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WESTERN WATER LAW & POLICY REPORTER™

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WWL

WESTERN WATER NEWS

CALIFORNIA GOVERNOR NEWSOM'S DROUGHT EXECUTIVE ORDER AIMS TO INCREASE REGIONAL WATER CONSERVATION EFFORTS

California Governor Gavin Newsom's recently issued Executive Order N-7-22 (Executive Order) which targets efforts to increase water conservation and bolster regional responses to the state's ongoing drought conditions.

Background

The Executive Order is the latest in a series of executive orders designed to reduce the impact of drought conditions in the state. Citing record-setting dry months in January and February, and third straight year of drought conditions, the Executive Order sets out a variety of new measures aimed at increasing conservation and drought resiliency throughout the state.

Water Shortage Contingency Plans

Governor Newsom directed the State Water Resources Control Board (State Board) to consider adopting emergency regulations related to urban water suppliers by May 25, 2022. For urban water suppliers that have submitted a water shortage contingency plan, these regulations would require suppliers to implement Level 2 response actions, which generally include actions responsive to water supply conditions being reduced by 20 percent. For suppliers that have not submitted a water shortage contingency plan, the State Board would establish Level 2 contingency plans based upon water shortage contingency plans submitted by other similar suppliers. The Executive Order also indicates that more stringent requirements should be expected if drought conditions persist throughout and beyond this year.

Non-Functional Turf

The Executive Order further directs the State Board to consider adopting regulations defining and banning irrigation of "non-functional turf." The Executive Order clarifies that these regulations would be aimed at decorative grass and would not apply to school fields, sports fields, and parks. The Governor's Office estimates that these regulations will result in annual water savings of several hundred thousand acre-feet.

Limitations on Certain New and Replacement Groundwater Wells

The Executive Order also seeks to limit the construction of new groundwater wells and the expansion of existing wells. Prior to issuing a permit for a new well or for alteration of an existing well, the responsible agency must determine that: 1) the proposal is not likely to interfere with existing wells nearby; and, 2) the proposal is not likely to adversely impact or damage nearby infrastructure. Additionally, the Executive Order imposes additional requirements for new or altered wells in a basin classified as medium- or high-priority under the Sustainable Groundwater Management Act (SGMA). Permits for new or altered wells in these areas will need to be accompanied by a written verification from the local Groundwater Sustainability Agency certifying that the proposed well would not be inconsistent with any applicable Groundwater Sustainability Plan (GSP) and would not decrease the likelihood of reaching a sustainability goal for the area covered by a GSP.

These limitations do not apply to permits issued to individual domestic users with wells that provide less than two acre-feet of groundwater per year, or to wells that will exclusively provide groundwater to public water supply systems as defined in § 116275 of the Health and Safety Code.

Other Directives

The Executive Order also directs the California Department of Water Resources to take a number of steps to combat the impact of sustained drought. These include: 1) consulting with commercial, industrial, and intuitional sectors to develop strategies for improving water conservation, including direct technical assistance, financial assistance, and other approaches; 2) working with state agencies to address

drinking water shortages in households or small communities where groundwater wells have failed due to drought conditions; and, 3) preparing for implementation of a pilot project to obtain and transfer water from other sources and transfer it to high need areas. The Governor also directs the State Board to increase investigations in to illegal diversions and wasteful or unreasonable use of water and bring applicable enforcement actions.

The Executive Order rolls back regulations that limit the transportation of water outside its basin of origin and encourages agencies to prioritize petitions and approvals for projects that improve conditions for anadromous fish or incorporate capturing high precipitation events for local storage or recharge.

The Governor directed all state agencies to submit proposals to mitigate the effects of severe drought by April 15, 2022. Agency responses to that directive were in process at the time of this writing.

Conclusion and Implications

The Executive Order, though broad, is less aggressive in implementing conservation measures than prior orders during the 2012-2016 drought period. It focuses primarily on urban water suppliers and regulations to be implemented at regional and local levels. Though it does not include mandatory individual water use restrictions on California residents, the Governor signaled to Californians that unless conditions dramatically improve, such restrictions can be expected in the future. The Executive Order is available online at: https://www.gov.ca.gov/wp-content/uploads/2022/03/March-2022-Drought-EO.pdf. (Scott Cooper, Derek Hoffman)

UTAH GOVERNOR COX ISSUES DROUGHT DECLARATION

On April 22, 2022, based upon a recommendation from the Drought Review and Reporting Committee, Governor Spencer Cox issued a drought declaration (Declaration) for the entirety of the State of Utah. The Executive Order (2022-4) declared a state of emergency due to extensive and wide-reaching drought. The Declaration officially makes additional aid, assistance and relief available from State resources.

Background and General Information:

Utah has experienced extreme drought in eight of the last ten years and statewide snowpack going into this summer is 25 percent below normal. Water levels at a number of critical reservoirs are also historically low. These conditions, coupled with declared shortages on the Colorado River mean that water supply conditions are at record lows. The Declaration notes that nearly 100 percent of Utah is presently in severe drought, or worse. Likewise, the United States Department of Agriculture has listed all 29 counties under the Secretarial Disaster Designation for drought.

The Drought Declaration

Given the foregoing conditions, the Governor has declared a state of emergency in Utah for the second consecutive year. Governor Cox stated:

> We've had a very volatile water year, and unfortunately, recent spring storms are not enough to make up the shortage in our snowpack. . . .Once again, I call on all Utahns—households, farmers, businesses, governments and other groups—to carefully consider their needs and reduce their water use. We saved billions of gallons last year and we can do it again.

The Declaration by its own terms is set to expire after 30 days unless the state of emergency is extended by the Utah Legislature. The Declaration triggers the activation of the Drought Response Committee, which includes representatives from the Governor's offices of Management and Budget and Economic Development; the departments of Environmental Quality, Agriculture and Food, and Community and Economic Development; and the divisions of Water Resources, Emergency Management; Forestry, Fire and State Lands; and Wildlife Resources.

The Utah Code contains several provisions allowing State resources to be reallocated during times of emergency (the Disaster Response and Recovery Act (Act). Specifically, Utah Code § 53-2a-204(1)(a) authorizes the Governor to utilize all available resources of state government as reasonably necessary to cope with a state of emergency. Likewise, Utah Code § 53-2a-204(1)(b) authorizes the Governor to employ measures for the purpose of securing compliance with orders made pursuant to the Act; and give direction to state and local officers and agencies that are reasonable and necessary for the purpose of securing compliance with the provisions of the Code and with orders, rules and regulations made pursuant to the Act.

The Drought Response Committee is charged with implementing the state's Drought Response Plan, which requires the state to prepare for, respond to and recover from emergencies or disasters, with the primary objectives to save lives and protect public health and property.

More Details

This declaration activates the Drought Response Committee and triggers increased monitoring and reporting. It also allows drought-affected communities, agricultural producers and others to report unmet needs and work toward solutions. It also triggers implementation of the State's Drought Response Plan. The Drought Response Plan, adopted in 1993 and most recently revised in 2013, establishes the procedures for dealing with a drought. These procedures include evaluation of the risks, establishment of six separate task forces and requires a recommendation to the Governor. The six task forces are charged with examining the actual and potential impacts in six different areas: 1) Municipal Water and Sewer Systems; 2) Agriculture; 3) Commerce and Tourism; 4) Wildfire; 5) Wildlife; and 6) Economic. Additionally, other task forces may be organized as needed (*e.g.*, health or energy).

The task force's report to the Drought Response Committee, which determines which needs can be met by reallocation of existing resources. Those needs which cannot be met will be identified and sent to the Governor with recommendations. At that point the Governor will typically request federal assistance. These actions are coordinated through the Director of Natural Resources, who serves as the State Drought Coordinator. Ultimately, the purpose of the Declaration and the Drought Response Committee is to trigger enhanced coordination and focus on the issues arising from the drought.

Conclusion and Implications

The first efforts of the Drought Response Committee are being compiled and will likely be presented to the Governor soon. The Utah Legislature has not yet extended the drought declaration, but an extension is anticipated for the duration of the water year, which ends on September 31.

Utah and the West are facing unprecedented drought conditions this summer and conditions do not seem likely to improve in the near term. Utah's Drought Response has been swift and comprehensive. However, as drought conditions become more persistent additional steps may become necessary to ensure the impacts are mitigated. The Utah Legislature passed a record number of water related bills during the 2022 General Session and that is likely to be a trend that continues in the coming years.

A copy of this Declaration may be found at: https://drive.google.com/file/d/17RTW8PJ5HFTv3DA27j7PXGAA4hIc_Cbz/view. A copy of Utah's Drought Response Plan may be found at: https://water.utah.gov/wp-content/uploads/2020/04/Drought-Response-Plan.pdf.
(Jonathan Clyde)

LEGISLATIVE DEVELOPMENTS

NEBRASKA LEGISLATURE PASSES BILL TO RESURRECT 120-YEAR-OLD SOUTH PLATTE CANAL WITHIN COLORADO FOR WATER DELIVERY TO NEBRASKA

The Nebraska General Assembly recently passed a series of bills reviving a century-old canal to divert water from the South Platte River near the Colorado-Nebraska state line. The canal, contemplated in the 1923 South Platte River Compact, could allow Nebraska to divert up to 500 c.f.s. throughout the non-irrigation season for storage in reservoirs and use throughout the year. However, the project's high price tag, as well as legal and logistical uncertainties surrounding the project leave significant gaps that Nebraska must fill before beginning construction.

Background

The South Platte River begins in the Mosquito Range before flowing east across the Colorado plains and crossing into Nebraska near Julesburg, Colorado. In the 1890s, Nebraska residents began construction on what became known as the Perkins County Canal to deliver South Platte water to Perkins County, Nebraska. The original canal began near Ovid, Colorado, slightly upstream from Julesburg. However, the project encountered a myriad of issues, primarily related to financing, and was eventually abandoned in 1895 after having only completed 16 of the planned 65 miles and not even reaching the state line. Residents of Perkins County eventually tapped into the Ogallala Aquifer and used groundwater supplies for their irrigation needs.

However, the 1923 South Platte River Compact (Compact) includes a provision allowing Nebraska to build the Perkins County Canal, provided it follows several restrictions in the Compact. Since the Compact's ratification, the Perkins County Canal was largely ignored for the next 100 years. There were two unsuccessful attempts to develop the canal in the 1980s, however those attempts were quickly ended in large part due to the project planners' refusal to comply with certain provisions in the federal Endangered Species Act.

In January 2022, Nebraska Governor Pete Ricketts announced plans to construct the Perkins County Canal and asked the general assembly for $500 million to finance the project. Colorado did not expect the announcement, and Governor Jared Polis has indicated to the press that he has yet to be in contact with Nebraska to discuss the details of the plan. In April 2022, the Nebraska General Assembly eventually passed a series of bills authorizing the Perkins County Canal Project and appropriating initial funds to begin planning and design work.

1923 South Platte River Compact

The 1923 South Platte River Compact allocates the river between Colorado and Nebraska. Critically, the Compact distinguishes the "Upper Section"—the headwaters to roughly the Morgan-Washington County line—and the "Lower Section" that runs the rest of the way to Nebraska. The Compact provides for an interstate measuring gage, located in the "Lower Section" at Julesburg and generally requires Colorado to deliver at least 120 c.f.s. to that gauge during the irrigation season, defined as April 1 to October 15.

Article VI of the Compact specifically references the Perkins County Canal and grants Nebraska the right to construct the canal "along or near the line of survey of the formerly proposed 'Perkins County Canal.'" Critically, the Compact contemplates that Nebraska may purchase land in Colorado for the canal or may acquire the necessary lands or easements through its eminent domain powers. The canal would then be entitled to divert up to 500 c.f.s. during the non-irrigation season, October 15-April 1, with an appropriation date of December 17, 1921. But the Perkins County Canal may not call out any present or future Colorado rights in the Upper Section, and the Compact prescribes a carveout of 35,000 acre-feet in the Lower Section to allow for future development within Colorado.

The Compact also provides that Article VI does not grant Nebraska, the canal operators, or users, any superior right to the South Platte during the irrigation season. Additionally, the canal diversions must not diminish the flow at Julesburg in such a way to injure senior Nebraska appropriators. After construction, Nebraska will have the right to regulate diversions into the canal for the purposes of protecting its rights, but Colorado also retains the right to regulate and control canal diversions to the extent necessary to protection Colorado appropriators and maintain flows at the Julesburg gauge.

Perkins County Canal Project Act

Although a recent study indicates that Colorado typically delivers more than 500 c.f.s. to Julesburg during the non-irrigation season, Nebraska cited the Colorado Water Plan and concerns about increasing water demands within Colorado as the motivation to resurrect the canal and appropriate diversions under the Compact. Nebraska claims that proposed projects in the South Platte basin could diminish river flows up to 90 percent. However, Colorado responded by noting that only 25 of the 282 proposed South Platte projects are in the Lower Division (*i.e.*, the canal cannot call or restrict Upper Division diversions) and that no projects are imminently planned. Additionally, according to Colorado officials, many of the proposed projects are non-consumptive and would have no, or a positive, impact on South Platte flows. Nevertheless, Nebraska Department of Natural Resources Director Tom Riley recently reported to the Omaha World-Herald, "we're not necessarily going to get any more [water], we just want to make sure we don't get any less."

To initiate the canal project, the Nebraska General Assembly passed the Perkins County Canal Project Act, LB-1015. The act grants the Nebraska DNR the authority to develop, construct, manage, and operate the Perkins County Canal, including the ability to acquire, exercise, and hold water rights, permits, easements, and property. A companion bill, LB-1012, creates the Perkins County Canal Project Fund to hold and manage the money necessary for the project, and allows Nebraska DNR to contract for an independent study to analyze the costs, timeline, alternatives, and impact of the Perkins County Canal Project on Nebraska water supplies, specifically drinking water in Lincoln and Omaha.

Lastly, a general appropriations bill, LB-1011, allocates an initial $53.5 million to the project for preliminary design work, engineering, permitting, and purchase options for lands in Colorado. This amount is significantly less than the $500 million that Nebraska estimated will be required to construct the canal. According to Governor Ricketts, that $500 million estimate is based on cost-adjusted estimates from the 1980s' attempts to build the canal. In his original proposal, Ricketts requested $400 million from Nebraska's cash reserves, and proposed an additional $100 million from the state's federal government pandemic relief funds.

Conclusion and Implications

Nebraska Governor Ricketts signed the Perkins County Canal Project Act on April 18, 2022 and is not expected to object to the canal-related portions of the appropriations bills. Colorado reports that it has reached out to Nebraska to discuss the project but does not yet know the specifics of the canal or any storage reservoirs slated to receive water diverted through the canal. It is expected that Nebraska's forthcoming study on canal costs, alternatives, and feasibility will shed more light on the state's plans and timeline. For now, Colorado officials say they are not necessarily opposed to the project, as it is described in the Compact, but would like the opportunity to work with Nebraska on a solution that is mutually beneficial to both states. Meanwhile, several Nebraska state senators also raised questions about the need for the canal, and whether the benefits will outweigh the half billion-dollar price tag. Regardless, Nebraska's push to bolster its water rights under the Compact in the face of increasing drought, and Colorado's hesitant response suggest that the devil will be in the details. The full text of LB- 1015 is available online at: https://nebraskalegislature.gov/FloorDocs/107/PDF/Intro/LB1015.pdf.
(John Sittler, Jason Groves)

REGULATORY DEVELOPMENTS

U.S. SECURITIES AND EXCHANGE COMMISSION PROPOSES RULE ON CLIMATE-RELATED DISCLOSURES

On March 21, 2022 the U.S. Securities and Exchange Commission (SEC) issued a Proposed Rule that would impose new standardized climate-related disclosure requirements on public companies under the Securities Act of 1933 and Securities Exchange Act of 1934.

The Proposed Rule adds sections to Regulation S-K (17 CFR § 229) and Regulation S-X (17 CFR § 210) that would require registrants to make climate-related disclosures in their registration statements and in periodic reports. Information regarding climate-related risks and associated metrics can have an impact on a public company's performance or position and may be of value to investors in making investment or voting decisions. Additionally, the SEC believes that more transparency and comparability in climate-related disclosures will foster competition. (Proposed Rule, p. 13.)

Background

Climate-related risks can pose significant financial risks to companies. Since the 1970s, the SEC has explored the need for disclosures related to material environmental issues. (Proposed Rule, p. 15). In 1982, the SEC adopted rules mandating disclosure of information related to litigation and other business costs that arose out of compliance with federal, state, and local environmental laws. Then in 2010, the SEC issued a guidance regarding when climate-related disclosures may be required under the existing reporting requirements. This guidance was in response to a rise in companies' voluntarily reporting climate-related information outside of their SEC filings. (Proposed Rule, p. 17.) As climate-related impacts and risks to businesses and the economy have grown, investors' demand for more detailed information about the effects of climate change and other climate-related risks have only increased. There are currently great inconsistencies in how companies disclose climate-related information. A central goal of this Proposed Rule is to address this issue by increasing consistency, comparability, and reliability of climate-related information for investors. (Proposed Rule, p. 21.)

Proposed Climate-Related Disclosure Framework

The Proposed Rule would require a registrant to disclose certain climate-related information, including information about its climate-related risks that are reasonably likely to have material impacts on its business or consolidated financial statements, and greenhouse gas (GHG) emissions metrics that could help investors assess those risks. A registrant may also disclose information about climate-related opportunities.

In particular, the Proposed Rule would require registrants to disclose information about:

> (1) the oversight and governance of climate-related risks by the registrant's board and management; (2) how any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term; (3) how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; (4) the impact of climate-related events and transition activities on the line items of a registrant's consolidated financial statements and the impacts on financial estimates, and assumptions used in the financial statements. (Proposed Rule, p. 42.)

Registrants that already analyze climate-related risks, have developed transition plans, or have publicly announced climate-related targets would have additional disclosure requirements regarding such activities. Specifically, these companies would be required to disclose:

(1) the registrant's process for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system; and (2) the registrant's climate-related targets or goals, and transition plan. (Proposed Rule, p. 42.)

Disclosure Requirements

Additionally, the Proposed Rule imposes disclosure requirements regarding GHG emissions. The Proposed Rule utilizes a standard developed by the GHG Protocol [https://ghgprotocol.org], which is the most widely-used global greenhouse gas accounting standard. (Proposed Rule, p. 38.) The GHG Protocol is a joint initiative of the World Resources Institute and World Business Council for Sustainable Development. The GHG Protocol standard classifies emissions by "Scopes." Scope 1 emissions are direct GHG emissions that occur from sources owned or controlled by the company. Scope 2 emissions are those primarily resulting from the generation of electricity purchased and consumed by the company. Scope 3 emissions are all other indirect emissions not accounted for in Scope 2 emissions, meaning they are a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company. Examples of Scope 3 emissions include emissions associated with the production and transportation of goods a registrant purchases from third parties, and employee commuting or business travel.

Under the proposed rule, a registrant would be required to disclose metrics regarding Scopes 1 and 2 GHG emissions. Scope 1 and Scope 2 emissions must be disclosed separately and include metrics that are: (1) disaggregated by constituent GHGs; (2) aggregated; and (3) in absolute and intensity terms. Registrants may also be required to disclose Scope 3 emissions if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions. (Proposed Rule, p. 42-43.)

Attestation Requirement

The proposed rule also includes an attestation requirement for accelerated filers and large accelerated filers with regard to GHG emissions. Such filers would be required to provide an attestation report covering, at a minimum, their Scope 1 and Scope 2 emissions. The attestation report must be from an independent attestation service provider. (Proposed Rule, p. 43-44.)

Other Accommodations to be Phased In

The Proposed Rule includes a phase-in period and other accommodations for complying with the proposed disclosure requirements. The phase-in period will have compliance dates dependent on the registrant's filer status. There would be an additional phase-in period for Scope 3 emissions disclosures and a safe harbor for Scope 3 emissions disclosures. (Proposed Rule, p. 46.)

Conclusion and Implications

The Proposed Rule seeks to provide investors with consistent, comparable, and reliable information regarding climate-related risks. The Proposed Rule is far reaching and public companies will need to develop plans to comply with the rule, if adopted as final. However, the climate disclosures rule will likely face hurdles before it is finalized and its final iteration may differ from the Proposed Rule. This is a significant rule and may take years to finalize and may be legally challenged when finalized. It is key that stakeholders understand the proposed requirements and provide the SEC with meaningful feedback in this early stage of the rulemaking process. Interested parties can submit comments on the Proposed Rule until May 20, 2022 on regulations.gov. The proposed rule is available online at: https://www.sec.gov/rules/proposed/2022/33-11042.pdf.
(Breana Inoshita, Hina Gupta)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD WARNS SURFACE WATER RIGHTS HOLDERS TO EXPECT CURTAILMENTS

The California State Water Resources Control Board (State Board or SWRCB) recently warned thousands of surface water rights holders that their use may be restricted or completely cut off in 2022 due to limited water supplies affected by the ongoing drought.

Background

The State Board manages surface water rights in California. In addition to issuing and enforcing permits for surface water rights, the SWRCB has authority to restrict water use during times of limited supply and drought. January and February 2022 were the driest on record for most of California, as the state enters a third consecutive year of drought.

State Board Issues 'Dry Year Letter' in March 2022

On March 21, 2022, the State Board issued a "Dry Year Letter" to approximately 20,000 water rights holders in the Sacramento River and San Joaquin River watersheds—the two largest rivers in the state—in addition to the watersheds of the Russian River, Scott River, Shasta River, Mill Creek and Deer Creek. These water rights holders include a vast spectrum of users, including cities, industrial users and farmers. The Dry Year Letter warned water rights holders to expect partial or total curtailments to their water rights this water year. It also reminded water rights holders of the requirement to timely report their water use. The Dry Year Letter states that in addition to fulfilling water rights holders' legal obligations to report, the information provided by the reports provides the SWRCB with the data it relies upon to manage water supplies, tailor anticipated curtailment orders and more precisely manage needs of water users and the environment.

Curtailment of Water Rights

The Dry Year Letter indicates that when curtailment orders are issued, curtailments would be begin with most junior water rights holders, namely appropriators with most recently issued diversion permits. The SWRCB indicates that if necessary, even senior water rights holders—those with pre-1914 appropriative rights and riparian rights—could see their use curtailed, and that curtailment orders may also be tailored to the needs and supplies of each water system, meaning the timing and extent of the curtailment may vary from watershed to watershed.

In 2021, the SWRCB ordered curtailment of water use in the late summer month of August; whereas, the recent Dry Year Letter warned water rights holders to expect curtailment even earlier in 2022. Prior to 2021, broad curtailment orders were issued during 2014-2016, 1987-88, and 1976-77. Certain regions have seen more frequent curtailments. The SWRCB's anticipation of a second year of curtailments beginning even earlier in the year reflects the severity of the threat to this year's water supplies.

Limitations on Other Water Sources

Water rights holders experiencing surface water curtailments may have difficulty supplementing from other sources. The Central Valley Project announced in February that due to shortage of supplies, it anticipated delivering zero percent of the contracted water supplies to most contractors this year. On April 1, 2022, the Central Valley Project reduced allocations to only that necessary for "public health and safety" for those municipal and industrial contractors who had previously been excepted from the zero percent allocation. Similarly, California's State Water Project recently announced reductions its initial allocations down to just 5 percent of contracted supplies.

In prior years, surface water users have often relied more heavily on groundwater supplies during drought years. However, as the Sustainable Groundwater Management Act (SGMA) moves deeper into implementation, supplementing with groundwater may become more difficult. Groundwater basins subject to SGMA have now adopted Groundwater Sustainability Plans (GSPs)and begun regulating groundwater use in their areas including through pumping restrictions, allocations and volumetric pumping fees.

Conclusion and Implications

Ongoing drought conditions have yet again prompted anticipated and extensive SWRCB surface water curtailments and restrictions. As water users seek out alternative supplies, these conditions will likely result in an early test of SGMA implementation during a drought year and how local agencies will respond to urgent water needs while also staying on course to achieve long-term groundwater sustainability.
(Jaclyn Kawagoe, Derek Hoffman)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ANNOUNCES NEW PROPOSED STANDARD FOR HEXAVALENT CHROMIUM

After years of waiting following the invalidation of California's previous standard for Hexavalent Chromium in drinking water, the State Water Resources Control Board (State Board) has finally announced a new standard that could take effect as early as 2024. As made famous by Julia Roberts in Erin Brockovich, the cancer-causing contaminant known as Hexavalent Chromium, or Chromium-6, is found in the drinking water of millions of Californians. With the new standard announced by the State Board, which would be the first standard nationwide targeting specifically hexavalent chromium, the state will finally have an enforceable standard for hexavalent chromium on the books.

The Proposed Standard

Back in 2011, a public health goal was set for hexavalent chromium at a mere 0.02 parts per billion. At this concentration, California scientists were able to say that it poses a negligible, one-in-a-million lifetime risk of cancer. Under the State Board's proposal, the Maximum Contaminant Level (MCL) would be set at 10 parts per billion—500 times the public health goal for negligible cancer risks. But while it's easy to say a more stringent standard should be adopted, the State Board has already had a previous MCL standard for hexavalent chromium overturned by California courts.

In July of 2014, an MCL standard of 10 parts per billion for hexavalent chromium was approved by the Office of Administrative Law. In 2017, however, the Superior Court of Sacramento County issued a judgment invalidating the MCL standard because the California Department of Public Health had failed to consider the economic feasibility for water suppliers to comply with the standard. Now five years later, the State Board has come back with the standard of 10 parts per billion, only this time with the accompanying feasibility analysis.

Among the findings of the State Board's look into the economic feasibility of implementing this standard, it was obvious that such water treatment standards would not be cheap. Rates for small water systems with fewer than 100 connections could see costs increase by around $38 per month if suppliers install Point-of-Use treatment technologies in households. Larger systems with 100 to 200 connections could see even higher increases ranging from $44 to $167 per month, based on installing reverse osmosis or other costly treatment systems, according to the State Board's estimates. The largest water providers would be much more capable of diffusing the costs across all customers, but even these large systems could see monthly rate increases up to $45.

Compliance Period

As a way to help alleviate some of these costs, the State Board is planning to provide up to four years for water providers to comply with the new standard should it be adopted. Under the current proposal, systems with more than 10,000 service connections would be required to comply with the standard within two years of adoption, systems with 1,000 to 10,000 would be required to comply within three years of adoption, and systems with less than 1,000 service connections would be given the most time, being required to reach compliance within four years of adoption.

Technologically and Economically Feasibility

In concluding its Staff Report on the proposed standard, the State Board emphasized that the Health and Safety Code § 116365 requires that to the extent technologically and economically feasible the MCL be set at a level that is not only as close to the public health goal as feasible, but also avoids any significant risk to public health.

Comparing the California Standard

This new standard is expected to reduce the number of cancer and kidney toxicity cases, but at the proposed MCL of 10 parts per billion, the cancer risk is still 500 times greater than at the public health goal. This equates to a lifetime risk for individuals that 1 person out of 2,000 exposed to drinking water at 10 parts per billion for 70 years might experience cancer—a far cry from the goal of one-in-a-million, but admittedly much better than no standard at all. Comparing this standard to the 69 MCLs currently adopted in California, the proposed MCL standard for hexavalent chromium of 10 parts per billion would place it as the seventh least protective MCL, with 63 current MCL standards more protective of human health.

Conclusion and Implications

Throughout California, 331 community water wells exceed the proposed hexavalent chromium limit of 10 parts per billion over a ten-year average. The highest levels throughout the state were reported in parts of Ventura, Los Angeles, Yolo, Merced and Riverside counties with some areas like Los Banos showing up to three times the proposed standard. Alarmingly, the highest level reported by the state was in Ventura County, where one drinking water well reported 173 parts per billion.

The current proposal is only an administrative draft at this time. Before the new standard can be implemented, the MCL must be considered for final adoption by the State Water Resources Control Board after a period for public comment and after any recommended changes have been considered. In any case, the proposal is still a huge step towards the establishment of an MCL standard for hexavalent chromium. For more information on the State Water Resources Control Board's proposed hexavalent chromium standard *see*: https://www.waterboards.ca.gov/press_room/press_releases/2022/pr03212022-hexavalent-chromium.pdf and https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/Chromium6.html.

(Wesley A. Miliband, Kristopher T. Strouse)

WASHINGTON STATE AND DROUGHT: PENALTY ORDERS ON DECK

As drought years multiply, water right compliance actions appear to be increasing in Washington. Based on code changes adopted in 2002, there is a sequence the Washington Department of Ecology (Ecology) must follow in the progression toward seeking water right compliance prior to issuing formal administrative orders or assessing penalties. *See*, RCW 90.03.605. If a violation has occurred or is about to occur, Ecology is directed by statute to first attempt to achieve voluntary compliance, through information and specific technical assistance. If after education and technical assistance, the non-compliance is not corrected "expeditiously," Ecology may issue a notice of violation OR assess penalties. *See*, RCW 90.03.605(1)(c). Unless the water use is causing immediate harm to other water rights or to public resources, in which case Ecology may take immediate action. Civil penalties may range from $100 to $5,000 per day, based on a variety of factors including whether the violation is repeated or continuous after notice of the violation is given, and whether any damage has occurred to other water users or to public resources.

Pending before the Washington Court of Appeals, Division III: *Ron Fode v. State of Washington, Dept of Ecology* (Case No. 38130-7)

In a Kafkaesque series of actions and appeals brought about by a tortured reading of the service statute and Ecology's insistence on a form over substance, the Fode saga continues to wind through the court system.

Background

Mr. Fode, either for property he owned or for property he was leasing, sought to temporarily transfer groundwater rights for seasonal irrigation. Ecology apparently rejected the application on grounds unclear in the record. Mr. Fode continued to irrigate. Ecology issued a Cease-and-Desist order, which Mr. Fode appealed to the Pollution Control Hearings Board (PCHB). The PCHB rejected the appeal as untimely under the statute. During the pendency of the appeal on the Cease-and-Desist order, Ecology issued a Civil Penalty, which Mr. Fode also appealed. In the subsequent appeal of the Penalty Order, Mr. Fode was barred from arguing any facts related to the ongoing water use and the Cease-and-Desist order on the grounds of Res Judicata because of the untimely filing of the original appeal. The PCHB upheld Ecology's Penalty order. Mr. Fode appealed to Superior Court. The Grant County Superior Court reversed the PCHB's ruling on timeliness, finding that the original filing was timely filed. The Department appealed the ruling to the Court of Appeals.

On appeal, Ecology argues that Mr. Fode continued to irrigate after receiving Cease and Desist Orders, defending the ultimate issuance of the Penalty Order, while also arguing that Mr. Fode was not prejudiced by the dismissal of his opportunity to appeal the Cease-and-Desist Order. The issue for Mr. Fode being whether Ecology and the PCHB should err on the side of substantive opportunity to be heard over procedural dismissal where there is ambiguity in the statute. And further, what does legally adequate technical assistance mean under the statute and how does that play into the penalty phase. And finally, does the technical assistance portion of the statute have any meaning if Ecology can apply its discretion at any time to bypass the provisions on a showing of use of public resources.

Fode's saga appeared to be a cautionary tale for water users and Ecology. The Department did not pursue any additional water right-related penalty actions from 2017 until the fall of 2021, when Ecology two Penalty orders based on water use in the 2021 drought year.

Settled before the PCHB: *Frank Teigs, LLC v. Ecology* (PCHB 21-074)

We previously reviewed the Frank Tiegs, LLC penalty here (PCHB 21-074, filed Nov. 12, 2021, see WWL Vol. 26, No. 2, Dec. 2021). The Frank Tiegs Penalty matter settled in April 2022. Under the agreed settlement, Ecology approved a series of temporary water right changes for the 2022 irrigation season only authorizing irrigation of the property previously under the penalty order. The penalty order was allowed to stand, although the amount of the penalty was reduced from $304,000 penalty to $125,000.

Order Issued to Acme Properties *et al.* (No. 21098)

Notice of Penalty was issued to Acme Properties LLC et al dba Skagit Valley Farms in April 2022 (Docket No. 21098). The notice of penalty against Acme Properties et al, follows a technical assistance letter issued in July of 2021.

The technical assistance included copies of the state water code, information about water rights generally, and site-specific information and direct observations. The landowner was given ten days to follow up. In the case of Acme Properties, a number of the water rights appurtenant to the property include provisions for ceasing diversions when flows on the Samish River drop below 20 CFS. 2021 was a severe drought year, and flows in the subject reach may have dropped below the required shutoff levels. Ecology did not issue a Cease-and-Desist Order but proceeded directly to a Penalty phase, presumably under its discretion to take action against harm to public resources.

According to Ecology's Penalty order, the landowner was "slow to respond, took only limited steps to address the breadth of water right issues on their lands, and continued to irrigate unlawfully through the remainder of the 2021 irrigation season" causing Ecology to issue a penalty order in April 2022. The appeal period has not yet lapsed. An appeal is expected.

Conclusion and Implications

Drought throughout the West has prompted actions on the part of the executive, legislative and regulatory bodies of government. In Washington, the regulatory bodies are active in addressing penalties related to drought and the courts are overseeing all of this.

(Jamie Morin)

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

•March 22, 2022—EPA has issued emergency orders under the Safe Drinking Water Act (SDWA) to four mobile home park water systems, requiring the mobile home park owners to comply with federal drinking water safety requirements and to identify and correct problems with their drinking water systems that present a danger to residents. The mobile home parks— Arellano Mobile Home Park, Castro Ranch, Gonzalez Mobile Home Park, and Sandoval Mobile Home Park—are all located on the Torres Martinez Desert Cahuilla Indians' Reservation in California. None of the water systems were previously registered with EPA and will now be required to comply with SDWA regulations. Under the terms of EPA's emergency orders, the owners of Arellano Mobile Home Park, Castro Ranch, Gonzalez Mobile Home Park, and Sandoval Mobile Home Park are required to provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; submit and implement an EPA-approved compliance plan to reduce arsenic below the MCL; and properly monitor the systems' water and report findings to EPA.

•March 31, 2022—EPA announced that GT Metals & Salvage LLC of Longview, Washington has agreed to pay a $50,300 penalty for repeated Clean Water Act violations. EPA found the company failed to comply with Washington's Industrial Stormwater General Permit EPA Website, which resulted in regular discharges of stormwater into ditches that eventually reach the Columbia River. Industrial stormwater from sites like GT Metals may include metals, polychlorinated biphenyls (PCBs), fuel oil, hydraulic oil, brake fluids, lead acid, and lead oxides. These pollutants and other debris can harm aquatic life and affect water quality. During inspections on February 2020, EPA found that the company failed to develop a Stormwater Pollution Prevention Plan (SWPPP); implement best management practices; conduct required sampling of discharges; conduct monthly visual inspections; and complete, submit, and maintain records.

Indictments, Sanctions, and Sentencing

•April 8, 2022—The Sanitary District of Highland, Indiana, and the Town of Griffith, Indiana, have agreed to construction projects and capital investments that will eliminate discharges of untreated sewage from their sewer systems into nearby water bodies, including the Little Calumet River. In two separate consent decrees, Highland and Griffith have each agreed to implement plans that will significantly increase the amount of wastewater they send to the neighboring town of Hammond for treatment and eliminate points in their sewer systems that overflow when their systems become overloaded. Together, the towns will spend about $100 million to improve their sewer systems. In addition, Highland will pay a civil penalty of $175,000 and Griffith will pay a civil penalty of $33,000. The two consent decrees would resolve the violations alleged in the underlying complaint filed by the United States and the state of Indiana, which alleges that Highland's sanitary sewage collection system overflowed on 257 days since 2012, resulting in discharges of untreated sewage into the Little Calumet River or a tributary to the river. The complaint also alleges that Griffith discharged sewage into a wetland adjacent to the Little Calumet River on 16 days since 2013. Finally, the complaint alleges that both Highland and Griffith failed to comply with previous orders by EPA to stop these illegal discharges. Under the proposed consent decrees, Highland and Griffith will also implement plans that will improve operations and maintenance

of their sewer system and ability to address and respond to any unforeseen sanitary sewer overflows in the future. Highland and Griffith will submit semi-annual progress reports to the United States and the state until all work has been completed and all of the reports and deliverables required will be available to the public on their municipal websites.
(Andre Monette)

JUDICIAL DEVELOPMENTS

ELEVENTH CIRCUIT CLARIFIES PLEADING STANDARD FOR AESTHETIC INJURY UNDER THE CLEAN WATER ACT

Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, 26 F.4th 1235 (11th Cir. 2022).

The U.S. Court of Appeals for the Eleventh Circuit recently vacated a lower court's ruling denying standing to an environmental group petitioner. The court held that the petitioner's allegations were sufficient to establish and injury in fact and confer Article III standing.

Factual and Procedural Background

Sea Island Acquisition owns a half-acre parcel of land near Dunbar Creek in Glynn County, Georgia. The parcel is considered a wetland under the federal Clean Water Act (CWA). When Sea Island sought to fill that parcel with outside materials, the CWA required a Section 401 water quality certification from the State of Georgia and a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps).

In 2012, the Georgia Environmental Protection Division issued a conditional Section 401 water quality certification for all projects authorized by Nationwide Permit 39—the general permit that was issued to Sea Island for its project. On January 10, 2013, Sea Island submitted a pre-construction notification to the Corps for its plan to fill the wetland for the purpose of constructing a commercial building. On February 20, 2013, the Corps issued a preliminary jurisdictional determination determined that the parcel might be a wetland, and the Corps "verified authorization" of the proposed project for two years or until Nationwide Permit 39 was modified, reissued, or revoked.

Sea Island filled the wetland between February 20, 2013, and March 27, 2013, but did not erect or intend to erect any buildings or structures on the wetland. Sea Island led the Corps to believe it was constructing a commercial building on its wetlands when it only intended to landscape over the wetland with fill material.

Two environmental organizations, and Jane Fraser, sued Sea Island. The organizations are Georgia nonprofit corporations. Some of their members, including Fraser, reside in Glynn County near the wetland. Fraser was a 20-year resident of Glynn County who loved to the area because of the unique ecology and native habitat, wildlife, and vegetation. Fraser alleged that the fill of the wetland was the partial cause of a noticeable deterioration of the natural aesthetic beauty, water quality, and habitat of the area.

Sea Island moved to dismiss the amended complaint for lack of standing and for failure to state a claim upon which relief could be granted. Sea Island argued that the allegations did not establish that any of the parties had suffered an injury in fact. The U.S. District Court dismissed the complaint for lack of standing on the ground that the plaintiffs failed to allege an injury in fact.

The Eleventh Circuit's Decision

The threshold issue is whether plaintiffs suffered an injury in fact to confer standing under Article III of the U.S. Constitution. At the motion-to-dismiss stage, a court evaluates standing by determining whether the complaint clearly alleges facts demonstrating each element. An individual suffers an aesthetic injury when the person uses the affected area and is a person for whom the aesthetic value of the area will be lessened by the challenged activity. An individual can meet the burden of establishing that injury at the pleading stage by attesting to use of the area affected by the alleged violations and that the person's aesthetic interests in the area have been harmed.

Sea Island put forward three arguments in defense of the dismissal. First, it argued that the District Court properly concluded Fraser did not allege that she visited the wetlands before the fill, only that she enjoyed the aesthetics of the wetland. Second, it argued that Fraser must have entered the wetland to have an aesthetic interest in it. Third, it argued that there is no interest in a wetland that is private property.

The Court of Appeals first noted that Fraser did specifically allege that she derived aesthetic pleasure from the wetland before the fill, and concluded that Fraser did not need to visit the wetland to derive the pleasure.

Second, the court noted that Fraser need not physically step foot on the wetland to have an aesthetic pleasure from it. Finally, the court held that even if the wetland was private property, Fraser alleged an aesthetic injury from the fill. Therefore, Fraser adequately alleged that an injury to aesthetic interests in the wetland from viewing the wetland, deriving aesthetic pleasure from its natural habitat and vegetation, and now deriving less pleasure from the fill of the wetland.

Injury

In analyzing whether plaintiffs' met their burden of establishing an injury, the court noted that Fraser "plausibly and clearly alleged a concrete injury" to aesthetic interest. The court highlighted the fact that Fraser gains aesthetic pleasure from viewing wetlands in their natural habitat. Fraser regularly visited the area to see the wetland. After the wetland was replaced with sodding, Fraser derived less pleasure from the wetland because the habitat and vegetation were unnatural. Thus, Fraser's injuries were sufficient at the pleading stage.

Conclusion and Implications

This case highlights the pleading requirements for environmental plaintiffs alleging an injury to aesthetic interests. It highlights that an individual member of an environmental organization alleges sufficient facts to withstand a motion to dismiss by alleging the individual viewed the wetland, derived aesthetic pleasure from its natural habitat and vegetation, and derives less pleasure from the altered site. https://scholar.google.com/scholar_case?case=10481156572434704205&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

SIXTH CIRCUIT AFFIRMS DISMISSAL OF CLEAN WATER ACT CITIZEN SUIT AGAINST SEWER DISTRICT

South Side Quarry, LLC v. Louisville & Jefferson County Metro. Sewer District, 28 F.4th 684 (6th Cir. 2022).

The U.S. Court of Appeals for the Sixth Circuit recently affirmed a decision by the U.S. District Court to dismiss a quarry owner's federal Clean Water Act (CWA) claims against a sewer district for diverting flood flows into a quarry. The appellate court's decision explains the types of CWA violations that a plaintiff may bring a citizen suit to enforce, the procedural requirements a plaintiff must satisfy to successfully bring a CWA claim, and the differences between a discharge and a diversion.

Factual and Procedural Background

Under the CWA, a discharge of pollutants to navigable waters is prohibited, except as authorized by a permit issued in accordance with the CWA; without such a permit, a discharge is unlawful. The CWA allows states to issue permits under the CWA's National Pollutant Discharge Elimination System (NPDES). Kentucky issues NPDES permits for waters within the Commonwealth (KPDES permits). In limited circumstances, the CWA permits citizen suits to enforce violations of the CWA.

A body of water named Pond Creek drained into a large watershed in the Louisville area. The watershed had the potential to cause massive flooding issues, therefore the U.S. Army Corps of Engineers (Corps) undertook a plan to address the flooding by creating a separate channel for a tributary to Pond Creek, which would divert the tributary's excess water into Vulcan Quarry. Vulcan Quarry would serve as a detention basin, and the Corps planned to build a pipe that would allow the water to from Vulcan Quarry to drain back into the tributary as the flooding subsided. The Corps partnered with a sewer district to complete the project, where the Corps designed and constructed the project, and the sewer district acquired necessary property rights, including a flowage easement affecting the whole quarry, and operated and maintained

the system. For 12 years, until the plaintiff acquired Vulcan Quarry, the project diverted excess stormwater from the tributary into Vulcan Quarry without issue.

When plaintiff took ownership of Vulcan Quarry, it provided the sewer district with notice that the plaintiff intended to sue the sewer district under the CWA. The notice alleged the sewer district was discharging stormwater and pollutants into Vulcan Quarry in violation of the CWA's general prohibition on dumping pollutants into waters of the United States, the easement, a consent decree, and various permits. After providing such notice, Plaintiff sued the sewer district.

The sewer district filed a motion to dismiss for failure to state a claim; and the District Court granted the sewer district's motion. The District Court found that some of plaintiff's claims were time-barred under a five-year statute of limitations, and that plaintiff gave the sewer district insufficient notice for the other claims. Plaintiff appealed.

The Sixth Circuit's Decision

Adequacy of Pre-Suit Notice

The appellate court's decision turned on whether plaintiff satisfied the CWA's pre-suit notice requirement. The court noted that plaintiff's CWA claims appeared to be contradictory—most CWA claims alleged violations of existing regulations, permit, or property rights, while the remaining claims alleged the sewer district discharged without a KPDES permit.

The court first considered the adequacy of the pre-suit notice in relation to the CWA claims alleging violations of six existing regulations, permits, or property rights: 1) the sewer district's easement; 2) the sewer district and the Corps' construction permit; 3) a consent decree between the sewer district, the EPA, and the Kentucky Cabinet; 4) agreements about upstream point sources; 5) the CWA's general prohibition on the discharge of pollutants; and 6) the sewer district's various KPDES permits. The court determined the notice was inadequate as to each. As to the first four, the court determined the easement was not an "effluent standard or limitation" under the CWA; the construction permit was not a KPDES permit; the notice did not reference the consent decree, and plaintiff lacked standing to enforce the consent decree; and the notice did not identify the owners, tracts of land, location of polluting sources, or any applicable effluent limitations or standards that might apply to the agreements.

The court also ruled that the CWA's citizen-suit provision does not authorize citizen suits for violating the general prohibition against discharging without a permit when the alleged discharger possesses a permit. Finally, the court determined the pre-suit notice was inadequate because it failed to identify any specific standard, limitation or order in the sewer district's existing KPDES permits that were violated.

Waters Flowing Through Tributary and Quarry Were Not Meaningfully Distinct

The court next addressed plaintiff's claims that the sewer district was diverting water from the tributary into the quarry without a permit under the CWA. Plaintiff argued the diversion of water and pollutants from the tributary into the quarry was a discharge that required a KPDES permit, and that the sewer district was violating the CWA by discharging without a permit. The court disagreed, reasoning that the CWA only requires permits for "discharges," which are defined as "any addition of any pollutant to navigable waters from any point source." The court stated that when water simply flows from one portion of a body of water to another, rather than being removed from and then returned to the body of water, no discharge of pollutants occurs. The court then reasoned the waters flowing through the tributary and the quarry were not meaningfully distinct bodies of water: the diversion from the tributary into Vulcan Quarry was simply water moving from one portion of the body of water to another, and was not a discharge. In coming to this conclusion, the court relied on the Corps' plan for the project and a recent letter from the Corps that indicated the tributary and Vulcan Quarry were the same body of water. As a result, the notice failed to allege any discharge under the CWA.

Even if District Bodies of Water, Water Transfer Rule Exemption Would Apply

Furthermore, the court opined that even if the tributary and the quarry were separate bodies of water, the sewer district still would not need a KPDES permit because of the EPA's Water Transfer Rule.

The Water Transfer Rules exempts water transfers, defined as activities that convey or connect waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use, from the NPDES permitting system. The court indicated that the diversion of water from the tributary to the quarry fell within the rule, and therefore that the sewer district would not need a permit even if these were two separate bodies of water.

Therefore, the court affirmed the District Court's judgment and rejected plaintiff's claims.

Conclusion and Implications

This case serves as an important reminder that plaintiffs must give violators proper pre-notice suit, including indicating specific standards, limitations, or orders under the CWA alleged violated. Although a court is required to construe a complaint in the light most favorable to a plaintiff during a motion to dismiss, this decision serves as a reminder that a court may, nevertheless, carefully evaluate the alleged facts to determine whether they support a plausible inference of wrongdoing. The court's opinion is available online at: https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0047p-06.pdf.
(William Shepherd, Rebecca Andrews)

NEVADA STATE COURT VACATES STATE ENGINEER'S 'SUPERBASIN' ORDER

Las Vegas Valley Water District, et al., v. Tim Wilson, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources, Consolidated Case Nos. A-20-816761-C, A-20-817765-P, A-20-818015-P, A-20-817977-P, A-20-818069-P, A-20-817840-P, A-20-817876-P, A-21-833572-J (8th Dist. 2022).

On April 19, 2022, Nevada's Eighth Judicial District Court entered an order that vacated Order 1309, in which the State Engineer combined multiple Southern Nevada hydrographic basins into a single administrative unit for the purpose of managing groundwater withdrawals. The court concluded that the State Engineer lacked statutory authority to jointly administer what had historically been legally distinct groundwater basins or to conjunctively manage surface and groundwater rights, even where the best available science demonstrated that the water sources were hydrologically connected. The decision strikes a blow to the State Engineer's efforts to prevent pumping of the carbonate aquifer known as the Lower White River Flow System (LWRFS) in a manner that is depleting the Muddy River Springs, home to the endangered Moapa dace.

Nevada's Hydrographic Basins

The State Engineer managers Nevada's groundwater resources through 232 administrative units called "hydrographic basins," which are generally defined by surface topography—more or less reflecting boundaries between watersheds. This administrative structure works reasonably well for basins where groundwater is pumped from the alluvial aquifer because annual groundwater recharge generally can be estimated from precipitation or from discharge data. Once a groundwater budget for a basin-fill aquifer is established, the State Engineer can determine the amount of groundwater that can be sustainably extracted annually, known as the "perennial yield."

With limited exceptions, Nevada generally follows the prior appropriation system for surface and groundwater. For groundwater applications, the administrative boundaries of each hydrographic basin determine the amount of water available for appropriation. The priority of groundwater rights is determined relative to other water rights holders within a basin. A groundwater appropriation that has a priority date junior to when the basin's perennial yield was fully allocated may be subject to curtailment.

The Lower White River Flow System

The administrative boundaries of Nevada hydrographic basins do not necessarily reflect the hydro-

geological boundaries of subsurface flow. Underlying approximately 50,000 square miles of Nevada is a large swath of fractured carbonate rock that, over thousands of years, has accumulated a considerable volume of water.

This carbonate-rock aquifer contains at least two major "regional flow systems," which are continuous, interconnected, and transmissive geologic features through which water flows underground roughly from north to south. The LWRFS at issue in Order 1309 encompasses the southern portion of the White River-Muddy River Springs flow system.

The Muddy River runs through a portion of the LWRFS before discharging into Lake Mead. Many warm-water springs, including the Muddy River Springs, discharge from the regional carbonate groundwater aquifer. The Muddy River Springs form the headwaters of the Muddy River and provide the only known habitat for the endangered Moapa dace, a warm-water minnow. Flows from the springs depend on the groundwater elevation within the carbonate aquifer and can change rapidly in direct response to changes in carbonate groundwater levels.

The Muddy River is fully appropriated by a 1920 decree that determined the relative surface water rights to the river. The Decree was entered before any significant groundwater development occurred within the LWRFS area. Muddy River decreed rights are the most senior rights within the LWRFS.

Aquifer Test of the Lower White River Flow System

As early as 1989, concerns arose that groundwater pumping from the carbonate-rock aquifer would result in water table declines, thereby reducing or eliminating discharge into the warm-water springs and, ultimately, the Muddy River. Nearly 100 groundwater applications seeking over 300,000 acre-feet from the various basins within the LWRFS were filed in the State Engineer's office in the 1980s and 1990s, with the State Engineer issuing permits for 40,000 acre-feet.

In 2002, the State Engineer issued Order 1169 to hold in abeyance water right applications and require an aquifer pump test to evaluate the impact of groundwater pumping on senior water rights and the Muddy River environment. The aquifer test was conducted from 2012 through 2014, with various participants pumping water to stress the carbonate aquifer.

From the test results, the State Engineer found an "unprecedented decline" in groundwater levels and the springs and concluded that groundwater pumping in certain areas of the LWRFS could not occur without conflicting with existing senior rights, including decreed surface water rights on the Muddy River, or detrimentally impacting the habitat of the Moapa Dace. The State Engineer also concluded that the test demonstrated connectivity within the carbonate aquifer of the LWRFS. As a result of the test, the State Engineer denied pending groundwater applications in certain basins within the LWRFS.

Expert Testimony Regarding the Lower White River Flow System

On January 11, 2019, the State Engineer issued Interim Order 1303, which designated the LWRFS as a joint administrative unit and invited stakeholders to file reports and participate in a hearing to take expert testimony on various technical questions. These included: 1) the LWRFS's geographic boundary; 2) aquifer recovery and spring flow subsequent to the aquifer test; 3) the long-term annual quantity of groundwater that may be pumped from the LWRFS without capturing Muddy River flow; 4) the effects of movement of water rights between alluvial wells and carbonate wells on deliveries of senior decreed Muddy River rights; and 5) "[a]ny other matter believed to be relevant to the State Engineer's analysis." The State Engineer held a hearing in fall 2019, which was limited to these technical issues and did not address legal questions raised by the joint administration of individual hydrographic basins.

Order 1309

On June 15, 2020, the Nevada State Engineer issued Order No. 1309, which delineated seven formerly independently administered hydrographic basins as a single hydrographic basin known as the "Lower White River Flow System Hydrographic Basin." Order 1309 further established 8,000 acre-feet annually as the maximum quantity of groundwater that may be pumped from the combined basin on an average annual basis without causing further declines in spring and river flows. That amount could be reduced if adverse impacts on the Moapa dace from pumping were observed. Order 1309 also set forth new criteria the State Engineer "considered critical in demon-

strating a close hydrologic connection requiring joint management."

As legal authority to issue Order 1309, the State Engineer cited a number of specific statutes:

- NRS 533.024(1)(c), a legislative declaration that "encourag[es] the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada."

- NRS 534.024(1)(e), a legislative declaration that states the policy of Nevada is "[t]o manage conjunctively the appropriation, use and administration of all waters of this State, regardless of the source of the water."

- NRS 534.020, which provides that all waters of the State belong to the public and are subject to all existing rights.

- NRS 532.120, which allows the State Engineer to "make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law."

- NRS 534.110(6), which allows the State Engineer to conduct investigations into any basin where average annual recharge is not adequate to serve all appropriations and then may restrict withdrawals to conform to priority rights.

- NRS 534.120, which allows the State Engineer to "make such rules, regulations and orders as are deemed essential for the welfare of an area where the groundwater basin is being depleted."

Legal Challenges to Order 1309

Numerous entities petitioned the district court for review of Order 1309. These included: Southern Nevada Water Authority and Las Vegas Valley Water District, which serve municipal water to Southern Nevada and own groundwater rights in various basins included within the LWRFS and a significant portion of the Muddy River decreed rights; various large land owners, water rights holders and developers; the Center for Biological Diversity a national nonprofit conservation organization; the Muddy Valley Irrigation Company, which owns most of the Muddy River decreed rights; industrial water uses; and a public water district. The cases were consolidated for review.

The District Court's Decision

In a 40-page order, the court vacated Order 1309 on the basis that the State Engineer lacked statutory authority to manage previously independent hydrographic basins as a single administrative unit and violated the petitioners' due process rights by failing to provide notice and opportunity to comment on the legal and policy issues at issue with basin consolidation.

The court concluded that the legislative declarations regarding best available science and conjunctive management are merely statements of policy that only encouraged, rather than authorized, the State Engineer to take any specific action. As a result, they did not allow the State Engineer to change established administrative boundaries, even if the science shows that groundwater withdrawals from one basin can have trans-boundary effects. As stated by the court:

> The statute does not declare that the best available science should dictate the decisions. Indeed, if science was the sole governing principle to dictate the Nevada State Engineer's decisions, there would be a slippery slope in the changes that could be made in the boundaries of the basins and how they are managed; each time scientific advancements and discoveries were made regarding how sub-surface water structures are situated or interconnected, under this theory of authority, the Nevada State Engineer could change the boundaries of the existing basins. Each boundary change would upend the priority of water right holders as they relate to the other water right holders in the new, scientifically-dictated "basin." This would lead to an absurd result as it relates to the prior appropriation doctrine.

Because conjunctive management also is just a policy declaration, the court likewise rejected it as a statutory basis for Order 1309.

The court noted that while NRS 532.120 allows the State Engineer to make reasonable rules and regulations as may be necessary for proper and orderly execution, "this authority is not without its limits,

and is only authorized for those 'powers conferred by law.'" Citing multiple statutory provisions, the court observed that the Legislature repeatedly referred to a "basin" as an independent administrative unit. As a result, the court concluded that no statute:

> . . .gives the State Engineer direct authority to eliminate, modify, or redraw the boundaries of existing hydrographic basins, or to consolidate multiple, already established, hydrographic basins into a single hydrographic superbasin."

The court reached this conclusion against the backdrop of the prior appropriation system, where appropriators have understood a hydrographic basin as being "an immutable administrative unit" for establishing water availability and priorities, "regardless of whether the boundaries of the unit accurately reflected the boundaries of a particular water resource."

In addition to the lack of statutory authority, the court identified numerous due process shortcomings in the State Engineer's notice and opportunity to be heard in relation to the rights impacted by Order 1309.

Conclusion and Implications

The intersection of science and water law has been murky territory in the jurisprudence of many states. However, this author is aware of no previous court order in Nevada that so readily acknowledges the connection between groundwater and surface water yet concludes, absent express legislative direction, that groundwater administration cannot adapt to hydrologic reality. It is too soon to know if the State Engineer or any of the petitioners will appeal the court's order to the Nevada Supreme Court, which is no stranger to cases that address the scope of the State Engineer's regulatory authority. In this case, though, more specific legislative action may be needed if the Legislature wants to expressly authorize the Nevada State Engineer to make management decisions based on best available science.
(Debbie Leonard)

NEW MEXICO SUPREME COURT FINDS GAME COMMISSION RULE ALLOWING LANDOWNERS TO RESTRICT ACCESS TO WATER FLOWING THROUGH PRIVATE PROPERTY UNCONSTITUTIONAL

Adobe Whitewater Club of New Mexico v. State Game Commission,
Case No. S-1-SC-38195 (N.M. Sup. Ct. March 2, 2022).

On March 2, 2022, the New Mexico Supreme Court issued a unanimous ruling finding that the New Mexico Game Commission's rule allowing landowners to restrict access to water flowing through their private property is unconstitutional. The ruling is a victory for broad recreational rights such a flyfishing and kayaking. Ranchers and landowner groups who supported the rule contended that it prevented trespassing and preserved sensitive streambeds. The Court heard oral arguments for an hour before taking 15 minutes to reach its unanimous ruling. The Court will issue an opinion detailing its reasoning for the ruling at a later date. The ruling, in effect, declares New Mexico river access a constitutional right.

Background

The New Mexico Game Commission promulgated Rule 19.31.22 NMAC, which provides a definition of "navigable in fact" to ascertain whether a waterway is navigable in New Mexico for the purpose of the Department of Game and Fish providing a private landowner a certification of non-navigable water. Such certification recognizes that within the landowner's private property is a segment of riverbed or streambed deemed non-navigable and closed to access without written permission of the landowner. Pursuant to the rule, "navigable in fact" is defined as follows:

That a watercourse is navigable in fact when it is was used at the time of statehood, in its ordinary and natural condition, as a highway for commerce over which trade and travel was or may have been con-

ducted in the customary modes of trade or travel. A navigable-in-fact determination shall be made on a segment-to-segment basis.

Rule 19.31.22.7(F) NMAC

Generations of New Mexicans grew up freely accessing riverbanks for fishing and recreation. However, in 2014, New Mexico's then Attorney General issued a non-binding legal opinion that "walking, wading or standing in a stream bed is not trespassing." N.M. Att'y Gen. Op. 14-04. The Attorney General Opinion spurred many landowners and organizations to support legislation that would codify the Game and Fish regulation into law. In 2017, the Department of Game and Fish established a procedure under which landowners could apply to have segments of waterways abutting their land certified as "non-navigable," and thereby, closed to access without written permission from the landowner. The procedure was later adopted as a Game and Fish Regulation, effective January 22, 2018. 19.31.22.7(G) NMAC; 19.31.22.8(B)(4) NMAC.

In the summer of 2021, the New Mexico Game Commission held hearings on five pending applications from private landowners whose property abuts waterways seeking state certifications and signage that the waterway is non-navigable and closed to the public. The Court's ruling immediately voids all certificates previously approved under the Rule.

The New Mexico Supreme Court's Ruling

Whether the public has a right to fish or float on streams and other waterways that flow through private property has been an ongoing debate in the West for decades. The New Mexico Supreme Court joined the conclusions reached by other courts in recent years including Utah, Oregon and Montana. Montana allows wading access to the "high water mark" or the point to which the river flows at seasonal flood stages. Montana differs from New Mexico in that it does not have a monsoon season. New Mexico's monsoon season results in the creation of seasonal flow waterways.

The New Mexico Constitution states that "unappropriated water of every natural stream, perennial or torrential . . . belong to the public." N.M. Const. art. XVI, § 2. In 1907, New Mexico's Territorial Legislature declared that "[a]ll natural waters in streams and water courses . . . belong to the public." NMSA 1978, § 72-1-1 (1907).

In tandem with the public ownership of all waters in New Mexico is the debate over the manner in which the public can access those waters.

The Court heard oral arguments debating public stream access. Environmental advocates contended the Game and Fish regulation aimed at stopping trespassing on private land by making sections of water off limits to the public is unconstitutional. Proponents of the Game Commission Rule argued, inter alia, that having segments of New Mexico's waterways off-limits to the public prevents habitat damage. Many large ranch owners contend they have invested heavily in conservation efforts and habitat restoration initiatives in response to increased foot traffic to stream banks. They also argued that their private property rights trump public access over their lands.

Conclusion and Implications

This case highlights the important intersection of outdoor recreation, stream access and private property rights. The New Mexico Supreme Court's unanimous ruling declaring New Mexico river access a constitutional right is a victory for recreational groups seeking to preserve public stream access. Although approximately seventy percent of New Mexico's waterways are located on public lands, the Court's ruling ensures the public's unfettered access to the remaining thirty percent of the state's waterways.
(Christina J. Bruff)

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