

# EASTERN WATER LAW™

## & POLICY REPORTER

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## WATER NEWS

## NEWS FROM THE WEST

In this month's News from the West we first report on regulatory efforts by the State of Washington assessing water use efficiency regulation and administration. We next report on a large-scale water rights acquisition by the State of Colorado's Colorado River Conservation District to assist in hydroelectric power generation. Finally, we report on regulations in California by the State Water Resources Control Board authorizing direct potable water reuse, converting wastewater to high quality drinking water.

### **Washington State Auditor Issues Report Assessing State Department of Health's Water Use Efficiency Regulations and Administration**

Recently, the Washington State Auditor conducted an audit of the Washington State Department of Health's (DOH) water use efficiency program. The audit considered the effectiveness of DOH's water use efficiency regulations and administration of municipal water suppliers.

#### **Background**

Water systems serving more than one residence are generally referred to as "public water systems." RCW 70A.125.010. Public water systems serving more than 15 residential connections, and other types of uses, are referred to as "Group A" water systems under Chapter 246-290 WAC and also "municipal water suppliers" under RCW 90.03.015. In 2003, the Legislature enacted what is known as the "Municipal Water Law" (MWL). As part of the MWL, the Legislature required water efficiency requirements for municipal water suppliers. The Legislature stated, in pertinent part, that:

It is the intent of the legislature that the department [of health] establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability.  
RCW 70A.125.170(1).

The Legislature directed DOH to enact rules to implement water use efficiency measures, including conservation planning requirements, water distribution leakage standards, establish minimum requirements for water conservation performance reporting, and utilize existing mechanisms and simplified procedures to minimize the cost and complexity of implementation. RCW 70A.125.170(4). By 2007, DOH adopted an amendment to Chapter 246-290 WAC (Part 8) to address water use efficiency.

#### **The Report Assessing Water Use Efficiency**

On December 19, 2023, the Washington State Auditor issued its report assessing DOH's water use efficiency regulations and administration. The audit focused on municipal water suppliers with 15 or more residential connections. The audit had three major findings. First, DOH's database of municipal water suppliers is not accurate. Second, most of the water use efficiency data DOH maintains is incomplete and not reliable. Third, smaller municipal water suppliers are finding compliance with DOH's water use efficiency rules more burdensome and can use additional outreach.

#### **Inaccuracy and Insufficiency of the Information**

The audit found that DOH's inventory of municipal water suppliers is not accurate and complete. The audit found that DOH maintains multiple datasets and that its current data configuration makes it difficult to identify which entities must provide water efficiency data. Furthermore, the audit found that DOH's data did not contain accurate contact information for all systems. Therefore, without an accurate dataset to track all the municipal water suppliers, DOH is unable to easily inform water system operators about tracking, reporting and noncompliance.

Of the data reported by municipal water suppliers, the Auditor found much of the data to be incomplete or otherwise unreliable. The audit found that DOH's reporting form does not request all the information

that its rules require. Moreover, its form allows municipal water suppliers to submit reports that do not include all necessary information. The audit found that there was unreported or unreliable data for 63 percent of the 1,917 water systems considered under the audit. The audit found that an additional 17 percent of the water systems had reasonable data and noncompliance water loss. The audit also stated that DOH does not sufficiently monitor its data.

The audit found that small water systems were less likely to be fully metered and less likely to be compliant with water efficiency standards. The audit stated that small municipal water suppliers may lack funding for administrative support to provide meter and leakage information. The audit identified that the water efficiency rules are more burdensome on small water systems and encouraged DOH to conduct additional outreach to provide more assistance to small water systems. Furthermore, the audit encouraged the consideration of the American Water Works Association process to improve water use efficiency.

The audit recommended specific changes to DOH's operations and larger programmatic changes to the Legislature. The audit recommended that DOH prepare a strategic workplan to improve its intake and database systems; including improved data management, more accurately identifying which systems require metering, developing methods to update contact information for operators, website intake, outreach to the regulated entities, and develop systems to alert the agency of noncompliant systems. On a larger programmatic scale, the audit recommended that the Legislature authorize DOH to lessen the impact on small municipal water suppliers below a certain size to have less burdensome reporting requirements and to consider transferring "all conservation planning and implementation associated with the water use efficiency portion of the law" to the Department of Ecology (Ecology).

In its response letter to the State Auditor, DOH explained that it has begun working to modernize its data systems considering the findings of the audit.

## Conclusion and Implications

At the time of writing this article, the Legislature is considering funding a study of whether it should transfer water use efficiency requirements from DOH to Ecology. Considering the audit's findings, DOH, Ecology, the Governor's office and the Legislature are

discussing how to address the issues identified to meet the larger intent of the Municipal Water Law to "ensure efficient use of water." For more information, see: Office of the Washington State Auditor, Performance Audit, Assessing the Effectiveness of Washington's Water Use Efficiency Regulations, Dec. 19, 2023, Report No. 1033620, available online at: [https://sao.wa.gov/sites/default/files/audit\\_reports/PA\\_Effectiveness\\_Washington\\_Water\\_Use\\_Efficiency\\_Regulations\\_ar-1033620.pdf](https://sao.wa.gov/sites/default/files/audit_reports/PA_Effectiveness_Washington_Water_Use_Efficiency_Regulations_ar-1033620.pdf)

(Jessica Kuchan)

## Colorado River Water Conservation District Completes Landmark Purchase of Large-Scale Water Rights

In December 2023, the Colorado River Conservation District entered into a \$98.5 million deal with Xcel Energy to buy the Shoshone Generating Station plant's senior water rights on the Colorado River. The River District will then lease the rights back to Xcel so the plant can continue to generate hydropower. The River District, along with the Colorado Water Conservation Board (CWCB) undertook this transaction as a way to ensure some security of the Colorado River's flows in the coming years.

## History and Background

The Colorado River District is a quasi-governmental agency created by the state legislature in 1937 that exists to protect the Colorado River and its tributaries. The Xcel Shoshone Generating Station is a hydroelectric plant located just east of Glenwood Springs on the Colorado River. The plant was constructed in the early 1900s and has been in operation since; it currently provides power for 15,000 regional users. The River District has been eyeing these water rights for years, but up until now, Xcel had no interest in selling.

These water rights are so coveted because they are some of the oldest water rights directly on the Colorado River. To operate, the plant owns two water rights: a 1905 right for 1,250 cubic feet per second (c.f.s.) for power, mining, milling, manufacturing, and other purposes; and a 1956 right for 158 c.f.s. for generating electricity. These rights are especially important because they are nonconsumptive—the plant diverts water, runs it through its hydropower system, and then returns it to the river. Because the use is

nonconsumptive the water is available to downstream users in both free river conditions and when the plant is operating and calling. And because the right is senior, the plant can place calls on the Colorado River from users upstream to ensure that the plant is receiving the full amount it's entitled to divert. The "Shoshone Call" comes on most years and ensures a certain amount of water remains in the Colorado River below the power plant. Thus, this plant has hugely positive effects on the river system for its downstream users, industries, and ecosystems.

Agriculture and recreation, both of which are critical in western Colorado, flourish thanks to the regularity of flows provided by the Shoshone power plant. The Grand Valley Project, located downstream, east of Grand Junction is a massive agricultural operation that irrigates over 40,000 acres of land. The Cameo Call, placed by the Grand Valley Project, is one of the largest calls on the Colorado River and its tributaries, affecting thousands of water rights each year. This area is known for its agriculture: Palisade peaches, wineries, and grains for livestock all come from this area. Steve Child, the Pitkin County Commissioner, was quoted in the Colorado Sun as saying this deal:

. . .would guarantee there's going to be water available for Western Slope agriculture in the mainstream of the Colorado Basin. . .[T]o me, it's as close as you could come to a guarantee that we could keep irrigated agriculture going in this part of Western Colorado.

Recreation is also a large part of Western Colorado's economy. According to the Outdoor Industry Association, the outdoor recreation economy in Colorado generates roughly 130,000 jobs and \$13.9 billion per year, with around three million annual participants. A large portion of these recreational activities are river-based such as rafting, kayaking, and flyfishing. When water levels in the Colorado River are too low, companies cannot take people on raft rides or fishing tours.

Aside from industries, the flows also benefit endangered species protected by the Upper Colorado River Endangered Fish Recovery Program. This program is a partnership of government agencies and interest groups, and it exists to protect critical habitat along the Colorado River for four endangered species in the

Upper Colorado River Basin: the humpback chub, the bonytail chub, the Colorado pikeminnow, and the razorback sucker. Sufficient flows in the river provide a suitable habitat for the fish. In addition to providing habitat, higher flows also reduce the effects of pollution in the river. With more water, the concentration of pollutants lowers, which in turn helps protect wildlife.

### **River District Purchase**

Because of the myriad benefits, the River District purchased these rights to protect against future uncertainty in the river's flows. For instance, if Shoshone were to shut its doors, it could sell its rights to an individual or entity that will put the water to consumptive use, or worse, sell the rights to a Front Range water provider that would fully remove them from the Western Slope. But Xcel currently has no plans to shut down the hydropower plant and therefore had little interest in a full sale to the River District. The parties therefore arrived at a unique solution: the River District will purchase Xcel's Shoshone water rights and permanently lease them back to the plant. If and when Xcel shuts down the plant, the River District will simply stop leasing the water rights and the plant will cease operations.

Aside from the lease, the sale does not come without further conditions. The River District must obtain an instream flow agreement with the CWCB that authorizes the board to use the plant's rights for instream flow purposes when the plant isn't operating. Another condition is that the parties must successfully obtain a decree in water court that changes the water right to allow for instream flow uses. These water court cases will no doubt invite stringent opposition and likely will take many years.

With a price tag of \$98.5 million, the River District needed to source some funding from outside sources. The River District will allocate \$20 million towards the price, a coalition of nineteen local governments and water entities will contribute \$10 million, the coalition requested \$20 million from the State, and the rest of the funding is hoped to be secured by 2027.

### **Conclusion and Implications**

The signing took place at the Hotel Colorado in Glenwood Springs in front of a gathering of specta-

tors and officials. At the signing, state representative Marc Catlin, who is also the vice president of the River District board, said, “How does history feel? It feels pretty good today, doesn’t it?” Perhaps this history will serve as an example for future conservation-based transactions between public, quasi-public, and private entities.

Water resources in the Colorado River basin are only becoming scarcer. Because Colorado utilizes a strict application of the prior appropriation doctrine to administer its water rights, groups like the River District or CWCBC looking to conserve water cannot simply file for new rights in water court as a means to lessen the uncertainty of future flows. While acquiring new rights certainly has its benefits, it is far preferable to obtain old rights than new ones. That makes purchasing old rights difficult, expensive, or both. This method of purchasing rights to lease them back to the owner may become a blueprint for conservation tactics in the future—making history, indeed. (Lauren Hoover, John Sittler)

## **Direct Potable Water Reuse Regulations Adopted for Treating Wastewater into High Quality Drinking Water in California**

On December 19, 2023, the California State Water Resources Control Board approved regulations authorizing direct potable water reuse, converting wastewater to high quality drinking water. The adoption of these regulations supports California’s ongoing efforts to improve the state’s resiliency to a changing climate, including hotter and drier conditions, in order to strengthen the state’s water supplies.

### **Background**

As part of Governor Gavin Newsom’s directive to California State Agencies to develop a comprehensive and resilient water portfolio, the development and approval of comprehensive regulations authorizing and governing direct potable water reuse is another significant step in securing water sustainability into the future for California. The State Water Resources Control Board announced its proposed regulations to allow for direct potable reuse on July 11, 2023. The development of the regulations being an important element of Governor Newsom’s Water Supply Strategy seeking to adapt California to a hotter and drier future.

### **Regulation Development**

The regulations establish the nation’s most advanced direct potable water standards, resulting in a water supply that meets or exceeds the current drinking water standards, which often results in a water supply that is cleaner than many existing drinking water sources. The regulations follow years of work by the State Water Resources Control Board’s Division of Drinking Water and work by numerous scientists and engineers to develop standards that are protective of public health. The proposed regulations released in July 2023 incorporated the recommendations of the expert panel, which support the use of advanced water treatment processes, including multi-barrier treatment processes, that eliminates public health risks from the direct reuse of water to produce finished water that can be consumed by the public with confidence. Gathering and considering public comment, the regulations were revised to take into account feedback from the public, and ultimately adopted unanimously in December 2023.

### **Regulation Overview**

The newly adopted regulations authorize and permit a direct potable reuse project utilizing municipal wastewater for the purpose of augmenting public water drinking supplies. Direct potable reuse projects must be separately permitted and the system operator must be specifically certified to operate the potable reuse system. The regulations establish certain requirements managing the source wastewater, as well as providing for strict pathogen controls. This includes the requirement that for each identified pathogen, a minimum number of treatment processes be implemented to assure removal of those specific pathogens. Additionally, treated water must be disinfected prior to distribution in a public water system. Further, the regulations require the development and maintenance of a Water Safety Plan and establishes an Independent Advisory Panel. Finally, the newly adopted regulations mandate that a Consumer Confidence Report be prepared annually.

### **Impact of Adopted Regulations**

With the adoption of regulatory processes and standards for implementing direct potable reuse, California is better equipped to meet the goals stated in the state Water Supply Strategy, including the reuse

of 800,000 acre-feet of water by year 2030 and 1.8 million acre-feet by 2040. Direct potable reuse of water makes available clean drinking water, supplies it at a rate much faster than traditional indirect potable reuse, contrasting hours versus months to years to achieve wastewater reuse. Implementation of direct potable reuse not only provides the benefit of stretching limited water supplies, but affords communities financial benefits through energy savings and efficient management of environmental impacts.

### **Conclusion and Implications**

As the impacts of a warming and drying climate are impacting California's water supplies, introducing

direct potable water reuse into the available tools for water purveyors is a significant step in establishing cost effective and more environmentally sustainable climate-resilient water supplies. Leading the nation with the most advanced standards, California continues its commitment to develop strategies and resources to minimize the risk of drought and improve flexibility for water purveyors to manage their water supplies and stretch those limited supplies to create greater resiliency through pure, safe, and wholesome drinking water supplies and supports California's resilient economy. For more information, see: [https://waterboards.ca.gov/press\\_room/press\\_releases/2023/pr20231219-dpr-regulations-adoption.pdf](https://waterboards.ca.gov/press_room/press_releases/2023/pr20231219-dpr-regulations-adoption.pdf) (Micheline Fairbank, Derek Hoffman)

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**LEGISLATIVE UPDATE**

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**HYDROELECTRIC POWER AND ENDANGERED SPECIES:  
CONGRESSMAN JOINS SPONSORSHIP OF THE “DAMN ACT”  
REGARDING SETTLEMENT IN THE COLUMBIA RIVER SYSTEM  
OPERATIONS LITIGATION**

Idaho Congressman Russ Fulcher joined Representatives Dan Newhouse (WA), Cathy McMorris Rogers (WA), Lori Chavez-DeRemer (OR), and Cliff Benz (OR) in introducing the Defending Against Manipulative Negotiations Act (DAMN Act) (Act) on January 24, 2024 in response to the U.S. Government Commitments (Commitments) in support of the Columbia Basin Restoration Initiative (Initiative). The Commitments are the centerpiece of a joint motion for stay of the three decades’-long Columbia River System Operations (CRSO) litigation pending in federal District Court in the District of Oregon regarding ESA protection and restoration of listed salmonids.

**Background**

The DAMN Act is a product of regional frustration over the Commitments negotiation process. Stakeholders reliant on the Lower Snake River Dams (Ice Harbor, Lower Monumental, Little Goose, and Lower Granite—the LSRD) assert that they were effectively deprived of meaningful opportunity to participate in the negotiations, if allowed to participate at all. Members of Congress are equally concerned because the Commitments issued absent Congressional input or oversight despite containing various federal obligations, including the proposed expenditure of over \$1 billion in funding for fish and habitat restoration in the Columbia River Basin and the funding and completion of several studies exploring the replacement of LSRD-related benefits (e.g., hydropower generation, transportation, and water supply) so that the LSRD may be breached in the future—an action (breaching) that can only occur by act of Congress given the Congressional authorization of the construction of the dams in the first place. The Biden administration, through the Commitments, seemingly wrote a check and consented to a plan of action that the administration, in and of itself, cannot do.

**The DAMN Act**

In response, Representatives Newhouse, McMorris Rogers, Chavez-DeRemer, Benz, and Fulcher introduced the Act expressly prohibiting the use of federal funds to: (a) study LSRD benefits replacement alternatives, or take any action ultimately leading to the modification or removal of the LSRD; and (b) support or implement the Initiative as detailed in the Commitments. The Act promises to be one of many pieces of legislation seeking to neuter the Commitments, in part, due to their alleged “closed door” and “back room” creation.

Whether and how hydropower generation, barging/transportation, and water supply (including agricultural water supply) benefits of the LSRDs can meaningfully be replaced is an interesting, and for some, ironic question. The Biden administration and the state legislatures of Oregon and Washington have been particularly aggressive at mandating the development and use of “green” energy (that which is not fossil fuel or nuclear-based). This alone, it seems, is a major hurdle to overcome in the Pacific Northwest Region where approximately 80 percent of the electricity generated comes from hydro sources (at least in terms of Bonneville Power Administration supply). Approximately 10 percent is sourced from wind, and less than 1 percent comes from solar.

Wind and solar sources are far more fickle and less reliable than hydro—what “green” sources of energy can be developed and implemented to replace what is otherwise an existing and widely-used carbon free “green” source of energy in the region? And while, hydropower generation certainly can have adverse effects on migratory fish species, wind and solar likewise come with their own environmental baggage above and beyond seasonal challenges and reliability issues (e.g., terrestrial and avian wildlife concerns, and heavy and strategic metals use concerns).

Transportation and water supply questions are no less concerning or ambitious. Barging on the



Columbia and Lower Snake rivers between Portland, Oregon and Lewiston, Idaho is undisputedly the most cost-effective method of commodities shipping/transportation in the region—significantly cheaper than rail and overland truck. Existing highway and rail corridors are narrow and congested—replacement of barging will likely require the whole cloth construction of entirely new highway and rail systems nearly as ambitious (and certainly more costly) than the initial construction of what currently exists. And what of the many thousands of acres of irrigated agriculture that are reliant on the water elevations and pools provided by the LSRD—at what cost are those pumping plants retrofitted?

### **Conclusion and Implications**

Clearly, unless benefits replacement studies are conducted, potential answers and solutions remain

nebulous and ethereal. But, the trouble with the Commitments from the perspective of many in the region is their result-oriented foundation. The Commitments seemingly assume dam-breaching is a foregone conclusion as opposed to serving as a platform for sound cost-benefit evaluation that then intelligently informs future discussion of all alternatives involving salmonid species conservation and recovery. Whether the Endangered Species Act needle can be threaded is an open question. But even the ESA contains off ramps—it, unlike the Commitments and the dam breaching premise they support, does not mandate species conservation and recovery no matter the cost. Arguably, the Commitments seem to lose sight of this fact.

(Andrew J. Waldera)

## REGULATORY DEVELOPMENTS

### A LOOK AT PFAS SUITS FOR MANUFACTURERS AS EPA BEGINS MORE ACTIVE ATTENTION

On the heels of news that the U.S. Environmental Protection Agency (EPA) is considering regulatory steps that will govern PFAS and has ordered PFAS testing, lawsuits at the U.S. District Court level in New York and New Jersey against DuPont® companies have come down, with mixed results.

#### The New York Decision

In a U.S. District Court in New York (S.D. NY), the Suez water management company sued the four DuPont related entities in December 2020, claiming that as manufacturers of PFAS products, including the coating for Teflon and the fibers for Tyvek®, they had contaminated its water sources for decades and that they should pay for the management company's upgrades to its five water treatment plants in New York. The claims filed sounded in public and private nuisance, and also in negligence.

District Court Judge Lewis Liman's Order is a detailed discourse on the causes of action alleged by Suez against the DuPont entities. It provides a thoughtful rationale why original chemical manufacturers are not liable for injuries resulting from the use or disposal of their products without some conscious involvement or control over that harmful use or disposal.

The opinion starts with a discussion of the concept of causation, which is required to be proven whether the tort claimed is common law nuisance, trespass or product liability.

While Judge Liman criticized Suez's claims against the chemical companies being filed under New York jurisdiction as "barely" meeting requirements, he did agree with the management company that the chemical companies do have enough presence in the state to be sued there. According to the 2020 complaint, the chemical companies had a legal presence in New York.

However, the court was critical of the bare bones nature of allegations the defendants contaminated the environment in New York and caused damages in the form of treatment costs being incurred by

the plaintiff water company. As to both public and private nuisance theory, the judge cites to major PCB and asbestos litigation cases for holding that a manufacturer cannot be responsible legally for all uses put to its product by third-party buyers who wind up allowing the product to enter commerce in ways that do cause harm to persons or property. Even more pointedly, DuPont entities as manufacturers were in no way "causing" illegal entry or insult to property such as to create a "trespass."

Similarly, the court reviews alleged product liability theories put forth in the complaint. It holds that the manufacture of the PFAS products was not, in and of itself, ultrahazardous activity. Even if the PFAS were viewed as themselves "ultrahazardous," their sale in commerce did not give rise to a tort of ultrahazardous activity, because that tort is restricted to inherently dangerous use of land, such as making explosives. [*Suez Water N.Y., Inc. v. E.I. duPont de Nemours & Co.*, 578 F.Supp.3d 511 (S.D. N.Y. 2022).]

#### The New Jersey Decision

The New York federal judge's reported opinion clashes with that of a counterpart suit in New Jersey who allowed Suez's claims against the same chemical companies in the Garden State to go forward in October, 2021. In her order, U.S. District Judge Madeline Cox Arleo (D. NJ) is reported to have found that Suez had sufficiently alleged injuries resulting from contamination to support a public nuisance claim. As to Suez's claims of successor jurisdiction, however, Judge Arleo found there was not enough on the record to decide the issue and ordered jurisdictional discovery. [*Suez Water NJ, Inc. v. E.I. Dupont De Nemours, et al.*, \_\_\_F.Supp.3d\_\_\_, Case No. 2:2020-cv-19906 (D. NJ).]

#### Efforts by the Biden Administration to Address PFAS

Meantime, on the regulatory front respecting PFAS, the Biden White House made an announce-

ment on October 18, 2021 of a multi-faceted, multi-agency approach to PFAS controls. In addition, the Biden EPA has reversed a denial of a petition for testing by Chemours, one of the DuPont companies sued by Suez, of some 54 PFAS that the Trump administration denied as it left office. Petitioners sought reconsideration. On Tuesday, December 28, 2021, Dr. Michal Freedhoff, Assistant Administrator, EPA Office of Chemical Safety and Pollution Prevention, penned a 29-page letter granting approval of the petition to test a total 39 of the 54 PFAS requested. See: <https://files.constantcontact.com/d92abf2c001/04911e22-e9aa-40f3-bbdc-5561297bbe54.pdf>

Dr. Freedhoff has summarized the major points in in her letter as follows:

- **Near-Term Testing Covers 30 of 54 Petition Chemicals**—Under the testing strategy, EPA's first test orders for 24 data-poor categories of PFAS will provide data that cover 30 of the 54 petition chemicals. Seven orders will be issued specifically for petition chemicals, which are in categories that also include 14 additional PFAS identified in the petition. Four orders will be issued for non-petition chemicals, which are in categories that include nine additional PFAS identified in the petition. The initial test orders will include animal tests that measure most of the specific human health related toxicity endpoints identified as a concern by the petitioners (e.g., systemic, reproductive, developmental, thyroid, and immunological toxicity). Subsequent tiers of testing that will be specified in the initial test orders may include additional endpoints (e.g., cancer), depending on the results of the initial tiers of tests and consistent with the TSCA statutory requirement regarding tiered testing.

- **Subsequent Testing May Cover Nine of 54 Petition Chemicals**—An additional nine PFAS identified in the petition belong to one other category included in the Testing Strategy. EPA is conducting more in-depth analyses of the sufficiency of the existing data, which will inform later phases of testing.

- **Mixtures Studies**—EPA is planning to address PFAS mixtures with component-based approaches wherein the toxicity of the product is determined or predicted from the toxicity of individual chemical substances that comprise the mixture, an approach which is consistent with the current state-of-science on PFAS. EPA is proceeding with development and peer review of such methods as specifically applied to PFAS.

- **Human Studies**—EPA is contributing to and reviewing numerous existing ongoing human studies, including studies on potentially exposed workers and communities in North Carolina, and is evaluating how to further advance and expand on these efforts.

- **Analytical Standards**—EPA does not believe it is appropriate to require the development or submission of analytical standards with the initial test orders that will be issued under the Testing Strategy and lacks the ability to order the submission of all analytical standards in the manner requested. Nonetheless, EPA has requested comment on whether to require the submission of existing analytical methods for PFAS under a separate rule-making proceeding the Agency expects to finalize next year.

## Conclusion and Implications

If the testing of the PFAS turns up data or information that affects understanding of the safety or toxicity of some of these specific products, one can foresee future legal battles over the details of the chemistry and whether continued sale or particular use of one or more of them could give rise to tort liability of some sort as to specific kinds of future sales, irrespective of the holding by Judge Liman in New York. For that matter, some form of amended and more particular pleading might succeed in permitting a tort case against DuPont or other manufacturers to proceed. (Harvey M. Sheldon)

## 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

**Jan. 30, 2024**—Guam Waterworks Authority (GWA) agreed to a consent decree with the United States to improve the quality of its sewer system, estimated to cost approximately \$400 million, to address unauthorized overflows of untreated sewage and other violations of the Clean Water Act. The Government of Guam is also a party to the agreement.

The United States filed a complaint alleging that GWA was in violation of provisions of the Clean Water Act and applicable permits by repeatedly discharging untreated sewage from its wastewater collection system and discharging excess pollutants from its wastewater treatment plants. At least 237 sanitary sewer overflows have occurred from GWA's collection system since 2018. GWA has also been implementing Safe Drinking Water Act work and other Clean Water Act work under a 2011 federal court order.

The consent decree requires GWA to minimize overflows, which will have immediate benefits to the island's environment. Untreated sewage from overflows can pose serious threats to human health and damage the environment.

GWA will improve sewer system operation and maintenance programs and implement new requirements for pretreatment of wastewater and to control fats, oils and grease (FOG). Sewer system upgrades will include practices to improve climate change resiliency of pump stations and to consider EPA's Creating Resilient Water Utilities initiative, including the Resilient Strategies Guide for Water Utilities. The settlement also requires enhanced public outreach and engagement to increase transparency around GWA's plans to comply with the agreement and edu-

cate the public on its environmental improvements.

GWA will also develop a feasibility study for secondary treatment upgrades to the Hagåtña wastewater treatment plant, which will include analyses of climate change and sea level rise and be submitted for EPA's approval. This secondary treatment upgrade will be embodied in a subsequent judicial settlement. GWA receives some grant funding from EPA for wastewater and drinking water projects, including \$50 million in Bipartisan Infrastructure Law funding over the past two years.

**Jan. 30, 2024**—The Environmental Protection Agency (EPA) and Justice Department announced that Holly Energy Partners-Operating L.P. and Osage Pipe Line Company LLC have agreed to pay \$7.4 million in Clean Water Act civil penalties and implement corrective measures to settle claims stemming from a pipeline rupture and crude oil spill from the Osage pipeline onto land owned by members of the Sac and Fox Nation in Oklahoma. In addition to payment of the civil penalties, the settlement requires that the two companies complete the cleanup and remediation of the impacted area and take additional steps to prepare for and prevent future spills.

The United States filed its Complaint today in the U.S. District Court for the Western District of Oklahoma along with the notice of lodging of a Consent Decree to resolve the case. In the Complaint, the United States alleges that the two related Dallas-based companies are liable under the Clean Water Act for the crude oil spill that occurred on July 8, 2022. Osage Pipe Line Company owns the 135-mile-long, 20-inch-diameter pipeline that transports crude oil from a tank farm in Cushing, Oklahoma, to the HollyFrontier refinery in El Dorado, Kansas. Holly Energy Partners-Operating is the operator of the pipeline.

The Complaint alleges the spill occurred when a segment of the pipeline ruptured adjacent to Skull Creek about five miles north of Cushing. From the point of the discharge, Skull Creek flows about three more miles before entering the Cimarron River. The

pipeline was operating at the time of the rupture and discharged about 300,000 gallons (7,110 barrels) of crude oil into the creek. The land where the rupture occurred, and the adjacent downstream parcel that the creek runs through, are both allotment lands owned by members of the Sac and Fox Nation.

The companies, the EPA, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA), the Department of the Interior's Bureau of Indian Affairs, and the Sac and Fox Nation responded to the rupture and spill. The companies are continuing cleanup work in Skull Creek under the oversight of the EPA, and the pipeline was returned to operation at reduced pressure under the oversight of PHMSA through its corrective action authority. The Sac and Fox Nation deployed tribal monitors to observe the companies' work at the spill site and monitor for impacts to natural and cultural resources.

In addition to payment of the civil penalties in the Consent Decree, the companies will be required to complete the cleanup and remediation of the impacted area, improve their pipeline integrity management program, provide additional training for all their control room operators, and expand their spill notification efforts for tribal governments with land interests within the footprint of the pipeline. The penalties and remedial measures required by the Consent Decree are in addition to the costs the companies have incurred to clean up the oil spill.

Section 311(b) of the Clean Water Act makes it unlawful to discharge oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines, the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act in quantities that may be harmful to the environment or public health.

**Jan. 24, 2024**—The U.S. Environmental Protection Agency announced that Michael Gagliano agreed to pay a penalty of \$8,000 for violating the Clean Water Act when he discharged fill material into the South Fork of the Coeur d'Alene River at his property in Pinehurst, Idaho.

Beginning in September 2022, Gagliano discharged large rocks below the ordinary high-water mark of the South Fork of the Coeur d'Alene River without a Clean Water Act permit. The unauthorized discharges occurred within the Bunker Hill Superfund

Site. As a result, these discharges likely mobilized highly contaminated sediment and mine tailings frequently found throughout the site. This type of mobilization is often exacerbated by high-flow events following heavy rains or snowmelt.

The unauthorized discharges occurred when the landowner attempted to increase armoring of the riverbank. This activity, especially when combined with similar bank armoring activities throughout a river system, can have dramatic and long-term impacts on ecosystem health and can result in increased riverbank scouring and erosion on adjacent properties.

In addition to paying the penalty, Gagliano agreed to remove the fill material and restore the site prioritizing slope stabilization, erosion reduction, and establishing vegetation along the riverbank.

**Jan. 22, 2024**—The U.S. Environmental Protection Agency announced Joan Bayley, Philip Bayley, and Big D's Beach Cabin LLC of Union, Washington have been ordered by the U.S. District Court for the Western District of Washington to pay a \$250,000 penalty and provide \$33,492 to the Hood Canal Coordinating Council as mitigation for illegal bulkhead replacement work that resulted in the death of chinook salmon.

In August 2017, Mr. Bayley, Ms. Bayley, and Big D's Beach Cabin LLC removed an old, sloped concrete bulkhead along the shoreline of the Hood Canal and replaced it with a new, vertical one. The project, which was performed without the required Section 404 Clean Water Act permit, discharged dredged and fill material, such as dirt, spoil, rock, sand and concrete into the Hood Canal. In August 2020, Mr. Bayley directed contractors to build a stairway adjacent to the new bulkhead and fill the shoreline behind it, again discharging concrete and other fill material in Hood Canal.

The construction projects permanently and negatively changed the patterns of tidal water flow and circulation along the shoreline. These changes advance beach erosion and decrease the overall ecosystem functions of Hood Canal, particularly as a spawning habitat for several species of fish. Construction of the bulkhead also likely increased the pH of the water that came into contact with it, which can kill or injure fish. Mr. Bayley, Ms. Bayley, and Big D's Beach Cabin LLC admitted to the death of endangered Chinook salmon during construction of the bulkhead.

Construction projects within Puget Sound, such as concrete bulkheads, require additional agency and public review to ensure adequate protection and recovery of salmon species and their habitat listed under the Endangered Species Act.

In addition to the \$250,000 penalty, Mr. Bayley, Ms. Bayley, and Big D's Beach Cabin LLC will pay a

\$33,492.10 compensatory mitigation payment to the Hood Canal Coordinating Council, which includes Jefferson, Kitsap, and Mason counties, and the Port Gamble S'Klallam and Skokomish Tribes. The Council will use the funds to create and protect aquatic resources throughout Hood Canal.  
(Robert Schuster)

## LAWSUITS FILED OR PENDING

SF BAYKEEPER FILES SUIT AGAINST THE FISH AND WILDLIFE SERVICE  
SEEKING ESA LISTING OF THE LONGFIN SMELT

On December 22, 2023, environmental interest group San Francisco Baykeeper (Baykeeper) filed suit in the United States District Court for the Northern District of California against the Fish and Wildlife Service (FWS) to list the longfin smelt in the San Francisco Bay-Delta as an endangered species. In October of 2022, the FWS published a petition of a proposed rule to list the longfin smelt as endangered. Under the federal Environmental Species Act (ESA) the FWS had a year to make a final determination on that petition, which it has not released. The suit seeks declaratory relief that the FWS has violated the ESA and injunctive relief compelling the FWS to issue its final determination. A determination to list the San Francisco Bay-Delta longfin smelt as endangered could require greater freshwater flows in the Delta, potentially affecting water supplies across the state. [*San Francisco Baykeeper v. United States Fish and Wildlife Service*, Case No. 23-cv-06601, filed Dec. 22, 2023 (N.D. Cal.).]

### Background

The longfin smelt live in estuaries and bays from the northern California coast to Alaska. The San Francisco Bay-Delta is the largest estuary in the Pacific. Longfin smelt live for roughly two to three years and grow to 3.5 to 4.3 inches in length. According to Baykeeper, the population of the smelt in the Bay-Delta were historically abundant, but field-surveys indicate that the population has significantly declined. The longfin smelt has been listed as a threatened species under the California Endangered Species Act (CESA) throughout its range in California by the California Department of Fish and Wildlife since 2009.

On April 2, 2012, FWS published a 12-month finding on the status of the Bay-Delta longfin smelt (77 FR 19756), which concluded that the population of longfin smelt in the San Francisco Bay-Delta was a valid distinct population segment (DPS) and was warranted for listing under the federal Endangered Species Act. The ESA imposes requirements for the

protection of endangered and threatened species and their ecosystems. Despite determining that listing the longfin smelt under the ESA was warranted, FWS' completion of a proposed rule to include the Bay-Delta DPS was precluded by higher priority actions. As a result, the Bay-Delta longfin smelt was added to FWS' candidate species list.

However, in April of 2021, Baykeeper filed a lawsuit to compel FWS to publish a finding and proposed rule regarding listing of the longfin smelt. This resulted in a settlement with the FWS, which required the FWS to publish a proposed rule to list the longfin smelt as an endangered species. Accordingly, in 2022, FWS noticed a proposed rule to include the DPS on its list of endangered and threatened wildlife species.

Under the ESA, the FWS must take action within one year of publishing a proposed rule that involves determination of a species as endangered or determination of a critical habitat. These options include (i) a final regulation to implement such determination, (ii) a final regulation to implement such revision or a finding that such revision should not be made, (iii) notice that such one-year period is being extended, (iv) or notice that the proposed regulation is being withdrawn together with the finding on which such withdrawal is based. Baykeeper alleges that the FWS took none of the required actions within one year of the proposed rule, which would have been October 7, 2023, and noticed the FWS of the missed deadline and the Baykeeper's intent to bring suit.

### The Complaint

The Baykeeper complaint challenges FWS' purported failures to issue a final rule on the petition to list the longfin smelt DPS and to finalize critical habitat protection for the longfin smelt DPS within the ESA's alleged mandated deadline. The lawsuit seeks declaratory and injunctive relief against FWS; namely, that FWS violated the ESA by failing to timely finalize its proposed rule and a critical habitat designation for the longfin smelt DPS and that FWS

be directed to finalize such rules and issue critical habitat designation by a date certain.

The complaint alleges that there is no reason to extend the decision period given the previous long period of consideration. Additionally, the complaint alleges that the FWS cannot justify finding that a critical habitat for the smelt is not determinable at this time and that no finding can be made that the longfin smelt should not be declared endangered. Baykeeper thus complains that by delaying the listing of the longfin smelt, FWS is denying the species the protections necessary to protect a critically endangered fish. In support of its theories, Baykeeper alleges that longfin smelt population abundance in the Bay-Delta is directly related to the amount of fresh water flowing out of the Delta during the winter and spring, and that declines in outflow result in a decline in fish

abundance, although Baykeeper does not cite to any evidence for that claim.

Baykeeper also seeks additional forms of relief. For instance, Baykeeper requests that the court compel FWS to publish the critical habitat designation or extension in the Federal Register by a date certain. Baykeeper also asks that the court retain continuing jurisdiction to review FWS's compliance with all judgments and orders issued by the court, as well as to grant Baykeeper its attorneys' fees and costs.

### **Conclusion and Implications**

It remains to be seen how Fish and Wildlife Service will respond to Baykeeper's complaint. It is also unclear how the outcome of this case could affect outflows from the Bay-Delta, if at all.  
(Miles Krieger, Steve Anderson)



## JUDICIAL DEVELOPMENTS

## TENTH CIRCUIT REVERSES \$500,000 CLEAN WATER ACT PENALTY AFTER INCOMPLETE APPLICATION OF MAUI FACTORS BY THE DISTRICT COURT

*Pamela Stone et al. v. High Mountain Mining Co. LLC et al.*, \_\_\_F.4th\_\_\_,  
Case No. 22-1340 (10th Cir. Jan. 32024).

On January 3, 2024, a unanimous Tenth Circuit panel reversed a U.S. District Court in Colorado's issuance of a \$500,000 penalty under the federal Clean Water Act (CWA). The reversal was based on the District Court's incomplete application of the seven-part "functional equivalent" test established by the Supreme Court in *County of Maui v. Hawaii Wildlife Fund*. In *Pamela Stone et al. v. High Mountain Mining Co. LLC et al.* the Tenth Circuit Court of Appeals held that the proper application of the seven-part functional equivalent *Maui* test involves considered analysis of all seven factors, not just the factors that are most relevant to the case at hand.

### Background

The Clean Water Act allows individuals and environmental groups to sue alleged violators under the act's citizen-suit provision. (33 U.S.C. § 1365.) Utilizing this provision, Plaintiffs brought a suit alleging that High Mountain Mining violated the CWA when seepage of pollutants from ponds surrounding mining operations flowed into the groundwater and then migrated to the Middle Fork of the South Platte River. This seepage, plaintiffs argued, constituted a discharge without a permit. High Mountain Mining argued that the seepage was not a discharge.

The CWA requires anyone operating a point source that discharges pollution into a navigable stream to obtain from the U.S. Environmental Protection Agency (EPA) a point source discharge permit, but what constitutes a discharge can be difficult to determine. The U.S. Supreme Court concluded in 2020 that a discharge to groundwater can be the "functional equivalent of a direct discharge" in certain circumstances, depending on the interplay of the point source, seepage, ground water, subsurface conditions, and the navigable water, and therefore requires a permit under the CWA. (*County of Maui v.*

*Hawaii*, 140 S. Ct. 1462, 1476 (2020).)

To prove a violation of the CWA, a plaintiff must show that a defendant: (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit. (*Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005).) The Supreme Court in *Maui* instructed lower courts to apply seven nonexclusive geophysical factors to determine whether the connection between the point source and the navigable water could invoke federal regulation at the expense of local or state regulatory regimes. The seven factors are: (1) transit time; (2) distance traveled; (3) the nature of the material through which the pollutant travels; (4) the extent to which the pollutant is diluted or chemically changed as it travels; (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; (6) the manner by or area in which the pollutant enters the navigable waters; and (7) the degree to which the pollution (at that point) has maintained its specific identity. (*Maui* at 1476–77.) The District Court in the case at hand struggled to analyze the first prong of the test, as it engaged in an incomplete functional equivalent analysis and only considered three factors.

### At the District Court

The District Court used three of the *Maui* factors to determine that High Mountain's discharge to groundwater from the unlined Settling Ponds and then to the Middle Fork was the functional equivalent of a direct discharge. The court found the first three factors supported Plaintiffs: transit time, distance traveled, and the nature of the material through which the pollutant traveled. The District Court concluded the remaining factors carried no weight because there was either limited evidence or High Mountain presented no evidence to persuade

the court that the factors should weigh in its favor.

The District Court relied on four categories of evidence to support its factual findings that there was a discharge to groundwater, a hydrological connection, and that the wastewater was a pollutant: a geophysics survey of two of the ponds; inspection and permitting documents addressing the design of the ponds; expert testimony at trial; and water-quality testing. At trial, the District Court determined there was substantial evidence showing that the ponds were designed to leak, and that two of the ponds were not effectively sealed and were discharging into the groundwater below them. The court also found that two other ponds were discharging to groundwater, and High Mountain Mining's inspection reports and permits confirmed the connection between the Settling Ponds and the Middle Fork.

### The Tenth Circuit's Decision

On appeal, the Tenth Circuit Court of Appeals concluded that it was legal error for the District Court to conclude that the unlined ponds were the functional equivalent of a direct discharge, primarily on the first two factors of time and distance. The Tenth Circuit determined that the District Court should have made additional findings on the remaining *Maui* factors, including how much the pollutant is diluted or chemically changed as it travels and the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source:

In light of the complex topography of the Alma Placer Mine and its environs, we hold that it was legal error for the [District Court] to conclude that the unlined Settling Ponds were the functional equivalent of a direct discharge, primarily on the first two factors of time and distance. Although we largely agree with the court's analysis on the first two factors, in the particular circumstances here, the court should have made additional findings on the additional *Maui* factors, including how much the pollutant is diluted or chemically changed as it travels and the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source.

The Court of Appeals went on to state:

Indeed, the facts here are so starkly different from those present in *Maui* that to conclude there was the functional equivalent of a direct discharge largely on the basis of just time and distance is not supportable on this record. This case is one of the "middle ground" cases *Maui* warned about, and one of the few to be resolved post-*Maui*. 140 S. Ct. at 1477. Though transit time, distance traveled, and the materials passed through favored [p]laintiffs, the [District Court] erred by effectively ending the analysis there.

In addressing the additional *Maui* factors in general the Tenth Circuit found the *possibility* that had those factors been addressed a different conclusion by the District Court *might* have been reached:

There is evidence, however, that several of these under-analyzed factors, such as dilution and amount of discharge *might* be important in the context here. In particular, the levels of the principal polluting elements (calcium, potassium, magnesium, and sodium) measured by the Arrakis water-quality sampling study were quite similar when measured at the Columbia Ditch (well upstream of the mine) and the pumphouse (downstream from the mine). If the levels of river pollutants above and below the mine are essentially the same, perhaps there is some mechanism that has kept polluting chemicals in the pond from escaping with the water that ends up in the river. To be sure, we cannot say because the record and analysis are incomplete.

The Tenth Circuit cited to the Supreme Court's warning in *Maui*: that courts should be wary of decisions that:

...create serious risk[ ]...of undermining state regulation of groundwater [*Maui* at 1477] yet that is precisely what the [District Court] did on too thin of a record and analysis.

### Conclusion and Implications

Rather than dismissing plaintiffs' claims for failure to provide sufficient evidence to assess relevant *Maui* factors, the Tenth Circuit has allowed the District Court on remand to reopen the evidentiary hearing in light of the Tenth Circuit's opinion and reconsider

all seven *Maui* factors to determine whether a violation of the CWA has occurred. After a consideration of all seven factors, the District Court may change

its initial conclusion. The Tenth Circuit's opinion is available online at: <https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110977588.pdf> (Lauren Murvihill, Megan Somogyi)

## DISTRICT COURT RULES U.S. COULD ALLOCATE ZERO ACRE-FEET TO DRAINAGE DISTRICT AND DISTRICT BREACHED FEDERAL CONTRACT BY DIVERTING WATER UNDER STATE PERMIT

*United States of America v. Klamath Drainage District*, \_\_\_F.Supp.4th\_\_\_,  
Case No. 1:22-cv-00962-CL (D. Or. Sept. 11, 2023).

In July 2022, the United States of America filed a breach of contract lawsuit against Klamath Drainage District (KDD). The government accused KDD of unauthorized water diversions from the Upper Klamath Lake (UKL) and Klamath River. The United States District Court for the District of Oregon, Medford Division, recently ruled in favor of the U.S., which: (1) interpreted a contract between the U.S. and the KDD in a manner that upheld a decision by the U.S. to allocate KDD zero acre feet of water from the UKL and Klamath River in 2022; and (2) held that KDD's contract with the U.S., along with conflicting federal law, prevented KDD from diverting water under a separate water permit issued to KDD by the State of Oregon. KDD has appealed the decision to the United States Court of Appeals for the Ninth Circuit.

### Factual Background

The Klamath River Basin, encompassing around 12,000 square miles across Oregon and California, is home to the Klamath River Basin Project (Project), established to provide irrigation water and reclaim land for agriculture. KDD, one of the largest districts in the Project, entered into a contract with the U.S. in 1943 to be part of the Project. This contract, under the authority of the Warren Act (43 U.S.C. §§ 523-25), provides KDD with water from the UKL and Klamath River and includes provisions for equitable proration in times of shortage. Additionally, the 1943 contract required KDD to comply with any "rules and regulations" issued by the United States. Finally, in 1977, KDD obtained an independent permit from the state to divert water from the Klamath River.

The controversy emerged when the U.S., following its Drought Plan, allocated no water to KDD in 2022 under the 1943 contract. The Drought Plan was implemented in response to insufficient water supply to meet the needs of Tribal rights, the federal Endangered Species Act (ESA), and the Project's other senior contract holders. The U.S. justified this action by interpreting the Drought Plan as "rules and regulations" incorporated into the 1943 contract. KDD contested this, arguing that the contract guaranteed an equitable share of water and that it could also rely on its state water right if Project water was unavailable.

### The District Court's Decision

The court's ruling in favor of the U.S. rests on several key findings. First, it held that the U.S. Drought Plan was a "rule and regulation" under the 1943 contract despite KDD's argument that the U.S. did not comply with the notice-and-comment requirements of the Administrative Procedure Act (APA). The court deemed the APA irrelevant because it did not exist when the contract was made in 1943 and because such procedures do not apply to matters relating to contracts. Second, the court ruled that the contract's plain language authorized the U.S. to distribute Project water in a manner it found equitable. After considering the hierarchy of priorities, the court held that the U.S. had contractual discretion to allocate no water to KDD.

Finally, the court held that the 1943 contract and federal law gave the U.S. the power to prohibit KDD from diverting water under its permit from the State of Oregon. The court specifically held that KDD's

diversions under the state permit hindered the federal government's ability to operate the Project in compliance with Tribal federal reserved rights and the ESA. Accordingly, KDD's state permit was ruled to be preempted by federal law.

### **Conclusion and Implications**

This decision has raised concerns over its broader implications, such as weakening adjudicatory protection and respect for state authority over water rights. The ruling suggests that federal agencies can effectively override state water rights, an interpretation that some are concerned could lead to increased federal control over state-administered water resources. Additionally, the District Court's approach

brings into question the sanctity of contractual commitments and rights, implying that contracts can be altered by agency policies that may undergo little public review. This aspect of the decision could have repercussions for federal agency accountability and procedural fairness.

The District Court's decision, now under appeal, challenges issues involving elements of western water law, federal-state relations in natural resource management, and the principles governing contractual agreements and administrative procedures. The outcome of this appeal could set a precedent affecting water rights administration and federal intervention in state water resource management across the western United States.  
(Wesley Miliband)



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