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WWL

FEATURE ARTICLE

HIGHLY-ANTICIPATED GROUNDWATER SUSTAINABILITY PLANS EMERGE FOR CALIFORNIA'S 'CRITICALLY OVERDRAFTED' GROUNDWATER BASINS

By Derek Hoffman & Chris Carrillo

For well over 150 years, the State of California did not comprehensively regulate its groundwater basin aquifers. That changed at the height of the historic multiyear drought, when the state's Sustainable Groundwater Management Act (SGMA) took effect on January 1, 2015. SGMA requires local Groundwater Sustainability Agencies (GSAs) to develop and implement Groundwater Sustainability Plans (GSPs) to achieve long-term basin sustainability. On January 31, 2020, GSPs for approximately 20 "critically overdrafted" basins were due for submission to the California Department of Water Resources (DWR). These highly anticipated GSPs are now available for review and public comment on DWR's website. The shape of groundwater management in California is *rapidly* evolving, and will continue to evolve as these and other GSPs are evaluated, updated, implemented—and in some basins—litigated.

SGMA Background

GSPs must be adopted by local GSAs and submitted to DWR by January 31, 2022 for high- and medium-priority basins that are neither adjudicated nor subject to an approved GSP Alternative. For high- and medium-priority basins that are designated "critically overdrafted," the deadline to submit adopted GSPs was two years earlier, January 31, 2020. DWR is required to post each submitted GSP on its website and evaluate it within two years for compliance with SGMA and DWR's GSP Emergency Regulations (California Code of Regulations, Title 23, Division 2, Subchapter 2, § 350 *et seq.*) (GSP Regulations). In the event that a GSA fails to submit a timely GSP, or submits a GSP that fails to satisfy SGMA and the GSP Regulations, that basin may be placed in DWR probationary status and subjected to intervention and regulation directly by the California State Water Resources Control Board.

Basin Sustainability

SGMA requires achieving basin sustainability within 20 years of GSP adoption. While SGMA provides the legal framework and minimum standards for sustainability, it authorizes GSAs to specifically define sustainability for their local basins. That determination must be based upon technical and policy considerations. GSAs are required, for example, to consider the best available science and information in developing their GSPs and projects and management actions, and are required to consider the interests of all beneficial users and uses of groundwater within the basin. (California Water Code § 10723.2.)

GSPs must identify a "sustainability goal," which is defined under SGMA as:

> . . .the existence and implementation of one or more groundwater sustainability plans that achieve sustainable groundwater management by identifying and causing the implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield. (*Id.* § 10721(u).)

"Sustainable yield" is defined as the maximum quantity of water, calculated over a *base period* representative of *long-term conditions* in the basin and *including any temporary surplus*, that can be withdrawn

annually from a groundwater supply *without causing an undesirable result*. (*Id.*, § 10721(w).)

In other words, determining a basin's "sustainable yield" is complex and is intrinsically linked to avoiding specific, undesirable results. In its Draft Best Management Practice publication for Sustainable Management Criteria (SMC BMP), DWR explains the "Role of Sustainable Yield Estimates in SGMA," stating that "that SGMA does not incorporate sustainable yield estimates directly into sustainable management criteria." It continues:

> . . .basin-wide pumping within the sustainable yield estimate is neither a measure of, nor proof of, sustainability. Sustainability under SGMA is only demonstrated by avoiding undesirable results for the six sustainability indicators. (SMC BMP, p. 32.)

Thus, the careful study, definition, establishment and management of sustainable management criteria for each sustainability indicator are integral to achieving complaint and effective GSP. SGMA defines undesirable results as one or more of the following effects caused by groundwater conditions occurring throughout the basin:

- Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and groundwater recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods.

- Significant and unreasonable reduction of groundwater storage.

- Significant and unreasonable seawater intrusion.

- Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies.

- Significant and unreasonable land subsidence that substantially interferes with surface land uses.

- Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water. (Wat. Code § 10721(x).)

SGMA does not define the threshold at which a specific sustainability indicator becomes *significant* and *unreasonable*. Rather, local GSAs are tasked with this weighty responsibility. Given the vast and varied users of groundwater in each basin and the potentially significant operational and financial impacts of GSP projects and management actions, the importance of establishing sustainable management criteria based upon the best available science and information and carefully informed policy considerations cannot be overstated.

GSPs must identify minimum thresholds, five-year interim milestones, and ultimate measurable objectives for each sustainability indicator. GSAs are afforded SGMA-enumerated powers, in addition to existing legal authority held by individual GSA member agencies, to implement GSPs within their jurisdictional areas. (*Id.* § 10725.) However, these powers are not unlimited. Municipalities retain, for example, their land use and well-permitting authorities, though coordination with GSAs may be required. (*Id.* §§ 10726.4, 10726.8, 10727.4). And, perhaps the most widely recognized SGMA limitation is its declared intent to "preserve the security of water rights in the state to the greatest extent possible consistent with sustainable groundwater management." (*Id.* § 10720.1(b).) SGMA expressly does not authorize a GSA to determine or alter California common law water rights or priorities. (*Id.* § 10720.5). Rather, water rights determinations remain within the role of the courts, primarily through the SGMA companion "comprehensive adjudication" legislation (California Code of Civil Procedure, Part 2, Title 10, Chapter 7, Article 1, § 830, *et seq.*) Through comprehensive adjudications, and other forms of litigation, pumpers are empowered to increase GSA accountability throughout the GSP development process, and ultimately seek a judgment as an alternative to a GSP.

'Critically Overdrafted' Basins

With the exception of a handful of GSP Alternatives (*i.e.*, specific types of basin managements plans that must satisfy specific SGMA and regulatory requirements), California's "critically overdrafted

basins" represent the first group required to be managed under GSPs. Through its Bulletin 118 publication, DWR designated 21 basins that are "subject to critical conditions of overdraft" based upon certain criteria in the *Water Code*. SGMA incorporates those Bulletin 118 designations. (Wat. Code § 10720.7(a).)

California's 21 critically overdrafted basins are geographically concentrated primarily in the Central Valley, in central- and southern California coastal areas and, to a lesser extent, in desert inland southern California. They include DWR Basins 1) 3-001 Santa Cruz Mid-County; 2) 3-002.01 Corralitos—Pajaro Valley; 3) 3-004.01 Salinas Valley—180/400 Foot Aquifer; 4) 3-004.06 Salinas Valley—Paso Robles Area; 5) 3-008.01 Los Osos Valley—Los Osos Area; 6) 3-013 Cuyama Valley; 7) 4-004.02 Santa Clara River Valley—Oxnard; 8) 4-006 Pleasant Valley; 9) 5-022.01 San Joaquin Valley—Eastern San Joaquin; 10) 5-022.04 San Joaquin Valley—Merced; 11) 5-022.05 San Joaquin Valley—Chowchilla; 12) 5-022.06 San Joaquin Valley—Madera; 13) 5-022.07 San Joaquin Valley—Delta-Mendota; 14) 5-022.08 San Joaquin Valley—Kings; 15) 5-022.09 San Joaquin Valley—Westside; 16) 5-022.11 San Joaquin Valley—Kaweah; 17) 5-022.12 San Joaquin Valley—Tulare Lake; 18) 5-022.13 San Joaquin Valley—Tule; 19) 5-022.14 San Joaquin Valley—Kern County; 20) 6-054 Indian Wells Valley; and 21) 7-024.01 Borrego Valley—Borrego Springs.

With the exception of Pajaro Valley (for which a GSP Alternative was approved) and Los Osos Area (which is deemed adjudicated), each of the 19 remaining basins were required to submit their adopted GSPs to DWR by the January 31, 2020 deadline. DWR's GSP Portal indicates that GSPs were timely submitted (though, at the time of this writing, some had not been accepted for review as DWR awaited receipt of certain related documents).

Any practitioner that was meaningfully involved in developing those GSPs will undoubtedly acknowledge the intense effort that was required to meet the January 31, 2020 deadline. However, the submission of GSPs marks the *beginning* of the path to sustainability as GSAs continue to monitor basin conditions, implement projects and management actions, and amend and update their GSPs. Implementing the GSPs will require a greater, sustained intensity of effort and engagement, and will likely trigger litigation in some areas.

In certain basins where GSPs would impose particularly aggressive groundwater pumping restrictions and/or fees, litigation has already begun. In Borrego Springs Sub-basin (DWR Basin No. 7-024.01) located in the inland desert area of San Diego County, the local GSA developed one of the first GSPs in the state which included imposing approximately 75 percent pumping reductions. In lieu of adopting and submitting the GSP, a proposed stipulated judgment and physical solution has been negotiated among the vast majority of the basin groundwater producers and submitted to DWR as a comprehensive adjudication GSP Alternative.

In the Indian Wells Valley (DWR Basin No. 6-054) located in eastern Kern County and portions of San Bernardino and Inyo counties, the Indian Wells Valley Groundwater Authority has adopted a GSP that includes, as a primary management action, allocating a static estimated annual basin recharge of 7,650 AFY among selected groundwater users, and assigning virtually all agricultural producers a temporary, non-transferable pumping allocation comprising a fraction of groundwater in storage. Once the temporary allocations are used (which for some could be less than one year), those agricultural producers would be required to cease pumping entirely or pay yet-to-be-defined pumping fees on every acre foot of production to fund imported water infrastructure and imported water supplies. A group of agricultural interests recently filed a verified complaint in Kern County Superior Court including claims to quiet title and for declaratory relief and seeking a physical solution among a group of large groundwater producers in the basin. The complaint declares that it does *not* seek a comprehensive adjudication, citing provisions of the comprehensive adjudication law that exempt certain types of actions among limited groundwater producers that do not involve a comprehensive allocation of the basin's groundwater supply or a comprehensive determination of water rights. (Code Civ. Proc. § 833(b)(1)-(3).). The complaint does not name the GSA and does not directly challenge the GSP.

By and large, the GSPs adopted for California's critically overdrafted basins recognize and identify the basin conditions that must be addressed in order to achieve sustainability, and they identify projects and management actions that may be considered for implementation as warranted. Most GSPs seek to achieve sustainability over the SGMA-authorized

20-year timeline, recognizing that the adjustments, costs and impacts of their GSPs will require time and careful implementation. Many GSPs appropriately prioritize monitoring, evaluating and honing their sustainable management criteria during the first five-year implementation period, prior to implementing significant projects or management actions. Nearly all GSPs have yet to clearly determine how they will fund their sustainability programs.

What follows is a closer look at select basins.

The Cuyama Basin (DWR Basin No. 3-013)

The Cuyama Basin is located within California's Central Coast Hydrologic Region, primarily in Santa Barbara County. The Cuyama Basin Groundwater Sustainability Agency is the exclusive GSA for the basin. It is a joint powers authority comprising: Kern, Santa Barbara, San Luis Obispo and Ventura counties, Cuyama Community Services District and the Cuyama Basin Water District.

Primary Sustainability Indicators of Concern

The GSP identifies declining groundwater levels and degraded water quality as the primary sustainability indicators of concern. It indicates that some areas of the basin have experienced no significant change in water levels while areas with the greatest concentration of irrigated agriculture occurs have shown declines. Groundwater quality varies but includes high levels of total dissolved solids (TDS) that exceed California's recommended secondary maximum contaminant level in some areas, and areas with high concentrations of nitrate and arsenic. The GSP finds that the lowering of groundwater levels has resulted in increased water quality degradation and elevated TDS levels. The GSP indicates that annual basin overdraft is approximately 26,000 acre-feet per year (AFY), and estimates that reducing pumping to 40,000 AFY is necessary to achieve long-term sustainability.

Projects and Management Actions

The GSP identifies primary projects and management actions including: 1) expanding monitoring programs; 2) a pumping allocation program to be implemented over a 15-year period beginning in 2023; 3) a cloud seeding project, described as a type of weather modification with the objective to increase the amount of precipitation that would fall in the Basin watershed and is estimated to yield up to 4,000 AFY of additional supply; and 4) diversion of high stormwater flows from the Cuyama River into basin recharge, which is estimated to support up to 4,000 AFY in groundwater production. Estimated implementation costs range up to approximately $5 million per year.

Salinas Valley—180-400 Ft. Aquifer (DWR Basin No. 3-004.01)

The Salinas Valley—180-400 Ft. Aquifer is located within the Central Coastal region in Monterey County. It is one of multiple Salinas Valley sub-basins. The sub-basin is named for its two-primary water-bearing units: the 180-Foot Aquifer and the 400-Foot Aquifer, and it encompasses an approximately 140 square-miles. The basin is managed by three GSAs: 1) the Salinas Valley Basin Groundwater Sustainability Agency (a joint powers authority comprising multiple counties, cities and other agencies); 2) the County of Monterey GSA; and 3) the Marina Coast Water District GSA.

Primary Sustainability Indicators of Concern

The GSP identifies declining groundwater levels and sea water intrusion as the primary sustainability indicators of concern. According to the GSP, agricultural irrigation comprises approximately 85 percent of total groundwater use within the sub-basin, and urban/domestic use primarily the remainder. According to the GSP, concentrated groundwater pumping near the coastal area has resulted in declining groundwater levels and seawater intrusion. During the drought years 2013 to 2017, increased pumping expanded the sea water impacted areas from 12,500 acres to 18,000 acres. The GSP reports that in 2005, nitrate levels exceeding the primary maximum contaminant level (MCL) were found in 32 percent of public water supply samples in the greater Salinas Valley Basin. The GSP estimates historical average sub-basin overdraft to be 10,900 AFY, and projects overdraft in the amount of 8,100 AFY in 2030, and 8,600 AFY in 2070. The GSP aims to mitigate the projected long-term projected 8,600 AFY overdraft, and to mitigate existing short-term overdraft estimated at over 40,000 AFY.

Projects and Management Actions

The GSP identifies primary projects and management actions including: 1) a three-tiered pump fee designed to incentivize reduced pumping; 2) in-lieu projects designed to provide direct delivery of surface water to offset pumping; 3) direct recharge projects through recharge basins or injection; 4) indirect recharge projects designed to decrease evapotranspiration and increased infiltration, such as removing invasive species from riparian corridors, and capturing storm water flows; and 5) hydraulic barrier development to control seawater intrusion, such as injection wells aligned parallel to coastline areas. The GSP anticipates developing the fee structure and refining and prioritizing selected projects within the first three years of GSP implementation. The GSP estimates that planned activities will cost over $11 million over the first five years of implementation.

Merced Basin (DWR Basin No. 5-022.04)

The Merced Sub-basin is located within the northern portion of the larger San Joaquin Valley Groundwater Basin, and encompasses an area of about 801 square miles. The basin is managed by three GSAs pursuant to a memorandum of understanding: Merced Irrigation-Urban Groundwater Sustainability Agency, Merced Subbasin Groundwater Sustainability Agency, and Turner Island Water District Groundwater Sustainability Agency #1.

Primary Sustainability Indicators of Concern

The GSP identifies multiple sustainability indicators of primary concern, including declining groundwater levels, degraded water quality, land subsidence, and depletions of interconnected surface waters. Notably, the GSP indicates that loss of groundwater in storage is not a concern because historical reductions have been insignificant relative to the total volume of freshwater water storage. The historical water budget finds an annual average rate of overdraft (change of storage) of 192,000 AFY from 2006 through 2015. According to the GSP, sustainable yield was estimated by modifying conditions in the groundwater model to balance out the change in stored water over time. In order to achieve a net-zero change in groundwater storage over a long-term average condition, the GSP states that current agricultural and urban groundwater demand in the basin would need to be reduced by approximately 10 percent, absent implementation of any new supply-side or recharge projects.

Projects and Management Actions

The GSP aims to achieve its sustainability goal by allocating a portion of the estimated basin sustainable yield to each of the three GSAs and coordinating the implementation of programs and projects to increase both direct and in-lieu groundwater recharge. The GSAs have not yet reached agreement on allocations or how they will be implemented. The GSP identifies twelve potential projects, which categorically include basin recharge, monitoring wells, water system interties and additional conveyance canals, water use efficiency programs, and streamlining certain replacement wells, and other project categories. The GSP anticipates completing all projects by 2026. GSP implementation costs are estimated to range between $1.2 million and $1.6 million per year, with additional costs for projects and management actions ranging up to $22.9 million.

San Joaquin Valley—Kern Sub-Basin (DWR Basin No. 5-022.14)

The Kern Sub-basin is the southernmost area of the San Joaquin Valley Groundwater Basin. It is managed by 11 organized GSAs and five coordinated GSPs. Six GSAs are included in the GSP developed by the Kern Groundwater Authority GSA (KGA). Two GSAs are included in the Kern River Groundwater Sustainability Agency GSP. Three additional district-specific GSPs have been prepared in the sub-basin by Buena Vista Water Storage District, Henry Miller Water District, and Olcese Groundwater Sustainability Agency.

The KGA's GSP covers the largest GSA area within the sub-basin, comprising 1.2 million acres of the sub-basin's approximate 1.8 million-acre area. The KGA is a joint power authority including 16 member entities made up of water districts/agencies, groundwater banking projects, and organized non-districted lands. Each KGA member is assigned the sole right and responsibility to implement SGMA within its respective boundaries and/or management areas, in a manner determined by the member, so long as the implementation actions do not interfere with the surrounding KGA members or other GSAs.

Primary Sustainability Indicators of Concern

The KGA's GSP includes basin-wise coordinated sustainable management criteria and water modeling budgets (historical, baseline and projected). Those budgets indicate that the basin, as a whole, averages overdraft in the amount of 324,326 AFY over the baseline conditions of which the KGA area comprises more than two-thirds of the deficit. Each KGA member agency addresses its own individual water supply sources, projects and management actions in greater detail in its individual management area plans comprising its dedicated GSP chapter.

Projects and Management Actions

The GSP indicates that KGA members have collectively identified more than 150 projects and management actions. They include expanding local and regional conveyance and recharge facilities, better utilizing surplus surface water supplies, developing new conveyance and recharge projects, and participating in the California 'WaterFix' or other thru-Delta improvement projects. Management actions include implementing district level fee structures to incentivize reduced groundwater pumping, participating in local, regional, and state-wide water markets, and establishing individual landowner groundwater allocations. According to the GSP, the coordinated modeling effort shows that the implementation of the identified projects and management actions throughout the basin would result in an average *surplus* of 85,578 AFY over the projected future baseline condition.

Conclusion and Implications

All Groundwater Sustainability Plans that were submitted to the Department of Water Resources and accepted for review are posted on DWR's website at: https://sgma.water.ca.gov/portal/gsp/all. The deadline to submit public comments on each individual GSP is also provided there. Virtually every GSP spans well over 1,000 pages (and some, over several thousand pages) including technical and other supporting attachments. The GSPs submitted for California's critically overdrafted basins collectively represent a truly "Herculean" effort to meet this crucial SGMA milestone. DWR is required to review the GSPs, consider all public comments, and render an evaluation of each GSP within two years. If the last five years have taught us anything, it is that January 2022 will be here before we know it. And at that point, DWR will have received an even larger wave of high- and medium-priority basin GSPs to review. In the meantime, GSPs for critically overdrafted basins will begin implementation, though the actual path for any particular GSP very much remains to be seen as GSAs.

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WESTERN WATER NEWS

ENVIRONMENTAL GROUP WILDEARTH GUARDIANS FILE ESA PETITION TO PROTECT RIO GRANDE SHINER

On January 21, 2020 the environmental group WildEarth Guardians filed a Petition with the U.S. Fish and Wildlife Service (FWS) urging the agency to protect the Rio Grande shiner (Shiner) under the federal Endangered Species Act. 16 U.S.C. § 1531 *et seq*. (ESA) The Shiner is a freshwater fish only found in the Rio Grande and Pecos rivers. WildEarth Guardians contends that water mismanagement of the Rio Grande resulting in artificial flow regimes that interrupt river channels and fragment habitat has imperiled the Shiner. The environmental group's Petition seeks to have the Shiner listed as "endangered" under the ESA.

Background

The Rio Grande Shiner is a small freshwater minnow native to the Rio Grande and Pecos rivers. WildEarth Guardians allege that the Shiner will not survive into the next century absent significant changes in management of the Rio Grande. The group points out that similar species of native fish, the phantom shiner and the Rio Grande bluntnose shiner, have become extinct in the past century. According to the Petition, the Shiner's current population is both small and isolated placing it at increased risk for extinction. When an aquatic species' population becomes fragmented, genetic diversity is lost along with the species' ability to readily adapt to altered riverine conditions.

Listings under the Endangered Species Act

Under the ESA, a species is listed as either endangered or threatened depending upon its status and degree of threat it faces. The FWS adheres to a legal rulemaking process to adopt regulations to protect a species. The agency has developed a priority system that is designed to direct the FWS' efforts toward the species that are in greatest need of protection.

The WildEarth Guardians Petition

The Petition filed by WildEarth Guardians is a formal request to list the Shiner. In accordance with the ESA, the FWS is required to make and publish specific findings on the Petition. As noted in the Petition, the FWS:

> . . .must evaluate whether a species is threatened or endangered as a result of any of the five listing factors set forth in 16 U.S.C. § 1533(a)(1): A. The present or threatened destruction, modification or curtailment of its habitat or range; B. Overutilization for commercial, recreational, scientific or educational purposes; C. Disease or predation; D. The inadequacy of existing regulatory mechanisms; or E. Other natural or man-made factors affecting its continued existence. Petition at 2.

The FWS must make listing determinations "solely on the basis of the best available scientific and commercial information regarding a species' status." 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b). As the noted in the Petition:

> . . .[r]eliance upon the best scientific data, as opposed to requiring absolute scientific certainty, 'is in keeping with congressional intent' that an agency 'take preventive measures' before a species is 'conclusively' headed for extinction. *Center for Biological Diversity v. Lohn*, 296 F. Supp.2d 1223, 1236 (W.D. Wash.2003).

According to WildEarth Guardians, "the [S]hiner's range and abundance has noticeably diminished in the Rio Grande since the 1950s." Petition at 6. The Petition analyzes the above listing factors A, C, D and E with particular attention paid to Factor A, the present or threatened destruction, modification, or curtailment of habitat or range. WildEarth Guardians contends that:

> . . .dams, dewatering, channelization, and other human interference have changed the nature of the Rio Grande and Pecos rivers such that uninterrupted stretches of river with wide channels and periodic flooding—prime habitat for the

shiner—have been replaced with deep, quick-flowing channels, stagnant reservoirs, and dry river beds unsuitable for the shiner's survival. Id.

What Follows the Petition

Within 90 days of receipt of a Petition for Listing, the FWS is required to make a finding as to whether there is "substantial information" indicating that the petitioned listing action is warranted. If this preliminary finding is warranted, then the FWS undertakes a status review of the species, usually over the course of a 12-month period. A proposed rule may then be published prompting a 60-day comment period. Upon request, a hearing may be held and then a final rule is promulgated or withdrawn.

Conclusion and Implications

WildEarth Guardians' latest Petition highlights the dwindling population and plight of the Rio Grande Shiner. Studies confirm that habitat modification, fragmentation and destruction are the primary causes of loss of freshwater aquatic biodiversity. The Petition requests that the Shiner be listed as endangered and requests that the FWS develop a recovery plan. The Petition is available online at: https://pdf.wildearthguardians.org/site/DocServer/Rio-Grande-Shiner-Petition-final.pdf
(Christina J. Bruff)

OREGON ADVOCACY GROUPS PETITION EPA TO TAKE ACTION ON DRINKING WATER CONTAMINATION IN LOWER UMATILLA BASIN—LEGISLATURE INTRODUCES BILL SEEKING TASK FORCE TO ADDRESS NITRATES IN THE BASIN

On January 16, 2020, a coalition of advocacy groups petitioned the U.S. Environmental Protection Agency (EPA) to exercise its emergency powers under § 1431 of the Safe Drinking Water Act (SDWA) to regulate nitrates in groundwater in northeast Oregon's Lower Umatilla Basin. The petitioners included Food & Water Watch, Columbia Riverkeeper, Eileen Laramore, Friends of Family Farmers, Humane Voters Oregon, WaterWatch of Oregon, Animal Legal Defense Fund, Center for Biological Diversity, and Center for Food Safety (collectively: Petitioners). EPA will consider the petition under "Updated Guidance on Emergency Authority under § 1431 of the Safe Drinking Water Act" from May 2018, which superseded two earlier guidance documents that had been in place since 1976 and 1991, respectively.

Also, in January 2020, Oregon State Senator Bill Hansell (R-Athena) introduced SB 1562, which instructs the Oregon Department of Agriculture (ODA) to form a new inter-agency task force to address nitrate contamination in the Lower Umatilla Basin, and provides $250,000 in funding for the task force.

Risks of Nitrate Contamination

Nitrate is a "contaminant" under the SDWA with an established maximum contaminate level (MCL) of 10 mg/L. Human exposure to high levels of nitrates has been linked to cancers, thyroid disease, birth defects, and methemoglobinemia, or "blue-baby syndrome," a potentially fatal condition caused by a lack of oxygen in an infant's blood. Nitrate exposure is particularly harmful to sensitive populations, including infants and pregnant and nursing women, who are among the approximately 46,000 people living in the Lower Umatilla Basin, almost all of whom rely on groundwater for their drinking water.

Nitrate Sources in the Lower Umatilla Basin

The Lower Umatilla Basin's highly productive agricultural industry accounts for approximately 82 percent of the nitrate contamination that reaches groundwater in the area. The Lower Umatilla Basin is home to ten concentrated animal feeding operations (CAFOs) totaling approximately 150,000 animals, most of which are dairy cows. Enormous quantities of manure from these operations are stored in lagoons before being applied to crops as fertilizer. Nitrate leaches from the lagoons and also reaches groundwater through the soil after it is applied to cropland.

The Lower Umatilla Basin's hydrogeology makes it particularly susceptible to nitrate leaching. The principal aquifers in the basin occur in alluvial sands and gravels that occur beneath porous, sandy soils.

Although the region receives only 8-10 inches of rain annually, widespread irrigation allows nitrates to permeate soils and reach groundwater much more quickly than they otherwise would.

The Groundwater Protection Act

Oregon's Groundwater Protection Act of 1989 provides that if designated contaminant levels are met or exceeded at least partly because of nonpoint source activities (for example, agricultural runoff), the state must investigate and declare a "groundwater management area" (GWMA) to respond to the contamination. For most contaminants, the state is required to establish a GWMA if a contaminant is present at a level 50 percent of the national MCL, but for nitrates the level was set at 70 percent. The Lower Umatilla Basin has been designated a GWMA since 1990 due to nitrate concentrations in groundwater. The designation triggered the establishment of the Lower Umatilla Basin Groundwater Management Area Committee (LUBGWMA Committee) and publication of the First Action Plan in 1997 and the Second Action Plan in 2019.

Thirty years after the Lower Umatilla Basin was designated a GWMA, nitrate levels remain elevated across the basin, which includes Morrow and Umatilla Counties and the towns of Hermiston, Boardman, and Irrigon. A 2015-2016 study of 255 wells showed that 48 percent exceeded the 10 mg/L MCL and 70 percent exceeded the 7 mg/L state trigger level. Petitioners identified several public water systems that had exceeded the MCL and/or state trigger level at least once. The most troubling data appeared primarily among very small systems, but, for example, the City of Irrigon documented dozens of samples above both the trigger level and MCL between 2002 and 2019.

The Safe Drinking Water Act

Oregon has "primacy" under the federal Safe Drinking Water Act, which means the state has the primary authority to administer the SDWA. However, even where a state has primacy, EPA retains emergency authority to act if: 1) "a contaminant which is present in or likely to enter a public water system or an underground source of drinking water. . . .may present an imminent and substantial endangerment to the health of persons" and, 2) "appropriate State and local authorities have not acted to protect the health of such persons." Under § 1431, EPA *may* act, but it is not obligated to.

Petitioners' Request for Emergency Action

Petitioners contend groundwater nitrate in the Lower Umatilla Basin constitutes an imminent and substantial endangerment because "nitrate levels are on the rise" and trends suggest "that more people's drinking water will become contaminated over time, and that the level of contamination will continue to increase." Moreover, petitioners contend, state officials have failed to address the problem. While the LUBGWMA Committee developed two action plans, both relied on a purely voluntary strategy and the state did not appropriate any money to implement the plans.

Petitioners request EPA act pursuant to its § 1431 emergency powers to: 1) provide free clean drinking water to residents whose drinking water exceeds safe nitrate levels; 2) prohibit new CAFOs in the basin unless and until nitrate concentrations in the area consistently fall below 10 mg/L; 3) investigate why Oregon's best management practices (BMPs) for CAFO management have been unsuccessful at reducing nitrate concentrations and determine what more effective BMPs are necessary; and (4) determine necessary enforcement measures and implement them immediately.

Oregon Senate Bill 1562's Proposal to Establish Task Force

Oregon lawmakers may address nitrate contamination in the Lower Umatilla Basin during this year's legislative session, which began on February 3. Senator Bill Hansell has introduced SB 1562, which directs ODA to form a new inter-agency task force to address nitrate contamination in the Lower Umatilla Basin, and provides $250,000 in funding for the task force. The proposal was part of a package introduced last year that ultimately did not make it into the budget. Senator Hansell introduced the Umatilla-specific proposal as his one bill for this year's short legislative session.

The proposed task force would include representatives of ODA, the Oregon Department of Environmental Quality, two members of the LUBGWMA Committee, and three at-large members, one of

whom must be a farmer or rancher with experience irrigating and fertilizing agricultural land. Among the task force's stated purposes are:

> . . .[t]o recommend, to the extent practicable, a scientifically based rationale for removing the ground water management area designation. . .in specific parts of the Lower Umatilla Basin Groundwater Management Area. . .[and]. . .[t]o create a long-term implementation plan for all areas of the Lower Umatilla Basin Groundwater Management Area to improve ground water conditions to an extent that will allow removal of the ground water management area designation from all or part of the Lower Umatilla Basin Groundwater Management Area.

Conclusion and Implications

If Senate Bill 1562 passes, it may at least somewhat undermine Petitioners' assertion that the state is not doing enough to address nitrate contamination in the Lower Umatilla Basin, as SB 1562 would represent the first time the state has actually provided funds to address the problem. SB 1562, however, contemplates the continuation of the voluntary approach that Petitioners contend has proven insufficient. Given this year's short legislative session, the fate of SB 1562 should be decided by March. The text of SB 1562 is available online at: https://olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/SB1562/Enrolled
(Alexa Shasteen)

SAN JUAN CAPISTRANO, CALIFORNIA, CITY COUNCIL APPROVES SANTA MARGARITA WATER DISTRICT ANNEXATION AGREEMENT

At its January 21, 2020 meeting, the San Juan Capistrano City Council (Council) unanimously voted to adopt a resolution approving an annexation agreement (Annexation Agreement) transferring (Service Transfer) all water, wastewater and recycled water services (System) of the City of San Juan Capistrano (City) to the Santa Margarita Water District (SMWD), whose board of directors approved the Agreement days earlier on January 17.

Background

The City expects that the transfer of the System to SMWD will relieve short-term financial pressures and improve the overall reliability, cost and efficiency of services within the City over the long term. Following the parties' approval of the Annexation Agreement, the Orange County Local Area Formation Commission (LAFCO) must approve the annexation application of SMWD and public hearing and protest procedures must be completed in order for the Service Transfer to be finalized.

The Service Transfer

The Service Transfer contemplated by the Annexation Agreement is the expected culmination of a process that began in 2015, when the Council authorized a study to examine the potential benefits of transferring the System to a dedicated water agency. In addition to potential long-term benefits of management by a water agency, the City has undertaken utility reorganization as a means of responding to increasing financial challenges facing the System in the near term, particularly capital replacement needs and regional sewage treatment contribution obligations. The City believes that retaining the water and sewer utility would necessitate significant rate increases.

Based on the study's findings and in accordance with the Cortese-Knox Hertzberg Local Government Reorganization Act of 2000 (Act), the City sought a Municipal Services Review (MSR) from LAFCO. Completed in October 2018, the MSR concluded that SMWD, Moulton Niguel Water District and South Coast Water District, three adjacent water agencies interested in the Service Transfer, were each capable of managing the needs of the System and eligible for selection by the City for further negotiations. The MSR suggested that the agencies were generally better equipped than the City to provide water and sewer services and that a transfer of the System would be likely to result in cost and efficiency savings of which could help alleviate the financing pressures facing the system.

After evaluating the proposals of the three eligible water agencies, the Council selected SMWD as the agency with whom the City would negotiate for the

Service Transfer. The foundation of the Annexation Agreement with SMWD was outlined in a Memorandum of Understanding (MOU) setting forth the major terms of the Service Transfer, approved by the Council in August 2019. Major points of negotiation included the assumption of existing debt and pension obligations of the System, water rights, infrastructure and service rates within the City.

The Annexation Agreement

With few exceptions, the Annexation Agreement transfers all assets of the System to SMWD, including existing real property, infrastructure, water rights and easements. The Annexation Agreement provides that SMWD will use its best efforts to invest at least $25 million in capital improvements to benefit the System over the next decade. As part of the proposal process that led to its selection, SMWD presented a plan for investment that included the replacement of the City System's aging infrastructure. To ensure adequate supply, SMWD plans to accelerate the development of groundwater resources in the San Juan Basin and explore partnerships with other agencies for desalination projects.

In order to limit the financial impact on City ratepayers, SMWD agrees to temporarily reduce average potable water charges for City users during the initial stages of Service Transfer implementation, and to set future rates in accordance with rate studies accounting for the particular needs of the System and contributions of City ratepayers. To facilitate the provisions of the Annexation Agreement specific to the City, SMWD intends to create an improvement district applicable only to the City service area. The improvement district and other terms specific to City ratepayers do not limit the ability of City ratepayers to participate in district-wide elections held by SMWD.

The majority of existing City water department employees are to be extended offers to work in comparable positions with SMWD according to the Annexation Agreement. To the extent possible, existing obligations and liabilities of the System will be assumed by SMWD, including the payment of outstanding bonds, pension funding obligations and certain existing settlement agreements. The City and SMWD also agree to pursue any negotiations necessary to accomplish a transfer of memberships in joint powers authorities and rights with respect to other existing joint ventures relating to the System to SMWD.

Moving Forward

To complete the Service Transfer, LAFCO must review and approve SMWD's annexation application and the Annexation Agreement as approved by the parties. LAFCO is expected to reach a decision in Spring 2020, after which a mandatory 30-day reconsideration period will commence, during which any person affected agency can seek reconsideration or amendment of the resolution making determinations with respect to the annexation. Pursuant to the Act, LAFCO will then hold a hearing with respect to the annexation application and public protest period of up to 60 days. While some City residents have expressed concerns regarding water rates and large users have sought to be involved in the process to ensure continued satisfaction of existing service obligations of the City, there have been no indications that protests sufficient to trigger the calling of an election or to block the Service Transfer under the Act are forthcoming.

Conclusion and Implications

This transfer demonstrates on a broader level what might become more common for various public water systems around the State of California. The City of San Juan Capistrano has promoted the Service Transfer as an important step in alleviating financial and operational pressures on the City associated with the management of the System, and an opportunity to protect the long-term interests of ratepayers within the City. Notwithstanding the City's financial considerations for the Service Transfer, the System has produced net operating revenues in recent years and the arrangement will notably expand the Santa Margarita Water District's footprint in the region. The coming months will determine whether the City and SMWD can successfully complete the final steps in the process of finalizing the Service Transfer pursuant to LAFCO regulations and the Cortese-Knox Hertzberg Local Government Reorganization Act. The findings of the Orange County Local Area Formation Commission set forth in the MSR and apparently low levels of local opposition leave little reason to suspect that either LAFCO or protestors will stand in the way.

(Wesley A. Miliband, Andrew D. Foley)

LEGISLATIVE DEVELOPMENTS

SUMMARY PREVIEW OF SELECT 2020 COLORADO WATER-RELATED BILLS

The Colorado General Assembly, which began its session on January 8, has a slate of water-related bills up for review. The various bills, some of which have already passed one of the chambers, cover the full range of Colorado water issues including anti-speculation, instream flow sources and regulation, water planning, and demand management. Colorado voters recently passed Proposition DD—to legalize sports betting with the majority of the proceeds going to Colorado's Water Plan—so it is expected we will see several bills addressing the end goals for that new revenue.

What follows is a summary of select water bills.

Senate Bill 20-24: Demand Management Programs

This bill, a bipartisan effort between sponsors Don Coram (R) and Kerry Donovan (D), would require public input if and when the state were to develop a water demand management program. Demand management programs are those in which the state or other local water authority pays water users to not use water. In a best-case scenario, the water users are still financially stable, and there is extra water in the stream available to bank in reservoirs (in Colorado's case, Lake Powell) for drier years. The Colorado program could bank up to 500,000 acre-feet.

Senate Bill 19-212, enacted last year, appropriated $1.7 million for use in the development of a statewide demand management program. That bill, in turn, was spurred by the 2019 passage of the drought contingency plans adopted by all Colorado River Upper Basin states. Among other expenditures, the Colorado Water Conservation Board was directed to use that money for "stakeholder outreach and technical analysis."

As part of that stakeholder outreach, newly introduced SB 20-24 requires that the public involvement mirror that of the comment provisions incorporated in the Colorado Water Plan. Specifically, C.R.S. § 37-98-102, controlling the Colorado Water Plan, requires "involvement of the public and… opportunities for public comment before adopting any final or significantly amended plan." That language is then incorporated, verbatim, into the new statute provision of SB 20-24, ensuring public input and advisement before any statewide demand management program is implemented. That public involvement would also explicitly include consultation with the Basin Roundtables, which are stakeholder interest groups representing each of Colorado's nine sub-basins.

Interestingly, this bill did not make it out of the Senate Agricultural and Natural Resources Committee, as it was defeated on January 30 at Senator Coram's request. He later said that he never intended the bill to pass as it isn't yet necessary but that, "[t]he bill has created the reaction we wanted." Between the passage of the Drought Contingency Plan last year and now SB 20-24, it is safe to say that Colorado legislators are now fully aware of the eventual need for a demand management plan as well as the complicated legal and legislative framework such a plan will require.

House Bill 20-1095: Water Elements in Local Master Plans

In the same vein as demand management programs and water conservation, HB 20-1095 would authorize local governments to include Colorado Water Plan goals and policies in their local master plans. The bill, co-sponsored by Democrats Rep. Jeni James Arndt and Sen. Jeff Bridges, was approved by the House Rural Affairs and Agriculture Committee on February 3 and was passed by the full House on February 12. Inherent in the need for the bill, according to Representative Arndt, is the Colorado Water Plan's projection of a 560,000 acre-foot municipal and industrial water supply gap by 2050. Proponents of HB 1095 argue that it is critical that master plans take into account water issues so that new development doesn't outpace supply. Opponents, chiefly Republicans as the vote was generally along party lines, argued that local master plans are not the most effective means to achieve these objectives. The Senate Agriculture and Natural Resources Committee referred the bill, unamended, to Senate Appropriations on February 20.

Instream Flows—HB 20-1157 and HB 20-1037

The Colorado House is currently debating two bills concerning instream flows. Instream flows, or ISFs, are water rights, controlled by the Colorado Water Conservation Board (CWCB), that leave water in the stream for the protection and benefit of the natural environment. HB 1037 would add a category of water rights that could be used as an ISF, while HB 1157 would expand the number of years for which a loaned water right may be used for ISF purposes.

House Bill 1037 passed the Chamber unanimously on January 29 and is now before the Senate Agriculture and Natural Resources Committee. The bill would authorize the CWCB to acquire water rights currently decreed for augmentation use, and use that water as an ISF without going through a change of use proceeding. Augmentation water is frequently utilized by all manner of Colorado water users to replace their out-of-priority diversions to allow them to keep diverting when their water right would normally be called out. This bill would simply make it easier for the CWCB to acquire and operate ISFs by removing one step from the process and allowing augmentation water rights to immediately be used for instream flow purposes.

House Bill 1157 passed the Chamber on February 21. The bill is sponsored by a bipartisan team of legislators including Reps. Dylan Roberts (D) and Perry Will (R). Sen. Kerry Donovan (D), the majority whip, is also a sponsor of the bill. HB 1157 expands the CWCB's loan program to allow the CWCB to more frequently utilized loaned water rights for instream flow purposes. The program, as currently operated, allows water rights owners to loan their right to the CWCB for a ten-year term, of which the CWCB make exercise that loan in any three out of those ten years to use as an ISF. Under the new proposal, the CWCB could exercise the loan up to 5 out of the ten years, but no more than three consecutive years, and the loan could be renewed for two additional ten-year periods.

The proposed loan would be reviewed by the Colorado State Engineer and there will be a period of time allowed for comments by interested parties. Specifically, the loan must not cause injury to other vested or conditionally decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water that were administratively approved before the date that the loan application was filed. The state engineer's decision may then be appealed to a water judge.

Anti-Speculation—SB 20-48

The final water-centric bill currently before the General Assembly is sponsored by many of the same legislators in the above bills including Rep. Roberts and Sens. Donovan and Coram. This bi-partisan bill passed the Senate on January 29 and is currently before the House Rural Affairs and Agricultural Committee.

SB 20-48 is intended to eventually strengthen Colorado's anti-speculation laws through the creation of a working group specifically tasked with analyzing the existing statutes. Although the Colorado Constitution explicitly prevents speculation, it is understood that water, specifically agricultural water, is often purchased by out-of-state entities with the intention to put it to a different use sometime in the future. In the face of a hotter and drier future for the Colorado River Basin, it is only more likely that speculators will look to Colorado water to turn a profit. The bill would require the executive director of the Colorado Department of Natural Resources, currently Dan Gibbs, to assemble a working group to analyze the current laws and provide a report to the water resource review committee by August 15, 2021 outlining recommended changes to strengthen the current laws. As it stands, speculation is evidenced by lack of a specific plan and intent to divert and place water to beneficial use; or by a lack of vested interests, or reasonable expectation of such, in the lands or facilities to be served by the appropriation of water.

Conclusion and Implications

It is clear from the various bills put forth in the 2020 legislative session that the Colorado General Assembly recognizes the growing water supply and demand problems within Colorado. The bills, many with bipartisan support, all share the same common themes of protecting Colorado's water, both for appropriation and for the environment, throughout the coming decades. These plans, particularly when combined with the additional money generated through sports betting via Proposition DD, provide a framework for the General Assembly to work towards the goals in the Colorado Water Plan.
(John Sittler, Paul Noto)

IDAHO MUNICIPAL WATER PROVIDERS SEEK STATUTORY AMENDMENTS RECONCILING PROOF PERIODS FOR PLANNING

Idaho Senate Bill No. 1316 passed out of committee on Monday February 17, 2020 on its way to a floor vote with a "do pass" committee recommendation. Assuming passage on the Senate floor, the bill will move to the germane House committee and, presumably, the House floor vote. The bill seeks to refine and reconcile Idaho Department of Water Resources (IDWR) water right licensing procedures for "reasonably anticipated future needs" (RAFN) water rights—those of municipal water providers claimed and developed to meet.

RAFN Water Rights

Idaho Code § 42-202(2) and related statutes authorize a unique breed of water rights available to municipal providers—those applied for and based on a multi-year (typically multi-decade) planning horizon/schedule based on a municipal provider's showing of "reasonably anticipated future needs." In short, and somewhat contrary to Idaho Code § 42-203A's admonition against water hoarding and speculation, municipal providers are legally allowed to obtain somewhat speculative water rights that they can "grow into" over time in order to meet increasing population and water use demands.

In order to receive an IDWR-determined "planning horizon," municipal providers must make a sufficient evidentiary showing to the agency via population and planning data, long-term facilities plans, and other justifiable forecast data substantiating what their reasonably anticipated needs are between the present and a future target year. Through this process, it is not uncommon for municipal providers to receive planning horizons (really authorized water right development/perfection periods) ranging between ten and 30 years, whereas the typical water user generally receives a five-year development window (in addition to any statutory extensions one might receive for "good cause" under Idaho Code § 42-204).

While the Idaho Municipal Water Rights Act and the concept of "reasonably anticipated future needs"-based planning horizons has been around since 1996, Idaho's water right licensing statutes and water right development period requirements have yet to meaningfully reflect the concept.

Development Period Discrepancies and Incremental Licensing

Generally speaking, typical water right applicants (including municipal providers who choose not to make a planning horizon-based evidentiary showing to IDWR) often receive a default period of five years to develop a permit, and prove beneficial use for end licensing purposes. This general "default" development period also populates municipal water right permit conditions even where a sufficient planning horizon showing has been made. Clearly, this results in a conflict in situations where one's planning horizon exceeds the typical five-year development period. Consequently, one aspect of Senate Bill No. 1316 marries a municipal provider's available permit development period to their actual planning horizon if the provider has one, thereby negating the front-end permit condition conflict and negating the need for municipal providers to seek piecemeal permit development extensions under Idaho Code § 42-204.

Another benefit of the proposed legislation is incremental licensing opportunity. In Idaho, water right permits are forms of personal property; water rights do not become defensible and enforceable real property rights until after they are perfected by licensing. The legislation authorizes IDWR to issue interim/incremental licenses to municipal providers for those portions of the water right developed prior to reaching the end of the assigned planning horizon.

For example, if a municipal water provider receives a 50 cfs water right permit with a 30-year planning horizon (*i.e.*, development period), existing law would not yield a fully vested water right license (real property right) until expiration of the 30-year period. Under the statutory amendments, however, municipal provider could seek incremental licenses upon incremental showings of beneficial use prior to completion of the 30-year planning horizon, which would provide them real property rights to the water developed in the interim. So, if a municipal provider developed 25 cfs by Year 15 of the 30-year planning horizon, that provider could seek final, perfected licensure of the 25 cfs developed to that point rather than having that quantity of water hanging out as a lesser property right for the next 15 years.

Finally, the bill provides a measure of greater certainty to the larger water user community via incremental reporting periods, and available lapse penalties for reporting violations. As discussed, RAFN water rights are speculative by nature—they authorize tying up potentially large blocks of water during comparatively long development periods (planning horizons). Thus, the statutory amendments balance this speculation somewhat by authorizing IDWR to impose permit development reporting intervals. During these reporting intervals, the municipal provider is required to demonstrate work/permit development completed to date (or demonstrate good cause regarding why work has not been undertaken). These reports provide IDWR and water users a form of measuring stick against which projected development of the permit may (or may not) occur for their own water right planning purposes. Moreover, failure to report as required can result in the lapse of the portion of the permit proportionally expected to be developed during the reporting interval. While this lapse is curable, restoration is not automatic. Thus, the reporting intervals and the potential for proportional permit quantity lapses better balance against traditional concerns of water right permit applications (speculation, delay and bad faith).

Conclusion and Implications

As a bit of a housekeeping measure, the bill includes a retroactive application clause. This is because there are several RAFN permits already issues in various stages of development containing within them the typical five-year development period condition notwithstanding the municipal provider's longer planning horizon. Thus, the legislation, if enacted will remedy this conflict in existing RAFN permits.

With broad based support of the Idaho Water Users Association and IDWR, it is expected that Senate Bill No. 1316 will successfully navigate both chambers and be signed into law this legislative session. (Andrew J. Waldera)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES NOTICE OF PREPARATION FOR DELTA CONVEYANCE PROJECT

On January 15, 2020 the California Department of Water Resources (DWR) released its Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project (NOP). The NOP details a familiar plan to update reliability in water deliveries to the State Water Project (SWP), this time under the name Delta Water Project (Project). Previously, the plan of action described by the Delta Water Project was laid out in DWR's California WaterFix. WaterFix was put on hold and went away, however, after Governor Gavin Newsom took office, rejecting the plan's use of a two-tunnel conveyance system proposed by WaterFix and stating that the project would better utilize a single-tunnel system.

Background

After the issuance of Executive Order N-10-19, directing the agencies of the state to focus on the implementation of this single-tunnel system, the Delta Water Project was created. Under this new title, the Project seeks to utilize water from the Sacramento River north of the Delta in coordination with its current conveyance systems to optimize water deliveries to the SWP. In doing so, the Project plans to implement a dual-intake system to convey water from the Sacramento River to a system of forebays near the SWP's existing Banks Pumping Plant. There, the water will be diverted to the pumping plant and used for the SWP accordingly.

Project Description

In addition to the existing points of diversion and conveyance systems, the SWP in the Delta area contains the Clifton Court Forebay and the nearby Banks Pumping Plant. Water diverted here is then lifted into the California Aqueduct for its use down the line. The Delta Conveyance Project seeks to expand upon this infrastructure by adding another point of diversion north of the Delta on the Sacramento River to "restore and protect the reliability of SWP water deliveries . . . consistent with the State's Water Resilience Portfolio." Additionally, the NOP addresses the potential for connecting the federal Central Valley Project (CVP) as an added beneficiary of the Project.

Following the flow of the water, the Project begins north of the Delta with several locations as possible points of diversion for the proposed dual-intake system. This system will utilize two on-river intakes at two of three potential sites near Clarksburg, Hood, and Courtland. From here, the NOP describes the meeting of these tunnels at a 100-acre Intermediate Forebay just north of Thornton, where a single-tunnel is then used to send the water south.

As written, the NOP describes two potential routes for the single tunnel. First, the Central Tunnel Corridor takes a direct route from the Intermediate Forebay to the Project's proposed 900-acre Southern Forebay near Discover Bay. Alternatively, the Eastern Tunnel Corridor is routed due south until reaching the Holt area before cutting westward for the Southern Forebay. In either case, the water will be received by a Pumping Plant before being released into the Southern Forebay. From here, the water may be diverted via newly constructed canals and two tunnels running under Byron Highway to either the SWP's Banks Pumping Plant and/or the CVP's Jones Pumping Plant if the CVP is ultimately involved in the Project.

Extent of the NOP's Details

In its current state, the Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project proposes conveyances of up to 6,000 cubic-feet per second (cfs), or 3,000 cfs per intake, to SWP and potentially CVP facilities. Throughout the Delta Conveyance Project's operation, DWR is said to do so as to "not reduce DWR's current ability to meet standards in the Delta to protect biological resources and water quality for beneficial uses."

That being said, the Project's initial operating criteria are set to be determined after the development of a Draft Environmental Impact Report (EIR).

Furthermore, final operating criteria and/or operating plans are set to develop only after the review process pursuant to the California Environmental Quality Act (CEQA) has been completed, all water rights approvals have been cleared by the State Water Resources Control Board, and the consultation and review processes required by the federal and California Endangered Species Acts have been completed.

In discussing alternatives to the Project as required by CEQA, the NOP notes that varying levels of conveyances are being considered, ranging from 3,000 cfs to 7,500 cfs. As noted earlier, another alternative being considered is the inclusion—or not—of the CVP as a beneficiary to the Project.

Finally, with respect to the potential environmental impacts of the Project, the NOP simply provides a laundry-list of the resource categories listed in Appendix G of the CEQA Guidelines. Without going into much detail, the NOP notes one by one the potential impacts for each category ranging from potential impacts on river flows in the Delta to the impact of operation facilities on water quality constituents and concentrations.

Conclusion and Implications

The Delta Water Project affords an opportunity for south of the Delta water users to increase the resiliency of the SWP and potentially CVP by providing additional security in water conveyances for deliveries. To be successful, the Project cannot violate the rights of water right holders, which means the Project and all supporting environmental and regulatory approvals need to adequately demonstrate that the Project will not infringe on existing water rights or related water quality. In addition, the Project is a massive undertaking—with construction times estimated at 13 years for completion—after all of the environmental review and regulatory approvals are properly completed.

The period for comments on the NOP is being held open by DWR until 5p.m. on March 20, 2020. In reaching the DWR, the NOP directs commenters to submit such comments via the following ways: 1) Email: DeltaConveyanceScoping@water.ca.gov; 2) Mail: Delta Conveyance Scoping Comments, Attn: Renee Rodriguez, Department of Water Resources, P.O. Box 942836, Sacramento, CA 94236. (Wesley A. Miliband, Kristopher T. Strouse)

NEVADA STATE ENGINEER USES MODERN-DAY METHODOLOGY TO DETERMINE HISTORICAL WATER DUTIES IN ADJUDICATIONS

In establishing the pre-statutory water duty for irrigation in two recent adjudications, the Nevada State Engineer deviated from a century of judicial decrees to use, for the first time, current consumptive use estimates from a 2010 study conducted by the Nevada Division of Water Resources. Although the study indicates that this data is "more representative of expected future conditions than prior periods," and the State Engineer acknowledged that the amount of water granted in an adjudication should represent historical usage, the State Engineer nevertheless used this modern data as a basis for fixing water duties for vested rights. By doing so, the State Engineer has called into question what information should be referenced in the adjudication process.

Nevada's Adjudication Process

Like other western states, Nevada recognizes water rights that vested prior to the enactment of the state's statutory water law. The statute specifically provides that "[n]othing contained in this chapter shall impair the vested right of any person to the use of water…." NRS 533.085. To determine the relative pre-statutory rights to use water from a source, the State Engineer conducts a general adjudication. An adjudication is a forensic inquiry of historical uses, involving field investigations, review of old records, interviews with those who have personal knowledge of long-time ranch operations, surveying and mapping of pre-statutory points of diversion and places of use.

The claimant files its claims of pre-statutory use with the State Engineer, who issues a preliminary order of determination and provides the opportunity for the filing of objections. The State Engineer then holds a hearing on objections and issues a final order of determination, which gets filed in the state District Court for the county in which the water source is located.

The state District Court hears exceptions to the final order and may consider additional evidence, after which it enters a final decree. Numerous Nevada water sources have been adjudicated in this manner. There are also federal decrees that adjudicate the respective rights to waters of several interstate rivers that flow into Nevada.

Duty Determinations in Nevada Water Decrees

A decree must fix the duty of water for each manner of use. Duty is the measure of water that is reasonably required on any given tract of land to maximize production without creating waste. Duty is generally measured in acre-feet per acre.

Historically, when determining such duties, the State Engineer has accounted for numerous parameters, which include: 1) wetting of the ditch that conveys the water; 2) ditch bank storage; 3) evaporative losses; 4) hydraulic head to push the water across the field; 5) secondary artificial ground water recharge; 6) plant consumption; 7) tail water/return flow; and 8) leaching of salts from the soil. In considering these parameters, courts issuing decrees have considered soil type, slope of the land, season and climate, type of crop and the method of irrigation used. The variability in conditions makes it difficult for courts to apply standard duties.

The location of measurement affects which of these parameters must be accounted for in the decreed duty. Some decrees, for example for the Truckee River, measure the duty at the field after transportation losses. Other decrees, for example for the Carson River, measure duties at both the diversion from the river to the canal and the point of delivery to the land, depending on the location of the land being served. The duties set in the Franktown Creek decree account for considerable sub-irrigation conditions. Depending on the type of culture and the location of measurement, duties can be highly variable from decree to decree.

Nevada State Engineer's Efforts to Gather Consumptive Use Data

In 2010, the Nevada Division of Water Resources issued a report entitled *Evapotranspiration and Net Irrigation Water Requirements for Nevada* (2010 Report). The 2010 Report estimated crop evapotranspiration and net irrigation water requirements for various crop types for each hydrographic basin in Nevada. Net irrigation water requirements (NIWR) is:

> . . .the amount of water necessary to supplement rainfall in a given region to grow a full yield of an irrigated crop under pristine crop conditions and a full supply of water without waste, or non-beneficial use, of water. Diamond Valley Adjudication, *Final Order of Determination* (Jan. 31, 2020).

The estimates were derived from the most recent 30 years of weather data where available. In basins that lacked weather stations, spatial interpolation was used to derive evapotranspiration (ET) and NIWR estimates. The objective of the 2010 Report was to update estimates of actual ET and NIWR statewide, which could assist resource agencies to evaluate irrigation development, transfers of irrigation water to municipal uses and litigation of water right applications and protests.

Use of NIWR to Establish Historical Water Duties

When determining the duty of a post-statutory permitted irrigation right, the State Engineer has an obligation to consider the local irrigation requirements; the duty established by local court decree "or by experimental work in such area"; the growing season, type of culture, and reasonable transportation losses"; and "any other pertinent data deemed necessary to arrive at the reasonable duty of water." NRS 533.070(2). Other than the obligation not to impair vested rights, there is no similar guideline for the State Engineer to set the allowable duty of a pre-statutory water appropriation.

In two recent adjudications, the State Engineer employed NIWR as the basis of establishing the water duties associated with vested rights. In the Diamond Valley adjudication, the State Engineer took 2.5 acre-feet per acre (the NIWR for alfalfa estimated in the 2010 Report) and added 0.5 acre-foot per acre for "conveyance losses" to come up with a 3.0 acre-feet per acre duty for all harvest crops. In the Cold Spring adjudication, the State Engineer took the NIWR value estimated in the 2010 Report and added 10 percent "transportation loss" to establish a 3.5 acre-feet per acre duty for harvest crops.

The orders in each adjudication are silent as to how the conveyance/transportation loss number was arrived at. The State Engineer also did not explain whether the various parameters that go into a duty are accounted for in this conveyance/transportation loss number. Nevertheless, in both adjudications, the State Engineer asserted that "[t]he amount of water herein granted in this adjudication represents the historical use prior to the statutory water law from the water sources."

Incongruously, these duties are lower than those that are allowed in the oldest water permits for each basin. For example, the earliest post-statutory permits issued in Diamond Valley establish a 4 acre-feet per acre duty for irrigation. In Cold Spring Valley, the earliest post-statutory permit allows 4.53 acre-feet per acre of harvest crop. This leads to the odd result that the earlier priority vested rights have a lower duty than later priority statutory permits.

Conclusion and Implications

Using recent data to estimate historical use is fraught with challenges. While current estimates of NIWR may be an appropriate starting point for determining the consumptive use component of a water duty, there are numerous other parameters that must be considered. Modern irrigation practices are more efficient than those employed by early settlers. Because an adjudication should look at the practices that were in place at the time the water was first diverted and placed to beneficial use, a more thorough discussion of historical conveyances and application methods may be warranted to determine whether NIWR plus the conveyance loss set by the State Engineer accurately reflects what was done in the past. Without this exercise, there is no assurance that vested rights have not been impaired.
(Debbie Leonard)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Due to the recent federal government shut down, many of the agencies who report on Clean Water Act civil and criminal enforcement actions have been silent resulting in a smaller than usual number of summaries below.

Civil Enforcement Actions and Settlements—Water Quality

•January 22, 2020 - A Lincoln County, Missouri, limestone quarry owner has agreed to settle a civil enforcement action with the EPA for alleged violations of the federal Clean Water Act (CWA). According to EPA, Magruder Limestone Inc. filled in more than 1,200 feet of a stream without first obtaining a permit, as required under the CWA. The Missouri Department of Natural Resources (MDNR) initially identified the alleged violation and reported it to the U.S. Army Corps of Engineers (Corps). EPA, MDNR and the Corps conducted a site visit at the Magruder Limestone Inc. property in September 2018 and confirmed that the company used earth-moving equipment to place dirt and other material into a tributary of Barley Branch. Barley Branch is a tributary of the Mississippi River. As part of the settlement, the company agreed to pay an $80,000 civil penalty and submit a plan to EPA to restore portions of the affected stream. The penalty settlement with Magruder Limestone Inc. is subject to a public comment period before it becomes final.

•February 10, 2020 - The EPA has finalized a settlement with Airtech International, Inc. over Clean Water Act violations at its facility in Huntington Beach. Airtech International is a large-scale manufacturer of materials used in the aerospace, automotive, marine, and wind energy industries. The agreement requires the company to pay a $95,208 penalty for unauthorized industrial stormwater discharges between December 2014 and January 2019. Airtech International will also conduct five beach cleanup events and complete a habitat restoration project as part of the settlement. EPA partnered with the Santa Ana Regional Water Quality Control Board to inspect Airtech International's facility in 2018 and found the company failed to obtain a stormwater discharge permit from the California State Water Resources Control Board. Stormwater runoff from Airtech International discharges into Bolsa Chica Channel, which flows into the Bolsa Chica Ecological Reserve before entering the Pacific Ocean. EPA also found the facility failed to use best management practices—such as routinely sweeping paved surfaces and covering areas where potential sources of pollution are stored—to reduce or eliminate pollutants in stormwater runoff. As part of the agreement, Airtech International will spend over $66,000 in 2020 to complete a Supplemental Environmental Project (SEP) to support restoration of the local marine environment. The SEP will include five beach cleanup events within Huntington Beach, an initiative to replenish native Olympia oyster shells in the Upper Newport Bay and a replanting of eelgrass to improve sustainability. Stormwater runoff from composite tooling production facilities can include plastic resin pellets, oil, grease, and scrap metal. Federal regulations require that certain industrial facilities obtain National Pollutant Discharge Elimination System (NPDES) permits to control the discharge of pollutants in stormwater runoff into nearby water bodies. These facilities must develop and implement stormwater pollution prevention plans to prevent runoff from washing harmful pollutants into local water bodies.

•February 10, 2020 - The EPA has announced that the owners of three Maine metal recycling facilities have agreed to come into compliance with stormwater regulations and will pay a fine to resolve claims that they violated federal clean water laws and state permits at three Maine locations. The proposed

settlement is subject to a 30-day public comment period. Three closely-related companies - Grimmel Industries, Inc., Grimmel Industries, L.L.C., and Kennebec Scrap Iron, Inc - agreed to comply with their industrial stormwater permits and to pay $250,000 to resolve the claims involving facilities in Topsham, Lewiston, and Oakland. The facilities are involved in sorting, shredding, storing, and transferring processed scrap metal for recycling. State and federal EPA inspections revealed numerous violations of state industrial stormwater permit requirements and of federal oil spill prevention regulations. The Consent Decree will require Grimmel to comply with all stormwater permit requirements, including submission of and compliance with adequate stormwater plans and proper maintenance, monitoring, and sampling. The Topsham Facility is on the site of a 20-acre former paper mill beside the Androscoggin River, and stormwater from industrial activity there flows into the river. Stormwater from the three-acre Lewiston facility eventually drains into a culvert running under a road, empties into Hart Brook, and then flows into the Androscoggin River less than a mile away. Stormwater from the Oakland Facility, located on 11 acres in a wooded area, flows into two streams that are tributaries to Messalonskee Stream. EPA's investigation concluded that the companies did not have adequate stormwater pollution prevention plans or best management practices and failed to do proper monitoring, sampling, inspections, and training. At the Topsham and Lewiston Facilities, they also violated oil spill prevention planning requirements.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•February 10, 2020—The EPA announced that Citgo Petroleum Corp. and Oxy USA have agreed to investigate and address hazardous waste releases at the former Cities Service Refinery, 2500 E. Chicago Ave., East Chicago, Indiana. EPA's administrative orders on consent under the federal Resource Conservation and Recovery Act require the companies to determine the nature and extent of hazardous waste releases at the former refinery and tank terminal and clean up any releases that may pose a risk to human health or the environment. Since 1929, the former Cities Service Refinery site has gone through multiple owners and operational configurations. The northern portion of the site is the currently active Citgo petroleum terminal. The southern portion of the site remains vacant after refinery activities ceased in 1972, and the above-ground structures were razed in the 1980s.

•February 12, 2020 - Under an agreement with the EPA Clean Harbors of Connecticut, Inc., has agreed to pay $58,338 to settle two counts of allegedly violating federal PCB regulations at the company's Bristol, Connecticut facility. Clean Harbors, which provides hazardous and non-hazardous waste management services, is now operating in compliance with federal laws regulating toxic chemicals at the Bristol facility. The case stems from a self-reported incident of non-compliance, pursuant to federal Resource Conservation and Recovery Act permit. It involved improper manifesting of PCB remediation waste resulting from a transformer spill as non-hazardous and improper disposal at a facility in New York based on field screening testing alone. Federal PCB regulations include prohibitions of and requirements for the use, disposal, storage and marking of PCBs and items that have come in contact with PCBs. The regulations are meant to reduce the potential for harm and to track PCBs from use to disposal. The violations at the Clean Harbors facility were significant given the quantity and concentrations of PCBs involved.

•February 13, 2020 - The EPA, along with the Justice Department, announced the release of the Butte Priority Soils Operable Unit (BPSOU) consent decree. This document provides the framework for the continued cleanup of mining-related contamination to protect public health and the environment in Butte and Walkerville, Montana. The consent decree requires Atlantic Richfield to undertake or finance over $150 million in cleanup actions, provide financial assurances for future cleanup actions, and provide enhanced community benefits through the implementation of end land use plans along the Silver Bow Creek Corridor. Additionally, EPA Region 8 is releasing an amendment to the 2006 Record of Decision for the BPSOU that will expand cleanup efforts. The amendment will require the removal of contaminated tailings at the Northside and Diggings East Tailings areas as well as contaminated sediment and additional floodplain contamination from Silver Bow and Blacktail Creeks. The amendment will also require the treatment of more contaminated storm water before it flows into the creeks, and the capture

and treatment of additional contaminated groundwater. Once executed by the parties and entered by the court, the consent decree will implement this amended remedy. The release of the consent decree will provide the commissioners of Butte Silver Bow County—who must approve the document before it can be submitted to the court—an opportunity to consider the document in a public forum. This process allows Butte Silver Bow County to inform and educate the public and the county commissioners about the content of the consent decree. Once that process concludes, the county commissioners will vote on whether to approve the document.

Indictments, Convictions, and Sentencing

•February 10, 2020 - Bernhard Schulte Shipmanagement (Singapore) PTE LTD. (Bernhard), a vessel operating company, pleaded guilty in federal court to one count of maintaining false and incomplete records relating to the discharge of bilge waste from the tank vessel Topaz Express, a felony violation of the Act to Prevent Pollution from Ships. U.S. District Judge Derrick K. Watson of the District of Hawaii accepted the guilty plea. Chief Engineer Skenda Reddy and vessel Second Engineer Padmanaban Samirajan previously pled guilty to their involvement in the offense. Under the terms of the plea agreement, Bernhard will pay a total fine of $1,750,000 and serve a 4-year term of probation. This is the largest fine ever imposed in the District of Hawaii for this type of offense. Bernhard further must implement a robust Environmental Compliance Plan, which applies to all 38 vessels operated by the company that call on U.S. ports. According to court documents and information presented in court, the defendants illegally dumped bilge waste from the Topaz Express directly into the ocean, without properly processing it through pollution prevention equipment. The defendants admitted that these illegal discharges were not recorded in the vessel's oil record book as required by law. Specifically, on three separate occasions between May and July 2019, Bernhard, acting through Chief Engineer Skenda Reddy and Second Engineer Padmanaban Samirajan, its employees, used a portable pneumatic pump and hose to bypass the ship's pollution prevention equipment and discharge bilge waste directly into the ocean. They then failed to record the improper overboard discharges in the vessel's oil record book. Additionally, during the U.S. Coast Guard's inspection of the Topaz Express, Reddy destroyed paper sounding sheets and altered a copy of the vessel's electronic sounding log, in an effort to conceal how much bilge waste had been discharged overboard without being processed through the vessel's pollution prevention equipment.
(Andre Monette)

JUDICIAL DEVELOPMENTS

SEVENTH CIRCUIT AFFIRMS DISMISSAL OF CHALLENGE TO STATE-ISSUED CLEAN WATER ACT 404 PERMIT

Menominee Indian Tribe of Wisconsin v. U.S. EPA and U.S. Army Corps of Engineers, et al., ___F.3d___, Case No. 19-1130 (7th Cir. Jan.27, 2020).

The U.S. Court of Appeals for the Seventh Circuit recently declined to review the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) actions regarding a federal Clean Water Act §404 permit issued by the Michigan Department of Environmental Quality (DEQ) for a proposed mine along the Menominee River. The court found it cannot judicially review a challenge to agency action unless it is final. A request to amend the plaintiff's complaint was also denied.

Factual and Procedural Background

The Clean Water Act requires parties to acquire a § 404 permit for dredge-and-fill projects prior to construction. The U.S. Environmental Protection Agency and the Army Corps of Engineers are initially tasked with enforcing § 404. However, states may apply to assume § 404 permitting authority over their jurisdictional waters. If states are granted this power, the EPA retains an oversight role by reviewing state-proposed permits. Through this function, the EPA has the power to approve or object to proposed state permits. If the EPA objects to a proposed permit, the state must revise and resubmit the permit for approval.

To challenge this permit process, parties must bring claims under the Administrative Procedure Act (APA). The APA limits judicial review to "final agency action," meaning the agency's decision must be a consummation of the agency's decision-making process. Additionally, agency decisions are exempt from judicial review as a matter of law if the decisions are committed to agency discretion. However, courts may compel agency action unlawfully withheld or unreasonably delayed.

Petitioner Menominee Tribe (petitioner) objected to the EPA's decision to not exercise authority over a dredge-and-fill permit issued by the State of Michigan. The U.S. District Court concluded that it did not have the authority to review EPA's decision because it was not a "final agency action" within the meaning of the APA. Additionally, the District Court denied petitioner's motion for leave to amend its complaint to include two APA claims: 1) EPA's withdrawal of objections to the state-issued permit; and 2) the agency's failure to consult the National Historic Preservation Act.

The Seventh Circuit's Decision

Final Agency Action

The court addressed two issues in its decision. The first was whether the agency action is judicially reviewable. The APA limits judicial review to "final agency actions" that determine rights or obligations or from which legal consequences will flow. Using this framework, the court examined the agencies' responses to the plaintiff's concerns by analyzing the letter sent by the EPA to the plaintiff. The Court of Appeals determined this letter as merely informational in nature because it "impose[d] no obligations and denie[d] no relief." Additionally, the court noted that the EPA and Corps, in its communications, did not address the plaintiff's contentions nor did they detail the proper challenge process for this matter.

Parallel State Proceedings

Despite the absence of final agency action, the Court of Appeals further reasoned that the presence of parallel proceedings ongoing in Michigan's Administrative Hearing System inhibited their authority to hear the case. Duplicative litigation in federal and state courts may cause problems, including conflicting judgment and coordination problems. The court, however, noted that Michigan state courts are equally able to adjudicate questions of federal law.

Motion for Leave to Amend

Second, the Court of Appeals addressed the District Court's denial of the plaintiff's motion for leave to amend its complaint. Addressing plaintiff's first claim—that the EPA's decision to withdraw their objection to the permit was arbitrary and capricious—the court asked whether the agency's decision was discretionary. The court reviewed the applicable regulations governing the withdrawal of objections and determined there was a lack judicially manageable standards for judging how and when an agency should exercise its discretion to withdraw objections. The court reasoned the decision to withdrawal an objection is committed to the agency's discretion.

In regard to plaintiff's second claim, the court rejected the plaintiff's contention that the EPA failed to recognize the tribe's consultation rights conferred by the National Historical Preservation Act (NHPA). Under the NHPA, a federal agency overseeing a project must "take into account the effect of the undertaking on any historic property." However, the NHPA only applies to undertakings that are federal or federally assisted. Here, the Court of Appeals reasoned that the proposed project is privately funded and state-licensed, thus the NHPA would not be triggered.

Conclusion and Implications

The Seventh Circuit recognized that the plaintiff ran into a "legal labyrinth and regulatory misdirection" in seeking resolution for their claims. Reluctantly, the court upheld the U.S. District Court's decision to dismiss the case, advising the plaintiff to pursue its challenge in Michigan's administrative system and state courts.

This case upheld a challenge to an agency's decision-based procedures and protections set forth by the Administrative Procedure Act. This case provided an example depicting the power and limitations set forth by the APA in deciding whether an agency acted properly in its decision. The court's decision is available online at: http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-27/C:19-1130:J:Scudder:aut:T:fnOp:N:2464851:S:0
(Megan Kilmer, Rebecca Andrews)

CITIZEN SUIT AGAINST COUNTY FOR CLEAN WATER ACT VIOLATIONS WITHSTANDS MOTION TO DISMISS IN THE U.S. DISTRICT COURT

Cox v. Board of County Commissioners of Franklin County, Ohio,
___F.Supp.3d___, Case No. 2:18-cv-1631 (S.D. Ohio Jan. 31, 2020).

On January 31, 2020, the U.S. District Court for the Southern District Court of Ohio determined that Jeffery Cox alleged valid claims under the federal Clean Water Act (CWA) against Franklin County, Ohio. The court determined that the notice of the harms was adequate even though the specific date when the violation occurred was not included in the notice. The court, however, also determined that two claims against the county that were similar to those made in a related state suit were impermissible under the CWA as they were duplicative.

Factual and Procedural Background

Jeffery Cox moved to the Sharon Township in 2016 where he noticed "noxious sewage odors and gases" from the storm sewer on his street. He alleged that this impinged on his use and enjoyment of the nearby waterbodies. Cox claimed that the issues were caused by discharges of sewage water and pollutants into the storm drains. He further asserted that the issues were not isolated to the storm drain on his street; instead, all of the storm drains covered by the Franklin County National Pollutant Discharge Elimination System (NPDES) permit suffered from the same issues.

On August 20, 2018, Cox sent a Notice of Intent to sue to Franklin County, the Ohio Environmental Protection Agency (Ohio EPA), and the U.S. Environmental Protection Agency (EPA) for violating effluent standards and limitations established by the Clean Water Act. Cox alleged illicit connections caused impermissible discharges, that Franklin County was aware of the presence of the sewage in the surface waters through the previously performed dry-

water screenings, and that Franklin County violated the CWA by not addressing the illegal connections.

On October 17, 2018, the Ohio EPA filed suit against Franklin County. On November 9, 2018, the Ohio EPA and Franklin County reached a Proposed Consent Degree. Cox felt the decree did not include meaningful enforcement mechanisms and failed to address most of the violations described in the notice letter. Due to the perceived inadequacies of the Proposed Consent Decree, Cox filed suit against Franklin County alleging violations of the CWA and National Pollutant Discharge Elimination System permit for allowing the pollution, failing to eliminate the contamination, failing to follow the requirements of the permit, negligence, and other related claims.

The District Court's Decision

Franklin County filed a motion to dismiss on the grounds that Cox failed to satisfy the statutory notice requirements by not providing the date(s) of the violations and argued that Ohio EPA's lawsuit against Franklin County barred the citizen suit. Franklin County also argued that Cox did not have standing, the alleged injuries were not redressable, and there was no harm outside of the township where he resides. Lastly, Franklin County argued that the violations were time barred.

Subject Matter Jurisdiction

The CWA requires a Notice of Intent to sue explaining what violations have occurred and providing enough information to understand what instances are discussed. Franklin County alleged that the notice requirement was not satisfied because the dates of the violations were not provided. Instead, the complaint and notice simply asserted that the violations occurred every day since the violations began. Here, the court determined that the individual dates were not necessary because the description of the dates was non-ambiguous and could not be determined to have any other meaning. Therefore, the court deemed this language sufficient to satisfy the notice requirement.

The CWA also provides that a citizen suit may not be commenced if the state is or has already diligently prosecuted the same harms in a different lawsuit. Here, Franklin County asserted that Cox's claims were impermissible because the state brought a previous lawsuit alleging five claims regarding various Franklin County violations of its NPDES permit requirements. These claims related to a failure to comply with the NPDES permit by not creating a storm sewer map, identifying where sewage was connected on this map, tracking the sewage connections, knowing when sewage was being discharged, and determining if sewage systems could be connected to the sewage lines. Cox argued the duplicative claims should be permissible because the state did not diligently prosecute these claims. Cox claimed the decree was vague and did not contain adequate enforcement mechanisms.

The court rejected Franklin County's diligent prosecution defense as to five claims regarding the daily illicit discharges for the last five years and the lack of ordinances prohibiting sewage discharges but dismissed two duplicative claims of failing to develop a storm sewer map as required by the NPDES permit and failing to submit a list of sewage disposal sights connected to the system. The court reasoned that diligent prosecution is presumed and a plaintiff is required to show that the government's action fails to result in compliance of the applicable standard. The court found that because Cox did not explain how the Proposed Consent Decree failed to enforce the county's obligation to address the alleged CWA violations, the complaint did not satisfy the burden of providing non-diligence. Therefore, the claims that overlapped with the state claim were dismissed.

Standing

The court next addressed Franklin County's standing argument. Standing under Article III of the U.S. Constitution requires a plaintiff to suffer an injury in fact, which is traceable to the defendant's challenged action, and it must be likely that a favorable decision will redress the harm. The County alleged that the impermissible levels of sewage found by the dry-weather screenings from Sharon Township were non-redressable past violations. They further asserted that Cox had no injury in fact with respect to the violations outside of the Sharon Township since he owns no property in these locations. The County also argued that all of the harms within the Sharon Township are considered past violations as all of the dry-weather screenings occurred prior to 2012. The County reasoned that since there is no more recent screening, all violations were in the past.

The District Court rejected the County's argument and determined the violations are not wholly past because the complaint asserted that the harms are ongoing starting from the date of the screenings. Since the dry-weather screenings showed that a harm occurred in the past and this result did not conflict with the assertion that the harm continued, the date of these dry-whether screenings did not make the harm no longer redressable. Instead, following the water quality standards and reducing pollution would cure the issues which remained in Sharon Township.

The court also determined that injury in fact could be shown by a harm that impacts the Plaintiff's aesthetic enjoyment of the land. Here, the Complaint alleged that Cox volunteers to preserve many of the rivers and streams included in the Franklin County NPDES permit. Due to his actions and the interest he has in protecting the river, Cox suffered an injury in fact as his use of the waterways are negatively impacted by the defendant's actions.

Statute of Limitations

Finally, the court addressed Franklin County's statute of limitations arguments. The County argued that most of the dry-weather screenings should not be included in the complaint because they occurred more than five years before the notice of intent to sue, which means the statute of limitations had run. The court determined this to be irrelevant since the screenings show that the ham is continuous and no remedy has been implemented. Due to the continuous nature of the harm, it was immaterial when these screenings occurred.

Conclusion and Implications

This case is another example of the application of the diligent prosecution bar to commencing a citizen suit. This case also shows that allegations of past violations in a notice of intent to sue and in a complaint are not necessarily fatal to a citizen suit action if the violations are also alleged to be ongoing.
(Anya Kwan, Rebecca Andrews)

WASHINGTON STATE SUPREME COURT INVALIDATES ANOTHER DEPARTMENT OF ECOLOGY RULE

Association of Washington Business, et al. v State of Washington, Department of Ecology, Case No. 95885-8 (Wash. Jan. 16, 2020).

We frequently cover rules promulgated by the Washington State Department of Ecology (Ecology) in terms of their water regulatory authority. In recent months the Washington State Supreme Court has utilized its legal authority to overturn actions by Ecology—demonstrating the Court's willingness to proactively oversee the limits of agency deference. It is therefore of interest to the water bar when the Court intervenes in this manner in any context—this time, in a narrow 5-4 decision, the Washington Supreme Court rejected Ecology's attempt to reduce greenhouse gas emissions in Washington through emission standards on natural gas and petroleum product producers and importers as outside of the authority granted by the legislature. While the court declared man-made climate change real and recognized that dramatic steps are required, the court still ruled in favor of business interests finding that Ecology does not have the authority to reach back up the supply chain to set emission standards on those who distribute the means to emit but do not actually emit themselves.

Background

Washington adopted its own Clean Air Act in 1967 (CAA). Ch. 70.94 RCW. The CAA as amended seeks to protect air quality through regulation of outdoor air pollution. The CAA delegates authorities to the Department of Ecology and regional air pollution control entities. Over time, the emphasis moved from controlling air pollution to an increasing focus on greenhouse gas emissions with the adoption of the Limiting Greenhouse Gas Emissions Act (GGEA) in 2008. Ch. 70.235 RCW. Under the GGEA, Ecology was to develop a greenhouse gas reduction plan, and implement the plan but within the confines of existing statutory authority. Ecology finally adopted the Clean Air Rule in furtherance of the GGEA in 2016. Ch. 173-442 WAC. Those are the regulations under review in the case.

A large portion of the greenhouse gas emissions in Washington come from the burning of petroleum and natural gas for automobiles and other uses of fuels which are otherwise outside of the Ecology ability to regulate as direct emitters. Under the Clean Air Rule, Ecology established green house gas emission standards for: 1) certain stationary sources, e.g. direct emitters; 2) petroleum product producers and importers; and 3) natural gas distributors. WAC 173-442-010. For those required to reduce their emissions, the rule provides three major pathways: 1) by reducing the actual emissions (for direct emitters); 2) by "undertaking recognized projects, programs, or activities that reduce emissions in real, specific, quantifiable, permanent, and verifiable ways"; or 3) purchase emission reduction units from market sources. WAC 173-442-110. Since the fuel and gas entities regulated by this rule are not direct emitters, they are limited to either undertaking projects elsewhere to offset the emissions cause by their products or buying credits from projects funded elsewhere.

Procedural History

Ecology adopted the rule in question in 2016. Consolidated petitions were filed by the Association of Washington Business together with several other trade organizations and by several natural gas distributers, seeking review of the rule under the Administrative Procedure Act as outside Ecology's authority. The Washington Environmental Council and other environmental groups filed for intervener status. The trial court ruled Ecology acted outside its authority and invalidated the rule as whole. The Washington Supreme Court granted direct review. Also invalidating the rule as it applies to those entities which are not direct emitters but allowing the rule to stand as against stationary sources.

The Supreme Court's Decision

Despite the sweeping directive address man-made climate change through development of a greenhouse gas reduction plan, the legislature has repeatedly failed to adopt any form of a cap and trade legislation which would have expressly authorized Ecology to regulate indirect emitters. This left Ecology with the authority to regulate emissions through the adoption of emission standards, but according to the court, those emission standards can only be applied against those who actually emit air pollutants. In focusing on who Ecology may regulate (direct emitters) instead of what Ecology may regulate (greenhouse gas emissions), the Court found Ecology's rule as it applies to indirect emitters to be outside the authority granted by the legislature. The Court reached this conclusion by determining that an "emission standards" is the same as an "emission limitation", and that a limitation can only be applied again those who are emitting, not those that control the means to emit. According to the court, "[f]orcing businesses to internalize the environmental costs of their customers' actions may indirectly help limit the aggregate concentrations of greenhouse gases in the atmosphere, but it does not actually regulate the release of those contaminants. "

Conclusion and Implications

The narrow decision leaves the Washington State Department of Ecology with limited means to lower emissions generally through offsets and places greater emphasis on direct emitters, which provides fewer of the inputs but without additional legislation, may now be subject to greater restrictions. Ecology's rule was an attempt to reach upstream in the supply chain though regulation of the fuel sources, costs which would be passed to those using the fuels, and which were expected to provide greater benefits. With the Court's rejection of Ecology's attempt to reach direct emitters in this manner, the goals laid out in the 2008 Act will be further delayed putting the play back in the lap of the legislature to revisit. The Court's decision also demonstrates a willingness on the Court's part to intervene in review of Ecology's rulemaking authority, whether in the context or water, or in this case, greenhouse gas air emissions.
(Jamie Morin)

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