

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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CALIFORNIA WATER NEWS

LOWER COLORADO RIVER BASIN REPRESENTATIVES COME TO AGREEMENT ON CONSENSUS-BASED SYSTEM CONSERVATION PROPOSAL FOR NEAR-TERM RIVER OPERATIONS

With just over a week remaining until the original deadline to submit comments on the draft Supplemental Environment Impact Statement for Near-term Colorado River Operations (Draft SEIS) the Department of the Interior announced that a significant development would be putting the review process on hold. In furtherance of the continued efforts to curb the effects of the persistent drought being experienced in the southwestern United States, representatives from the Lower Colorado River Basin States have come together in submitting a proposal for what they are now calling the Lower Basin Plan (Plan). The Plan, as outlined by the representatives in a letter to the US Bureau of Reclamation, would utilize a consensus-based approach to increase voluntary conservation measures throughout the Colorado River Basin.

A Consensus-Based System for Conservation

The consensus-based conservation proposal, agreed upon by the Lower Colorado River Basin States of California, Arizona, and Nevada, establishes a minimum system conservation requirement of at least 3 million acre-feet (MAF) by the end of calendar year 2026. The Lower Basin Plan further demands that at least half of that total be met by the end of 2024.

As for how exactly this will be done, the Lower Basin Plan outlines that up to 2.3 MAF of system conservation will be federally compensated under the Inflation Reduction Act's funding provisions for Drought Mitigation in the Reclamation states. The remaining 0.7 MAF of system conservation would then be left open to compensated reductions funded by state or local entities or simply left up to voluntary, uncompensated reductions by the Lower Basin States. If any system conservation is federally funded with "non-Bucket 1" funding under the Inflation Reduction Act—e.g. through "Bucket 2" funding or funding under the Bipartisan Infrastructure Law—the Plan would allow for that system conservation to offset up to 0.2 MAF of the remaining 0.7 MAF in required

system conservation. The Lower Basin Plan would also allow for any portion of the remaining required system conservation beyond that offset to be further offset with ICS created in 2023-2026 and for any such ICS that the creator cannot order delivery of, transfer, or assign by the end of 2026.

Contingency Plan

As a contingency in the event that Lake Mead water levels fall to critically low elevations, the Lower Basin Plan also outlines a process for the Lower Basin States to take responsive action. Under this contingency, if the April 24-month Study "Minimum Probable" model indicates that the end of year elevation of Lake Mead will fall below 1,025 feet, the Lower Division States will have 45 days to come up with a proposal for the Bureau of Reclamation to protect Lake Mead from reaching an elevation of 1,000 feet. If the Lower Basin States cannot come up with an acceptable proposal, the Bureau of Reclamation would then be able to take independent action to maintain Lake Mead's water levels above 1,000 feet.

DOI Withdraws Its Draft SEIS

In response to the Lower Basin States' submission of the Plan, the Department of the Interior withdrew the Draft SEIS that was published in April so that it can fully analyze the potential impacts of the Plan under the National Environmental Policy Act. From there, an updated version of the Draft SEIS can be published to reflect the inclusion of the consensus-based system conservation as an action alternative, which is expected to occur later this year.

Conclusion and Implications

With the purpose of the Draft SEIS being to modify the guidelines for the operation of the Glen Canyon and Hoover dams in order to address historic drought conditions, low reservoirs, and low runoff conditions throughout the Colorado River Basin,

it is looking like the Lower Basin States have come together with an approach that may yet fulfill that purpose. Utilizing a combination of compensated and voluntary reductions to reach the prescribed three MAF in system conservation over the next three years, the Lower Basin Plan would not require the exercise of authority by the Department of the Interior to implement the reductions and does so without the waiver such authority to protect the Colorado River system in the future if worsened drought conditions require such action.

Looking forward to the future of Colorado River operations, the Department of the Interior has also formally initiated the process for the development of new operating guidelines to replace the 2007 Colo-

rado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead at the end of 2026.

As of June 15, the Bureau of Reclamation published its Notice of Intent for the Environmental Impact Statement related to the post-2026 guidelines. The public comment period on the Notice of Intent is currently set to run through August 15, 2023. The Bureau of Reclamation will also be hosting three virtual public meetings to provide information and receive oral comments on the post-2026 guidelines with those dates currently set for Monday, July 17, Tuesday, July 18, and Monday, July 24. (Wesley A. Miliband, Kristopher T. Strouse)

GOVERNOR NEWSOM SIGNS EXECUTIVE ORDER THAT MAY BENEFIT WATER STORAGE AND INFRASTRUCTURE PROJECTS

In May 2023, Governor Newsom signed Executive Order N-8-23 (Order), which calls for the streamlining and expediting of administrative processes related to various infrastructure projects in California, including water projects. The Order creates a Strike Team to identify projects that could benefit from the Executive Order's directives and helps prioritize important infrastructure projects for streamlining purposes. Executive Department State of California, *Executive Order N-8-23* (May, 19, 2023).

Background

California Governor Gavin Newsom signed Executive Order N-8-23 on May 19, 2023 in an effort to streamline and expedite permitting, construction, and ultimately operation of a variety of critical infrastructure projects throughout the state. Specifically, by facilitating and streamlining project approvals and completions, the Order is intended to maximize California's share of federal infrastructure funds and implement projects intended to advance the state's various clean energy and other large infrastructure goals in the future. California intends to invest up to \$180 billion over the coming decade to advance clean energy projects.

Areas for improvements to California's ability to meet its infrastructure goals targeted by the Order in-

clude the following: (1) construction, (2) judicial review, (3) permitting, (4) CEQA procedures, and (5) the maximizing of federal funds. The Order directs the Senior Counselor on Infrastructure to convene an Infrastructure Strike Team (Strike Team), and directs the Strike Team to identify projects on which to focus streamlining efforts, to support coordination between agencies and governments, and to support infrastructure. The Order further directs working groups created by the Strike Team, one of which focuses on water, to prioritize funding projects that achieve multiple benefits. This funding is identified in the Order as coming from both the state of California and the federal government through the Infrastructure Investment and Jobs Act (IIJA) and the Inflation Reduction Act (IRA).

With respect to water, the Order specifically calls for adaption and innovation to diversity water supplies, expand water resources, efficiently use existing water resources, strengthen California's water resiliency, and modernize our water infrastructure.

Streamlining Projects

In tandem with the Order, Governor Newsom's office identified several examples of projects that could be streamlined. These included water storage projects funded by Proposition 1 and the Delta Conveyance

Project. Notably, many of these such projects are identified in California’s Water Resilience Portfolio. In 2020, state agencies developed the Water Resilience Portfolio in response to the Executive Order N-19-20, which directed state agencies to develop recommendations to meet California’s challenges of rising temperatures, over drafted groundwater, aging infrastructure, and water security. In particular, the Water Resilience Portfolio identifies four broad approaches to support water systems in California, which are: (1) maintain and diversify water supplies; (2) protect and enhance natural systems; (3) build connections; and (4) be prepared. Each of these then have detailed recommendations and actions that fall underneath one of the approaches. Furthermore, the portfolio also breaks down each action by the agency that should pursue or perform the action. In sum, the Water Resilience Portfolio contains more than 100 separate detailed actions to be implemented to the extent resources are available. The 2023 Order presents an opportunity for more resources to be made available to implement these identified actions.

Proposition 1—Six New Water Storage Projects

For instance, under Proposition 1, six new water storage projects eligible for \$2.7 billion in state water bond funding advancing their projects. This includes the Sites Reservoir, Harvest Water Program, the Kern Fan Project, Los Vaqueros Reservoir Expansion Project, Pacheco Reservoir Expansion Project, and the Willow Springs Water Bank Conjunctive Use Project. Since the publication of the Water Resilience Portfolio, all the projects were deemed feasible and if completed they would together expand the state storage capacity of water by nearly 2.8 million acre-feet. Such storage could address the concerns of rising temperatures, drought, aging infrastructure, and water security—all of which are challenges that need to be met according to the Order. Thus, these

projects could benefit from the streamlining that the Order calls for as well as the funding and could likely be projects that the Strike Team identifies and focuses on.

Strike Team to Identify Changes to Facilitate Streamline Project Approval

In addition to Proposition 1 projects, the working groups created by the Strike Team are also directed to:

. . . [i]dentify potential statutory and regulatory changes to facilitate and streamline project approval and completion, and elevate propose changes to the Strike Team for consideration.

Proposals for such changes include authorizing expedited judicial review to avoid delays on the back end of projects without reducing environmental and governmental transparency provided for under the California Environmental Quality Act. Similarly, changes to accelerate permitting for certain projects, reduce delays, and reduce project costs are also being proposed. If implemented, such statutory and regulatory changes could facilitate completion of water-related projects that are delayed by administrative obstacles or legal challenges.

Conclusion and Implications

Projects for water storage and groundwater storage, such as those funded by Proposition 1, will likely be identified by the Strike Team as projects where federal and state funding opportunities can be maximized to increase water infrastructure and resiliency. Thus, they may benefit from not only additional funding, but from processes to streamline and expedite the projects. It remains to be seen what regulatory or other changes will be made to streamline and expedite proper review of such projects and whether those projects will move forward.
(Miles Krieger, Steve Anderson)

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 sys-

tem 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)

PROPOSED U.S. SENATE BILLS WOULD EXPAND FUNDING AND ELIGIBILITY FOR ENVIRONMENTAL PROTECTION PROGRAMS

In anticipation of the upcoming 2023 Farm Bill, two bipartisan groups of U.S. Senators have set forth two significant proposals: the Headwaters Protection Act and the Conservation Reserve Program Improvement Act. These bills take aim at fixing and modernizing outdated conservation programs that were established in previous Farm Bills. If adopted, these bills would greatly increase the amount of federal funding and the number of eligible participants for the Water Source Protection Program and the Conservation Reserve Program.

The Headwaters Protection Act

On June 7, 2023, U.S. Senators Michael Bennett (D – Colorado) and Mike Crapo (R – Idaho), along with their colleagues, introduced a bipartisan bill dubbed the Headwaters Protection Act of 2023 (HPA). This bill would reauthorize and expand the purpose, eligibility, and funding of the Water Source Protection Program (WSPP) adopted in the 2018 Farm Bill.

The WSPP was established with the goal of rehabilitating and protecting watersheds through a partnership between the Secretary of Agriculture (Secretary) and public and private entities. This program was, and is, designed to maintain the watersheds in the National Forest System, which provide water to “end water users,” such as a state, a municipal water system, a nonprofit organization, or a corporation. The WSPP enables the Secretary to enter into “water source investment partnership agreements” with the end water users and provide them with federal funds to repair and protect the watershed. To participate, the end water users are required to match the amount of federal funding they received with their own in-

vestment. In addition, the WSPP also allows the Secretary to conduct forest management activities within National Forest System land if it is necessary to protect or enhance the water quality of the watersheds. This maintenance activity must have the primary purpose of protecting the municipal water system and restoring the health of the forest from insect infestation and diseases. Lastly, the WSPP authorizes the Secretary to annually spend \$10,000,000 from 2019 to 2023 for the purpose of this program.

Regardless of its innovative approach to foster collaboration between the federal government and other entities for the conservation of national watersheds, the WSPP was not all that effective and was never fully appropriated; hence, the HPA was introduced. One of the key improvements of the HPA is the expansion of the program's purpose. Unlike the WSPP, which focused solely on maintaining watersheds in the National Forest System and the federal forest surrounding them, the HPA would also extend its conservation effort to any non-federal lands that are adjacent to the watersheds and National Forest System land. Under the HPA, the Secretary and the end water users could conduct activities even on certain private lands. Furthermore, the HPA would recognize the protection of forests from insect infestation, diseases, and forest fires as standalone objectives of the program. As a result, forest maintenance activities need not be exclusively linked to ensuring the water quality of watersheds as was required by the WSPP. Also, the HPA proposes some minor procedural changes, such as adopting funding priorities that favor historically disadvantaged communities and expanding the definition of eligible end water users.

Another key change proposed by the HPA is the overall expansion of funding. Under the HPA, the

annual budget of the program would be \$30,000,000, a \$20,000,000 increase from the WSPP's annual budget. Moreover, the HPA would no longer require the end water users to equally match the federal contribution with their own investment. Instead, they would only need to invest an amount of at least 20 percent of the federal funding to be eligible for the program. The Secretary can also waive this 20 percent contribution requirement based on the Secretary's discretion.

The Conservation Reserve Program Improvement Act

Since its implementation in the 1985 Farm Bill, the Conservation Reserve Program (CRP) has been a crucial initiative for environmental conservation in the United States. Under the CRP, private landowners may enter into a contract with the Department of Agriculture (Department) to cease agricultural use of their lands deemed environmentally sensitive for ten to 15 years. Such a practice allows the restoration of soil, water, and wildlife resources on these lands. The participating landowners are required to perform "management activities," such as tilling, grazing, and prescribed burning, which ensure the biodiversity of these lands. As compensation, the landowners receive a rental payment of up to \$50,000 per year.

Currently, the CRP protects about 22 million acres of environmentally sensitive land, successfully creating many wild life habitats with healthy water and soil. However, the program has not been significantly updated since its adoption in 1985. As a result, the total acreage of CRP-enrolled land has dropped by 37 percent since its peak in 2007.

The recently proposed Conservation Reserve Program Improvement Act (Improvement Act) by U.S. Senators Klobuchar (D – Minnesota) and Rounds (R – South Dakota) aims to remedy the problem of aging CRP provisions. First and foremost, the Improvement Act increases the maximum annual rental payment from \$50,000 to \$125,000. If adopted, this would be the first time the maximum annual rent amount would be updated since the adoption of the CRP almost forty years ago. In addition, the Improvement Act would also subsidize 50 percent of the cost of installing fencing and water infrastructure for grazing if the land meets certain qualifications. Similarly, the Improvement Act would also share the cost of

performing some management activities other than haying and grazing.

Conclusion and Implications

Many conservation groups, such as Trout Unlimited and the Nature Conservancy, supported the introduction of HPA as a way of reducing the financial and procedural hurdles to participating in the program established by the WSPP. The provisions in the HPA are certainly more concrete and extensive than the provisions in the WSPP, but it is still uncertain whether the federal government could create the unique environmental partnership it envisioned in the WSPP through this new program. As for the CRP, it has existed as a popular program for many farmers and ranchers who want to retire some of their lands for additional income while protecting the environment and wildlife. Despite the gradual decrease in participating agricultural lands, the CRP is still one of the largest single conservation programs. If this proposed bill is adopted, there will be significant financial and environmental incentives for the landowners to participate in the CRP again, which may restore the program to its former glory.

Although these two bills offer vastly different approaches for protecting our water resources, they both present unique and practical ways in which we can make an impact on the overall strain our system has experienced in the ongoing drought and otherwise. The Improvement Act takes a more traditional approach to conservation, cutting back on irrigation and other agricultural related water uses. By contrast, the HPA takes a more indirect approach by emphasizing the need for healthy watersheds to meet the needs of downstream water users. As the 2023 Farm Bill nears in time we may yet see more initiatives looking to enhance and protect our water supplies, but the HPA and Improvement Act represent worthwhile efforts towards this goal.

For more information on the Headwaters Protection Act, see: <https://www.congress.gov/bill/118th-congress/house-bill/4018/text?s=1&r=13>. For more information on the Conservation Reserve Program Improvement Act, see: <https://www.congress.gov/bill/118th-congress/senate-bill/174?q=%7B%22search%22%3A%5B%22Conservation+Reserve+Program+Improvement+Act%22%5D%7D&s=1&r=1>. (Wesley A. Miliband, Kristopher T. Strouse, Andrew J. Hyun)

CALIFORNIA DROUGHT AND FLOOD STREAMLINING TRAILER BILL: FLOODWATER DIVERSION EXCEPTION AND DROUGHT CONTROL MEASURES

As California reckons with the likelihood of ongoing issues relating to flooding and drought, Governor Newsom has put forward a trailer bill attached to the 2024 budget that would amend existing sections of the Fish and Game Code and the Water Code to streamline flood and drought responses. One of the central facets of the bill is an amendment to the Water Code that seeks to streamline water projects with an eye toward helping the state meet its climate goals.

Background

The Drought and Flood Streamlining Trailer Bill (Drought and Flood Bill) was included as an amendment to the state budget. Such “trailer bills” are passed as part of the adoption of the state’s budget in June without going through the typical committee process. A number of other measures aimed at advancing water policy have been included as trailer bills as part of the 2023-2024 budget process, including an infrastructure bill that would overhaul permitting and litigation for the Delta Conveyance Project. The use of trailer bills to implement substantive policy is controversial because such bills give lawmakers less opportunity to consider, amend, or challenge proposed policy.

Floodwater Diversion and Drought Control Measures

The Drought and Flood Bill includes a number of amendments aimed at streamlining floodwater diversion measures by excluding such activities from the usual restrictions included in Chapter 6 of the Fish and Game Code. The chapter provides for fish and wildlife protection and conservation by implementing the Lake and Streambed Alteration Program. The program requires that the Department of Fish and Wildlife review whether a proposed activity will substantially adversely affect an existing fish and wildlife resource and provides for steps an entity must take to proceed with the project while protecting those resources. Section 1610 includes an exemption for emergency work or projects. The Drought and Flood Bill would expand Section 1610’s exemptions

to include activities undertaken pursuant to Section 1242.2 of the Water Code, which concerns the diversion of flood flows for groundwater recharge. This amendment would therefore classify such diversions as emergency actions under Section 1610 that are exempt from the review and mitigation procedures otherwise required under Chapter 6. By exempting qualifying projects from California Department of Fish and Wildlife review, the Drought and Flood Bill is intended provide for faster project approval and implementation.

The Drought and Flood Bill would also amend Water Code section 1242 to clarify existing law to state that the diversion of flood flows for groundwater recharge is a beneficial use. The amendments to Water Code section 1242 would further provide that the beneficial use of such groundwater is not limited to only uses requiring subsequent extraction of the recharged water; protection of water quality may also be a beneficial use.

The Drought and Flood Bill would add section 1242.2 to the Water Code. If adopted, Water Codes section 1242.2, subdivision (a), would provide that the diversion of flood flows for groundwater recharge would not require an appropriative water right if a local or regional flood control agency, city, or county has alerted the public that flows downstream of the point of diversion are at immediate risk of flooding. To ensure that the diversion’s purpose is confined to flood control, section 1242.2, subdivision (b) would provide that the diversions must cease when the flood conditions have abated. Section 1242.2, subdivision (c) would forbid the diversion of water to the following areas: (1) animal waste generating facilities, (2) agricultural fields where pesticides have been applied within 30 days, (3) areas where the release of water could cause infrastructure damage, and (4) areas that have not been actively irrigated for agricultural cultivation within the past three years, unless there is an existing facility on the land for groundwater recharge or managed wetlands. Section 1242.2, subdivision (c) would also forbid diversions to the Sacramento-San Joaquin Delta for the purposes of meeting flow requirements for achieving water quality or protect-

ing endangered species in the Delta. Section 1242.2, subdivision (e) would address the use of existing infrastructure to facilitate diversions by requiring the use of existing facilities or temporary infrastructure where none is available. Section 1242.2, subdivision (e) would also emphasize the temporary nature of the diversion by forbidding the person or entity making the diversion from claiming any water right based on that diversion. Last, section 1242.2, subdivision (g) would provide that preliminary and final reports must be filed by the party making the diversion. The ostensible purpose of exempting such diversions of floodwaters from the requirements for establishing or exercising appropriative water rights is to allow parties to capture floodwaters for recharge (perhaps with little warning) without first having to undertake the time-consuming permit application process otherwise required by the State Water Resources Control Board (SWRCB).

The Drought and Flood Streamlining Trailer Bill also amends a number of other Water Code provisions to include references to Section 1242.2. Specifically, Water Code section 1831d, subdivision (7) would provide that the SWRCB may issue a cease and desist order in response to a violation or threatened violation of a condition or reporting requirement for the diversion of floodwaters for groundwater recharge under Section 1242.2. Likewise, Water Code section 1846 would be amended to read that a person or entity may be subject to a maximum \$500 fine for violating a condition or reporting requirement under Section 1242.2.

The Drought and Flood Bill would also amend Water Code section 13198 to provide the definitions for the provisions relating to drought relief in Article 6 of the Water Code. The amendment would add the

phrase “water use reduction and efficiency equipment” to Water Code section 13198, subdivision (c) (1)(G) to define “interim or immediate relief” to include construction or installation of water use and efficiency equipment. The amendment would also add Section 13198, subdivision (c)(1)(K) to include groundwater recharge projects pursuant to the proposed Section 1242.2 as additional tools for drought relief.

Last, the Drought and Flood Control Bill would amend Water Code section 1398.2 to exempt information related to drought emergency activities from the public posting and notice requirements of Government Code sections 7405 and 11546.7. State agencies would alternatively be required to post an accessible version of any materials related to the emergency response as soon as practicable.

Conclusion and Implications

If adopted as currently drafted, the Drought and Flood Bill will have potentially broad implications for the capture and use of floodwaters for groundwater recharge and for drought response more generally. The use of a trailer bill to bring this measure before the Legislature as part of the budget process remains controversial, and the nature of the trailer bill may obscure a careful analysis of the bill’s impacts or the extent of opposition to the substance of the bill. For example, it remains to be seen whether the bill will affect pending water rights petitions for flood flows pursuant to existing rules for appropriating water. The full text of the Drought and Flood Bill is available online at: <https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/910>.

(Brian Hamilton, Sam Bivins)

REGULATORY DEVELOPMENTS

STATE WATER RESOURCES CONTROL BOARD RECHARGE PERMITS DEEMED SUCCESSFUL

In response to extremely wet weather conditions and in efforts to boost groundwater levels, the State Water Resources Control Board has allowed the diversion of 1.2 million acre-feet of water for underground storage, wildlife refuges, and other purposes. This scale of authorized recharge has come from accelerated temporary permitting, a change in San Joaquin's water rights at Friant Dam, and additional recharge facilitated by Governor Gavin Newsom's Executive Orders. The most significant contributor of authorized recharge, temporary permits, may be key to sustainability in water management in the coming years. While the temporary permitting program has administrative, legal, and funding challenges, the expedited nature, fee reduction, and overall simplification in the application process appear to have been successful.

Background

In 2014, California adopted the Sustainable Groundwater Management Act (SGMA), which established a statewide framework to help protect groundwater resources. SGMA imposes an obligation on certain overdrafted groundwater basins to achieve sustainability within a 20-year time horizon. Groundwater recharge has been deemed to be an important strategy in achieving sustainability.

According to the State Water Resources Control Board (State Water Board), groundwater recharge is an important strategy to manage water through various weather extremes, including both drought and flood events or during particularly wet years. During dry years, groundwater may make up as much as 60 percent of the state's water supply. During wet years, excess surface water percolates into underlying aquifers and replenishes groundwater basins, often for use in future droughts or dry years. Groundwater recharge can occur in a number of ways, including filling recharge basins or ponds, directing water to unlined canals and riverbeds, injecting water through wells, and using extra surface water to avoid pumping. Groundwater basins throughout the state are deemed

to be able to hold as much as 850 million acre-feet of water.

In general, capturing and storing surface water underground requires an appropriate water right. Prospective water rights holders can apply for new water rights to capture and store water, or existing water rights holders can petition the State Water Board to add groundwater recharge projects as part of their existing permits. To facilitate groundwater recharge projects, the State Water Board implemented temporary permits as a streamlined alternative to standard permits. Such permits allow public agencies to apply for short term relief and strategize for impending weather extremes. While long-term water right permits can take several years to process, temporary permits were developed to allow for short-term diversions on a seasonal basis. These permits are not water rights but offer temporary authorization for local agencies to divert water for underground storage. Two options are available: 180-day permits for short-term projects with urgent needs and five-year permits for longer-term projects.

Water Permits Issued

Since December 2022, the State Water Board authorized 1.2 million acre-feet of diversions for underground storage, wildlife refuges, and other purposes under both temporary and five-year permits for groundwater recharge. In particular, the State Water Board issued nine 180-day permits, primarily in the Central Valley, and one five-year permit for the Consumnes River in Sacramento County.

Temporary permits are not in themselves water rights and instead are a conditional approval by the state to divert and use available water that has not been claimed by a water rights holder. Accordingly, temporary permits are junior to all water rights and enjoin diversions of water during times of water shortage when the demands of water rights holders may not be met. Temporary permits may be revoked at any time by the state. Nonetheless, temporary permits offer several advantages for capturing excess water dur-

ing storm events or periods of particularly high flow, including the relatively fast processing time of fourth months. For instance, upon receipt of an application for a temporary permit, the Water Board will: (1) review the application for initial completeness, (2) review information relevant to water availability, (3) determine compliance with CEQA and public trust interests, (4) prepare findings, and (5) prepare a temporary permit. For five-year permits, the State Water Board may take as long as a year to process, and examines additional factors such as a public hearing process, the proposed accounting method for storage and extraction of diverted water, and objections made at relevant hearings.

Fees

In addition to the relatively expedient processing time for temporary permits, the State Water Board has reduced fees for such permits, thus facilitating greater participation by stakeholders for groundwater recharge projects. Further encouraging recharge efforts, the Division of Financial Assistance within the State Water Board provided \$1.2 billion in support to 34 projects, which collectively contribute 115,000 acre-feet annually to California's groundwater supplies. This financial assistance has not only helped initiate and sustain projects but has also accelerated

the completion of six projects, adding 55,000 acre-feet per year in support of 165,000 households.

Conclusion and Implications

The success of the State Water Resources Control Board's temporary permit program likely encourages continuation of the program and future issuances of temporary permits. Continued or even increased financial assistance to local agencies may further incentivize capture of excess surface flows during storm or high flow events. The temporary permit program may become increasingly important as local agencies attempt to balance groundwater basins to meet the sustainability objectives of SGMA and satisfy local water demand. While it remains to be seen whether California will receive high levels of precipitation in the coming winter, the Water Board's temporary permit program may help the state continue its effort in managing both surface and groundwater supplies. For more information, see: State Water Resources Control Board. "Over 1 Million AF of Groundwater Recharge Authorized Since December 2022." Press Release, 7 June 2023. https://www.waterboards.ca.gov/press_room/press_releases/2023/PR-on-1-million-AF-of-GW-Recharge.pdf.

(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TO TAKE CRITICAL STEPS TOWARD PLACING GROUNDWATER BASINS ON PROBATION AND ON PATH TO INTERVENTION

Following multiple attempts to submit and revise Groundwater Sustainability Plans (GSPs), Groundwater Sustainability Agencies (GSAs) responsible for managing six large basins may soon be placed in probationary status and potentially subject to intervention from the California State Water Resources Control Board (State Water Board). Such intervention would be costly in many respects. The State Water Board is beginning the intervention process now, beginning with probationary hearings.

Background

California's Sustainable Groundwater Management Act of 2014 (SGMA) prioritizes local ground-

water management. The law requires formation of groundwater sustainability agencies to develop and implement groundwater sustainability plans and to take related actions to avoid long-term "undesirable results." GSPs must be submitted to Department of Water Resources (DWR) for review. GSPs that do not substantially comply with statutory requirements and DWR emergency regulations must be corrected until they achieve compliance.

A failure of compliance may result in the loss of local control, through which the State Water Board intervenes and imposes direct basin management. Such management would likely comprise blunt pumping reductions and imposition of hefty groundwater

pumping fees. SGMA provides that even after State Water Board intervention, local GSAs must prioritize achieving compliance in order to achieve and regain local management responsibilities. In other words, intervention is intended to be a temporary rather than permanent status.

GSPs Deemed Inadequate

In March 2023, DWR deemed six groundwater sustainability plans to be inadequate, placing those plans on a pathway toward potential intervention by the State Water Board. The six basins include: (1) Delta Mendota, (2) Chowchilla, (3) Kaweah, (4) Tulare Lake (5) Tule and (6) Kern County.

The inadequate designation follows prior attempts to remedy previously incomplete GSPs. Basins designated by the DWR as being subject to conditions of critical overdraft were required to adopt and submit GSPs by January 2020. DWR is statutorily required to review submitted plans within two years. GSPs for these basins were deemed incomplete in January 2022, and given six months to submit revisions. Revised plans were submitted in the summer of 2022 but ultimately found inadequate by DWR, citing primarily failures to sufficiently address chronic and continuing overdraft, accelerating land subsidence and impacts on domestic wells.

Probationary Status

When a GSP is deemed inadequate by DWR, the State Water Board considers whether to place the basin into probation. During the probationary period, GSAs may be allowed time to address and correct issues. If they remain uncorrected, the State Water Board may proceed with developing and implementing an Interim Plan, which is most likely to be characterized by significant reductions in pumping and the imposition of expensive fees. Probationary basins are generally provided one year to attempt to make necessary corrections. The process of entering and exiting probation must be open and transparent, including through public State Water Board meetings.

State Water Board Prioritization for Probationary Basins

At a recent board meeting, the State Water Board received a staff presentation outlining factors to consider in determining a potential probationary

status. Staff identified and recommended prioritizing the six basins into two groups. The “first priority basins” include Kaweah, Tulare Lake, Tule and Kern County. These basins were described by State Water Board staff as continuing to see groundwater declines without a clear or reliable path to correction.

The “second priority basins” include Delta Mendota and Chowchilla, which State Water Board staff describe as basins that, though experiencing severe challenges, may be correctable in a shorter timeframe.

Based upon those priority levels, probationary hearings could begin as early as December 2023 and continue through October 2024. This timeline is subject to change.

Basin probationary hearings before the State Water Board must be publicly noticed. Cities and counties must receive at least 90 days’ notice. Known pumpers must be notified at least 60 days in advance. State Water Board staff must present, prior to the hearing, a list of deficiencies in a public report. Local stakeholders and others may comment on the report. Staff then consider public comments and must issue a revised report, if needed, and a proposed probationary order for consideration at the public hearing.

In the interim, GSAs are expected to continue working hard to avoid and/or exit probationary status.

Conclusion and Implications

SGMA implementation has presented significant challenges throughout much of the State. A significant number of basins with GSPs that DWR deemed complete remain subject to legal challenges and comprehensive groundwater basin adjudications to determine water rights under the “streamlined groundwater adjudication” law. The six basins now facing potential probation and intervention may still, technically, avoid that status and retain local management responsibilities. However, the timeline and effort to do so becomes more complicated and intensive as the State Water Board contemplates assuming that control. State Water Board intervention and an interim plan directed and implemented from Sacramento would likely see dramatic pumping reductions and hefty groundwater management fees—not including creative and tailored solutions that local stakeholders could otherwise potentially advance. (Derek Hoffman)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DENIES NAVAJO NATION A COURT-MANDATED SOLUTION TO WATER ACCESS

Arizona et al. v. Navajo Nation, et al., ___U.S.____, Case No. 21-1484 (June 22, 2023).

The Supreme Court has issued its decision, in a 5 to 4 vote, in which the majority found that the 1868 Treaty and under the *Winters* doctrine:

... do not support the claim that in 1868 the Navajos would have understood the Treaty to mean that the United States must take affirmative steps to secure [already scarce] water for the Tribe.

The majority opinion was penned by Justice Kavanaugh and joined by Justices Roberts, Thomas, Alito and Barrett. Justice Gorsuch issued a dissenting opinion joined by Justices Sotomayor, Kagan and Jackson which would have had the Court allow the Navajo Nation's claims to move forward—akin to the decision of the Ninth Circuit Court of Appeals.

Background

The Navajo Tribe is one of the largest in the United States, with more than 300,000 enrolled members, roughly 170,000 of whom live on the Navajo Reservation. The Navajo Reservation is the geographically largest in the United States, spanning more than 17 million acres across the States of Arizona, New Mexico, and Utah. To put it in perspective, the Navajo Reservation is about the size of West Virginia.

In 1849, the United States entered into a Treaty with the Navajos. See Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850). In that 1849 Treaty, the Navajo Tribe recognized that the Navajos were now within the jurisdiction of the United States, and the Navajos agreed to cease hostilities and to maintain “perpetual peace” with the United States. *Ibid.* In return, the United States agreed to “designate, settle, and adjust” the “boundaries” of the Navajo territory.

Two treaties between the United States and the Navajo Tribe led to the establishment of the Navajo Reservation.

For the next two decades, however, the United States and the Navajos periodically waged war against one another. In 1868, the United States and the Navajos agreed to a peace treaty. In exchange for the Navajos' promise not to engage in further war, the United States established a large reservation for the Navajos in their original homeland in the western United States. Under the 1868 Treaty, the Navajo Reservation includes (among other things) the land, the minerals below the land's surface, and the timber on the land, as well as the right to use needed water on the reservation. [Majority Opinion]

The 1868 Treaty was to put an end to “all war between the parties.” The United States “set apart” a large reservation “for the use and occupation of the Navajo tribe” within the new American territory in the western United States. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667–668 (ratified Aug. 12, 1868). Importantly, the reservation would be on the Navajos' original homeland, not the Bosque Redondo Reservation. The new reservation would enable the Navajos to once again become self-sufficient, a substantial improvement from the situation at Bosque Redondo. The United States also agreed (among other things) to build schools, a chapel, and other buildings; to provide teachers for at least ten years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn. [Ibid]

Under the 1868 Treaty, the Navajo Reservation includes not only the land within the boundaries of the reservation, but also water rights. Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use

needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation. [Ibid]

The Navajo Reservation lies almost entirely within the Colorado River Basin, and three vital rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation. To meet their water needs for household, agricultural, industrial, and commercial purposes, the Navajos obtain water from rivers, tributaries, springs, lakes, and aquifers on the reservation. [Ibid]

Over the decades, the Federal Government has taken various steps to assist tribes in the western States with their water needs. The Solicitor General explained that, for the Navajo Tribe in particular, the Federal Government has secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation.

Nature of the Legal Dispute

In the Navajos’ view, however, those efforts did not fully satisfy the United States’ obligations under the 1868 Treaty. The Navajo Nation sued the U. S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties. As relevant here, the Navajos asserted a breach-of-trust claim arising out of the 1868 Treaty and sought to “compel the Federal Defendants to determine the water required to meet the needs” of the Navajos in Arizona and to “devise a plan to meet those needs.” App. 86. The States of Arizona, Nevada, and Colorado intervened against the Tribe to protect those States’ interests in water from the Colorado River.

According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argued that the United States also must *take affirmative steps* to secure water for the Tribe—including by assessing the Tribe’s water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. [Ibid]

At the District Court and Ninth Circuit Court of Appeals

The U. S. District Court for the District of Arizona dismissed the Navajo Tribe’s complaint. In relevant

part, the District Court determined that the 1868 Treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe.

The U. S. Court of Appeals for the Ninth Circuit reversed, holding in relevant part that the United States has a duty under the 1868 Treaty to take affirmative steps to secure water for the Navajos. *Navajo Nation v. United States Dept. of Interior*, 26 F.4th 794, 809–814 (2022). The Supreme Court granted *certiorari*. 598 U. S. ____ (2022).

The Majority Opinion

With this backdrop of the history of the formation of the Navajo Nation’s Reservation land, the Treaties, and the *Winters* doctrine, in an arid West, the Court found that the United State’s obligations did not go so far as to include the duty to take affirmative steps to secure water supply:

Of course, it is not surprising that a treaty ratified in 1868 did not envision and provide for all of the Navajos’ current water needs 155 years later, in 2023. Under the Constitution’s separation of powers, Congress and the President may update the law to meet modern policy priorities and needs. To that end, Congress may enact—and often has enacted—legislation to address the modern water needs of Americans, including the Navajos, in the West. Indeed, Congress has authorized billions of dollars for water infrastructure for the Navajos. . . But it is not the Judiciary’s role to update the law. And on this issue, it is particularly important that federal courts not do so. Allocating water in the arid regions of the American West is often a zero-sum gain situation. . . And the zero-sum reality of water in the West underscores that courts must stay in their proper constitutional lane and interpret the law (here, the Treaty) according to its text and history, leaving to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water.

The Court went on to emphasize its interpretation of the Treaty and in the end, its conclusion as to implications of a duty on the part of the United States to supply water to the Tribe:

The 1868 treaty granted a reservation to the Navajos and imposed a variety of specific obligations on the United States—for example, building schools and a chapel, providing teachers, and supplying seeds and agricultural implements. The reservation contains a number of water sources that the Navajos have used and continue to rely on. But as explained above, the 1868 treaty imposed no duty on the United States to take affirmative steps to secure water for the Tribe.

The Dissenting Opinion

In the Dissent, Justice Gorsuch, along with Justices Sotomayor, Kagan and Jackson found that the Navajo Nation's claims should move forward, along the lines of the Ninth Circuit's decision:

This case is not about compelling the federal government to take “*affirmative steps* to secure water for the Navajos.” *Ante*, at 2. Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe's behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo's water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit's judgment and allow the Navajo's case to proceed.

Looking to the “promises” made pursuant to the Treaty and establishment of a “homeland,” Justice Gorsuch went on to state:

The Treaty of 1868 promises the Navajo a “permanent home.” Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Art. XIII, 15 Stat. 671 (ratified Aug. 12, 1868) (Treaty of 1868). That promise—read in conjunction with other pro-

visions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights.

But Justice Gorsuch opined why quantifying those water rights by this Court was repugnant to the Majority, especially in light of the *Winters* and *McGirt* decisions

Yet even today the extent of those water rights remains adjudicated and therefore unknown. What is known is that the United States holds some of the Tribe's water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. . . . It is easy to see the purchase these rules have for reservation-creating treaties like the one at issue in this case. Treaties like that almost invariably designate property as a permanent home for the relevant Tribe. See *McGirt v. Oklahoma*, 591 U. S. ___, ___ (2020) (slip op., at 5). And the promise of a permanent home necessarily implies certain benefits for the Tribe (and certain responsibilities for the United States). One set of those benefits and responsibilities concerns water. This Court long ago recognized as much in *Winters v. United States*, 207 U. S. 564 (1908). . . . For these reasons, the agreement's provisions designating the land as a permanent home for the Tribes necessarily implied that the Tribes would enjoy continued access to nearby sources of water. . . because the Treaty of 1868 must be read as the Navajo “themselves would have understood” it, *Mille Lacs Band*, 526 U. S., at 196, it is impossible to conclude that water rights were not included. Really, few points appear to have been *more* central to both parties' dealings. What water rights does the Treaty of 1868 secure to the Tribe? Remarkably, even today no one knows the answer. But at least we know the right question to ask: How much is required to fulfill the purposes of the reservation that the Treaty of 1868 established?

Conclusion and Implications

In the West and especially amongst the Lower Basin States, competition for Colorado River water is fully in play with scarcity forming the basis for a voluntary agreement for water sharing [and conservation efforts]. With this as a backdrop, the Navajo Nation claims water rights and ongoing water *supply*, with a duty imposed on the U.S. to assist in this, pursuant to trust theory, the 1868 Treaty and the Supreme Court’s *Winters* decision. The Supreme Court, while recognizing the Treaty’s obligations, including water, found duties on the part of the United States only

extended so that those obligations did *not* apply to affirmative actions to secure ongoing water supply in an arid West with, as the Court states, classifies as a “zero-sum gain.” The Court looked to the four-corners of the Treaty and found no affirmative duty to provide water supply and further, found that under the U.S. Constitution’s [and the current Treaty] only the President and Congress may change the U.S. obligations relating to water—but the courts are not the vehicle to achieve this result. The Court’s opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-1484_aplc.pdf.
(Robert Schuster)

FIFTH CIRCUIT DETERMINES CITY STORMWATER MANAGEMENT FEES ARE NOT ‘REASONABLE SERVICE CHARGES’ ON FEDERAL FACILITIES

City of Wilmington v. United States, 68 F.4th 1365 (5th Cir. 2023).

The Fifth Circuit Court of Appeals, on May 31, 2023, denied the assessment of stormwater management fees by the City of Wilmington, Delaware against the U.S. Army Corps of Engineers (Corps) because the fees were not a “reasonable service charge” under Clean Water Act section 313.

Factual and Procedural Background

The Corps owns five properties in Wilmington, Delaware, which occupy nearly 11,888,000 square feet. The properties are used for dredge material disposal in support of Corps’ work dredging waterways near Wilmington. Stormwater runs off the properties into a nearby river, but none of the properties discharges into the city’s stormwater system.

As part of its water pollution management program, Wilmington charges its residential and non-residential property owners a stormwater management fee. The fee is based on a formula comprised of four variables: (1) gross parcel area; (2) the runoff coefficient between 0 and 1 based on a property’s approximate imperviousness; (3) impervious area, calculated by multiplying the property’s total area by the assigned runoff coefficient; and (4) an equivalency stormwater unit, derived from the size of the median single-family home.

For the runoff coefficient, the city relied on the county tax assessment categorization of properties

into 200 sub-categories. Then, the city grouped several types of sub-categories into broader categories and designated runoff coefficients for the categories. The runoff coefficients were assigned based on a 1962 study, which specified the runoff coefficients for various types of land uses and the work of an engineering firm, Black Veatch. The city did not provide further evidence on how the land use categories from the 1962 study and the county’s tax assessment categories were similar or related. The city’s code established a process for appealing determinations of the four factors.

Wilmington designated all five Corps properties as “vacant,” which had a runoff coefficient of 0.3, meaning that nearly 30 percent of rainwater would runoff and carry any contaminants into the stormwater system. Based on the 0.30 runoff coefficient and Wilmington’s methodology for calculating fees, the city assessed the Corps \$2,577,686.82 in fees for the properties between January 4, 2011, and April 16, 2021. The Corps never paid the assessed service charges or pursued the city’s appeal process.

Section 313 of the Clean Water Act (CWA) requires federal facilities to adhere to federal, state, local, and interstate requirements related to water pollution abatement, including payment of “reasonable service charges.” In the absence of this provision, federal facilities would have sovereign immunity from

the local fees. Congress thus provided a broad waiver of this federal sovereign immunity under the CWA to ensure federal facilities comply with local pollution requirements.

In 2016, Wilmington sued the Corps to recover \$2,577,686.82 in unpaid stormwater management fees and \$3,360,441.32 in accrued interest between January 4, 2011, and April 16, 2021. The Corps moved for judgment on partial findings, which the trial court granted. Wilmington appealed.

The Fifth Circuit's Decision

On appeal, the Fifth Circuit considered whether the storm management fees assessment process met the “reasonable service charge” requirements of the CWA to waive sovereign immunity for federal facilities. The court began by clarifying that the general approach used by the city is allowed. At least three-quarters of cities use a similar category and runoff coefficient approach when assessing similar fees. However, it was the specific manner of application by the city which the court determined did not adhere to the statutory definition of “reasonable service charges.”

First, the court pointed to the lack of evidence connecting the runoff coefficient from the 1962 study to the county tax assessor property categories. The court reasoned that while the county definitions and categories of property may accurately reflect the nature of the properties for tax purposes, there was no further evidence that those definitions accurately reflected the nature of the properties for stormwater runoff. The city assumed that definitions used in the 1962 stormwater study correlated to similar meanings as the tax assessor categories without providing evidence of such a connection.

Second, the court highlighted the wide variance of potential runoff attributed to the “vacant” property category, which had an automatic coefficient of 0.30 and attributed to all of Corps’ properties. In doing so, the court rejected the city’s arguments that size differences allow charges on a class containing ‘totally different properties’ to remain proportional to runoff

while retaining similar land use characteristics and that use of runoff units normalized each property’s estimated impervious area. In rejecting these arguments, the court noted that city witnesses testified that “marshes or wetlands” could be included in the “vacant” stormwater class together with “wooded areas,” “regular grass,” “loose gravel,” “concrete and asphalt,” and “different kinds of soils.” The city also agreed that “properties with completely different land covers could be included in the vacant stormwater class.” Additionally, the appeal process for fees also implicitly admits that it subjects property owners to unfair fees, where due to “site specific variances,” “in some situations, the resulting measure of imperviousness may differ from the actual imperviousness that exists in a specific property.” Taken together, the court stated that the vacancy designation “says nothing about the other physical characteristics of the land that would impact stormwater runoff.”

Finally, the court noted that the city’s appeal process is permissive, not mandatory, and is solely forward looking. As a result, the appeal would not provide the retroactive relief sought by the Corps. The Corps was not required to exhaust the appeal process before refusing to pay the assessed fees.

Conclusion and Implications

The court emphasized that the holding in this case is limited to the specific facts of the case. The court even reiterated that there was “nothing necessarily problematic about a stormwater fee methodology that uses a multifactor formula, or a formula that includes impervious area or runoff coefficients as variables.” However, the case emphasizes the need to provide evidence regarding how a methodology that relies on land use codes or classes of property, which is used by three-quarters of cities, fairly captures variability within the land use code or property class. The court’s opinion is available online at: <https://law.justia.com/cases/federal/appellate-courts/cafc/22-1581/22-1581-2023-05-31.html>.

(Uriel Saldivar, Rebecca Andrews)

D.C. CIRCUIT REQUIRES EPA TO REGULATE PERCHLORATE LEVELS UNDER THE SAFE DRINKING WATER ACT

NRDC v. Regan, ___F.4th___, Case No. 20-1335 (D.C. Cir. May 9, 2023).

In *NRDC v. Regan* the United States Court of Appeal for the D. C. Circuit determined that the United States Environmental Protection Agency (EPA) erred in withdrawing its regulatory determination to regulate perchlorate in drinking water under the Safe Drinking Water Act (SDWA). The majority held that, once EPA makes a preliminary determination that a contaminant warrants regulation under the SDWA, the agency lacks discretion to withdraw the determination. A concurring opinion would have found EPA's decision was arbitrary and capricious, agreeing that its withdrawal should be vacated, but disagreed with the majority's view that EPA could never withdraw such a determination.

Background

The SDWA authorizes EPA to regulate potentially harmful contaminants in drinking water. As part of that authority, the EPA is required to maintain a list of unregulated contaminants that may require future regulation (Contaminant Candidate List). Every five years the agency must update the list, as well as make preliminary determinations for at least five of the listed contaminants as to whether they warrant regulation. After finding regulation to be warranted in a preliminary determination, EPA "shall" promulgate a maximum contaminant level goal (MCLG) and national primary drinking water regulation for the contaminants. While the MCLG is aspirational and unenforceable, the national primary drinking water regulation normally includes an enforceable maximum containment level (MCL). The MCLG and national primary drinking water regulations must be proposed within 24 months of the preliminary determination, and the agency must promulgate the regulations within 18 months of the proposal, subject to a nine-month extension. The law also contains an anti-backslide provision, requiring any subsequent revisions to adopted regulations to maintain current safeguards or provide for greater health protection.

Perchlorate is a naturally occurring and manufactured chemical commonly used in the aerospace and defense sectors. Ingesting perchlorate can inhibit the

thyroid's ability to absorb iodide, disrupting the production of hormones and leading to potential adverse neurodevelopmental outcomes.

In recognition of these health risks, EPA added perchlorate to the Contaminant Candidate List in 1998. In 2008, the agency issued a preliminary determination not to regulate the perchlorate, but later deviated from that preliminary determination when it issued a final determination to regulate the contaminant in 2011. The agency did not, however, propose an MCLG and regulations within 24 months. In 2016, the National Resource Defense Council (NRDC) sued EPA, seeking to compel the agency to regulate the contaminant. The parties entered into a consent decree requiring the EPA to propose and promulgate the MCLG and final regulations by 2020. In 2019 the agency proposed MCLG and MCLs at two possible levels, but also considered withdrawing its 2011 preliminary determination. It sought comment on its proposal and the three alternatives. In 2020, after the comment period ended, EPA announced it was withdrawing the preliminary determination, finding that the contaminant did not meet the statutory criteria for regulation upon its re-evaluation.

The D.C. Circuit's Decision

EPA argued that its decision was consistent with the statute and that the agency had an "inherent authority" not abrogated by the SDWA to change positions and withdraw a determination to regulate. However, the D.C. Circuit found this to be incorrect. The court determined that an agency only has the authority delegated to it by Congress; the appropriate question was not whether the SDWA abrogated any EPA authority, but whether it granted the agency authority to act as it had. The court found the statutory text to be clear in this respect. Once the threshold determination has been made, the SDWA states that EPA "shall" publish and propose the MCLG and regulations. The court observed that the SDWA "frontloads EPA's discretion, allowing the agency to create the list of contaminants that may require future regulation" but "balances that discretion with

a strict, mandatory scheme governing the regulatory process.” While EPA maintained that its initial step in the regulatory process did not bind it to issue future regulations, the court found this to contradict the statute’s clear language.

The court went on to reject several additional arguments raised by the EPA. The agency argued that other provisions of the SDWA implicitly gave it the authority to withdraw a regulatory determination, but the court found none to negate the “clear directive” to propose and promulgate regulations after making the regulatory determination. EPA also claimed that the court’s reading would hamstring its decision-making, resulting in regulations unsupported by current science. However, the court noted that EPA still retained the ability—and mandate—to reflect current science when setting the appropriate regulatory level. The EPA also argued that certain provisions, including the anti-backslide provision, suggested that the agency was free to withdraw its regulatory determination prior to promulgation of final regulations. But the court once more disagreed, finding the statute to permit only a determination to not regulate or a determination to regulate followed by promulgation of the regulations; EPA’s attempt to create a third option was at odds with that statutory scheme. The court also considered EPA’s argument based on the absence of provisions governing withdrawal of a regulatory determination to merely repackage its already-rejected argument that it retained inherent authority to act as it had. Finally, the court found EPA’s argument premised on the SDWA’s legislative history insufficient to override the statutory language, and inconsistent with the court’s interpretation as well.

Having found that the statute does not permit EPA to withdraw a preliminary determination to regulate, the majority declined to address NRDC’s additional contention that EPA’s decision was also arbitrary and capricious. The court vacated EPA’s withdrawal and remanded to the agency for further proceedings.

The Concurring Opinion

Judge Pan, concurring in the judgement, would have decided the case differently. The concurring opinion expressed the view that EPA does have authority to withdraw an initial regulatory determination. To support this position, Judge Pan explained how the best available scientific evidence had changed since the initial determination in this case.

Additional and more rigorous studies had been published in the intervening years, indicating that the “levels of public health concern” were higher than initially thought. Further, in the original UCMR-1 study supporting the agency’s initial determination, more than half of the samples detecting perchlorate had been from California, which had subsequently adopted its own state-level perchlorate drinking-water standard. As such, based on the updated information, EPA concluded that perchlorate did not occur in public water systems at the requisite levels to justify regulation.

While the concurrence agreed with the majority’s conclusion that the SDWA creates a duty to regulate, it did not read the statute to prevent withdrawal. In its view, the mandatory timelines relied on by the majority are no longer operative once the determination is withdrawn. The opinion also noted the potential application of *Chevron* deference to an agency’s interpretation of an ambiguous statute, but declined to apply it to this case as the EPA did not rely on the principle.

Nonetheless, Judge Pan concurred in the judgement because she found the EPA’s decision here to have been arbitrary and capricious under the Administrative Procedure Act. The MCLGs EPA sought comments on acknowledged that the proposed levels would still allow for some impacts to average IQ in sensitive populations, but at a level the agency determined to be below what is “biologically significant.” The concurring opinion found this to violate the statutory mandate for the MCLGs to be set at the level at which there would be *no* known or anticipated adverse effects.

Further, in revising the data in the updated UCMR-1 study, EPA had only updated those samples where perchlorate was detected, and not the negative samples. Judge Pan agreed with NRDC that this set up a one-way ratchet to selectively update the data only where it would reduce the observed impacts.

As such, the concurrence would have held EPA’s withdrawal to be arbitrary and capricious, and still vacated its decision for that reason.

Conclusion and Implications

The majority’s ruling draws a hard line: once EPA makes an initial determination that a contaminant warrants regulation under the SDWA, it must proceed through the process to regulate it. If the judg-

ment stands, EPA will have to promulgate regulations for perchlorate under the SDWA. While the controlling opinion does not affect the substance of those regulations, the concurrence suggests that EPA may need to refine its approach to establishing the MCLG

for perchlorate as well. The court's opinion is available online at: [https://www.cadc.uscourts.gov/inter-net/opinions.nsf/E8EC4867311BA7BA852589AA0052854F/\\$file/20-1335-1998466.pdf](https://www.cadc.uscourts.gov/inter-net/opinions.nsf/E8EC4867311BA7BA852589AA0052854F/$file/20-1335-1998466.pdf).

(Sam Bacal-Graves, Megan Somogyi, Hina Gupta)

DISTRICT COURT AFFIRMS PARTIES CANNOT CONTRACTUALLY AVOID CERCLA LIABILITY TO THE U.S. GOVERNMENT

United States v. The Boeing Company,
___F.Supp.4th___, Case Number 2:22-cv-00485 (W.D. Wash. Apr. 25, 2023).

The U.S. District Court for the Western District of Washington recently rejected the Boeing Company's (Boeing) motion to dismiss the U.S. Government's (Government) case to recover costs for environmental remediation of the Naval Weapons Station Seal Beach in California. The Government brought suit against Boeing in April 2022 to recover costs to remediate groundwater contaminated with trichloroethylene (TCE) under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). Boeing attempted to avoid liability for the costs of cleanup at the 40-acre superfund site by arguing that a hold harmless agreement in a contract with the United States Navy and National Aeronautics and Space Administration (NASA) bars the action entirely.

Background

In 1962, NASA contracted with North American Aviation, Inc. (NAA) to assemble and test the Saturn V Rocket, which would later land on the moon, at the Naval Weapons Station Seal Beach in California. NASA and NAA entered into various contracts as a result of this project, one of which contained a "Facilities Clause" in which NASA agreed to indemnify or hold harmless NAA for damage to the facilities. NAA merged with Rockwell Standard to create North American Rockwell (NAR), which was then later acquired by Boeing. According to the U.S. Government, Boeing assumed NAR's liabilities as a result of this acquisition. In the 1990s, the U.S. Navy discovered that groundwater at the site was contaminated with TCE, which allegedly resulted from NAA's and NAR's wastewater disposal techniques.

The Government now seeks to recover its costs to remediate this site.

Contracting Away CERCLA Liability

Boeing asserted that its predecessor (NAA) successfully shifted away CERCLA liability when it entered into the contract with NASA in the 1960s. Characterizing the agreement as "an enforceable promise as to who bears the cost of liability" under CERCLA, Boeing argued the Government cannot hold it liable for any cleanup costs because NASA agreed to hold NAA harmless for the costs of loss or damage to the facilities in this 1960s contract.

The Government presented two counter arguments. First, citing to *California ex rel. California Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 672 (9th Cir. 2004), it pointed out that a contractual obligation is not an enumerated defense to CERCLA liability under 42 U.S.C. § 9607(a) and (b). Second, the Government also argued that although CERCLA allows private parties to allocate liability among themselves, those agreements between private parties do not shield the parties from underlying CERCLA liability enforced by the Government.

In response, Boeing argued that where CERCLA litigation is between the same parties that entered into the contract that allocates liability, the contract's terms will apply to both parties and be enforced in the instant litigation.

The District Court's Decision

The District Court ultimately sided with the Government, holding that agreements to indemnify or hold harmless are not enforceable against the Gov-

ernment in CERCLA litigation. The court's holding was the result of the "weight of authority" endorsing the Government's position. The Court cited a host of cases from various federal circuits that similarly held that parties can contract with respect to indemnification and cost allocation but that the parties shall remain fully liable to the government. Further, the court pointed out that Boeing failed to cite to any controlling law supporting its position. Although Boeing cited the Federal Circuit Court of Appeal's ruling in *Shell Oil Co. v. United States* (Fed. Cir. 2014) 751 F.3d 1282, 1288-89, for the position that hold-harmless agreements can shield contractors from CERCLA liability in suits brought by the Government, the court distinguished this case as it involved entities suing the Government for reimbursement of CERCLA cleanup costs pursuant to a contract. The only case Boeing cited that supported its position was an unpublished decision from the U.S. District Court for the Western District of Texas that the court declined to follow because it did not consider § 9607(e) (1) or any of the cases interpreting it, and the court further noted that its conclusion could contravene Fifth Circuit precedent.

Unrelatedly, the court also denied Boeing's motion to dismiss based on Boeing's statute-of-limitations defense because the court found that "[c]onstruing the complaint's factual allegations in the government's favor, . . . the government may be able to show that the statute of limitations did not expire before it filed suit."

Conclusion and Implications

After the denial of their motion, Boeing must now file its answer to the Government's Complaint and any counterclaims no later than May 23, 2023. This court's denial further reinforces long-standing precedent holding that the parties cannot contract away their CERCLA liability to the Government. This court's holding, in particular, will likely give parties a pause before entering into cost-allocation or hold-harmless agreement with government entities in the future. A copy of the court's opinion is available online at: <https://casetext.com/case/united-states-v-the-boeing-co-7?q=united%20states%20v.%20the%20boeing%20company%202023&sort=relevance&p=1&type=case&resultsNav=false>.
(Monica Browner, Hina Gupta)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT UPHOLDS WATER CODE EXEMPTION— REJECTS ATTEMPT TO EXPAND CEQA REVIEW TO REGIONAL WATER BOARD APPROVAL OF WASTE DISCHARGE PERMITS

Los Angeles Waterkeeper v. State Water Resources Control Board,
___Cal.App.5th___, Case No. B309151 (4th Dist. June 2, 2023).

In a modified opinion filed June 2, 2023, the Second District Court of Appeal rejected petitioner's attempt to avoid a statutory exemption in Water Code § 13389 that exempts waste discharge permits issued by Publicly Owned Water Treatment Works (POTWs) from review under the California Environmental Quality Act (CEQA). Petitioner argued that § 21002 of the Public Resources Code, which sets out a policy goal of CEQA gave rise to substantive and procedural obligations by POTWs outside of CEQA's substantive environmental review provisions found in Chapter 3 of the CEQA statutes. Section 13389 expressly exempted POTW issuance of waste discharge permits from the provisions of Chapter 3. The court decided, in the narrow context of a POTW waste discharge permit that is the equivalent of a permit issued under the National Pollutant Discharge Elimination System (NPDES), that § 21002 of the Public Resources Code does not itself set forth any self-executing procedural or substantive environmental review obligations on POTWs.

This summary will only discuss the CEQA related portions of the decision.

Factual and Procedural Background

Los Angeles Regional Water Quality Control Board (LA Board) renewed four waste discharge permits for Publicly Owned Treatment Works in the Los Angeles area that discharge millions of gallons of treated wastewater into the Los Angeles River and then into the Pacific Ocean.

Petitioner, Los Angeles Waterkeeper, filed a lawsuit to challenge the issuance of the permits. The primary allegation in the lawsuit was that Article X, § 2 of the California Constitution and Water Code §§ 100 and 275 imposed a duty on the LA Board and the State Water Board to prevent the waste of water from

POTWs.

Petitioner also brought CEQA claims that argued the Regional Board and State Water Resources Control Board (State Board) had a duty to analyze whether there were feasible alternatives to the POTW discharge levels. Petitioner also claimed that the LA Board needed to analyze cumulative impacts from the waste discharge permits.

The LA Board and State Board filed a demurrer to petitioner's CEQA claims on the basis that state Water Code section 13389 fully exempts waste discharge permits from CEQA review. The trial court granted the demurrer and petitioner appealed.

In an initial decision issued by the Second District, the Court of Appeal agreed with the LA Board and State Water Board with respect to both the issues raised under the California Constitution and state Water Code CEQA issues.

After a rehearing, the Second District issued a slightly modified decision, which is summarized with respect to CEQA issues below.

The Court of Appeal's Decision

With respect to CEQA issues, the Second District focused on an argument raised by petitioner that Chapter 1 of CEQA imposes substantive and procedural requirements or obligations on lead agencies that are enforceable by mandamus. Chapter 1 of CEQA states broad CEQA policies whereas Chapter 3 contains the substantive and procedural provisions with regard to preparing an Environmental Impact Report (EIR).

As the court noted, petitioner:

... contends that Public Resources Code section 21002, located in CEQA chapter 1, obliges the Regional Board... to make findings as to whether

the project has significant and unavoidable impacts, including cumulative impacts resulting from multiple approvals of [waste discharge requirements for POTWs, and if so, whether there are feasible alternatives or mitigation measures that would substantially lessen those impacts.

Public Resources Code Section 21002

The only CEQA provision that petitioner alleged the water boards violated was § 21002, so the court limited its review to the specifics of that section. Section 21002 reads as follows:

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which would avoid or substantially lessen such significant effects.

Essentially petitioner was arguing that § 21002 imposes obligations on lead agencies apart from their obligation to prepare EIRs and perform other forms CEQA review as set forth in Chapter 3 of CEQA.

The court disagreed, citing Water Code § 13389's CEQA exemption language providing that:

Neither the state board nor the regional boards shall be required to comply with the provisions of Chapter 3... of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement.

Chapter 3 referenced above is the portion of CEQA governing EIRs and how CEQA's policies are actually implemented. The court found support in the language of Public Resources Code sections 21002.1 and 21081 which both speak in terms of applying CEQA policy through the preparation of EIRs. The court also cited to multiple appellate court decisions that had held in other circumstances that Chapter 3

of CEQA is how the environmental review process is implemented.

In rejecting petitioner's claims, the court highlighted that EIRs are how CEQA policies set forth in § 21002 and Chapter 1 are actually implemented. Section 21002 does not, itself give rise to any self-executing obligations.

A Narrow Decision?

In its modified decision issued after hearing, the court clarified that the scope of its decision with regard to CEQA was narrow, and only applied to waste discharge permits that are the equivalent of National Pollutant Discharge Elimination System permits:

The Boards contend in their modification request that the CEQA exemption under Water Code section 13389 applies only to waste discharge permits that are the state equivalent of federal NPDES permits, and not to waste discharge permits issued pursuant to other provisions of the Water Code. Because the waste discharge permits at issue in the instant case are NPDES-equivalent permits, and the parties do not dispute the permits are subject to the Water Code section 13389 exemption, we need not, and do not decide whether the exemption applies to other types of waste discharge permits not at issue in this case.

The court nonetheless maintained its disagreement with petitioner's contention that Public Resources Code § 21002 somehow imposes environmental review requirements independent of CEQA's EIR procedures from which NPDES permits are exempt.

Conclusion and Implications

Although the decision appears narrow at first glance, the decision is important because the court rejected an interpretation of CEQA that could have significantly broadened CEQA review obligations to scenarios where approvals are expressly exempt from the obligations set out in Chapter 3 of CEQA.

A copy of the decision can be found here: <https://www.courts.ca.gov/opinions/documents/B309151A.PDF>.

(Travis Brooks)

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