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& POLICY REPORTER

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WESTERN WATER NEWS**CONGRESSIONAL MEMBERS, INCLUDING THOSE FROM IDAHO, SEEK CLARIFICATION OF APPARENT COLUMBIA RIVER SYSTEM OPERATIONS SETTLEMENT TERMS**

On November 29, 2023, Idaho Congressman Russ Fulcher joined Pacific Northwest colleagues Cathy McMorris Rodgers (R-WA), Dan Newhouse (R-WA), and Cliff Bentz (R-OR) in a letter addressed to President Biden (among others) seeking clarification and explanation regarding various proposed settlement terms arising out of the pending Columbia River System Operations (CRSO) litigation concerning, chiefly, CRSO hydropower operations and Endangered Species Act (ESA)-listed salmonid recovery (Letter). Of particular concern and interest to Idaho water users are settlement terms concerning the reach of salmonid reintroduction efforts (*i.e.*, into Idaho or not), implications, if any, under the 2004 Nez Perce Agreement/Snake River Water Rights Settlement Act, and potential breaching of the four Lower Snake River Dams (Lower Granite, Little Goose, Lower Monumental, and Ice Harbor dams). The letter reacts to a draft mediation document titled: “United States Government Commitments in Support of the Columbia Basin Restoration Initiative and in Partnership with the Six Sovereigns,” dated November 2, 2023 (Mediation Statement).

Endangered Species

That ESA-listed salmon and steelhead populations have declined significantly over time within the Columbia and Snake River basins is undisputed. Whether and how to try to stem and reverse those declines is very much disputed. Clearly, the construction of various run-of-river hydropower dams has played a role in the decline. But dams are far from the only issue. And, while the dams form a convenient scapegoat, at what point are salmonid recovery efforts simply too costly to continue, if ever there is such a point given the billions of dollars already spent in the region on recovery efforts over the last several decades? The Mediation Statement at least provides a glimpse of what the Biden administration thinks reasonable and prudent.

Regarding Idaho salmonid populations in particular, the four lower Snake River Dams (LSRD) have long been in the crosshairs for breaching advocates. But whether the blame cast on the LSRD is justified is an open question because many variables are known to impact salmon survival. Poor ocean condition trends, predation, warming inland waterways affected by climate change, and insufficient ambient water quality are significant examples. What is not questioned is the decades of ESA-related salmon litigation clogging federal courts in Oregon and Washington state, coupled with many billions of dollars spent in the region already trying to recover listed salmon and steelhead.

Columbia Basin Fund Concept Plan

In February 2022, Idaho Congressman Mike Simpson surprised many with the release and promotion of his Columbia Basin Fund Concept Plan—an approximately \$34 billion proposal attempting to end decades of salmon-related Endangered Species Act litigation through the breaching of the LSRD. At the time, Idaho Governor Brad Little expressed appreciation for Congressman Simpson’s desire to end the ongoing salmon litigation and efforts to secure billions in infrastructure improvements spending. But, Governor Little reiterated Idaho’s long-standing position against dam breaching fearing the effects breaching would likely have on the Idaho economy, particularly in and around the Port of Lewiston. And, in many respects, Idaho already brokered long-term water and dam operations “peace” under the ESA, by agreeing to provide up to 487 kAF of flow augmentation water in exchange for 30-year term biological opinions governing Upper Snake River dam operations throughout Idaho.

Conclusion and Implications

Of concern to Idaho water users is the Mediation Statement’s seeming bent towards a salmon recovery

“at all costs” approach. For example, the Mediation Statement cites the “indisputable value and importance of salmon” and asserts that in light of, as opposed to successful outcome uncertainties posed by, “climate change, urgent action is needed to restore [salmonid] populations to healthy and abundant levels.” And, the terms “dam breaching” appear repeatedly throughout the document.

Concerned that the Mediation Statement is long on ambition, including the commitment of many hundreds of millions of dollars, but short on detail, the Letter poses 23 pointed questions seeking additional clarification and detail from the Biden administration on various aspects of the government’s “commitments.” The Letter inquiries include request-

ing the identities of mediation negotiation participants to determine the breadth of, and meaningful collaboration with, important regional stakeholders (or the lack thereof), and how the Biden administration intends to work within, as opposed to around, prior Congressional authorizations and legislation in the region.

The Letter and the underlying Mediation Statement are perhaps too new to fully absorb and appreciate at present. But, Idaho water users and many others in the Columbia and Snake River Basins are reviewing both intently. Many are certainly tired of the ongoing treadmill that is the CRSO litigation. But, mission statements and potentially unfunded mandates do not yield an appealing space either. (Andrew J. Waldera)

CALIFORNIA GOVERNOR NEWSOM SIGNS MAJOR CLIMATE CHANGE DISCLOSURE LAWS FOR CORPORATE ACCOUNTABILITY

In early October, Governor Newsom signed into law two landmark bills, Senate Bill 253 and Senate Bill 261, designed to reinforce California’s commitment to tackling climate change and increase transparency of both private and public companies’ revenues and financial risk related to climate change. Both bills are part of the state’s larger Climate Accountability Package and constitute the first laws of their kind to be implemented in the United States.

Senate Bill 253

Senate Bill 253 (SB 253), authored by Senator Scott Wiener, would require the California Air Resources Board (CARB) to, by January 1, 2025, develop regulations requiring businesses operating in California with total annual revenues over \$1 billion to disclose their Scope 1, Scope 2, and Scope 3 greenhouse gas (GHG) emissions to a qualified emissions reporting organization. “Scope 1 emissions” means all direct GHG emissions that stem from sources that a reporting entity owns or directly controls. “Scope 2 emissions” means indirect GHG emissions from consumed electricity, steam, heating, or cooling purchased or acquired by a reporting entity. “Scope 3 emissions” means indirect upstream and downstream GHG emissions, other than scope 2 emissions, from sources that the reporting entity does not own or directly control, such as from entities further up a

supply chain. Once regulations are in place, applicable businesses with reporting obligations (based on revenues of prior fiscal year) shall begin reporting their Scope 1 and Scope 2 emissions annually starting 2026 and begin reporting Scope 3 emissions starting 2027. The emission disclosures of reporting entities shall be independently verified by a third-party assurance provider. These requirements could apply to an estimated 5,344 companies operating in California.

SB 253 also requires CARB to contract with the University of California, the California State University, a national laboratory, or another equivalent academic institution to prepare a report on the public disclosures made by the reporting entities.

Notably, SB 253 gives CARB enforcement power to impose penalties of up to \$500,000 per year if companies fail to comply with the bill’s reporting requirements.

Senate Bill 261

Senate Bill 261 (SB 261), authored by Senator Henry Stern, and also known as the Climate-Related Financial Risk Act, would require a business operating in California with annual revenues over \$500 million (based on prior fiscal year’s revenue), beginning January 1, 2026, to develop a report on its climate-related financial risks. This reporting requirement would then continue biennially. This requirement is

estimated to affect over 10,000 companies operating in California.

Specifically, the required report must include (i) the business's climate-related financial risk, in accordance with the recommended framework and disclosures contained in the Final Report of Recommendations of the Task Force on Climate-related Financial Disclosures; and (ii) the measures adopted to reduce and adapt to climate-related financial risk. "Climate-related financial risk" are defines as the:

. . .material risk of harm to immediate and long-term financial outcomes due to physical and transition risks, including, but not limited to, risks to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health.

Any reports that contain a description of a business's GHG emissions or voluntary mitigation of those emissions must be verified by an independent third-party.

Of note, the disclosures required by SB 261 apply to both public and private companies. Although the Securities and Exchange Commission has proposed similar federal disclosure regulation, none would apply, as SB 261 would here, to private companies.

Response to Senate Bill 261 and Senate Bill 253

Supporters of the new laws see them as powerful tools to increase transparency into the climate impact of corporations and hopefully encourage consumers to

consider such impacts when choosing where to purchase products. As a result, the goal is to ultimately drive down corporate carbon emissions.

Conclusion and Implications

While SB 261 and SB 253 have received much support for their ambitious goals, they are not without challenges and criticisms. Governor Newsom noted in his bill signing messages for both bills that he is concerned with the overall financial impact of the bills and has directed CARB to monitor the cost impacts and make recommendations to streamline the new program. The governor also noted that both bills failed to provide CARB with adequate time to carry out the bill's requirements. Consequently, the governor directed his administration to work with the bill's author and the Legislature next year to address this issue. Others claim the bills are too costly and restrictive for businesses, especially SB 253's Scope 3 emissions reporting requirement, and that these costs will ultimately be passed on to consumers. Additionally, critics believe that requiring reporting emissions from a company's entire supply chain provides disincentives for these companies from doing business with small and medium businesses that will struggle to accurately measure their GHG emissions.

Many companies already voluntarily collect and disclose data related to their impacts on climate and will benefit from these bills' evening of the playing field in this arena. Although it will be at least a year before the requirements of both bills take effect, businesses operating in California will now need to focus more on the way their business operations contribute to climate change impacts.

(Monica Browner, Hina Gupta)

BENEATH THE SURFACE: A LOOK INTO CALIFORNIA'S HIGH DESERT WATER BANK

A new project, the High Desert Water Bank, will soon be realized as another tool in the toolbelt to aid in Southern California's response to future water supply challenges. With a budget of \$211 million, the Metropolitan Water District of Southern California (MWD) will bring the project to life in the Mojave Desert. The project comes as another crucial piece in improving the region's water supply resilience to combat the effects of climate change. Given the likelihood of more profound swings between wet and dry periods in the future, MWD has emphasized the importance of seizing opportunities to store water when abundant, and the High Desert Water Bank does just that.

With operations having just begun in October, the High Desert Water Bank has already started receiving water supplies from the State Water Project. A seven-foot-wide pipeline diverts water from the East Branch of the California Aqueduct into basins carved into the desert. This simple yet effective approach allows the water to gradually percolate into the desert soil, recharging the aquifer below.

Collaborative Development

In collaboration with the Antelope Valley-East Kern Water Agency, MWD's development of the High Desert Water Bank involved over three years of construction, marking it as one of MWD's most substantial investments in groundwater storage. Anticipated to be fully operational by 2027, the facility is expected to significantly contribute to MWD's ability to store and withdraw water, providing flexibility and a relatively reliable backup supply during extreme weather cycles.

The Antelope Valley groundwater basin, where the water bank is located, has the capacity to store up to 280,000 acre-feet of water, surpassing the storage capacities of other larger facilities like Castaic Lake and Big Bear Lake. Once fully operational, the facility will enable the withdrawal or addition of up to 70,000 acre-feet of water annually into existing water supplies, or enough water to provide for approximately 210,000 households.

Confronting Drought and Climate Change Challenges

The increased storage capacity is seen as a strategic measure to confront future droughts with greater confidence. By bolstering MWD's capacity to store and retrieve water along the California Aqueduct, the High Desert Water Bank provides California's largest urban water supplier with enhanced flexibility to navigate extreme weather patterns.

During periods of severe drought, the water bank is expected to ensure more reliable water supplies, mitigating the impact of reduced allocations from the State Water Project. The project also aims to reduce Southern California's dependence on the overstressed Colorado River, offering an alternative source of water supply during shortages.

MWD officials have continued to emphasize the significance of this initiative in the context of climate change. MWD is concurrently developing a Climate Adaptation Master Plan for Water, which focuses on building flexibility into the water system to enhance water supply resilience. Alongside groundwater storage, the plan includes initiatives such as wastewater recycling and remediation of contaminated groundwater sources.

As water flows into the facility from the California Aqueduct, MWD estimates that it will be able to store about 12,000 acre-feet in the groundwater basin by the end of 2023. The Antelope Valley-East Kern Water Agency highlights the suitability of this region for underground water storage, utilizing vacant land and former farm fields. The project will also help the regions declining agriculture industry, which once produced crops such as peaches, onions, and carrots in the Antelope Valley. MWD plans to recover 90 percent of the stored water, compensating the Antelope Valley agency for withdrawals. The remaining 10 percent of water accounts for evaporation losses and water left underground.

The ongoing construction involves the construction of recharge basins and wells to receive water. When completed, the water bank will have 26 recharge basins and 27 wells in total. The project will also require the building of a facility to treat the

groundwater, particularly with an eye toward potential arsenic contamination, before reintroducing it to the California Aqueduct.

Conclusion and Implications

The establishment and operation of the High Desert Water Bank represents a key component of Southern California’s response to the increasing challenges of drought and climate change. With the project backed by MWD, the High Desert Water Bank will be poised to play a transformative role in the region’s water supply, with the potential to influence other regions in adopting similar strategies to combat water supply challenges.

Furthermore, the High Desert Water Bank sets a precedent for integrated climate change response strategies. The development of MWD’s Climate

Adaptation Master Plan, encompassing groundwater storage, wastewater recycling, and contaminated groundwater remediation, alongside new water supply development and storage facilities such as the water bank, reflects a comprehensive approach to safeguarding water supplies. The project’s positive impact also has the potential to extend beyond urban water supply to help address the needs of the agriculture industry in the Antelope Valley, showcasing a multifaceted solution to regional water challenges.

By strategically expanding and diversifying water storage capabilities, the collaborative effort here aims to secure a more resilient water supply for Southern California, aligning with the imperative of adapting to the challenges posed by climate change.

(Wesley A. Miliband, Kristopher Strouse, Farrah Ghaffarirafi)

CONSERVATION GROUPS, GOVERNMENT ENTITIES EXPLORE OPTIONS FOR PROTECTING WESTERN COLORADO’S CRYSTAL RIVER

Recent efforts to preserve the Crystal River in Western Colorado sparked discussions on the preferred way to manage conservation efforts for waterways. Some individuals seek federal conservation status, some are interested in management by the state or locality, and some wish to continue development to cater to the American West’s ever-growing population. While this article focuses on management tactics both federal and Colorado-specific, these discussions echo throughout western states also grappling with the tensions between management, development, and conservation.

Background

The Crystal River flows approximately 40 miles from its headwaters in the Elk Mountains of Western Colorado to its confluence with the Roaring Fork River, approximately fifteen miles above the Colorado River. The Crystal provides recreation and scenic benefits in addition to the various water uses including domestic and irrigation. On October 26, 2023, community members met at a local high school in Carbondale, Colorado to discuss different options for preserving the river.

Wild and Scenic Designation for the Crystal River?

Central to the discussion is the prospect of obtaining a federal Wild and Scenic designation for the Crystal River, which provides significant protection for rivers holding that distinction. Under the federal Wild and Scenic Rivers Act of 1968, codified at 16 U.S.C. § 1271, *et seq.*, selected rivers are preserved in “their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.” 16 U.S.C. § 1271. Under the program, rivers are designated as either wild, scenic, or recreational. *Id.* § 1273(b). These designations are not defined by use; rather, they are defined by the amount of development present on the river. *See id.* Wild rivers are “essentially primitive” and “represent vestiges of primitive America.” *Id.* § 1273(b)(1). Scenic rivers, on the other hand, are “free of impoundments, with shorelines or watersheds still largely primitive.” *Id.* § 1273(b)(2). Recreational rivers “are readily accessible by road,” “may have some development along their shorelines,” and “may have undergone some impoundment or diversion in the past.” *Id.* § 1273(b)(3).

Once part of the Wild and Scenic system, the river receives a specialized management plan, which protects and enhances the values that provided the basis for the river to be included in the system in the first place. *Id.* § 1281. A main incentive to obtain a Wild and Scenic designation is keeping the river in its free-flowing condition—meaning, there cannot be construction of a dam or reservoir. *Id.* § 1278(a). Additionally, the federal government provides financial assistance to states to manage the protected river’s resources. *Id.* § 1282. As of 2023, the only Colorado river part of the Wild and Scenic program is the Cache la Poudre River near Fort Collins.

Attempts to designate the Crystal River as part of the Wild and Scenic system are not new, and locals have tried to protect the Crystal for decades. As recently as 2011, the Wild and Scenic designation was mentioned as a possibility to eliminate future dams. These efforts to dam the Crystal River and create two reservoirs, the Osgood and Placita, have since dissipated due to financial issues and community push-back. However, as Colorado’s population continues to grow, so does its need for water. Trans-basin pipelines ship water from the Western Slope to the densely populated Front Range. Thus, rivers—like the Crystal—may be subjected to future efforts to dam and create a water supply for a growing populous. The general consensus in the Crystal River area leans towards conservation, but there is significant disagreement on the proper method. Part of that disagreement includes the apprehension of some private landowners to subject their land to governmental intervention, particularly that of the federal government.

Crystal River Protection Options

A Wild and Scenic designation is not the only option for preserving waterways. If water quality is the concern, rivers may become part of the “outstanding waters” program. This program is authorized under the Clean Water Act, and it gives states the authority to designate Outstanding National Resource Water protections for “high-quality waters [that] constitute an outstanding National resource,” as well as “waters of exceptional recreational or ecological significance.” 40 C.F.R. § 131.12. These waters are given the highest level of protection to prevent degrading water quality. 63 Fed. Reg. at 36,786.

To protect water quantity—*i.e.*, ensure a sufficient flow rate—the Colorado Water Conservation Board (CWCB), part of the Colorado Division of Natural Resources, can obtain instream-flow water rights. These rights are non-consumptive, meaning they do not divert water from the rivers. Instead, they allow the CWCB to use the priority system to call out junior water rights and maintain certain flows between specific points on a stream.

For an option focused on local efforts, a Colorado locality can designate a river as an area of state interest, such as areas containing significant natural resources of statewide importance, under 1041 regulations. *See* C.R.S. § 24-65.1-201(1)(c). These powers allow local governments to regulate activities of state interest through a local permitting process. *See id.* § 24-65.1-301. Local governments hold hearings and grant or deny applications for permits for development in areas of state interest, as well as receive recommendations from state agencies, and send recommendations to other local governments. *Id.* Those in favor of localized management will be more inclined to use 1041 regulations as opposed to pursuing federal governmental protections.

Colorado also provides local governments and municipalities an option with the sole objective of protecting recreation. These entities may appropriate recreational in-channel diversions (RICDs) which allow for an in-channel water right. These, however, are fairly limited and are thus not overly popular. Only certain governmental entities can appropriate RICDs, and the rights are limited to nonmotorized boating recreation. C.R.S. § 37-92-103. They are only permitted for the “minimum amount of stream flow . . . for a reasonable recreation experience.” *Id.* Lastly, the applications “undergo extensive review by both the CWCB and an adjudicating water court.” *St. Jude’s Co. v. Roaring Fork Club*, 351 P.3d 442, 449 (Colo. 2015) (en banc). While this remains an option, it is not without its own challenges and therefore not readily available as a stream protection tool.

Outside of governmental intervention, owners of water rights could voluntarily sell or lease their water rights to the CWCB to convert to instream flows or otherwise decline to divert and leave that water in the stream. This option may grow increasingly less likely as the value and utility of water rights on the Western Slope continue to appreciate due to drought conditions and increasing populations.

Conclusion and Implications

Each conservation option has its own benefits and drawbacks. Ultimately, there is not a one-size-fits-all solution for waterways. The proper strategy depends on the reason for conservation and the ultimate goals a community is striving to obtain. While the community weighs options for the Crystal River, these discussions are not isolated. As populations increase in the American West generally, communities must

ask if it is better to dam a river to form reservoirs to serve these populations, or if it is better to leave the river free-flowing and curtail junior water rights owners. Other areas should take notes as the community around the Crystal River—and other rivers in the West—decide their course of action. There is no sole solution for the best way to manage resources, and perhaps the answer to whether to conserve or develop waterways is also a highly individualized question without a blanket solution.

(Lauren Hoover, John Sittler)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE BILL 659 AIMS TO IMPROVE GROUNDWATER RECHARGE EFFORTS

The California Legislature enacted Senate Bill 659 (SB 659) earlier this year, which will take effect on January 1, 2024. SB 659 is designed to improve groundwater recharge efforts, including by requiring the California Department of Water Resources (DWR) to provide actionable recommendations for additional groundwater recharge opportunities in designated groundwater basins.

Background

In October, California Governor Gavin Newsom signed SB 659 into law, known as the California Water Supply Solutions Act of 2023 (Act). The Act is intended to improve groundwater recharge efforts. California's groundwater supplies face unique challenges arising from continued projections for dramatic swings between few extremely wet years to sustained periods of drought. To prevent flooding during rainy seasons, there is a need to release water from surface reservoirs to avoid overcapacity, but which also depletes the stored surface water supplies. By contrast, many of California's groundwater basins have capacity to store water for future use, including during dry periods when surface water supplies are strained or unavailable. The Act calls for the development of administrative regulations and funding to address the impacts of climate change on the State's water supply.

The bill was authored by California State Senator Angelique V. Ashby. It was co-sponsored by the California Association of Winegrape Growers (CAWG) and the Regional Water Authority (RWA). The Act was further supported by a coalition of 52 organizations representing the agricultural industry, builders, water agencies, local agencies, and environmental organizations.

Importance of Groundwater Recharge

Many Californians depend on groundwater as their regular source of water. Groundwater provides 30 to 60 percent of California's water, depending on precipitation and reservoir conditions. Water users pump

more groundwater during dry years, which is why it serves as a crucial buffer against drought and climate change. There are several communities in California that rely entirely on groundwater for drinking water. When aquifers are depleted, natural contaminants can become concentrated making drinking water unsafe.

Additionally, groundwater is a critical resource for many farmers throughout the State, and is utilized to grow crops valued at more than \$50 billion each year. Ensuring a steady replenishing supply of water is important for winegrape growers, for example, who indicate in SB 659 supporting statements that they are contending with threats to their water rights, curtailments, heightened regulations for new and existing wells, fallowing, and various other water-related challenges.

However, it takes a long time to replenish over-pumped groundwater aquifers. Unlike lakes and reservoirs that can fill up after a year of above-average rain and snow, it can take years, and even decades, to replenish underground reservoirs. Because of this, there is a need for effective strategies to recharge groundwater aquifers.

Existing Law

Existing law requires DWR to update every five years the plan for the orderly and coordinated control, protection, conservation, development, and use of the water resources of the State, which is known as "The California Water Plan." Further, existing law requires DWR to establish an advisory committee, composed of representatives of agricultural and urban water suppliers, local government, business, production agriculture, and environmental interests, and other interested parties, to assist the department in the updating of the California Water Plan.

The Act

The Act focuses on replenishing groundwater basins through active recharge efforts. By prioritizing

groundwater recharge, the Act addresses water-related concerns and ensures a more secure water supply in the face of climate uncertainties. The Act puts a spotlight on groundwater as a climate change resilient resource by providing the impetus for California to optimize state infrastructure, operational protocols and regulatory mechanisms to harness and store excess water in the groundwater aquifer when it's available.

Under the Act, DWR is directed to provide actionable recommendations for additional opportunities to recharge groundwater basins. The recommendations shall identify immediate opportunities and potential long-term solutions to increase the State's groundwater supply, with a priority on multi-benefit projects.

DWR's recommendations shall include all of the following:

- (1) An estimate of the volume of recharge that could potentially be realized by the enactment of the recommendations;
- (2) A discussion of the variability of the quantities of water potentially available for recharge given varying hydrogeologic environments;
- (3) An identification of the legal and regulatory requirements for recharge projects;
- (4) A discussion of the possible financial or regulatory incentives that could support the development of recharge projects;
- (5) An identification of locations and a description of how groundwater recharge at those loca-

tions can protect access to safe drinking water and provide water quality benefits; and

- (6) An identification of best practices to advance all benefits of groundwater recharge, including, but not limited to: (i) analysis regarding where groundwater recharge will be effective and protective of access to safe drinking water consistent with Section 106.3 or (ii) Mapping that identifies areas where recharge is unlikely to degrade groundwater quality based on consideration of the quality and composition of the source water, the qualities of the soil upon which recharge will occur, and the proximity to drinking water wells.

DWR must also, to the extent feasible, evaluate the potential economic and noneconomic costs and benefits of implementing the recommendations. Further, the goals of the Act are to be achieved without compromising water availability for environmental purposes, and through safeguarding safe drinking water and maintaining high water quality standards.

Conclusion and Implications

Many California water supply experts and stakeholders assert that it has become imperative for California to capture stormwater and substantially accelerate its groundwater recharge efforts. SB 659 is intended to spur those efforts toward developing and maintaining reliable, long-term water supplies by better managing and directing the available natural water supply to storage withing California's vast and extensive groundwater basins.

(Christina Suarez, Derek Hoffman)

REGULATORY DEVELOPMENTS

EPA PUBLISHES FINAL RULE— REQUIRES PFAS REPORTING UNDER TSCA

On October 11, 2023, U.S. Environmental Protection Agency (EPA) published a final rule, Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, at [88 Fed. Reg. 70516](#) (October 11, 2023), requiring reporting and recordkeeping requirements of per- and polyfluoroalkyl substances (PFAS) under the Toxic Substances Control Act (TSCA). The rule is the latest in the agency's efforts to regulate and address PFAS in the environment and supply chain.

Background

PFAS are a group of man-made chemicals that have been used in a variety of industrial applications and consumer products that resist heat, oil, stains, grease, and water. They are often referred to as “forever chemicals” due to their persistent nature in the environment and their tendency to accumulate in the human body. A wide range of manufactured goods make use of PFAS, including cleaning products, food packaging, water-resistant clothing, and nonstick cookware.

In 2019, as part of the National Defense Authorization Act, Congress amended TSCA section 8(a) directing EPA to promulgate a rule addressing PFAS reporting.

The Final Rule

The new rule requires commercial manufacturers or importers of products containing PFAS to submit information to disclose to the EPA PFAS uses, production volumes, byproducts, disposals, exposures, environmental and impacts, and worker exposure. Further, the final rule applies retroactively, requiring disclosure of PFAS use since January 1, 2011.

EPA's final rule contains a technical definition of PFAS for purposes of the regulation, and includes an additional 41 PFAS identified as being of concern. EPA reports that there are at least 1,462 PFAS known to have been made or used in the U.S. since 2011.

The rule contains no *de minimis* exemptions. As

such, any amount of PFAS in qualifying products or processes triggers the reporting obligation. And the definition of “manufacture for commercial purposes” for purposes of the rule includes the:

... coincidental manufacture of byproduct and impurities that are produced during the manufacture, processing, use, or disposal of another chemical substance or mixture.

Entities subject to the rule need only report information that is “known or reasonably ascertainable by” the entity. This includes all information in their possession or control, and all information a similarly situated person might be expected to possess, control, or know. As the rule explains, manufacturers will need to undertake some due diligence to satisfy this standard, and potentially undertake additional analysis not otherwise required in order to comply.

Regulated entities are required to submit reporting information to the EPA within 18 months of the rule's effective date, which is November 13, 2023, with an additional six months for reports from small businesses subject to the rule only due to importing PFAS contained in articles.

The final rule marks the latest in ongoing and multifaceted federal efforts to regulate PFAS contamination. In 2021, the EPA announced a PFAS Strategic Roadmap laying out the agency's approach to addressing PFAS contamination. The roadmap called for not only the PFAS reporting rule under TSCA but also for the publication of a national PFAS testing strategy, new approaches to address PFAS in drinking water, and designation of some PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. And earlier this year the White House Council on Environmental Quality released a report documenting actions throughout the federal agencies to address PFAS. The report highlights dozens of completed and ongoing actions by the Food and Drug Administration, Department of Agriculture, Department of Defense, National Oceanic and Atmospheric Administration, Department of Veteran Affairs, and others.

Conclusion and Implications

However, the ambitious regulatory push has not been without criticism. Publication of the final rule was delayed in part due to concerns over its economic impact, particularly on smaller entities. Commenters expressing concerns during the rule's development prompted the EPA to convene a Small Business Advocacy Review of the rule in February 2022 to seek further feedback from small businesses, trade associations, and other small entity representatives. While the agency had initially estimated only \$10.8 million in industry costs, following the additional study this increased dramatically to \$876 million.

While the EPA acknowledges that the rule's benefits cannot be quantified, it maintains that the benefits do outweigh these costs. The agency reports that it has no other source for data of this nature, and that it plans to use the information to support activities and programs addressing PFAS, including to more effectively determine whether additional risk assessment and management measures are needed. But the manufacturers and importers remain concerned about the costs of reporting and the ability to comply with these new onerous requirements under the new rule. (Samuel Bacal-Graves, Hina Gupta)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES SGMA GUIDANCE DOCUMENT FOR GROUNDWATER SUSTAINABILITY PLANS

The California Department of Water Resources (DWR) recently released the much anticipated "Groundwater Sustainability Plan (GSP) Implementation Guide: A Guide to Annual Reports, Periodic Evaluations, and Plan Amendments."

Background

The Sustainable Groundwater Management Act (SGMA), enacted in 2014, comprised a landmark legislative effort to address statewide groundwater management in California. SGMA empowered local agencies to develop and implement GSPs tailored to their respective groundwater basins, with the goal of achieving sustainable groundwater management by 2040.

The GSP serves as a tool for Groundwater Sustainability Agencies (GSAs) in their ongoing efforts to comply with SGMA and the associated GSP Regulations. Additionally, this guidance release comes at a time when many GSAs in the most challenging basins within the State are planning to submit their first Periodic Evaluation in early 2025.

Goals of the Guidance: Clarify Language and Formatting

The newly released guidance by DWR aims to streamline the GSP reporting compliance process by providing further guidance for GSAs. The guidance

covers the preparation of documents such as annual reports, periodic evaluations, and plan amendments, all of which are keystone components of the SGMA compliance framework.

One of the main points of the guidance is to help clarify language on what DWR is reviewing and what GSAs are required to submit to DWR. Part of this guidance focuses particularly on the colloquial use of "the terms 'GSP Update' or 'Revised GSP'" which many GSAs have used when looking at their compliance obligations.

DWR encouraged GSAs to use terminology consistent with SGMA and the GSP Regulations, which refer to a Plan Amendment, to avoid confusion on reporting and deliverable requirements. Below is the general framework of what documents a GSA must create to comply with reporting compliance obligations, as described in the DWR guidance document.

Annual Reports: Submitted Annually by a GSA and Submitted to DWR by April 1

An Annual Report is a report prepared and submitted to DWR by April 1 of every year, for all basins with a GSP or Alternative. The report acts as a yearly status update and presents data gathered over the previous water year for each applicable sustainability indicator and provides an analysis of that data in relation to the sustainable management criteria established in the GSP. The report also identifies any

issues or data gaps that still exist in the basin and provides an implementation status update on all the projects and management actions identified in the GSP. Additionally, data associated with the Annual Report are required to be submitted via the SGMA Portal Monitoring Network Module (see Water Code § 10728 and 23 CCR § 356.2).

Periodic Evaluations: Performed Every Five Years by a GSA

A Periodic Evaluation is an evaluation of the implementation of an approved GSP performed by the GSA, which is described in a written assessment submitted to the Department. The periodic evaluation represents a progress report for each evaluation cycle (*i.e.*, at least every five years after the initial GSP submission). It summarizes basin conditions in relation to sustainable management criteria established in the GSP, the implementation of projects and management actions, and other information as specified in SGMA (Water Code § 10728.2) and the GSP Regulations (23 CCR § 356.4) and describes whether GSP implementation is meeting interim milestones and is on track to meet measurable objectives and the sustainability goal for the basin. The Periodic Evaluation is a GSP implementation evaluation tool. The first Periodic Evaluations are due in 2025 for basins designated by DWR to be subject to conditions of critical overdraft.

Plan Amendments: Prepared as Needed by a GSA

A Plan Amendment is a revision made by a GSA to its previously adopted GSP, often to make warranted changes to ensure the GSP reflects the most current groundwater management approaches. A GSA must submit the amended GSP to DWR, along with a Periodic

Evaluation that explains and justifies the GSP Amendment. Prior to adopting the amended GSP, the GSA must hold a public hearing to adopt the amended GSP, at least 90 days after providing notice

to cities, counties and stakeholders within the area of the proposed GSP Amendment. The GSA must review and consider comments from any city or county that receives notice and must consult with a city or county that requests consultation within 30 days of receipt of the notice. The GSA must also review and consider comments received from basin stakeholders.

Periodic Review: Conducted by DWR Every Five Years in Response to a Periodic Evaluation

A Periodic Review of a GSP is an evaluation and assessment of an approved GSP performed by DWR at least every five years. When performing a Periodic Review, DWR ensures the GSP, as implemented, remains compliant with SGMA, in substantial compliance with the GSP Regulations, and is being implemented in a manner that will likely achieve the sustainability goal. DWR may rely on Annual Reports and Periodic Evaluations prepared and submitted by the GSA as well as other available information when performing Periodic Reviews. DWR will issue a written assessment reporting the results of its Periodic Reviews, which includes a determination of the status of the GSP and its implementation (*i.e.*, Approved, Incomplete, or Inadequate).

Conclusion and Implications

While some GSAs undoubtedly wished this guidance had come out earlier as they started to prepare for their first Periodic Evaluation in 2025, the guidance ultimately will help to serve as a road map for how GSAs could format and display the information required by the above reports along with providing clarifying language of how GSAs should refer to these efforts. The guidance is available on the DWR website at: <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/Sustainable-Groundwater-Management/Best-Management-Practices-and-Guidance-Documents/Files/GSP-Implementation-Guidance-Report.pdf>

(Darien Key, Derek Hoffman)

PETITION BEFORE THE WASHINGTON DEPARTMENT OF ECOLOGY FOR DECLARATORY ORDER TO RECONSIDER THE DEVELOPMENT AND USE OF A WATER BANK DENIED

Over the past decade, many new “water banks” have been proposed and developed in Washington State to provide mitigation for new water uses. Water banking is broadly defined as “an institutional mechanism that facilitates the legal transfer and market exchange of various types of surface, groundwater and storage entitlements.” (McDonnell, L., *Water Banks: Untangling the Gordian Knot of Western Water*, 22 *Mineral L. Institute* 22-6 (1995).) Under RCW 90.42.100, the Washington State Department of Ecology (Ecology) can use the State Trust Water Right Program for water banking activities, with certain requirements and restrictions. In Washington, water banks are owned by private and public entities. In order to transfer a water right to the State Trust Water Right Program for water banking activities, the water right must undergo a tentative determination on its extent and validity and the proponent must enter into a water banking agreement with Ecology.

This article will consider some recent events relating to TransAlta Corporation’s water bank in the Skookumchuck River. The Skookumchuck River is located in Southwest Washington, it is a tributary to the Chehalis Basin where flows it flows into Grays Harbor and the Pacific Ocean. TransAlta applied to transfer its water right to the State Trust Water Right Program on June 8, 2020. Historically, the water right was used by TransAlta for cooling the Centralia Steam Generation coal-fired power plant. The need for water at the plant has been declining because the plant has been partially decommissioned, with full decommissioning scheduled for 2025. On August 23, 2021, Ecology authorized TransAlta’s transfer of its water right (up to 28,033 acre-feet annually) to provide water for instream flows and new future uses through water banking activities.

Petition filed by the Quinault Indian Nations

On October 30, 2023, the Quinault Indian Nation (Nation) filed a Petition to the Director of Ecology seeking a Declaratory Order reconsidering a water right transfer and creation of a water bank for TransAlta Corporation in the Chehalis River Basin. Under Washington law, any person may petition an agency

for a declaratory order with respect to the “applicability to specified circumstances of a rule, order or statute enforceable by the agency.” RCW 34.05.240(1). The petitioner must set forth facts and reasons to show that an uncertainty necessitating resolution exists, there is an actual controversy, the uncertainty adversely affects the petitioner, that the adverse effect of the uncertainty out ways any adverse effects on others and the petition complies with any other rules adopted by the agency. Under state law, the agency has 30 days to respond to the Petition.

Arguing in Favor of an Order of Reconsideration

The Nation asserted that Ecology must reconsider the amount of water authorized under the 2021 change because it exceeded the amount that should have been authorized for transfer under state law. Additionally, the Nation asserted that Ecology failed to consider impairment to its treaty fishing rights and instream flows when creating the water bank. The Nation asserted that Ecology must grant its Petition to revoke its 2021 Change of Use approval, reduce the annual volume of water authorized, fully consider impairment to the Quinault Indian Nation’s (unquantified) reserved water rights, and consider the public interest in restoring salmon to the Skookumchuck River.

Alleging that Ecology Unlawfully Authorized Too Much Water

In the Petition, the Nation provided an analysis asserting that Ecology unlawfully authorized approximately 30 percent more water under the water right than should have been approved for change. Under Washington Law, a water right can be changed so long as there is no increase in the annual consumptive quantity of water used under the water right. RCW 90.03.380(1) states, in pertinent part, that:

. . . ‘annual consumptive quantity’ . . . means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, av-

eraged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.

‘Continuous Beneficial Use’

The Nation claimed that Ecology’s decision focused on the incorrect time period of “continuous beneficial use” when considering the transferability of the water right because it held that part of the water right was protected against relinquishment. Under Washington law, a water right may be partially or fully relinquished if it is not exercised over a period of five continuous years, unless the use is excused under an exception to relinquishment. In considering the transfer of a water right, if a water right has not been fully used but there is “sufficient cause” under the statute for the non-use, then the unused portion is protected from relinquishment. In TransAlta’s approval, Ecology found that the “determined future development” exception applied. RCW 90.14.140(2) (c). The determined future development exception requires evidence of a fixed plan during the five-year period of non-use and it takes place within 15 years of the last beneficial use of the last beneficial use. Therefore, Ecology considered the most recent five-year period of continuous beneficial use of the water right to date back to 2003, which correlated with the highest use of the water right. The Nation asserted this was inaccurate because the exemption from relinquishment should not have applied. The Nation also asserted that Ecology did not average the two highest years of beneficial use as required to do so under RCW 90.03.380.

Additionally, the Nation asserted that Ecology’s consumptive use rate for the plant was too high which led to more water authorized for transfer.

Ecology’s authorization calculated that the consumptive range of the use was between 91.8 percent and 95.6 percent. The Nation’s expert explained that the assumed consumptive rate was too high based on the literature and some additional questions about the plant’s operations. The Petition asserted that Ecology authorized TransAlta to use 30 percent more water than allowed by law.

Ecology’s Denial of the Petition

On November 28, 2023, Ecology denied the Quinault Indian Nation’s Petition. Ecology asserted that the Nation had ample opportunity to raise issues during the application process and that it should have raised its concerns or appealed the August 23, 2021, decision. Ecology stated that it believed in the importance of the finality of water right decisions. Furthermore, Ecology cited the State Administrative Procedure Act which expressly prohibits an agency from entering an order impacting a party (TransAlta) without that party’s express written agreement. Ecology’s denial of the Petition expressed its intent to continue to work with the Nation on water resource issues throughout the Chehalis Basin.

Conclusion and Implications

The Nation’s Petition is the first of this approach to address the operations of water banks in Washington State. Any appeal of Ecology’s decision is expected before the end of year. Regardless of further appeal, as Washington State continues to grapple with complex water resource issues throughout the state, there will likely continue to be greater scrutiny on water banks and water right changes. (Jamie Morin)

PENALTIES & SANCTIONS

**RECENT INVESTIGATIONS, SETTLEMENTS,
PENALTIES, AND SANCTIONS**

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

**Civil Enforcement Actions and Settlements—
Water Quality**

Dec. 4, 2023—The U.S. Environmental Protection Agency, along with the U.S. Department of Justice, the Tennessee Attorney General's Office, and the Tennessee Department of Environment & Conservation announced a proposed modification of a 2013 Consent Decree with the City of Chattanooga, Tennessee.

The proposed modification extends certain deadlines in the Consent Decree while adding significant remedial projects that the city must complete in the next five years. The new projects will be undertaken in collaboration with the Hamilton County Water and Wastewater Treatment Authority (WWTA) and will be implemented at locations where the work will benefit both Chattanooga's sewer system and the sewer system owned and operated by WWTA. The cost of the additional required projects is estimated to be \$185 million.

These projects will consist of the design and construction of equalization basins for temporary storage of wet weather flows from WWTA's sewer system that are transmitted into Chattanooga's sewer system. The mitigation of wet weather flows from WWTA's system into Chattanooga's sewer system will facilitate the elimination of sanitary sewer overflows (SSOs) in Chattanooga's system.

Under the modification, Chattanooga also agrees to accept additional wastewater flows from WWTA's sewer system that are currently transmitted to WWTA's Signal Mountain Wastewater Treatment Plant (Signal Mountain WWTP) for treatment. The Signal Mountain WWTP experiences frequent bypasses of treatment and one of the remedies for this problem

that is under consideration by WWTA is to redirect flows that currently go to the Signal Mountain WWTP to Chattanooga. Chattanooga's agreement to accept such additional flows expands the range of options for WWTA to consider as it works to resolve a serious environmental and compliance problem at the Signal Mountain WWTP.

In addition to the requirement to implement additional remedial projects and potentially accept flows currently transmitted to the Signal Mountain WWTP, the modification extends certain deadlines in the Consent Decree. The adjusted deadlines include Chattanooga's deadline to submit an East Bank/West Bank Assessment and Rehabilitation Plan to eliminate SSOs from the East Bank and West Bank Outfalls.

The Parties agree that such an extension is warranted because the city has pending projects, including the projects added to the Consent Decree through this modification, that may eliminate the East Bank and West Bank Outfall SSOs without the need for development and implementation of additional remedial plans. If SSOs are continuing to occur at the East Bank and West Bank Outfalls five years from the effective date of the Modification, then the city's obligation to submit an East Bank/West Bank Assessment and Rehabilitation Plan to eliminate SSOs from the East Bank and West Bank Outfalls will be triggered.

The Consent Decree Modification also extends until five years from the Effective Date of the Modification the date when the city becomes subject to the requirements of the Capacity Assurance Program (CAP) established under the Consent Decree. The CAP limits the circumstances where the City can add new sewer connections to its system in areas where the sewer system lacks sufficient capacity to manage flows during a two-year, twenty-four-hour storm event. Under the Modification, the city will still be obligated to follow its pre-Consent Decree capacity management procedures which have similar but less stringent limits on when new sewer connections

can be added in areas where SSOs are recurring. The delay in the CAP program applicability is fair to the city because the city's ability to meet the CAP Program requirements is impacted by excessive flows the city receives from WWTAs sewer system. When the original Consent Decree was entered, the city was anticipating that WWTAs would address problems in its sewer system that causes these excessive wet weather flows from WWTAs system. For a variety of reasons, WWTAs progress has been slower than anticipated, and WWTAs has only this year completed negotiations of its own Consent Decree with the government parties that will lead to a ramping up of WWTAs remediation efforts.

The original 2013 Consent Decree resolved claims, through the date of the original Consent Decree's date of lodging, by the United States and the State of Tennessee that the City violated the Clean Water Act and the Tennessee Water Quality Control Act. The violations primarily involved SSOs from the City's sewer system, particularly those reaching waters of the United States or Tennessee, and failures to comply with certain operation and maintenance conditions of the city's National Pollution Discharge Elimination System (NPDES) permits.

Under the 2013 Consent Decree, the city was required to assess the causes of overflows of untreated sewage, develop and implement remedial plans to eliminate the overflows, and improve its management, operation, and maintenance programs to prevent future overflows and respond to overflows when they occur. The city also paid a civil penalty of \$ \$476,400, split equally between the United States and the State of Tennessee.

Dec. 1, 2023—The U.S. Environmental Protection Agency (EPA) announced a proposed rule to establish new and revised federal water quality standards (WQS) for the state of Florida based on the latest scientific knowledge about protecting human health.

Under the Clean Water Act, state governments, or EPA, when necessary, set limits (called "human health criteria") for pollutants in water bodies that pose risks to human health through the consumption of drinking water or locally caught fish and shellfish. EPA is proposing new or revised criteria for a total of 73 priority toxic pollutants.

On December 1, 2022, EPA issued an Administrator's Determination that Florida's current standards—last updated in 1992—do not reflect the latest science or the current habits of Floridians. Since 1992, national and regional data have become available that indicate greater levels of fish consumption, particularly among residents of coastal states like Florida. In addition, Florida does not have human health criteria for 37 pollutants that are likely to be in its waters. New data have become available since 1992 on the specific toxic pollutants that are likely to be present in Florida's waters, and how those pollutants may impact Florida's designated uses. EPA's proposed rule accounts for more recent evidence on fish consumption rates and, as a result, proposes criteria that are more protective of Floridians that consume fish caught in the state.

In addition, EPA's rule proposes criteria to protect subsistence fishers in and around Everglades National Park and Big Cypress National Preserve where Tribes hold reserved rights to fish for subsistence.

Nov. 21, 2023—The U.S. Environmental Protection Agency announced that Electron Hydro, LLC, and its Chief Operating Officer, Thom Fischer, have agreed to pay a \$1,025,000 civil penalty for major violations of the federal Clean Water Act stemming from the illegal installation of thousands of yards of artificial turf at a construction project at the Electron dam and the subsequent release of hundreds of yards of the turf and the crumb rubber it contained into the Puyallup River in the summer of 2020.

Turf has been found at least 5000 feet from the site and crumb rubber has been found at least 19 miles downstream. Recovery of all the discharged material is not possible.

Artificial turf contains a wide range of toxic compounds, including plasticizers, zinc, lead, and other toxic compounds. Crumb rubber is made from waste tires that contain 6PPD, a chemical used in tire manufacturing. When 6PPD reacts with ozone, it forms 6PPD-q, which is toxic to salmon, trout, and many other fish and aquatic species, and is known to be lethal to coho salmon.

The Puyallup River, which flows into Puget Sound, is home to chinook salmon, bull trout, and steelhead trout, all of which are protected under the federal Endangered Species Act. The river is also home to coho, chum, and pink salmon, as well as cutthroat trout.

The Puyallup Tribe owns the bed and banks of the Puyallup River within its reservation and downstream of the discharge site. Since time immemorial, Tribal members have fished the waters of the Puyallup River, the Puyallup River Watershed, and Commencement Bay -- and the Tribe's fishing rights are protected by treaty.

In its investigation, the EPA also discovered that for many years Electron Hydro violated the conditions of the Washington Department of Ecology's Construction Stormwater General Permit by failing to:

- update its Notice of Intent to reflect the true size of the construction area;
- provide secondary containment for equipment containing fuel;
- implement and/or maintain required best management practices;
- adequately conduct and/or document inspections;
- maintain records on-site; and
- timely submit discharge monitoring reports.

The company's failure to comply with the conditions of the permit may have resulted in environmental harm due to discharge of pollutants such as sediment, phosphorus, and petroleum products from the construction site to the Puyallup River.

In November 2020, the U.S. Department of Justice filed a complaint in federal court. After multiple successful rulings in federal court, the EPA and the Department of Justice negotiated a Clean Water Act settlement with Electron Hydro and Fischer, which is memorialized in the Consent Decree announced today.

Civil Enforcement Actions and Settlements— Hazardous Chemicals

Dec. 4, 2023—The U.S. Environmental Protection Agency (EPA) today announced the final cleanup plan for the Sulphur Bank Mercury Mine Superfund site, covering the mine site and residential soils in Clearlake Oaks, California. EPA's cleanup plan will combine and cover mine waste piles, remove or cover contaminated residential soils, minimize impacts on nearby tribes, and reduce mercury entering Clear Lake sediments and fish. The mine operated from the late 1800s to the 1950s, spreading waste with toxic levels of mercury and arsenic across the mine property and into nearby neighborhoods and Clear Lake.

Before finalizing the cleanup plan, EPA held a 90-day public comment period and hosted online question and answer sessions, in-person open houses, and hybrid (online and in-person) formal public hearings for both the whole community and a tribal-focused audience. The agency captured both written and verbal comments, considered them in cleanup planning, and responded to them in the final decision document.

The plan is detailed in a document called a Record of Decision (ROD). The ROD and other documents on how the EPA decided on this plan are found in the site's Administrative Record posted on [EPA's website](#).

EPA has already completed eight earlier cleanups at Sulphur Bank to protect community members and the environment. These prior cleanups included controlling soil erosion, improving surface water management, removing contaminated soil on the Elem Indian Colony, and capping mine waste beneath roadways. EPA also continues to study Clear Lake's complex ecosystem, sediment, and north wetlands to understand how to reduce mercury pollution.
(Robert Schuster)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS CHALLENGE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S ORDER MODIFYING IRRIGATED LANDS PROGRAM ORDER FOR CENTRAL COAST REGION

A coalition of environmental plaintiff groups filed a petition for writ of mandate against the State Water Resources Control Board (State Water Board) on October 27, 2023, in the Sacramento County Superior Court. (*San Jerardo Cooperative, Inc., et al. v. State Water Resources Control Board, et al.*, Case No. 23WM000108 (Sac. Cty. Super. Ct.,).) The coalition, composed of San Jerardo Cooperative, Comité de Salinas, Monterey Coastkeeper, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, California Sportfishing Alliance, California Coastkeeper, and Santa Barbara Channelkeeper (collectively, Petitioners), seeks to overturn the State Water Board's Water Quality Order 2023-0081 (Order 2023-0081). (*San Jerardo Cooperative, Inc. v. State Water Resources Control Board, et al.*, Petition for Writ of Mandate) Order 2023-0081 modified the Central Coast Regional Water Quality Control Board's (Central Coast Regional Board) General Waste Discharge Requirements for Discharges from Irrigated Lands Order No. R3-2021-0040 (Ag Order 4.0).

Background

The Porter-Cologne Water Quality Control Act (Porter-Cologne) charges the State Water Board and the nine Regional Water Quality Control Boards with enforcing California's water quality laws. (Wat. Code § 13000.) Under Porter-Cologne, Regional Boards develop Basin Plans, subject to State Water Board approval, which designate water quality objectives for pollutants to protect beneficial uses of water in the Basin Plan's jurisdiction. (Wat. Code §§ 13240–13245.) Additionally, Porter-Cologne requires Regional Water Quality Control Boards regulate both point-source and non-point source discharges through a permitting process to achieve compliance with the Basin Plan. (Wat. Code § 13263.) The Central Coast Regional Board's Ag Order 4.0 is one such general permit.

Ag Order 4.0

The Central Coast Regional Board adopted Ag Order 4.0 on April 15, 2021 after four years of deliberation and public participation. Ag Order 4.0 is the fourth iteration of the Central Coast Regional Board's attempt to regulate nonpoint source discharges of pollutants from irrigated agriculture in the Central Coast region. Specifically, Ag Order 4.0 sought to minimize nitrate discharges to groundwater, nutrient discharges to surface water, toxicity in surface water from pesticide discharges, sediment discharges to surface water, and protect riparian and wetland habitat.

Most relevant to Petitioners concerns, Ag Order 4.0 departed from previous Ag Orders by setting enforceable standards for nitrogen. Prior Ag Orders relied on voluntary "management practice implementation approach without clear and enforceable requirements." Instead, Ag Order 4.0 set numeric standards and timetable for nitrogen application and nitrogen discharge to groundwater below agricultural lands. And, if growers subject to Ag Order 4.0 violate the applicable standards, the Central Coast Regional Board would be able to initiate an enforcement action.

After the Central Coast Regional Board adopted Ag Order 4.0, environmental groups and agricultural interests filed petitions to the State Water Board seeking review of Ag Order 4.0. The State Water Board announced it would review Ag Order 4.0 on its own motion, pursuant to Water Code section 13320, subdivision (a) and California Code of Regulations, title 23, section 2050.5, subdivision (c). Then, after a hearing on September 20, 2023, the State Water Board adopted WQO 2023-0081.

In doing so, the State Water Board remanded Ag Order 4.0 to the Central Coast Regional Board because the use of numeric standards for nitrogen application and discharge was inconsistent with the State Water Board's precedent, Water Quality Order 2018-0002 (Eastern San Joaquin Order). In the Eastern San Joaquin Order, the State Water Board declined to use numerical standards for nitrogen application

and discharge because it was “premature at this point to project” the utility of numerical standards as a regulatory tool. The State Water Board thus applied Eastern San Joaquin Order as precedent in Order 2023-0081 and eliminated the numeric standards for nitrogen application and discharge, and prohibits the Central Coast Regional Board from using numeric standards as the basis for bringing enforcement actions. Instead, the Central Coast Regional Board can only use numeric standards “for the limited purpose of requiring additional education for growers who exceed the [nitrogen] target.”

Petition for Writ of Mandate

The Petitioners filed their petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 and Water Code section 13330. Petitioners assert five causes of action against the State Water Board, alleging that Order 2023-0081 violates Porter-Cologne, the State Antidegradation Policy and the State Nonpoint Source Policy. First, Petitioners allege that Order 2023-0081’s removal of numeric standards is unlawful because it violates two key elements of the State Nonpoint Source Policy. Second, Petition-

ers allege that the State Water Board unlawfully amended the Nonpoint Source Policy by prohibiting the Regional Boards from imposing regulatory requirements for nitrogen discharge from irrigated agriculture. Third, the Petitioners allege that Order 2023-0081 is unlawful because it does not make any findings consistent with the State Antidegradation Policy. Fourth, the Petitioners allege that Order 2023-0081 violates Porter-Cologne by failing to adopt requirements consistent with the Basin Plan. And fifth, the Petitioners allege that Order 2023-0081 violates Porter-Cologne because does not make findings regarding environmental justice considerations and tribal impact considerations required by law.

Conclusion and Implications

Notably, agricultural interests also challenge Order 2023-0081 in *Grower-Shipper Association of Central California, et al., v. State Water Resources Control Board, et al.*, (Sac. Super. Ct., Case No. 23WM000092). The State Water Resources Control Board has not yet responded to the petitions for writ of mandate in either case, and it is not yet clear whether the court will consolidate the cases. (Nico Chapman, Sam Bivins)

JUDICIAL DEVELOPMENTS

DISTRICT COURT HOLDS SUBJECT MATTER JURISDICTION UNDER THE CLEAN WATER ACT IS INDEPENDENT OF THE MERITS OF THE CLAIM

Inland Empire Waterkeeper v. Corona Clay Company, ___F.Supp.4th___, Case No 10-26-2023 (C.D. Cal 2023).

The U.S. District Court for the Central District of California recently affirmed its subject matter jurisdiction to hear federal Clean Water Act citizen suits in situations where the existence of jurisdictional waters is disputed. The case illustrates the distinction between jurisdiction to hear a controversy and the necessary elements of a claim of violation of permit requirements of the Act. In *Inland Empire Waterkeeper v. Corona Clay Co.* the court addressed a defense motion under FRCP 12(b)(1) to dismiss the case on grounds that the receiving Creek was not “waters of the United States” (WOTUS). The situation illustrates the perils of proving and defending cases when the underlying law itself is changing.

Background

The citizen groups filed their original complaint in 2018. They asserted that the Corona Clay Company’s operations that crushed and re-purposed used clay tile and brick were polluting a creek located offsite and downhill and thence a river it entered, with storm-water runoff. Plaintiffs alleged the Defendant Clay company was violating a National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharge.

At first, Plaintiffs lost at trial. However, on appeal, the Ninth Circuit reversed based on the decision of the Ninth Circuit in 2018 that had held that discharges to groundwater via wells that were shown to flow through the ground to the ocean could be classified as requiring NPDES permits. See *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737, 2018 U.S. App. LEXIS 8131 (9th Cir. Haw., Mar. 30, 2018). The Ninth Circuit vacated that judgment and remanded on November 5, 2021, for proceedings consistent with an intervening Supreme Court ruling, *Cnty. of Maui v. Hawaii Wildlife Fund*, 140

S. Ct. 1462, 206 L. Ed. 2d 640 (2020). See *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 826 (9th Cir. 2021). The Court denied Plaintiffs’ second Motion for Summary Judgment on August 4, 2022. However, Plaintiffs won at retrial.

The trials of the case itself appears to have been significantly affected with the historic changes in the issue of what discharges are covered as National Pollutant Discharge Elimination System violations, complicated by discovery process that included a defense admission that water from its operational runoff would indirectly reach the Santa Ana River. In the Supreme Court’s 2020 *County of Maui* decision it was held that the federal Clean Water Act (CWA) only required an NPDES permit when there was a direct discharge from a point source of pollutants that reached navigable waters after traveling through groundwater if that discharge was the functional equivalent of a direct discharge from the point source into navigable waters. The case was originally filed when a broader set of discharges had been held to warrant a permit.

At the District Court

The District Court described part of the issue as follows:

Shortly after final judgment issued in this case, the Supreme Court held that an NPDES permit is required only when discharge from a point source flows directly into navigable waters, or when there is “functional equivalent of a direct discharge.” *Cnty. of Maui*, 140 S. Ct. at 1468. An emission of polluted water is therefore a “discharge” for CWA purposes only “when a point source directly deposits pollutants into navigable waters, [**24] or when the discharge reaches the same result through roughly similar

means.” Id. at 1476. “Time and distance are obviously important,” but there are “too many potentially relevant factors” to allow a bright-line test...

When the case was remanded for a second trial, a dissenting judge on the appeals panel opined:

The change in law affected not only the jury instructions, but also the partial summary judgment, which were premised on the discharge. The parties deserve the ability to address whether the “indirect” discharge admitted by Corona is the “functional equivalent” of a direct discharge into the waters of the United States, or whether that required discharge can otherwise be established. As we did in [similar circumstances in County of Maui, we therefore vacate the judgment below and remand for further proceedings in light of the Supreme Court’s intervening opinion. [*837] See *Cnty. of Maui*, 807 F. App’x 695, 696 (9th Cir. 2020) (order). *Inland Empire Waterkeeper v. Corona Clay Co.*, 17 F.4th 826, 836-837

Subject Matter Jurisdiction

According to the District Court decision reviewed here, after the second trial and a finding of liability, the defense moved for a dismissal of the case and asserted the court lacked subject matter jurisdiction under FRCP 12(b)(1). Their theory, according to the court, was partially dependent on the Supreme Court’s holding earlier this year in the second *Sackett* saga decision. [*Sackett v. Environmental Protection*

Agency, 598 U.S. 651 (2023).] Defendant asserted that the creek involved is not WOTUS. However, the second *Sackett* case dealt almost exclusively with wetlands and when they can be considered WOTUS, not with creeks.

The court’s opinion emphasizes that the issue for a dismissal motion under FRCP 12(b)(1) is restricted to whether the court has authority to hear a case. Merits of the dispute are not decided, only whether the statute vests the District Courts with jurisdiction over Clean Water Act violation claims by citizen groups. Here the court had no difficulty citing and pointing to express authority to do just that:

Citizens can commence a civil action under the CWA against any party who is alleged to have violated an effluent standard or limitation under specified statutes. [citing 33 U.S.C. § 1365(a)(1)] Thus it refuses to delve into the issue of whether the disputed Creek is legally WOTUS.

Conclusion and Implications

The case opinion failed to answer the question of whether the defendant’s admission early on of an indirect connection of its runoff water with the Santa Ana River (which would require downhill over or underground water flow, and then flow of water in the disputed Creek until it reached the river) was ever revisited by either the court or the jury during the second trial.

Hearings on remedy remained to be held at the time the 12(b)(1) motion was decided. It is not clear how or whether the Creek’s status as a WOTUS is a continuing possible issue on a potential appeal. (Harvey M. Sheldon)

DISTRICT COURT ALLOWS CLAIMS TO PROCEED AGAINST WISCONSIN PRISON FOR EIGHTH AMENDMENT AND SAFE DRINKING WATER ACT VIOLATIONS

Trais Fernandez Haire v. Warden Randall Hepp, et al., ___F.Supp.4th___,
Case No. 23-C-1073 (E.D. Wis. Oct. 26, 2023).

The United States District Court for the Eastern District of Wisconsin recently screened a complaint brought by an incarcerated person against a warden, which alleged that drinking water at the prison, which exceeded maximum contaminant levels, violated the inmate's civil rights under Section 1983. The District Court screened the complaint for compliance with the "well-pleaded complaint" rule and allowed the complaint to continue, in part.

Factual and Procedural Background

Plaintiff Trais Haire is currently incarcerated at Waupun Correctional Institution in Wisconsin. Haire alleges the drinking water at the prison is contaminated with toxic radium, lead, bacteria, and rust. He alleges that the warden has not done anything to resolve the issue; and therefore, he does not have access to clean drinking water at the institution. Haire also alleges that the contaminated water he has been drinking since 2021 has been causing severe stomach pain and might cause cancer. Haire filed a Section 1983 claim against Defendants Warden Randall Hepp and others, alleging that the defendants: (1) knew drinking water was above maximum contamination levels under the Safe Drinking Water Act and (2) did not take necessary steps to protect inmates' health from these hazards despite numerous calls for a remedy in violation of the Eighth Amendment.

Section 1983 allows citizens to file claims against the government for "deprivation of any rights, privileges, or immunities" secured by the Constitution or other U.S. laws (state or federal law). A successful claim needs to articulate two elements, (1) that the conduct at issue was committed by a person acting "under the color of law." and (2) that the conduct actually deprived the plaintiff of a protected right, privilege or immunity. A compliant must also meet the "well-pleaded complaint" guidelines, which require adequacy and logical reasoning. As long as a complaint alleges claims with factual content adequate

enough for the court to draw "reasonable inferences," the complaint will pass the "well pleaded complaint" requirement.

The court has a duty to review any complaint in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity, and to dismiss any complaint or portion thereof if the prisoner has raised any claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. During the screening process for Haire's complaint, defendants alleged Haire failed to state a proper claim for relief.

The District Court's Decision

Eighth Amendment Claim

The court first examined Haire's Eighth Amendment claim. To state a "conditions of confinement" claim under the Eighth Amendment, a plaintiff must allege that: (1) confinement conditions are so adverse that they deprive the incarcerated person of basic life necessities, like drinkable water, ventilated air, etc., and (2) the defendant did nothing to effect or change those conditions despite knowledge of a substantial risk of serious harm.

The court found that the plaintiff satisfied this requirement by alleging that Warden Hepp had direct knowledge of the contaminated drinking water, from Haire's numerous complaints to him, with no resolution of the issue. Additionally, while Haire was forced to drink the water and allegedly suffered severe stomach pain and the possibility of cancer from the contaminated water, Warden Hepp worked as the prison warden and did nothing. With the alleged facts showing Warden Hepp had knowledge and refused to correct the issue, the court held that the complaint satisfied all requirements of the well-pleaded complaint rule for a claim under Section 1983.

Safe Drinking Water Act Claim

The court next considered whether Haire had a right to sue under the Safe Drinking Water Act. The Safe Drinking Water Act provides private people with the right to seek injunctive relief for the any failure to meet the federal safe drinking water standards. The prison water was allegedly contaminated with toxic radium, lead, bacteria, and rust, which are all in violation of the Safe Drinking Water Act standards. Haire communicated these concerns to Warden Hepp, thus giving him knowledge of the issues, but no changes occurred. Again, the court found that Haire sufficiently alleged facts satisfying the well-pleaded complaint rule for a claim under the Safe Drinking Water Act.

Despite Haire's ability to continue in suit against Warden Hepp for the drinking water conditions, the court did not find any facts alleged in the complaint that supported the plaintiff's same claims against any other defendants. No allegations stated that the remaining defendants knew of the issues or contributed

to their continuance in any way. The court held that simply stating that an employee at the institution was "assigned to the prison district" for compliance purposes did not meet the threshold needed to state an adequate complaint against them.

Therefore, the District Court held that Haire may proceed on the Section 1983 action against Warden Hepp for alleged violations under the Safe Drinking Water Act and Eighth Amendment, but all other claims and defendants were dismissed.

Conclusion and Implications

This case upholds the foundational requirements of a Section 1983 claim as well as the standards for well-pleaded complaints, even when the plaintiff is an incarcerated person. This case also highlights the use of Section 1983 in an institutional setting to address allegations of drinking water contamination. The court's ruling is available online at: <https://casetext.com/case/haire-v-hepp> (Elleasse Taylor, Rebecca Andrews)

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