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WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

WESTERN WATER NEWS

Water For Sale Across the West Presents Differing Opportunities and Challenges. 155

LEGISLATIVE DEVELOPMENTS

California Assembly Bill Would Add Tribal Water Uses as 'Waters of the State' that May be Protected as 'Beneficial Uses' 157

2024 Utah Water Resource-Related Legislation 158

REGULATORY DEVELOPMENTS

U.S. Bureau of Reclamation Releases Final Supplemental Environmental Impact Statement for the Colorado River 160

California Department of Water Resources Releases Water Plan Update Looking to the Future of Water Resource Management 162

California State Water Board Extends Deadline to Protest Change Petition for DWR's Delta Tunnel Project 163

Idaho Department of Water Resources Modelling Predicts an Irrigation Season Demand Shortfall on the Conjunctively Managed Eastern Snake Plain Aquifer 165

Washington State Department of Ecology Declares Nearly Statewide Drought Emergency 166

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties, and Sanctions 168

Continued on next page

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JUDICIAL DEVELOPMENTS

Federal:

District Court Issues Consent Decree Between Los Angeles Waterkeeper and Steel Company over Alleged Federal Clean Water Act Violation. 172
Los Angeles Waterkeeper v. Tell Steel, Inc., ___F. Supp.4th___, Case No. CV 23-8720-GW-PVCx (C.D. Cal. Mar. 27, 2024).

District Court Orders Payment of Penalties for Failure to Comply with Clean Water Act Consent Decree 174
Upper Chattahoochee Riverkeeper Fund, Inc., at al. v. City of Atlanta, ___F.Supp.4th___, Case No. 1:95-CV-02550-TWT (N.D. Ga. Mar. 28, 2024).

State:

California Superior Court Rules in Favor of the State Water Board's Substitute Environmental Document for Phase I of the SF Bay-Delta Plan 175
State Water Board Case Judicial Council Coordinated Proceedings, Case No. 5013 (Sac Super. Ct, Mar. 15, 2024).

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WWL

WESTERN WATER NEWS

WATER FOR SALE ACROSS THE WEST PRESENTS DIFFERING OPPORTUNITIES AND CHALLENGES

Conflict over water in the West has existed for as long as the West has been irrigated (and likely longer). Mark Twain is alleged to have once said, "whiskey is for drinking, and water is for fighting." But instead of irrigators fighting about ditches, several new disputes in different states highlight a new kind of water fight, one that is sure to shape the future of the West over the next several decades. Water transfers from agricultural to municipal water rights, or any other change in the use of senior water rights can impact the entire stream system. Whether investments and sales should be allowed, what they look like, and how they affect all water users will be a critical issue throughout the next several decades.

Cibola, Arizona

The tiny town of Cibola, Ari. (population 200) recently made national and international news with the transfer of more than 2,000 acre-feet of water from this agricultural outpost to a fast-growing suburb of Phoenix. Although the sale actually occurred in 2018, years of legal battles resulted in Queen Creek, the new owner of the water, not diverting and using its new supplies until last summer. This type of "buy and dry" sale is not new—growing cities need water, retiring farms and other owners of senior water rights are ready to retire, and the resulting sale and transfer from agricultural to municipal use seems to benefit all parties. However, some critics say the transfer of water rights from small towns to cities will eventually lead to economic hardship erasure of small farming communities.

In Cibola, the bigger story that caught the attention of major news outlets was the role that a private investment company, Greenstone Resource Partners, played in the sale. Greenstone originally purchased approximately 500 acres of irrigated land near Cibola beginning in 2013. Greenstone is not a farming entity, but rather a water company that invests in water rights and seeks to sell those to municipalities and other users needing a reliable water supply. After its purchase, Greenstone leased its water rights back to farmers near Cibola to continue growing alfalfa and cotton. But in 2018, Greenstone sold all 2,033 acre-feet to Queen Creek, the fastest-growing suburb of Phoenix, for $11,500 per acre-foot, a $14 million profit.

It then turned around and sold all 2,033 acre-feet of water, previously used to irrigate cotton and alfalfa, to Queen Creek for domestic use in its growing municipality. Several counties, including La Paz County where Cibola is located, sued the Bureau of Reclamation challenging the Bureau's finding that the transfer to Queen Creek would have no significant environmental impact. Although Queen Creek is currently using the water purchased from Greenstone, this case is still active with a recent federal ruling in favor of the counties. Nevertheless, Greenstone has continued its strategy of purchasing agricultural lands and water rights with the goal to later sell those rights to growing cities. Greenstone is currently the largest landowner in another Arizona irrigation district—this strategy of obtaining a controlling interest is not new, and in fact is currently implemented in Colorado by one of Greenstone's competitors, Water Asset Management (WAM).

Western Colorado

The Government Highline Canal diverts out of the Colorado River just upstream of the City of Grand Junction. This 55-mile canal is owned and operated by the Grand Valley Water Users Association and irrigates more than 24,000 acres in western Colorado. WAM, a New York-based investment firm, has been purchasing lands irrigated by the Government Highline Canal for the last several years and is now the largest landowner in the Grand Valley Water Users Association. Like Greenstone, WAM is currently leasing this water back to the farmers where it is used to irrigate the same lands it has for more than 100 years. Community sentiment on WAM is split—some farmers enjoy having a consistent landlord and find that leasing water from WAM is no different than it has been from any other owner; others are more

concerned that WAM could eventually sell its senior water rights to Grand Junction, or a Front Range city, and begin the buy and dry practice in earnest.

Colorado Senate Bill 20-46

The Colorado General Assembly heard these concerns and passed Senate Bill 20-48 in March 2020. This bill created the Anti-Speculation Workgroup to investigate and analyze private equity investment in Colorado water rights. The workgroup was unable to reach a consensus on any type of law or program to discourage investment in water speculation without running afoul of constitutional issues or discouraging investment and flexibility in Colorado's water system. The legislature later introduced a bill in 2022 outlining a framework to investigate, penalize, or block speculative water sales, although the bill did not make it out of committee and the General Assembly has not introduced similar measures in the subsequent legislative sessions. Greenstone and WAM demonstrate a clear appetite for these types of investments, although some municipalities have elected to make these purchases themselves, without an intervening water broker.

City of Aurora

Aurora, a suburb of Denver, recently entered into an agreement to purchase 5,200 acres of agricultural land, including 4,806 irrigated acres, for $80.4 million. Aurora plans to use the water rights from these lands to secure its domestic water supply in times of drought. But this sale is not an outright transfer like the Cibola water rights. Instead, Aurora will lease the water back to the ranchers and only utilize the water rights for municipal use in dry years, and in no case for more than three out of any ten years. Aurora claims this structure will secure the city's water supply while preserving the agricultural lands and avoiding negative externalities from total buy and dry.

But even this "compromise" deal is not without its critics. The Southeastern Colorado Water Conservancy District recently voted to oppose Aurora's deal on the grounds that it allegedly violates a 2003 agreement intended to keep irrigation water rights on the fields. It is unclear whether Southeastern will take any legal action if Aurora's agreement is finalized, although this scenario further demonstrates the ongoing conflict between agricultural and municipal water users throughout the West.

Shoshone Power Plant

The Colorado River Water Conservation District (River District) recently joined the municipalities and venture capital firms with a historic purchase of senior water rights. *See, Colorado River Water Conservation District Completes Landmark Purchase of Large-Scale Water Rights*, 28 W. Water L. & P'lcy Rptr. 75, 75-76 (Feb. 2024). The River District is in the process of purchasing hydropower water rights for the Shoshone Power Plant near Glenwood Springs, Colo. These extremely senior water rights are typically the "calling" right for the Upper Colorado River and therefore control water rights use and development for much of the western part of the state. The River District is seeking to acquire these rights in order to ensure that this water can remain in the river benefiting environmental, recreational, and consumptive users, in the event the power plant is ever decommissioned. The River District signed a $98.5 million deal with Xcel Energy in December 2023 and is currently in the process of obtaining the necessary funding to finalize the deal. In the last several months numerous governmental entities (Eagle, Mesa, and Grand Counties), conservancy and irrigation districts (Ute Water, Basalt Water, Orchard Mesa, Palisa, Mesa County, West Divide, Grand Valley), and municipalities (Rifle, Grand Junction) have combined to pledge more than $8 million towards the purchase. The River District plans to obtain the balance of the funds through its own funds and grants from the state and other entities.

Conclusion and Implications

All western water users seem to agree on a few things—water is scarce, the climate is becoming more arid, and water is more valuable than ever. While vastly different from the agricultural to municipal transfer described above, the River District purchase is yet another example of western water users working on innovative ideas to address their water needs. There is no one-size-fits-all approach, but it is clear that future water needs in the West will require creative solutions. The recent sales described above made national news but actually represent business as usual in the West. Whether these sales will continue, and what they will look like, is up to policymakers, courts, and legislatures throughout the West.
(John Sittler)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL WOULD ADD TRIBAL WATER USES AS 'WATERS OF THE STATE' THAT MAY BE PROTECTED AS 'BENEFICIAL USES'

On February 14, 2024, State Assembly Member James C. Ramos introduced Assembly Bill (AB) 2614. The bill would update the definition of "beneficial use," which currently describes "certain waters of the state that may be protected against quality degradation," including "domestic, municipal, agricultural, and industrial supplies," in order to add tribal water uses. (AB 2614, Leg. Counsel's Digest, § (1).)

Background

The Porter-Cologne Water Quality Control Act (Water Code, § 13000, *et seq*.) (Act) is California's clean water statute, and provides for the creation of regional water quality control boards to serve as agencies with primary responsibility for coordinating and controlling water quality. Under the Act, it is the policy of the state to protect "beneficial uses of the waters of the state."

The Act presently defines "beneficial uses" as follows:

> Beneficial usesof the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.

Only beneficial uses count as "waters of the state that may be protected against quality degradation" under the Act.

At present, the definition of "beneficial use" does not expressly contemplate tribal uses. AB 2614 aims to include tribal uses as beneficial uses under the Act. As of April 23, 2024, the bill has been referred to the Assembly's Appropriations Committee and is pending there.

Assembly Bill 2614

AB 2614 would add tribal water uses to the definition of "beneficial uses" under the Act. In its present form, the bill amends Water Code sections 13000, 13050, 13144, 13181, and 13241, while adding sections 13142.1, 13170.4, and 13243.5.

Among AB 2614's proposed changes, the bill would add certain findings that "California tribal communities have special ties to the bodies of water that have sustained their people, who have suffered from genocide, disease, displacement, and discrimination dating back to European colonization, and therefore tribal water uses must be protected through the statewide program for the control of the quality of all the waters of the state," and further that "allowing for tribal water uses should be a primary factor in determining the highest water quality that is reasonable in all regulatory decisions."

The proposed definition of "tribal water uses" is as follows:

> Tribal water uses means any tribal practice that involves contact with a body of water or use of animals, plants, or fungi that reside in, or are adjacent to, a body of water. A California tribal community that elects not to publicly disclose its tribal water uses may confidentially disclose them to the state board or a regional board pursuant to the consultation provisions of Section 65352.4 of the Government Code. This definition of tribal water uses shall be used exclusively and shall replace all definitions previously adopted by a state agency, including, but not limited to, definitions of "tribal traditional cultural uses" and "tribal subsistence uses."

The bill emphasizes the value of tribal ecological knowledge and would direct state agencies to make resources available for tribal co-management of aquatic resources within both traditional and current tribal lands.

Further, the bill would require any project or regulatory program subject to approval by the state or any regional control board to, within an environmental review and any findings presented, "describe, with both quantitative and qualitative information, how the project or regulatory program will impact tribal water uses." The State Water Resources Control Board would be required, on or before December 1, 2025, and every two years thereafter, to publish a report on the implementation of these requirements on its website.

AB 2614 would also require the State Water Resources Control Board to, no later than January 1, 2026:

> . . .incorporate water quality standards to achieve reasonable protection of tribal water uses into the water quality control plan for the San Francisco Bay and Sacramento-San Joaquin Delta watershed.

Current law requires the California Environmental Protection Act and Natural Resources Agency to have entered into a memorandum of understanding (MOA) to establish the California Water Quality Monitoring Council, to be administered by the state board. AB 2614 would require, by no later than December 1, 2025, that California EPA and the Natural Resources Agency amend such MOA "to incorporate participation from California tribal communities in the actions of the monitoring council." This may include council membership for tribal representatives, the creation of a separate tribal water quality council, or consultation with tribal communities.

The bill would also add two new statutory considerations required in any water quality control plan: consultations with California tribal communities; and environmental justice considerations.

Finally, the bill exempts the adoption of tribal water uses within a water quality control plan from the requirements of the California Environmental Quality Act, and requires, by January 1, 2028, that each regional board must adopt water quality standards to achieve reasonable protection of tribal water uses as part of their water quality control plans.

Conclusion and Implications

Assembly Bill 2614, if enacted into law, would specifically recognize tribal water uses as "beneficial uses" under the Act. By requiring state and regional water quality boards to take-into-account issues of environmental justice, consider the impacts of projects on tribal water use, and promoting consultation and collaboration with tribal members, the bill would expand the number of protected interests that state agencies must take into account in their water quality planning functions. For more information, *see:* California Assembly Bill 2614, LegiScan, Mar. 21 2024, https://legiscan.com/CA/text/AB2614/2023
(Miles Krieger, Steve Anderson)

2024 UTAH WATER RESOURCES-RELATED LEGISLATION

Utah's 2024 water legislation that impacted the Division of Water Resources primarily did one of two things: clarified and refined water legislation from 2023 and 2022 or made structural adjustments to statewide water planning efforts. These changes bolster the conservation and infrastructural gains made in previous sessions.

What follows is a summary of water resource-related bills that were *enrolled* into law.

•HB 11 Water Efficient Landscaping Requirements

HB 11: restricts the use of overhead sprat irrigation for local government, school district and highway authority properties in the Great Salt Lake Basin. Overhead spray irrigation is limited primarily to active recreation areas such as sports field or playgrounds. For more on HB 11, *see:* https://le.utah.gov/%7E2024/bills/static/HB0011.html

•HB 62 Utah Water Ways Amendments

HB 62 requires Utah Water Ways to coordinate with the Board of Education to create standards-aligned resources and professional development opportunities for public education use. For more information on HB 62, *see:* https://le.utah.gov/%7E2024/bills/static/HB0062.html

•HB 275 Water Amendments

HB 275 prohibits homeowner's associations from requiring turfgrass; permits the State Engineer to require data submissions to appear in a particular format in the Great Salt Lake Basin; clarifies who is eligible for gran money for water conservation efforts other than secondary water metering. For more information on HB 275, *see:* https://le.utah.gov/%7E2024/bills/static/HB0275.html

•HB 280 Water Related Changes

HB 280 modifies how the state water plan is created; requires a study of how water infrastructure projects are financed; and requires the Water Development Coordinating Council to prioritize state water projects across water agencies utilizing the newly created Water Infrastructure Fund. The Utah Watersheds Council will advise the Water Development Coordinating on these matters. For more information on HB 280, *see:* https://le.utah.gov/%7E2024/bills/static/HB0280.html

•HB 295 Produced Water Amendments

HB 295 requires the Board of Oil, Gas and Mining to regulate produced water (subsurface water extracted by an oil or gas well) to allow for nonconsumptive use without impacting water rights.

•SB 218 Water Modifications

SB 18 adjusts forfeiture provisions related to saved water, including as part of agricultural optimization, and ensures saved water is not put towards other consumptive projects. This encourages water-saving changes without reducing a water right, in a way that should increase returns to natural systems. For more information on SB 18, *see:* https://le.utah.gov/%7E2024/bills/static/SB0018.html

•SB 125 Secondary Water Amendments

SB 125 modifies who may meter at strategic points of a secondary water system instead of at every connection. It sets the limit at 2,500 or fewer users per system except in the Great Salt Lake Basin where the limit is 1,000 or fewer users. This all assists the Board of Water Resources in the distribution of funds for secondary metering. For more information on SB 125, *see:* https://le.utah.gov/%7E2024/bills/static/SB0125.html

•SB 211 Generational Water Infrastructure Amendments

SB 211 creates the Water District Water Development Council as a joint administrator between the four largest conservancy districts in the state. This Council will address anticipated generational water needs. The Director of the division will serve on the Council to represent the needs of portions of the state not served by the water conservancy districts. The needs analyzed and the solutions identified by the Council will provide information on state water planning. For more information on SB 211, *see:* https://le.utah.gov/%7E2024/bills/static/SB0211.html

•SB 270 Utah Lake and Great Salt Lake Study Amendments

SB 270 requires the Division of Forestry, Fire and State Lands to study enhancing habitat, conserving water resources, improving water quality and enhancing recreational use of Utah Lake. As part of the study, conditions that may impact Utah Lake's ability to deliver water to the Great Salt Lake must be studied. For more information on SB 270, *see:* https://le.utah.gov/%7E2024/bills/static/SB0270.html

Conclusion and Implications

As climate change continues to take its toll on water supply in the West the Utah bi-cameral legislature is tackling the need to address making the most of water that is available—all this as the Great Salt Lake continues to shrink.
(Robert Schuster)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE COLORADO RIVER

In early March 2024, the U.S. Bureau of Reclamation (Reclamation) released the Final Supplemental Environmental Impact Statement for Near-Term Colorado River Operations (SEIS). The SEIS details Reclamation's updated operational guidelines for Glen Canyon Dam and Hoover Dam, which form the reservoirs at Lake Powell and Lake Mead, respectively, and in doing so responds to historically low runoff levels threatening water supplies in the Colorado River Basin. The SEIS reflects Reclamation's proposal to revise the standing 2007 Interim Guidelines, and if implemented, its alternative guidelines are projected to result in a minimum savings of three million acre-feet of system water by 2027. Reclamation also entered into three conservation implementation agreements, committing California water entities to conserve nearly 400,000 acre-feet of Lake Mead water in that same period.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau of Reclamation. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

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

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, Reclamation, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (Interim Guidelines") to, among other things, provide incentives and tols to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

Citing the need to address "historic drought, historically low reservoirs, and low-runoff conditions in the Basin," Reclamation partnered with multiple state and federal agencies in order to supplement the existing Interim Guidelines, which were previously intended to remain in effect until 2027. SEIS, p. 1-10. The Interim Guidelines, are published in their current form in 73 *Federal Register* 19881 (April 11, 2008). When the Interim Guidelines were promulgated, "the potential for … persistent low level-conditions was recognized as a low possibility," and they "did not include provisions that would prevent system collapse" under such conditions. *Id.* at p. 1-12. In recent years, Reclamation has taken multiple "unprecedented" emergency actions, including: authorizing increased releases from the Colorado River Storage Project to deliver additional water to Lake

Powell; a "500 Plus Plan" aimed at reducing water consumption in the Lower Basin (including Arizona and parts of California and Nevada); increased releases from neighboring reservoirs to increase Lake Powell's storage levels; multiple drought contingency plans; and conservation and efficiency programs for both the Upper and Lower Colorado River systems. *Id.* at p. 1-6. Despite these efforts, 2021 was one of the lowest inflow years on record, and "the combined storage of Lake Powell and Lake Mead declined from about 50 percent to 25 percent of total live capacity" between 2020 and 2022. *Id.* at p. 1-7.

Determining that it lacked "the operating tools to sufficiently protect system operations," Reclamation thereafter issued a notice on November 17, 2022, declaring its intent to revise the Interim Guidelines to address these conditions with the intent of stabilizing reservoir storage levels and staving off system collapse. *Id.* at pp. 1-8, 1-12–13.

The lead agencies (under the National Environmental Policy Act) responsible for preparing the SEIS were Reclamation, Upper Colorado Basin Interior Region 7 (comprising all or parts of Arizona, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming), and Lower Colorado Basin Interior Region 8 (comprising all or parts of Arizona, California, and Nevada (Lower Division States)). *Id.* at pp. 1-11, 1-12. These agencies worked in cooperation with the Bureau of Indian Affairs, National Park Service, Western Area Power Administration, US Fish and Wildlife Service, and the US Section of the International Boundary and Water Commission.

Accounting for "Extreme Low Runoff"

According to Reclamation, continuing operations at Lakes Powell and Mead without accounting for the "extreme low-runoff scenarios" that threaten the American Southwest risks depleting the reservoirs' water levels to a point "limiting operation of Glen Canyon Dam or Hoover Dam, or both," impacting their ability to provide water supplies in the Basin." *Id.* at p. 2-7. To guard against this outcome, SEIS proposes to amend the Interim Guidelines, expanding and/or modifying the following sections: (i) Section 2, "Determination of Lake Mead Operation During the Interim Period"; (ii) Section 6, "Coordinated Operation of Lake Powell and Lake Mead During the Interim Period"; and (iii) Section 7, "Implementation of Guidelines." *Id.* at p. 1-9.

Inflows Stored Above the Dam

The SEIS proposes to adjust how "inflows stored above the dam" are "managed in light of the specific physical and operational characteristics of the dam and reservoir." These characteristics include each dam's "storage capacity, types and elevations of structures to release water, or the need to preserve space for additional inflow as snow melts." The time of year and even day-to-day variances in factors such as temperature and ecological conditions will necessitate adjustments in how and when releases are performed. Each facility's infrastructure, river maximum and minimum flow rates, and safety considerations for downstream infrastructure and water users must also be taken into account. In short: "Reservoir operators must routinely—and continuously—adjust releases for these characteristics; there is no option for reservoir operations to simply stop while new rules are developed." Operators must be ready and able to respond to, and exploit, ever-changing conditions in order to optimize precisely how much water they release—and when.

Glen Canyon Dam and Lake Mead

The SEIS modeling changes to the Dams' operation based on savings estimates of 3 million acre-feet through conservation efforts through 2026, including savings of 1.5 million acre-feet before 2025. *Id.* at 2-7. Under its Proposed Action, Glen Canyon Dam would continue to operate as under the current Interim Guidelines unless Lake Powell's water levels are projected to fall below 3,500 in the next 12 months, in which case "a mid-year adjustment could be made to reduce the annual volume to no less than 6.0 [million acre-feet]." Further, if Lake Mead's content is projected to fall below 1,025 feet, the Lower Division States "would have 45 calendar days to provide Reclamation with an implementation plan to project Lake Mead from falling to a surface elevation of 1,000 feet, and Reclamation "may take additional action" to prevent this outcome if it does not approve of such plan. *Id.* at 2-8. In essence: "the annual Lake Powell release would be based on the volume of water in storage or the corresponding elevations of Lake Powell and Lake Mead," as divided into certain operational tiers. *Id.* at 2-10. Overall, higher water levels would be maintained in Lake Mead. *Id.* at 3-221. The Secretary of the Interior would retain "the authority to protect

the Colorado River system if hydrologic conditions require additional action." *Id.* at 2-13.

Conclusion and Implications

The SEIS's Proposed Action purports to increase the resiliency of the Colorado River system by more closely coordinating releases from Lake Powell and the operation of Glen Canyon Dam in order to respond to rapidly changing hydrological conditions and stave off low water elevation in both Lake Powell and Lake Mead. While under the 2007 Interim Guidelines Reclamation was limited in how it could respond to the sustained low-runoff conditions that have impacted the Basin in recent years, the SEIS would expand the operational tools available to it in order to take faster action in response to declining reservoir levels. For more information, *see:* Final SEIS for Near-term Colorado River Operations, U.S. Bureau of Reclamation, Mar. 2024: https://www.usbr.gov/ColoradoRiverBasin/documents/NearTermColoradoRiverOperations/20240300-Near-termColorado-RiverOperations-FinalSEIS-508.pdf
(Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES WATER PLAN UPDATE LOOKING TO THE FUTURE OF WATER RESOURCE MANAGEMENT

On April 3, 2024, the California Department of Water Resources released the 2023 Update to the California Water Plan. The statewide plan provides local communities, water districts, tribes, cities, counties and the public guidance with respect to the statewide objectives for the use and development of California's water resources.

Background

The California Water Plan is updated every five years and the 2023 Update focuses on promoting climate resilience by providing a vision for the entire state, establishes clear goals, and provides planning frameworks and toolkits to support the Plan's objectives. The updated Water Plan also includes resource management strategies, regional planning and performance tracking tools, and looks to a future where changes to the climate are invariably impacting resource management.

Development of the 2023 State Water Plan Update

In preparing the 2023 Update, the Department of Water Resources engaged with California's tribal communities, other state agencies, industry representatives, non-governmental organizations, water suppliers and local government. Committees and teams were established as well as numerous public meetings and workshops were conducted gathering the concerns, priorities and ideas, which were integrated into the final plan.

Key Elements of the 2023 Update

The primary objective of the 2023 Update is to continue to build California's water supplies to be climate resilient and equitable into the future. The 2023 Update integrates the Water Plan with existing water policies, laws and regulations that have been implemented in recent years. This includes financial investments, prioritizing vulnerable and disadvantaged communities, accounting for ecosystem needs and the importance of water resource management in California's economy. Integrating three primary themes, the 2023 Update addresses climate urgency, strengthening watershed resilience, and steps to achieve equity with the overarching goal of assuring California has climate resilient water systems that equitably benefit all Californians.

The 2023 Update identifies seven objectives that provide a roadmap toward resilience in meeting the challenges facing California. These include: (1) Supporting water resilience planning and implementation; (2) Improved resiliency of "backbone" state, federal, and regional water infrastructure; (3) Improved resiliency of natural "backbone" infrastructure; (4) Advancing equitable outcomes in water resource management; (5) Support and learn from tribal water resource management practices; (6) Support and increase flexibility of regulatory systems; and, (7) Provide guidance and support continued resources for implementation of actions toward water resilience.

Climate Urgency

Focusing on water resource planning while expanding on existing knowledge and experiences. The 2023 Update examines the challenges facing California's water systems and builds on the lessons learned—both positive and negative—to improve water supply management, improve water quality and food security while seeking to protect communities from the adverse impacts of the changing climate, including drought, flooding, sea level rise, and excessive heat. In achieving these objectives, the 2023 Update addresses strategies to continue to enhance and protect infrastructure within watersheds and regions.

Resilient Watersheds

As watersheds, including surface and groundwater systems, are on the frontline of impacts from climate change, the 2023 Update focuses on encouraging climate vulnerability analyses and adaptation plans for California's watersheds. These evaluations and plans will then support the development of solutions and programs that will allow for communities to implement solutions to face climate and resource uncertainties.

Equity

Building on California's legislative recognition that every human has the right to safe, clean, affordable, and accessible water, the 2023 update focuses on implementing strategies to achieve water equity for all Californian's regardless of social, economic, and health disadvantages. This includes addressing inequities in access to domestic water supplies as well as inequities in water quality. The 2023 Update also addresses challenges to disadvantaged communities in responding to the impacts of climate change, including drought and floods.

Conclusion and Implications

The 2023 Update to the California Water Plan continues California's efforts to be proactive in addressing the challenges in managing the state's water resources. By building on lessons that have been learned over prior years and developing strategies to meet the goals and needs of the State, the 2023 Update continues to reflect California's priorities of understanding the challenges facing the state though developing proactive strategies to meet those challenges while improving equity and economic opportunities for all Californians.
(Micheline Nadeau Fairbank, Derek Hoffman)

CALIFORNIA STATE WATER BOARD EXTENDS DEADLINE TO PROTEST CHANGE PETITION FOR DWR'S DELTA TUNNEL PROJECT

On February 29, 2024, the State Water Resources Control Board (State Water Board) issued notice of a water rights change petition (Change Petition) for the Department of Water Resources' (DWR) proposed Delta Conveyance Project (DCP) and an April 29, 2024 deadline to file protests. The DCP is the single-tunnel successor to DWR's prior conveyance project, known as the WaterFix twin tunnels. On April 17, in response to requests by the public, the State Water Board extended the protest period by two weeks to establish a new deadline of May 13, 2024.

Background

The DCP encompasses the construction and operation of two large intake structures on the Sacramento River in the North Delta, a 45-mile underground tunnel, and related facilities to be incorporated into DWR's State Water Project (SWP) system and bolster water deliveries to contractors south of the Delta. According to DWR, the DCP is needed to address water reliability concerns and uncertainties due to climate change, and the risks of seismic activity to existing Delta levee infrastructure. DWR anticipates without the DCP, those factors could lead to lower water quality in the Delta, increased risk of interruptions to SWP operations, less water stored as snowpack in the mountains, reduced operational flexibility due to saltwater intrusion, and larger peak inflows that will not be captured due to more precipitation falling as rain instead of snow.

The purpose of the DCP is to develop diversion and conveyance facilities that will be more resilient in the face of climate change and provide operational flexibility to better manage water supplies for the 27

million Californians and 750,000 acres of farmland that rely on SWP deliveries. DWR approved and certified the final Environmental Impact Report (EIR) for the DCP in December of 2023, which multiple parties have since challenged in court under the California Environmental Quality Act (CEQA) for failure to consider the full impacts of the project. Earlier this year, a Sacramento County Superior Court judge ruled that DWR acted outside of its delegated authority under the Central Valley Project Act when it issued bonds finance the project in 2020. Notwithstanding the pending court cases, DWR estimates all necessary permitting processes and certifications for the DCP will be completed by the end of 2026.

Grounds for Extension

The DCP is a significant water infrastructure project that will require changes to DWR's water right permits to authorize the addition of new points of diversion in the North Delta. Before it may approve a water right change petition, the State Water Board must determine that the requested changes will not injure other legal users of water, adversely affect the environment, or otherwise be contrary to law. Section 1703.1 of the California Water Code provides that any interested person may file a written protest against approval of a change petition by a provided deadline.

Following notice of the Change Petition, the State Water Board received written requests from the public seeking to extend the April 29, 2024 protest deadline in light of the DCP's voluminous administrative record, overlapping administrative hearings and permitting processes, and pending legal challenges to DWR's approval of the DCP. One letter, jointly submitted by several tribal coalitions, fisheries groups, and environmental and public interest organizations, identified several grounds for delaying the protest deadline, including that the EIR and other documents identified to support the Change Petition are too voluminous to meaningfully review within the provided protest window. Further, with a multitude of ongoing regulatory matters and pending litigation that relate to the DCP, and other concurrent State Water Board proceedings such as the Water Quality Control Plan Update for the Bay-Delta, the groups argued there should be no urgency to process the Change Petition on such an accelerated schedule.

In its opposition to extend the protest deadline, DWR responded that the original protest period was reasonable because the Change Petition only relies on certain sections of the EIR, a draft version of which has been available for review since July of 2022. While other administrative matters and permitting efforts are taking place at the same time, DWR suggests the concurrent processes are intended to provide for efficiencies.

The State Water Board declined requests to vacate the Change Petition altogether or suspend the protest deadline for other matters to conclude, citing the potential importance of resolving DCP issues for managing California's water supply. But recognizing that some entities are balancing resources to participate in another major water right hearing with coinciding due dates, the State Water Board determined a two-week extension to May 13, 2024 would be warranted to avoid the undue burden associated with that inadvertent overlap.

To address concerns over the size of the administrative record for the DCP, the extension notice clarifies that parties do not need to support their protests with "an extensive amount of comprehensive information," so long as the protests meet the basic legal requirements of identifying the bases for potential claims, as prescribed in the Change Petition notice and relevant sections of the Water Code.

Conclusion and Implications

While it does not go as far as some requested, the State Water Board's extension of the protest deadline for the DCP Change Petition may provide some relief to parties whose resources have been stretched thin by multiple ongoing water proceedings. The extension notice also encourages potential protestants to identify issues they could settle with the Department of Water Resources informally, though it acknowledges a number of protests will not be resolvable without a water right hearing.

The Change Petition for the DCP and related documents are available on the State Water Board's website at: https://waterboards.ca.gov/bay_delta/delta_conveyance.html.

(Arley Titzler, Austin C. Cho)

IDAHO DEPARTMENT OF WATER RESOURCES MODELING PREDICTS AN IRRIGATION SEASON DEMAND SHORTFALL ON THE CONJUNCTIVELY MANAGED EASTERN SNAKE PLAIN AQUIFER

On April 18, 2024, the Director of the Idaho Department of Water Resources (IDWR) issued his *Final Order Regarding April 2024 Forecast Supply (Methodology Steps 1-3)* (Order) predicting a 74,100 acre-foot irrigation water demand shortfall owed under the senior surface water rights of the Twin Falls Canal Company. The Order was quickly followed by an *Order Shortening Notice Period; Notice of Status Conference* (Apr. 30, 2024) (Notice) requiring that representatives of the Surface Water Coalition (SWC; senior surface water users) and the Idaho Ground Water Appropriators, Inc. (junior ground water users) gather on May 3, 2024, to discuss matters and expected mitigation efforts during the 2024 irrigation season.

Background

Tensions are escalating again over interconnected surface and groundwater use on the Eastern Snake Plain Aquifer (Aquifer) stretching along the Snake River largely between Hagerman and Idaho Falls, Idaho. The Aquifer is roughly the size of Lake Erie, providing irrigation water to multiple hundreds of thousands of acres of prime agricultural land and the cities and towns along the way. The Aquifer also surfaces and contributes to surface water flows in the Snake River in numerous river reaches.

While the Aquifer is no stranger to litigation (over 20 years'-worth) bouncing back and forth between IDWR and Idaho's court system (including various trips to the Idaho Supreme Court), much of the litigation paused after execution of a settlement agreement in 2015, and the implementation of a variety of groundwater user-based mitigation plans approved by IDWR both before and after the settlement agreement. That pause in litigation mostly ended in 2022 when the parties arrived on IDWR's doorstep arguing over the interpretation and application of various terms and obligations contained in the 2015 settlement agreement, and over whether terms of the agreement were materially breached during the 2021 irrigation season and beyond.

Hydrologic Interconnection, Modeling and Ongoing Disputes

No one disputes the hydrologic interconnection of the Aquifer and the overlying Snake River. But it became apparent in 2022-23, after completing updates and the inputting of new data resulting in the release and use of a new (version 2.2) of IDWR's ESPAM Aquifer management model that some key assumptions and related modeling results under version 2.1 were markedly incorrect. For example, the Aquifer is shaped differently (larger and wider in the east) than previously understood. This, in turn, means that Aquifer stabilization efforts will take far more water (in terms of pumping reductions and managed Aquifer recharge using abundant surface water in good water years) to accomplish. In short, the parties have come to realize that Aquifer stabilization and storage increase volume goals set in 2015 are not achievable under existing efforts—Aquifer levels continue to decline despite the parties (essentially the groundwater users) doing largely what they agreed to do under the 2015 settlement agreement.

To be sure, there are arguments over whether the various terms and obligations of the 2015 settlement agreement have been followed to the letter. The SWC asserts not, and in many respects IDWR and Idaho's Water Adjudications Court have agreed with the SWC in a series of administrative and judicial decisions issued from July 2022 to date. But whether the administrative and judicial decisions are aiding in solving Aquifer-based issues long term is questionable.

Curtailment Issues

Under prior IDWR modeling (ESPAM v.2.1), curtailment dates would typically reach water rights with priority dates of the late 1970s to mid-1980s. Under current modeling (ESPAM v.2.2), curtailment dates are consistently reaching the mid (or so)-1950s. For example, in his April 2024 Order, the Director anticipates curtailment of water right priorities of March 31, 1954, and junior if adequate mitigation

water is not made available. And, this is a good water year with adequate snowpack and full reservoirs (though legacy Aquifer pumping does cause lingering depletive effects that continue to impact Snake River reach gains when surface water inputs are otherwise normal or even above normal).

Ongoing and consistent curtailment threatening groundwater uses dating back to the mid-1950s is not sustainable; if that is the end result over time, many thousands of acres of agriculture will need be retired if other solutions are not pursued. The economic impact of doing so will cut deep and wide.

Conclusion and Implications

While the ongoing litigation is stout, there is hope that the parties will come back to the drawing board to collectively work on a modified approach in light of the ESPAM v.2.2 model revelations. Based on new modeling, it unfortunately appears that the 2015 settlement agreement and its benchmark goals (and interim measurements of anticipated progress) were very (if not hopelessly) optimistic. Aquifer issues on the Eastern Snake River Plain are now (if not always been) as much about policy as law. The Final Order is available here: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20240418-Final-Order-Regarding-April-2024-Forecast-Supply-Methodology-Steps-1-3.pdf

The Notice is available here: https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-MP-2016-001/CM-MP-2016-001-20240430-Order-Shortening-Notice-Period-Notice-of-Status-Conference.pdf

(Andrew J. Waldera)

WASHINGTON STATE DEPARTMENT OF ECOLOGY DECLARES NEARLY STATEWIDE DROUGHT EMERGENCY

The Washington State Department of Ecology (Ecology) declared a drought emergency on April 16, 2024. The state of emergency is in effect statewide with the limited exception of the major Puget Sound area municipal suppliers of Seattle, Everett, and Tacoma. This drought declaration comes on the heels of a drought declaration covering 12 counties in 2023 and follows the same nearly statewide areas as a drought declaration in 2021. The 2024 Order is set to be in place for the maximum length of time authorized under state law, one year, expiring on April 15, 2025.

Background

State law allows for the designation of a drought emergency declaration when various regions of the state have received or are expected to receive less than 75 percent of the normal water supply for that year and water users are expected to insure undue hardships due to the shortage. The *El Nino* conditions in the Pacific Ocean are sending the winter precipitation usually seen in the Pacific Northwest to California and the Great Basin. At the time of the declaration, the snowpack water equivalent in areas of Washington ranged between 56-75 percent as tracked by the National Water and Climate Center.

Implications of a Drought Designation

The practical effect of a drought designation is in funding availability and emergency administrative response efforts. That's the carrot. There is also a stick, which is increased monitoring of water use in general and more enforcement actions.

First, to avoid the negative impact of drought on water users, Ecology offers money and streamlined processing.

Emergency Grants for Public Entities

Ecology has $4.5m available for drought-related grants to public entities. See WAC Chapter 173-167 adopted by Emergency Rule on April 16, 2024. Public entities include cities, counties, federally recognized tribes, and special purpose districts but do not include individual water users. Grants are available for leasing water rights for instream or out-of-stream use, funding emergency infrastructure, providing emergency supplies of potable water; and funding for resolving fish passage barriers. Under the Emergency Rule, Applicants must provide at least a 50 percent cost share unless the applicant serves economically-disadvantaged communities.

Emergency Drought Permits

During a declared Drought, Ecology can issue emergency permits from alternate source supplies, including groundwater or dead storage in reservoirs, to replace the drought-affected supply. Emergency permits have a limited duration and must be reapplied for subsequent drought declarations. Ecology regulations require the issuance of drought permits within fifteen calendar days from the date the application is received. Emergency permits cannot be used for new lands, new uses, or restoration or enhancement of fisheries resources. Emergency permits are subject to "essential minimum streamflow and water levels" as defined by the regulation. Applications for emergency permits are exempt from newspaper publication and review under the State Environmental Policy Act. WAC 173-166-070.

Temporary Water Right Changes

The drought emergency allows Ecology to prioritize staffing to process temporary water right changes to address supply needs to meet "previously established activities." WAC 173-166-040. Temporary transfers include transfers from irrigated lands to other irrigated lands, from out-of-stream to instream use, and between public water systems. Otherwise, the same administrative process and constraints apply as with Emergency Permits.

Water Right Curtailments

In addition to emergency support, the Washington State Drought Contingency Plan, last updated in 2018, calls for Ecology to be prepared for water right curtailment and enforcement actions. Low flows will mean that junior users will see earlier and more curtailment, especially in areas of stream flows already under pressure during the summer months. Ecology will be staffing to ensure capacity for "enforcement of the water right priority system." The general process is for Ecology to provide advance notice in those areas where curtailment is likely. Following the Notice, Ecology issues first "formal requests" and later "formal orders" to ensure curtailment. In areas with an instream flow, Ecology provides a toll-free hotline for users to call daily before diverting.

How Often Does This Hapen?

The Legislature granted Ecology permanent authority to make drought declarations absent legislative authorization in 1989. Ecology makes the determination with the written approval of the governor in consultation with the state's Water Supply Availability Committee (WSAC) consisting of Ecology, the National Weather Service, the Natural Resources Conservation Service, the U.S. Geological Survey, the U.S. Bureau of Reclamation, and other federal agencies involved in water supply forecasting (National Ocean and Atmospheric Administration, the Columbia River water management group, U.S. Army Corps of Engineers).

The benchmark for determining drought conditions is "the median amount of water available to a geographical area, relative to the most recent thirty-year base period used to define climate normals." WAC 173-166-030(6). Climate Normals are 30-year averages for climate variables like temperature and precipitation. Ecology is to consider seasonal water supply forecasts, precipitation, snowpack, soil moisture, streamflow, and aquifer levels. The current Climate Normals model from the National Water and Climate Center is for the years 1991-2020.

Ecology has issued ten drought declarations in the last 35 years according to the *Seattle Times*. (WA declares statewide drought emergency following poor snowpack, April 16, 2024.) Six of those declarations have been in the last ten-year period, and three in the years not yet covered by the Climate Normals.

Conclusion and Implications

After the need for a late drought declaration in 2021 after the Legislature had already adjourned leaving the agency strapped for cash to respond effectively, the Legislature adopted a process for automatic funding in the event of future droughts in 2023. "Upon the issuance of an order of drought emergency … , the state treasurer shall transfer from the general fund to the emergency drought response account … those amounts necessary to bring the balance of the emergency drought response account to $3,000,000…" RCW 43.83B.406.
(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

May 1, 2024—The Department of Justice, on behalf of the U.S. Environmental Protection Agency (EPA), and the Attorney General of California, on behalf of the San Francisco Bay Regional Water Quality Control Board, filed a civil complaint in federal court today against the City and County of San Francisco for claims of federal Clean Water Act violations spanning the last decade. The complaint seeks financial penalties and improvements to remedy San Francisco's repeated and widespread failures to operate its two combined sewer systems and three sewage treatment plants in compliance with the Clean Water Act and its permits. San Francisco failed to operate its combined sewer systems in a manner that keeps untreated sewage out of San Francisco Bay and its tributaries, streets, beaches and other areas with risk of human contact.

"Protecting San Francisco Bay, the Pacific Ocean and public health are critical priorities for EPA, and this complaint is a major step to improve how the San Francisco sewer system is managed," said EPA Pacific Southwest Regional Administrator Martha Guzman**.** "EPA and our partners are committed to ensuring San Francisco comes into compliance with the Clean Water Act to protect clean water and local communities."

The United States and the San Francisco Water Board request that the Court order the City of San Francisco to cease further violations of the Clean Water Act and its permits and complete all actions necessary to ensure that the City complies in the future. On average each year since 2016, San Francisco has discharged more than 1.8 billion gallons of untreated sewage from its combined sewer systems into creeks, San Francisco Bay, and the Pacific Ocean, including areas popular for wading, swimming, surfing, kayaking and fishing. San Francisco is served by two combined sewer systems that collect domestic sewage, industrial and commercial wastewater, and stormwater in the same pipes. During heavy rains, when the sewage treatment plants are at maximum capacity, combined sewage is discharged from near-shore outfalls to creeks, the San Francisco Bay, and the Pacific Ocean without receiving disinfection treatment.

San Francisco's failure to take steps to minimize these discharges or provide disinfection treatment interferes with the state's designated uses for these water bodies, which include water contact recreation and protection of aquatic life. Untreated sewage contains pathogens such as E. coli, which can cause severe illness if ingested. Children, the elderly, people with weakened immune systems and pregnant women have a higher risk for adverse consequences from such illness than the general population.

In addition, San Francisco's combined sewer systems are in a state of disrepair, and the City's failure to properly operate and maintain them has led to additional combined sewage discharges that has put members of the public at risk for unknowingly coming into contact with untreated sewage. San Francisco has also consistently failed to properly notify the public about the presence of untreated sewage at popular water recreation locations, overflows from manholes onto sidewalks and streets and the risks of coming into contact with untreated sewage.

EPA has brought enforcement actions to require municipalities across the country to update their sewer systems and address similar Clean Water Act violations. Nationally, EPA has been working with states, municipalities, and trade organizations to develop tools to help communities work towards compliance with Clean Water Act requirements, including meeting applicable water quality standards.

San Francisco is one of approximately 750 communities in the country with combined sewer systems but is only one of two such systems in California. San

Francisco began planning to address its combined sewer overflows in the 1970s and completed construction of planned controls over 25 years ago. Since completion of those controls, no significant upgrades or updates have been made to the system to reduce combined sewer overflows and currently, the controls are insufficient to meet the requirements in San Francisco's Clean Water Act permits.

May 2, 2024—The U.S. Environmental Protection Agency (EPA) announced a final rule that will help protect water quality where Tribes hold and assert rights to aquatic and aquatic-dependent resources. For the first time, this action establishes a clear and consistent national framework for EPA and states to consider Tribal treaty and reserved rights when establishing Water Quality Standards under the Clean Water Act. In addition, this rule advances the Biden-Harris Administration's commitment to uphold the United States' treaty and federal trust responsibility to federally recognized Tribes. When implemented, this final rule will better protect waters that Tribes depend on for fishing, gathering wild rice, cultural practices, and other uses.

"President Biden is committed to ensuring that all people have access to clean and safe water. Strengthening our regulations to support Tribes and protect precious water resources is essential," said EPA Administrator Michael S. Regan. "With this action, EPA is establishing clear rules of the road that will support healthier Tribal communities. We look forward to partnering with Tribes and our state co-regulators to implement Clean Water Act protections consistent with Tribal treaty and reserved rights."

Historically, EPA has addressed Tribal reserved rights under the Clean Water Act on a case-by-case basis in state-specific actions. This practice fostered uncertainty for Tribes, states, and entities seeking to comply with Clean Water Act requirements. EPA's final rule provides clarity and transparency by revising the federal water quality standards regulation to better protect Tribal reserved rights under the Clean Water Act. With this action, EPA is ensuring that water quality standards are established taking into consideration Clean Water Act-protected aquatic and aquatic-dependent resources where Tribes hold and assert rights to those resources under federal treaties, statutes, or executive orders. This final regulatory framework will be applied consistently while accounting for local conditions and factors to inform the development of specific water quality standards.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

Apr. 29, 2024—Max Environmental Technologies, Inc. (MAX) has agreed to several actions to ensure compliance with federal and state hazardous waste safeguards at the company's waste facility in Yukon, PA, the U.S. Environmental Protection Agency (EPA) announced today.

MAX owns and operates a 160-acre facility, surrounded by agricultural and residential properties, about 30 miles southeast of Pittsburgh, PA in Westmoreland County. According to EPA, this site is an area with potential environmental justice concerns. MAX conducts waste operations under permits issued by the Pennsylvania Department of Environmental Protection (PA DEP) pursuant to the federal Clean Water Act (CWA and RCRA). RCRA is the principal federal hazardous waste storage and disposal statute.

Among the hazardous wastes at the MAX facility are wastewater treatment sludge, corrosives, arsenic, barium, cadmium, chromium, lead, selenium, silver, electric arc furnace dust, and waste acid/pickle liquor. Waste management units include five closed impoundments, an active solid waste landfill, waste storage tanks and containers, hazardous waste treatment units, and a leachate management system that generates sludge from wastewater treatment.

EPA officials inspected the facility in March 20-24, 2023, to determine MAX's compliance with environmental regulations, including the terms of its PA DEP-issued CWA and RCRA permits. According to EPA, its inspectors documented several RCRA permit violations, including but not limited to: (1) unlawful disposal of hazardous waste in the solid waste landfill at the facility, (2) failure to maintain a containment building, and (3) failure to keep the hazardous waste containers closed to prevent hazardous waste release.

The consent order announced today addresses RCRA and state hazardous waste requirements. MAX has agreed to immediate measures to eliminate the potential release of solid and hazardous waste into the environment and to ensure that future ongoing operations do not cause or contribute to releases at the facility. The RCRA consent order requirements include, but are not limited to:

•Prohibition of disposal of untreated and treated hazardous waste in the facility's landfill unless it has been reviewed and analyzed by a third-party auditor and unaffiliated PA DEP-accredited laboratory.

•Retention of an EPA approved third party Professional Engineer to perform a structural evaluation and recommendations to repair or modify the containment and processing building and containment pads.

•Monitoring and sampling of residential wells adjacent to the facility.

Monthly progress reports and meetings with EPA project managers to evaluate the compliance actions stated in the Consent Order

Apr. 23, 2024—The U.S. Environmental Protection Agency finalized a rule that strengthens its process for conducting risk evaluations on chemicals under the Toxic Substances Control Act (TSCA). These improvements to EPA's processes advance the goals of this important chemical safety law, ensure that TSCA risk evaluations comprehensively account for the risks associated with a chemical, and provide a solid foundation for protecting public health, including workers and communities, from toxic chemicals. The rule also includes changes to enhance environmental protections in communities overburdened by pollution, complementing the Biden-Harris Administration's ambitious environmental justice agenda.

The 2016 TSCA amendments require that EPA establish a procedural framework rule on the process for conducting chemical risk evaluations. TSCA risk evaluations are the basis for EPA's risk management rules that protect people and the environment from harmful chemicals. Although EPA finalized a risk evaluation framework rule in 2017, that rule was challenged in court. The United States Court of Appeals for the Ninth Circuit remanded several provisions of the rule back to the agency for reconsideration. Another aspect of the litigation, related to the policy to categorically exclude the consideration of exposures from breathing polluted air or drinking contaminated water, was deemed not ripe for review by the court.

EPA's final rule includes revisions made to respond to the court's ruling, as well as several changes to improve EPA's process for TSCA risk evaluations, including:

•Consideration of real-world exposure scenarios such as multiple exposure pathways (*e.g.*, in air and water) to the same chemical, and combined risks from multiple chemicals when EPA has the scientific information to do so, which may be particularly important for communities who face greater exposures or susceptibilities to chemicals than the rest of the general population.

•A requirement that risk evaluations are comprehensive in scope and do not exclude conditions of use or exposure pathways.

•Clarifications to ensure EPA appropriately considers risks to all workers in its risk evaluations.

•Consideration of chemical uses that may be required for national security or critical infrastructure by other Federal agencies.

•Assurance the agency will continue to use the best available science to conduct risk evaluations, that decisions are based on the weight of the scientific evidence and that risk evaluations will be peer reviewed in accordance with both federal and EPA guidance.

•Discussion of chemical-specific fit-for-purpose approaches that allow for varying types and levels of analysis so that risk evaluations focus less rigorously on the conditions of use that are expected to pose low potential risk and can reliably be completed within the timeframes required by the statute.

•A clear requirement for risk evaluations to culminate in a single risk determination on the chemical substance, rather than on individual chemical conditions of use in isolation, and improved communications regarding the uses that significantly contribute to the unreasonable risk.

•New procedures and criteria for whether and how EPA will revise scope and risk evaluation documents, to improve transparency.

•Adjustments to the process for submission and review of manufacturer requests for risk evaluations of chemicals to better align with the process and timeline associated with EPA-initiated risk evaluations, while also ensuring that the agency can use the authorities provided under the law for gathering any needed additional information on such chemicals.

•A requirement that risk evaluations must explicitly consider overburdened communities when identifying potentially exposed and susceptible populations as relevant to the risk evaluation.

(Robert Schuster)

JUDICIAL DEVELOPMENTS

DISTRICT COURT ISSUES CONSENT DECREE BETWEEN LOS ANGELES WATERKEEPER AND STEEL COMPANY OVER ALLEGED FEDERAL CLEAN WATER ACT VIOLATIONS

Los Angeles Waterkeeper v. Tell Steel, Inc., ___F.Supp.4th___,
Case No. CV 23-8720-GW-PVCx (C.D. Cal. Mar. 27, 2024).

The United States District Court for the Central District of California recently issued a consent decree (Consent Decree) between Los Angeles Waterkeeper (LA Waterkeeper) and Tell Steel, a Steel company located in Long Beach, California. The Consent Decree came as a result of negotiations over a lawsuit brought by LA Waterkeeper against Tell Steel for alleged violations of the federal Clean Water Act (CWA) and a general permit regulating pollutant discharges. Included in the Consent Decree are a number of requirements to implement Best Management Practices (BMPs) and policies to reduce the amount of toxic metals flowing in Waters of the United States (WOTUS) from storm water drainage and runoff from the Tell Steel center.

Factual and Procedural Background

LA Waterkeeper issued a notice of intent to file for suit on August 15, 2023 for violations of the CWA and a general permit for Tell Steel's facility under the National Pollutant Discharge Elimination System (NPDES Permit). The NPDES program regulates storm water discharges associated with industrial activity, including at Tell Steel's facility in Long Beach. On October 6, 2023, LA Waterkeeper filed a complaint against Tell Steel in the United States District Court for the Central District of California. LA Waterkeeper and Tell Steel agreed to enter into a Consent Decree to resolve the lawsuit.

The Consent Decre

The basic objectives of the Consent Decree are compliance with all the terms of the Consent Decree, the NPDES Permit, and of the CWA. The "Commitments of the Settling Parties" section of the Consent Decree contains six sections: (a) Storm Water Pollution Control Best Management Practices, (b) Monitoring and Reporting (c) Reducing/Preventing Pollutants in Facility Discharges (d) Visual Observations (e) Compliance with Monitoring and Reporting (f) Environmental Mitigation, Litigation Fees and Costs, Stipulated Penalties, and Interest.

The Consent Decree term is the date between the effective date and the termination date, which can be a variety of dates as laid out in the Consent Decree. At the earliest, the Consent Decree will terminate on June 30, 2027, but may be later if Tell Steel delays their compliance with the Consent Decree.

Storm Water Pollution Control Best Management Practices

The first section, Storm Water Pollution Control Best Management Practices, lays out the best management practices that Tell Steel must implement. It broadly states that "any unauthorized non-storm water discharged, as defined in the General Permit," and "any industrial activity occurring in areas designated as non-industrial or no-exposure" in the Storm Water Pollution Prevention (SWPPP) are both violations of the Consent Decree. Additionally, this section lays out the overarching requirement that Tell Steel implement the BMPs identified in its SWPP and as laid out in this section. The Consent Decree requires a number of actions from Tell Steel, including installing an electronic rain gauge sensor, installing concrete berms and barriers to prevent discharge from any point other than Designated Points, and installing new wattles/filter socks. Tell Steel is also required to implement BMP policies. More specifically, Tell Steel must implement a three-prong sweeping program and a pre-rain protocol, including a requirement to cover all industrial materials before a rain event.

Monitoring and Reporting

The second section, Monitoring and Reporting, requires Tell Steel to "develop and implement an expanded MIP that includes storm water sample collection and analysis" for qualified storm events and lays out the designated locations from which those samples must be taken. The definition of a qualified storm event is set forth in the NPDES Permit. In particular, a qualifying storm event is one that produces a discharge for at least one drainage area and is preceded by 48 hours with no discharge from any drainage area.

Prevention of Discharges

The third section focuses on the prevention of pollutant discharges and contains a table that specifically lays out the numeric levels of pollutants Tell Steel must not exceed. If Tell Steel fails to meet these standards at any time between the effective date of the Consent Decree and the end of the remainder of the terms of the Consent Decree, then Tell Steel must submit an Action Plan to LA Waterkeeper of how it will achieve compliance with the standards.

Visual Observations

The Visual Observations section sets a requirement for visual observations during qualified storm events as well as monthly non-storm observations. Tell Steel must keep records of these observations. Additionally, the Consent Decree requires Tell Steel to implement a training program within 45 days of when the Consent Decree becomes effective and lays out what the training program must include. Lastly, this section calls for the revision of the SWPPP, including the training program, updated site maps, and assessments of potential storm water discharge, among other requirements.

Compliance Monitoring and Reporting

The fifth section, Compliance Monitoring and Reporting, is aimed at allowing LA Waterkeeper to oversee and monitor Tell Steel's implementation of all these proceeding requirements. It allows LA Waterkeeper to conduct one annual site inspection and requires Tell Steel to send photos and confirmations of writing of their compliance with the Consent Decree. This reporting requirement is accompanied by a promise by Tell Steel to pay $5,000 a year to LA Waterkeeper to cover the costs of their oversight, which is to be paid every year during the term.

Monetary Obligations

The last section provides for the monetary obligations of Tell Steel under the Consent Decree. This includes a $35,000 to the Rose Foundation to "fund environmental project activities that will reduce or mitigate the impacts of storm water pollution from industrial activities occurring in the Los Angeles River." Tell Steel must also pay $95,000 to LA Waterkeeper to partially reimburse them for their investigation, fees, and costs for investing, filing, and negotiating the lawsuit.

Conclusion and Implications

Following the issuance of the Consent Decree, LA Waterkeeper will submit the Consent Decree to the EPA and the U.S. Department of Justice for review. The agencies can either object to the Consent Decree or let 45 days pass after receipt of the Consent Decree, and so long as the agencies do not object the Consent Decree will be operative until at least June of 2027. This Consent Decree does not require Tell Steel to pay any penalties other than to LA Waterkeeper and their chosen Rose Foundation but does require Tell Steel to implement a number of practices and policies and allows LA Waterkeeper some limited oversight to ensure those requirements are met. Accordingly, consent decrees can impose substantial obligations, but parties may prefer them over litigating a case to conclusion with an uncertain outcome.
(Miles Krieger)

DISTRICT COURT ORDERS PAYMENT OF PENALTIES FOR FAILURE TO COMPLY WITH CLEAN WATER ACT CONSENT DECREE

Upper Chattahoochee Riverkeeper Fund, Inc., at al. v. City of Atlanta, ___F.Supp.4th___, Case No. 1:95-CV-02550-TWT (N.D. Ga. Mar. 28, 2024).

The United States District Court for the Northern District of Georgia recently denied the City of Atlanta's (City) petition to review penalties from the U.S. Environmental Protection Agency (EPA) related to violations of a 1998 Consent Decree issued under the federal Clean Water Act. In particular, the court ordered the City to pay the $485,000 fine plus interest for failure to obtain permission from the EPA and Georgia Environmental Protection Division (EPD) before beginning construction of a bridge through land designated as a greenway.

Factual and Procedural Background

The decision of the District Court stems from a Consent Decree issued by the District Court in 1998 for the City's violation of the federal Clean Water Act (CWA). The Consent Decree "provided for the Greenway Acquisition Project," which required the city to set aside and maintain land along waterways in order to "prevent erosion and non-point source pollution." To carry out this project, the Consent Decree also provided that the City would prepare the Greenway Acquisition Plan (GAP) and stated that the construction of public access facilities in that designated area were subject to approval by the EPA and EPD.

In 2004, the City acquired a piece of land that it held as a Greenway. Subsequently, the City acquired a grant to build a path connecting two parks in the City and planned to build it within the Greenway property. Without approval from either the EPA or EPD, the City's contractors began construction of a pathway and bridge through the Greenway in January of 2021. The City claimed that it was unaware that the land was designated as a Greenway because of a cyberattack, despite multiple signs on the property apparently designating the parcel as a Greenway.

The Atlanta Department of Watershed Management (DWM) learned of the construction of the bridge and pathway in February of 2021, a month after the contractors began work. At that point, DWM began an investigation, but the construction did not halt until April. DWM then requested retroactive approval, which the EPA initially rejected a year after DWM's request. As part of this denial, the EPA also determined that the City was subject to a $485,000 penalty for violation of the Consent Decree's requirement that the City receive approval from the agencies before any construction of public access projects. Eventually, the DWM and EPA reached an agreement to allow for retroactive approval, but the EPA still maintained that it was entitled to the $485,000 penalty. The City challenged the penalty in a petition that is the subject of the District Court's opinion.

The District Court's Decision

Ultimately, the District Court denied the City's petition and ordered the City to pay the $485,000 penalty plus interest. The City made two arguments in its petition.

First, the City argued that the Consent Decree "does not allow for the stipulated penalty" both "because the City's project complies with the GAP and the Consent Decree permits retroactive approval."

Second, even if a penalty is allowed, the City argued that "the assessed penalty [was] unenforceable as disproportionate in the absence of any environmental harm." The District Court dealt with these claims in turn.

First, the District Court concluded that the City violated the terms of the Consent Decree, because the Consent Decree clearly stated that any construction of public access trails were subject to EPA and EPD approval, which the City failed to obtain. In fact, the District Court stated that the City would not have received EPA approval even if they had sought it. The District Court also reasoned that the EPA did not unreasonably withhold approval between the period of learning of the construction and entering the agreement with the City, relying on the idea that the City relinquished some of its land control power when it entered into the Consent Decree.

Second, the District Court concluded that the violation warranted the assessed penalty amount. The

City argued that "the penalty bears no relation to the degree of harm caused by its failure to seek approval for the project." However, the District Court rejected this argument by distinguishing the case from which that principle comes from, *United States v. Witco Corp*. In the *Witco* case, the penalty at issue continued to accrue while the court considered the case. However, in this case, the $485,000 penalty accrued only during the 94-day period between January 2021 and April 2021 where the City actively constructed the project without approval. Accordingly, the District Court distinguished the City's situation and agreed with the EPA that the penalty was reasonable as to the clear violation of the Consent Decree. In his concluding remarks in the opinion and order, Judge Thomas W. Thrash Jr. emphasized that no matter the good intentions of the City, the Consent Decree must be complied with.

Conclusion and Implications

This case highlights that cities and local governments may surrender some of their land use power when entering into a Consent Decree and that courts are likely to demand strict compliance with those decrees. Additionally, it underscores the consequences of failing to comply with such decrees. Thus, local governments should ensure that public land they develop is not subject to consent decree restrictions, and if it is, should carefully ensure that they obtain approvals from applicable federal or state agencies. Failure to do so can result in significant penalties that the courts will likely enforce, even if the project is ultimately approved. The court's opinion is accessible online at: https://casetext.com/case/upper-chattahoochee-riverkeeper-fund-inc-v-city-of-atlanta-1 (Miles Krieger)

CALIFORNIA SUPERIOR COURT RULES IN FAVOR OF THE STATE WATER BOARD'S SUBSTITUTE ENVIRONMENTAL DOCUMENT FOR PHASE I OF THE BAY-DELTA PLAN

State Water Board Case Judicial Council Coordinated Proceedings, Case No. 5013 (Sac Super. Ct, Mar. 15, 2024).

On March 15, 2024, a Sacramento Superior Court judge upheld the State Water Resources Control Board's (State Water Board) Substitute Environmental Document (SED) for the Phase I update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The SED adopts more stringent flow objectives for native and migratory fish in the lower San Joaquin River and its three major tributaries, the Merced, Stanislaus, and Tuolumne rivers, while partially relaxing salinity standards for South Delta crops. In a comprehensive 160-page ruling, the court considered all 116 claims filed by various petitioners and found the State Water Board did not violate the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), the California Environmental Quality Act (CEQA), the public trust doctrine, or article X, section 2 of the California Constitution. (Super. Ct. Sacramento County, 2024, No. JCCP5013 (Ruling).)

Background

The Porter-Cologne Act authorizes the State Water Board and its regional boards to adopt, implement, and update plans that protect water quality in California's rivers and waterways for fish, agriculture, and other beneficial uses of water. Under CEQA, a lead agency must analyze the environmental impacts of a proposed project and inform the public in an Environmental Impact Report (EIR). Here, a program-level SED was prepared in place of an EIR, but like an EIR, an SED must identify and analyze the potential impacts, alternatives, and feasible mitigation measures of a proposed plan or program. In addition to the statutory frameworks that govern the adoption of a new Bay-Delta Plan, the State Water Board is subject to the common law public trust doctrine and article X, section 2 of the California Constitution. The public trust doctrine vests a duty in the State, as sovereign, to act as trustee for the benefit of the people by taking the public trust into account when managing and allocating public resources, and to protect public trust uses whenever feasible. Article X, section 2 of the California Constitution establishes a rule that all water use in the state must be reasonable and beneficial.

At the confluence of the Sacramento and San Joaquin rivers, the Delta is the largest estuary on the West Coast and a significant source of the state's water supply. The State Water Board adopted the first Bay-Delta Plan in 1978, shortly after the enactment of the Porter-Cologne Act. The Bay-Delta Plan was updated in 1991, 1995, and 2006, though flow standards have remained largely unchanged since 1995. For the current Bay-Delta Plan update, the State Water Board has divided the process into two phases: Phase I to address flow and salinity objectives for the San Joaquin River watershed, and Phase II to address flow and cold-water management standards in the Sacramento River and the Delta.

The Supplemental Environmental Document

The SED revises the San Joaquin portion of the Bay-Delta Plan by adding a numeric objective to maintain 40 percent unimpaired flow—with an allowed adaptive range of 30 to 50 percent—to support and maintain the viability of fish populations in the San Joaquin River watershed. Unimpaired flow is the amount of natural flow in a river, unaffected by upstream diversions, storage, or other manipulation. Requiring 40 precent unimpaired flow will likely prohibit water right holders from diverting the full amount allowed under their water rights in certain conditions. To justify its new flow requirements, the SED relies on a 2012 technical report that found:

> . . .increased unimpaired flows are needed in February through June when juvenile fall-run Chinook are in the critical freshwater-rearing phase of their life cycle and migrating from the [San Joaquin River] basin through the Delta and out to the ocean. (*Ruling*, at p. 16.)

The SED also lowers the summer salinity threshold for agriculture that was originally developed in the 1978 Bay-Delta Plan to avoid salt stress and damage to crops on roughly 100,000 acres of irrigated farmland in the southern Delta. Under the 2006 Bay-Delta Plan, the salinity objective was 0.7 deciSiemens per meter (dS/m) from April through August, and 1.0 dS/m from September through March. Citing a 2010 report on salt tolerance that found South Delta crops could handle a salinity range of 0.9 to 1.1 dS/m, the SED revises the salinity standard to 1.0 dS/m, year-round.

The Superior Court's Decision

In establishing a water quality control plan, the State Water Board must ensure the reasonable protection of beneficial uses. (Wat. Code, § 13241.) One of the factors that must be considered under the Porter-Cologne Act is "[p]ast, present, and probable future beneficial uses of water." (*Id.* at subd. (a).) Numerous parties challenged the SED, arguing that the State Water Board did not consider the impacts to other beneficial uses, such as municipal, industrial, and agricultural uses, when it set the unimpaired flow objective.

CEQA Claims

However, the court found the administrative record demonstrates the State Water Board did consider the water supply impacts and did not abuse its discretion, despite foreseeable impacts to competing beneficial uses. *The court reasoned that since* other flow alternatives would result in more harm to native fish populations, the mere fact that reasonable minds could disagree over the State Water Board's ultimate decision does not indicate the decision was arbitrary or capricious. The court deferred to the State Water Board's conclusions regarding water supply impacts, finding substantial evidence to support the use of the hydrologic modeling and analysis employed to consider the topic.

The other primary CEQA claim was that the State Water Board did not adequately analyze the impact of the complete Bay-Delta Plan because it "improperly segmented" the project by not considering the Phase II update to the Bay-Delta Plan. The court rejected the argument that the SED needed to consider the impacts of Phase II because:

> . . .the [Lower San Joaquin River] flow and southern Delta salinity objectives operate independently of any future amendments in the Sacramento River or Delta watersheds and can be implemented separately.

The court held that the interconnected ecosystems of the Delta do not require the State Water Board to formulate revisions to the Bay-Delta Plan in a single environmental review process:

> . . .because the phases pertain to separate rivers and watersheds in hydrologically distinct geo-

graphic areas with native fish that have different viability needs.

Public Trust Doctrine and Article X Claims

In considering challenges under the common law public trust doctrine, the court held that the State Water Board satisfied its affirmative duty to take the public trust into account by satisfying its responsibilities under the Porter-Cologne Act. Similarly, the court held that the State Water Board did not act in an arbitrary or capricious manner that would amount to a violation of its authority to balance competing beneficial uses of water under article X, section 2 of the California Constitution.

Salinity Standards

Lastly, the court rejected claims that the revised salinity standards for crops in the South Delta relied on faulty analysis or were otherwise arbitrary or capricious. Finding no significant discrepancy between the State Water Board's 2010 report and petitioners' conflicting expert analysis, the court deferred to the administrative findings under the substantial evidence standard. Moreover, the court agreed with the State Water Board's conclusion that the additional unimpaired flows would provide an added benefit of higher water quality. For any remaining claims that were not specifically addressed in the Ruling, the court considered them, but did not find them persuasive.

Conclusion and Implications

The court's ruling represents a significant victory for the State Water Board, which may be emboldened as it moves forward with the implementation of Phase I and considers the draft SED for the Phase II update to flow objectives in the Sacramento River and Delta watershed.

A copy of the Ruling is available at: https://qhj126.p3cdn2.secureserver.net/wp-content/uploads/2024/03/2024-03-15-State-Water-Board-cases-decision.pdf
(Jake R. Voorhees, Austin C. Cho)