SAVE THE DATE: 2020 Conference in SLC
The Conveners have set the dates for next fall’s Dividing the Waters general conference in Salt Lake City for September 23-26, at the University of Utah law school. The conference will address a range of current and emerging water law issues and include a day in the field.

SCOTUS: Maui Oral Argument – A “Tie?”
According to SCOTUS Blog, the argument over whether discharges to groundwater that flow into the ocean were a “point source” under the Clean Water Act presented a “tie” to the Court for adjudication. Lower courts had held that Maui violated the Clean Water Act by not obtaining a point-source discharge permit for treated water discharges to wells, when the treated water ultimately flowed through groundwater to the ocean.

The SCOTUS oral argument centered on how to interpret the statutory term “from.” If pollution can come only from a point-source discharge directly, Maui wins. If it can come indirectly, from the wells that Maui admits are point sources, then environmentalists win. The Blog suggested that Justice Kavanaugh’s question supported its view on the tie: “What then should we look at to help us decide how to interpret [the word “from”]?”

Environmentalists argued that “traceability” to a point-source, such as Maui’s groundwater injection wells, makes the discharge from a point source, even if the pollution entered the ocean from a non-point source.

Maui argued that the Clean Water Act’s structure provided for separate regulation for point and non-point sources. In that context, regulated pollution can come only directly from a point source, not groundwater, which is a non-point source. USDOJ offered USEPA’s perspective that asserted, for the first time, that the statute categorically exempts discharges to groundwater from regulation.

While environmentalists sought to emphasize the facts of a large treatment plant’s discharges, the justices focused on how their ruling may affect hypothetical individual cases, such as homeowners with septic tanks.

11th Cir: EPA Has Discretion on State Authority
The 11th Circuit held that the US EPA has the discretion to determine whether to withdraw its approval of a state’s National Pollution Discharge Elimination System (NPDES) regulation, pursuant to the Clean Water Act.

Seven Alabama environmental groups petitioned USEPA to withdraw the State of Alabama’s NPDES regulatory authority for the State’s regulatory/statutory violations. USEPA denied the petition on some counts, in an interim decision. Petitioners filed an appeal to the 11th Circuit, which dismissed the appeal on the interim decision without prejudice. USEPA issued its final decision denying the petition in January 2017.

In Cahaba Riverkeeper v. USEPA, the 11th Circuit held that USEPA has discretion whether to withdraw a state’s NPDES regulatory authority. It noted that the statute gives states the “primary” regulatory role and emphasizes “restraint” by USEPA. The question shifts to whether USEPA’s decision was arbitrary and capricious. After analyzing state violations, the court recognized debate on the State’s compliance and concluded that USEPA properly exercised its discretion.

CA’s First Hearing Officer Takes the Bench
The May 2019 Network Note announced that CA’s State Water Resources Control Board sought applications for its first Presiding Hearing Officer. The Board completed its appointment process in September and its first presiding officer took up his duties this month.

Long-time CA water lawyer Alan Lilly stepped up to lead the Board’s new Administrative Hearings Office. He will appoint the Office’s other hearing officers and technical staff in the coming months.

Lilly has 38 years of experience in water law, the last 29 at the firm Bartkiewicz, Kronick & Shanahan. He has litigated extensively in water right matters before both the courts and the Board. Lilly’s clients have included public agencies, private clients, and conservation groups, particularly in Northern California’s Sacramento Valley. He earned his JD from UC Berkeley in 1982.

Recent court decision? Something to share? Contact the Network Note Editor at ALFIII@sbcglobal.net
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