

# EASTERN WATER LAW<sup>TM</sup>

## & POLICY REPORTER

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## EASTERN WATER NEWS

**BIDEN ADMINISTRATION ANNOUNCES \$300 MILLION  
IN BIPARTISAN INFRASTRUCTURE LAW SPENDING  
TOWARDS WATER INFRASTRUCTURE**

The Biden administration has announced that nearly \$585 million from the Bipartisan Infrastructure Law—signed into law back in 2021—would be put towards infrastructure repairs on water delivery systems throughout the western United States. Specifically, the funding will be provided to 83 projects across 11 states with the stated purpose of improving water conveyance and storage, increasing safety, improving hydroelectric power generation, and providing water treatment.

The projects selected for funding are all located within major watersheds with ongoing U.S. Bureau of Reclamation (Bureau) operations, including the Colorado River Basin and the San Francisco Bay Delta watershed. Much of the funding will be provided to projects that seek to increase canal capacity, provide water treatment for Tribal entities, replace equipment for hydroelectric power production, and provide maintenance to aging facilities. The list of western states benefitting from this allocation of funds includes California as well as Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington.

**California's Share of the Funds**

Out of all the states receiving funding for water infrastructure improvements, perhaps it comes as no surprise that California is set to receive the largest share of the funding. With over \$300 million in funding provided to California projects alone, the Golden State will be getting a little over half of the \$585 million announced last month.

The long list of projects set to receive funding was broken up by project area in the Bureau's description of the Fiscal Year 2023 Aging Infrastructure Projects. Among the project areas listed are the federal Central Valley Project, the Klamath Project, and the All-American Canal System, among other smaller project areas throughout the state.

**The Central Valley Project**

The vast majority of the funds will be dedicated to the maintenance and modernization of facilities in the Central Valley Project. Of California's 24 projects that were allocated funds in the recent announcement, 12 of them are located along the Central Valley Project and will be receiving a whopping \$279 million out of the \$307 million allocated for California projects in total. These funds will predominantly be used for projects in the Shasta-Trinity area, which will see roughly \$133 million in total funding. On the Shasta side, the dam will receive \$25 million in funding for the refurbishment of tube valves and replacement of parts for the Shasta Dam Temperature Control Device.

**The Trinity River**

Along the Trinity River, two major projects will be funded by the recent allocation: the Trinity River Fish Hatchery and the Spring Creek Power Facility. The Trinity River Fish Hatchery will be getting a massive overhaul thanks to its \$65.9 million allocation. As part of this overhaul, the project will utilize the funds to install a Supervisory Control and Data Acquisition (SCADA) system, replace corroded and leaking pipes, install new filtration systems and incubation jars, implement sound dampening measures to reduce hazardous noise from hatchery operations, and replace deteriorated iron supports for 150 shallow troughs and 26 deep tanks. The Spring Creek Power Facility will likewise see a substantial injection of funds, totaling \$42.25 million, earmarked for the replacement of the transformers that provide power to pumps at the Spring Creek, J.F. Carr and Trinity pump generation units, all of which are used to move water from the Trinity River into the Sacramento River for using the Central Valley Project.

## Folsom and Nimbus Reservoirs

Further south, the Folsom and Nimbus reservoirs will be receiving \$31 million in combined funding for refurbishment and upgrades to facilities as well as modernization of the Nimbus Fish Hatchery. The Jones Pumping Plant, which moves water from the Delta into the Delta-Mendota Canal, will be getting \$25 million worth of refurbishments while the Delta-Mendota and Friant-Kern canals will be getting nearly \$50 million to combat the impacts of land subsidence in the Central Valley. Lastly for the Central Valley Project, the Gianelli Power Plant at the San Luis Reservoir is set to receive \$43 million in funds for the refurbishment of the San Luis Unit 8 motor generator, turbine, and butterfly valve.

## All-American Canal and Other Colorado River Project

Although the funding for the Central Valley Project overshadows the remaining project funds by a wide margin, the All-American Canal and other Colorado River facilities was allocated a healthy \$10 million in funding for the five projects named in that region. Among these projects, the announcement including funding for maintenance work along the Colorado River and its levee system in addition to allocations of \$5.67 million towards the replacement of the All-American Canal's Desilting Basin's Clarifier Arms and another \$2.57 million for necessary repairs at the Imperial Dam.

## Klamath and Truckee River Areas

Other recipients of funding under the recent announcement included projects along the Klamath and Truckee rivers as well as projects located within

the Bureau of Reclamation's Yuma Project area. For the Klamath Project, \$8.75 million was dedicated to implementing upgrades on canal systems. Along the Truckee River, roughly \$3 million each was dedicated to maintenance at the Stampede Dam and for studying the benefits of replacing the Lake Tahoe Dam which helps regulate the flow of water from Lake Tahoe into the Truckee. As for the Yuma Project, a modest \$4.1 million will be provided for the refurbishment of the Laguna Dam gate, installation of governor controls at the Siphon Drop Power Plant, and to assist in the replacement of some 220 power pole structures for the Yuma County Water Users' Association.

## Conclusion and Implications

The Bipartisan Infrastructure Law included \$8.3 billion for water infrastructure projects in fiscal years 2022-2026 to improve drought resilience and expand access to clean water. The Inflation Reduction Act brought another \$4.6 billion in funding to further address these issues. Together, the two initiatives represent the largest investment in climate resilience in the history of the United States. Building on the \$240 million allocated through the Bipartisan Infrastructure Law in fiscal year 2022, the \$585 million represents a significant ramp up in funding for much needed infrastructure repairs and improvements. The next application period for funds is expected to take place in October 2023, and given the significant jump from 2022 to 2023 and the pool of funds remaining it is not unlikely the total funding provided increases even more in 2024. For more information on the Bipartisan Infrastructure Law, see: <https://www.congress.gov/bill/117th-congress/house-bill/3684/text> (Wesley A. Miliband, Kristopher T. Strouse)

## NEWS FROM THE WEST

In this month's News from the West we first report on California (nearly) declaring its drought over and done. With reservoirs at capacity or near capacity throughout the state—and this is before the enormous snowpack in the Sierra has yet to have started to melt in earnest—the state is brimming with water. And yet, the state will retain some aspects of its drought proclamations, perhaps in anticipation of the potential seasons that lie ahead.

Next, we report on the status of water-related bills that were introduced at the Washington State Legislative Session that now has ended.

Finally, we report on the Colorado State Engineer's issuance of new measurement rules for Water Division 6 that would, for the first time, require the installation of measurement devices in northwest Colorado.

### **California Governor Issues Executive Order Terminating Provisions of Prior Drought Emergency Proclamations and Executive Orders**

In late March 2023, Governor Newsom issued Executive Order N-5-23 (Order), terminating numerous provisions of multiple drought executive orders and state of emergency proclamations related to drought conditions. While the Governor did not go so far as to declare an end to the statewide drought, the Order eases certain drought restrictions, though other water conservation regulations remain in effect.

#### **Background**

In response to the current multi-year drought, Governor Newsom issued a series of state of emergency proclamations and executive orders between April 2021 and February 2023 related to drought conditions and water conservation. Conservation measures identified in these orders included: a request for the State Water Resources Control Board to require water suppliers to implement Stage 2 demand reduction measures identified in suppliers' Water Shortage Contingency Plans, as well as a call for all Californians to voluntarily reduce their water use by 15 percent from 2020 usage levels.

However, after years of prolonged drought, recent storms resulted in the wettest three-week period on record in California. The Department of Water Re-

sources (DWR) found that, in part due to the significant precipitation during the winter of 2022–2023, surface water supplies have been partially rehabilitated in some parts of the state. In particular, DWR and partner agencies found that most regions of the Sierra Nevada are above average for snow water content, and some regions are nearing record amounts of snow, with snow and rain continuing to fall across many regions of the state with more precipitation forecasted. Accordingly, the Governor's office determined that improved conditions have helped rehabilitate surface water supplies but have not abated severe drought conditions that remain in some parts of the state, including the Klamath River basin and the Colorado River basin, and that many groundwater basins throughout the state remain depleted from overreliance and successive multi-year droughts. While the Order observed that the drought is ongoing, it calls for the implementation of "an even more targeted State response," such that certain provisions of prior orders and proclamations can be rolled back.

#### **The Executive Order**

The Order rescinds portions of four state of emergency proclamations made in 2021, as well as portions of Executive Orders N-10-21, N-7-22, and N-3-23. Among these changes, it rescinds the Governor's direction to the State Water Resources Control Board (Water Board) to adopt emergency regulations requiring local agencies to move to Stage 2 of their Water Shortage Contingency Plans. However, those emergency regulations that have already been adopted by the Water Board remain in effect until June 2023. Termination of Stage 2 water shortage demand reduction measures before the emergency regulations expire or before the Water Board rescinds them could be deemed a violation punishable by fine of up to \$500 per day and enforcement action by the Water Board under Water Code § 1058.5, subdivision (d).

The Order also withdrew the Governor's previous direction that all Californians voluntarily reduce their individual water use by 15 percent of 2020 usage levels.

#### **What the Executive Leaves in Place**

Perhaps equally significant are those declarations,



rules, and regulations that the Order *leaves in place*. Among them is the declaration that the drought state of emergency declaration remains in effect in all 58 California counties.

In addition, before issuing a permit for non-exempt, new groundwater wells or alterations to existing wells, well-permitting agencies such as cities and counties are still required to:

In high and medium priority groundwater basins, obtain a verification from the applicable groundwater sustainability agency that the proposed well is consistent with the groundwater sustainability plan for that basin; and

In all groundwater basins, determine whether the proposed well is unlikely to interfere with nearby wells and cause subsidence that would damage nearby infrastructure.

The prohibition on watering certain non-functional turf remains effective.

Local agencies cannot prohibit the hauling of water outside the basin of origin if such hauling is necessary for human health and safety in communities threatened with the loss of affordable, safe drinking water.

State agencies must prioritize and assist local agencies with capturing water from high precipitation events for local storage or recharge.

The Water Board must continue to increase its efforts to investigate illegal diversions and waste and to stop such actions with its enforcement powers.

The Order also directs the State Water Board, DWR, and the Department of Fish and Wildlife to continue collaborating on expediting permitting of recharge projects and working with local water districts to facilitate recharge projects. The purpose of this directive is to maximize the extent to which winter precipitation recharges underground aquifers, for instance by capitalizing on high-flow events and percolating flood waters below ground for the benefit of local aquifers.

Finally, the Order directs the Water Board to “consider” modifying requirements for reservoir releases or diversion limitations in the Central Valley Project or State Water Project facilities to (1) conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead, (2) enhance

instream conditions for fish and wildlife, (3) improve water quality, (4) protect carry-over storage, (5) provide opportunities to maintain or to expand water supplies north and south of the Sacramento-San Joaquin Delta. Importantly, the Order suspends the applicability of the California Environmental Quality Act (CEQA) and the state’s water quality law, Porter-Cologne, as well as their implementing regulations, to effectuate actions taken pursuant to the Order and any approvals granted in furtherance thereof.

## Conclusion and Implications

Governor Newsom’s Executive Order acknowledges recent improvements to certain surface water supplies, and rescinds certain high-level directions from the Governor to reduce water usage. However, the drought emergency declaration persists statewide. It remains to be seen whether the Order will facilitate the capture of high flows throughout the state for the benefit of water supplies and beneficial uses thereof. The *Executive Order N-5-23* (March 24, 2023) is available online at: <https://www.gov.ca.gov/wp-content/uploads/2023/02/Feb-13-2023-Executive-Order.pdf?emrc=b12708> (Miles Krieger, Steve Anderson)

## Washington’s 2023 Legislative Session: Water Resources

The Washington State Legislature finished its regular legislative session on April 23, 2023.\* The Legislature passed three bills relating to water resource issues. The three water resource bills consider drought preparedness, the Walla Walla Watershed water resource planning, and a potential water right adjudication in the Nooksack River Basin. The Legislative session did not see contentious water resource related bills this year; all three bills passed the House and Senate unanimously. [\*Because of the legislature’s failure to address criminalization of drug offenses, the Washington Legislature is expected to hold a special session before July 1. Special sessions are not limited to the purpose for which they are called, meaning more water legislation could be on the horizon but there is nothing specific expected yet.]

## The Bills

- In Substitute House Bill (SHB) 1138 the Legislature addressed drought preparedness. Under current

law, the Washington State Department of Ecology can declare a drought emergency by administrative order. In order to do so, Ecology must determine that a specific area is experiencing or is expected to experience less than 75 percent of normal water supply and suffer undue hardships as a result. SHB 1138 amends Chapter 43.83B RCW and RCW 90.86.030 to address the Washington State Department of Ecology's obligations to undertake its responsibilities after a drought emergency order is issued. SHB 1138 clarifies that if grant funding is provided to public entities to address impacts from drought conditions the project does not need to be completed while the drought emergency order is in effect. SHB 1138 creates an emergency drought response account (Sec 4 of SHB 1138). The bill also provides that upon the issuance of a drought emergency order, the State Treasurer shall transfer funds to "bring the balance of the emergency drought response account to \$3,000,000. . . ." The bill also allows the chair of the Joint Legislative Committee on Water Supply During Drought to convene the committee when a drought advisory is in effect. At the time of writing this article, the bill is awaiting Governor Inslee's signature.

- In Second Substitute House Bill (SSHB) 1322 the Legislature amended Chapter 90.90 RCW which relates to the Walla Walla Watershed in southeast Washington state. In 2009, the Legislature enacted the Walla Walla Pilot Local Water Management Program. The pilot program authorized a board to develop an integrated watershed plan for the Walla Walla watershed. In 2019, the Legislature directed Ecology to work with the board to develop a 30-year strategic plan. The final version of that plan is the Walla Walla Water 2050 Strategic Plan released in June 2021. SSHB 1322 provides that the Walla Walla Water 2050 Strategic Plan be developed as an integrated plan in coordination with the State of Oregon, tribes and the federal government to encourage both instream and out-of-stream water uses. The bill allows Washington state funds to be used on projects in Oregon which benefit streamflows in Washington. The Legislature required that at least half of the financing of the Plan be funded through other sources. At the time of writing this article, the bill is awaiting Governor Inslee's signature.

- In House Bill (HB) 1792 the Legislature amended portions of Chapter 90.03 RCW relating to an adjudication for Water Resource Inventory Area

(WRIA) 1 (Nooksack Watershed). In September 2020, Ecology submitted the Water Resources Adjudication Assessment Legislative Report (<https://apps.ecology.wa.gov/publications/SummaryPages/2011084.html>) Ecology's report identified watersheds in the state that should be considered for water right adjudications. In 2021, Ecology began preparing to file water right adjudications in water resource inventory areas (WRIA) 1 (Nooksack) and 58 (Lake Roosevelt and WRIA 58). Ecology has stated that it intends to file both adjudications in 2023, although recent indications are that the Lake Roosevelt filing will be delayed. The bill requires the Department of Ecology to "broadly distribute a draft version of the adjudication claim form" for review and public comment prior to finalizing the form. HB 1792 modifies timelines and other initial procedural actions for an adjudication in the Nooksack watershed, requiring claimant be entitled to at least one year after the service of summons for the adjudication to file claims. The bill also states that parties to the adjudication shall have at least three years after the date of filing the adjudication claims to submit evidence to support water right claims. All timelines are subject to extension by the court.

### **Funding for the 2023-2025 Fiscal Biennium**

In addition to the general operating budget, the Legislature approved a number of special appropriations related to Water Resources. The efforts underway to start two water rights adjudications in Washington drew several special appropriations including:

- \$2.7m solely for preparation and filing of the Nooksack Adjudication;
- \$1.5 solely for preparation and filing of adjudication in Lake Roosevelt and its tributaries;
- \$300,000 for the Department of Ecology to engage with stakeholders in the Nooksack Adjudication on a settlement process, with a report back to the legislature on progress in each year of the appropriation;
- \$300,000 for technical assistance for all water users in the Nooksack Basin to be administered by Whatcom County; and
- \$700,000 for the local watershed management board to support water supply planning and facilitation and mediation available only after the adjudication is filed.

Outside of the adjudication efforts, the Legislature also funded \$500,000, to study the effects that possible removal of the lower Snake River dams would have on irrigation.

## Conclusion and Implications

For more information about the Washington Legislature and bills pending, see: <https://leg.wa.gov> (Jessica Kuchan)

## Colorado State Engineer Issues New Measurement Rules for Water Division 6

The Colorado State Engineer recently issued new measurement rules for Water Division 6 that would, for the first time, require the installation of measurement devices in northwest Colorado. The rulemaking process has been ongoing for several years, culminating with the State Engineer's official filing in the Water Court in October 2022. [Case No. 22CW3102] 22CW3102]

## Background

Colorado Water Division 6 includes the Yampa, Green, White, and North Platte River basins in northwest Colorado. This area of the state is historically sparsely populated with more than sufficient water supplies for all users. However, due to increasing demand and ongoing drought, recent years have resulted in unprecedented river calls. In 2019, the Division 6 Engineer ordered approximately 500 water users in the Yampa River basin to install measuring devices, such as Parshall flumes, to record their water use and allow for administration. The Division Engineer sent similar notices to the White and Green River basins in 2020, but ultimately did not enforce any formal orders in light of the COVID-19 pandemic.

Although many heavily appropriated basins in Colorado have nearly 100 percent compliance with measuring devices, Division 6 as a whole still had 46 percent of users without such capabilities as of April 2021. The Division Engineer and State Engineer (Engineers) therefore decided to undertake a formal rulemaking process to clarify their authority, place all users on notice, and allow for more efficient water administration.

## Rulemaking Process

The Engineers conducted six in-person stakeholder meetings in October 2021 to allow the public to offer comments and suggestions on the proposed measurement rules. The public also could submit written comments electronically through the State Engineer's website. The Engineers then revised the rules based on those comments and held additional stakeholder meetings in June and July 2022.

Throughout the process the Engineers emphasized the need for measurement rules in the face of impending water shortages within Division 6. Although there are still many streams within the division that have never been called, previously unprecedented calls now occur in most years on many of the larger rivers. The Engineers opine that the measurement rules are necessary because they: (1) clarify the extent and limits of the Engineers' authority; (2) establish consistency in the application of that authority; (3) allow consideration of all scenarios ahead of time; (4) provide technical guidance; and (5) necessarily involve public stakeholder participation and a formal legal process.

## Division 6 Measurement Rules

The Division 6 Measurement Rules are not radically different from other rules currently existing in other basins. However, the rural nature of this part of Colorado and types of water uses within the Division are considered. The rules apply to all surface and groundwater diversions and storage, with the following exceptions: (1) statutorily exempt wells, (2) ponds used for stock watering, wildlife watering, or fire protection that do not intercept groundwater and are not filled by diversions from a stream (for example, on-channel ponds on ephemeral streams); (3) head stabilization ponds (a/k/a irrigation control structures, where outflows must exceed inflows every 72 hours); (4) surface diversions including springs that are limited to domestic use inside three single-family homes and no more than one acre of lawn and garden irrigation; and (5) erosion control dams. The Engineers believe that diversions from these types of structures are minimal and therefore should be excluded from administration under the measurement rules.

The measurement rules require a measuring device (or approved alternative) capable of measuring flow rate or total volume, depending on the type of struc-



ture. The required accuracy of flow rate devices will depend on the total amount of water decreed to that structure. Water users will be required to install and maintain the devices in working condition and supply data to the Division Engineer as may be required. Off-channel reservoir will be required to have devices to measure inflows, total storage, and releases, while on-channel reservoirs must also include an outlet structure capable of releasing all out-of-priority inflows. In general, the rules do not require any specific actions not already required either through law or by rule in other parts of the state. However, because such rules have never been enforced in Division 6, many users do not have such devices and therefore are concerned about the costs and burden to install, operate, and maintain measurement devices. Thus, the Division Engineer opted to formally adopt rules to place all Division 6 water users on equal footing.

### Case No. 22CW3102

The Engineers further revised the measurement rules after the 2022 stakeholder meetings and then formally filed an Order of the State Engineer adopting the rules with the Division 6 Water Court in October 2022 as Case No. 22CW3102. In addition to the formal Order adopting the rules, the State Engineer included a “Statement of Basis and Purpose” in support of its Order. This statement notes that robust measurement is needed to allow proper administration of calls within Division 6. If water users do not adequately measure their use, there is no way for the Division Engineer to administer water rights except through total curtailment of junior users. The Engineers also want to ensure that Colorado has accurate and consistent water use data in the event of future Colorado River Compact obligations. According to the Division Engineer, accurate measurement will help to ensure Contract compliance administration is done in a way most protective of Colorado.

A variety of parties filed statements of opposition to the rules including municipalities (Fort Collins and Steamboat Springs), water conservancy districts (Upper Yampa and Jackson County), and private businesses (Caerus Piceance and Colowyo Coal Company). The majority of opposers said they generally understand and support the adoption of measurement rules but want to participate in the case to ensure that any modifications to the rules would not adversely affect their water rights. Colowyo Coal Company and the City of Steamboat Springs both filed detailed

statements of opposition highlighting several issues that may be litigated throughout the case.

Colowyo first claims that the proposed rules fail to account for the large number of water rights as compared to relatively limited Division Engineer’s Office personnel in Division 6. According to Colowyo, this discrepancy, combined with harsh weather and access difficulties in this part of the state, make the rules “entirely impractical to implement.” Colowyo also challenged several individual rules such as the requirement to install outlet structures on all on-channel reservoirs. It claims this rule is arbitrary and capricious and may compromise the structural integrity of old earthen embankments that are common in this part of the state. Finally, Colowyo claims that the definitions and terms included throughout the rules are ambiguous, confusing, and internally inconsistent. It therefore requests that the Engineers revise the rules to clarify and allow water users to better understand certain requirements and impacts.

The City of Steamboat Springs raised similar concerns regarding ambiguous definitions. For example, the City noted that under one reading of the rules it could be forced to obtain a variance to prove it is not required to install a headgate on its recreational in-channel diversion (essentially a whitewater park, where water is not actually taken from the stream). The City also took issue with the Statement of Basis and Purpose. The Engineers incorporated the statement into the rules through its filing, but the City claims there are inconsistencies between the two that further muddy the waters as to the specific inclusions and requirements within the rule.

### Conclusion and Implications

The Water Court set the case for trial in February 2024. The parties will work to revise the rules and settle the case before that time, however given the wide range of opinions and controversial nature of the dispute, it does seem likely that at least some parties will continue to trial and ask the Water Court to resolve disagreements on certain portions of the measurement rules. Until the rules are finalized, the Division Engineer will continue to administer water rights under the existing ad hoc system of issuing orders for certain streams when they become over appropriated or otherwise require administration by the Division Engineer.

(John Sittler)

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## LEGISLATIVE DEVELOPMENTS

### FEDERAL OPEN ACCESS EVAPOTRANSPIRATION DATA ACT IN CONGRESS PROPOSES SIGNIFICANT UPDATES TO WATER MEASUREMENT AND MANAGEMENT

The Open Access Evapotranspiration Data Act (HR 2429) (OAEDA) is once again on the United States House floor after Sen. Catherine Cortez Masto, D-Nev., and Rep. Susie Lee, D-Nev., reintroduced the OAEDA alongside Sen. John Hickenlooper, D-Colo., and Reps. Chris Stewart, R-Utah, Jared Huffman, D-Calif., and Burgess Owens, R-Utah. The version currently under consideration in Congress has the potential to significantly change how water resources are managed and measured in the United States. The OAEDA would require the development of a system for measuring evapotranspiration using satellites, which would provide valuable data for farmers, water managers, and policymakers.

A similar bill was introduced in the 2021-2022 session but did not make it out the House Natural Resources Subcommittee on Water, Oceans, and Wildlife.

#### Measuring Evapotranspiration

One primary purpose of the OAEDA is to measure evapotranspiration, which is the process by which water is transferred from the land to the atmosphere through evaporation from soil and plant surfaces, as well as through transpiration from plants. It is a key component of the water cycle and is critical for understanding water availability and uses in agricultural and natural systems. However, OAEDA sponsors assert that current methods for measuring evapotranspiration are often time-consuming and costly, and may not be representative of the entire landscape.

#### Satellites and OpenET Data Program

OAEDA sponsors state that the value of improved evapotranspiration reporting is widely understood in the water resources science and management community, and that satellites offer a promising solution to these challenges, as they can provide a more comprehensive view of evapotranspiration across large areas.

The OAEDA would require the development of a system for measuring evapotranspiration using satellites, and would require that this data be made available to the public through an open-access platform called the Open Access Evapotranspiration (OpenET) Data Program. This would allow researchers, farmers, and water managers to access the data they need to make informed decisions about water use and management.

The OAEDA finds one of the key benefits of using satellites to measure evapotranspiration is the ability to obtain data across large areas, particularly in agricultural regions. By providing data on evapotranspiration across entire watersheds or regions, farmers and water managers could make more informed decisions about when and how much to irrigate, and how to allocate water resources among different crops and uses.

OAEDA sponsors assert that satellite data can also provide a more accurate picture of evapotranspiration than current methods, which often rely on point measurements or estimates based on weather data. Satellites can provide continuous, spatially explicit data that can capture variability in evapotranspiration across different land cover types, soil types, and other factors. This may lead to more accurate estimates of water use and availability, and better predictions of drought and other water-related risks.

#### OAEDA Challenges

OAEDA also faces challenges. One of the main challenges is the technical complexity of developing a satellite-based evapotranspiration measurement system. This will require significant investment in research and development, as well as coordination among multiple agencies and organizations. The OAEDA looks to share these costs among project partners, though at this time it is not exactly clear which partners those might be. The OAEDA as drafted currently expects the project to have a \$23,000,000 annual impact from 2024 to 2028.

### **Conclusion and Implications**

The potential impacts of the OAEDA are significant, but several many important aspects will likely require refinement before making it to the President's desk for signature. By providing open access to evapotranspiration data obtained through satellite measurements, the OAEDA could help to transform

how water resources are managed and measured in the western United States. The OAEDA has the potential to benefit farmers, water managers, and natural resource managers alike, by providing the data needed to make informed decisions about water use and management.

(Darien Key, Derek Hoffman)

## REGULATORY DEVELOPMENTS

### EPA PROPOSES FIRST-EVER ENFORCEABLE NATIONWIDE PRIMARY DRINKING WATER STANDARDS FOR PFAS

On March 29, 2023 the U.S. Environmental Protection Agency (EPA) published a preliminary regulatory determination and a proposed rule that would establish first-ever legally enforceable federal primary Maximum Contaminant Levels (MCLs) for six per- and polyfluoroalkyl substances (PFAS) in drinking water. In addition to creating these enforceable national drinking water standards, these MCLs, if adopted, could be used as a benchmark for establishing groundwater remediation goals or be used in other regulatory or litigation contexts. EPA expects to finalize the rulemaking by the end of this calendar year.

#### The Proposed Rule and its Requirements

PFAS are a large family of synthetic chemicals that have been in use since the 1940s, and are highly stable and resistant to degradation in the environment, thus colloquially being named as “forever chemicals.” People can be exposed to PFAS through use of consumer products, and/or consuming food and drinking water containing these forever chemicals. The scientific evidence demonstrates that PFAS consumption by humans can result in harmful health effects, including:

...negative impacts on fetal growth after exposure during pregnancy, on other aspects of development, reproduction, liver, thyroid, immune function, and/or the nervous system; and increased risk of cardiovascular and/or certain types of cancers.

As such, the rulemaking, also referred to as EPA’s National Primary Drinking Water Regulation (NP-DWR), proposes to establish primary MCLs for the following six different PFAS compounds:

- Perfluorooctanoic acid (PFOA)
- Perfluorooctane sulfonic acid (PFOS)
- Perfluorononanoic acid (PFNA)
- Hexafluoropropylene oxide dimer acid (HFPO-

DA, commonly known as GenX Chemicals)

- Perfluorohexane sulfonic acid (PFHxS)
- Perfluorobutane sulfonic acid (PFBS).

Under the proposed rule, PFOA and PFOS would be treated as individual contaminants, both with primary MCLs set at 4.0 parts per trillion (ppt or ng/L). For PFHxS, PFNA, PFBS, and HFPO-DA (commonly referred to as GenX Chemicals), EPA proposes the use of a “Hazard Index” MCL where the maximum limit is based on any mixture containing one or more of the four compounds. Compliance with the Hazard Index MCL is calculated as the sum of the ratios of the measured concentration compared to the allowable concentration. To determine the Hazard Index, water systems will need to monitor and compare the amount of each PFAS compound in drinking water to its associated Health-Based Water Concentration (HBWC), which is the level at which no health effects are expected for that compound. The HBWC levels of each GenX Chemical is as follows:

- PFNA: 10.0 ppt
- PFHxS: 9.0 ppt
- PFBS: 2000 ppt
- GenX chemicals: 10.0 ppt.

Water systems will need to then add the comparison values for each compound contained within the mixture. A value greater than 1.0 (the index is unit less) would be considered an exceedance of the proposed Hazard Index MCL. Therefore, the proposed MCL for any mixture containing PFHxS, HFPO-DA and its ammonium salt, PFNA, and/or PFBS is a Hazard Index exceedance of 1.0.

EPA also proposed health-based, non-enforceable MCL Goals (MCLGs) for each of the six PFAS compounds. An MCLG is the maximum level of a contaminant in drinking water where there is no known or anticipated negative effects in an individual’s health. The proposed MCLG for PFOA and PFOS is 0.0 ppt, based on EPA determination that each

PFOA and PFOS is “likely to cause cancer,” whereas the proposed MCLG for PFNA, PFHxS, PFBS, and/or GenX Chemicals is a Hazard Index equal to or less than 1.0

### Conclusion and Implications

If adopted, EPA’s proposed rule will require public water systems to monitor for the six PFAS compounds, notify the public of the concentrations detected, and reduce concentrations in drinking water if they exceed the proposed primary MCLs. While there are existing methods available to monitor for the constituents (e.g., method 1633 for PFOA and PFOS), treatment technologies to remove the constituents (e.g., granular activated carbon (GAC), anion exchange resins (AIX), reverse osmosis (RO), and nanofiltration) are like to be seen by the regulated community as expensive and cost of compliance a

significant concern. Importantly, if adopted, for states delegated authority to regulate their own programs under the Safe Drinking Water Act, the Proposed Rule would require these states to establish PFAS-related drinking water standards in-line with EPA’s final rule and conform to EPA’s standards.

Some level of debate regarding the EPA’s scientific basis for its proposed MCLs and MCLGs can be anticipated, as the federal Safe Drinking Water Act [<https://www.epa.gov/sdwa>] obligates the agency to use best available science when setting standards. As such, challenges to the proposed rule related to the costs of implementing it, procedural mechanisms, and the sufficiency of the scientific evidence supporting EPA’s conclusions, are also anticipated. The proposed rule is available online at: <https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking> (Jaycee Dean, Hina Gupta)

## U.S. BUREAU OF RECLAMATION RELEASES SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON COLORADO RIVER OPERATIONS AT LAKE MEAD AND LAKE POWELL

On April 14, the United States Bureau of Reclamation (Bureau) released for comment a draft Supplemental Environmental Impact Statement (SEIS) for proposed modifications to interim guidelines pertaining to the management of the Colorado River. The SEIS focuses on modifications to operational guidelines for Lake Powell and Lake Mead, and specifically on those guidelines governing shortage conditions, elevation and release tiers for the reservoirs, and mid-year reviews of reservoir operating conditions. The Bureau expects to release a final SEIS by late summer 2023.

### Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire

flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the “Law of the River.” The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states (lower Basin states) are each apportioned specific amounts of the lower basin’s 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake



Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, developed and implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet. The 2007 Interim Guidelines are currently set to expire by January 1, 2027.

The 2007 Interim Guidelines have four operational elements: shortage guidelines, coordinated reservoir operations, storage and delivery of conserved water, and surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the 2007 Interim Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, the Bureau will apportion the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

Also, in 2019, the lower Basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and the Bureau must consult and determine what additional measures will be taken by the Bureau and the lower basin states if Lake Mead levels are forecast to be at or below 1,030 feet during the succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To

assist with these determinations, the Bureau releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

## Analysis

The SEIS focuses on the 2024 operating year. The operating year for Glen Canyon Dam, which forms Lake Powell, begins October 1. For Hoover Dam, which forms Lake Mead, the operating year begins January 1. The modified guidelines will also take into account the August 2023 24-month study. The SEIS nonetheless will inform operating guidelines for 2025 and 2026, although guidelines for those years may be further refined based on the outcome of the 2024 operating year. The Bureau will release a new environmental impact statement for post-2026 operations in the future.

The SEIS proposes three alternatives: a No Action Alternative, Alternative Action 1, and Alternative Action 2. The No Action Alternative would continue the existing 2007 Interim Guidelines without change. Notably, under the existing guidelines, reservoir releases are assessed at a scheduled mid-year review, and any changes to projected releases must only be for increasing, not reducing, releases.

## Alternative Action 1

Alternative 1 proposes reduced releases from Lake Mead based on the concept of priority, *i.e.*, the Law of the River. Reductions are limited to a total of 2.083 million acre-feet from Lake Mead because that is the maximum amount of reductions analyzed in the final EIS for the 2007 Interim Guidelines. According to the Bureau, using that previously analyzed figure will help finalize the SEIS by late summer, before the 2024 operating year begins.

Alternative Action 1 also contemplates 6-8.23 maf of releases from Lake Powell when Lake Powell is below 3,575 feet elevation. In particular, Alternative Action 1 modifies coordinated reservoir operations at Lake Powell and Lake Mead. When elevations at Lake Powell (projected as of January 1) are below 3,575 feet, an initial annual release in the amount of 6 maf would be set. Adjustments based on the April 24-Month Study would be made depending on projected end-of-year lake levels. Depending on end-of-year projections, releases could total from 6 maf to 8.23 maf. However, Alternative Action 1 preserves

water levels of 3,500 feet at Lake Powell because the minimum power pool at that reservoir, *i.e.* the lowest lake level where power can still be generated from Glen Canyon Dam, is 3,490 feet. If lake levels are below 3,500 feet in any month, the Bureau would impose a 6 maf maximum release limit and such releases would be set to maintain or increase lake elevations consistent with existing operating criteria for Glen Canyon Dam. Finally, under Alternative Action 1, the mid-year review would allow for further reductions in deliveries.

### Alternative Action 2

Under Alternative Action 2, the Bureau proposes to reduce releases from Lake Mead in the same amount as contemplated by Alternative Action 1, *i.e.*, to a maximum of 2.083 maf. However, reduced releases would not be based exclusively on the concept of priority. Instead, reductions are distributed in the same percentage across all lower Basin water users. Depending on levels at Lake Mead, additional

percentage reductions (*i.e.* in excess of reductions already contemplated by the 2007 Interim Guidelines and DCP), range from 2.67 percent to 13.11 percent for each lower Basin state. Coordinated reservoir operations and allowances for further reductions following mid-year review are the same under Alternative Action 2 as they are for Alternative Action 1.

### Conclusion and Implications

The draft SEIS is not a final document. Written comments are due May 30. At this time, the Bureau does not have a preferred alternative. It remains to be seen which action the Bureau adopts, or whether additional changes will be made based on public responses. Nonetheless, the likelihood of further reductions in releases for water users is likely in operating year 2024. The Supplemental Environmental Impact Statement is available online at: <https://www.usbr.gov/ColoradoRiverBasin/documents/NearTermColoradoRiverOperations/20230400-Near-termColorado-RiverOperations-DraftEIS-508.pdf>  
(Miles Krieger, Steve Anderson)

## 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

•April 26, 2023—The U.S. Environmental Protection Agency has ordered the Chemours Company to take corrective measures to address pollution from per-and polyfluoroalkyl substances (PFAS) in stormwater and effluent discharges from the Washington Works facility near Parkersburg. The order on consent also directs Chemours to characterize the extent of PFAS contamination from discharges.

This is the first EPA Clean Water Act enforcement action ever taken to hold polluters accountable for discharging PFAS into the environment. PFAS are a group of man-made chemicals that have been manufactured and used in industry and consumer products since the 1940s. There are thousands of different PFAS chemicals, some of which have been more widely used and studied than others.

According to the EPA order, PFAS levels in the discharges from the facility exceed levels that are set in the facility's Clean Water Act permit.

Under the Clean Water Act, it is unlawful to discharge pollutants into U.S. waterways except pursuant to a National Pollution Discharge Elimination System (NPDES) permit, issued by EPA or a state. The permit sets pollution discharge limits, monitoring and reporting requirements, and other conditions designed to protect water quality. More information on the [NPDES program](#).

Chemours operates several manufacturing units at the Washington Works facility, which produce fluorinated organic chemical products including fluoropolymers. The facility discharges industrial process water and stormwater to the Ohio River and its tributaries, under the terms of a NPDES permit

issued in 2018 by the West Virginia Department of Environmental Protection. E.I. du Pont de Nemours and Company was the NPDES permit holder at Washington Works until 2015. In 2015, the permit was transferred to Chemours.

The permit imposes discharge limits and requires monitoring of certain pollutants, including PFAS such as perfluorooctanoic acid (PFOA), which was used in the past as a processing aid for manufacturing, and HFPO Dimer Acid, also known as GenX—which replaced PFOA as a processing aid.

In an administrative compliance order on consent (AOC) issued today, EPA sets forth that this facility exceeded permit effluent limits for PFOA and HFPO Dimer Acid on various dates from September 2018 through March 2023, and that Chemours failed to properly operate and maintain all facilities and systems required for permit compliance.

As an initial step in characterizing PFAS in surface water discharges, EPA's order requires Chemours to implement an EPA-approved sampling plan to analyze PFAS and conduct analysis to further understand the presence of PFAS in stormwater and effluent discharged from the facility. Also, Chemours will submit and implement a plan to treat or minimize the discharge of PFAS to ensure compliance with numeric effluent limits of PFOA and HFPO Dimer Acid.

In addition, to identify best practices to reduce PFAS discharges from the site, Chemours will submit its existing Standard Operating Procedures relating to the management of wastewater for various systems and its revised Storm Water Pollution Prevention Plan.

•March 31, 2023— The U.S. Environmental Protection Agency (EPA) and in coordination with the U.S. Attorney's Office for the Northern District of Ohio, the Justice Department's Environment and Natural Resources Division announced a complaint against Norfolk Southern Corporation and Norfolk Southern Railway Company (Norfolk Southern) related to the Feb. 3, derailment in East Palestine,

Ohio. The complaint seeks penalties and injunctive relief for the unlawful discharge of pollutants, oil, and hazardous substances under the federal Clean Water Act, and declaratory judgment on liability for past and future costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

This action follows EPA's issuance on Feb. 21, 2023 of a Unilateral Administrative Order under CERCLA to Norfolk Southern Railway Company requiring the company to develop and implement plans to address contamination and pay EPA's response costs associated with the order.

The United States Attorney's Office stands with our district's residents in pursuing accountability and justice in both the immediate and distant future, as we work together to deal with the damage and destruction this disaster has caused," said First Assistant U.S. Attorney Michelle Baepler for the Northern District of Ohio.

On Feb. 3, 2023, a Norfolk Southern train carrying hazardous materials, including hazardous substances, pollutants, and oil derailed in East Palestine, Ohio. The derailment resulted in a pile of burning rail cars, and contamination of the community's air, land, and water. Residents living near the derailment site were evacuated. Based on information Norfolk Southern provided, the hazardous materials contained in these cars included vinyl chloride, ethylene glycol monobutyl ether, ethylhexyl acrylate, butyl acrylate, isobutylene, and benzene residue. Within hours of the derailment, EPA and its federal and state partners began responding to the incident, including providing on-the-ground assistance to first responders and conducting robust testing in and around East Palestine.

The fire caused by the derailment burned for several days. On Feb. 5, monitoring indicated that the temperature in one of the rail cars containing vinyl chloride was rising. To prevent an explosion, Norfolk Southern vented and burned five rail cars containing vinyl chloride in a flare trench the following day, resulting in additional releases.

Since the EPA's issuance of the Unilateral Administrative Order to Norfolk Southern Railway Company, the EPA has been overseeing that company's work under the order. Approximately 9.2 million gallons of liquid wastewater, and an estimated 12,932 tons of contaminated soils and solids have been shipped off-site.

The EPA and other federal agencies continue to investigate the circumstances leading up to and following the derailment. The United States will pursue further actions as warranted in the future as its investigatory work proceeds.

•March 20, 2023— ABF Freight System Inc. (ABF), a freight carrier that operates more than 200 transportation facilities in 47 states and Puerto Rico, has resolved allegations that it violated requirements of the Clean Water Act (CWA) relating to industrial stormwater at locations across the country. Under the proposed settlement, ABF will enhance and implement its comprehensive, corporate-wide stormwater compliance program at all its transportation facilities except those located in the state of Washington, and will pay a civil penalty of \$535,000, a portion of which will be directed to the Louisiana Department of Environmental Quality, the State of Maryland, and the State of Nevada who all joined this settlement.

The complaint in the case, filed contemporaneously with the proposed consent decree, alleges that ABF failed to comply with certain conditions of their CWA permits (e.g., spills that had not been cleaned up; failure to implement required spill prevention measures; failure to implement measures to minimize contamination of stormwater runoff; failure to conduct monitoring of stormwater discharges as required; and failure to provide all required training to ABF's employees) at nine of its transportation facilities.

In April 2015, ABF voluntarily disclosed to EPA that it failed to obtain industrial stormwater permit coverage at multiple facilities and had discovered additional areas of noncompliance with the CWA through the company's own compliance audits which were conducted at nearly all its facilities during 2013 and 2014. Between October 2016 and April 2019, EPA, the Louisiana Department of Environmental Quality, the State of Maryland, and the State of Nevada conducted 15 inspections of ABF's facilities and observed noncompliance with applicable stormwater laws at both CWA permitted facilities and No Exposure Certification (NEC) facilities.

To address the extent of ABF's noncompliance, the proposed consent decree requires ABF to continue to implement and enhance its comprehensive, corporate-wide stormwater compliance program. This includes a memorialization of stormwater roles and responsibilities, comprehensive employee training with

contractor awareness, implementation of standard operating procedures, stormwater pollution prevention plan management, and tracking facility-specific corrective actions. The settlement also requires ABF to conduct tiered management oversight inspections at its permitted and NEC facilities throughout the three-year implementation of this consent decree.

The injunctive relief measures set forth in the proposed consent decree are designed to result in

effective stormwater runoff management at ABF's facilities, including those facilities that conduct vehicle maintenance and equipment cleaning.

The consent decree, lodged in the U.S. District Court for the Western District of Arkansas, is subject to a 30-day federal public comment period and approval by the federal court.

(Robert Schuster)



## JUDICIAL DEVELOPMENTS

FOURTH CIRCUIT UPHOLDS VIRGINIA'S CLEAN WATER ACT  
SECTION 401 PERMIT FOR NATURAL GAS PIPELINE

*Sierra Club v. State Water Control Board*, 64 F.4th 187 (4th Cir. Mar. 29, 2023).

The United States Court of Appeals, Fourth Circuit upheld Virginia's grant of a section 401 water quality certification for an in-stream natural gas pipeline.

### Background

This appeal is the latest installment in a series of challenges to Mountain Valley Pipeline, LLC's ("MVP") plans to build a natural gas pipeline (Pipeline) that will span approximately 304 miles from Wetzel County, West Virginia to Pittsylvania County, Virginia.

In February 2021, MVP submitted an application requesting both a Virginia Water Protection individual permit (VWP Permit) from Virginia's Department of Environmental Quality (DEQ) and the State Water Control Board (Board) (collectively: the Agencies) and a certification from the United States Army Corps of Engineers (Corps) pursuant to Section 404 of the federal Clean Water Act (CWA). On December 14, 2021, the Board adopted DEQ's recommendation to approve MVP's application.

The Sierra Club, Appalachian Voices and eight other conservation groups (collectively: Petitioners) sued the Agencies and several individuals associated with the Agencies (Respondents), alleging that its approval of a state water protection permit and water quality certification violated the Clean Water Act.

Petitioners asserted that the VWP Permit should be vacated because the Agencies failed to: (1) evaluate whether alternative crossing locations would be environmentally preferable and practicable; (2) independently verify whether each of MVP's proposed water crossing methods was the least environmentally damaging practicable alternative (LEDPA); and (3) determine whether the Pipeline will comply with Virginia's narrative water quality standards. In addition, Respondents contended that the court lacked jurisdiction to review the petition.

### The Fourth Circuit's Decision

Petitioners argued that the Agencies' issuance of the VWP Permit was not in accordance with the law because the Agencies failed to: (1) evaluate alternative crossing locations; (2) verify MVP's crossing methods were the least environmentally damaging practicable alternative (LEDPA); and (3) evaluate whether the Pipeline will comply with Virginia's narrative water quality standards. The court rejected each argument.

### Evaluation of Alternative Crossings

Petitioners' first argument turned on whether the Agencies were required to ask:

...on a crossing-by-crossing basis, whether alternative sites for MVP's proposed crossings would avoid or result in less adverse impact to state waters.

Respondents explained that the Pipeline is a large, contiguous project, and, as such, changing one stream crossing would alter the Pipeline's siting in other places. The Court of Appeals found that Petitioners failed to present any evidence indicating that any crossing could be moved without altering the Pipeline's siting elsewhere and concluded that the Agencies correctly applied Virginia law by approving MVP's proposed crossing locations.

### Least Environmentally Damaging Practicable Alternatives Analysis

Petitioners next argued that the Agencies acted arbitrarily and capriciously by failing to independently verify whether each of MVP's proposed water crossing methods was the LEDPA. Specifically, that the Agencies failed to address Petitioners' expert report. The court noted that DEQ did not simply grant MVP's application without considering its merits.

Rather, the agency held multiple public meetings where it heard directly from the public, considered nearly 8,000 public comments, addressed several recurring issues raised by the commenters, and provided a Final Fact Sheet detailing its reasons for recommending that the Board grant MVP's application for a VWP Permit. The court found evidence in the record indicating that the Agencies asked a number of clarifying questions to ensure they were satisfied that the project minimizes the impact on the environment. The court was satisfied that the Agencies considered the relevant data and provided a satisfactory explanation for their conclusion. The court concluded that the Agencies' review of MVP's proposed crossing methods was neither arbitrary nor capricious.

### **Compliance with Virginia's Narrative Water Quality Standards**

Lastly, Petitioners argued that the Agencies acted arbitrarily and capriciously by failing to address whether the Pipeline would comply with Virginia's narrative water quality standard. DEQ addressed this issue in its responses to the public comments, in which it listed a host of conditions that it placed on the VWP Permit to ensure that Virginia's water quality is protected both during and after construction. In addition, DEQ described the indicators it uses to measure water quality, which Petitioners have not challenged. The court concluded that the Agencies did not act arbitrarily and capriciously by determining

that the Pipeline will comply with Virginia's narrative water quality standard.

### **Federal Court Jurisdiction**

Finally, the court addressed Respondents' argument that the court lacked jurisdiction. Respondents argued that the court lacked jurisdiction because (1) Petitioners' claims were rooted in state law and (2) Virginia did not waive sovereign immunity by participating in the regulatory schemes of the Natural Gas Act and Clean Water Act.

The court explained that DEQ was acting pursuant to the authority granted to it through the CWA when it issued the VWP Permit, which provided the court jurisdiction to hear this case. As for the second argument, the court explained that a state's voluntary participation in the NGA and CWA's regulatory schemes resulted in federal jurisdiction over the state's decisions made pursuant to that scheme and concluded that the State waived the defense of sovereign immunity by issuing the VWP Permit.

### **Conclusion and Implications**

This case provides a reminder that large projects with multiple layers of regulatory oversight typically undergo extensive public review and evaluation. A challenge based on a deficiency of the factual record is difficult to prove. The Court of Appeals' opinion is available online at: <https://www.ca4.uscourts.gov/opinions/212425.P.pdf>  
(Tiffany Michou, Rebecca Andrews)

## **COURT OF FEDERAL CLAIMS PARTIALLY GRANTS MOTION TO IMPOSE SANCTIONS FOR SPOILIATION OF EVIDENCE RELATING TO CLEAN WATER ACT PERMITTING OF WASTE DISCHARGES**

*United Affiliates Corp. v. United States*, 164 Fed. Cl. 565, 571 (Feb. 28, 2023).

The United States Court of Federal Claims recently imposed sanctions on a mining company for destroying documents relevant to its ongoing lawsuit against the U.S. Environmental Protection Agency (EPA). The Federal Court of Claims found that the mining company misled the federal government about the existence of documents, which were highly relevant to determining the central claims of the ongoing litigation.

### **Factual and Procedural Background**

Mingo Logan Coal LLC (Mingo) leased land in West Virginia owned by United Affiliates Corp. (United) to operate a surface coal mine. Mingo sought a federal Clean Water Act Section 404 permit to discharge mining-generated waste into two nearby streams. The permit was issued in 2007, after a ten-year application process and environmental impact study. Four years later, in 2011, the EPA withdrew the

permit. Shortly thereafter, United and Mingo filed suit alleging that the permit withdrawal constituted a categorical and regulatory taking of Mingo's property under the Fifth Amendment.

In May 2019, the United States Court of Federal Claims partially granted the federal government's motion to dismiss. The court agreed that the plaintiffs failed to allege a compensable property interest and thus could not state a categorical takings claim as a matter of law, but found the taking sufficiently alleged to support a regulatory takings claim.

During the subsequent discovery process, the federal government sought from Mingo mine models and forecasts that supported the 2007 permit. Mingo provided the modeling files it created in 2006, but the government believed more recent models existed because Mingo conducted contract mining operations for a neighboring mine after the Section 404 permit was issued in 2008. After a series of discovery conferences that failed to resolve the issue, the federal government deposed Mingo Logan in August 2021 in order to obtain the mine modeling it had.

Two days before the scheduled December 8, 2021, deposition, Mingo informed the federal government that certain requested data was lost. The files were on the hard drive of the engineer chiefly responsible for the mine planning and modeling. However, Mingo did not place a litigation hold on the engineer's files. Therefore, when the engineer left Mingo four months after it filed the complaint, his computer and files were not preserved. The federal government moved for evidentiary sanctions against Mingo and United for their failure to preserve those documents.

### The Court of Federal Claims' Decision

The court granted in part the motion for sanctions against Mingo and United for committing spoliation of evidence. The court observed that a party has a legal duty to preserve evidence when litigation is 'pending or reasonably foreseeable. Where a party fails in that duty, it commits spoliation. In reviewing the reasonableness of sanctions against a spoliator, the court applied a four-part policy rationale. First, sanctions for spoliation of evidence are imposed to "punish the spoliator" and prevent that party from benefiting from the misdeed; second "to deter future misconduct"; third, to remedy or mitigate damages, evidentiary or otherwise, caused by the spoliation;

and fourth, to uphold the judicial process and "its truth-seeking function."

### Spoliation of Evidence

Here, the court concluded Mingo committed spoliation. The engineer's files for updated mine models and alternative disposal sites were lost, although Mingo initially asserted that such files did not exist. Only shortly before the deposition did Mingo verify the existence of those deleted files. In actuality, the engineer's files were deleted four months after Mingo filed its complaint. Although Mingo had instructed its employees about data preservation, the court found that Mingo failed to adequately follow up in ensuring compliance with those instructions. Thus, Mingo committed spoliation.

### Measuring the Impact of Spoliation

In measuring the impact of that spoliation, the court examined the relevance of the lost evidence as well as the extent the lost evidence prejudiced the federal government. Here, the court determined the lost evidence to be relevant to the litigation. The updated mine models and alternative disposal sites would have provided the government the mine site's conditions at the time of the alleged taking, as well as Mingo's available alternatives for dumping mining waste. Both topics would help determine the economic value of the permit revocation upon which the plaintiffs' regulatory takings claim was based. The court rejected Mingo's argument that the economic value could be based on the 2006 calculations, finding that the updated files would provide a more accurate record when the Section 404 permits were revoked in 2011. Thus, the spoliated evidence was relevant to the litigation.

### Prejudice

Further, the court concluded that the federal government was prejudiced by the spoliation. Only Mingo possessed those files, and the government had no way to obtain the information through other means or otherwise verify Mingo's calculations without source data. Again, the court found Mingo's argument that the 2006 models were sufficient to be unpersuasive. Mingo could be correct in that assertion, the court reasoned, but there is no way to know if it is telling the truth without the lost files.

## Sanctions

The court found sanctions to be warranted against Mingo, as they failed to produce the requested evidence, intentionally deleted it, and did not provide an adequate substitute for the deleted files. The sanction awarded attorney's fees and costs against Mingo, as the federal government held unnecessary depositions stemming from the spoliation, as well as increased costs from their attempts to reconstruct the lost evidence from available data. However, the sanction awarding attorney's fees did not apply to United, as the court found no evidence to suggest United had anything to do with Mingo's spoliation, thus rejecting part of the federal government's motion. The court's sanction also precluded all plaintiffs, including the United, from relying on the spoliated evidence. Although United was not responsible for the spolia-

tion, the court agreed with the federal government's argument that United, as a co-plaintiff, could still make use of the destroyed evidence, and it would be reasonable to extend the prohibition on spoliated evidence to both plaintiffs.

## Conclusion and Implications

This case demonstrates the extent to which spoliation of evidence can extend beyond the spoliator and affect a co-plaintiff. The case also upholds the application of spoliation to acts where the party failed to adequately ensure subordinates' compliance with required litigation holds on relevant documents. The court's opinion is available online at: <https://law.justia.com/cases/federal/district-courts/federal-claims/cofce/1:2017cv00067/33981/138/>  
(Michael Ervin, Rebecca Andrews)





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