# MS4 Update

Indiana Association for Floodplain and Stormwater Management

INAFSM Annual Meeting

September 14, 2022
Ft. Wayne, IN

Skipp Kropp

Steptoe & Johnson PLLC

# OVERVIEW

- PFAS
- WOTUS
- MS4 Litigation

- PFAS

# PFAS

- September 6, 2022: EPA proposed to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as CERCLA Hazardous Substances (87 Fed Reg 54415)
  - Comments due no later than November 7, 2022
- PFOA and PFOS historically found in or used in making consumer products including carpets, clothing, fabrics for furniture, and packaging for food and cookware that are resistant to water, grease or stains.

# PFAS

- Used for firefighting at airfields and in several industrial processes.
- PFOA and PFOS are persistent and mobile in the environment; exposure can lead to adverse human health effects, including high cholesterol, changes in liver enzymes, decreased immune response to vaccination, thyroid disorders, pregnancy-induced hypertension and preeclampsia, and cancer (testicular and kidney for PFOA, liver and thyroid cancer for PFOS).

# PFAS

- PFOA and PFOS are widely detected in surface water samples collected from various rivers, lakes, and streams in the United States
- PFOA and PFOS have been detected in groundwater in monitoring wells, private drinking water wells, and public drinking water systems across the country and therefore….

# PFAS

Regulation

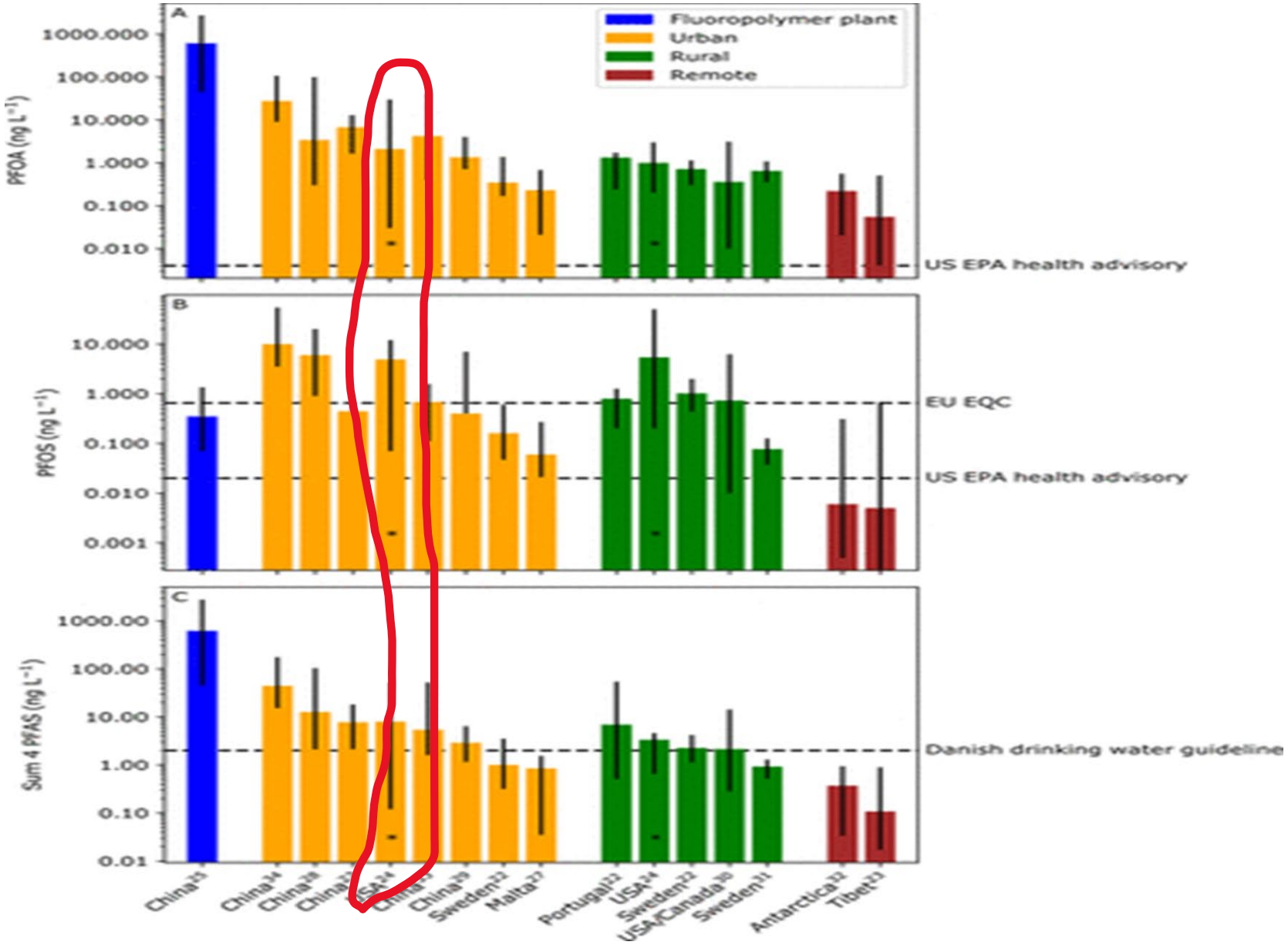
- 2016- EPA published a health advisory (not a regulatory standard) on PFOA and PFOS, for drinking water at ≤70 parts per trillion (ppt)
- June 15, 2022- EPA issued an interim updated Lifetime Drinking Water Health Advisories for Four Perfluoroalkyl Substances at ≤4 ppt, replacing the 2016 advisory

# PFAS

## Science

- August 2, 2022, Article in Environ. Sci. Technol. “Outside the Safe Operating Space of a New Planetary Boundary for Per- and Polyfluoroalkyl Substances (PFAS)” Cousins, Johansson, Salter, and Sha, Dept of Env Science, Stockholm University
- Finding: The US EPA Lifetime Drinking Water Health Advisories for PFOS and PFOA Are Often Lower than Their Respective Levels in Rainwater and the Danish Drinking Water Limit Value for Σ4 PFAS Is Also Often Lower than the Level of Σ4 PFAS in Rainwater

# Levels of PFAS in precipitation



# MS4 Impacts?

- Possible discharge levels for PFAS in stormwater in general permits?
- Possible PFAS monitoring requirements in MS4 general and site-specific permits?
- CERCLA “continuous release” reporting
  - CERCLA requires reporting of “continuous release” of a CERCLA Hazardous Substance
  - "continuous" means a release that occurs without interruption or abatement that is routine, anticipated, and intermittent during normal operation or treatment process

# MS4 Impacts?

## CERCLA “continuous release” reporting

The following notifications shall be given for any release qualifying for reduced reporting under this section:

(1) Initial telephone notification;

(2) Initial written notification within 30 days of the initial telephone notification;

(3) Follow-up notification within 30 days of the first anniversary date of the initial written notification;

(4) Notification of a change in the composition or source(s) of the release or in the other information submitted in the initial written notification of the release under paragraph (c)(2) of this section or the follow-up notification under paragraph (c)(3) of this section; and

(5) Notification at such times as an increase in the quantity of the hazardous substance being released during any 24-hour period represents a statistically significant increase as defined in paragraph (b) of this section.

- WOTUS

# Waters Of The US (WOTUS)

- Rapanos v. United States , 547 US 715 (2006)
- Plurality Decision (4-1-4) Typically apply the narrowest common grounds
- Plurality (limited jurisdiction) by Scalia joined by Roberts, Thomas, Alito
- Concurrence by Kennedy
- Dissent (expanded jurisdiction) by Stevens, Souter, Ginsburg, Breyer

# Waters Of The US

Rapanos tests

- *Scalia* – waters of the US should include only relatively permanent, standing or continuously flowing bodies of water (where wetlands and bodies of water abut, or abut and are nearly indistinguishable)

- *Kennedy* – significant nexus to a traditional water (practically requires a case by case analysis)

# Waters Of The US

## WOTUS since Rapanos

- 2015 Rule – Follows *Kennedy* opinion
  - Immediately appealed in several jurisdictions by industry groups and half of the states
  - Issue regarding jurisdiction
  - Stayed first by appellate court, then by several district Courts
  - Rule effective in 22 states; enjoined in 28 states

- 2017 Executive Order – Required EPA and USCOE to review rule – align with *Scalia* definition rather than “significant nexus”

# Waters Of The US

WOTUS since Rapanos

- 2018 Proposed Rule – changed applicability date to February 2020 (appealed)

- Resulted in 2020 Navigable Waters Protection Rule

# Waters Of The US

April 21, 2020- EPA and Department of the Army published Navigable Waters Protection Rule (85 Fed Reg 22250) to finalize a revised definition of “waters of the United States” under the Clean Water Act.

Rule became effective June 22, 2020, and is currently being implemented by EPA and the Army across the country.

# Waters Of The US

Final rule specifically clarifies that waters of the United States do not include:

diffuse stormwater runoff and directional sheet flow over upland areas

stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff

However…..

# Waters Of The US

Sackett v EPA Part 1

- Sacketts purchased 0.63 acre vacant lot near Priest Lake, Idaho in 2004
- Property is bounded on North side by road, on the other side of which runs a drainage ditch
- Property is bounded on the South side by another road, on the other side of which are houses  that front Priest Lake
- No surface water connection exists between Sackett property and ditch or lake
- Described as “soggy property”
- Sacketts began construction of residential home in 2007
- Immediately received EPA Compliance Order requiring restoration of site

# Waters Of The US

## Sackett v EPA Part 1

- Failure to comply with Compliance Order could result in $75,000 per day ($37,500 for wetland violation, $37,500 for ignoring compliance order
- Sacketts brought a civil action under Administrative Procedure Act in District Court seeking review of Compliance Order
- EPA moved to dismiss, stating that such request was pre-enforcement judicial review (i.e. Sacketts should ignore compliance order, then they would be able to appeal request for penalties, while penalties are accruing at $75,000 per day)
- Scalia announced unanimous decision that Compliance Order is sufficiently final for purposes of review (566 U.S. 120, 2012)

# Waters Of The US

## Sackett v EPA Part 1

- Alito concurring:
  - Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.
  - Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase [WOTUS] as an essentially limitless grant of authority. We rejected that boundless view…but the precise reach of the ACT remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity…
  - Allowing aggrieved property owners to sue under the APA is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem.

# Waters Of The US

## Sackett v EPA Part 2

- Sacketts continued seeking appropriate review and permits to build home – but challenge whether EPA and reviewing Courts used appropriate test (they applied “significant nexus”)
- Sacketts urge Court to adopt Scalia’s plurality test, and reject significant nexus
- During briefing Petitioners also raised argument that constructed channels should not be considered “traditional navigable waters”
- EPA requests significant nexus be upheld – and argues that EPA is entitled to deference

# Waters Of The US

## Sackett v EPA Part 2

- Briefing Completed on July 8, 2022, Oral argument scheduled for October 3, 2022
- Significant Number of Amici Briefs (more than 30)
- Amici included:
  - Several States and State environmental agencies
  - Native American Tribes
  - Congressional Representatives
  - State and City Economic Development Groups
  - Environmental Groups
  - Industry Groups

# Waters Of The US

## Sackett v EPA Part 2

- Will the Wetland Standards Change?
  - Significantly different Court – and those urging restrictive rule focus on regulatory certainty and individual rights while broader rule relies upon agency discretion and case by case analysis
  - Congressional activity regarding WOTUS has been significantly increased
  - Neither party challenged authority over wetlands, rather just advocated for two competing tests (although later briefing by Sacketts did argue against jurisdiction over manmade water conveyances)

# Waters Of The US

New rule may bring MS4s into play

If new WOTUS definition doesn't include prior stormwater exclusions for:

- diffuse stormwater runoff and directional sheet flow over upland areas
- stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff

- MS4 Litigation

# COUNTY OF LOS ANGELES, et al. v. MONSANTO COMPANY, et al. (United States District Court, C.D. California, 11/21/2019)

- Plaintiffs have property rights in stormwater drainage systems, captured stormwater, and/or waterbodies in Los Angeles County that are contaminated with PCBs manufactured by Monsanto
- Plaintiffs' stormwater drainage systems consist of MS4 and non-MS4 components
- Plaintiffs' operation of its MS4 is subject to an MS4 NPDES Permit from Los Angeles Regional Water Quality Control Board and includes conditions and requirements for the reduction and management of PCBs
- In addition, the County and District are named as responsible parties in several TMDLs that require Plaintiffs to significantly reduce concentrations of PCBs in designated water bodies or the entry of PCBs into those water bodies

# COUNTY OF LOS ANGELES, et al. v. MONSANTO COMPANY, et al. (United States District Court, C.D. California, 11/21/2019)

- **Procedural History**
- Defendants filed a Motion to Dismiss on August 30, 2019
- Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory

# COUNTY OF LOS ANGELES, et al. v. MONSANTO COMPANY, et al. (United States District Court, C.D. California, 11/21/2019)

- Plaintiffs County of Los Angeles and Los Angeles County Flood Control District sue Defendants Monsanto Company, Solutia, Inc., and Does 1-10 for:
  (1) public nuisance;
  (2) equitable indemnity;
  (3) strict liability, for design defect under the consumer expectation test;
  (4) strict liability, for design defect under the risk-benefit test;
  (5) strict liability, failure to warn;
  (6) negligence, based on manufacturer or supplier duty to warn;
  (7) negligence, for failure to recall; and
  (8) trespass.

# COUNTY OF LOS ANGELES, et al. v. MONSANTO COMPANY, et al. (United States District Court, C.D. California, 11/21/2019)

- Court discusses all counts, holding:

(1) public nuisance- Plaintiffs have pleaded sufficient facts to support their stormwater nuisance claim at this point. The Court would like the parties to further address this question at the hearing. Motion to Dismiss denied
(2) equitable indemnity- Plaintiffs do not oppose dismissal of their equitable indemnity cause of action. Motion to Dismiss granted
(3) strict liability, for design defect under the consumer expectation test- Court would agree that Plaintiffs have adequately pleaded foreseeability and causation. Motion to Dismiss Denied
(4) strict liability, for design defect under the risk-benefit test- Court would agree that Plaintiffs have adequately pleaded foreseeability and causation. Motion to Dismiss Denied

# SOUTH SIDE QUARRY, LLC; Jason Lee Stanford, v. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRIC (28 F.4th 684, 6th Circuit Court of Appeals, March 11, 2022

Facts:

- Two creeks, Pond Creek and Fishpool Creek
- Pond Creek, drains into a watershed highly prone to flooding
- Fishpool Creek diverts excess stormwater from that watershed into Vulcan Quarry through a channel maintained by the Louisville & Jefferson County MSD

Allegation: MSD used diversion channel to flood and pollute Vulcan Quarry, all in violation of the Clean Water Act and Kentucky state law

Defense: diversion channel connecting Fishpool Creek and Vulcan Quarry is part of flood control project planned and constructed years ago; South Side knew of project when it bought property, so some of South Side's claims were time-barred; South Side failed to give sufficient notice of pollution problems before suing

# SOUTH SIDE QUARRY, LLC v. LOUISVILLE & JEFFERSON COUNTY MSD(28 F.4th 684, 6th Circuit,
March 11, 2022

Facts:

- 1996 Corps of Engineers flood control project diverted stormwater from Pond Creek through tributary, Fishpool Creek, causing potential flooding of nearby residences
- Corps partnered with Louisville MSD to complete project involving quarry that alleviated flooding potential
- MSD would obtain the property rights needed for project and maintain system
- MSD acquired rights to property, but quarry owners refused because of prices and no guarantee of water quality
- Court award MSD easement but did not require water quality guarantee

# SOUTH SIDE QUARRY, LLC; Jason Lee Stanford, v. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRIC (28 F.4th 684, 6th Circuit Court of Appeals, March 11, 2022

Facts:

- Project completed in 2000
- South Side LLC bought Vulcan Quarry in 2012, disliked diversion channel connecting its new quarry to Fishpool Creek, and filed a motion in the long-closed eminent domain proceeding seeking to hold MSD in contempt of the order that awarded the easement in the first place.
- South Side LLC withdrew motion and, in 2017, sent MSD CWA citizen suit notice, alleging MSD had "permanently diverted" a "significant portion of Fishpool Creek" into Vulcan Quarry and that the diversion exceeded the property right limitations—like volume limitations and water discharge limitations—implicit in the easement.
- Notice also included new accusations of septic pollution, claiming the water coming over the spillway "changed to a '[feces]-smelling murky brown' " around 2014, noting that South Side testing found "E. coli, coliform and fecal matter levels" in the quarry " 'were off the charts high.' "
- Together, the excess wastewater and pollution showed MSD used "Vulcan Quarry as a gigantic septic tank/settling pond/dewatering pond/debris filter."

# SOUTH SIDE QUARRY, LLC; Jason Lee Stanford, v. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRIC (28 F.4th 684, 6th Circuit Court of Appeals, March 11, 2022

Facts:

- South Side's notice alleged that MSD's discharge of stormwater and pollutants violated the CWA's "general prohibition on the dumping of pollutants into U.S. waters," the easement, a Consent Decree, and various Kentucky-issued permits, including a Stream Construction Permit, MSD's MS4 permit, and MSD's wastewater treatment permits. As for the Consent Decree, it came about in 2005 when the Cabinet, the EPA, and MSD agreed to a series of steps designed to reduce the effects of combined and sanitary sewer overflows.
- South Side sued; its complaint included six counts of CWA violations, along with several state law claims for trespass, nuisance, and the like.
- MSD responded with a motion to dismiss for failure to state a claim.

# SOUTH SIDE QUARRY, LLC; Jason Lee Stanford, v. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRIC (28 F.4th 684, 6th Circuit Court of Appeals, March 11, 2022

Facts:

- District court granted MSD's motion.
- Court bifurcated South Side's complaint into two distinct kinds of pollution claims: (1) pollution via excess wastewater and (2) pollution via sewage. It dismissed the excess wastewater claims as time-barred under the five-year statute of limitations because South Side had brought excess stormwater claims against MSD in the 2013 contempt proceedings and knew about its potential CWA claim more than five years earlier.
- District court dismissed sewage claims because South Side didn't give MSD sufficient notice about the pollution problem before it filed suit, finding South Side's notice had failed to (1) identify sewage as a pollutant, (2) provide dates the pollution took place, and (3) describe the source of the pollution.
- South Side appealed

# SOUTH SIDE QUARRY, LLC; Jason Lee Stanford, v. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRIC (28 F.4th 684, 6th Circuit Court of Appeals, March 11, 2022

Analysis:

- Case turns on whether South Side satisfied CWA pre-suit notice requirement.
- CWA permits citizen suits for alleged violations of an "effluent standard or limitation," which, in this case, means KPDES permits or conditions of those permits and requires plaintiff to provide "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated." (40 C.F.R. § 135.3(a))
- Notice must include other information as well, including "the activity alleged to constitute a violation," "the person or persons responsible," and the "location" and "dates" of the violation. Id.
- Purpose is to allow alleged violator to identify any violation, bring its conduct into compliance with the law, and avoid the suit. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987);
- Satisfying pre-suit notice requirement is a "mandatory condition precedent to bringing a citizen suit." Cooper, 797 F. App'x at 923
- If plaintiff fails to provide sufficient notice, a district court "must dismiss the action as barred" under the CWA. Atl. States Legal Found., Inc., v. United Musical Instruments, 61 F.3d 473, 478 (6th Cir. 1995);

# SOUTH SIDE QUARRY, LLC; Jason Lee Stanford, v. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRIC (28 F.4th 684, 6th Circuit Court of Appeals, March 11, 2022

Analysis:

- Here, most of South Side's CWA claims rest on violations of existing regulations, permits, or property rights.
- South Side also bases its CWA suit on a permit that doesn't exist. It claims MSD needed—and failed—to obtain a KPDES permit specific to the Vulcan Quarry detention basin.
- Dichotomy means the outcome of citizen suit turns on two corresponding inquiries. First, whether MSD's diversion system violated a specific standard, limitation, or order found in an existing KDPES permit. And second, whether MSD failed to obtain a KPDES permit specific to its operation of the diversion system.

# SOUTH SIDE QUARRY, LLC v. LOUISVILLE & JEFFERSON COUNTY MSD (28 F.4th 684, 6th Circuit, March 11, 2022

Analysis:

- In its pre-suit notice, South Side mentions six potential “standards, limitations, or orders” that could serve as the basis for its CWA citizen suit. These are: (1) MSD's easement; (2) MSD and the Corps' Stream Construction Permit; (3) the Consent Decree between MSD, the EPA, and the Kentucky Cabinet; (4) agreements about upstream point sources; (5) the Clean Water Act's general prohibition on the discharge of pollutants; and (6) MSD's various KPDES permits.3
- Each of the bases South Side relies on suffers from one of two problems. Some bases—like the easement, the Stream Construction Permit, and the Consent Decree—can't sustain a CWA citizen suit in the first place. Others—like the KPDES permits—could serve as the basis of a CWA claim. The problem? South Side never identifies a permit-specific “effluent standard or limitation” that MSD violated. This means South Side strikes out on each if its potential bases for a CWA suit.

# SOUTH SIDE QUARRY, LLC v. LOUISVILLE & JEFFERSON COUNTY MSD (28 F.4th 684, 6th Circuit, March 11, 2022

Analysis:

- MSD didn't receive a KPDES permit when it first built the Fishpool Creek diversion system. The Cabinet didn't demand otherwise. Instead, MSD only needed a stream construction permit. The Cabinet issued that permit. And it didn't require MSD to obtain a separate KPDES water treatment permit before the Corps could start construction.
- Second, as a legal matter, the CWA doesn't sweep every water diversion project into its permitting scheme. And MSD's rechanneling of Fishpool Creek is just the kind of water allocation system that falls outside the CWA's regulatory ambit. To begin, the diversion system isn't the kind of discharge that needs a permit under the CWA. But even if the opposite were true, the EPA's Water Transfer Rule would exempt the channel system from the permit requirement.

# SOUTH SIDE QUARRY, LLC v. LOUISVILLE & JEFFERSON COUNTY MSD (28 F.4th 684, 6th Circuit, March 11, 2022

Holdings:

- sewer district's usage of flowage easement to divert creek water into quarry could not serve as the basis for a lawsuit by quarry owner claiming violation of the Clean Water Act;
- pre-suit notice did not tie sewer district's agreements with owners of multiple tracts upstream of quarry to anything specific, and thus notice was insufficient under the Clean Water Act;
- pre-suit notice did not point to any violation of an effluent standard or limitation contained in sewer district's Kentucky Pollution Discharge Elimination System (KPDES) permit to operate municipal storm sewer system;

# SOUTH SIDE QUARRY, LLC v. LOUISVILLE & JEFFERSON COUNTY MSD (28 F.4th 684, 6th Circuit, March 11, 2022

Holdings:

- flow of creek into quarry and then back into creek pursuant to sewer district's flood control plan was not a “discharge” which required a Kentucky Pollution Discharge Elimination System (KPDES) permit; and
- diversion channel into quarry area fell within Environmental Protection Agency's definition of a “water transfer” such that sewer district did not need a Kentucky Pollution Discharge Elimination System (KPDES) permit to use quarry as a detention basin.

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- California Sportfishing Protection Alliance ("CSPA") and County of Amador ("Amador") brought now-consolidated action against Kathleen Allison, Secretary of the California Dept of Corrections and Rehabilitation ("CDCR"), and Patrick Covello, Warden of CDCR's Mule Creek State Prison seeking declaratory and injunctive relief for alleged violations of the Clean Water Act
- CDCR owns and operates Mule Creek State Prison outside of Ione, California, housing roughly 4,000 prisoners.
- In addition to housing prisoners, prison provides space and utilizes prisoner labor for meat packing, coffee roasting and packing, and textile manufacturing operations.
- Prison also owns and operates an MS4, composed of drains, ditches, swales, and outfalls that channel storm water toward Mule Creek.
- Mule Creek is a tributary to Dry Creek, which in turn is a tributary to the Mokelumne River.

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- After cases were consolidated, plaintiffs jointly filed what is now the operative complaint on January 26, 2022.
- Plaintiffs filed the instant motion for partial summary judgment on June 28, 2022
- "In response to plaintiffs' motion, defendants have filed a 71-page list of single-spaced objections. Although the court has not counted the individual objections, it is clear that they number in the hundreds. One can only imagine how many attorney hours were spent coming up with what appears to be every conceivable objection and putting each into writing, and how much time plaintiffs' counsel was in turn required to spend responding to those objections. This all-too-common practice operates as a substantial drain on the resources of the court and, likely, the clients who are billed for these countless hours of work. Counsel would do well to consider whether a particular objection is in fact meaningful and important to their clients' case before including it in a laundry list that the court must sift through before reaching a motion's merits."

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- Defendants' objections based on (1) a lack of foundation or personal knowledge, or on speculation; (2) improper opinion testimony; (3) hearsay; (4) the best evidence rule; and (5) vagueness and ambiguity
- Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
- A material fact is one "that might affect the outcome of the suit under the governing law," and a genuine issue is one that could permit a reasonable trier of fact to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- Plaintiffs seek summary judgment on (1) whether Mule Creek is a "Water of the United States" within the meaning of the Clean Water Act; (2) whether plaintiffs have Article III standing to bring this action for injunctive relief; (3) whether defendants violated each of four separate provisions of the Small MS4 Permit: sections (a) B.1, (b) B.2, (c) B.3, and (d) D; and (4) whether defendants violated the Industrial General Permit.
- WOTUS: Plaintiffs provided evidence that Mule Creek is a tributary that leads to the Mokelumne River, a navigable water, that the state and regional water boards consider Mule Creek to be a water of the United States, and that defendants have themselves previously acknowledged that Mule Creek is a water of the United States. Defendants do not dispute this, nor do they argue that Mule Creek is not a water of the United States. Court concludes Mule Creek is a water of the United States and will enter partial summary judgment accordingly

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- Article III standing: To have standing, ‘a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision.’ (Nat. Res. Def. Council v. S.W. Marine, Inc., 236 F.3d 985, 994 (9th Cir. 2000))
  - Amador has expended economic resources to monitor and enable itself to address potential pollution caused by stormwater discharges at the prison; if the prison is improperly discharging contaminated stormwater, court-monitored injunctive relief preventing such improper discharges would obviate the need for Amador to expend further resources monitoring the situation itself. Plaintiffs have therefore sufficiently established that Amador has standing, and the court will enter partial summary judgment for plaintiffs accordingly.

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- Article III standing:
  - CSPA, as an organization rather than an individual, asserts organizational standing. “An association has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization’s purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” (Friends of the Earth, 528 U.S. at 181)
  - Three CSPA members states that they use or have used waterways near or downstream from Mule Creek, that they are concerned those waterways have become hazardous due to contaminated discharges from the prison, and that their use or enjoyment of the waterways has been reduced because of those concerns
  - The court therefore will enter partial summary judgment establishing that CSPA has standing

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- MS4 Permit violations B.1: Section B.1 provides: “Discharges of waste from the MS4 that are prohibited by Statewide Water Quality Control Plans or applicable Regional Water Quality Control Plans (Basin Plans) are prohibited.”
- Plaintiffs expert evaluated stormwater data collected at various points near the prison and concluding that discharges have previously violated and continue to violate applicable water quality standards; conclusions based on surface water quality standards with the designation “MUN,” denoting municipal use
- Defendants MUN designation does not apply to Mule Creek and that conclusions that the prison violated applicable water quality standards are therefore invalid, citing an order by the regional water board listing the beneficial uses applicable to Mule Creek as AGR, REC-1, REC-2, WARM, COLD, MIGR, SPWN, and WILD.”

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- MS4 Permit violations B1: Given Basin Plan's lack of clarity on portion of Mokelumne River designated as MUN and the 13383 Order's omission of the MUN designation in listing Mule Creek's beneficial uses, there is a genuine dispute of fact as to whether Mule Creek is designated MUN and plaintiffs' expert conclusions may not be applicable to plaintiffs' claims. Court will deny summary judgment on this issue
- MS4 Permit violations B2: B.2 provides: "Discharges of storm water from the MS4 to waters of the U.S. in a manner causing or threatening to cause a condition of pollution or nuisance as defined in  Water Code § 13050 are prohibited."

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- MS4 Permit violations B2: Plaintiffs argue that because measured discharges from prison exceed applicable standards, the discharges necessarily violate provision B.2 but , because these determinations appear to rely on the conclusion that the MUN beneficial use designation applies to Mule Creek, however -- a point in dispute -- it is unclear how probative these determinations are until plaintiffs can prove that the MUN designation applies.
- Further, provision B.2's plain language indicates that a violation thereof requires that the discharges actually enter a water of the United States. Similarly, to establish a violation of provision B.2, the discharges into Mule Creek must "caus[e] or threaten[ ] to cause a condition of pollution or nuisance" therein.

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- MS4 Permit violations B2: Because there appears to be a dispute of material fact as to whether the discharges upon which plaintiffs rely reached Mule Creek, the court cannot at this time conclude that defendants' discharges entered "waters of the U.S." or "caus[ed] or threaten[ed] to cause a condition of pollution or nuisance" therein. Accordingly, summary judgment on the issue of whether defendants violated provision B.2 of the Small MS4 Permit will be denied.
- MS4 Permit violations B3: B3 provides in part: "Discharges through the MS4 of material other than storm water to waters of the U.S. shall be effectively prohibited, except as allowed under this Provision or as otherwise authorized by a separate NPDES permit."

# California Sport Fishing Alliance v Allison, (US Dist CT., E.D. California, No. 2:20-cv-02482 WBS AC, August 29, 2022

- MS4 Permit violations B3: Plaintiffs contend that there are “defects in both the MS4 and [the prison’s] sanitary sewer system that allow for indirect connections between the two systems,” thereby allowing wastewater to enter and be discharged from the MS4
- Defendants say CDCR commissioned independent investigation of potential cross-connection between the two systems and a report concluded that dye testing performed to trace whether dye added to the prison’s wastewater system migrated into the MS4, revealed no evidence of cross-connections, and it ultimately concluded that there were “no cross-connections between the stormwater and sanitary sewer collection systems, nor ... any information indicating that the stormwater collection system has been or is being contaminated with sewage, wastewater, or grey water.”

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- MS4 Permit violations B3: Because there are multiple genuinely disputed issues of fact that are germane to whether defendants have violated provision B.3 of the Small MS4 Permit, summary judgment on this issue will be denied
- MS4 Permit violations D. Section D provides in part: “Discharges shall not cause or contribute to an exceedance of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan.”
- Plaintiffs allegations are based on same expert; so not probative and summary judgment on the issue of whether defendants violated section D of the Small MS4 Permit will therefore be denied.

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- Conclusion:

Summary judgment is GRANTED for plaintiffs, establishing that (1) Mule Creek is a water of the United States and (2) plaintiffs County of Amador and California Sportfishing Protection Alliance have standing to bring this action, see Fed. R. Civ. P. 56(a), (g);

Summary judgment is DENIED in all other respects.


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