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WWL

WESTERN WATER NEWS

COLORADO WATER LEADERS WORKING TOWARDS DEMAND MANAGEMENT PROGRAMS

The Colorado Water Conservation Board (CWCB) recently hosted a two-day forum in its ongoing Demand Management Feasibility Investigation. The March 4-5, 2020 meeting was a joint event combining the Interbasin Compact Committee (IBCC) and all eight Demand Management Workgroups. The various groups used this meeting to reflect on past discussions and analyze the challenges and benefits they foresee if Colorado were to implement a temporary, voluntary, compensated demand management program.

Interbasin Compact Committee

The IBCC is a 27-member committee established to facilitate conversations between Colorado's river basins. The committee includes two members appointed by each of the nine basin roundtables. There are six additional members appointed by the Governor who are directed to come from "geographically diverse parts of the state" and have expertise in a wide variety of subject matters including environmental, recreational, and agricultural issues. The final three members include one person appointed by each of the chairpersons of the Colorado Senate Agricultural Committee and the Colorado House Agricultural Committee, as well as a Director of Compact Negotiations who is appointed by the Governor and chairs the IBCC. The IBCC was established in 2005 by the Colorado Water for the 21st Century Act, and works on a broad level to encourage dialogue on water issues, expand the number of stakeholders participating in water decisions, and incorporate the basin roundtable discussions and decisions, all with an eye on state-level water issues including compliance with the Colorado River Compact.

Basin Roundtables

Although, for the purposes of water rights administration, Colorado has seven water divisions based on the main river systems, there are nine basin roundtables. These roundtables include the South Platte, Arkansas, Metro, North Platte, Rio Grande, Gunnison, Colorado, Yampa/White, and San Juan/Dolores, also called the Southwest Basin. The Metro (Denver) and North Platte basins are absorbed and not separate areas for Colorado water rights administration. In total, the Basin Roundtables include more than 300 Coloradoans, made up of designated members, ten at-large members, non-voting members, agency liaisons, and a CWCB Board member for each basin.

Demand Management Investigation

In 2019 the CWCB issued a Work Plan for Intrastate Demand Management Feasibility Investigations that directed the IBCC and Basin Roundtables to begin investigating what a Colorado demand management program would look like and how it would operate. For that purpose, demand management is narrowly defined as:

> . . .the concept of temporary, voluntary, and compensated reductions in the consumptive use of water in the Colorado River Basin. Any water saved would only be used to ensure compact compliance and to protect the state's water users from involuntary curtailment of uses.

To lead this investigation, eight Demand Management Workgroups were created:

- Administration & Accounting
- Agricultural Impacts
- Economic & Local Government
- Education & Outreach
- Environmental Considerations
- Funding

- Law & Policy
- Monitoring & Verification

The workgroups are more fully discussed, as directed under the 2019 Work Plan, below.

Administration and Accounting

The primary goal of this group is to research and test various methods to 1) assist in administering water rights as a result of demand management activities within Colorado; and 2) account for the volume of conserved water as it is transported and stored. The Administration & Accounting group specifically focuses on actions and practices that may incentivize or obstruct participation in each basin. This is an important approach, because the program that might work in the Metro (Denver) Basin might fail in the more rural and agricultural Colorado Basin, or vice versa.

Economic and Local Government/Funding

These two groups are tasked with analyzing two sides of the same coin: how much money will it cost, in terms of actual dollars, and how much will it cost, in terms of economic impacts, to implement a demand management program? The Economic and Local Government Workgroup specifically is looking at both short- and long-term economic impacts for communities in which a demand management program is implemented. For example, if a group of farmers in a certain area all participate in a demand management program, they will be compensated and therefore, in theory, are in the same economic position they would have been had they farmed their fields as normal. However, other agricultural adjacent businesses in the community—such as elevators and implement dealers and servicers—could experience adverse economic impacts. These groups are attempting to quantify possible outcomes, as well as how plans could be tailored to incentivize or obstruct participation in various basins.

Education and Outreach

Although the purpose of this group is self-explanatory, it is nevertheless critical. Any demand management program, no matter how artfully designed, will not work without participation. Because any program will necessarily be voluntary, getting community buy-in is essential. As discussed above, Colorado is an extremely diverse state—geographically, economically, and politically—so a demand management program, or programs, that can adapt to meet the needs of different water users is necessary to ensure such a program's success.

Environmental Considerations

This workgroup is tasked with researching, testing, and identifying potential negative outcomes associated with the implementation of a demand management program. Specifically, although allowing water to stay in the stream seems like an environmental benefit, there could be issues stemming from delayed return flows and other timing and use issues. At the risk of sounding like a broken record, this group is also analyzing how programs could be structured in different basins to ensure environmental protection.

Monitoring and Verification/ Law and Policy

These two groups are reviewing and researching the legality and feasibility of implementing a demand management program. The groups are interconnected in that, because of Colorado's priority system, the measuring of water rights is critical to ensure legal diversions by water users. The monitoring group in particular is tasked with developing and testing methods to quantify and verify the exact volumes of water conserved, including where and how that water will be stored. The law and policy group is then analyzing the complex landscape of water statutes and regulations, both in Colorado and federally. Specifically, the law group's goals are: 1) to help inform the legal and policy questions raised by other workgroups as they investigate specific elements of demand management feasibility within Colorado; and 2) to assist in developing reporting and educational materials.

The 'Next Step'

The March 4-5, 2020 meeting was "the next step in sharing ideas for Colorado's water future, and positioning [the] state as a national leader for cooperative problems solving," according to CWCB Director Rebecca Mitchell in a statement. The entire investigation is part of a larger effort between the Colorado River Upper Basin States to reach a drought protection agreement. If agreed to, this agreement

would result in Colorado, Utah, Wyoming, and New Mexico banking as much as 500,000 acre-feet of water in a Lake Powell "drought pool" to protect against a future Compact call. Although the drought pool was authorized by Congress last year, as part of the Colorado River Drought Contingency Plan, the states have yet to come to an agreement. This Feasibility Investigation is Colorado's effort to determine if the state should join the plan and, if so, how to do it in such a way as to not disproportionately affect any one region or basin within the state. In particular, Colorado could be called upon to contribute as much as 250,000 acre-feet, fully half of the drought pool. Russell George, Director of the IBCC, said at the conference, "It's understood that we have to be fair about this and we have to share [the burden] or it won't work." Smith, Jerd. "Colorado River drought study advances as participants call for fairness between cities, ranches." *Water Education Colorado*, March 11, 2020.

Conclusion and Implications

All participants, from the IBCC to the roundtables to the CWCB, agreed that the meeting was a success and a great step forward. However, any final plan would likely have to be approved by the Colorado General Assembly as part of the Colorado Water Plan. There is no set meeting for all workgroups to reconvene on the books at this time—the Environmental Considerations Workgroup had a follow-up meeting scheduled for May 7, 2020 in Frisco, although the Colorado Department of Natural Resources recently ordered that all meetings be held remotely for the foreseeable future due to ongoing concerns from COVID-19. The various workgroups are still, however, continuing to conduct their studies and analyses. By taking the initiative on demand management feasibility and operation, Colorado is looking to not only provide for the water future of its citizens, but to be a national leader in forward-thinking water policy. (John Sittler, Paul Noto)

LEGISLATIVE DEVELOPMENTS

WASHINGTON STATE LEGISLATIVE RECAP OF WATER RELATED BILLS

Washington State operates on a biannual budget cycle, but the state Legislature meets annually, convening in early January of each year. Odd years are budget years, with a longer (105 day) session; even years have short sessions (60 day) sessions. In this session, one bill passed.

Background

Water bills made a surprise early showing this legislative session. Of particular interest was the regulation of "water banking" in Washington. Water banking has increasingly become the mechanism of choice to meet growing and changing water demands in Washington. With much of the state closed to new appropriations and increasing focus on instream flows protections being adopted by regulation for the benefit of endangered resident and anadromous fish species, water banking has become the tool of choice to mitigate for new water withdrawals.

After a *Seattle Times* article in the fall describing the scope and prevalence of water banking activities, a number of bills were introduced with various proposals to modify the existing water code in various forms. This included Governor request legislation which sought a wholesale "clean up" of the water banking statutes.

Washington's 'Trust Water Program'

The Water Banking provisions in Washington built upon the state's Trust Water Program. The Trust Water Program started in one basin in 1989 as a way to protect conserved water from relinquishment, and subsequently expanded statewide. Under the Trust Water Program, vested water rights can be changed for their historic out of stream beneficial use, to remain instream. As instream rights, these are protected from relinquishment or abandonment. In 2003, the Trust Program was expanded to allow for donations into the Trust Water Program. Those donations may be used to provide mitigation for new or existing uses that might otherwise impair other issues, including instream flows. Water banks have been set up around the state. The *Seattle Times* article brought to forefront that some of these banks are using mitigation from region of the state, to allow for economic development far downstream.

Water Related Bills

The bills ranged in scope from outright prohibits, to new tests for "community interest", and various levels in between. Ultimately, a short session does not allow enough time to work through the nuances of changing the water code. Despite more than 30 bills being introduced affecting the water code, only one of the "water bills" passed and none of the water banking bills passed. While there was talk through the end of session that there may be a budget proviso to require further study, even that ultimately fell by the wayside.

In response the legislative interest, the Department of Ecology has formed an "Advisory Group on Water Trust, Banking, and Transfers." The plan is for Ecology to convene an advisory group to discuss these topics through a series of meetings in the spring and summer, culminating in findings and recommendations to the Legislature in the fall. The first Advisory Group meeting is scheduled for April 16, 2020, in Yakima, Washington, however the date and format is subject modification due to the Covid-19 crisis.

Another hotly debated bill also died, but not before passing through the house of origin. Senate Bill 6278 would have effectively banned water right applications for new surface water withdrawals for the commercial production of bottled water as detrimental to the public welfare and the public interest. If this had passed, it would have been the first instance of an otherwise beneficial uses being prohibited. Washington has a long history of a lengthy list of allowed beneficial uses, which have survived steadfastly without prioritizing. All beneficial uses in Washington are allowed without preference as to one over the other. This bill is expected to return in 2021.

The one water bill to pass was a carryover from the previous session. Engrossed Substitute House Bill 1622 authorizes the Department of Ecology to issue a

drought advisory when it appears that drought conditions may develop and further develops the Agency's obligation and authorities in response to drought.

Conclusion and Implications

One water bill passed the legislative session—House Bill 1622—which addresses drought. Other bills were not so successful. Perhaps the state's relatively short session was the reason other bills died. One thing is for sure: Water supply remains a key issue in the state and undoubtedly, more water related bills will materialize in the coming legislative session. (Jamie Morin)

REGULATORY DEVELOPMENTS

CALIFORNIA FISH AND GAME COMMISSION ADOPTS NEW STRIPED BASS POLICY FOR THE DELTA

In late February 2020, the California Fish and Game Commission (Commission) voted unanimously to adopt an amended striped bass policy for the Sacramento-San Joaquin Delta. Striped bass are non-native species that have established a presence in the Delta beginning in the late 1800s. The new policy eliminates a specific population objective for striped bass, but also states a commitment to sustaining the striped bass fishery within the Delta.

Background

Striped bass were introduced into the Sacramento-San Joaquin Delta (Delta) in the late 1800s. Commercial fishing of striped bass was outlawed in 1935. Between the mid- 1970s and 1990s, populations of the non-native striped bass in the Delta plummeted from over 2 million fish (estimated) to less than 700,000. To improve the population, in 1981 the California Legislature established the Striped Bass Management Program. However, the program was eliminated in the early 2000s. According to a Senate Floor Analysis for a pertinent bill from 2003:

> Striped bass populations have been steadily increasing. In fact, they have reached a point where predatory striped bass, an introduced species, are becoming a problem in recovering certain native species of fish. (Senate Floor Analysis, SB 692 (2003), p. 2.)

Indeed, trawl survey data indicate that striped bass populations have substantially increased in the last ten years, though they are still not near the abundance levels seen in the 1970s and prior years. Some estimates put the number of striped bass in the Delta at or below 300,000.

In 1996, the Commission adopted a striped bass policy that set a long-term population restoration goal of 3 million adult striped bass within the Delta. The Commission set a five to ten year goal of 1.1 million adults, reflective of the striped bass population in 1980. The Commission identified several means of achieving its population targets, including helping to maintain, restore, and improve habitat, pen-rearing fish salvaged from water project fish screens, and artificial propagation. Additionally, Commission regulations continued to provide for a take limit of two striped bass, with a general 18-inch length limit, unless an exception applies. (CCR, tit. 14, § 5.75.)

In 2016, the Commission received a regulation change petition from a local interest group called the Coalition for a Sustainable Delta, among others, requesting an increase in the bag limit and a reduction of the minimum size limit from striped bass in the Delta. According to the petition, the purpose of the regulatory change would be to reduce predation by striped bass, as well as black bass, on fish native to the Delta and listed as threatened or endangered under the federal or California Endangered Species Acts. These threatened or endangered species include winter-run and spring-run chinook salmon, Central Valley steelhead, and Delta smelt. Negative impacts on threatened or endangered species can, according to the petition, affect water deliveries from the Delta to local water users as well as water users elsewhere in the state.

Despite the petition later being withdrawn, the Commission requested that the Wildlife Resource Committee (WRC), operating within the Commission, begin reviewing the existing striped bass policy adopted in 1996. More broadly, an effort to review existing policy and to potentially adopt a new policy concerning fisheries management in the Delta has been in progress since 2017. Following public stakeholder meetings and discussions, including with representatives from the Coalition for a Sustainable Delta, an initial draft fisheries policy emerged that became the subject of stakeholder and Commission discussion leading up to the Commission adopting its newest striped bass policy.

Policy Options

In early 2020, the Commission held a meeting with the California Department of Fish and Wildlife and stakeholder groups representing fishing and water interests to discuss three striped bass policy options that were presented to the Commission in December 2019. The three options were comprised of two stakeholder options and one Commission staff option. According to the Commission, discussion focused primarily on whether a specific numeric population target for striped bass was appropriately included in a revised striped bass policy. Ultimately, the Commission voted unanimously to adopt an amended policy that did not include a specific numeric target, and instead aimed to "monitor and manage" the striped bass fishery in the Delta.

Points of Agreement

Prior to the Commission's adoption of the revised striped bass policy, the Commission and sport fishing industry stakeholders reached several points of agreement related to the importance of a striped bass fishery in the Delta. In particular, stakeholders and the Commission agreed that a new policy should include ensuring a robust recreational fishery or maintaining/increasing striped bass recreational angling opportunities. However, stakeholders and the Commission also agreed that the 1996 policy's objective of achieving a striped bass population of 3 million was likely unrealistic given the current state of the Delta, and that pen-rearing and artificial propagation would likely be unsuccessful in light of past efforts using those methods, which were not successful in reversing fish declines. Moreover, pen-rearing is not a practice employed by the Department of Fish and Wildlife in inland waters. Nonetheless, stakeholders and the Commission agreed that activities designed to support striped bass, such as habitat improvement, controlling invasive aquatic vegetation, improving water quality, reducing striped bass loss, and monitoring populations of striped bass should be included in the policy.

Point of Disagreement—Numeric Targets

The primary point of disagreement between the Commission and stakeholders was setting a numeric target for the striped bass population in the Delta. From the Commission's perspective, identifying a specific numeric target would not lead to a different result compared to striped bass population numbers over the past few decades, when a specific numeric target was in place. Instead, according to the Commission, the striped bass population in the Delta would depend on management actions aligned with policy-based guidelines, as well as third party and stakeholder relationships. Generally, the Commission adopted the view that many Department of Fish and Wildlife projects that help restore the Delta ecosystem also benefit striped bass, including by focusing on benefits to native species. Accordingly, given limited resources available to the Department of Fish and Wildlife, the Commission contended that resources should be devoted to native species, as opposed to restoring numerically defined striped bass populations in the Delta.

Fishing industry stakeholders advocated for specific numeric targets, typically around 1 million striped bass in the Delta. Many stakeholders contended that a specific numeric population figure would help make the Commission's policy concrete and measurable. Additionally, academic support was offered for maintaining striped bass populations in the Delta due to the bass' long-term presence in the Delta, despite its introduction as a non-native species. In particular, striped bass populations can be used to evaluate the health of the estuarine ecosystem of the Delta, because the bass spend each of their life stages within the Delta and typically parallel salmon and smelt population increases or declines. Nonetheless, the Commission adopted a policy that does not provide a specific population target, but does commit to maintaining the striped bass fishery in the Delta.

Conclusion and Implications

Without a specific numeric population figure for striped bass in the Delta, some stakeholders may believe the Commission's policy could lead to a decline in striped bass populations. At the same time, however, if the Commission is correct that general improvements to Delta ecosystems and habitat that benefit other species may also benefit the striped bass, the species could experience some level of stability or even increase. Only time will tell how the Commission's new striped bass policy will affect population numbers in the Delta. The Striped Bass Policy is available online at: https://fgc.ca.gov/About/Policies/Fisheries#StripedBass.
(Miles B. H. Krieger, Steve Anderson)

IDAHO DEPARTMENT OF HEALTH ISSUES SHELTER-IN-PLACE ORDER—WHERE DO STATE IRRIGATION WATER ENTITIES STAND DURING THE COVID-19 PANDEMIC?

At the risk of Covid-19 news reporting fatigue, there is no question the ongoing pandemic is touching all aspects of people's lives and livelihoods. Many states have issued shelter-in-place orders (or stay-at-home orders) effectively shuttering wide swaths of the economy, and in states where such orders do not exist many counties and cities have issued their own orders filling the void. On March 25, 2020, the State of Idaho, Department of Health and Welfare, issued a statewide "Order of the Director—Order to Self-Isolate" (Order) urging Idahoans to stay home except for "essential" businesses and services. This, in turn, is yielding an interesting sociological experiment regarding the subjectivity surrounding one's definition of "essential." Regardless, there is no question that the delivery and drainage of irrigation water are "essential" services.

Different Entities, Different Standards?

In Idaho, like many other western states, irrigation water delivery and drainage functions are performed by private corporations (non-profit, share-based canal and ditch companies) and (typically) larger irrigation and drainage districts (which are hybrid, quasi-municipal corporations exercising a variety of governmental functions and authorities). Under Idaho's Order, both types of entity are deemed "essential" in terms of operating and maintaining "Essential Infrastructure" and operating as an "Essential Business."

The Order defines "Essential Infrastructure" to include the "operations and maintenance of . . . water . . . systems," among a variety of other systems and services. Order §8.c. The Order defines an "Essential Business," in part, as including businesses and operations directly performing or supporting/supplying "food cultivation and production, including farming, livestock, fishing, and food processing." Order §§ 8.f.iii and 8.f.xvi. Irrigation and drainage entities do both of these things.

Irrigation Entities

Beyond the definitions of the Order, irrigation entities are statutorily obligated to function for the benefit of their landowners (in a district) or shareholders (in a company). For example, Idaho Code § 42-1201 requires "every person, company or corporation owning or controlling any ditch . . . for the purpose of irrigation . . . to keep a flow of water therein sufficient to the requirements of such persons as are properly entitled to the use of water therefrom" between April 1 and November 1, subject to seasonal start and end date discretion of entity governing boards. Idaho Code § 42-1202 requires that such ditches be maintained during the non-irrigation season in a manner readying them for the irrigation season. And, Idaho Code §§ 42-1203 and 42-1204 require irrigation ditch owners and operators to actively manage the ditch systems so as not to "damage or in any way injure the property or premises of others." These statutory duties and obligations remain regardless of the contents of the Order (particularly when the Order is otherwise silent concerning the same).

Finally, irrigation districts and drainage districts are further "essential" given their quasi-governmental-form and function. The Order makes clear that "Essential Government Functions" are to continue in the interests of providing for the health, safety, and welfare of the public. Prior to issuing the Order, the Governor's Office issued a Proclamation on March 18, 2020 relaxing the provisions of Idaho's open meeting laws (which irrigation and drainage districts are subject to) because "government agencies and boards need to continue operate, make decisions, and ensure the continuity of services to the people of Idaho during the declared emergency." Among the governmental functions of irrigation district are, for example, the statutory requirements to conduct monthly meetings and "do any and every lawful act necessary to be done that sufficient water may be furnished to the lands in the district for irrigation purposes." Idaho Code §§ 43-303 and 43-304.

Conclusion and Implications

While there are some limited exceptions in highly urbanized areas, the vast majority of Idaho irrigation and drainage entities support production agriculture and all entities operate and maintain water systems. Nonetheless, and out of an abundance of caution, the

Idaho Water Users Association expressly inquired of the Governor's office whether irrigation water delivery and drainage entities—no matter private corporation or quasi-municipal district—were deemed "essential" under the Order. Not surprisingly, the Governor's Office responded affirmatively. Consequently, the Order does not shut down irrigation or drainage entity services and those services (thankfully) continue during these trying times.

If you happen across an employee of your local irrigation and/or drainage entity discharging their duties, please tip your cap to them (with at least six-feet of separation between you) and thank them for doing so. Irrigation and drainage are, in this author's opinion at least, vital services that help provide at least one avenue of normalcy during these anything-but-normal times.
(Andrew J. Waldera)

OREGON DEPARTMENT OF LAND CONSERVATION DETERMINES ENERGY PROJECT AND GAS PIPELINE ARE INCONSISTENT WITH THE STATE'S COASTAL MANAGEMENT PROGRAM

On February 19, 2020, the Oregon Department of Land Conservation and Development (DLCD) issued a negative determination regarding the proposed Jordan Cove Energy Project and Pacific Connector Gas Pipeline's (Project) consistency with the Oregon Coastal Management Program, which implements the Coastal Zone Management Act.

DLCD's decision represents the latest in a series of permit challenges the Project has faced. For example, in late 2018 we covered *Coos Waterkeeper v. Port of Coos Bay Oregon*, 363 Or. 354 (2018), in which the Oregon Supreme Court upheld the Oregon Department of State Lands' issuance of a removal fill permit to the Port of Coos Bay for the construction of the marine terminal associated with the Project. In July 2019, we covered the Oregon Department of Environmental Quality's (DEQ) denial of water quality certification for the Project.

Project Overview

The Project proponent is Pembina Pipeline Corp., a Canadian energy company. The proposed export terminal would be located on the North Spit of Coos Bay in Coos County, Oregon. Facilities would include a slip and access channel, modifications to the federal navigational channel, a marine terminal, a natural gas conditioning and liquefaction facility, operations buildings, and wetland mitigation sites. The terminal would be served by the proposed 229-mile Pacific Connector pipeline that would connect to existing interconnections in Klamath County, Oregon. The pipeline could transport up to 1.2 billion cubic feet of natural gas per day. The Project is expected to cost $10 billion and could enter service as early as 2025.

Coastal Zone Management Act

Under the federal Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451 *et seq.*, states develop Coastal Management Programs to manage their coastal zones. The CZMA requires that:

> . . .[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone… be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. 16 U.S.C. § 1456(c)(1)(A).

The process by which states review federal agency activities within the coastal zone is referred to as "consistency review."

Oregon's Coastal Management Plan

Oregon's Coastal Management Plan (OCMP) was federally approved in 1977. DLCD is Oregon's designated coastal management agency and is responsible for implementing the OCMP and conducting consistency reviews.

To be consistent with the OCMP, a proposed project must comply with enforceable policies contained in: 1) the statewide land use planning goals; 2) the applicable acknowledged city or county comprehen-

sive plans and land use regulations; and 3) selected state authorities, such as those governing removal-fill, water quality, and fish and wildlife protections.

DLCD's Coastal Effects Analysis

DLCD's decision begins with the agency's coastal effects analysis. Coastal effects are any reasonably foreseeable direct or indirect effects on any coastal use or resource resulting from a federal agency activity or federal license or permit activity. DLCD's coastal effects analysis covers five categories: natural resources, recreation and access, cultural resources, aesthetic resources, and economic resources. DLCD surveyed numerous adverse effects of the Project on these resources, including:

- Dredging approximately 18 million cubic yards of material from the estuary would increase turbidity and expose contaminated sediments;
- Disturbance to marine mammals such as sea lions and seals;
- Habitat impacts on threatened species like the western snowy plover, marbled murrelet, and northern spotted owl;
- Air pollution caused by transport, storage, and liquification of natural gas
  Impacts to public water recreation;
- Impacts to tribal food sources and culturally significant landscapes;
- Light and noise pollution.

After analyzing these effects and considering public comments, DLCD concluded "that the coastal adverse effects from the project will be significant and undermine the vision set forth by the OCMP."

DLCD's Enforceable Policies Analysis

DLCD then explained why the proposed Project and its coastal effects are inconsistent with specific enforceable policies listed the OCMP. A key reason for DLCD's decision was that Pembina has not obtained, and in some cases, has not applied for, required state permits and authorizations. For example, DEQ denied Pembina's application for state water quality certification that is required by the federal Clean Water Act. DLCD administrative rules provide that issued state permits or authorizations are the only acceptable evidence demonstrating consistency with the enforceable policies that the permit or authorization covers. Without a final permit or authorization, the Project cannot be shown to be consistent with the OCMP.

Pembina may yet prevail. The U.S. Secretary of Commerce has authority to overturn a state's denial of coastal zone permit, and Pembina is awaiting a decision on its request to the Secretary.

Conclusion and Implications

The fate of the Project remains unclear. Despite Pembima's failure to secure multiple required state permits and authorizations, the Federal Energy Regulatory Commission (FERC) on March 19 conditionally approved the Project by a vote of 2-1. FERC's decision authorizes Pembina to initiate the process of eminent domain for roughly 90 private landowners in southern Oregon who have declined to sell Pembina easements for the Pacific Connector pipeline to cross their property. Oregon Governor Kate Brown vowed to "use every available tool to prevent" Pembina from proceeding with eminent domain until it secures "every single required permit from state and local agencies."
(Alexa Shasteen)

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.

Civil Enforcement Actions and Settlements—Water Quality

•February 27, 2020—The EPA has reached settlements with three Massachusetts construction companies, which ensures they will come into compliance with stormwater regulations to reduce pollution from runoff. Under the settlements, the three companies will also pay fines and follow the terms of their permits for discharging stormwater. Martelli Construction Co., developer for the Greenwood II site under construction in Holden, paid $8,400 to resolve claims it failed to comply with its stormwater permit. According to EPA, the company failed to stabilize slopes, protect stockpiles from erosion, and establish and maintain controls on its perimeter. Wall Street Development Corp., which operates the Boyden Estates site under construction in Walpole, agreed to pay a $7,020 penalty for failing to get a stormwater permit, as required under the Clean Water Act. Comfort Homes, Inc., a developer at the Wheeler Village site under construction in Dracut, agreed to pay $7,800 to resolve claims that the company failed to document inspections required by its permit. Dirt and sediment carried off construction sites can damage aquatic habitat, contribute to algal blooms and physically clog streams and pipes. EPA's stormwater permit for construction sites requires sites bigger than an acre to take steps to minimize discharges of sediment. These settlements are the latest in a series of enforcement actions taken by EPA New England to address stormwater violations from industrial facilities and construction sites around New England. These cases stem from inspections by EPA New England in the spring of 2019 at all three sites.

•February 27, 2020 - The EPA announced that Dyno Nobel, Inc. (Dyno Nobel) has reached a settlement with the United States to address violations of the Clean Water Act and the Resource Conservation and Recovery Act at Dyno Nobel's explosives manufacturing facility in Carthage, Missouri and its ammonium nitrate facility in Louisiana, Missouri. As part of the settlement, Dyno Nobel has agreed to make extensive improvements to those facilities that will prevent future releases and discharges of explosives, nitrogen, and other pollutants, ultimately reducing pollution levels in Center Creek (adjoining the Carthage facility) and the Mississippi River (adjoining the Louisiana facility). The controls embodied in the settlement will result in the reduction of over 3,800,000 pounds per year of nitrogen, nearly 257,000 pounds per year of heavy metals such as zinc, aluminum and iron, nearly 187,000 pounds per year of oxygen demanding material and 103,500 pounds per year of suspended solids entering Missouri waterways. Dyno Nobel will also pay a civil penalty of $2,900,000 to the United States. The settlement resolves water pollution and hazardous waste claims brought by the United States in a lawsuit filed in April 2019. In that lawsuit, the United States alleged that Dyno Nobel violated the Clean Water Act at both facilities by discharging pollutants such as ammonia, nitrate, pH, Total Suspended Solids, Biochemical Oxygen Demand, E. coli, and Nitroglycerin into Center Creek and the Mississippi River in amounts that exceeded the facilities' permitted limits; failing to properly sample and monitor discharges; and failing to appropriately manage stormwater. Additionally, Dyno Nobel violated the Clean Water Act by discharging wastewater at the Carthage facility into Center Creek that included unauthorized explosives and zinc in toxic levels. The United States also alleged that Dyno Nobel violated the Resource Conservation and Recovery Act by disposing of hazardous waste (including explosives) at both facilities without a permit, and at the Carthage facility, by failing to meet requirements for the generation and transporta-

tion of hazardous waste. The consent decree requires Dyno Nobel to develop and revise pollution controls at both facilities to prevent unauthorized discharges of pollutants, and to investigate sources of contamination.

•March 4, 2020 - Two Massachusetts companies have agreed to come into compliance with federal regulations meant to prevent oil pollution under settlement with the EPA. The companies have both created oil spill prevention plans, helping ensure that the environment in the communities where they operate is better protected from damaging oil spills. Under to the agreements with EPA, the companies—Lawrence Lynch Corp. of Falmouth and Fed Corp. of Dedham—will each pay $3,000 penalties. The companies also agreed to quickly correct violations of the Oil Pollution Prevention regulations under the federal Clean Water Act. These companies have oil storage capacity in quantities large enough that they are required by the federal regulations to put in place Spill Prevention, Control and Countermeasure plans to prevent spills and to minimize damage from oil spills. Federal oil spill prevention, control, and countermeasure rules provide requirements for businesses that store oil and prevent oil discharges that can affect nearby water resources. The cases include the following: 1) Lawrence Lynch Corp. agreed to pay a $3,000 penalty and address violations of the Oil Pollution Prevention regulations at its asphalt and paving manufacturing facility. The company agreed to submit an amended spill prevention plan that addresses deficiencies identified in a September 2019 inspection by EPA. The plan will include a schedule that includes constructing any necessary containment, such as asphalt cement tanks. 2) Fed Corp. agreed to pay a $3,000 penalty and correct violations of the Oil Pollution Prevention regulations by preparing a spill prevention plan that it then submitted to EPA in August 2019. Fed Corp. is a general contractor with a focus on underground utility installation, site preparation, and roadway construction for public agencies and municipalities in Massachusetts.

•March 9, 2020 - The EPA will take enforcement actions on the Big Island to bring about the closure of a dozen pollution-causing large-capacity cesspools (LCCs) and charge $144,696 in fines. Under the Safe Drinking Water Act, EPA banned large-capacity cesspools in 2005. EPA inspectors identified multi-unit residential buildings illegally discharging wastewater into eleven cesspools in Kealakekua, Hawaii. The cesspools will be replaced with compliant systems. The owner, K. Oue, Limited, has agreed to pay a $88,545 penalty and close all eleven LCCs. In addition, in Kailua-Kona the Group Investments LLC failed to close a cesspool at a building that the company owns and leases to tenants Sherwin Williams and B. Hayman Co. Services. The LCC will be replaced with a compliant system. Group Investments has agreed to pay a $56,151 penalty and close the LCC. Since 2005's LCC ban, more than 3,400 of the cesspools have been closed statewide; however, many hundreds remain in operation. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. Groundwater provides 95 percent of all domestic water in Hawaii, where cesspools are used more widely than in any other state. In 2017, the State of Hawaii passed Act 125, which requires the replacement of all cesspools by 2050. It is estimated that there are approximately 90,000 cesspools in Hawaii.

•March 13, 2020—Federal officials announced a civil settlement with Plains All American Pipeline L.P. and Plains Pipeline L.P. (Plains) arising out of Plains' violations of the federal pipeline safety laws and liability for the May 19, 2015, discharge of approximately 2,934 barrels of crude oil from Plains' Line 901 immediately north of Refugio State Beach, located near Santa Barbara, California. The discharge was caused by Plains' failure to address external corrosion and have adequate control-room procedures in place, and was further exacerbated by Plains' failure to respond properly to the release. The crude oil discharge resulted in the oiling of Refugio State Beach, the Pacific Ocean, and other shorelines and beaches, resulted in beach and fishing closures and adversely impacted natural resources such as birds, fish, marine mammals and shoreline and subtidal habitat. The United States worked closely with co-plaintiff the state of California, and both the United States and California are signatories to the complaint and the consent decree. The complaint seeks injunctive relief, penalties, natural resource damages and assessment costs, and response costs for the United States,

on behalf of the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration; the U.S. Environmental Protection Agency; the U.S. Department of the Interior; the Department of Commerce, National Oceanic and Atmospheric Administration and the U.S. Coast Guard. The United States' claims are under the federal pipeline safety laws, the Clean Water Act, and the Oil Pollution Act of 1990. The settlement requires Plains to implement injunctive relief to improve Plains' nationwide pipeline system and bring it into compliance with the federal pipeline safety laws, in addition to addressing unique threats and modifying operations that caused the Line 901 oil spill; pay $24 million in penalties; pay $22.325 million in natural resource damages, and $10 million for reimbursed natural resource damage assessment costs; and pay $4.26 million for reimbursed Coast Guard clean-up costs. Excluding the value of the required injunctive relief changes to Plains' national operations, the settlement in conjunction with reimbursed costs is valued in excess of $60 million.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•March 10, 2020 - The EPA announced a settlement with Wilbur-Ellis for the improper storage, labeling and containment of bulk agricultural pesticides at its facilities in Willows, Helm and El Nido, California, and Farmington, New Mexico. The firm, a pesticide re-packager and distributor, has corrected all identified compliance issues and agreed to a systematic evaluation of the company's overall compliance system and subsequent firmwide implementation of improvements to its management systems, and stopped repackaging pesticides altogether at three of the four facilities. In addition, the company will pay $73,372 in civil penalties. The violations were discovered through a series of inspections conducted by the Navajo Nation Environmental Protection Agency and the California Department of Pesticide Regulation from 2016 to 2018. Based on those inspection findings, EPA asserted Wilbur-Ellis had committed 14 violations under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which regulates the safe distribution, sale and use of pesticides in the U.S. The company failed to properly label pesticides and violated pesticide containment regulations at four of the company's facilities. Based on information gathered during the inspections, the EPA determined that Wilbur-Ellis held pesticides for sale in bulk containers with misbranded labeling that failed to include directions for use and/or net contents, failed to maintain required recordkeeping for repackaged pesticides, failed to keep a containment pad and secondary containment unit liquid-tight, failed to have an appropriate holding capacity for its containment pad and a secondary containment unit, and failed to anchor or elevate bulk stationary pesticide containers. Each of these violations increases the risk of a pesticide release. California accounts for a quarter of all agricultural pesticides used each year in the U.S., and more than half of that amount is applied in the San Joaquin Valley alone. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) authorizes EPA to review and register pesticides for specified uses, to regulate safe storage and disposal of pesticides, and to conduct inspections and enforce pesticide requirements. FIFRA regulations help safeguard the public by ensuring that pesticides are used, stored and disposed of safely, and that pesticide containers are adequately cleaned. Pesticide registrants and refillers (*i.e.*, those that repackage pesticides into refillable containers) must comply with the regulations, while consumers are required to follow the label instructions for proper use and disposal.

Indictments, Convictions and Sentencing

•February 26, 2020 - Unix Line PTE Ltd., a Singapore-based shipping company, pleaded guilty in federal court to a violation of the Act to Prevent Pollution from Ships. Assistant Attorney General Jeffrey Bossert Clark of the Justice Department's Environment and Natural Resources Division, U.S. Attorney David L. Anderson of the Northern District of California and U.S. Coast Guard Investigative Service Special Agent in Charge Kelly S. Hoyle made the announcement. In pleading guilty, Unix Line admitted that its crew members onboard the Zao Galaxy, a 16,408 gross-ton, ocean-going motor tanker, knowingly failed to record in the vessel's oil record book the overboard discharge of oily bilge water without the use of required pollution-prevention equipment, during the vessel's voyage from the Philippines to Richmond, California. According to the plea agreement, Unix Line is the operator of the Zao Galaxy, which set sail from the Philippines on Jan. 21, 2019, heading toward Richmond, California,

carrying a cargo of palm oil. On Feb. 11, 2019, the Zao Galaxy arrived in Richmond, where it underwent a U.S. Coast Guard inspection and examination. Examiners discovered that during the voyage, a Unix Line-affiliated ship officer directed crew members to discharge oily bilge water overboard, using a configuration of drums, flexible pipes, and flanges to bypass the vessel's oil water separator. The discharges were knowingly not recorded in the Zao Galaxy's oil record book. Unix Line's sentencing hearing is scheduled for March 20 before U.S. District Court Judge Jon S. Tigar in Oakland, California. Senior Trial Attorney Kenneth Nelson of the Environmental Crimes Section, with the assistance of Kay Konopaske and Katie Turner, Assistant U.S. Attorney Katherine Lloyd-Lovett and Special Assistant U.S. Attorney Andrew Briggs of the Northern District of California are prosecuting the case. The prosecution is the result of a year-long investigation by the Coast Guard Investigative Service and the Investigations Division of Coast Guard Sector San Francisco.
(Andre Monette)

LAWSUITS FILED OR PENDING

STATE CLASS ACTION FILED CHALLENGING PUBLIC AGENCIES' RETAIL WATER RATES UNDER CALIFORNIA'S PROPOSITION 218

On February 19, 2020, a class action lawsuit challenging the retail water rates of more than 80 public agencies was filed in California Superior Court. The case, *Kessner et al v. City of Santa Clara et al.*, Case No. 20CV364054 (Santa Clara County Super. Ct.), alleges that the rates charged by each of the named entities exceed their cost of service, in violation of Proposition 218.

Background

Proposition 218 (an amendment to the California Constitution adopted by voters in 1996) imposes substantive and procedural limits on the fees that a local agency may charge for property-related services, including water service. Those constitutional limits include a directive that revenues derived from the fee must not exceed the funds required to provide the property-related service; that these revenues shall not be used for any purpose other than that for which the fee or charge was imposed; that they shall not exceed the proportional cost of the service attributable to the parcel; and that no fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. (Cal. Const. Art. XII D, Sec. 6.)

Fees for water service to a parcel are traditionally considered property-related fee subject to Proposition 218. *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 217 (2006). While public agencies have some flexibility in setting those rates, they must adhere to the basic proportionality principles outlined by the Constitution. The precise scope of what constitutes an appropriate property-related fee for water service has, however, been the source of regular litigation.

The Lawsuit Challenges Retail Water Rates Statewide

The complaint filed by Kessner *et al.* in February 2020 attacks the water rates of more than 80 public agencies from across the state of California, each of whom are named as defendants and respondents in a single "Respondent Class." It identifies specific retail customers of each agency as a plaintiff, each of whom is listed both individually as a ratepayer of the defendant agency, on behalf of "all others similarly situated" in a class of plaintiffs and petitioners unique to that respondent (the class of "Retail Customers of City of Santa Clara", for example).

Plaintiffs allege that, as a class, defendants have charged rates to their customers that exceed their cost of service, and that each defendant's water rate structure subsidizes water service provided to the government and for general governmental services, including public fire hydrant services. Plaintiffs further allege that some of the named defendants' rates as to the plaintiff's class agricultural and irrigation water rates by the same provider, effectively allowing the defendant to charge a below-cost rate to those customers at the expense of plaintiffs. In addition, certain of the defendants (referred to as the San Diego County SAWR defendants in the complaint) are members the San Diego County Water Authority, and represented on that entity's 36-member board of directors. As to those defendants, plaintiffs additionally allege that they have caused the San Diego County Water Authority, to maintain a subsidized wholesale water rate which it passes on to certain unlawfully subsidized retail accounts.

The defendant and respondent agencies named in the suit are diverse in both geography and composition: they are situated in more than twenty counties, and include cities, counties, special act districts, California water districts, irrigation districts, and public utility districts. Notwithstanding those differences, plaintiffs assert that common issues may be found among these defendants and classes, specifically "whether the California Constitution prohibits reallocation to Retail Water Customers of Subsidized Government Water Service." (Complaint, ¶ 185.) As to each class of retail customers, the complaint

indicates that it will ask the court to address "whether the defendant Retail Water Provider unlawfully reallocated costs of service to its Retail Water Customers, and the amount of unlawfully reallocated costs."

Conclusion and Implications

While water rates have been the subject of Proposition 218 class actions in other contexts, the statewide, multi-agency scope of this action is unusual, and presents unique class-certification issues in this action. Plaintiffs have asked the court for declaratory and injunctive relief, as well as damages. None of the defendants has filed a formal response: responsive pleadings and discovery in the case were temporarily stayed; and a case management conference has been scheduled for June 23, 2020. The full text of the complaint, and an order deeming the case complex, are available on the Santa Clara County Superior Court's website: http://scscourt.org.
(Rebecca Smith, Meredith Nikkel)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT FINDS CERCLA COST RECOVERY CLAIM A GAINST THE FEDERAL GOVERNMENT FAILS DUE TO PREVIOUS CLEAN WATER ACT CONSENT DECREE

Government of Guam v. United States of America, ___F.3d___, Case No. 19-5131 (D.C. Cir. Feb. 14, 2020).

On February 14, 2020, the D.C. Circuit Court of Appeals determined that the government of Guam was unable to recover money from the U.S. Navy under the cost recovery sections in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court determined that CERCLA § 107(a) was inapplicable because a previous Consent Decree (Consent Decree) resulting from a federal Clean Water Act (CWA) claim resolved some of the liability. Since the liability had been resolved, only § 113(f)(3)(B) was a viable means of recovery; however, recovery was impermissible because the statute of limitations for this section had run.

Factual and Procedural Background

Between 1903 and 1950, the United States treated Guam as a US Naval ship—the "USS Guam"—and maintained military rule over the island. In the 1940s, the Navy constructed and began operating a landfill, called the Ordot Dump, where municipal and military waste was disposed. In the 1950s the United States began forming a civilian government, but even after relinquishing sovereignty, the Navy used the Ordot Dump for the disposal of munitions and chemicals, allegedly including Dichlorodiphenyltrichloroethane—DDT—and Agent Orange, throughout the Korean and Vietnam wars. Despite the dump's extensive use for both military and civilian needs, there were few environmental safeguards implemented. It was unlined at the bottom and uncapped on top which allowed the rain to mix with the chemicals and contaminate the soil and ground water.

Starting in 1986, the U.S. Environmental Protection Agency (EPA) repeatedly ordered Guam to contain the environmental impacts at Ordot Dump. In 2002, the EPA sued Guam under the CWA asserting that Guam violated the Act when water flowed from the Ordot Dump into the Lonfit River without a permit. To avoid litigation, Guam and the EPA entered into a Consent Decree in 2004, which required Guam to pay a civil penalty, close the dump, and install a cover over the dump.

In 2017, Guam initiated an action under CERCLA, asserting that the Navy was responsible for the Ordot Dump's contamination, and seeking to recover costs caused by closing the land fill and cleaning the area. Guam brought two causes of action: a CERCLA § 107(a) "cost recovery" claim seeking "removal and remediation costs" related to the landfill, and, alternatively, a § 113(f) "contribution" action.

The U.S. moved to dismiss the claims, arguing, first, that the 2004 Consent Decree resolved the United States' liability for a response action, and therefore Guam had to proceed under § 113 rather than § 107. Second, the United States argued that because CERCLA § 113 "imposes a three-year statute of limitations on contribution claims" that runs from a consent decree's entry, Guam was time-barred by the three-year statute of limitations from pursuing a § 113 contribution claim.

The U.S. District Court found that the § 107(a) claim was not barred by the Decree because it did not sufficiently resolve the liability of the Ordot Dump and denied the motion to dismiss. The United States sought interlocutory appeal of the district court's order.

The D.C. Circuit's Decision

Two CERCLA sections are at issue in this case: § 107(a) and § 113(f)(3)(B). Section 107(a) provides a cost recovery action with a six-year statute of limitations that is permissible if liability has not been resolved. Section 113(f)(3)(B) provides a contribution action available to recover paid funds from a nonparty as a result of a § 107(a) action, settlement,

or other contribution action with a three-year statute of limitations.

Cost Recovery and Contribution Claims Are Mutually Exclusive

The court first considered whether CERCLA §§ 107(a) and 113(f)(3)(B) were mutually exclusive. That is, if a party incurs costs pursuant to a settlement and therefore has a cause of action under § 113, is it precluded from seeking cost-recovery under § 107? The court reasoned that the purpose of § 113(f)(3)(B) is to allow private parties to seek contribution after they have settled their liability with the government. Allowing recoupment of costs through a § 107 cost-recovery claim would render § 113(f)(3)(B) superfluous.

Triggering Section 113(f)(3)(B) through a Non-CERCLA Claim

The court next considered whether the 2004 Consent Decree resolved Guam's liability for a response action within the meaning of § 113(f)(3)(B), thus triggering Guam's right to seek contribution and precluding it from seeking cost-recovery under § 107. In order to trigger CERCLA § 113(f)(3)(B), a party must resolve its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in a judicially approved settlement. Guam argued the 2004 Consent Decree could not qualify as a settlement under CERCLA because it settled an action brought by EPA under the CWA, not CERCLA.

The court determined that § 113(f)(3)(B) did not require a CERCLA specific settlement. Because other subsections in § 113 specifically required a CERCLA claim and 113(f)(3)(B) does not, this implied that Congress did not intend to place this restriction on the subsection when drafting CERCLA.

Consent Decree Resolves Liability

After determining that a settlement agreement under the CWA could trigger 113(f)(3)(B), the court examined the terms of the 2004 Consent Decree. The court determined that the ordinary meaning of the phrase "resolved its liability" meant that the liability must be decided in part by the agreement with the EPA. The Consent Decree required Guam to take actions against further contamination, which constituted a response action.

Guam unsuccessfully argued that the Consent Decree did not resolve liability in this context for multiple reasons. First, Guam argued that the Consent Decree did not resolve liability because it explicitly reserved the right to pursue other claims against Guam that arose from the circumstances. The court determined that complete resolution was not necessary as 113(f)(3)(B) only required some response action, which was present when Guam agreed to work to cover the Ordot Dump in the Consent Decree.

Second, Guam argued that the Consent Decree did not trigger § 113(f)(3)(B) because liability under the decree due to ongoing performance requirements. The court rejected this argument, reasoning that such a position would produce the absurd result that Guam's cause of action under § 113 would not accrue until after the statute of limitations ran. Because this created a timing inconsistency that was impossible to resolve, the court found that Congress could not have intended for the liability to accrue only after performance had been completed.

Third, Guam argued that the disclaimer in the Consent Decree, which asserted there was no "finding or admission of liability," prevented the liability from being resolved as required by § 113(f)(3)(B). Here, the court determined that disclaimer did not overcome the substantive portions of the Consent Decree. Because the Consent Decree caused Guam to assume obligations consistent with finding liability, this was sufficient action to trigger § 113(f)(3)(B).

Fourth, Guam argued that the Consent Decree was outside of CERCLA because the document was only about violations to the CWA and "non-CERCLA pollutant discharges only." The court determined this to be irrelevant because the instructions regarding the cover asserted that the system was designed to "eliminate discharges of untreated leachate" which was an action specifically identified in CERCLA as a remedial action.

Finally, Guam argued that denying § 107(a) recovery violated the due process clause by not providing notice that the Consent Decree also triggered CERCLA. Since this argument was not raised originally in the District Court, the Circuit Court found that it was forfeited.

Conclusion and Implications

This case brought the D.C. Circuit in line with the Third, Seventh, and Ninth Circuit Courts who have ruled that § 107(a) and 113(f)(3)(B) are mutually exclusive. This case also shows that CERCLA § 113(f)(3)(B) can be triggered by actions taken by the EPA under other statutes and is triggered as soon as the settlement, not the performance, occurs. Lastly, any disclaimers or rights to take other actions reserved in a Consent Decree do not necessarily prevent § 113(f)(3)(B) from being triggered.
https://www.cadc.uscourts.gov/internet/opinions.nsf/36DBD6063D08111F8525850E00580F44/$file/19-5131-1828593.pdf
(Anya Kwan, Rebecca Andrews)

DISTRICT COURT HOLDS CLEAN WATER ACT CITIZEN SUIT ALLEGING STORMWATER DISCHARGES INTO SAN FRANCISCO BAY SURVIVES MOTION TO DISMISS

Eden Environmental Citizen's Group, LLC v. American Custom Marble, Inc., ___F.Supp.3d___, Case No. 19-CV-03424-EMC (N.D. Cal. Feb. 13, 2020).

The U.S. District Court for the Northern District of California denied defendants' motion to dismiss Eden Environmental Citizens Group's (Eden) federal Clean Water Act (CWA) complaint on the grounds of standing and personal jurisdiction. However, the court granted defendants' motion to dismiss Eden's fifth, sixth, and seventh causes for failure to implement Best Available and Best Conventional Treatment Technologies, discharges of contaminated stormwater, and failure to properly train employees, respectively. The court allowed Eden to amend its complaint to cure pleading deficiencies within 30 days because the court dismissed these causes of action without prejudice.

Background

Eden is an environmental membership group organized to protect and preserve California's waterways. Eden's mission is implemented by enforcing provisions of the CWA by seeking redress from environmental harms caused by industrial dischargers. Eden brought suit against American Custom Marble (ACM) and Patricia A. Sharp, ACM's corporate secretary and the facility's legally responsible person (collectively Defendants) for violations of the CWA. In its complaint, Eden alleged that ACM stores industrial materials in an outdoor location where the materials are vulnerable to storms and wind. As a result of this storage, Eden alleged that stormwater containing ACM's industrial materials discharged from ACM's facility into waters of the United States that drain to San Francisco Bay.

Eden filed a complaint against ACM and Ms. Sharp for violations of the CWA. Eden gave ACM proper notice, but Eden did not explicitly give notice to Ms. Sharp in her personal capacity. ACM moved to dismiss, arguing that: 1) Eden lacked standing, 2) the court lacked personal jurisdiction over Ms. Sharp because Eden failed to give her proper notice, and 3) Eden failed to state facts that support a cause of action.

The District Court's Decision

Standing

The court began by analyzing whether Eden had organizational standing. An organization may assert standing to sue on behalf of its members where: 1) its members would otherwise have standing to sue on their own, 2) the interests it seeks to protect are relevant to the organization's purposes, and 3) neither the claim nor the relief require the participation of the individual members. Here, the court found that Eden had sufficiently alleged organizational standing. Even though Eden had not included any facts about its members in its complaint, Eden cured this pleading deficiency by submitting a declaration from one of its members claiming the member used and enjoyed the watershed at issue and claiming the member had suffered harm as a result of the discharges.

The court next analyzed whether Eden had standing to bring claims predating Eden's existence, given that Eden was formed in 2018. The court determined that the key inquiry was whether Eden's harmed member would have standing to bring suit for the violations of the CWA in his own right, even if those violations predated Eden. The court found that Eden's member would in fact have standing in his own right because he had lived in the area for the full amount of time allowed by the statute of limitations. Therefore, Eden had standing to sue on its member's behalf for violations before Eden's existence.

Personal Jurisdiction Over Ms. Sharp

The court next analyzed whether it had personal jurisdiction over Ms. Sharp even though Eden did not give her notice of the violations in her personal capacity. Responsible corporate officers can be held personally liable under the CWA. However, the CWA requires that a plaintiff give prior notice to alleged violators before filing a complaint.

Defendants argued Eden failed to give any CWA notice to Ms. Sharp in her personal capacity, therefore Eden could not sue Ms. Sharp. However, Eden addressed its notice to "Officers, Directors, Property Owners and/or Facility Managers of ACM," which gave Ms. Sharp notice she could be sued in her personal capacity because of her position. Eden also served notice to Ms. Sharp at her home, and noted that Ms. Sharp should be on notice of her personal liability because she is the ACM facility's "legally responsible person." The court took these facts into consideration and determined Ms. Sharp had fair notice. Ms. Sharp had not alleged that she was prejudiced by Eden's imperfect notice, therefore the court denied the motion to dismiss for lack of personal jurisdiction.

Failure to State a Cause of Action

Finally, the court analyzed whether Eden had adequately stated its causes of action to survive a Rule 12(b)(6) motion. To overcome a Rule 12(b)(6) motion, a plaintiff's factual allegations in the complaint must suggest the claim has a plausible chance of success. A plaintiff cannot simply recite elements of a cause of action; the complaint must contain sufficient allegations of underlying fact to give fair notice to the defendant.

The court found that Eden's fifth, sixth, and seventh causes of action were deficient under Rule 12(b)(6). Eden only alleged its fifth and seventh causes of action in general terms, and the court decided Eden merely recited the elements of a cause of action. The court stated that it needed more information from Eden to uphold the fifth and seventh causes of action. The court found Eden's sixth cause of action deficient because it alleged an unspecified number of discharges. The sixth cause of action stated that an unlawful discharge occurred in every rain event presumably from the beginning of the statute of limitations to the filing of the lawsuit. The court stated that ACM was entitled to know how many violations were being alleged and how Eden identified "rain events" that would count as discharges under the CWA. Accordingly, the court dismissed Eden's fifth, sixth, and seventh causes of action under Rule 12(b)(6) with leave to amend.

Conclusion and Implications

This case establishes that organizations have standing to sue on behalf of their members when their members have standing to sue in their own capacity, even if the members' injuries predate the existence of the organization. This case also establishes that a defendant must show they have suffered prejudice from a plaintiff's imperfect CWA notice in order to succeed in dismissing a lawsuit under the CWA. Practically, this case allows Eden's lawsuit against Defendants to continue forward. Eden may amend its complaint within 30 days to cure its deficient pleadings for the fifth, sixth, and seventh causes of action. For more information, *see*:
https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_19-cv-03424/pdf/USCOURTS-cand-3_19-cv-03424-1.pdf
(William Shepherd, Rebecca Andrews)

DISTRICT COURT FINDS, IN THE FACE OF OIL POLLUTION ACT CLAIM, THAT THE U.S. COAST GUARD'S PLANS FOR 'WORST CASE DISCHARGES' IN THE GREAT LAKES, ADEQUATE

Environmental Law & Policy Center, et al., v. U.S. Coast Guard, ___F.Supp.3d___, Case No. 18-12626 (E.D. MI Mar. 16, 2020).

On August 22, 2018, plaintiffs, Environmental Law & Policy Center (ELPC) and National Wildlife Federation (NWF), filed a complaint against defendants, United States Coast Guard and Rear Admiral Joanna M. Nunan in her official capacity as Coast Guard District Commander. Plaintiffs alleged that the Coast Guard's Northern Michigan Area Contingency Plan (NMACP), certified by the Ninth Coast Guard District Commander, Rear Admiral June E. Ryan, on June 6, 2017, is inadequate to respond to a worst-case discharge and that defendants wrongfully approved the NMACP in violation of the Administrative Procedure Act (APA) and the Oil Pollution Act of 1990 (OPA). The U.S. District Court for the Eastern District of Michigan denied ELPC's and NWF's motion for summary judgment and granted defendants' motion for summary judgment.

Background

The Straits of Mackinac connecting Lakes Superior. Huron and Michigan are among the most treacherous navigable waters plied by large vessels. Two prominent environmental groups brought a complaint in 2018 against the U.S. Coast Guard alleging that the "worst case scenario" planning of the Coast Guard was legally deficient under the federal Oil Pollution Act amendments to the Clean Water Act in 1990.

The Environmental Law & Policy Center and National Wildlife Federation asserted that the Coast Guard approved a plan that failed to respond to the worst-case discharge scenario to the extent required by law. The OPA requires the area contingency planning "be adequate to remove a worst-case discharge [of oil] from a vessel, offshore facility or onshore facility operating in or near the area.'" 33 USC § 1321(i)(4)(C). They alleged the failures involved lack of consideration of the need for ice-breaking vessels to reach an oil spill in the Straits of Mackinac, and the plan allegedly also failed to consider wave heights.

The "Worst-Case Discharge" is a defined term: "The largest foreseeable discharge in adverse weather conditions." The plan in question, known as the Northern Michigan Area Contingency Plan (NMACP) is fairly complex, including response activity arising in at least two states and internationally. According to the NMACP, the Worst-Case Discharge would be a large Canadian tanker vessel with over three-million-gallon capacity spilling its load from the Canadian side of Lake Superior. Another potential WCD would be a break in an Enbridge Energy oil pipeline just five miles west of the famous Mackinac Bridge, with discharge direct to the Straits.

The NMACP challenged was adopted in 2017. It is a 217-page document. It provides details that should occur in a coordinated response from state, federal and 20 local county governments. Actual exercises were staged and held to assist in making judgments on what should be done under several scenarios. In addition to reviews of exercises held, the plan record included interviews with experienced responders, some of whom discussed problems that exist if wave heights are higher than three or four feet. The Coast Guard's own review of the NMACP indicated some degree of deficiency in planning and logistics

The District Court's Decision

The complaint was filed in the Eastern District of Michigan federal court, Northern Division and heard by US District Judge Tomas Ludington. The court's decision includes a careful recital of the criteria for the courts in reviewing the record of an agency. The arguments of the plaintiffs are reviewed, including assertions that the record laced investigation of the availability of ice-breaking vessels, and that the record itself sowed that wave height could defeat clean-up efforts.

The Coast Guard in turn urged the court to consider the record as a whole. They had done a serious and thoughtful job of identifying and evaluat-

ing response techniques. They admitted there could be delays in achieving the desired success level in conditions where ice was thick or waves were high, but they also noted that the law does not require immediacy, but only that it: "be adequate to remove a worst-case discharge, and to mitigate or prevent a substantial threat of a discharge."

Plaintiffs insisted that they had caselaw support, but in his analysis, Judge Ludington found that the Coast Guard's analysis and adoption of a plan complied with the APA and the OPA. The Coast Guard indicated that the plaintiffs overstated facts, in that the presence of thick ice was one of the elements of "severe adverse weather" as a matter of standard practice. They had thus considered ice and ice breakers. And the record expressly cited difficulties that exist from high waves.

Conclusion and Implications

The ruling came down March 16, 2020 upholding the Coast Guard's decision and consideration as being consistent with the law and not arbitrary or capricious. In a nutshell, the District Court found plaintiffs were focused on arguing the law requires a perfect plan with complete immediate success. Since the law itself requires only "adequacy to remove" a spill, the Coast Guard's record showed it had made its decisions reasonably and consistently with the law. The District Court's decision is available online at: https://www.leagle.com/decision/infdco20200316f67
(Harvey M. Sheldon)

COURT OF FEDERAL CLAIMS REJECTS 'TAKINGS CLAIMS' RELATED TO HURRICANE HARVEY DOWNSTREAM FLOODING CASES

In re Downstream Addicks and Barker (Texas) Flood-Control Reservoir, ___F.Supp.3d___, Case No. 17-9002 (Fed. Cl. Feb. 18, 2020).

The U.S. Court of Federal Claims dismissed U.S. Constitutional Fifth Amendment takings claims related to "Hurricane Harvey" for failure to state a claim upon which relief could be granted. The ruling comes as a result of the court's determination that the Fifth Amendment only protects legally recognized property rights created by states or the federal government.

Factual and Procedural Background

This litigation was brought by residents of Harris County, Texas (plaintiffs). Plaintiffs suffered from flooding that damaged their property during Hurricane Harvey in 2017. Plaintiffs alleged that economic and emotional damages occurred as a result from imperfect flood control from two dams created by the U.S. Army Corps of Engineers (Corps or federal government) to mitigate against floods in their area.

The Corps created the Barker Dam and Addicks Dam between February of 1942 and December of 1948, respectively. The dams' reservoirs provided flood protection along the Buffalo Bayou. Plaintiffs acquired their respective properties between 1976 and 2015. All properties fell within the Buffalo Bayou watershed and all properties were built after the erection of the dams.

On August 25, 2017, Hurricane Harvey made landfall on the coast of Texas. To mitigate against downstream flooding, the Corps closed the flood gates on both the Addicks and Barker dams. By August 28, the volume of water in the reservoirs exceeded capacity and the Corps began releasing waters downstream. Despite the controlled releases, uncontrolled water was reported to be flowing around the north end of the Addicks Dam.

In September of 2017, property owners began to file claims with the court. Plaintiffs alleged that the flooding caused by Hurricane Harvey and the dams was an unconstitutional taking of their property. The claims were consolidated and then bifurcated into an Upstream Sub-Docket and a Downstream Sub-Docket. The federal government filed a motion to dismiss under Rule 12(b)(6) of the United States Court of Federal Claims for failure to state a claim upon which relief could be granted. The federal government alleged that the government cannot take a property interest that plaintiffs do not possess.

The Court of Federal Claims Decision

The Takings Clause of the Fifth Amendment protects against private property being taken for the public without just compensation. Accordingly, courts implement a two-step analysis of takings claims. First, a court determines whether plaintiffs possess a valid interest in the property affected by the government action. If the court determines that the plaintiffs do have a property right, then it must decide whether the governmental action at issue constituted a violation of the property right.

The Court of Federal Claims referenced that for a Fifth Amendment takings claim to succeed, plaintiffs must first establish a compensable property interest. For a property right to be recognized, it must have a legal backing, such as a state or federal law protecting the interest.

State Recognized Property Rights

The Court of Federal Claims reviewed over 150 years of Texas flood-related decisions and determined that the State of Texas has never recognized perfect flood control in the wake of an "act of God," such as a hurricane, as a protected property interest. In fact, the court determined that Texas had specifically excluded the right to perfect flood control when the occurrence was an act of God.

Under Texas law an act of God is the result of an event that was "so unusual that it could not have been reasonably expected or provided against." Here, the court determined that Hurricane Harvey was an event that occurred only every 200 years, and that the Houston area could not have reasonably expected or provided against its damages. Therefore, the federal government could not be held responsible for plaintiff's injury because Texas law specifically

limits liability in takings and tort contexts when the operator of a water control structure fails to perfectly mitigate against flooding caused by an act of God.

The court then looked to the Texas state Constitution, which specifically enumerates that police power is an exception to takings liability and that property is owned subject to the pre-existing limits of the state's police power. The court highlighted the fact that Texas courts have consistently recognized efforts by the state to mitigate against flooding as a legitimate use of police power.

The court also looked to the Texas Supreme Court's holding that governments cannot be expected to insure against every misfortune on the theory that they could have done more. The reasoning behind that conclusion was the fact that extending takings liability on such instance would encourage governments to do nothing to prevent flooding instead of trying to address the problem.

Finally, under Texas case law when an individual purchases real property, the individual acquires that property subject to the property's pre-existing conditions and limitations. The court noted that each of the plaintiffs in this case acquired their property after the construction of the Addicks and Barker dams. Therefore, plaintiffs acquired their property subject to the right of the Corps and federal government to engage in flood mitigation.

Federally Recognized Property Rights

Because the court did not find a property right recognized by the State of Texas, it examined whether federal law provides plaintiffs with protected property interest. Plaintiffs advanced two legal theories to allege that federal law recognized their property rights. First, plaintiffs alleged that because their property only experienced minimal flooding before Hurricane Harvey, they had a reasonable investment-backed expectation that they would always remain free from flooding. Second, plaintiffs alleged that because the water ran through the Corp's reservoir, it was the Corps' water and not flood water.

First, the Court of Federal Claims determined that plaintiffs did not have a reasonable expectation to be free from flooding simply because the federal government erected a dam to mitigate floods. The court determined that:

> . . .an unintended benefit could not create a vested property interest, and that '[i]n certain limited circumstances, the [federal government] can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment.'

The court highlighted the notion that government projects rarely provide an individual with a property interest because government projects are intended to benefit the community as a whole.

Second, the court determined that the Flood Control Act of 1928 (FCA) defines water impounded behind dams because of a natural disaster as flood waters. Additionally, the court determined that the FCA does not confer owners a vested right in perfect flood control simply for owning property that benefits from a flood control system. The court determined that when the federal government undertakes efforts to mitigate against flooding, it does not become liable for a taking because the efforts failed.

The court concluded that there exists no cognizable property interest in perfect flood control against waters resulting from an act of God. The court refused to extend liability to the federal government because it failed to protect against waters outside of its control. Therefore, the court granted the federal government's motion to dismiss for failure to state a claim upon which relief could be granted.

Conclusion and Implications

The court's decision closely tracked state law and federal law in an attempt to harmonize its decision. In the end, the Court of Federal Claims found that the failure of a federal flood control project to control flood waters may not constitute a Fifth Amendment taking without a state-created property right to be free from the type of flooding at issue. The implication of that analysis would suggest that a different result might be possible on the same or similar fact in another state. In February 2020 we reported on the court's decision in the "upstream" portion of the flooding event. *See*: 30 *Envtl Liab Enforcement & Penalties Rptr* 74. The court' decision is available online at:
https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv9002-203-0
(Marco Ornelas, Rebecca Andrews)

NEVADA STATE DISTRICT COURT ORDERS THE DENIAL OF SOUTHERN NEVADA WATER AUTHORITY'S GROUNDWATER APPLICATIONS FOR LAS VEGAS PIPELINE

White Pine County and Consolidated Cases, et al. v. Nevada State Engineer, Case No. CV-1204049 (Mar. 9, 2020).

Southern Nevada Water Authority's efforts to import eastern Nevada groundwater to Las Vegas suffered another setback recently, with the state District Court in White Pine County ordering that all of SNWA's water permit applications be denied. The District Court's March 9, 2020 order (2020 Order) follows up on its 2018 order that remanded to the Nevada State Engineer for further proceedings (the Remand Order). On remand, the State Engineer held a hearing and issued a ruling in compliance with the court's directives (2018 Ruling), but which contended that the Remand Order was "legally improper and conflicted with longstanding policy that the State Engineer followed to consistently manage the waters of the state." Ruling #6446, p.8 n. 41.

Background

SNWA's efforts include applications to appropriate water from various basins in eastern Nevada, which would be transported by pipeline to serve the Las Vegas metropolitan area.

SNWA's predecessor initially filed applications in 1989, and the State Engineer held the first hearing in 2006. The State Engineer then issued permits for approximately 75,000 acre-feet of groundwater from four basins. On appeal, however, the Nevada Supreme Court vacated the permits and remanded to the State Engineer to re-open the protest period and re-notice the applications due to the passage of time between filing of the initial applications and the hearings. *See, Great Basin Water Network v. Taylor*, 126 Nev. 187, 234 P.3d 912 (2010).

After re-opening the protest period, in 2011, the State Engineer held a hearing on all applications in the four basins. In 2012, the State Engineer issued various rulings that granted in part and denied in part SNWA's applications, issuing permits for approximately 83,000 acre-feet (collectively: 2012 Rulings). The permits were subject to certain conditions, including compliance with monitoring, management and mitigation plans (3M Plans).

Certain protestants appealed the 2012 Rulings to the Seventh Judicial District Court of Nevada. In 2013, the District Court issued an order (Remand Order) that vacated the permits and remanded to the State Engineer to:

- Add Millard and Juab counties in Utah to the 3M Plans because of the effect of Nevada pumping on Utah water basins;

- Recalculate the amount of water available in Spring Valley based on evapotranspiration rates to ensure that the basin will reach equilibrium between discharge and recharge within a reasonable time;

- Define standards, thresholds or triggers to ensure that mitigation of unreasonable effects of pumping is neither arbitrary nor capricious;

- Recalculate the appropriations from three basins to avoid over-appropriation or conflicts with existing rights in down-gradient basins.

Beyond these issues, the District Court did "not disturb the findings" of the State Engineer.

The State Engineer appealed the Remand Order, which the Nevada Supreme Court dismissed for lack of jurisdiction, holding that because the District Court remanded to the State Engineer for further fact finding, the Remand Order was not final or appealable. Alternatively, to overcome the jurisdictional hurdle, the State Engineer and SNWA filed petitions for writ of mandamus, which the Nevada Supreme Court denied, concluding that an adequate legal remedy existed; namely, a petition for judicial review once a final District Court decision issues.

Thereafter, the State Engineer proceeded to comply with the Remand Order, holding another administrative hearing in September and October 2017 that was limited to the four remand issues. Ten months later, the State Engineer issued Ruling #6446 to address the issues specified in the Remand Order

(2018 Ruling). In the 2018 Ruling, the State Engineer preliminarily noted his "misgivings regarding aspects of the Remand Order," which he sought to address through the appeal and writ petition. Specifically, the State Engineer contended that the Remand Order was:

> . . .legally improper and conflicted with long-standing policy that the State Engineer followed to consistently manage the waters of the state.

For that reason, although the State Engineer stated he was complying with the requirements of the Remand Order, he expressly preserved "any right to challenge" it. Ruling #6446 at pp. 8-9.

The Court's Decision and the 2020 Order

The 2020 Order is the result of SNWA's petition for judicial review of the 2018 Ruling. The court stayed the course with the Remand Order that, to determine the groundwater available for appropriation, the State Engineer must use an evapotranspiration (ET) capture approach as a proxy for a basin's perennial yield. The court also adhered to its earlier conclusion that the water SNWA sought to appropriate was already appropriated in down-gradient basins. Additionally, the court agreed with the State Engineer that the pumping proposed by SNWA threatened the environmental and cultural resources in the Swamp Cedar Area of Cultural and Environmental Concern (ACEC). Ultimately, the 2020 Order required that all of SNWA's applications in Spring, Cave, Delamar and Dry Lake Valleys be denied.

Perennial Yield Versus ET Capture

The State Engineer manages groundwater in Nevada by requiring that withdrawals from each hydrographic basin not exceed the basin's perennial yield. Perennial yield is the maximum amount of groundwater that can be salvaged each year from a basin over the long term without depleting the groundwater reservoir. *Pyramid Lake Paiute Tribe v. Ricci*, 126 Nev. 521, 524, 245 P.3d 1145, 1147 (2019). Citing a report from the State Engineer's office, the court noted that:

> . . .[p]erennial yield is limited to the maximum amount of natural discharge that can be salvaged for beneficial use. The perennial yield cannot be more than the natural recharge to a groundwater basin and in some cases is less.

Appropriations that exceed the perennial yield result in over appropriation and groundwater mining. *State Eng'r v. Morris*, 107 Nev. 699, 703, 819 P.2d 203, 206 (1991).

When groundwater pumping occurs, the State Engineer requires that the aquifer must reach a new balance between recharge and discharge within a reasonable period of time. This is referred to as "steady state." In the SNWA case, the State Engineer took the position that Nevada law does not require that post-development equilibrium be achieved within a defined period of time.

In its applications, SNWA proposed a well field with 15 points of diversion. SNWA's expert agreed that the system would not reach equilibrium after 200 years of pumping with the well configuration identified in the applications because it "was not designed to capture ET." Ruling #6446 at p.17.

In the 2018 Ruling, the State Engineer criticized the Remand Order as being a "new ET capture rule" that did not exist previously in Nevada law. Ruling #6446, p. 20. According to the State Engineer, re-calculation of the amount of ET capture in the Spring Valley basin to determine the time it will take for the basin to reach a new equilibrium, as required by the Remand Order, is "antithetical to the doctrine of prior appropriation and to the prevailing policy which encourages the maximum beneficial use of the state's waters." Ruling #6446, p. 20. The State Engineer thought the Remand Order "disproportionately favor[ed] water applicants adjacent to areas of natural discharge" and was akin to riparianism, which is not recognized in Nevada. Based on the confines of the Remand Order, however, the State Engineer denied SNWA's applications in Spring Valley.

In its review the 2018 Ruling, the court accused the State Engineer himself of conflating ET capture and perennial yield when considering SNWA's applications. The court declared:

> Illogically, the Engineer has concluded that sustainability and beneficial use are mutually exclusive. Actually, sustainability and maximum beneficial use are two sides of the same coin. One cannot exist without the other. . . .This is not a case of the court substituting its judgment

> for that of the current Engineer. . . .This is a case of the court agreeing with the Engineer's practice before the Engineer's [sic], for no logical, lawful or rational reason for [sic] changing the definitions of perennial yield. 2020 Order at p.11

The court deemed the State Engineer to have:

> . . .unilaterally change[d] the interpretation [of perennial yield] mid-case—with no rational reason and without any substantial evidence as to why the change is necessary. 2020 Order at p.11.

The court concluded this was "contrary to Nevada law and arbitrary and capricious." 2020 Order at p.11.

Conclusion and Implication

Rejecting the State Engineer's comparison to riparianism, the court declared "The brutal fact is that Las Vegas is over 300 miles from the [basins from which SNWA seeks to appropriate water]. Neither the [State Engineer] not this Court can change geography." 2020 Order at p.13. An applicant who seeks to make an inter-basin transfer, the court articulated, must expect different obstacles than "a rancher who lives atop the reservoir." Id. Based on the well configuration in the applications, the court concurred that the Spring Valley applications had to be denied because groundwater withdrawals might never reach a new equilibrium.
(Debbie Leonard)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

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