legal and policy arguments in favor of and against federal courts' use of nationwide injunctions.

Legal Arguments

One of the most robust legal arguments surrounding federal courts' authority to issue nationwide injunctions is rooted in English and American history. This argument typically leans against the issuance of nationwide injunctions—arguing that federal courts cannot issue such as part of their equitable powers since their powers are derived from traditional English equity. Furthermore, opponents of nationwide injunctions argue that there were no such injunctions issued against federal defendants for nearly two centuries in the United States. During this time, federal courts would issue injunctions that protected plaintiffs from the enforcement of federal statutes, regulations, and orders—not injunctions that protected all possible plaintiffs throughout the United States. These critics argue national injunctions emerged in the 1960s and increased in popularity only very

recently—concluding that neither English nor American legal history supports the courts' current utilization of nationwide injunctions.

Some proponents of the nationwide injunction have an opposite view, however, arguing that, as far back as 1913, the Supreme Court itself enjoined federal officers from enforcing a federal statute not just against the plaintiff, but against anyone, until the Court had decided the case.¹⁴ In these proponents reckoning, if the Supreme Court can issue a universal injunction against enforcement of a federal law, then, as an Article III matter, so can a lower federal court. Moreover, such proponents point out that lower federal courts have been issuing injunctions that reach beyond the plaintiffs as to state laws and cases dating back more than a century, with the Supreme Court repeatedly approving of such injunctions. Supporters also argue that "bills of sale" issued by English courts of equity were very similar in effect to nationwide injunctions. Accordingly, some of those in favor of nationwide injunctions allege that the history behind the practice supports the conclusion that courts both in England and America have always had the authority to issue equitable relief that encompasses nonparties regardless of whether they used the same nomenclature as today's controversial injunctions.

Another major argument surrounding federal courts' utilization of nationwide injunctions concerns Article III standing. Some scholars argue that Article III's "case or controversy" requirement limits not only who has standing to sue, but also the scope of federal courts' power to order equitable relief.¹⁵ The standing requirement mandates that plaintiffs have an "injury in fact" that is both traceable to the challenged conduct and redressable by a court. Critics of nationwide injunctions argue Article III allows courts to issue remedies only to parties with standing, and not others. In these critics' view, once a federal court has given an appropriate remedy to the plaintiffs, there is no longer any case or controversy left for the court to resolve. The court has no constitutional basis to decide

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disputes and issue remedies for those who are not parties.

Conversely, proponents of nationwide injunctions argue that critics' claim that courts cannot issue equitable relief extending further than needed to address the plaintiff's "actual injury" is at odds with American judicial practice.¹⁶ Such proponents argue that courts regularly issue remedies broader than required to address the injury that originally gave the plaintiff standing to sue. For example, federal judges sometimes issue prophylactic injunctions that go beyond the plaintiff's "actual injury." Similarly, courts can enjoin a defendant from engaging in conduct that could, in the future, be anticipated to cause the plaintiff harm based on the defendants' past conduct, even though the potential future injury would not, on its own, have been sufficient to establish standing. In short, such proponents of nationwide injunctions argue that, while standing is required to gain entry into a federal court, it does not govern the scope of the remedy a court may issue.

A final body of legal arguments both for and against nationwide injunctions revolves around the role of federal courts in the Constitution's structure. The first of these arguments concerns whether federal courts are primarily intended to: (1) resolve disputes between the parties, or (2) decide the meaning of federal law for everyone. Those opposed to nationwide injunctions tend to see courts primarily as resolvers of individual legal disputes. These opponents either reject courts' law declaration role completely or view such as incidental to their dispute resolution role. Proponents of nationwide injunctions take the opposite view. In other words, those scholars who view courts as primarily serving to resolve individual disputes generally reject nationwide injunctions as overreaching, while those who believe that a significant aspect of the judicial function is law declaration generally view such injunctions more favorably.

The role of federal courts in the Constitution's structure also comes into play in the context of the

separation of powers. Attitudes toward nationwide injunctions often turn on one's view of the courts as a check on the political branches. If courts are limited to deciding individual cases and lack the power to issue broader injunctions, they arguably lose a significant tool with which to curb abuses of power by the other branches. For example, while the United States must obey judgments in individual cases in which it is a defendant, it is not technically bound to follow district or circuit court precedent in future cases—a phenomenon termed "nonacquiescence."¹⁷ When nonacquiescence is invoked, federal entities essentially ignore court decisions that go against them and refuse to accept their validity as binding precedent. To avoid this, the executive branch can, and often does, act strategically in various ways to prevent negative circuit or Supreme Court precedent from being created, such as by choosing not to appeal and moot cases in which plaintiffs seek to do so. Such strategies can arguably be used to avoid judicial decisions affecting more than a few individuals at a time—that is, unless courts have the power to issue nationwide injunctions.

Policy Arguments

From a policy perspective, both critics and proponents of nationwide injunctions have proffered a number of arguments worth mentioning. The first of these negative arguments involves the incentive to forum shop. Critics argue that nationwide injunctions encourage litigants to seek out the district court judge most likely to stop a federal policy in its tracks. Furthermore, critics point out that litigants who do not succeed can always file a new case in another district hoping for a better result, enabling them to "[s]hop 'til the statute drops."¹⁸

Critics also argue that nationwide injunctions interfere with good decisionmaking by the federal judiciary.¹⁹ When a district court grants a nationwide injunction, thus halting federal enforcement everywhere, that choice affects the Supreme Court's resolution of a legal issue. This is due to the fact that it impedes the opportunity for more circuits to express their views, as parties in other circuits might no longer bring their own challenges to the statute, regulation, or order. The Supreme Court is,

thus, more likely to hear a case without the benefit of disagreement from a court of appeals. In a legal system that emphasizes the development of law through cases and distributed decisionmaking, critics argue that it would be unfortunate if the Supreme Court began to decide major constitutional questions not in order to resolve circuit splits, but, instead, to address stays of district court injunctions. In these critics' view, a world of nationwide injunctions is one in which the Supreme Court will tend to decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.

The risk of conflicting injunctions is also worthy of consideration. If two conflicting nationwide injunctions are issued by two different federal district courts, a defendant may risk being held in contempt of court no matter which injunction they attempted to obey. However, conflicting injunctions are rare, in part because the comity doctrine requires judges to avoid issuing such injunctions when possible, and in part because courts can and do alter their injunctions when they learn of such conflicts. On the infrequent occasion when such a conflict arises, the usual result is that the judges back down, staying their injunctions or narrowing them to eliminate the conflict. In any case, eliminating nationwide injunctions is unlikely to reduce the risk of conflicting injunctions which are a natural byproduct of a judicial system that permits courts with overlapping jurisdiction to reach different results.

Some opponents of nationwide injunctions also point to the limited precedential value of lower federal court decisions as an argument justifying their position.²⁰ In the federal judicial system, only the U.S. Supreme Court can issue decisions establishing the meaning of federal law for the nation. District court decisions lack precedential value even in the issuing district. Federal appellate decisions are binding in the circuit in which they are issued but are merely persuasive precedent elsewhere. Accordingly, nationwide injunctions can be viewed as abnormal in a judicial system in which only the Supreme Court's decisions establish binding

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law for the nation. However, decisions by lower federal courts often have effect outside of the geographic region in which they sit. A district court's injunction applies across the United States, even when it bars the defendant from taking action against a single plaintiff and no one else. Under the Full Faith and Credit Clause of the Constitution, as long as the court had personal jurisdiction over the defendant, its judgments must be enforced by federal and state courts in other jurisdictions. The precedential effect of a judicial opinion is separate from its judgment, however. Accordingly, a district court decision holding President Trump's travel ban unconstitutional and enjoining the United States from enforcing it against anyone does not create binding precedent that must be followed by other courts in future cases. In fact, other courts did weigh in on the constitutionality of the travel ban even after the Hawaii district court that gave rise to *Hawaii v. Trump* issued its nationwide injunction against the ban.²¹

Scholars have also pointed out a number of policy arguments that lean in favor of nationwide injunctions. First, nationwide injunctions that enforce rights of individuals who are not parties to the lawsuit are sometimes necessary to provide complete relief to the plaintiffs.²² For example, if an African American plaintiff were to challenge a segregated public school system, granting an injunction requiring the defendant school system to admit the plaintiff only (and no other African American child) would not alleviate the plaintiff's injury. Challenges to policies that cross state lines—such as regulations concerning clean air and water, as well as some immigration policies—also arguably require broad injunctions. For example, a nationwide injunction was appropriate in *Northwest Environmental Advocates v. EPA* to invalidate a federal regulation exempting ships from the requirement to obtain a permit before discharging ballast water.²³ The court in this case reasoned that the environmental harm from discharge of ballast waters could not be easily contained geographically, and, thus, prohibiting ballast water discharge in some

regions of the United States but not others would not alleviate the plaintiffs' injury. As this case illustrates, it is difficult to craft injunctive relief limited to the plaintiff alone, or to a single geographic region, in cases involving easily dispersed or mobile items, such as cases concerning endangered species or the safety of food or medical devices.

Proponents of nationwide injunctions also argue that they are necessary to protect nonparties from irreparable injury. Such proponents note that, sometimes, injured individuals cannot easily or quickly join in litigation. For example, new restrictions on state voting laws enacted on the eve of an election, or an exemption allowing emission of air or water pollutants, can have immediate, harmful effects on thousands of people, most of whom will not be able to file suit. Typically, the U.S. Supreme Court takes months or years to address such an issue, and its ruling would, therefore, come too late for those who had lost the right to vote or suffered the ill effects of breathing polluted air or drinking contaminated water. District courts, by virtue of their position as the point of entry to the federal court system, are able to nimbly address such irreparable grievances in a way the Supreme Court, or any other federal court, cannot. Furthermore, the executive branch could act strategically to block a case from reaching the Supreme Court—for example, by mooting individual claims or by choosing not to appeal losses in the district or appellate courts—making it impossible for most people to obtain relief as a result of the decisions made by a federal appellate court. Therefore, nationwide injunctions arguably provide a mechanism for courts to protect all those who could be harmed by a federal policy when only a few can quickly bring their case before a court.

Finally, proponents of nationwide injunctions point to their administrability as an argument in favor of their use. Supporters of this argument allege that nationwide injunctions are sometimes the only practicable methods of providing relief to plaintiffs. Furthermore, such parties argue that nationwide injunctions can avoid the cost and confusion of piecemeal injunctions—an important benefit. An example of this exists in

the Sixth's Circuit's 2015 decision to issue a nationwide stay of the Corps' and EPA's final "waters of the United States" rule.²⁴ Eighteen states had challenged the rule, arguing that it violated the Clean Water Act by expanding the agencies' jurisdiction and was promulgated in violation of the APA. In making its decision, the Sixth Circuit noted that district courts around the country had already issued disparate rulings on the question, and that the rule had been preliminarily enjoined in thirteen states. The court then ordered the agencies to stay implementation of the rule nationwide because such patchwork injunctions would create "confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing."²⁵ In short, the court concluded that piecemeal injunctions were unworkable and opted for a more easily administrable nationwide injunction.

Conclusion

While the nationwide injunction issued by the U.S. District Court for the District of Montana, Great Falls Division, in *Northern Plains Research Council v. U.S. Army Corps of Engineers* is currently valid and applicable across the United States, it will not necessarily remain so depending on the Corps' and courts' future decisions. If the Corps decides to appeal the district court's holding to the Ninth Circuit and is granted a stay of the district court's decision pending appeal, the Corps would again be permitted to administer permits under NWP 12 until the Ninth Circuit makes its decision on the appeal. As set forth above, there are a number of major legal and policy arguments that scholars have made both in favor and against nationwide injunctions. If the Ninth Circuit agrees with critics' arguments and issues an opinion reflecting such, the Corps' headache will be over. However, if the case makes it to the Supreme Court, the Corps' battle could be a lengthy one. Whether as a result of this case or another, the issue of nationwide injunctions is ripe for adjudication at the Supreme Court—especially as their use becomes more popular in federal district and circuit courts.

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Endnotes

- 1 *Northern Plains Res. Council v. United States Army Corps of Eng'rs*, 2020 U.S. Dist. LEXIS 66745.
- 2 Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1071 (2018).
- 3 *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. Feb. 16, 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).
- 4 *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).
- 5 Memorandum from the Office of the Attorney General on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download>.
- 6 Nationwide Injunction Abuse Prevention Act of 2019, S. 2464, 116th Cong. (2019); Nationwide Injunction Abuse Prevention Act of 2019, H.R. 4292, 116th Cong. (2019).
- 7 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
- 8 *Id.* at 2425.
- 9 *Id.* at 2429.
- 10 *Id.*
- 11 *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020).
- 12 *Id.* at 600.
- 13 *Id.* at 601.
- 14 *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).
- 15 Frost, *supra* note ii, at 1082.
- 16 *Id.*
- 17 *Id.* at 1088-1089.
- 18 Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 460 (2017).
- 19 *Id.* at 461.
- 20 Frost, *supra* note ii, at 1111.
- 21 See Michael T. Morely, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487 at 490-91 (2016) (arguing that nationwide injunctions have a similar effect to class actions).
- 22 Frost, *supra* note ii, at 1091.
- 23 See *Northwest Environmental Advocates v. EPA*, No. C 03-054760 SI, 2005 WL 756614, at *1 (N.D. Cal. Mar. 30, 2005).
- 24 *In re EPA*, 803 F.3d 804, 805-06 (6th Cir. 2015), *vacated on other grounds sub nom.*
- 25 *Id.*



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	AFFILIATE – Students	\$20

I understand that all privileges accorded to members of the section are accorded affiliates and law students, except that affiliates may not advertise their status in any way, and neither affiliates nor law students may vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

CERTIFICATION: I hereby certify that I have never been denied admission to any bar, or been the subject of any proceeding questioning my moral character, disbarred from any legal bar, convicted of a felony, expelled from any University or Law School, or investigated for fraud, misappropriation or mismanagement of funds.

SIGNATURE: _____ DATE: _____