Volume 28, Number 11
October 2024

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

WESTERN WATER NEWS

California Governor Newsom Issues New Executive Order Partially Lifting Drought Declarations and Withdrawing Well Permit Requirements for Counties. 259

Idaho Executive Branch Takes Dim View of Biden Administration's Seeming Call for the Federalization of Groundwater Management 260

LEGISLATIVE DEVELOPMENTS

Colorado River Basin States, Congress Explore Variety of Programs to Address Western Water Needs 262

REGULATORY DEVELOPMENTS

EPA's Fourth Six-Year Review of Drinking Water Standards: Key Findings 264

The San Francisco Bay-Delta Conveyance Project: An Update on Schedule and Next Steps 265

Nevada's Walker Basin Conservancy Retires Another 500 Acre-Feet in the Smith Valley 267

PENALTIES & SANCTIONS

Recent Investigations, Settlements, Penalties, and Sanctions 269

LAWSUITS FILED OR PENDING

U.S. Supreme Court Agrees to Hear Challenge to San Francisco Water Quality Standards 272
City and County of San Francisco v. U.S. Environmental Protection Agency, Case No 23-753.

Continued on next page

EDITORIAL BOARD

Christina J. Bruff, Esq.
Law & Resource Planning Assoc.
Albuquerque, NM

Jonathan Clyde, Esq.
Clyde, Snow, Sessions & Swenson
Salt Lake City, UT

Micheline Nadeau Fairbank, Esq.
Fennemore Craig
Reno, NV

Miles Krieger, Esq.
Best, Best & Krieger,
Tucson, AZ

Jessica Kuchan, Esq.
Confluence Law
Seattle, WA

John Sittler, Esq.
Patrick | Miller | Noto
Aspen, CO

Andrew J. Waldera, Esq.
Sawtooth Law Offices
Boise, ID

ADVISORY BOARD

Robert Johnson, Exec. Dir.
National Water Resources Assn.
Arlington, VA

John E. Echohawk, Exec. Dir.
Native American Rights Fund
Boulder, CO

Prof. Robert Jerome Glennon
Univ. of Arizona School of Law
Tucson, AZ

Anthony G. Willardson, Exec. Dir.
Western States Water Council
Midvale, UT

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT FEDERAL DECISIONS

Circuit Court of Appeals:
EPA's Decision to Pursue Non-Regulatory Action regarding CAFOs Upheld by Ninth Circuit 274
Food & Water Watch, et al. v. U.S. Environmental Protection Agency, Unpub., Case No. 23-2146 (9th Cir. Oct. 2, 2024).

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222, schuster@argentco.com.

WWW.ARGENTCO.COM

Copyright © 2024 by Argent Communications Group. All rights reserved. No portion of this publication may be reproduced or distributed, in print or through any electronic means, without the written permission of the publisher. The criminal penalties for copyright infringement are up to $250,000 and up to three years imprisonment, and statutory damages in civil court are up to $150,000 for each act of willful infringement. The No Electronic Theft (NET) Act, § 17 - 18 U.S.C., defines infringement by "reproduction or distribution" to include by tangible (i.e., print) as well as electronic means (i.e., PDF pass-alongs or password sharing). Further, not only sending, but also receiving, passed-along copyrighted electronic content (i.e., PDFs or passwords to allow access to copyrighted material) constitutes infringement under the Act (17 U.S.C. 101 et seq.). We share 10% of the net proceeds of settlements or jury awards with individuals who provide evidence of illegal infringement through photocopying or electronic distribution. To report violations confidentially, contact 530-852-7222. For photocopying or electronic redistribution authorization, contact us at the address below.

The material herein is provided for informational purposes. The contents are not intended and cannot be considered as legal advice. Before taking any action based upon this information, consult with legal counsel. Information has been obtained by Argent Communications Group from sources believed to be reliable. However, because of the possibility of human or mechanical error by our sources, or others, Argent Communications Group does not guarantee the accuracy, adequacy, or completeness of any information and is not responsible for any errors or omissions or for the results obtained from the use of such information.

Subscription Rate: 1 year (11 issues) $1025.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster.

Western Water Law and Policy Reporter is a trademark of Argent Communications Group.

WWL

WESTERN WATER NEWS

CALIFORNIA GOVERNOR NEWSOM ISSUES NEW EXECUTIVE ORDER PARTIALLY LIFTING DROUGHT DECLARATIONS AND WITHDRAWING WELL PERMIT REQUIREMENTS FOR COUNTIES

On September 5, 2024, Governor Gavin Newsom issued an Executive Order (N-3-24) to terminate the drought State of Emergency declaration for 19 counties in light of improved conditions. The Executive Order also rescinds certain provisions from prior drought State of Emergency Proclamations and Executive Orders, including the requirement for counties to obtain verifications and make findings regarding proposed groundwater wells before issuing permits. Despite improvements to overall surface water supplies, groundwater basins have been slower to recover and a drought State of Emergency remains active in certain vulnerable watersheds. Finally, the Executive Order narrows the State of Emergency Proclamations and Executive Orders targeting the flood effects caused by 2023 winter storms.

Background

The California Legislature has empowered the Governor to issue emergency proclamations and executive orders under the California Emergency Services Act during specified conditions. The Governor utilizes those emergency powers to carry out the state's:

> . . .responsibility to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to the life, property, and resources of the state and generally to protect the health and safety and preserve the lives and property of the people of the state. (Gov. Code, § 8550.)

Pursuant to this power, the Governor can "make, amend, and rescind orders and regulations necessary to carry out the provisions" of the California Emergency Services Act and those orders and regulations have the force and effect of law. (Gov. Code, § 8567.)

The current multi-year drought began in October of 2019, just three years after the drought of 2012-2016. (*See* Executive Order N-3-24, at p. 1.) Through a series of declarations in 2021, the Governor proclaimed a drought State of Emergency in all 58 counties to increase flexibility, set conservation goals, and bolster California's response capabilities. (*See* Executive Order N-3-24 at p. 1.)

Drought conditions continued through Water Year 2023, when cool and wet conditions resulted in record Sierra snowpack and the reemergence of Tulare Lake. (*See* California-Nevada Drought Status Update, National Integrated Drought Information System (Oct. 19, 2023).) Notably, the California-Nevada region started Water Year 2023 with 100 percent of the region in drought, but concluded with less than 1 percent in drought, according to the U.S. Drought Monitor. (*Id.*)

The drastic changes in hydrology during Water Year 2023 and resulting floods prompted a new slate of emergency proclamations and orders throughout the year to address the impacts of the early 2023 winter storms in the Tulare Lake Basin and other regions, even while the drought state of emergency remained in effect. (*See* Executive Order N-3-24 at p. 2.)

Executive Order N-3-24

Considering the reduction in drought conditions since Water Year 2023 and the improvements in areas impacted by the late winter storms of 2023, Executive Order N-3-24 terminates the drought State of Emergency in the Counties of Imperial, Inyo, Los Angeles, Marin, Mendocino, Mono, Monterey, Orange, Riverside, San Bernardino, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Sonoma, and Ventura.

The drought State of Emergency remains active in the 39 other counties, given the persistence of significant impacts from the multi-year drought such as including depleted groundwater supplies, domestic well insecurity, and harm to native fish populations. Executive Order N-3-24 calls for continued action by the state to address the ongoing effects of drought

in the Sacramento and San Joaquin River basins, the Tulare Lake Basin, the Shasta, Scott, and Klamath River Watersheds, and the Clear Lake Watershed. Though the Executive Order does not fully terminate the drought State of Emergency in the remaining 39 counties, it narrows or rescinds specific provisions of prior orders that are no longer necessary. Keeping the State of Emergency active in these counties allows the Office of Emergency Services to continue providing disaster assistance funding when needed.

The new Executive Order also withdraws the provisions of prior orders that imposed conditions on counties and other groundwater well permitting authorities. Executive Order N-3-23 restricted approvals of new groundwater well permits or alterations of existing permits for wells located in medium- or high-priority basins subject to the Sustainable Groundwater Management Act (SGMA) without written verification from the respective groundwater sustainability agency that the well would not be inconsistent with the applicable Groundwater Sustainability Plan. (*See* Executive Order N-3-23 at p. 3.) Permitting entities were also barred from issuing a permit for a new or altered groundwater well:

> . . .without first determining that extraction of groundwater from the proposed well is (1) not likely to interfere with the production and functioning of existing nearby wells, and (2) not likely to cause subsidence that would adversely impact or damage nearby infrastructure. (*See id.* at p. 4.)

Counties that had adopted interim procedures to obtain the verification and findings may seek to adjust their procedures with the removal of those requirements.

As to the State of Emergency for the counties impacted by 2023 winter storms, the new Executive Order rescinds provisions deemed no longer necessary, finding that changed conditions "warrant a more targeted emergency response to the effects of those storms." (*See* Executive Order N-3-24, at p.2.)

Conclusion and Implications

Though California has now had two winters with above-average rainfall, the Governor's decision to keep the drought State of Emergency in effect for 39 counties shows the significant and lasting impacts the prior multi-year drought had across the state. Executive Order N-3-24 also highlights the uncertainty of future hydrology, cautioning that wet winters do not necessarily mean another drought is out of the question for California.

A copy of Executive Order N-3-24 is available at: https://www.gov.ca.gov/wp-content/uploads/2024/09/9.4.24-Drought-EO-N-3-24.pdf. (Taylor Strain, Austin Cho)

IDAHO EXECUTIVE BRANCH TAKES DIM VIEW OF BIDEN ADMINISTRATION'S SEEMING CALL FOR THE FEDERALIZATION OF GROUNDWATER MANAGEMENT

On September 23, 2024, Idaho Governor Brad Little and Lieutenant Governor Scott Bedke issued a joint letter to the Biden administration rebuking the administration's seeming efforts to federalize groundwater use and management. The letter responds to the President's Council of Advisors on Science and Technology's (PCAST) nationwide request for information regarding groundwater resources and management from state-to-state, dated April 25, 2024.

The PCAST's Nationwide Request and Idaho

The PCAST request for information arguably comes at a sensitive time in Idaho. Legal disputes between senior surface water users and junior groundwater users across the Eastern Snake Plain Aquifer (ESPA) flared up in 2022 into 2024 after several years of relative calm under a settlement agreement-based mitigation plan was approved by the Idaho Department of Water Resources in 2016. The 2016 mitigation plan was a negotiated one that, at the time, put an end to roughly two decades of litigation over ESPA water use preceding it. In June of 2024, the parties reached an interim agreement to bridge the 2024 irrigation season, and the Governor and Lieutenant Governor's Offices have been engaged in additional negotiation sessions to address irrigation season

2025 and beyond recognizing that disputes under the 2015 settlement agreement and the 2016 mitigation plan were intractable and unwavering.

The state of Idaho has actively managed groundwater resources since the 1951 enactment of the Idaho Ground Water Act, and that management has been further expanded (if not refined) by the Idaho Department of Water Resource's Conjunctive Management Rules, circa 1994 (conjunctively managing water right administration between ground and hydrologically-connected surface water sources like the ESPA and the Snake River flowing through the ESPA region). Consequently, Governor Little and Lieutenant Governor Bedke took exception to the implication of the PCAST request for information that the Biden-Harris Administration finds local resource management insufficient or lacking.

Further, the PCAST request for information targets the "western states," where according to PCAST "groundwater resources are being depleted at an alarming rate." PCAST blames agricultural use of groundwater as primary cause of the depletion (mostly from agricultural withdrawal). Given agriculture and ranching's importance to the Idaho economy, it is no surprise that the Idaho executive branch bristled at the PCAST information request.

In addition to the philosophical disagreements with the tenor of the PCAST request, Governor Little and Lieutenant Governor Bedke take exception to the potential legal implications of the request. The Clean Water Act has long left the management and regulation of non-jurisdictional waters to the states. But the PCAST information request seemingly criticizes "best management practices that vary from state to state," suggesting that more centralized "national stewardship strategies" are needed to better manage groundwater resources. Most bluntly, the PCAST request for information is intended to "support the development of a report to advance government-wide action on groundwater." While the information request may not say that "federal" government-wide action is necessary, the "national strategies" language fills in the gap and falls flat with the Idaho executives (Idahoans generally reject the term 'government-wide action).

Idaho Responds

In their joint response letter, Governor Little and Lieutenant Governor Bedke pose a number of questions to PCAST, questioning the end goals of the information-gathering exercise, the accuracy and credibility of the information returned, whether and to what extent individual states be engaged in any policy development report PCAST ultimately issues, and, importantly, whether this PCAST exercise will be used to create new and additional federal regulations going forward. It may be that the PCAST information request proves to be a valuable information-gathering tool for local state stakeholders to review and learn from. But, there is no question that the request's verbiage and tenor is poorly delivered as a threshold matter.

Conclusion and Implications

Idaho water users are monitoring the PCAST process for fear of what it may bring. Water users in several other western states are presumably doing the same. As Governor Little and Lieutenant Governor Bedke point out, "Congress has long left [local water resource management] up to the states and has [instead] limited its involvement to funding of projects and technology advancements." Perhaps the PCAST process is in line with this history, but it does not read that way. Absent further clarification, however, the Idaho executive branch requests that PCAST "pause" the development and issuance of any report, making it clear that "[m]anagement of water is a state issue . . . [Idaho does] not invite or welcome the involvement of the federal government in making decisions about this precious resource."
(Andrew J. Waldera)

LEGISLATIVE DEVELOPMENTS

COLORADO RIVER BASIN STATES, CONGRESS EXPLORE VARIETY OF PROGRAMS TO ADDRESS WESTERN WATER NEEDS

The federal government, through Congress and the U.S. Bureau of Reclamation, proposed two new water programs in September 2024. The first, the Water Project Navigators Act, would see Congress create a new program within the Bureau of Reclamation to help communities access federal monies for water conservation and infrastructure projects. The second, a conservation-for-credit agreement between the Upper Colorado River Basin States and the Bureau of Reclamation, would offer a way for the Upper Basin states to benefit from their internal voluntary water conservation measures. Both programs offer new ways to build on existing programs to further a common goal of sustainable water use in the West.

The Water Project Navigators Act

A bi-partisan group of legislators recently introduced the Water Project Navigators Act in an effort to support development of water management and conservation programs throughout the West. The Act, sponsored by Sens. John Hickenlooper (D-CO) and Jerry Moran (R-KS) and Reps. Brittany Petterson (D-CO) and Juan Ciscomani (R-AZ) would create a mechanism to help states, tribes, and rural communities access federal resources for water-related projects. The federal government currently has numerous programs that offer grant and low-interest loan funding to support high-needs communities and projects. Some examples of these programs include the USDA Rural Development Water and Environmental grants and loans, and the Bureau of Reclamation WaterSMART water and energy efficiency grants. However, many communities, particularly rural and Tribal communities, often struggle to have the means to access this money. In a press release, Sen. Hickenlooper noted that, "Rural and tribal communities deserve their fair share of federal funds to address drought, but all too often are left out. Our water project navigators will help these communities get their share."

To accomplish this goal, the Act would create "Navigators" under the Bureau of Reclamation to assist and guide communities through the application and acquisition process to obtain federal funds. Specifically, the Navigators would be tasked with grant writing, project management, and technical assistance, including design, environmental review, and engineering. The program is modeled in part after Colorado's Federal Technical Assistance Grants and the Colorado River Water Conservation District's Accelerator Grant Program. These programs, although limited in scope to certain Colorado communities, have shown success and offer, as Sen. Moran said, a way to "connect these communities with the resources available to them to help combat the impacts of drought."

The bill sponsors' press releases states that the primary goals of the Navigator program are to help communities develop and implement multi-benefit water projects, and to accelerate the creation of those projects that support water supply and sustainability goals. Although a wide variety of entities would be eligible for Navigator support, the primary focus will be on rural and Tribal communities that do not have the resources or technical expertise to implement their water-related projects on their own.

In addition to strong bipartisan support, the bill is supported by a variety of conservation and agricultural groups including Trout Unlimited, American Rivers, Environmental Defense Fund, Nature Conservancy, Rocky Mountain Farmers Union, and the Kansas Department of Health and Environment. Rep. Ciscomani said, "[a]s the drought worsens in the West, it is now more important than ever that impacted communities have the necessary tools to secure federal dollars for critical multi-benefit water infrastructure projects."

There are currently two versions of the bill pending in the Senate. Senate Bill 5014 is in the Committee on Energy and Natural Resources Subcommittee on Water and Power, while Senate Bill 4995 is in the Senate Committee on Environment and Public Works. The companion House Resolution 9506 is before the House Committee on Natural Resources.

Water Conservation Credits

Outside of Congress, the Upper Colorado River Basin states are working with the Bureau of Reclamation on an agreement that would allow states to obtain credits for conserved water that could then be used to protect against potential future cutbacks. Water conservation measures are currently the hot-button issue in the Colorado basin as dry years and overuse have combined to severely deplete storage reservoirs, most notably Lake Powell and Lake Mead. All seven basin states have been working with the Bureau of Reclamation on proposals for operation during times of shortage. *See, Upper and Lower Colorado River Basin States Submit Competing Proposals for Post-2026 Operational Guidelines*, 28 W. Water L. & P'lcy Rptr. 129-131(Apr. 2024). However, in the interim many Upper Basin States have already enacted programs to reduce their water usage. For example, Colorado's System Conservation Pilot Program is a demand management program that pays water users to fallow their fields for a season and keep that water in the river. In 2023 alone that program paid $16 million to farmers and ranchers to not use their water. Although generally seen as a conservation success, the Upper Basin states are worried that there is not a central mechanism to track and store that water. Instead of refilling the large downstream reservoirs, that water could simply flow to the lower basin for consumption, thereby derailing the goals of the program.

To combat that issue, the Upper Basin states proposed an agreement with the Bureau of Reclamation under which those states would track their conserved water as "storage credits." If and when severe drought forces basin-wide curtailment, the Upper Basin could then use those credits to fulfill their water delivery obligations to the Lower Basin. In essence, the Upper Basin would no longer be penalized if the Lower Basin used the "saved" water during non-curtailment periods. The Bureau of Reclamation is currently drafting a conservation-for-credit agreement that it will then present to the Upper Colorado River Commission. The agreement is expected to specify which conservation programs are eligible for credits, who can participate in the credit program, and how the credits would be regulated, including measurement and calculations.

The parties stated a goal to have a draft agreement by the end of September, although no agreement was publicly available as of press time. The Upper Colorado River Commission said in a statement that it hopes to approve the agreement in time to operate conservation projects during the 2025 water season.

Conclusion and Implications

Although the conservation-for-credit and Water Project Navigators Act are seemingly disparate, they share an underlying theme. Extended drought and changing climate are overriding partisan divides and forcing cooperation among western shareholders. Any long-term western water solution will likely be multi-faceted and involve both infrastructure improvements and voluntary water curtailment. Creative ideas, like those outlined above, offer an optimistic view of the future of water in the West. There may be no magic bullet, but legislators, states, quasi-governmental organizations, and private parties are all working together to attack the growing challenges and find solutions for the 21st century.
(John Sittler)

REGULATORY DEVELOPMENTS

EPA'S FOURTH SIX-YEAR REVIEW OF DRINKING WATER STANDARDS: KEY FINDINGS

In July 2024, U.S. Environmental Protection Agency (EPA) announced the results of the fourth cycle of its Six-Year Review of existing national primary drinking water regulations (NPDWRs). This review process, mandated under the Safe Drinking Water Act (SDWA), occurs every six years. The purpose of the review is aimed at ensuring the safety of drinking water by evaluating existing drinking water standards and determining whether they need updating to reflect new scientific knowledge and technological advancements. EPA's fourth Six-Review report sheds light on the state of drinking water safety, but did not lead to any proposed regulatory changes.

Background on the Six-Year Review Process

The Six-Year Review process is designed to ensure that drinking water standards remain effective in protecting public health. Under the SDWA, EPA is required, every six years, to review each NPDWR, which are legally enforceable primary standards and treatment techniques that apply to public water systems. This process involves a thorough assessment of current standards, incorporating the latest scientific data, technological advances, and any emerging health concerns. The Six-Year Review is not a final regulatory decision to revise or not revise an NPDWR, but rather the initiation of a planning process that involves more detailed analyses of factors relevant to deciding whether a rulemaking effort to revise an NPDWR should be considered.

During each review cycle, EPA's evaluation involves, but is not limited to, the following:

- Contaminant Occurrence and Exposure Analysis: Information on the frequency, levels, and geographic distribution of contaminants is analyzed to determine how changing a maximum contaminant level (MCL) or required treatment technique may affect health risks of water consumers and impact compliance costs for public water systems.

- Technological Advancements: Consideration of advancements in water treatment and monitoring technologies.

- Analytical Method Improvements: Evaluated to determine whether there have been advances in laboratory technology to potentially enable a revision to the MCL for a regulated contaminant.

- Risk-Balancing: Addresses whether a change to an MCL and/or treatment technique will affect the risk from one or more other contaminants, and, if so, to consider revisions that will balance these overall risks.

- Implementation Issues: Considered based upon EPA's or states' experience in implementing the regulations as written.

The findings from these reviews can lead to updates in regulations, new rulemakings, or reaffirmation of existing standards.

Key Findings from the Fourth Six-Year Review

Of the 88 NPDWRs assessed during the fourth Six-Year Review 4, EPA did not identify any that needed revision at this time. The review did identify areas where updates may be warranted. For example, EPA noted that it did not evaluate lead and copper in this Six-Year Review because such efforts would duplicate efforts to review those NPDWRS as part of an ongoing regulatory action in which EPA has proposed to, among other thing, require water systems to replace lead service lines, remove the lead trigger level, reduce the lead action level to 0.010 mg/L, and strengthen tap sampling procedures.

In addition to possible revisions to maximum contaminant level goals (MCLGs), MCLs, and treatment techniques (TTs), as a part of the Six-Year Review, EPA considered whether other regulatory revisions to NPDWRs were needed to address implementation issues, such as revisions to monitoring and system reporting requirements. The agency focused on the following five implementation issues in this Six-Year Review:

- Use of an alternative MCL for nitrate in Non-community Water Systems (NCWSs)

- Frequency of nitrate monitoring in Transient Noncommunity Water Systems (TNCWS)

- Frequency of nitrite monitoring

- Total nitrate-nitrogen plus nitrite-nitrogen MCL

- Total cyanide screening for free cyanide

Although the results from this review did not warrant any changes at this time, EPA noted it would consider changes to monitoring requirements in the future. Regarding nitrate monitoring requirements, EPA intends to work with States to encourage more systems to sample for nitrite at least once during each nine-year compliance cycle.

Notably, EPA did not include in this Six-Year Review cycle the recently promulgated per-and polyfluoroalkyl substances (PFAS) regulations. The PFAS regulations, promulgated in April 2024, established six new NPDWRs. EPA anticipates that once the PFAS regulations go into effect and sufficient information regarding compliance monitoring becomes available, those NPDWRs will be subject to a more detailed regulatory review under a future Six-Year Review cycle.

Conclusion and Implications

EPA's fourth Six-Year Review of drinking water standards is a critical step in maintaining and improving the safety of the nation's water supply. By integrating the latest scientific research, technological advancements, and public health considerations, the review highlights areas where regulatory updates are needed and provides a roadmap for future actions. While this review did not result in any concrete recommendations for future revisions, there are a number of current proposed regulatory changes relating to water quality standards that are important to follow. For more information, *see*: https://www.epa.gov/dwsixyearreview/six-year-review-4-drinking-water-standards

(Monica Browner, Meagan J. Somogyi, Breana Inoshita)

THE SAN FRANSISCO BAY-DELTA CONVEYANCE PROJECT: AN UPDATE ON SCHEDULE AND NEXT STEPS

Much has been written about the Delta Conveyance Project (DCP) and its prior iterations over the years including in this publication. The preceding and upcoming months present circumstances calling for an update as the DCP relates to the water rights petition proceeding pending before the State Water Resources Control Board (State Water Board). As discussed more below, the hearing date remains set to begin January 16, 2025, though various dates have been vacated leading up to January with a second pre-hearing conference set for October 17, 2024.

Background

The DCP is the fourth iteration dating back decades to create a massive water conveyance system for water to move from northern regions of the state of California to areas south of the Sacramento-San Joaquin River Delta (Delta). The most recent iteration of this large water project was California Water Fix, and prior to that project iteration was the Bay Delta Conservation Plan and the Peripheral Canal. The price tags of course vary with each new project iteration, with the DCP's cost estimated at $15 billion.

The project seeks to build a 36-foot diameter tunnel in the Delta to carry fresh water from the Sacramento River southward and under the Delta to a network of reservoirs, canals, pipelines, and other water conveyance infrastructure. The DCP is scaled down from the Water Fix version by being a single concrete tunnel about 150 feet underground though two large intakes would be constructed to feed the tunnel.

Project Status at the State Water Resources Control Board

The California Department of Water Resources (DWR) submitted a petition to the State Water Board in February 2024 to request a change in point

of diversion for the existing State Water Project water rights. The petition seeks to divert water under existing water rights from two new locations in the Delta.

Following the August 13 pre-hearing conference, various dates previously scheduled have been vacated, including the December 4, 2024, deadline for submission of case-in-chief exhibits with a new deadline said to be set no sooner than January 10, 2025.

The October 17 pre-hearing conference notice provides an agenda for: (1) rendering a decision on DWR's August 23 request; (2) consideration of DCP change petitions separately from time extension petitions; and (3) staggering deadlines for submission of case-in-chief exhibits. Notices of intent to participate and any pre-hearing conference statements are due by October 10, 2024.

Key Procedural Issues for the October 17, 2024, Pre-Hearing Conference

The key procedural issues are:

- Expired Deadline for Beneficial Use: Legal questions about the significance of the expiration of time for the Department of Water Resources (DWR) to divert and beneficially use water under the specified water right permits.

- Scope of the Proceeding on DWR's Petitions for Change: Whether the State Water Board should consider the change petitions separately from petitions for an extension of time to divert and beneficially use water under the subject permits. If considered separately, how the Board should address potential outcomes of future-filed time extension petitions and condition any approval of the DCP change petitions.

- August 23 Request for Minor Change: Objections to DWR's request to amend the DCP change petitions, including procedural flaws and the appropriateness of seeking a 55-year extension of the construction deadline as a "minor change."

Each of these issues deserve robust discussion beyond what is written here. DWR seeks to amend the DCP change petitions to modify Term 6 of the referenced permits, extending the construction deadline from December 31, 2000, to December 31, 2055. The request appears procedurally flawed because the cited Water Code sections (1700.4 and 1700.6) authorize minor changes to water right applications, permits, and licenses, but not to change petitions. A 55-year extension does not seem to qualify as a "minor adjustment" to papers already submitted.

Conclusion and Implications

DWR's August 23 Request introduces significant procedural and legal complexities that the State Water Board must address to ensure a fair and efficient hearing process.

The resolution of these issues will likely affect the scope, schedule, and conditions of the hearing on the DCP change petitions. The hearing officer may need to stagger the deadlines for submission of case-in-chief exhibits and hearing days, allowing DWR to present its case-in-chief before protestants submit and present their cases-in-chief. If the Board decides to consider the DCP change petitions separately, it must determine how to condition any approval to ensure that diversion or rediversion of water through the proposed DCP is limited to the amount of water that DWR put to beneficial use by the 2009 deadline, unless and until the Board approves petitions for an extension of time. Accordingly, the October 17 pre-hearing conference presents very significant legal and factual issues for discussion that will shape, or re-shape, the State Water Board's hearing process for the DCP.
(Wes Miliband)

NEVADA'S WALKER BASIN CONSERVANCY RETIRES ANOTHER 500 ACRE-FEET IN THE SMITH VALLEY

In August 2024, the Walker Basin Conservancy (Conservancy) secured 500 acre-feet of groundwater rights in Smith Valley, Nevada, advancing toward the organization's long-term conservation objectives. This is the first permanent relinquishment of groundwater rights under a new 2023 Nevada Legislative program.

Background

The 2023 Nevada Legislature passed Senate Bill 176, establishing an Account for Purchasing and Retiring Water Rights, as well as the Nevada Water Buy-Back Initiative. The Bill was funded by the Legislature with $25 million from the American Rescue Plan Act (ARPA) funds. The purpose of the program was to focus on acquiring water rights in groundwater basins that are either over-pumped or over-allocated. Following the enactment of the legislation, the Nevada Department of Conservation and Natural Resources established an advisory committee to determine the methodology used to acquire and retire water rights from willing sellers. The Conservancy's transaction is the first to be completed under the new program.

Walker River and Walker Lake

The Walker River travels through Smith Valley, Nevada, a farming and ranching area in western Nevada, and terminates in Walker Lake, on the Walker River Indian Reservation. Walker Lake has experienced a 90 percent decline in volume and a 50 percent reduction in surface area since the early 1900s. The Walker River watershed includes the West and East Forks of the Walker River, significant sources of irrigation water in both California and Nevada. As a result of declining river flows from surface water diversions, groundwater pumping, and climate change, the lake volume and salinity have surpassed and remain above the survivable level for native Lahontan cutthroat trout–Nevada's state fish—and other aquatic species. The Conservancy is working to reduce the salinity of Walker Lake to between 10,000 and 12,000 mg/L TDS (total dissolved solids) by acquiring and relinquishing a total of 50,000 acre-feet of water rights in the Walker Basin.

The Conservancy

The Conservancy is dedicated to increasing inflows of the Walker River to restore Walker Lake, with its mission being to restore water volume, quality, and aquatic life to Walker Lake.

Through a water rights acquisition program originally established by funding from the Desert Terminal lakes Act, Public Law 101-171 (2002), the Conservancy's purchases water rights from willing sellers in the Walker River Basin. Surface water rights remain in the Walker River for delivery to Walker Lake, with each water rights transaction furthering its objective to rehabilitate Walker Lake. Thus far, the Conservancy has acquired nearly 60-percent of its surface water rights goal and has improved more than 2,000 acres of habit throughout the Walker River Basin.

The recent purchase of 500 acre-feet of primary groundwater rights from the Fulstone family is a significant step toward reducing groundwater pumping in the Smith Valley. As other groundwater users voluntarily reduce their use, the needle moves ever closer to restoring the sustainability of the Walker River System. The rights acquired from the Fulstone family are being permanently relinquished to the State of Nevada.

Smith Valley

Agriculture, especially alfalfa farming, is a major industry in the Smith and Mason Valleys, which include the communities of Wellington, Smith, Mason, and Yerington. Irrigation is the top consumer of groundwater in both valleys by a significant margin.

The Smith Valley struggles with groundwater availability and over-pumping, contributing to surface water capture and decreased flows on the Walker River. In 2015, the State Engineer attempted to curtail rights in the basin after the water table declined significantly and caused some wells to run dry. Smith Valley has experienced groundwater declines averaging 1.2 ft./year since 1969, with the recent drought period featuring declines between 6.7 ft./year and 11.1 ft./year. Between 2020 and 2023, Smith Valley water table levels fell by an average of 6.6 feet per year, and levels in neighboring Mason Valley averaged a decline of 3.5 feet/year over the same period.

Conclusion and Implications

The Fulstone family's water rights relinquishment in partnership with the Conservancy is a significant move toward alleviating groundwater drawdown in the Walker basin and represents an important step toward sustaining the Walker River system. This retirement serves as an example of a mutually beneficial transaction, helping: (1) to alleviate demand on the aquifer in the Smith Valley, better sustaining important agricultural activities in Lyon County, and (2) furthering the Conservancy's goal to mitigate salinity and restore a fishery, complete with Lahontan Cutthroat trout, to the lake.
(Micheline Nadeau Fairbank, Evan Klouse)

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

Oct. 1, 2024—The U.S. Environmental Protection Agency (EPA) announced an agreement with Honeywell International Inc. that funds construction of groundwater treatment facilities at the San Fernando Valley (Area 1) Superfund site in Los Angeles, California. The treatment facilities, to be built in a section of the Superfund site referred to as the North Hollywood Operable Unit, will help clean up industrial groundwater contamination and allow the Los Angeles Department of Water and Power (LADWP) to use the treated water in its drinking water supply. The EPA reached today's agreement with Honeywell after more than a decade of negotiation that included extensive consultation and coordination with LADWP.

The construction of the treatment facilities resulted from a cooperative process among LADWP, EPA, and Honeywell. The parties worked closely to solve complex problems related to the management of groundwater contamination, ensuring that important cleanup work can be completed while, at the same time, allowing Los Angeles to increase the use of its groundwater for delivering safe and critically needed drinking water to the public. The cooperative framework, which included a separate settlement between LADWP and Honeywell in 2019, has laid the foundation for a more coordinated and robust long-term approach to tackling the pollution that has plagued the San Fernando Basin for decades. More broadly, this approach will serve as a template for EPA's ongoing efforts to protect valuable drinking water resources in Southern California.

The agreement reflects coordinated efforts between LADWP and EPA to hold responsible parties accountable for their historic production of hazardous materials and the resulting groundwater contamination in the San Fernando Basin. Honeywell's predecessors manufactured and tested aircraft parts and other industrial equipment beginning in the 1940s at a facility in North Hollywood known as the Former Bendix Site. The EPA and the Los Angeles Regional Water Quality Control Board determined that operations at several industrial facilities, including operations at the Former Bendix Site, resulted in contamination to the groundwater resources in the area designated by EPA as the North Hollywood Operable Unit.

As part of the agreement between EPA and Honeywell, impacted groundwater will be extracted for treatment and will then be delivered to LADWP for use in its drinking water supply system. This additional supply will help meet the daily water needs of roughly 144,000 residents of the nation's second largest city.

Sept. 27, 2024—Max Environmental Technologies, Inc. (MAX) will take steps to properly manage the treatment and disposal of industrial wastewater at the company's waste management facility in Yukon, PA, the U.S. Environmental Protection Agency (EPA) announced today. The joint agreement addresses the discharge of pollutants and structural and operational failures that EPA officials identified at the Yukon facility during a 2023 inspection.

EPA officials inspected the facility in March 2023 to determine whether MAX was meeting the requirements of its industrial wastewater and stormwater discharge permits. According to the EPA, its inspectors documented numerous failures to properly maintain and operate the facility, including, but not limited to, holes in the wastewater treatment system, inadequate reporting of wastewater sample results, and that pollution prevention training was not provided to employees. Metals and other pollutants were found in landfill

discharge and stormwater runoff at the facility from January 2022 to July 2023, EPA said.

In the Consent Order MAX has agreed to take action to eliminate the potential release of hazardous wastewater into the environment and to ensure that operations do not cause or contribute to unauthorized discharges from the Yukon facility. The consent order requirements include, but are not limited to, retaining technical professionals to conduct wastewater sampling and evaluate certain operations and facilities, and developing a plan and schedule for correcting issues identified at the facility related to the permit violations.

MAX conducts industrial wastewater treatment activities under the Pennsylvania National Pollutant Discharge Elimination System.

Treated industrial wastewater from MAX's Yukon facility is discharged to the Sewickley Creek. The Sewickley Creek connects to the Youghiogheny River, which eventually joins the Monongahela River. The 160-acre waste facility is surrounded by agricultural and residential properties and is located about 30 miles southeast of Pittsburgh, PA, in Westmoreland County.

Sept. 25, 2024—Responding to the urgent threat of per- and polyfluoroalkyl substances (PFAS) in the Tucson aquifer, the U.S. Environmental Protection Agency (EPA) has entered into an agreement with Tucson Airport Authority. This agreement constitutes a proactive step to address contamination from the airport property, aiming to combat an ongoing threat to a primary drinking water source for the city of Tucson.

PFAS chemicals, often referred to as forever chemicals, originating from the Tucson International Airport Area (TIAA) Superfund Site are threatening the water quality of the drinking water system managed by Tucson Water (the City of Tucson's water department). The agreement being announced today will help ensure the protection of the aquifer and address groundwater contamination.

The agreement, known as an Administrative Settlement Agreement and Order on Consent, requires Tucson Airport Authority to determine the nature and extent of PFAS contamination that the Authority is responsible for at the TIAA site, and whether cleanup action at or around the airport property is needed. If so, the Authority must evaluate cleanup options to prevent, mitigate, and respond to the release or threatened release of PFAS at or from airport property. This agreement further motivates Tucson Airport Authority to cooperate with others who are not parties to this agreement, such as Tucson Water and the Air Force, to prevent and mitigate impacts from PFAS.

The agreement between EPA and Tucson Airport Authority, under sections 104, 106, and 122 of the Comprehensive Emergency Response, Compensation and Liability Act, also known as the Superfund Law, is a testament to the government's commitment to addressing PFAS contamination. The EPA will not just be a signatory but will actively oversee the work implemented because of the agreement, ensuring that the public's health and the environment are protected.

Scientific studies have unequivocally shown that exposure, even at low levels, to certain PFAS chemicals can have serious health implications. These include adverse effects on the immune system, cardiovascular systems, and human development in children. Furthermore, studies have linked oral exposure to adverse health effects on the liver, the kidneys, and the immune system, as well as cancer. Following oral exposure, adverse health effects have been found on the thyroid, reproductive organs, and tissues, and developing fetuses. It is crucial that the public is aware of these potential risks, as they underscore the seriousness of the situation.

Sept. 20, 2024—The U.S. Environmental Protection Agency announced a collaboration with the city of Muskegon Heights, Michigan, to help identify drinking water lead pipes, accelerate replacement and protect public health. Muskegon Heights is participating in EPA's Get the Lead Out Initiative, which is funded entirely by the Biden-Harris Administration's Bipartisan Infrastructure Law to help move the nation towards achieving 100% lead service line replacement. The Get the Lead Out Initiative will provide technical assistance to approximately 200 communities nationwide.

Consuming lead in drinking water can cause serious health impacts, including irreversible harm to brain development in children. To protect children and families, the Biden-Harris Administration's Bipartisan Infrastructure Law invests a historic $15 billion to replace lead pipes and deliver clean and

safe drinking water, including nearly $62 million for Michigan just this year alone. The Bipartisan Infrastructure Law also allocated another $11.7 billion to the General Supplemental Drinking Water State Revolving Fund, which can be used for lead pipe replacement.

However, many underserved communities lack the resources to plan for lead pipe replacement and access federal investments. The technical assistance provided through the Get the Lead Out Initiative will help ensure that no community is left behind in the opportunity to replace lead pipes.

"It's not an exaggeration to say, this investment is saving lives," said Rep. Hillary Scholten. "There is no amount of lead level in the blood that is safe for children. Even trace amounts of lead exposure can cause irreversible brain damage that can hinder a child's life irrevocably. When we Get the Lead Out, we're ensuring every West Michigan child is afforded equal opportunity to grow up safe and healthy. Investments like these—made possible by the Bipartisan Infrastructure Law—will protect the Muskegon Heights community and children for generations to come."

Under the Get the Lead Out Initiative, EPA will support the city of Muskegon Heights in identifying lead pipes, developing lead service line replacement plans, increasing community outreach and education efforts, and applying for funding. As a result of these efforts, Muskegon Heights will move quickly towards the goal of 100% lead-free pipes.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

Sept. 30, 2024—The U.S. Environmental Protection Agency (EPA) announced a settlement with Horizon Tool, Inc. (Horizon Tool) of Greensboro, North Carolina, to resolve alleged noncompliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) relating to the sale and distribution of an unregistered product. Under the settlement, Horizon Tool will pay a $140,940 civil penalty.

In June 2023, the EPA conducted an inspection at Horizon Tool's facility and determined that between April 2020 and December 2022, the company had sold and distributed a product called "AllShield Spray Sanitizer," whose label bore claims that the product was antimicrobial and could be used to sanitize by removing bacteria from surfaces. In July 2023, the EPA determined that Horizon Tool was offering for sale the AllShield Spray Sanitizer product on its website which included claims that the product could be used to sanitize surfaces. Under FIFRA, products that are intended to kill, destroy, prevent, or repel bacteria or viruses are considered to be pesticides and must be registered with the EPA. The AllShield Spray Sanitizer product was not registered as a pesticide with the EPA at the time it was distributed and sold by Horizon Tool from 2020 to 2023.

Sept. 20, 2024—The U.S. Environmental Protection Agency announced a settlement with Akron Steel Treating Co. to resolve alleged hazardous waste violations at the company's facility at 336 Morgan Ave. in Akron, Ohio. Under the terms of the settlement, the company will address the alleged violations and pay a civil penalty of $105,855 to the federal government. The company treats carbon and stainless steel parts with heat to remove scale.

EPA alleged that the company stored hazardous waste at the facility for more than 180 days without a Resource Conservation and Recovery Act permit as required. RCRA is the nation's primary law governing the management of solid and hazardous waste, which helps protect human health and the environment.

EPA cited the company for several RCRA violations involving issues of storage, tracking and labelling.

The facility is in a community with potential environmental justice concerns. Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.
(Robert Schuster)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT AGREES TO HEAR CHALLENGE TO SAN FRANCISCO WATER QUALITY STANDARDS

City and County of San Francisco v. U.S. Environmental Protection Agency, Case No 23-753.

The U.S. Environmental Protection Agency (EPA) is facing a legal challenge from San Francisco (City) regarding its water quality standards, specifically in relation to a federal Clean Water Act permit for the City's Oceanside combined sewer system and wastewater treatment facility. The EPA's narrative standards, a key feature of the permit, are being contested by the City on the grounds of vagueness, as San Francisco argues that these standards make it difficult for the City to comply with specific water quality expectations. However, California, along with several environmental advocacy groups, is supporting the EPA, asserting that these narrative standards are essential for effective environmental regulation. The case is currently before the U.S. Supreme Court, with oral argument scheduled for October 16. The grant of review stems from the Ninth Circuit Court of Appeals.

The EPA's Narrative Standards Under Scrutiny

San Francisco's challenge revolves around the permit's inclusion of narrative effluent limitations. These limitations are broader, descriptive requirements that restrict what a permit holder, such as the City, can discharge into a jurisdictional body of water. According to San Francisco, while it does not oppose the idea of narrative standards in principle, it takes issue with the responsibility imposed on permit holders for the overall quality of receiving waters—a mandate the City claims is too ambiguous.

The City argues that these vague standards create compliance difficulties, as they lack the precision of specific effluent limitations, which are numeric restrictions on the concentration of pollutants a facility can release. Without clear guidelines, San Francisco contends, it is challenging to ensure adherence to the requirements set forth in the Clean Water Act (CWA).

California's Support for the EPA

In an *amicus* brief supporting the EPA, the California Department of Justice countered San Francisco's claims, arguing that narrative standards are not only legally valid but also crucial in some cases to meet water quality goals. According to California, it is impractical, if not impossible, to codify every water quality standard into precise numeric effluent limitations for every facility. As a result, narrative standards provide a necessary and flexible tool for regulators to ensure that water quality objectives are met, even when numeric standards are difficult to apply.

California's argument emphasizes that if the U.S. Supreme Court sides with San Francisco and strikes down the narrative standards, a vital regulatory tool will be lost. This would, in the state's view, undermine the ability of permitting authorities to enforce the CWA effectively. California's position underscores the importance of maintaining regulatory flexibility in safeguarding water quality, particularly when the complexity of environmental factors cannot be reduced to simple numbers.

Environmental Groups Rally Behind the EPA

In addition to California's support, several environmental organizations, including the Natural Resources Defense Council, San Francisco Baykeeper, and the Sierra Club, have submitted a joint amicus briefs urging the Court to uphold the EPA's narrative standards. These groups argue that San Francisco's challenge introduces legal arguments that distort the CWA's intent and undermine the efficacy of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program.

The environmental organizations maintain that Congress, when crafting the CWA, established a comprehensive permitting system that should not be subject to reinterpretation based on undefined legal terms. They argue that the City's effort to undermine

the narrative standards could have far-reaching consequences for water quality management nationwide. By potentially narrowing the scope of permissible regulatory tools, San Francisco's legal challenge risks destabilizing the "carefully calibrated regime" the CWA seeks to achieve in protecting the environment from pollutant discharges.

The EPA's Defense and Legal Precedent

In response to San Francisco's claims, the EPA has defended its use of narrative standards, pointing to established legal precedent and statutory interpretation. The agency has argued that its authority under the CWA extends beyond merely imposing effluent limitations, as evidenced by prior U.S. Supreme Court precedent affirming that the EPA's regulatory authority includes imposing discharge limitations beyond the narrow statutory definition of "effluent limitations."

The EPA contends that the language of the CWA explicitly allows for discharge limitations beyond effluent limitations and that this interpretation has been a longstanding part of the agency's approach to implementing the law. The agency further argues that compliance with numeric effluent limitations alone will not always suffice to achieve a state's water quality standards, thus reinforcing the need for narrative standards in certain regulatory scenarios.

Potential Impact of the Supreme Court's Ruling

The outcome of this case has significant implications not only for San Francisco, but also for the future of water quality regulation across the United States. If the Supreme Court sides with San Francisco and strikes down the EPA's use of narrative standards, the decision could constrain the regulatory tools available to both federal and state agencies under the CWA. This would make it more challenging to address complex water quality issues that do not lend themselves to numeric limitations alone.

Conversely, if the Court upholds the EPA's standards, San Francisco argues that it could expose permittees to unpredictable and costly penalties. "For municipalities like San Francisco, the cost of injunctive relief in CWA enforcement cases can often run into the hundreds of millions or even billions of dollars," and with the narrative standards established under its recent permit, the City argues that it can have little certainty about whether or not its conduct will expose the municipality to such actions.

Conclusion and Implications

The legal battle between San Francisco and the EPA over water quality standards highlights a critical tension in environmental regulation: the balance between precision and flexibility. As San Francisco challenges the vagueness of narrative standards and the potentially costly consequences of its flexibility, California and environmental groups emphasize the necessity of these standards for effective water quality management. With the U.S. Supreme Court set to weigh in, the case could set an important precedent for how the CWA is applied moving forward, determining the future of water quality protections and regulatory enforcement in the U.S.
The Brief for the Respondent is available here: https://www.supremecourt.gov/DocketPDF/23/23-753/323429/20240826212335332_23-753bsUnited-States.pdf

The Reply Brief for Petitioner is available here: https://www.supremecourt.gov/DocketP DF/23/23-753/326883/20240925173628062_23-753%20Reply%20Brief.pdf
(Sam Bacal-Graves, Meagan J. Somogyi, Breana Inoshita)

JUDICIAL DEVELOPMENTS

EPA'S DECISION TO PURSUE NON-REGULATORY ACTION REGARDING CAFOS UPHELD BY NINTH CIRCUIT

Food & Water Watch, et al. v. U.S. Environmental Protection Agency, Unpub., Case No. 23-2146 (9th Cir. Oct. 2, 2024).

In October, the Ninth Circuit Court of Appeals, in an *unpublished* decision, denied a petition for review regarding the U.S. Environmental Protection Agency's (EPA) decision to deny a petition to initiate rulemaking related to regulations governing concentrated animal feeding operations (CAFOs). The EPA instead proposed to undertake review of existing regulations and the viability of non-regulatory actions to address pollution attributable to CAFOs.

Background

Congress enacted the Clean Water Act in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). The CWA in part regulates the discharge of dredged or fill material into navigable waters. In the context of the CWA, the term "navigable waters" is defined as "waters of the United States." 33 U.S.C. § 1362(7). The CWA prohibits the discharge of any pollutant by any person into waters of the United States without a permit. 33 U.S.C. § 1311(a).

Animal Feeding Operations (AFOs) are agricultural operations where animals are kept and raised in confined situations. An AFO is a lot or facility (other than an aquatic animal production facility) where the following conditions are met: (1) animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (2) crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

AFOs that meet the regulatory definition of a concentrated animal feeding operation (CAFO) are regulated under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program. The NPDES program regulates the discharge of pollutants from point sources to waters of the United States. CAFOs are point sources, as defined by the CWA. To be considered a CAFO, a facility must first be defined as an AFO, and meet the criteria established in the CAFO regulation.

Petitioners Food & Water Watch and twelve other environmental nonprofits (Petitioners) petitioned the United States Environmental Protection Agency (EPA) to initiate a rulemaking and revise its regulations governing CAFOs that discharge animal waste and manure into U.S. waterways, pursuant to EPA's authority under the CWA. Petitioners alleged that CAFOs were responsible for ongoing and unlawful water pollution.

The Ninth Circuit's Decision

As a threshold matter, EPA agreed with Petitioners that CAFOs may be responsible for unlawful water pollution, but it determined that an immediate, multipronged rulemaking may not be the best way to fix the problem. Instead, EPA decided that it would do two things: (1) convene a committee of stakeholders to solicit insights into the problem and (2) initiate a study addressing the efficacy of its current regulations. After conducting these measures, EPA would assess whether it could address water quality concerns related to CAFOs through improvements to implementation, enforcement, and other non-regulatory initiatives, or whether regulatory revisions are appropriate. However, Petitioners were dissatisfied with EPA's response.

As identified by the court, petitioners focused their challenge on three specific issues, which they presented to EPA in their petition and to which EPA responded in detail. Specifically, Petitioners alleged that: (1) EPA had lax requirements for CAFOs with National Pollutant Discharge Elimination System (NPDES) permits; (2) EPA's CAFO program, which allows most discharging CAFOs to avoid permit coverage, was inadequate; and (3) EPA's broad agricultural stormwater exemption independently prevents adequate regulation of CAFOs.

The Ninth Circuit held that EPA did not act unreasonably when it refused to take petitioners' re-

quested action to further regulate CAFOs. An agency action may be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, the court's review is extremely limited and highly deferential. According to the court, an agency action qualifies as arbitrary or capricious if it is not reasonable and reasonably explained. In other words, an agency cannot simply ignore an important aspect of the problem; it must offer a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

In this instance, as explained by the court, EPA acknowledged the serious problem of CAFO-based waste discharges into U.S. waterways, and it decided that the most effective way to counter the problem is to further study its Effluent Limitation Guidelines and to commission a stakeholders' subcommittee.

Accordingly, the Ninth Circuit held that the EPA did not refuse to taken any action with respect to its CAFO regulations. The court thus distinguished this case from others where the EPA wholly declined to act. The court further observed that the EPA has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities and significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. The court therefore concluded that EPA deemed it prudent to first seek information about how best to tackle the problem before directing resources toward a new rulemaking. Those justifications, in the view of the court, were reasonable and not at odds with the CWA's requirements.

Conclusion and Implications

This case reflects that federal courts, at least the Ninth Circuit, remain willing to defer to agency actions where the agency has directly engaged with the issue at hand and not completely avoided considering it. Whether federal courts continue to defer to agency actions around rulemaking issues post-overturning of *Chevron* deference remains to be seen, but in this instance the agency's decision not to engage in a rulemaking process and to instead look to non-regulatory actions may suggest that federal agencies will pursue non-rulemaking actions where possible to enforce existing regulations rather than risk enacting rules to which federal courts are no longer required to defer. The Ninth Circuit's *unpublished* decision available at https://cdn.ca9.uscourts.gov/datastore/memoranda/2024/10/02/23-2146.pdf
(Miles Krieger)

Western Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108