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CALIFORNIA WATER™
LAW & POLICY Reporter

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RECENT STATE DECISIONS

Editor's Note: In the article titled "Water Agencies File Lawsuits Challenging State Water Board's Sacramento-San Joaquin Curtailment Order" in the November edition of the *California Water Law and Policy Reporter*, it was reported that the petitioners in *Banta-Carbona Irrigation District, et al. v. SWRCB*, Sacramento Superior Court Case No. 2021-80003718, filed a petition for coordination with the Judicial Council on October 15, 2021. However, the petitioners in fact filed a brief with the Sacramento Superior Court on October 15, 2021 in which they stated their intention to file a petition for coordination without stating a date by which such petition would be filed. The brief filed in the Sacramento Superior Court was submitted in response to the trial court's order directing counsel to submit briefing on whether the action is a complex civil case. Petitioners argued the case is a complex civil action and should be coordinated in the same court together with the other cases concerning the State Water Resources Control Board's Sacramento-San Joaquin Curtailment Order. However, the trial court stated that "the cases do not appear to be complex" and ordered the other related case, *Central Delta Water Agency, et al., v. SWRCB*, Sacramento Superior Court Case No. 2021-80003720, transferred to its department.

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com.

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CALIFORNIA WATER NEWS

STATE OF DROUGHT EMERGENCY EXTENDED TO ALL 58 COUNTIES IN CALIFORNIA AS LACK OF PRECIPITATION PERSISTS AND CONSERVATION EFFORTS FALL FLAT OF GOALS

With the current drought still appearing to have no end in sight, California Governor Gavin Newsom, on October 19, 2021, issued a proclamation extending the drought emergency statewide and further urging Californians to step up their water conservation efforts.

Voluntary Conservation Efforts

Back in July, Governor Newsom issued an executive order imploring Californians to voluntarily reduce their water use by 15 percent as compared to 2020 in order to protect the State's water reserves and complement ongoing local conservation mandates. Despite Governor Newsom's pleas, Californians reduced their water use at home by a meager 1.8 percent statewide in July compared to last year's water use. Since then, these numbers have certainly increased, with August's report indicating an average conservation of about 5 percent statewide.

Leading this conservation effort has been the north Coast region, reducing water use by 18.3 percent compared to last year's figures, with the San Francisco Bay Area and Sacramento River regions following at 9.9 percent and 8.1 percent reductions in water use, respectively. On the other side of the coin, the South Coast region—which houses over half of the State's population—was only able to achieve a 3.1 percent reduction in water use from last year.

Statewide Proclamation of Emergency

As a part of Governor Newsom's Statewide proclamation of a drought emergency, he acknowledged that:

> . . .sustained and extreme high temperatures have increased water loss from reservoirs and streams, increased demands by communities and agriculture, and further depleted California's water supplies.

With that said, the Governor reiterated that:

> . . .the most impactful action Californians can take to extend available supplies is to re-double their efforts to voluntarily reduce their water use by 15 percent from their 2020 levels.

Primarily, the Governor's proclamation adds the eight counties not previously included in the drought state of emergency: Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Francisco and Ventura. With the lackluster conservation figures reported for the South Coast region in August, it immediately stands out that the counties of Los Angeles, Orange, San Diego, and Ventura all lie within this region, along with portions of San Bernardino and Riverside counties.

In addition to the inclusion of the remaining counties as being in a state of drought emergency, the proclamation also requires local water suppliers to implement water shortage contingency plans that are responsive to local conditions and prepare for the possibility of a third dry year. Noting that long-term weather forecasts for the winter rainy season, dire storage conditions of California's largest reservoirs, low moisture content in native vegetation, and parched soils magnify the likelihood that drought impacts will continue in 2022, the Governor's proclamation emphasizes that we are not out of the woods yet even with the winter months arriving.

Another notable inclusion in the Governor's proclamation is the grant of authority to the State Water Resources Control Board to adopt emergency regulations as needed to supplement voluntary conservation by prohibiting certain wasteful water practices. Among such "wasteful water practices," the proclamation includes the use of *potable* for: water for sidewalk and building washing; the individual private washing of vehicles; irrigation of ornamental landscapes including turf during and within 48 hours after

at least a quarter inch of rainfall; and for decorative fountains or the topping-off of decorative lakes and ponds.

Conclusion and Implications

With the rest of the state being brought under the umbrella of the drought emergency, the Governor continues to stress that this is a statewide problem necessitating statewide response. Furthermore, this statewide proclamation has since been complemented by the Metropolitan Water District, which declared a regional drought emergency shortly after, calling on local water suppliers to implement all conservation measures possible to reduce usage. This regional proclamation is a huge follow up to the Governor's statewide proclamation as MWD manages water deliveries to 26 agencies in six counties, including the aforementioned Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura counties. For more information on the proclamation, *see:* https://www.gov.ca.gov/2021/10/19/governor-newsom-expands-drought-emergency-statewide-urges-californians-to-redouble-water-conservation-efforts/; *and see:* https://www.gov.ca.gov/wp-content/uploads/2021/10/10.19.21-Drought-SOE-1.pdf. (Wesley A. Miliband, Kristopher T. Strouse)

STUDY ADDRESSES EFFECTS OF DROUGHT INTENSITY ON DEEP GROUNDWATER AQUIFERS

A recent study on the relationship between multi-year precipitation droughts and groundwater aquifers without human management found that an increase in the severity of a drought can prolong the recovery of groundwater levels, particularly in aquifers with deeper groundwater tables. The study found an average groundwater recovery of three years for shallow aquifers. In addition to drought severity for deep groundwater aquifers, the study determined that the second most important factor controlling groundwater recovery time was mean annual recharge potential.

Background

The study, published in the *Journal of Hydrology*, analyzed observation wells in "unconfined" aquifers with a mean depth of eight meters across the conterminous United States. The study analyzed groundwater responses and recovery from multi-year droughts in aquifers with no appreciable human management, mostly in the northeast. (Despite most of the observation wells being located in the northeast, the study concluded that its findings were consistent for observation wells across the United States.) Specifically, the study relied on 266 observation wells within the coterminous United States, none of which were located in high or medium density development areas, and only nine were located in low density development areas. Each observation well had at least ten consecutive years of data available from the Climate Response Network maintained by the U.S. Geological Survey (USGS). None of the wells were located on irrigated lands.

Defining Drought

According to the study, "drought" can be defined in multiple ways, including "meteorological drought as a result of reduced precipitation," "hydrological drought affecting streamflow," "snow drought," "agricultural drought where declining soil moisture results in crop failure," and "groundwater drought due to decline in groundwater levels." Different definitions of drought entail different "spatial and temporal scales," and the study indicates that a key challenge in "quantifying groundwater response to meteorological drought is quantifying consistent drought periods for different hydrological metrics." The study focuses on the relationship between multi-year meteorological droughts and groundwater droughts, and addresses three questions:

> (1) Do precipitation or subsurface properties play a stronger role in controlling groundwater response time to precipitation drought initiation? (2) What factors influence the trajectory of groundwater recovery to drought? (3) Under what conditions are precipitation or geographic properties impacting lagged groundwater response to drought?

'Groundwater Lag Time'

To answer these questions, the study focuses on two variables called "groundwater lag time" and "recovery time." Groundwater lag time represents:

> . . .the time that it takes until changes in precipitation propagate through the vadose zone and/or changes in streamflow in a connected surface water-groundwater system impact groundwater levels.

In other words, groundwater lag time means the time it takes precipitation to impact groundwater levels. The recovery time consists of:

> . . .the lag time between the cessation of negative monthly precipitation and groundwater anomalies, and the time needed for the groundwater levels to rise to the 5-year average pre-drought groundwater levels.

In other words, recovery time means the time between the end of a multi-year drought and a return to five-year pre-drought average groundwater levels. Thus, the study looks at how long it takes rain or snow to impact groundwater levels relative to a multi-year drought, and how long it takes groundwater levels to return to pre-drought levels, *i.e.* to recover water lost from the aquifer during the drought.

As a general matter, the study found that wells in the western regions of the United States had longer groundwater lag times than wells in more humid regions of the eastern United States. Notably, the "drought intensity" is the "most significant factor influencing groundwater lag time" for areas with deep groundwater levels, followed by the "mean annual potential recharge." Areas with shallow groundwater levels are impacted most by geographic properties such as elevation, percent vegetation canopy cover, and temperature.

The study found that groundwater levels across "multiple aquifer systems" had recovered from drought within ten years the majority of the time (85 percent), and that storage recovery rate for aquifers is greatest during the first year following the end of a drought. However, the storage recovery rate declines in the following years. While the study acknowledges that it is still unclear if drought properties, such as intensity, severity, and duration, exert greater control over groundwater lag time than geographic properties such as temperature, the study:

> . . .suggests that if precipitation droughts become more intense in the future, the time-lag between precipitation drought and groundwater response may decrease.

That is, drought intensity may accelerate the impacts of drought on groundwater levels, thus increasing groundwater recovery time absent human management efforts.

In particular, the study concludes that there may be a significant lag time—up to 15 years—between precipitation and groundwater droughts, and the severity of a drought may increase the recovery time of an aquifer. Accordingly, the study suggests that:

> . . .in a changing climate, an important management consideration is to understand the most important set of factors that control groundwater [lag time].

Those factors, at least for deep groundwater aquifers, appear to be drought intensity and the annual recharge potential of an aquifer.

Conclusion and Implications

The study provides a broad observational analysis of the relationship between drought characteristics and groundwater response, as well as how geographical properties may impact groundwater response to drought. According to the study, for California and much of the western United States, deep groundwater levels are most likely to be impacted by the intensity of droughts, which may prolong recovery times for groundwater levels absent human management efforts. This may underscore the role active groundwater management plays in maintaining groundwater supplies, including maximizing recharge activities following prolonged droughts. The Study: "Delayed response of groundwater to multi-year meteorological droughts in the absence of anthropogenic management," appeared in the *Journal of Hydrology* 603 (2021) 126917, which is accessible online at: https://www.sciencedirect.com/science/article/abs/pii/S0022169421009677.
(Miles Krieger, Steve Anderson)

FORT BRAGG LAUNCHES NEW DESALINATION SYSTEM AS DROUGHT RESPONSE WITH HELP FROM THE STATE WATER RESOURCES CONTROL BOARD

The current drought has taken its toll on many communities throughout California, but for the residents of Fort Bragg, a new desalination-reverse osmosis system could help ease the impacts the drought has had on the north coast city.

Background

The City of Fort Bragg's (City) primary water source comes from the Noyo River, the largest of the City's three surface water sources that serves the nearly 3,000 customer connections in the area. Suffering a similar fate as the Sacramento-San Joaquin River Delta, however, the Noyo River has suffered from increased saltwater intrusion as a result of lowered flows at the river's mouth as a result of the drought. This summer, in fact, flows in the Noyo reached such a low level that Fort Bragg's water system was considering pulling from its emergency reservoir to maintain a sufficient supply for the area's residents. Despite the grim situation the City was facing, it instead sought to utilize desalination to extract more drinking water supplies from the river, requesting emergency funding from the State Water Resources Control Board (SWRCB or State Water Board) to do so.

The Project and Funding

Working together with the SWRCB, the City's initial application for funding was approved in May 2021, and thanks to expedited approvals through the State Water Board's Emergency Drinking Water Program, the City and the SWRCB were able to have the desalination unit delivered by September 24 with testing the following week.

While the speed in which the SWRCB and the City were able to get the desalination up and running is obviously an impressive enough feat, the State Water Board also funded 100 percent of Fort Bragg's grant request, totaling $691,796. Using the funding and assistance from the State Water Board, the City was able to get the desalination-reverse osmosis system up and running with the additional support of a new shallow groundwater well treatment system that can produce an 57,000 gallons of water per day, providing the City with a much needed boost to its current supplies.

Fort Bragg's new desalination unit is designed to release desalinated water into a raw water pond that flows into the City's existing full-sized treatment plant. Mounted on a concrete skid, the unit can produce 200 gallons a minute of desalinated water. Although the unit has a maximum running time of 12 hours per day, the unit is capable of processing up to 144,000 gallons in a 24-hour period when factoring in the run time restrictions.

Perhaps as a gage of the desalination plant's success, in late October 2021, and *after* the recent state wide drought proclamation by Governor Newsom, the city council passed a resolution rescinding the Stage 2 Water Warning and lifting all mandatory water conservation restrictions within the Fort Bragg water service area. (*See:* https://www.mendocinobeacon.com/2021/11/01/fort-bragg-city-council-lifts-all-water-conservation-restrictions/)

Commenting on the project, Joe Karkoski, deputy director of the State Water Resources Control Board's Division of Financial Assistance stated:

> Fort Bragg came to us with a creative solution, and our team worked with them to address any obstacles to making it happen quickly. . . .Expedited approvals through our Emergency Drinking Water Program allow us to help people in communities like Fort Bragg who are struggling with drought impacts.

Conclusion and Implications

The impact this new desalination system will have on the City of Fort Bragg is undeniable and helps the City work towards a more reliable water system, but the City's project may have big implications throughout the state. The State Water Resources Control Board has worked to fund countless drought assistance projects for other cities, water systems, and households throughout the state to repair or replace wells, provide hauled or bottled water, install point-of-use treatment systems, conduct well testing and

provide technical assistance. When push comes to shove, the State Water Resources Control Board and the City of Fort Bragg seem to have proven that these drought assistance programs can also be conducted in an expedited timeframe. Within the span of just four months, for example, the City of Fort Bragg was able to have its initial application approved and a desalination unit delivered and ready to use only a few weeks later.

The timeline in which Fort Bragg was able to receive the much-needed aid provided by the State Water Resources Control Board may be the exception and not the rule, but it at least shows that the State Water Board is capable of working together with local water systems to quickly resolve problems brought on by the drought. For more information, *see:* https://www.waterboards.ca.gov/press_room/press_releases/2021/pr10122021-fort-bragg-desalination.pdf. (Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

EPA RELEASES POLYFLUOROALKYL SUBSTANCES MULTI-YEAR PLAN 'ROAD MAP'

On October 18, 2021, the United States Environmental Protection Agency (EPA) published a national PFAS testing strategy using its authority under the Toxic Substance Control Act (TSCA). The primary goal with the testing strategy is to have more scientific data for EPA to utilize in taking future regulatory and administrative actions. The EPA intends to use authority under TSCA to require the manufacturers of PFAS to both conduct and fund these studies.

Background

Per- and polyfluoroalkyl substances (PFAS), according to the EPA:

- Are widely used, long lasting chemicals, components of which break down very slowly over time;
- Because of their widespread use and their persistence in the environment, many PFAS are found in the blood of people and animals all over the world and are present at low levels in a variety of food products and in the environment;
- PFAS are found in water, air, fish, and soil at locations across the nation and the globe;
- Scientific studies have shown that exposure to some PFAS in the environment may be linked to harmful health effects in humans and animals; and
- There are thousands of PFAS chemicals, and they are found in many different consumer, commercial, and industrial products. This makes it challenging to study and assess the potential human health and environmental risks.

The PFAS Roadmap

The PFAS Strategic Roadmap (Roadmap) is a multi-year plan that sets forth the agency's goals and priorities for addressing per- and polyfluoroalkyl substances through a three-pronged approach: regulatory; administrative; and enforcement activities. The Roadmap draws out a plan for addressing PFAS from the beginning of its lifecycle by reviewing and utilizing the science of PFAS. Throughout the Roadmap, it is clear the EPA aims to crackdown on the production and use of PFAS and minimize effects on human health and the environment. Some of the proposed actions could potentially increase the liability for water and wastewater districts, as well as municipalities, as it relates to PFAS limitations and triggers. The key to successfully overcoming these new hurdles, will be a clear understanding of the limitations, expectations, roles, and responsibilities. As the EPA releases opportunity for public comment and consideration on new actions related to PFAS, each district and municipality can have a voice to help shape the next steps the EPA takes with regards to PFAS.

The EPA has provided three concurrent stages for controlling PFAS compounds as described in the Roadmap: research; restriction; and remediation. The purpose of the research is to gain a comprehensive understanding of the potential harms related to PFAS and to ensure that the PFAS restrictions and remediation efforts are based on clear and specific scientific evidence. EPA's PFAS Council has set a goal of stopping the PFAS issue at the source. To achieve this, the EPA will utilize new data and studies to ensure that excessive amounts of new PFAS will not be introduced into the stream of commerce. Further remediation will provide guidelines on how to remove PFAS in areas where there are high concentrations and how to address PFAS levels known to be harmful to human and environmental health. To achieve throughout each of the three prongs, EPA has set an expected timeline of actions it is currently proposing.

Research

Currently, there are 4,700 known PFAS compounds and little is known about the toxicity and potential harms caused by most of these compounds. The Roadmap recognizes that understanding the potential harms is necessary to successfully restrict

and remediate PFAS use, and the key to more understanding is more data and research. Beginning Fall 2021 and ongoing over the next few years, EPA seeks to develop additional methods to more extensively detect and monitor PFAS in the air, ground, and water. As of the publishing of the Roadmap, the EPA has validated methods of measurability of 29 PFAS compounds in drinking water; 24 PFAS compounds in groundwater, surface water, and wastewater; and selected PFAS in air emissions.

In October 2021, the EPA published a national PFAS testing strategy using its authority under the Toxic Substance Control Act. The primary goal with the testing strategy is to have more scientific data for EPA to utilize in taking future regulatory and administrative actions. The EPA intends to use authority under TSCA to require the manufacturers of PFAS to both conduct and fund these studies.

EPA intends to issue a proposed rulemaking in 2022 to categorize PFAS on the Toxics Release Inventory (TRI) and designate it as a "Chemical of Special Concern." While PFAS has been a reportable chemical for certain industries since 2020, this proposed 2022 change will expand those industries and add additional PFAS to the TRI. By Winter 2022, the EPA plans to use its authority under TSCA to finalize a rule on the gathering of data, including data-points on use, production, disposal, exposures, and hazards.

In addition to general PFAS research, EPA will conduct a specific risk assessment of two compounds of PFAS: perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) in biosolids. Expected by Winter 2024, the assessment will set the basis as to whether and in what ways, the EPA will regulate PFOA and PFOS in biosolids.

The research performed will inform the steps that could potentially best address the production, use, and harm of PFAS, through additional restrictions and new remediation measures.

Restrictions

In fall 2021, the EPA published toxicity assessments for two PFAS compounds: hexafluoropropylene oxide dimer acid and its ammonium salt (GenX chemicals). In this toxicity assessment, the EPA stated that oral ingestion of no more than 3 parts-per-trillion (ppt) per day would not impact the health of most people. These toxicity assessments set the stage for future toxicity assessments on five additional PFAS compounds: PFBA, PFHxA, PFHxS, PFNA, and PFDA. Further, the toxicity assessments have led the EPA to re-examine the standards set for PFOS, PFOA, and perfluorobutanesulfonic acid (PFBS). Following the release of the toxicity assessment, the EPA stated that oral ingestion of no more than 0.0015 ppt per day of PFOA and 0.0079 ppt per day of PFOS would not impact the health of most people. Because the EPA used an oral ingestion rate of 20 ppt per day to create the 70 ppt health advisory limit for both PFOA and PFOS, the EPA will likely create a new lower health advisory limit.

EPA also announced that the drinking water regulation for GenX would be coming in Spring 2022. In addition, the EPA's Roadmap sets forth the intention to set a national primary drinking water regulation for PFOA and PFOS through a proposed rule in Fall 2022 to be finalized by the Fall of 2023. This action will be in addition to the Fourth Regulatory Determination published in March 2021, in which EPA declared it would regulate PFOA and PFOS in drinking water. In the next few months, the EPA is expected to finalize the Fifth Unregulated Contaminant Monitoring Rule (UCMR 5), which is expected to provide critical information on the frequency and levels of 29 PFAS compounds in national drinking water systems.

Utilizing data on PFOA and PFOS, in Winter 2022, EPA will produce recommendations on the criteria for aquatic life; this will not include a recommendation for GenX compounds. Then taking into account drinking water and fish consumption, EPA will develop a human-health criteria for PFOA and PFOS around Fall 2024.

Also, by the end of 2024, the EPA intends to utilize Effluent Limitations Guidelines (ELGs) to establish nationwide technology-based regulatory limits on the level of specified pollutants in wastewater discharged into surface waters and municipal sewage treatment facilities. In addition, the EPA is expected to propose a rule in Summer 2023 (to be finalized by Summer 2024) that would restrict PFAS discharges from industrial categories. Included in this action, the EPA will conduct studies to gather information on other areas of industrial discharge where data is currently limited as well as monitor the phase-out of industrial use of PFAS categories including pulp, paper, paperboard, and airports—this specific component is expected to be addressed in the ELG Plan 15 in Fall

2022. To further ensure minimal PFAS entrance into the stream of commerce, EPA will more stringently apply its pre-manufacture notice review process for new PFAS and impose strict safety requirements as a condition of new use.

Remediation

Although there have been few concrete remediation paths provided, the EPA has begun laying the foundation for future remediation and recovery actions, which are expected to be finalized once methods to perform the remediation are developed. The Roadmap has given little guidance on how to remove PFAS from contaminated resources because more research is needed to understand how a cleanup could be done effectively. As of now, granulated active carbon systems have been used to remove some PFAS compounds from water systems. However, new research has shown that granulated active carbon is not effective against all PFAS compounds, such as GenX compounds.

Critical to current and future holders of a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit, the EPA is seeking to leverage existing and future permit processes to reduce discharges of PFAS at the source. Specifically, EPA will propose that NPDES permits: 1) contain conditions based on production elimination and substitution where a reasonable alternative to using PFAS is available; 2) require best management practices to address PFAS containing firefighting foams for Stormwater permits; 3) require enhanced public notification and engagement with downstream communities and public water systems; and 4) require pretreatment programs to include source control and best management practices to protect wastewater treatment plant discharges and biosolid applications.

Additionally, the EPA has initiated the process to propose adding PFOA, PFOS, PFBS, and GenX compounds to the Resource Conservation and Recovery Act (RCRA) Hazardous Constituents list. Adding these compounds to the list would make them subject to corrective action. Following the designation, the EPA intends to clarify the regulations under the RCRA Corrective Action Program so that all PFAS compounds can be subject to clean up through this process, without EPA having to first add each individual compound.

Lastly, EPA is expected to propose a rule in Spring 2022 which would designate PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). When finalized, this designation would allow the EPA and other federal agencies to seek compensation for the cleanup and remediation of PFOA and PFOS from responsible parties. In addition to the designation of PFOA and PFOS, in the Spring of 2022, EPA will be seeking comments on a whether the agency should also designate precursors to PFAS, additional PFAS, and groups or subgroups of PFAS as hazardous substances under CERCLA. The addition of any PFAS compound under CERCLA opens up the possibility of citizen suits against water and wastewater agencies and municipalities.

Conclusion and Implications

The EPA Roadmap approaches PFAS control using research, restrictions and remediation. The research performed will inform additional restrictions and new remediation measures. Although the EPA Roadmap currently lacks clear restrictions or remediation requirements, it is evident that the EPA is attempting to create standards regards PFAS and related chemicals based on scientific research that, in the EPA's view, best protect human health and the environment. As the EPA PFAS Council indicated, it will be proposing actions to both best address PFAS at the source, while also taking actions to ensure both human and environmental health are prioritized and protected. These additional actions could add additional checks and steps agencies will need to take to ensure compliance with new regulations. EPA's Roadmap on PFAS is available online at: https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

(Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES CALIFORNIA'S GROUNDWATER UPDATE 2020 FINAL REPORT

The California Department of Water Resources (DWR) recently issued the final version of California's Groundwater—Update 2020 (Report). The Report, commonly known as Bulletin 118, comprises the state's most current and complete compendium of data and information on groundwater resources and management. It is an invaluable resource for water managers, water users and other stakeholders.

Background

As stated by DWR, the Report builds on the past progress and state of knowledge, synthesizes the most recent data to close current gaps in knowledge, and focuses on statewide groundwater management and planning efforts. It is the latest report in a series of Bulletin 118 and other predecessor publications dating back as early as 1952. Update 2020 also summarizes implementation of the Sustainable Groundwater Management Act of 2014 (SGMA) and focuses on emerging topics including water markets and the impacts of climate change on groundwater. The Report is described as the start of a new platform for tracking statewide groundwater management to advance near term actions and long-term strategies for improved decision-making, management, education, and access.

Organization of Report

The Report includes several components, organized as follows:

- Highlights. This segment provides an overview of the Report including findings and recommendations to achieve sustainable groundwater management.

- Statewide Report Chapters 1-6. This segment provides a detailed report on groundwater conditions in California including a history of California's Groundwater reports (Bulletin 118 and its predecessors), economic value of groundwater, and groundwater management both before and after the enactment of the SGMA. It details the status of statewide groundwater monitoring, groundwater levels, change in storage, groundwater quality and land subsidence.

- Regional Reports Chapter 7. This segment is organized according to California's ten (10) hydrologic regions. It summarizes regional land and water use, as well as sustainability indicators including groundwater levels, groundwater quality, land subsidence, seawater intrusion and surface watergroundwater interactions. It also lists and depicts all groundwater basins in each region together with their current designated SGMA Basin Prioritization level.

- Appendices. The Report includes multiple appendices that provide extensive supporting data for each of the respective Report chapters, including assumptions, methods, citations and references to related reports.

- CalGW Live. In addition to the written Report, DWR also released a companion web-based dashboard, entitled California's Groundwater Live (CalGW Live). As stated in DWR's recent press release, CalGW Live "leverages the California Natural Resources Agency's Open Data Platform to improve the timeliness of statewide groundwater information and make it easily accessible for water managers and the public. California's Groundwater Live is a dynamic platform with real-time data that will help generate greater awareness and improved understanding of groundwater to support more informed decisions over the long term." The platform synthesizes data submitted by local groundwater management agencies throughout the State, thereby enhancing the scope, scale and detail of information available.

Report Recommendations

The Report provides recommendations organized into several categories:

- Advance Data Driven Decision-Making. The Report emphasizes the importance of obtaining and maintaining reliable groundwater data and

information and making that data widely available for decision-making and public engagement.

•Maintain Momentum for Sustainability. The Report indicates that the State will continue to enhance existing planning, technical, and financial assistance as part of statewide groundwater management efforts to assist local agencies in achieving their long-term goals of sustainable groundwater management.

•Engage, Communicate and Educate. The State will continue to promote and facilitate broad stakeholder engagement and to provide platforms such as CalGW Live to educate water managers, decision-makers and the public about groundwater and its importance.

•Invest, Innovate and Incentivize. The Report states that both financial and non-financial incentives will be necessary over the next two decades and beyond in order to support the development and implementation of projects throughout the State to achieve sustainability.

Conclusion and Implications

According to the Report, groundwater accounts for 41 percent of the state's total annual water supply on an average basis and as much as 58 percent of the total annual water supply in a critically dry year. Approximately 83 percent of Californians depend on groundwater for some portion of their water supply and many communities are entirely reliant on groundwater for all their water needs. The importance of sustainably managing those resources cannot be overstated. The Report provides both a broad and deep perspective on the state of groundwater conditions in California and recommendations for achieving and maintaining sustainability into the future. The Report and CalGW Live can be accessed at: https://water.ca.gov/Programs/Groundwater-Management/Bulletin-118.
(Derek Hoffman)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT HEARS ORAL ARGUMENTS IN *MISSISSIPPI V. TENNESSEE*—THE COURT COULD SET PRECEDENT FOR INTERSTATE GROUNDWATER DISPUTES ACROSS THE UNITED STATES

On October 4, 2021, the U.S. Supreme Court heard oral arguments in *Mississippi v. Tennessee*, Case No. 143 orig.—a case that could impact how states allocate interstate groundwater among themselves and how states determine their obligations to each other. At oral argument, the parties presented their objections to the Report of the Special Master, which determined the groundwater in dispute is an interstate resource subject to the doctrine of equitable apportionment and that equitable apportionment of the contested groundwater is the appropriate remedy for Mississippi's alleged harm. Resolution of the dispute in *Mississippi v. Tennessee* could decide whether the doctrine of equitable apportionment governs allocation disputes between states over groundwater stored in interstate aquifers.

Background

In 2014, the State of Mississippi filed a motion for leave to file a bill of complaint alleging the State of Tennessee, the City of Memphis, and Memphis Light, Gas & Water Division (Tennessee) stole groundwater from Mississippi by pumping large amounts of groundwater, without physical intrusion, from an interstate aquifer straddling the Mississippi-Tennessee border. Mississippi asserts Tennessee's groundwater pumping from wells located in Tennessee pulled groundwater that would have remained in groundwater storage within Mississippi's borders. Mississippi seeks over $600 million in damages and a declaratory judgment establishing its sovereign right and exclusive interest in groundwater stored in a formation of the interstate aquifer that lies entirely under the state of Mississippi.

The Special Master's Report

The Supreme Court granted Mississippi's motion for leave and appointed a Special Master to determine whether the groundwater stored in the Middle Claiborne Aquifer constitutes an interstate resource. In the Report of the Special Master in *Mississippi v. Tennessee*, Case No. 143 orig., Special Master's Docket No. 135 (Nov. 5, 2020), the Special Master rejected Mississippi's contention that Mississippi controls all of the water resources within its boundaries and thus owns a fixed portion of the aquifer. The Special Master's Report identified the aquifer as an interstate resource under four different theories–the definition, pumping effects, flow, and surface connection theories–with each theory viewing a different feature of the aquifer as individually making the entire aquifer an interstate character. The Special Master's Report recommended the Supreme Court apply the doctrine of equitable apportionment to the aquifer and uphold equitable apportionment as the appropriate remedy.

Mississippi filed exceptions to the Special Master's Report arguing that equitable apportionment does not apply to the groundwater at issue because the groundwater is not hydraulically connected to the surface water and Tennessee's pumping of groundwater violated Mississippi's sovereignty over its natural resources. According to Mississippi, the sovereignty-based framework should remedy its injury. Tennessee and numerous other amicus curiae filed briefs in opposing Mississippi's exceptions.

The Breadth of Equitable Apportionment Doctrine

Equitable apportionment is a federal common law doctrine that governs disputes between states over the allocation of interstate waters and ensures that contested water is divided between states in a just and equitable manner. *Colorado v. New Mexico*, 459 U.S. 176 (1982). However, the doctrine only applies in the absence of an interstate compact. *Id.* In situations such as this one, where the states have not already allocated and declared rights to contested water under an interstate compact, the Court is unable to enforce the terms of a compact and applies the doctrine of equitable apportionment.

Although the Court has applied the equitable apportionment doctrine to a variety of interstate resources, including groundwater, Mississippi argues that the equitable apportionment doctrine should not govern disputes over *all* groundwater. Instead, Mississippi asks the Court to limit the doctrine to groundwater that is hydraulically connected to a disputed surface water. According to Mississippi, groundwater does not freely flow within the aquifer's Sparta and Memphis Sand formations. Consequently, this non-hydraulically connected groundwater has a character different and district from surface water and is not subject to equitable apportionment.

In response, Tennessee argues that Mississippi is artificially limiting its claims to a portion of the aquifer's stored groundwater to avoid an equitable apportionment of the entire aquifer. Tennessee maintains that the doctrine should apply to the entire interstate aquifer and should be Mississippi's exclusive remedy.

Sovereignty and Interstate Resources

The Court has recognized that each state "has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Kansas v. Colorado*, 206 US 46 (1907). Under a state's sovereign authority, the state retains the power to preserve, protect, and control natural resources within its borders. Mississippi argues that Tennessee's pumping of groundwater violated Mississippi's sovereignty and consequently, the sovereignty-based framework should remedy the injury, not the equitable apportionment doctrine. In effect, Mississippi asks the Court to take a new approach to resolving interstate disputes over groundwater resources not hydraulically connected to interstate surface water.

Mississippi maintains it has a constitutional right and sole authority to control and allocate all waters located within its territorial borders under the sovereignty-based framework. Mississippi contends that Tennessee's cross-border groundwater pumping–without physical intrusion–knowingly, intentionally, and wrongfully invaded Mississippi's sovereign territory. Because equitable apportionment was not designed to remedy an injury resulting from an invasion of sovereign territory, Mississippi argues that a damages-based remedy is necessary for its alleged injury.

In response, Tennessee emphasizes that the Court has never allowed one state's sovereignty to subsume an entire interstate resource, and thus it is not possible for Mississippi to exercise exclusive ownership or control over *all* waters flowing within its boundaries. Tennessee also supports the Special Master's view that the Court has been unequivocal that equitable apportionment applies even when "the action of one State reaches through the agency of natural laws into the territory of another state." Report of the Special Master at 27, citing *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983). Tennessee argued that any adverse effects caused by Tennessee's cross-border pumping of groundwater from an interstate aquifer are natural consequences of the laws of hydraulics. Therefore, when pumping that occurs entirely within Tennessee affects Mississippi's ability to use the aquifer's groundwater through the operation of natural laws, it is no different than surface water and equitable apportionment is the appropriate remedy.

Western States' Perspective

The Attorneys General from the States of Colorado, Idaho, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, and Wyoming jointly filed an *amicus* brief. The *amici curiae* encouraged Mississippi and Tennessee to follow established law concerning interstate groundwater resources by either entering into an interstate compact or by petitioning the Court to obtain a decreed equitable apportionment of the groundwater. The Attorneys General argued that the Court should not create a new claim to resolve interstate disputes over natural resource use under the sovereignty-based framework, which provides damages to compensate for past actions.

The *amici curiae* also emphasized that states involved in a dispute over interstate bodies of water should attempt to enter an interstate compact to establish duties and obligations for collectively managing the interstate resource. Absent an interstate compact, states have no duty to manage shared natural resources for the benefit of another state. In the event of a dispute over an interstate body of water, the Court should declare rights under the governing compact and enforce its terms or, in the absence of a compact, divide the water among the states by equitable apportionment.

According to the *amici curiae*, a claim for damages that addresses past violations of unknown duties will not solve the problem of how states should share a water resource going forward. When states are involved in a dispute over an interstate body of water,

the better remedy is for a state to sue to enforce the duty created by a compact or to petition the court for an equitable apportionment. When a court enforces the terms of a compact or decrees an equitable apportionment, any remedies for alleged injuries provided by the court are forward looking, eliminate present harm, and prevent future injuries. A court does not provide remedies that compensate for past actions absent an existing interstate compact or judicial equitable apportionment.

Conclusion and Implications

In *Mississippi v. Tennessee*, Mississippi asks the Supreme Court to remedy damages caused by Tennessee's interstate groundwater pumping of a shared aquifer. Mississippi invites the Court to weigh in on how states should share an interstate aquifer and to take a new approach to resolving disputes between states fighting over groundwater resources not hydrologically connected to interstate surface water. A decision by the Supreme Court could have profound impacts on how unallocated interstate groundwater resources are shared among states and could fundamentally reshape the role that equitable apportionment plays in determining states' obligations to each other.

The outcome in this case could increase the court's potential involvement in future interstate groundwater disputes. Additionally, the Supreme Court could further complicate water law by creating a new claim that provides damages for past conduct that occurred without a known duty to another state, which could undermine cooperation among states, decrease certainty over shared water resources, and potentially incentivize more states to pursue damages claims for groundwater pumping by a neighboring state.
(Lisa Claxton, Jason Groves)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS THE CLEAN WATER ACT ALLOWS EPA TO CONSIDER COMPLIANCE COSTS IN APPROVING WATER QUALITY STANDARDS AND VARIANCES

Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency et al., 15 F.4th 966 (9th Cir. 2021).

The Ninth Circuit, on October 6, 2021, recently affirmed in part and reversed in part the judgment of the U.S. District Court for Montana, which concluded that: 1) the U.S. Environmental Protection Agency (EPA) reasonably interpreted the federal Clean Water Act (CWA) as allowing EPA to consider the economic impact associated with mandating compliance with the CWA's base water quality standards (affirmed); and 2) that EPA's 2017 approval of a 17-year variance (2017 Variance) from base CWA standards, as requested by the State of Montana, was arbitrary and capricious (reversed).

At issue on appeal was whether the District Court erred in 1) rejecting the plaintiff's claim that EPA violated the Administrative Procedure Act (APA) by considering compliance costs when granting the 2017 Variance; and 2) ordering that the grant of the 2017 Variance be partially vacated because it did not require compliance with "the highest attainable condition at the outset of the term" and with "Montana's base water quality standards by the end of the term."

Factual and Procedural Background

In 2017, Montana requested EPA approval of the 2017 Variance. The 2017 Variance would apply to 36 municipal wastewater treatment facilities for up to 17 years and would permit covered facilities to release into "wadeable streams" levels of nitrogen and phosphorous otherwise forbidden under the state's base water quality standards. In its application, Montana submitted evidence that achieving compliance with state base standards would necessitate the adoption of reverse osmosis technology at each facility, at high economic cost. Montana claimed that adopting this technology "would result in substantial and widespread economic and social impact on the surrounding communities."

EPA's regulations authorize states to seek a variance from base water quality standards where compliance can be shown to be infeasible. In evaluating whether a state's compliance with base water quality standards is feasible, EPA's regulations permit it to consider, among other things, whether compliance with state standards "would result in substantial and widespread economic and social impact." Even then, a variance must set interim limits that "represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the variance," and may only last "as long as necessary to achieve the highest attainable condition." Prior to Montana's application, EPA had issued guidance that a substantial economic impact existed when the average annual cost per household of achieving compliance exceeded 2 percent of the median household income in the affected community.

EPA determined compliance would impose such costs on the local Montana communities and granted the 2017 Variance. It concluded that the 2017 Variance's interim limits were the highest attainable condition for each of the 36 facilities, and its 17-year term was no longer than necessary to achieve such conditions.

At the U.S. District Court

Plaintiff Upper Missouri Waterkeeper initiated suit against EPA, alleging the CWA prohibited EPA from taking economic compliance costs into account when considering a variance request.

The District Court ruled against the plaintiff on this claim, noting that EPA's interpretation of the CWA—that it was permitted to take the economic costs associated with attaining compliance into account—was reasonable. However, the court took issue with the 2017 Variance's 17-year term, deeming it "arbitrary and capricious" because it did not require compliance 1) "with the highest attainable condition at the outset of the term" and 2) "with Montana's base water quality standards by the end of the term."

The court entered a summary judgment order of a partial *vacatur* of the 2017 Variance's approval.

On appeal, the plaintiff sought reversal of the lower court's rejection of its Administrative Procedure Act claim. EPA (joined by intervenor-defendants) sought reversal of the order partially vacating its approval of the 2017 Variance.

The Ninth Circuit's Decision

Administrative Procedure Act Challenge

EPA based its authority to consider compliance costs on its interpretation of 33 U.S.C. § 1313(c)(2)(A) (Provision). The Provision sets out factors to be considered in establishing water quality standards, but not in granting variances. The plaintiff alleged the Provision, which failed to expressly include compliance costs as one of the factors to be considered, provided EPA no authority to consider such costs when evaluating a variance. EPA's regulations interpret the Provision as requiring states to adopt water quality standards that protect identified "beneficial uses" unless a state can show, through a use attainability analysis, that attainment the water quality necessary to support an identified beneficial use is not feasible for one of several reasons, including that the controls necessary to protect those uses would result in substantial and widespread economic and social impact.

EPA's variance regulation built on this same framework, by first recognizing that states may decline to designate a use or remove a previously designated use by conducting a use attainability analysis and making the required showing that attainment of such a use is not feasible. If approved, that action would remove the designated use and associated water quality criteria from the water quality standard as applied to all dischargers and all pollutants. EPA next reasoned that the variance procedure was an environmentally preferable tool over changing a designated use, because variances retain designated use protection for all pollutants as they apply to all sources with the exception of those specified in the variance."

Satisfied that the Provision was relevant to the grant of variances generally, the court employed the *Chevron* two-step analytical framework to consider whether to defer to EPA's interpretation of the Provision here.

Chevron Analysis: Step One

As a preliminary step, the *Chevron* analysis asked the court to consider whether Congress had "directly spoken to the precise question at issue." Concluding at the outset that Congress remained silent on the precise issue of whether compliance costs could be considered, the Ninth Circuit determined that nothing in the text of the Provision or the wider CWA expressed an intent by Congress to foreclose EPA from considering such costs. Rather, it held that:

> Congress' silence as to costs in [the Provision] can be understood 'to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree.'

This step having been satisfied, the appellate court proceeded to step two.

Chevron Analysis: Step Two

The Ninth Circuit next considered whether EPA's interpretation of the Provision was "based on a permissible construction of the statute." The court concluded EPA's interpretation was appropriate for two reasons. First, the court reasoned that the Provision stated that water quality standards must protect the public welfare, and that term could reasonably be understood to encompass consideration of whether compliance costs would cause substantial and widespread economic and social impact. Second, the court reasoned EPA had reasonably construed the Provision's requirement that water quality standards "serve the purposes of this chapter" as incorporating the purposes referred to in the CWA's overall statement of its purpose.

The Ninth Circuit ultimately concluded, based on its *Chevron* analysis, that EPA reasonably interpreted the CWA as authorizing it to consider economic compliance costs in granting variance requests.

The District Court's Order Partially Vacating the 2017 Variance

Turning next to the District Court's order partially vacating the 2017 Variance, the Ninth Circuit examined the lower court's two-pronged justification that the 2017 Variance 1) did not "require compliance

with the highest attainable condition at the outset of the term," and 2) did not "require compliance with Montana's base water quality standards by the end of the term." The appellate court reversed the District Court on both grounds.

On the first ground, observing that while the CWA provides "that the highest attainable condition specified in the variance shall apply through (or during) the variance's term," the Ninth Circuit held that the applicable provisions "do not state that an individual discharger must be in compliance with the highest attainable condition on day one." Rather, the court noted, EPA's variance regulation unambiguously provides that compliance with the highest attainable condition is not required at the outset. Ultimately, the court concluded that the purpose of a variance is to provide the time needed to achieve the attainable interim standard, and therefore that compliance with the highest attainable condition is required by the end of the variance's term, not at the beginning.

On the second ground, the Ninth Circuit concluded that the District Court had not based its rationale on any portion of EPA's variance regulation. While the plaintiff argued that permitting states to receive variances without mandating compliance by their end would free such states "to postpone compliance with the base standards indefinitely by securing one variance after another," the appellate court found this reasoning unconvincing. The Ninth Circuit noted that if, at the conclusion of a variance's term, compliance has become feasible, another variance could be granted. Further, it observed that the variance process set interim requirements that ensure incremental attainment of the base standards.

The Ninth Circuit affirmed the District Court's summary judgment order in part and reversed it in part, remanding the matter to the trial court with instructions to grant summary judgment to EPA in full.

Conclusion and Implications

This case sees the Ninth Circuit apply the *Chevron* two-step framework to uphold EPA's regulatory interpretation of the CWA—that economic costs may properly be considered in evaluating a variance from the CWA's water quality standards. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/10/06/19-35898.pdf. (Carl Jones, Rebecca Andrews)

FIRST CIRCUIT FINDS AGENCY'S EXPRESS INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS INSUFFICIENT TO AVOID MOOTING A GROUNDWATER CONTAMINATION CLAIM

United States v. Puerto Rico Industrial Development Company, ___F.4th___, Case No. 19-1874 (1st Cir. Nov. 17, 2021).

Applying the U.S. Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, ___U.S.___, 140 S. Ct. 1462, 1473, 206 L.Ed.2d 640 (2020), the First Circuit Court of Appeals has clarified that property owner liability for Superfund clean-up costs of groundwater contamination does not depend on the U.S. Environmental Protection Agency establishing the exact process by, or location at, which release of the contaminant occurred.

Background

Since at least 1968, the Puerto Rico Industrial Development Company (PRIDCO) has owned land in a southeastern coastal area of Puerto Rico in the Municipality of Maunabo (Property). Consistent with its purpose as a public corporation, PRIDCO developed the Property with "industrial structures" that, from 1969, were leased for manufacturing uses involving the production of modular circuit prints, biomedical and reactive instruments, solar panels, laminated bedroom furniture, fruit juice, guitars, and prefabricated piping for frame walls.

Maunabo Well #1, a municipal water supply well, is located adjacent to the southern boundary (and downgradient) of the Property. In the period between 2001 and 2004, tests detected elevated levels of

volatile organic compounds (VOCs) including tetrachloroethene (PCE), trichloroethene (TCE), and cis-1,2-dichloroethene (cis-1,2-DCE) in the drinking water of municipal water customers from Well #1. Tests in 2002 revealed that the groundwater associated with the well contained the same compounds, with the concentration of PCE exceeding the federal maximum contaminant level.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq*., authorizes the U.S. Environmental Protection Agency (EPA) "to investigate and respond to the release of hazardous substances, contaminants and pollutants into the environment," including by compiling a list of "contaminated sites for cleanup, commonly known as Superfund sites," undertake itself "the necessary response measures as to Superfund site[s]" and sue potentially responsible parties (PRPs) for reimbursement of the costs of those remedial actions. *Atl. Richfield Co. v. Christian*, ___U.S.___, 140 S. Ct. 1335, 1346 (2020). PRPs are defined in the statute to include:

> . . .the owner and operator of a vessel or a facility ... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. 42 U.S.C. § 9607(a).

EPA began investigating the Maunabo Area Groundwater Contamination Superfund Site (Site), which includes both the Property and Maunabo Well #1, in 2005, adding the Site to the National Priorities List in 2006. 71 Fed. Reg. 56399, 56403 (Sept. 27, 2006). The investigation identified a "contaminated plume," the cis-1,2-DCE plume' (or the PRIDCO Plume) as being located "under the surface of PRIDCO's property and extend[ing] downgradient towards Maunabo Well #1." Further details include that the PRIDCO Plume contains high concentrations of TCE and cis-1,2-DCE, a degradation product of TCE. The EPA reports show there are no test results which have detected these two contaminants on the Property in the soil directly above the PRIDCO Plume. Those same reports state that:

> [t]he configuration of the cis-1,2-DCE plume indicates that a release of Site-related contaminants ... occurred at or near the [PRIDCO] property." That is where cis-1,2-DCE "exceed[ed] the groundwater screening criteria.

The parties agreed the contamination is not naturally occurring.

The investigation culminated in a 2021 Final Remedial Investigation/Feasibility Study Report, on which PRIDCO commented to contest its identification as a PRP. EPA replied that:

> . . .'site related contamination was detected in the groundwater on the [PRIDCO] property and immediately downgradient [thereof],' which follows the direction the groundwater flows.

EPA issued a Record of Decision selecting an active treatment method--air sparging--as the appropriate remedial treatment for the PRIDCO Plume, and subsequently sought from PRIDCO contribution for cleanup costs. The District Court entered summary judgment for EPA on the basis that the agency had established a *prima facie* case for PRIDCO's liability under CERCLA.

The First Circuit's Decision

CERCLA provides that:

> . . .the owner and operator of a ... facility. . .from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . . 42 U.S.C. § 9607(a). . . . [P]roperty owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc*., 596 F.3d 112, 120 (2d Cir. 2010).

To establish a *prima facie* case for liability against PRIDCO as a property owner, EPA has the burden of proving that the Property constitutes a 'facility' as defined by 42 U.S.C. § 9601(9); PRIDCO owns the facility, *id.* §§ 9601(20), 9607(a); there was a release, or threatened release of a hazardous substance' from the facility, *id.* §§ 9601(14), (22), 9607(a); and, as a result, the United States incurred response costs 'not inconsistent with the national contingency plan,' *id.* §§ 9601(23)–(25), 9607(a).

This is in contrast with the agency's burden of proof to establish the liability of past owners and operators, arrangers, and transporters, with respect to whom EPA must prove that they engaged in "disposal" of the contaminants. 42 U.S.C. § 9607(a).

"Release" is defined under CERCLA as:

> . . .any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. 42 U.S.C. § 9601(22) (emphasis supplied by the Court).

Courts have broadly construed this definition:

> . . .to include passive migration into the environment, *see United States v. CDMG Realty Co.*, 96 F.3d 706, 715 (3d Cir. 1996) (concluding that Congress used the term 'leaching' in its definition of 'release' but not of 'disposal' to include passive migration only for the former); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997) (same).

Thus, the First Circuit rejected PRIDCO's argument that EPA had failed to prove PRIDCO had taken an active part in the contamination of the Property. It further rejected PRIDCO's contention that EPA had failed to prove its allegation in the pleadings that the release occurred, actively, "at" the Property, rather than, passively, "from" the Property:

> It is the statute that governs here, not the language used by the United States in its pleadings. As just explained, the undisputed evidence satisfies the 'release' element as provided in the statute.

The presence of the contaminants linked to the Property in the downgradient PRIDCO Plume and Maunabo Well #1 was sufficient to establish PRIDCO's property owner liability.

Applying the *County of Maui* Decision

Applying *County of Maui v. Hawaii Wildlife Fund*, ___U.S.___, 140 S. Ct. 1462, 1473, 206 L.Ed.2d 640 (2020), the Court of Appeals rejected PRIDCO's argument that EPA was required to identify the specific source of the contamination. In *County of Maui* the Supreme Court explained that:

> . . .in the context of groundwater pollution under the Clean Water Act, that 'the specific meaning of the word 'from" necessarily draws its meaning from context.'

As applied here, undisputed evidence established the presence of the contaminants in the groundwater at the Property, and that they had migrated into Maunabo Well #1 and in the tap water of municipal water customers supplied by Well #1:

> Because groundwater flows and is not static, the hazardous substances have migrated 'from' the groundwater in the facility, to the groundwater in the environment, constituting a release.

EPA was not required to establish soil contamination at the Property from which the groundwater contamination occurred.

Conclusion and Implications

The elements to establish strict liability of property owners for groundwater contamination continues to be clarified by the Courts of Appeal in the aftermath of *County of Maui*. Here, a clear chain of chemical evidence was sufficient to establish responsible party liability in the absence of any identification of a specific industrial process or release location. The Court of Appeals' opinion is available online at: http://media.ca1.uscourts.gov/pdf.opinions/19-1874P-01A.pdf. (Deborah Quick)

DISTRICT COURT VACATES TRUMP ERA CLEAN WATER ACT 401 WATER QUALITY CERTIFICATION RULE—REMANDS TO EPA FOR FURTHER PROCEEDINGS.

In re Clean Water Act Rulemaking, ___F.Supp.4th___, Case No. C 20-0436 WHA (N.D. Cal. Oct. 21, 2021).

On October 21, 2021, the U.S. District Court for the Northern District of California vacated the Trump administration's July 2020 Clean Water Act (CWA), § 401, Water Quality Certification Rule (Water Quality Certification Rule) and remanded the rule back to the Biden administration's U.S. Environmental Protection Agency (EPA) for further proceedings. Shortly thereafter, on November 17, 2021, intervenor defendants comprised of industry trade associations and certain states filed a motion for stay pending appeal. While the District Court has yet to hear argument on the stay motion, and the appeal is still making its way through the courts, EPA has already issued guidance indicating the agency interprets the District Court's *vacatur* to apply nationwide. This interpretation could change should the stay motion be effective.

The Clean Water Act Section 401

Section 401 of the CWA requires state water quality certification for any federal permit or license covering an activity that may result in a discharge into waters of the United States. (33 U.S.C. § 1341.). For example, water quality certification by the relevant state in which the activity is proposed is required for CWA § 404 permits for discharges of dredge or fill material issued by the U.S. Army Corps of Engineers (Corps), and/or hydroelectric facility permits issued by the Federal Energy Regulatory Commission (FERC). Generally, the states and authorized tribes (collectively: Certification Authorities) with jurisdiction over the location of a discharge's origin are responsible for issuing the certification, which may be conditioned on limitations necessary to ensure compliance with state water quality criteria (in California, called water quality objectives) and "any other appropriate requirement of state law." (33 U.S.C. § 1341(d).) The Certification Authorities must issue the certification "within a reasonable period of time (which shall not exceed one year)," or else the certification is deemed waived. (33 U.S.C. § 1341(a)(1).) Given this time limitation on certification issuance, Certification Authorities could delay finding an application for water quality certification is "complete," to avoid triggering the limitations period, effectively extending the reasonable period of time the CWA provides. (85 Fed. Reg. 42212 (July 13, 2020).)

Consequently, on April 10, 2019, President Trump issued Executive Order 13868 (*Promoting Energy Infrastructure and Economic Growth*), which sought to streamline federal project permitting. (84 Fed. Reg. 15494 (Apr. 10, 2019).) In response, on July 13 2020, EPA issued the Water Quality Certification Rule, which primarily: 1) restricted the scope of permissible certification conditions, and 2) adopted a number of procedural requirements and definitions, which collectively had the effect of limiting the time afforded to Certification Authorities prior to waiver. (85 Fed. Reg. 42210 (July 13, 2020).)

Until the Water Quality Certification Rule, EPA interpreted § 401 of the CWA to provide Certification Authorities with authority to impose broad conditions in a water quality certification based, in part, on the U.S. Supreme Court's holding in the seminal case *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). In *PUD No. 1*, the Court held that Certification Authorities may condition certification on any limitations necessary to ensure compliance with state water quality standards; in that case, the limitation involved controversial minimum flow requirements to protect species of salmon and steelhead from a proposed hydroelectric facility. (*Id.* at 713-714.) The Court further found that the language in CWA § 401(d) is most reasonably read as authorizing placement of conditions and limitations on a federally permitted activity as a whole once the existence of a discharge is deemed present. (*Id.* at 712.)

Factual Background of the Order Vacating Water Quality Certification Rule

Challenges to the Water Quality Certification Rule through lawsuits brought by states, Native American tribes, and non-profit conservation orga-

nizations (plaintiffs) began the day EPA issued the Water Quality Certification Rule; several of the cases filed were ultimately consolidated in the U.S. District Court for the Northern District of California. (*In Re Clean Water Act Rulemaking*.) A lawsuit filed by the Delaware Riverkeeper Network proceeded separately and concurrently in *Delaware Riverkeeper Network, et al. v. United States Environmental Protection Agency*, Case No. 20-3412 (E.D. Penn. 2021). However, the momentum of the litigation stalled when on January 20, 2021, the Biden administration issued Executive Order 13990, declaring an intent to issue a replacement rule. Consequently, EPA later sought remand of the Water Quality Certification Rule without *vacatur* in both the concurrent cases in California and Pennsylvania, arguing that EPA should have the opportunity to review and revise the regulations on its own. Plaintiffs universally opposed, arguing that remand should occur with *vacatur*, given the potential interim impact of the Water Quality Certification Rule on the environment.

The District Court's Decision

In evaluating whether the Water Quality Certification Rule could be remanded without *vacatur*, as requested by EPA, the District Court applied the test established in *Allied Signal Inc. v. U.S. Nuclear Reg. Comm'm*, (988 F.2d 146 (D.C. Cir. 1993)), which requires a court deciding whether agency action is defective, and therefore necessary to vacate, to consider 1) the seriousness of the order's deficiencies and 2) the disruptive consequences of an interim change that may itself be changed. (*Id.* at 150.) Applying the first *Allied-Signal* factor, the District Court found the Water Quality Certification Rule suffered from serious deficiencies, given the rule's alleged "antithetical position" to *PUD No. 1* without a reasonable explanation for the change. Additionally, EPA's recognition of its own inconsistent interpretations and acknowledgement that the agency would not adopt the same rule upon remand further persuaded the District Court that the Water Quality Certification Rule's changes were arbitrary and capricious, and therefore, did not warrant deference. Thus, the District Court ruled the first *Allied-Signal* factor supported *vacatur* of the 2020 revised certification rule.

When considering the second *Allied-Signal* factor, disruptiveness of *vacatur*, the District Court found compelling, plaintiffs' argument that significant harm would likely transpire without *vacatur* because proposed projects would lack adequate water quality conditions under the Water Quality Certification Rule, resulting in adverse environmental impacts for a generation. Consequently, according to the District Court, failure to vacate would be more disruptive than would *vacatur* of a 13 month-old regulation.

Agency Rule Can Be Vacated Absent Adjudication on the Merits

The District Court's decision to vacate the Water Quality Certification Rule hinged also on a finding that an agency rule could be vacated absent adjudication of the merits. The District Court's decision is in stark contrast to the decision rendered by the U.S. District Court for the Eastern District of Pennsylvania, which also remanded the Water Quality Certification Rule, but found *vacatur* inappropriate, because the court "has not yet, and will not make a finding on the substantive validity of the Certification Rule." (*Delaware Riverkeeper Network, et al. v. U.S. Environmental Protection Agency*, No. 20-3412 (E.D. Penn. Aug. 6, 2021).) When evaluating EPA's request for remand, the court in *Delaware Riverkeeper* applied the holding in *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), which does not address the conditions under which *vacatur* is appropriate. Rather, the court in *SKF* evaluated an agency's authority to change a policy or interpretation of law and found remand appropriate, in pertinent part, where: 1) Congress has not directly spoken to the issue; 2) the agency's request for remand is not made in bad faith; and 3) the agency "believes that its original decision is incorrect on the merits and wishes to change the result." (*Id.* at 1028–29.) Thus, by applying the *SKF* framework, the Eastern District of Pennsylvania District Court found remand without *vacatur* was the most appropriate result, as it would allow EPA to use its own discretion to revise the Water Quality Certification Rule, consistent with the agency's clear intent as presented in public statements. Interestingly, the Pennsylvania District Court only referenced *Allied-Signal* in its discussion of that case's holding; the court did not appear to directly apply the *Allied-Signal* framework in any meaningful way. The differing results in these two cases appears to turn on two issues: 1) whether the reviewing court thought deference to EPA appropriate in light of the Trump administration's Water Quality Certification

Rule's alleged departure from the principles enunciated in *PUD No. 1*; and 2) how each court exercised the discretion afforded it when evaluating the appropriateness of *vacatur*.

Conclusion and Implications

Interestingly, in concluding that *vacatur* was appropriate absent a decision on the merits, the District Court pointed to other recent District Court decisions within the Ninth Circuit Court of Appeal that reached a similar conclusion, including an Arizona District Court vacating and remanding the Navigable Waters Protection Rule (the Trump administration's rule defining what constitutes "waters of the United States") in *Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021) demonstrating the power of the judiciary to eliminate controversial rules with the stroke of a pen. As noted above, the final outcome of this case remains undetermined, given intervenor defendants' recent motion for stay pending appeal, asserting, among other things, that: 1) the District Court acted improperly by subverting the Administrative Procedures Act, which requires review of the full administrative record and adjudication on the merits before a reviewing court may set aside agency action; and 2) the District Court's application of the *Allied-Signal* factors was erroneous because an assessment of error, as required by *Allied-Signal*, logically follows a conclusion that the challenged rulemaking suffered from legal error, which can only be determined after adjudication on the merits. Notably, the intervenors' arguments hinge, in part, on an assertion that while the Water Quality Certification Rule departs from the principles enunciated in *PUD No. 1*, the *PUD No. 1* ruling does not represent "the *only* reasonable interpretation" of § 401. Given earlier decisions by the Ninth Circuit Court of Appeal, the intervenor Defendants' arguments may not succeed in that forum; however, the group could succeed if the District Court has indeed inappropriately applied *Allied-Signal* when vacating the Water Quality Certification Rule. This case represents the latest in the ongoing saga of whipsawing federal regulation in the water quality arena. (Nicole E. Granquist, Meghan A. Quinn, Jaycee L. Dean, Meredith Nikkel)

RECENT STATE DECISIONS

FRESNO COUNTY SUPERIOR COURT DENIES WESTLANDS WATER DISTRICT'S VALIDATION ACTION ON ITS FEDERAL WATER REPAYMENT CONTRACT

Westlands Water District v. All Persons Interested in the Matter of the Contract Between the United States and Westlands Water District Providing for Project Water Service, San Luis Unit and Delta Division and Facilities Repayment, Case No. 19CECG03887 (Fresno Cnty Super Ct.).

On October 27, 2021, a Fresno County Superior Court judge denied Westlands Water District's (Westlands) latest effort to validate its contract with the U.S. Bureau of Reclamation (Bureau) for the delivery of water from the federal Central Valley Project. Westlands filed the action under the Validation Statutes, Code of Civil Procedure § 860 *et. seq*, its decision to adopt and execute the "Contract Between the United States and Westlands Water District Providing for Project Water Service, San Luis Unit and Delta Division and Facilities Repayment" (Repayment Contract) under the Water Infrastructure Improvements for the Nation (WIIN) Act.

Background

The Central Valley Project created a water supply system federal wherein the federal government would contract with local agencies to supply water imported to the Central Valley, including from northern California through the Sacramento-San Joaquin Delta.

Westlands entered into a water service contract with the Bureau in 1963 to receive surface water supplies from the Central Valley Project. Westlands and the Bureau have since extended the original contract through a series of interim-renewal contracts, each for a defined term of years. Each of Westlands' contracts with the Bureau allows for delivery of up to 1.15 million acre-feet of water per year, subject to water availability and shortage provisions set out in the contract. The payment term of each successive water service contract included an amount for the repayment of the Bureau's capital costs for constructing the Central Valley Project.

In 2017, Congress passed the WIIN Act [*see:* https://www.epa.gov/goldkingmine/water-infrastructure-improvements-nation-wiin-act], which allows water service contractors such as Westlands to convert water service contracts into repayment contracts without a defined term upon repayment of the full remaining capital costs. Other terms of the converted contract would remain the same as the original water service contract, including the quantity of water available under the contract. The converted contract would also require the contractor to obtain a judgment in state court validating the contractor's adoption and execution of the contract.

Westlands requested in 2018 to convert its water service contract into a repayment contract. On October 15, 2019, Westlands adopted a resolution directing its General Manager to execute a draft version of the Repayment Contract with the Bureau. At the time the resolution was issued, the final repayment price still had not been determined, and the resolution provided that Westlands' President, General Manager, or General Counsel was authorized to modify the contract's terms after the it had been approved by Westlands' board of directors.

Procedural Background

On October 25, 2019, Westlands filed an action under the Validation Statutes, California Code of Civil Procedure § 860 *et seq.*, in Fresno County Superior Court. A number of parties filed answers challenging validation of the draft Repayment Contract on various grounds.

On February 27, 2020, Judge A.M. Simpson denied Westlands' motion to validate the draft Repayment Contract, for three reasons. First, the draft Repayment Contract had not yet been executed. Second, the draft Repayment Contract did not include certain material terms, including the repayment amount (which was estimated by Westlands to exceed $362

million) and a payment schedule. Last, Westlands did not submit competent evidence of compliance with the Brown Act in adopting the resolution authorizing the execution of the draft Repayment Contract. Judge Simpson also dismissed answers filed by three of the four opponents to validation on the ground that the answers were untimely filed.

On February 28, 2020, the Bureau and Westlands executed a final Repayment Contract, which included the full repayment amount.

At the Court of Appeal

Meanwhile, the three parties whose answers were dismissed appealed the dismissals to the Fifth District Court of Appeal. The validation proceeding was stayed during the pendency of the appeals.

The Court of Appeal reversed Judge Simpson's order dismissing the three challengers, and the case was remitted to the Fresno County Superior Court on May 10, 2021. Judge Simpson had since retired, and the renewed motion for validation was set for October 27, 2021, to be heard by Judge D. Tyler Tharpe.

In June 2021, Westlands adopted a resolution confirming the execution and delivery of the Repayment Contract. On September 17, 2021, Westlands filed a motion pursuant to Code of Civil Procedure section 1008 to renew its request for validation based on the fully executed Repayment Contract that included the repayment term. Westlands also submitted evidence related to its compliance with the Brown Act in adopting the October 2019 resolution.

The Superior Court's Ruling

On October 27, 2021, Judge Tharpe issued an order denying Westlands' renewed motion for a validation judgment on the basis that Westlands failed to show that there was a change of fact, law, or circumstances that justified the court revisiting its prior determination denying Westlands' validation motion, either pursuant to Code of Civil Procedure § 1008 or based on the court's inherent authority to reconsider its own rulings. The court pointed out that the final Repayment Contract was executed the day *after* the court denied Westlands' earlier motion. But the decision before the court in February 2020—and thus the renewed issue before the court in October 2021—was the validity of Westlands' October 2019 decision to adopt and execute the draft Repayment Contract. The court thus concluded that the final Repayment Contract and the later resolution confirming that the final Repayment Contract was consistent with Westlands' earlier resolution "did not constitute the kind of 'new fact or circumstance' that would justify" a renewed motion.

The court further rejected Westlands's new evidence regarding Brown Act compliance. Although Westlands passed a new resolution in June 2021 to approve the adoption and execution of the final Repayment Contract, the court noted that the only issue before it at the February 2020 hearing was whether the October 2019 resolution was proper, "not whether it later made subsequent resolutions that attempted to cure earlier deficiencies in the draft contract." The court also rejected additional evidence Westlands raised to show that it complied with the Brown Act for the February 2019 meeting because Westlands did not sufficiently explain why it could not present evidence of Brown Act compliance at the time of the February 2020 hearing.

Conclusion and Implications

The court noted in its October 27, 2021 order that "the court envisions dismissing the case" and set a status conference for December 2, 2021 "for any party to show cause why the case should not be dismissed."

It remains to be seen whether the court will dismiss Westlands' validation action or Westlands will appeal the court's ruling. Meanwhile, the terms of the Repayment Contract remain in effect.
(Brian Hamilton, Meredith Nikkel)

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