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WESTERN WATER LAW & POLICY REPORTER™

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WESTERN WATER NEWS

INTERSTATE COMPACT LITIGATION UPDATE: FEDERAL GOVERNMENT OBJECTS TO PROPOSED HISTORIC SETTLEMENT AGREEMENT SUBMITTED BY NEW MEXICO, TEXAS AND COLORADO

In November, 2022 after almost ten years of litigation, Colorado, New Mexico and Texas officials delivered the announcement of a proposed interstate compact settlement agreement between New Mexico, Texas and Colorado over equitable apportionment of the states' shared river system under the Rio Grande Compact after almost ten years of litigation. The three states filed a Notice of Joint Motion to Enter a Consent Decree supporting the Rio Grande Compact on November 14, 2022. On November 23, 2033, the United States subsequently filed a Notice of Motion to Strike the Proposed Consent Decree. The Special Master entered an Order denying the Motion to Strike on December 30, 2022. The proposed settlement agreement was unsealed and became public January 9, 2023. The United States' objections to the proposed settlement decree remain under seal pending further confidential negotiations among the parties and a hearing on the Joint Motion.

Background

The Rio Grande originates in the eastern slopes of the Rockies in Colorado about seventy miles from the New Mexico border. It flows through the fertile San Luis Valley and then into New Mexico where it travels south eventually forming the boundary between the United States and Mexico before emptying into the Gulf of Mexico. As neighboring states and partners to several interstate compacts (the Pecos River Compact, the Rio Grande Compact, and the Canadian River Compact) New Mexico and Texas share a long water history. As the downstream state, Texas's focus is ensuring New Mexico meets its various compact delivery requirements.

To this end, on January 5, 2013, the State of Texas filed a Motion with the United States Supreme Court seeking leave to file its Complaint against New Mexico contending that excessive groundwater pumping between Elephant Butte Reservoir and the New Mexico-Texas border is depriving Texas of water. The Motion sought to invoke the Supreme Court's original jurisdiction to both determine and enforce Texas' rights against New Mexico to deliveries of Rio Grande water in accordance with the Rio Grande Compact, 53 Stat. 785 (1939). The Supreme Court granted Texas's Motion in 2014 and appointed a Special Master. The United States filed a Complaint-in-Intervention paralleling Texas's allegations against New Mexico. New Mexico filed a Motion to Dismiss. On October 10, 2017, the Supreme Court denied New Mexico's Motion to Dismiss Texas's Complaint. On March 5, 2018, the United States Supreme Court held that the United States may pursue its federal interests in the Rio Grande Compact in ensuring water entitlements are met on the Rio Grande, one of North America's longest rivers. *Texas v. New Mexico*, 138 S.Ct. 954 (2018).

Drought and New Mexico

In recent years, prolonged drought conditions continue to play a significant role in all western states' interstate water issues. Ongoing severe drought seasons implicate New Mexico's delivery obligations. One emerging trend is that downstream states are increasingly seeking to invoke the United States Supreme Court's original jurisdiction to address problems created in the event drought results in under-deliveries and municipal demand increases in the face of decreased supplies and storage. Ironically, these are some of the same tensions that prompted the states to develop and negotiate the Compact.

The Rio Grande is apportioned by the Rio Grande Compact of 1938, which allocates water to Colorado, New Mexico and Texas. The Compact effects an equitable apportionment of the waters of the Rio Grande among Colorado, New Mexico and Texas by establishing delivery amounts due at specific gauges. The motivating factor behind the Compact negotiations was the insufficient supply of water in the Rio Grande for irrigation in the three states and Mexico.

The Rio Grande Compact

The Rio Grande Compact divides the waters of the Rio Grande between the three Compact states. In doing so, it maximizes the beneficial use of the water without impairment of any beneficial uses under the conditions prevailing in 1929. Colorado and New Mexico can increase their storage using excess floodwater and Texas is assured that 790,000 acre-feet will be released below Elephant Butte Reservoir. However, during drought conditions Colorado and New Mexico may be required to release water from storage and may be precluded from increasing the amount of water in storage.

The Proposed Settlement

Highlights among the states' proposed settlement agreement include changes to the location where Texas's share of water under the Rio Grande Compact will be measured. Currently, the delivery measurement is approximately 100 miles north of the Texas state line. The proposed new measurement line would be on the New Mexico-Texas state line at the El Paso Gage. In addition, the proposed agreement incorporates groundwater pumping calculations into the delivery formulas. The effects of groundwater pumping have been a major source of contention among the states. The states' proposal also provides for updated conditions for the resolution of disputes regarding over or under delivers of water under the Compact.

Conclusion and Implications

Given the fact that the legal bases for interstate water deliveries under the Rio Grande Compact is 83 years old, revisions and more sophisticated hydrologic accounting methodologies was expected in any settlement proposal among Colorado, New Mexico and Texas. Another major goal of the proposed settlement included crafting new dispute resolution procedures to avoid future conflicts. A hearing on the proposed settlement decree is scheduled for February 2023. (Christina J. Bruff)

IDAHO WATER USERS CONSIDER LEGISLATIVE AMENDMENTS CODIFYING THE COMMON LAW REMEDY OF 'SELF-HELP'

Members of the Idaho Water Users Association are considering potential statutory amendments codifying the common law remedy of self-help to address unauthorized ditch encroachments and other ditch modifications in response to the Idaho Supreme Court's recent decision in *Hood v. Poorman*, ___ Idaho ___, 519 P.3d 769 (2022). While the Court acknowledged the right of self-help availability under Idaho Code § 42-1209 (addressing ditch encroachments) in *Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 288 P.3d 810 (2012), it expressly precluded the right of self-help under Idaho Code § 42-1207 (addressing ditch modifications such as tiling and relocation) in *Hood* creating a concerning inconsistency heading into the 2023 irrigation season.

What is 'Self-Help' and Why is It an Important Remedy?

At its core, much of Idaho ditch rights-based law is rooted in easement. This is because the vast majority of irrigation and drainage ditches in Idaho are easement-based (express, statutory, or prescriptive), as opposed fee title-based. Consequently, Idaho Code contains various statutes protecting ditch easements from unauthorized encroachment and modification (whether realignment or piping). *See*, *e.g.*, Idaho Code §§ 42-1102, 42-1207, and 42-1209. These statutes require the express written permission of the ditch owner or operator before one can construct or install improvements encroaching on the ditch easement, or otherwise modify a ditch. The purpose of the written permission requirement is to allow ditch owners/operators the opportunity deny permission when they determine that the requested improvement or ditch alteration will unreasonably or materially interfere with ditch operation or maintenance, including impeding the flow of water in the ditch.

Under Idaho common law, easement owners possess the right of self-help, the right to unilaterally remove obstructions and abate interference within the easement area without resorting to the courts first when the obstruction(s) or interference unreason-

ably interfere or conflict with the purpose and use of the easement. *See*, *e.g.*, *Carson v. Elliot*, 111 Idaho 889, 891, 728 P.2d 778, 780 (Ct.App. 1986). In the context of ditch rights, operations, and maintenance, self-help is an important remedy during the height of the irrigation season when only a few days without water can make a big difference. In other words, the judicial process takes more time than water users can afford for remedying ditch interference claims.

The Idaho Supreme Court's Conflicting Treatment of Self-Help under Idaho Code Sections 42-1209 and 42-1207

In 2012, the Idaho Supreme Court addressed the availability of the self-help remedy in the context of a dispute pending between Pioneer Irrigation District and the City of Caldwell (City). Caldwell was growing and its municipal stormwater disposal need was growing with the increase in impermeable rooftops, driveways, roadways, and parking lots. The City's preferred method of municipal stormwater disposal was discharge to irrigation water delivery and drainage ditches owned, operated, and maintained by Pioneer Irrigation District, as well as those owned by the United States Bureau of Reclamation but operated and maintained by Pioneer under contract. Pioneer and Caldwell had different views of the application of Idaho Code Section 42-1209, and whether and to what extent the statute curtailed municipal drainage and police powers under Title 50, Idaho Code.

Ultimately, the Court determined that Idaho Code § 42-1209 applied to Caldwell's stormwater outfalls, and that ditch owners/operators were vested with the initial discretion to deny encroachment requests because it is the ditch owner/operator, not the encroacher, who is immediately liable under Idaho Code §§ 42-1201 through 42-1204 for damage to the property of others caused by negligent ditch operations. If an encroacher feels aggrieved by the ditch owner/operator's decision, they have a right to seek judicial review of that decision.

In light of the statutory duties owed, the *Pioneer* Court confirmed not only the ditch owner/operator's initial discretion under Idaho Code § 42-1209, but also held that those decisions are entitled to deference on judicial review. The Court further reasoned that nothing within the statute expressly precluded the right of self-help and, to the contrary, the exercise of self-help was an available remedy consistent with general easement law—ditch owners/operators should not "be forced to wait weeks, if not months, to cause removal of an encroachment that ought not have been constructed in the first instance." *Pioneer*, 153 Idaho at 600, 288 P.3d at 817.

In late 2022, however, the Court determined that the right of self-help did *not* exist under Idaho Code § 42-1207 concerning the relocation, alteration, and/or tiling of ditches. *Hood*, ___ Idaho at ___, 519 P.3d at 791 ("[T]he appropriate recourse for a violation of section 42-1207 is to seek damages or an injunction to return the ditch to its original state . . . Nothing in the statute or our caselaw indicates resorting to self-help by removing a preexisting culvert us an appropriate form of relief under Idaho Code Section 42-1207]).

Some argue that these statements are befuddling because: (a) they turn the statutory interpretation criterion on its head (*i.e.*, statutory silence leaves common law remedies available and intact—silence does not abrogate them (*see*, *e.g.*, *Pioneer*, 153 Idaho at 601-602, 288 P.3d at 818-819 (citations omitted)); and (b) § 42-1207 contains the same prior written permission requirement as § 42-1209, and the statute is read *in pari materia* with the same ditch owner/operator duties and obligations found earlier in the same chapter (*i.e.*, §§ 42-1201 through 42-1204) as applied by the *Pioneer* Court as being supporting context for promoting the remedy of self-help under Idaho Code § 42-1209.

Conclusion and Implications

So, while ditch/owners and operators are equipped with self-help remedies in the context of interfering ditch encroachments under Idaho Code § 42-1209, those same owners/operators must conversely "wait weeks, if not months" under the judicial process before abating a ditch modification interference (realignment and/or piping) that does not function correctly and impedes the flow of water during the same irrigation season when only a few mere days matter. This judicial application inconsistency within Idaho Code Title 42, Chapter 12 is concerning to the Idaho water user community heading into the 2023 irrigation season.

Consequently, the Idaho Water Users Legislative Committee is currently working on proposed statutory amendments addressing this self-help inconsistency. The proposed amendments seek to codify the right

of ditch owner/operator self-help consistent with the Supreme Court's 2012 *Pioneer* holdings and rationale going forward. Whether the proposed amendments make it to the 2023 Idaho Legislative Session remains to be seen, but efforts to do so are understandably underway.
(Andrew J. Waldera)

LEGISLATIVE DEVELOPMENTS

WASHINGTON STATE AGENCY REQUESTS LEGISLATION AFFECTING WATER RESOURCES, LEGISLATING CLIMATE RESILIENCY

With still some weeks left for new bills to be filed during the 2023 Legislative Session, the Washington Legislature has more than a dozen bills to consider with climate policy implications. Arguably an expected sign of the times in a state that has seen both sudden and record droughts, and sudden and record floods within the same calendar year every year for the last several years.

Among the bids for legislation addressing climate impacts is Agency request legislation to update the state's Integrated Climate Response Strategy. The cornerstone of State Department of Ecology's (Ecology) Legislative Agenda for 2023 are the companion measures of House Bill 1170 / Senate Bill 5093 titled: "AN ACT Relating to improving climate resilience through updates to the state's integrated climate response strategy."

Washington first legislated creation of a climate response policy in 2009, enacted as Ch. 70A.05 RCW. The so-called "Integrated Climate Change Response Strategy," directed Ecology and five other state agencies to prepare a climate change strategy. Ecology was the lead in preparing a report ultimately published in 2012 under document number 12-01-004, entitled "Preparing for a Changing Climate, Washington State's Integrated Climate Response Strategy" (2012 Climate Response Strategy). The primary objective of this initial effort directed the formation of a "state integrated climate change response strategy." To develop this strategy, multiple state agencies were to work with state and local governments as well as public and private businesses and individuals "to prepare for, address, and adapt to the impacts of climate change." The report was to identify barriers and opportunities.

The 2012 report was organized by areas that were affected by climate change: Human Health; Ecosystems, Species, and Habitats; Ocean and Coastlines; Water Resources; Agriculture; Forests; and Infrastructure and the Build Environment (including utilities). Ecology established technical advisory groups comprised primarily of state agencies and academia with limited participation from environmental groups, local governments, and a few business interests.

The Water Resources Section of the 2012 Climate Response Strategy identifies Impacts (declining snowpack, changes in streamflow, higher drought risk, more severe flooding, and water quality concerns) and makes a number of Recommendations for Adaptation and Actions. The Recommendations from 2012 include initiatives still under discussion today in water resources—more reliance on regional planning groups that use integrated strategies, improvement in climate planning by water utilities and agriculture, increased efforts in conservation by all sectors, restoration of stream flows, improvements in data collection and monitoring use, increased reliance on strategies like water banking, storage, and reuse, and better preparation for droughts.

2023 Agency Request Legislation

Fast forward to 2023. Ecology is back with Agency request legislation to "update" the Climate Response Plan through the creation of a Climate Resiliency Plan. Following on the heels of the State's "Climate Commitment" in 2021 to reduce the state's greenhouse gas emissions and build a clean energy economy (See Ch. 70A.65 RCW), the 2023 legislation is seeking to use the broader Climate Response Plan to expand climate consciousness into all levels of state government. How will this climate plan differ?

The table is bigger: in addition to Ecology, Agriculture, Fish and Wildlife, Natural Resources, and Transportation, the table now includes Commerce (replacing Community, Trade and Economic Development), Health, the State Conservation Commission, the Puget Sound Partnership, and the Emergency Management Division. Tribal governments are aligned with local governments as collaborating partners. In addition to local and tribal governments, Ecology is directed to collaborate and engage with nongovernmental organizations, business entities, "overburdened communities" and other "marginalized groups" not previously consulted.

The costs are higher: The fiscal note issued by the Official of Financial Management for the 2009 effort came in at under $1m. The current fiscal note estimates between $2m and $3m per biennium through 2029 for a total cost of close to $9m.

The science is bigger: Ecology is directed to engage with the University of Washington Climate Impacts Group to develop, solicit and host relevant scientific and technical data collection efforts.

The task is bigger: The directive is no longer just to develop a strategy and plans; the emphasis is now on implementation and action. The directive includes evaluating a range of scenarios and timescales to among other things, "inform agency action." The agencies are also directed to prioritize solutions to be implemented within and across state agencies. The legislature is providing guiding principles in the focusing of these actions: reduce greenhouse gas emissions and build climate preparedness; protect "overburdened communities and vulnerable populations and provide more equitable outcomes"; "prioritize actions that deploy natural solutions, restore habitat, or reduce stressors that exacerbate climate impacts"; "prioritize actions that promote and protect human health"; and the catch-all, to "consider flexible and adaptive approaches for preparing for uncertain climate impacts, where relevant."

And the timeline is faster: The first recommendations are due within one year of the funding authorization (July 1, 2024); with an update anticipated every four years and interim biennial work plans to be presented to the legislature, not in cycle with the biennial budget process but in "off" years.

What is missing? While there is a reporting loop back to the legislature and the legislature's ongoing funding oversight, there are no current links back to the legislature to review or adopt the final plan, despite the directive that the plan addresses real actions to be undertaken by state government. As designed, this shifts the action on climate resilience and the associated and necessary policy trades from the legislative branch to the executive branch.

Conclusion and Implications

From a water resources standpoint, the Department of Ecology already exercises a great deal of discretion in its decision process for approving, denying, and managing water resources actions related to water rights and water resources. The policy and action directives use a planning process as a means to integrate climate policy into government actions, giving the agency additional decision-making directives without public discussion. The link to the 2012 strategy is available here: https://apps.ecology.wa.gov/publications/documents/1201004.pdf. The link to Ecology's 2023 Legislative Strategy is available here: https://ecology.wa.gov/2023priorities.
(Jamie Morin)

REGULATORY DEVELOPMENTS

FINAL RULE DEFINING CLEAN WATER ACT 'WATERS OF THE UNITED STATES' PUBLISHED IN THE FEDERAL REGISTER

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) published the "Revised Definition of 'Waters of the United States'" rule in the Federal Register. This final rule will become effective March 19, 2023, 60 days after its publication. [88 Fed. Reg. 3004, Jan. 18, 2023]

The final rule purports to return to the pre-2015 definition of waters of the United States (WOTUS), which was implemented by the agencies for over 40 years, and, according to an EPA fact sheet on the new Rule, prioritizes:

> . . .practical, on-the ground implementation by providing tools and resources to support timely and consistent jurisdictional determinations[.]

Background

Justice Kennedy's "significant nexus" test, articulated in the concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), predominated jurisdictional determinations for "waters of the United States" until 2015, when President Obama's administration adopted the "Clean Water Rule: Definition of 'Waters of the United States'" (2015 Clean Water Rule). The 2015 Clean Water Rule significantly expanded the regulatory definition of WOTUS. The 2015 Clean Water Rule was immediately challenged, resulting in a number of federal court decisions that stayed the application of the rule in a number of jurisdictions. This effectively created a patchwork of applicable WOTUS definitions that varied based on geography.

On October 22, 2019, the Trump administration issued a repeal rule, which took the WOTUS definition back to pre-2015 regulations. Then, three months later, on January 23, 2020, the Trump administration issued a final rule —the "Navigable Waters Protection Rule: Definition of 'Waters of the United States'" (2020 NWPR). For the first time, the 2020 NWPR defined "waters of the United States" based primarily on Justice Scalia's plurality test from *Rapanos*. Among other changes, the NWPR purported to categorically exclude from federal Clean Water Act jurisdiction ephemeral streams and features, regardless of whether they had a "significant nexus" with traditionally navigable waters. The 2020 NWPR was also subject to a series of legal challenges.

Revised Definition of 'Waters of The United States'

On January 20, 2021, President Biden signed Executive Order 13990, entitled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." In conformance with the Order, the agencies reviewed the 2020 NWPR to determine its alignment with three principles laid out in the Executive Order: science, climate change, and environmental justice.

Five Categories of WOTUS

The final rule defines "waters of the United States" to include (a): (1) traditional navigable waters, the territorial seas, and interstate waters; (2) impoundments of "waters of the United States"; (3) tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (jurisdictional tributaries); (4) wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or to jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard ("jurisdictional adjacent wetlands"); and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard.

Further definitions are intended to help interpret and apply these five categories of jurisdictional waters. For example, the final rule states that "relatively permanent standard" means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. The "significant nexus standard" means waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. A waterbody that meets either the significant nexus test or the relatively permanent test is likely to be treated as a WOTUS, and subject to EPA and U.S. Army Corps of Engineers (Corps) permitting jurisdiction under the final rule. These definitions, however, are not bright-line rules and will likely require the assistance of an expert.

Exclusions from WOTUS

Finally, the final codifies eight exclusions from the definition of "waters of the United States" in the regulatory text to provide clarity, consistency, and certainty to a broad range of stakeholders. The exclusions are: (1) Prior converted cropland, adopting USDA's definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985; (2) Waste treatment systems, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act; (3) Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water; (4) Artificially irrigated areas, that would revert to dry land if the irrigation ceased; (5) Artificial lakes or ponds, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (6) Artificial reflecting pools or swimming pools, and other small ornamental bodies of water created by excavating or diking dry land; (7) Water-filled depressions, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of "waters of the United States" and ; (8) Swales and erosional features (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Conclusion and Implications

Based on recent history, it is reasonable to expect legal challenges to the final rule. Moreover, the U.S. Supreme Court is expected to issue a ruling this year in *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), cert. granted Jan. 24, 2022, a case argued in October 2022, which focuses on the question of how regulators should interpret WOTUS. For more information, *see:* https://www.epa.gov/system/files/documents/2023-01/Revised%20Definition%20of%20Waters%20of%20the%20United%20States%20FRN%20January%202023.pdf.
(Tiffany Michou; Rebecca Andrews)

DEPARTMENT OF THE INTERIOR ANNOUNCES $85 MILLION FOR WESTERN DROUGHT RESILIENCE PROJECTS

On December 22, 2022, the U.S. Department of the Interior announced an investment of $84.7 million to help 36 communities in the western United States prepare for and respond to the challenges of drought, including for projects such as groundwater recharge, rainwater harvesting, aquifer recharge, water reuse, and other methods to maximize existing water supplies. More than $36 million will go to 17 projects in California.

Background

The Department of the Interior (Interior) conducts water-related infrastructure projects in the West through the U.S. Bureau of Reclamation (Bureau). The Bureau was established in 1902 and develops and manages water resources in the western United States and is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one

in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial use. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

Under the Bipartisan Infrastructure Law of 2021 (Infrastructure Law), the Interior is set to receive $30.6 billion over five years. The Infrastructure Law allocated $8.3 billion of this $30.6 billion for the Bureau water infrastructure projects, to be provided in equal increments over five years to advance drought resilience and expand access to clean water for domestic, agricultural, and environmental uses. The Bureau has developed a spending plan (Plan) under the Infrastructure Law that includes four key priorities: increase water reliability and resilience; support racial and economic equity; modernize infrastructure; and enhance water conservation, ecosystem, and climate resilience. Under the Plan, the Bureau considers a potential projects' ability to effectively address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate environmental impacts of projects. Accordingly, the Bureau generally gives priority to projects that complete or advance infrastructure development, make significant progress toward species recovery and protection, maximize and stabilize the water supply benefits to a given basin, and enhance regional and local economic development as well as advance tribal settlements. The $85 million announced by Interior is part of the funding allocated under the Infrastructure Law.

Plan Funding

The Bureau's Plan for 2022 provided for significant investment in water and groundwater storage and conveyance projects. The purpose of these projects is to increase water supply, and the Plan allocates funding across a broad range of project types related to construction of water storage or conveyance infrastructure or by providing technical assistance to non-federal entities: ($1.05 billion); aging infrastructure to support, among other things, developing and resolving significant reserved and transferred works failures that prevented delivery of water for irrigation ($3.1 billion); rural water projects, including developing municipal and industrial water supply projects ($1.0 billion); water recycling and reuse projects ($550.0 million) and "large scale" water recycling and reuse projects ($450.0 million) to promote greater water reliability and contribute to the resiliency of water supply issues; water desalination ($250.0 million); safety of dams to ensure Bureau dams do not present unacceptable risk to people, property, and the environment ($500.0 million); WaterSMART grants to provide adequate and safe water supplies that are fundamental to the health, economy, and security of the country ($300.0 million); watershed management projects ($100.0 million); aquatic ecosystem restoration and protection ($250.0 million); multi-benefit watershed health improvement ($100.0 million); and endangered species recovery and conservation programs in the Colorado River Basin ($50.0 million).

WaterSMART Program

Specifically, the funding announcement of $85 million is part of the Bureau's WaterSMART program, which supports states, tribes, and local entities plan for and implement actions to increase water supply through investments to modernize existing infrastructure and avoid potential water conflicts. Under that program, the Bureau provides financial assistance to water managers for projects that seek to conserve and use water more efficiently, implement renewable energy, investigate and develop water marketing strategies, mitigate conflict risk in areas at a high risk of future conflict, and accomplish other benefits that contribute to the sustainability of the western United States. The Bureau had selected 255 projects across the western states since January 2021 to be funded with $93 million in WaterSMART funding and $314.3 million in non-Federal funding, with a total of $1 billion provided for WaterSMART grants in 2022. In addition to advancing the WaterSMART program, the $85 million investment will help repair aging water delivery systems, secure dams, complete rural water projects, and protect aquatic ecosystems.

Projects in California

There are 17 projects in California that will receive funding from Interior's $85 million investment. There are a number of different entities and project types represented across the 17 funded projects. For instance, a number of public agencies will receie

funding related to the development of conjunctive use modeling (*e.g.*, using groundwater instead of surface water to meet demand), recycled water reuse projects, water treatments projects including for per- and poly-fluoroalkyl (PFAS), groundwater recharge projects, pipeline conveyance projects, and aquifer storage and recovery. Other projects include drought resiliency projects for state parks—also referred to as "mitigation actions" in drought contingency planning documents that provide for fish and wildlife benefits—and rural water supply planning for smaller communities in northern California. A number of municipal projects include treatment and pipeline projects.

Conclusion and Implications

The drought resilience funding announced by Interior is part of an overarching and substantial investment in Western water planning efforts by the Bureau, local entities, tribes, and others. While it remains to be seen to what extent the funded projects will achieve their objectives, particularly as water tensions in the West appear to be increasing, the funding is a step forward in federal and non-federal efforts to address ongoing drought impacts. For more information, *see: Biden-Harris Administration Invests More Than $84 million in 36 Drought Resiliency Projects* (Dec. 22, 2022), https://www.usbr.gov/newsroom/news-release/4395.

(Miles Krieger, Steve Anderson)

ARIZONA DEPARTMENT OF WATER RESOURCES RELEASES HASSAYAMPA SUBBASIN MODEL RESULTS

In January 2023, the Arizona Department of Water Resources (AZDWR) released its groundwater model for the Hassayampa sub-basin west of Phoenix. The model indicated that there was a total 4.4 million acre-feet of unmet demand over a 100-year period, which means that AZDWR cannot approve the development of subdivisions in the area that intend to rely on groundwater.

Background

The Hassayampa subbasin is located approximately 50 miles west of Phoenix. The subbasin includes roughly 1,200 square miles in west-central Arizona. The subbasin is an alluvial plain bounded on the north by the Vulture and Wickenburg Mountains, on the east by the White Tank Mountains, on the south by the Buckeye Hills and Gila Bend Mountains, and on the west by the Delmont and Big Horn Mountains and the Palo Verde Hills. The subbasin is drained by the Hassayampa River and other large washes. Due to the ephemeral nature of the streams overlying the subbasin, the only reliable source of water is groundwater.

In 1980, Arizona enacted the Groundwater Management Act (GMA). The GMA requires that developers of new subdivisions within Active Management Areas (AMA[s]) demonstrate that subdivisions have a 100-year "assured water supply" (AWS). According to AZDWR, the AWS program was created to address the problem of limited groundwater supplies in Arizona. The AWS program operates within the five AMAs in Arizona. Under the AWS program, developers must demonstrate a number of criteria before recording plats or selling parcels within an AMA. These criteria are as follows: (1) physical water availability; (2) continuous water availability; (3) legal water availability; (4) water quality; (5) financial capability; (6) consistency with the management plan of an AMA; and (7) consistency with the management goal of an AMA. With respect to the physical water supply, developers must demonstrate the availability of actual water of sufficient quality uninterrupted for a 100-year period unless sufficient backup supplies exist for any anticipated shortages. In particular, water level depths must not go 1,000 ft below land surface (bls) or bedrock, and demands from existing wells and previous AWS determinations must be satisfied.

The Hassayampa sub-basin is located in the Phoenix AMA. There are two primary groundwater modeling requirements in the Phoenix AMA applicable to AWS determinations. First, water level declines due to groundwater withdrawals must not exceed 1,000 bls or bedrock, whichever is shallower. Second, simulated groundwater pumping must not result in unmet AWS groundwater demands over

the 100-year projection period. Importantly, unmet groundwater demand occurs when the model cannot simulate pumping of all demands included, creating a pumping shortfall or deficit. This pumping shortfall or deficit occurs when there is insufficient saturated aquifer to satisfy the pumping demand due to depth to water either reaching bedrock or exceeding 1,000 feet below ground surface during the 100-year projection period. In short, modeling efforts are cumulative with respect to existing demand, including prior AWS determinations.

Hassayampa Subbasin Groundwater Model Findings

The Hassayampa groundwater model (Model) considered the lower Hassayampa subbasin and a small portion of the West Salt River Valley subbasin. The Model was based on a prior model developed for the town of Buckeye, with input from AZDWR. The Model included standard AWS assumptions for the 100-year projection period. Specific inputs included total pumping demand per year of 294,000 acre-feet and recharge totaling 100,000 acre-feet per year (AFY). Accordingly, future demand for the subbasin was based on, among other things, historical values for existing demand and recharge.

The Model calculated an unmet demand total of 4.4 million acre-feet over the 100-year projection period. The Model indicated that depth to water in the year 2116 would range from less than 200 feet below land surface to over 1,200 feet bls. Two areas in the northern part of the subbasin exceeded the 1,000 bls limit under the AWS. In addition, several areas near the mountains to the north, east, and south hit bedrock. The Model also projected that after 100 years, water levels would decline in the range of 0 to 983 feet, with one area showing slight increases, while the area with the largest water level decline would exceed 1,000 bls. AZDWR noted that the largest declines in groundwater levels typically coincide with the areas of AWS demand.

In sum, the Model projected a total 4.4 million acre-feet of unmet demand over the 100-year projection period, and depth to water would exceed 1,000 feet bls or hit bedrock—both of which are inconsistent with the primary groundwater modeling requirements of the Phoenix AMA. According to AZDWR, the results of the Model indicate that AZDWR cannot approve the development of subdivisions in the area that intend to rely on groundwater, a determination that could impact multiple large master-planned communities currently being proposed in the area.

Conclusion and Implications

The results of the Hassayampa groundwater model indicating unmet demand and groundwater level decline inconsistent with AMA requirements is not the first such result to impact potential developments. AZDWR's modelling efforts for the Pinal AMA produced similar results. However, given the limited surface water availability for proposed developments in the areas around Phoenix, the modeling results could have significant implications for future development. Moreover, water supply constraints on the Colorado River may make findings alternative surface water supplies, and possibly groundwater banking supplies, more difficult moving forward. It remains to be seen how the Hassayampa subbasin modeling results will directly impact future development plans, but impacts are likely. For more information, *see:* ADWR Releases Much-Anticipated Hassayampa Sub-Basin Groundwater Model, available at https://new.azwater.gov/news/articles/2023-20-01.
(Miles Krieger)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD EXTENDS EMERGENCY WATER CONSERVATION REGULATIONS

The California State Water Resources Control Board (State Water Board) recently extended emergency water conservation regulations originally adopted in January 2022, which will now remain in place through December 2023. Additional water conservation regulations adopted in May 2022 remain in effect through June 2023.

Background

The State Water Board's stated mission is to preserve, enhance and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper resource allocation and efficient use for the benefit of present and future generations. Despite sporadic, intense wet months, California has generally been experiencing one of the most severe droughts in its recorded history. In response, the State Water Board adopted two sets of emergency water conservation regulations. The regulations implement directives contained in drought emergency declarations and executive orders issued by Governor Gavin Newsom.

Emergency Drought Proclamations

Throughout the Summer of 2021, Governor Newsom issued evolving proclamations declaring drought states of emergency for a total of 50 counties and directing state agencies to take immediate action to preserve critical water supplies, to mitigate the effects of drought and to ensure the protection of health, safety, and the environment. In late Fall 2021, Governor Newsom issued a further proclamation extending the drought emergency declaration to the remainder of the state and urging Californians to reduce water use.

Emergency Regulations

The State Water Board implemented two sets of emergency regulations in response to Governor Newsom's directives.

First Water Conservation Emergency Regulation

The first set of water conservation emergency regulations were adopted and took effect in January 2022. These regulations prohibit: (1) application of potable water to outdoor landscapes in a way that causes more than incidental runoff; (2) the use of a water hose to wash a motor vehicle, unless it has a shut-off nozzle; (3) use of potable water for washing sidewalks, driveways, buildings, structures, or other hard surfaces; (4) the use of potable water for street cleaning or construction site preparation purposes; (5) the application of water to irrigate turf and ornamental landscapes during and within 48 hours after measurable rainfall of at least one fourth of one inch of rain. The regulations also prohibit cities and homeowners associations from preventing homeowners from replacing their lawns with drought-tolerant vegetation.

Second Water Conservation Emergency Regulation

The State Water Board's second set of water conservation regulations took effect in May 2022. These regulations build upon the first set of regulations and further prohibit the watering of non-functional turf at commercial, industrial, and institutional properties. The ban does not apply to watering grass that is used for recreation or other community activities. The regulation also requires urban water suppliers to implement all demand-reduction actions under Level 2 of their Water Shortage Contingency Plans, which are actions meant to address a 10 percent to 20 percent water shortage. Level 2 actions may vary with each water supplier, but they often include things such as: (1) increasing communication about the importance of water conservation; (2) limiting outdoor irrigation to certain days or hours, and (3) increasing patrolling to identify water waste.

Additionally, the second set of emergency regulations requires suppliers who do not have drought plans to take conservation actions. These actions may include conducting outreach to customers about conservation and limiting outdoor irrigation to two days a week. Water suppliers are also required to communicate with their customers about the requirements of the emergency regulation. Violations of the non-functional turf irrigation provision are subject to enforcement through fines of up to $500.

Readoption of Wasteful Water Ban

The State Water Board recently extended the first set of water conservation regulations that were originally adopted in January 2022. Those regulations will remain in place through December 2023. The regulation applies to water suppliers and individual water users. Violations may be subject to enforcement through warning letters, water audits or fines.

State Water Board officials have indicated that the extension of the emergency regulation is intended not only bolster the state's conservation efforts, but to also further efforts to make water conservation a daily habit and way of life for Californians.

Conclusion and Implications

The State Water Resources Control Board continues to adopt, extend and implement emergency regulations in response to severe drought conditions. The current water year has experienced unprecedented storm events and is seeing improvements in snowpack and surface water reservoir levels; however, California has seen similar patterns in recent years erode to hot, dry conditions accelerating runoff and limiting long-term supplies. The State Water Board's extension of the emergency regulations reflect the possibility of another dry year. In the meantime, may Californians would likely urge pursuit of more stabilizing, long-term water supply solutions that could minimize the need to operate in seemingly perpetual emergency conditions. Information on the latest updates to the Water Conservation Emergency Regulations can be found on the State Water Board website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html. (Christina Suarez, Derek Hoffman)

NEVADA STATE ENGINEER ISSUES ORDER ESTABLISHING PERENNIAL YIELD FOR COLD SPRING VALLEY

On January 24, 2023, Nevada State Engineer Adam Sullivan issued Order No. 1333 which established the perennial yield for the Cold Spring Valley Hydrographic Basin in Washoe County and rescinded Interim Order 1307.

Background

The Office of the Nevada State Engineer exists within the Nevada Division of Water Resources which is tasked

> . . .to conserve, protect, manage and enhance the State's water resources for Nevada's citizens through the appropriation and reallocation of the public waters. In addition, the Division is responsible for quantifying existing water rights; monitoring water use; distributing water in accordance with court decrees; reviewing water availability for new subdivisions and condominiums; reviewing the construction and operation of dams; appropriating geothermal water; licensing and regulating well drillers and water rights surveyors; reviewing flood control projects; monitoring water resource data and records; and providing technical assistance to the public and governmental agencies.

Interim Order 1307

Interim Order 1307 was issued on December 20, 2019, which:

> . . .established a temporary moratorium on the review of, and action on, submissions concerning development and construction in the Cold Spring Valley while investigating water availability.

The order sought stakeholders with interests in water rights to file a report with the State Engineer addressing:

> 1) the perennial yield. . .defined as the quantity of groundwater that may be withdrawn. . .without depleting the groundwater reservoir;
>
> 2) whether the quantity of groundwater. . .over the long-term is sufficient to meet the needs of the current commitments withing the Basin; and
>
> 3) whether the location of groundwater withdrawals and recharge. . .impact the quantitly of water that may be sustainably developed within the Basin

Public hearings were held in May 2020 to afford stakeholders an opportunity to comment and support their conclusions in their submitted reports. Comment was extended until June 2020.

The State Engineer reviewed all this information which resulted in the "Evaluation of Best Estimates of Water Budget Components and Review of Hear-

ing Questions for Cold Spring Valley Hydrographic Basin," issued on January 24, 2023.

The 2023 Order

The State Engineer, taking into account all the information before the office, determined in 2023 as follows:

> Current groundwater commitments exceed the perennial yield, however the consumptive use of current pumping does not exceed the amount that can be supported for the long term in Cold Spring Valley;
>
> Locations of pumping and recharge will continue to be considered along with other available data in the evaluation of applications before the State Engineer.

Conclusion and Implications

Since December 20, 2109 a moratorium was in place in the Cold Spring Valley on the review of and action on submissions concerning development and construction in the form of Order 1307. Now, in January 2023 the State Engineer has rescinded Order 1307 and via Order 1333, lifted that moratorium of development in the Valley. From here on out, proposed development will be considered on a case-by-case basis, based on the studies and stakeholder feedback addressing what level of groundwater extraction would be consistent with safe yields.

The State Engineers Order 1333 is available online at: http://water.nv.gov/documents/1333o.pdf. (Robert Schuster)

OREGON WATER RESOURCES DEPARTMENT AWARDS $6.6 MILLION FOR WATER PROJECTS

The Oregon Water Resources Department, Water Resources Commission, recently, in 2023, announced the award of million in grant funds for projects for the 2022 cycle of Water Project Grants and Loans.

The Awards

The Water Projects Grants and Loans program provides funding for projects that meet instream and out- of-stream water supply needs and produce economic, environmental, and social/cultural benefits. Funding for projects is awarded annually, with applications due each spring. Eligible water projects include but are not limited to: conservation, reuse, storage, streamflow protection and restoration, and water infrastructure.

On January 9, 2023 the Oregon Water Resources Department announced the award of $6.6 million to three projects. The three awardees are as follows:

> Deschutes Basin Flow Restoration—Group 4: The Tumalo Irrigation District receive $2 million to improve irrigation efficiency by pumping 11.1 miles of open canals. The project will legally protect the conserved water instream through the Department's Allocation of Conserved Water Program:
>
> East Fork Irrigation District Sublateral Modernization Project—East Fork Irrigation District received $822,995 to improve irrigation efficiency by installing pressure reducing stations, removing waterboxes and replacing 2.1 miles of non-pressure-rated pipe. The project will legally protect the conserved water instream through the Allocation of Conserved Water Program;
>
> Mill Creek Park Aquifer Storage and Recovery Project—The city of Stayton received $3,819,750 to develop an aquifer storage and recovery (ASR) system at Mill Creek Park to store approximately 156 million gallons of drinking water for the city.

The Commission also awarded an additional $68,064 to Trout Unlimited and the Rocking M Cattle Company, LCC for the Fitzpatrick Conservation Project [which previously was awarded $529,840 in December 2021].

Conclusion and Implications

The Oregon Water Resources Department is the state agency charged with allocating and distributing water in Oregon. The Department's Planning, Collaboration, and Investments section builds partnerships and incentivizes Oregonians to pursue integrated and innovative solutions for complex water challenges and an uncertain water future.

The Oregon Water Resources Department is currently accepting applications for the 2023 Water Projects Grants and Loans funding cycle. There is an estimated nearly $20 million that will be available in 2023. Application for the 2023 funding cycle must be made to the Department no later than close of business on April 26, 2023.
(Robert Schuster)

LAWSUITS FILED OR PENDING

CALIFORNIA TRIBES AND ENVIRONMENTAL ORGANIZATIONS FILE CIVIL RIGHTS COMPLAINT AND PETITION FOR RULEMAKING WITH EPA FOR SAN FRANCISCO BAY-DELTA WATER QUALITY STANDARDS

A coalition of California Tribes and environmental justice organizations, including Save California Salmon, Restore the Delta, Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and Little Manila Rising (collectively: Coalition), filed a civil rights complaint and petition for rulemaking (Complaint) with the U.S. Environmental Protection Agency (EPA). The Coalition's Complaint urges the EPA investigate the State Water Resources Control Board's (State Water Board) alleged civil rights violations and initiate rulemaking to adopt federal Clean Water Act-compliant water quality standards for the San Francisco Bay/Sacramento-San Joaquin Bay-Delta Estuary (Bay-Delta). [*Title VI Complaint and Petition for Rulemaking* (EPA).]

Background

The State Water Board is responsible for implementing the federal Clean Water Act and the California Porter-Cologne Water Quality Act. (Wat. Code §§ 13141, 13160.) Pursuant to this authority, the State Water Board adopted the first Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Estuary (Bay-Delta Plan) in 1978. (Complaint, at p. 26.) The Bay-Delta Plan designates beneficial uses for the Bay-Delta, establishes water quality objectives for those uses, and sets forth an implementation program to achieve those objectives. (Bay-Delta Plan (2006) at p. 26.) As part of the State Water Board's duties under Porter Cologne, it must periodically review the Bay-Delta Plan. (Wat. Code § 13240.) The State Water Board has conducted three full reviews of the Bay-Delta Plan since its initial adoption—1991, 1995, and 2006. (Complaint, at pp. 26–27.)

After its most recent review in 2006, the State Water Board began the review process again in 2008 via a bifurcated process. (Resolution No. 2008-0056 (2008) State Water Board.) First, the State Water Board would review and update the salinity and flow objectives for the southern Delta and San Joaquin River in Phase I. (*Id.*) Then, in Phase II, the State Water Board would review and update standards to protect native fish and wildlife in the Sacramento River, Delta, and associated tributaries. (*Id.*) The State Water Board adopted amendments relevant to the Phase I update of the Bay-Delta Plan in December, 2018. (*Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Dec. 12, 2018) State Water Resources Control Board, Resolution 2018-0059.) The State Water Board is currently in the process of conducting Phase II, which includes consideration of voluntary agreements in which water users would agree to limit surface water diversions to attain water quality standards. (*See, Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreements for the Sacramento River, Delta, and Tributaries Update to the San Francisco Bay/Sacramento-San Joaquin Delta Water Quality Control Plan* (2023) State Water Board.)

Civil Rights Complaint and Petition For Rulemaking

The Coalition's Complaint is the latest in a series of actions over the past year regarding updates to the Bay-Delta water quality control plan. On May 22, 2022, the Coalition filed a petition for rulemaking before the State Water Board. (Complaint, at p. 31.) The Board rejected the petition on June 24, and then denied a request for reconsideration on September 21, 2022. (*Id.*) Then, on December 16, 2022, the Coalition submitted its Complaint pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Administrative Procedures Act (5 U.S.C. § 551 *et seq*) before the U.S. EPA. (Complaint, at p. 2.)

Civil Rights Act Allegations

Under Title VI of the Civil Rights Act, federal agencies are authorized and directed to adopt rules and regulations implementing the act. (42 U.S.C. § 2000d-1.) Accordingly, the EPA promulgated regula-

tions prohibiting entities or programs that receive EPA assistance from discriminating on the "basis of race, color, national origin or . . . sex." (40 C.F.R. § 7.35.) Individuals who believe their civil rights were violated by an entity that receives funding from the EPA can submit a complaint to the EPA's External Civil Rights Compliance Office, which will then investigate and resolve the complaint. (*External Civil Rights Compliance Office Compliance Toolkit 8* (2017) U.S. EPA.).

The Coalition alleges the State Water Board is violating Title VI of the Civil Rights Act by failing to update the Bay-Delta Plan. (Complaint, at p. 33.) According to the Coalition, the EPA External Civil Rights Compliance Office should investigate the Complaint because the State Water Board's failure to update the Bay-Delta Plan's water quality standards disproportionately impacts Native American Tribes and communities of color in the Bay-Delta watershed. (*Id.*) Specifically, the Coalition alleges that the State Water Board is violating native tribes' civil rights by failing to maintain water quality standards that result in impaired tribal access to fish, riparian resources, and waterways. (*Id.*) Additionally, the Coalition argues the same failures resulted in outsized impacts from harmful algae blooms to communities of color. (*Id.*) Finally, the Complaint alleges that the State Water Board's purportedly preferred approach to Phase II—the consideration of voluntary agreements—has excluded communities of color and tribes from the decision making process. (*Id.*) The Coalition seeks an investigation into the Complaint's allegations, and remedies such as withholding or terminating State Water Board funding, and withholding approvals for permits for Delta Conveyance Project and for water quality standards that result from the Voluntary Agreements. (*Id.* at p. 55.)

Seeking Promulgation of Water Quality Standards

In addition to alleging civil rights violations, the Coalition asks the EPA to promulgate water quality standards for the Bay-Delta under the Administrative Procedure Act and its discretionary oversight authority to promulgate federal water quality standards. (Complaint, at p. 47; 33 U.S.C. § 1313(c)(4)(B).) The Coalition asks that the EPA designate Tribal Beneficial uses and adopt flow-based and temperature water quality criteria, including criteria for cyanotoxins to address harmful algal blooms. (*Id.* at p. 55.)

Conclusion and Implications

As of this writing, the U.S. Environmental Protection Agency has not publicly commented on the complaint or petition for rulemaking. The EPA's External Civil Rights Compliance Office's website further states the Coalition's complaint is pending under jurisdictional review.
(Nico Chapman, Sam Bivins)

JUDICIAL DEVELOPMENTS

D.C. CIRCUIT VACATES HYDROELECTRIC DAM LICENSE OVER DEFICIENCIES WITH THE CLEAN WATER ACT WATER QUALITY CERTIFICATION

Waterkeepers Chesapeake v. Federal Energy Regulatory Commission, 56 F.4th 45 (D.C. Cir. Dec. 20, 2022).

The United States Circuit Court of Appeals for the District of Columbia recently determined that the State of Maryland could not retroactively waive its previously-issued water quality certification for a license for a hydroelectric dam. The license was vacated and remanded to the Federal Energy Regulatory Commission (FERC).

Background

Constellation Energy Generation, LLC is the operator of Conowingo Dam, a hydroelectric dam on the Susquehanna River in Maryland. In 2014, Constellation Energy submitted a request for a water quality certification under Section 401 of the Clean Water Act to Maryland's Department of the Environment. After years of negotiation, public notice, commenting, and a public hearing, Maryland issued a section 401(a)(1) water quality certification in 2018.

The water quality certification required Constellation to develop a plan to reduce the amount of nitrogen and phosphorus in the dam's discharge, improve fish and eel passage, make changes to the dam's flow regime, control trash and debris, provide for monitoring, and undertake other measures for aquatic resource and habitat protection. Constellation challenged the certification and its conditions, calling the conditions unprecedented and extraordinary.

As part of settling Constellation's challenge to the water quality certification, Maryland and Constellation agreed to submit a series of proposed license articles to FERC for incorporation into the dam's license. If those articles were incorporated into the license, Maryland agreed to conditionally waive any and all rights it had to issue a water quality certification. FERC issued a 50-year license that included the proposed license articles.

Several environmental groups, collectively referred to as "Waterkeepers," filed a petition for rehearing with FERC. They argued that Maryland had no authority to retroactively waive its 2018 water quality certification and that FERC therefore exceeded its authority under the federal Clean Water Act by issuing a license that failed to incorporate the conditions of that certification. FERC rejected Waterkeepers' argument and denied the petition. Waterkeepers petitioned for review.

The D.C. Circuit's Decision

Retroactive Waiver Argument

The court first considered Waterkeepers' argument that the Clean Water Act does not allow a retroactive waiver of the kind Maryland has attempted. In opposition, FERC argued that Section 401 of the Clean Water Act does not prevent a state from affirmatively waiving its authority to issue a water quality certification. The court rejected FERC's argument, reasoning that the Clean Water Act provides two routes for a state to waive a water quality certification: failure or refusal to act on a request for certification, within a reasonable period of time. If a state has not granted a certification or has not failed or refused to act on a certification request, section 401(a)(1) prohibits FERC from issuing a license. Because the state acted when it issued the water quality certification in 2018, the subsequent backtracking of that issuance through a settlement agreement was not a failure or refusal to act. In the end, the court agreed with Waterkeepers.

Remedy

The court next considered what the appropriate remedy should be. FERC argued that the appropriate remedy would be to remand the license back to FERC without vacating the license. This would allow the license to remain in place while a new permit was issued and would avoid disruptive consequences that

result from vacating a license with environmental protections in place. The decision whether to vacate depends on the seriousness of the license's deficiencies and the disruptive consequences of an interim change that may itself be changed.

The court determined *vacatur* was appropriate. First, the license had serious deficiencies because FERC issued it without statutory authority. Second, disruptions to the environmental protections can be avoided through issuance of interim, annual licenses until a permanent license can be issued. Further, Waterkeepers' brought the action for the very purpose of strengthening the environmental protections, and Waterkeepers agreed with vacatur. Finally, vacating the license would allow the administrative and judicial review to be completed after being interrupted by the settlement agreement.

Conclusion and Implications

This decision is another case reminding states and project proponents to proceed with caution when attempting to resolve disputes surrounding Section 401 water quality certifications. Under the Clean Water Act. The court's opinion is available online here: https://www.cadc.uscourts.gov/internet/opinions.nsf/3A0ACFE0A2A87BFE8525891E00572389/$file/21-1139-1978279.pdf.
(Rebecca Andrews)

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