Volume 29, Number 4
February 2025

WESTERN WATER LAW & POLICY REPORTER™

CONTENTS

WESTERN WATER NEWS

Arizona Governor Hobbs Proposes Adding Over $60 Million to Defend State's Water Future 69

Utah Water Resources Update: Water Conditions Update for January 2025 and New Study on Water Infrastructure Financing 70

LEGISLATIVE DEVELOPMENTS

New Water-Related Bills in the Colorado General Assembly 72

Washington State Legislative Update for Water Resources 74

REGULATORY DEVELOPMENTS

EPA Releases Draft Risk Assessment Associated with PFAS Chemicals in Biosolids 76

EPA Partially Approves, Partially Disapproves California's 2024 Integrated Report Regarding Clean Water Act 303(d) Listings 78

U.S. Bureau of Reclamation Issues Final Decision Regarding Long-Term Operation of the Central Valley Project and State Water Project 79

California's Delta Stewardship Council Releases Draft Climate Adaptation Plan for the Delta 81

PENALTIES AND SANCTIONS

Recent Investigations, Settlements, Penalties, and Sanctions 83

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

Jamie Moran, 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

Federal Circuit Court of Appeals Rejects California Water Contractors' Takings Claims. 86
City of Fresno v. United States, 124 F.4th 876 (Fed. Cir. 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 © 2025 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

ARIZONA GOVERNOR HOBBS PROPOSES ADDING OVER $60 MILLION TO DEFEND STATE'S WATER FUTURE

On January 30, 2025, via a press release, Arizona Governor Katie Hobbs announced her proposals, via a recently released state executive budget proposal, various funding for water-related projects in the state. "Arizona's water future depends on taking action today," said Governor Katie Hobbs:

> Not only is my administration driving key policy reforms, I'm committed to making investments that protect water for every Arizonan and ensure our communities have the resources they need to continue growing for generations to come.

The Financial Allocations

What follows is a summary of those proposed and actual investments.

$14.6 Million Deposit to the Water Infrastructure Finance Authority Water Conservation Grant Fund

Governor Hobbs has now allocated $14.6 million to the Water Conservation Grant Fund to enable the Water Infrastructure Finance Authority (WIFA) to continue investing in generational water conservation projects.

Thanks to $200 million awarded by the state in federal funds allocated through the American Rescue Plan Act, WIFA has been able to fund conservation-focused projects across Arizona. To date, WIFA has funded over 150 water conservation projects. The Governor's 2025 Executive Budget proposal includes investments in current and future water solutions, including WIFA's funding for rural water supply development and long-term augmentation.

These critical resources will help ensure that rural areas can invest in the infrastructure they need to be water resilient, statewide efforts continue their investment in the infrastructure Arizona needs to find sustainable, renewable water supplies for the future. These investments speak directly to the mission of WIFA, which has been to augment and expand Arizona's water supplies.

$12 Million Grant for City of Buckeye Renewable Water Infrastructure

By enrolling in the new Alternative Designation of 100-year Assured Water Supply (ADAWS) Program, the City of Buckeye has committed to increasing the sustainability of its water resource portfolio, a major step forward toward creating sustainable growth. This allocation of $12 million will help Buckeye build infrastructure to reuse its effluent supplies and recover them from a hydrologically connected area, facilitating sustainable growth and increased use of renewable water supplies.

$7 Million Statewide Groundwater Monitoring and Data Collection

These allocations will provide ADWR with much needed additional tools to ensure that Arizona's groundwater resources are properly managed and protected. Governor Hobbs has invested $7 million to ADWR to install groundwater monitoring index wells throughout rural Arizona to observe declining groundwater levels and inform ongoing groundwater protection efforts. Without these index wells, ADWR hydrologists are less able to accurately assess the health of groundwater supplies in rural areas.

$5.5 Million For ADWR Hydrogeologic Studies in Priority Groundwater Basins

To help rural communities understand and protect their groundwater supplies, ADWR hydrologists create groundwater models that help water managers and community leaders understand the conditions of their aquifers. This $5.5 million investment will allow ADWR hydrogeologists to collect key hydrogeologic information to build these critical models in groundwater basins experiencing severe water declines. The Governor also announced $3.45M ADWR Leading Edge Satellite Water Monitoring Systems & Equipment.

Conclusion and Implications

This investment with ADWR funds the acquisition and use of cutting-edge technologies including absolute gravity survey equipment to monitor aquifer conditions, funding for the Arizona Continuously Operating Reference Stations (AZCORS) Network that provides critical GPS data for scientists, engineers, and surveyors throughout Arizona. It provides funds for satellite monitoring of statewide water demand, and funding for ADWR contractual partnerships with the US Geological Survey to collect key water use data. The information in this summary came from various press releases from the office of the Governor.
(Robert Schuster)

UTAH WATER RESOURCES UPDATE: WATER CONDITIONS UPDATE FOR JANUARY 2025 AND NEW STUDY ON WATER INFRASTRUCTURE FINANCING

Water Conditions Update

On January 16, 2025, the Utah Division of Water Resources reported on water conditions. It found that Northern Utah has experienced near-normal precipitation, although much of it has been in the form of rain rather than snow, which could affect water storage for the spring melt. In southern Utah, however, snowpack remains 27-64 percent of normal for this time of year, continuing dry conditions in that region.

"We're encouraged to see most reservoirs at or above normal levels for this time of year, even in areas with below-normal snowpack," Candice Hasenyager, director of the Division of Water Resources, said. "The dry soil moisture in southern Utah combined with below-normal snowpack could pose challenges for water availability in certain basins."

According to the Natural Resources Conservation Service's January Report, almost no measurable snow fell in southwestern Utah during December, and the regional snow water equivalent was consequently some of the lowest of all observations.

Reservoirs are at 77 percent of capacity, offering some reassurance to water users. This is 20 percent higher than is typical for this time of year and a testament to the carryover storage from the last two years of above-normal snowpack.

The Colorado Basin River Forecast Center models how much water supply is anticipated based on soil moisture and snowpack. The majority of water supply forecasts fall in the 70-90 percent of average range. In southern Utah those forecasts are in the 40 percent of average range.

"Every drop saved today contributes to a more resilient water supply tomorrow," Hasenyager said. "Runoff efficiency will depend on weather conditions, but we all have a role to play in protecting this precious resource."

In Utah, about 95 percent of our water supply comes from snowpack. Reservoir storage helps us preserve that water for use in dry summer months and drought years. To encourage water conservation among Utahns, the Department of Natural Resources continues to promote initiatives such as the Agricultural Water Optimization Program for farmers and SlowtheFlow.org for residents. These programs aim to educate and incentivize water-saving practices, ensuring Utahns become more drought-resilient and prepare for future conditions. Many indoor water-saving tips are available on the Slow the Flow website.

Division of Water Resources Contracts with NGO to Complete Study on Water Infrastructure Financing

In relation to Senate Bill 34 (*see:* https://le.utah.gov/~2023/bills/static/SB0034.html) the Utah Division of Water Resources has contracted with LRB Public Finance Advisors to complete a new study on water infrastructure funding. This study evaluates how property tax revenue is currently utilized in the supply, delivery and water infrastructure needs of Utah and neighboring states. It also explores best practices for the procurement and management of infrastructure funding and makes recommendations for promoting equity among water users.

"To secure Utah's water future, we must be intentional about conservation and the investments we make in water infrastructure," said Sen. Daniel McCay, R-Riverton. "This study will help Utah strategically balance smart investment and effective water conservation."

The study quantifies the impacts of various policies and rate structures and provides foundational data sets to illuminate the costs of the current water rates. It also explores the potential financial impacts of shifting to other rate structures and removing or limiting certain tools available to water purveyors today.

"This study is a resource for policymakers and water suppliers," said Candice Hasenyager, director of the Division of Water Resources. "We want to ensure the best available information on how we currently fund water in the state and considerations if policy changes modify it."

Conclusion and Implications

One key finding from the study is that tiered rates have proven to be effective in curtailing excessive water use but, if utilized alone, pose risks to reliable revenue stability for operations and securing debt. It also highlights that if property taxing authority were limited entirely, monthly water rates could negatively impact low-income, non-profit and non-taxing entities. Impacts could vary and would greatly depend upon how changes are implemented. Modifying how water is funded would require prudent implementation to ensure stable financial operations for Utah's water sector and avoid unintended consequences.

More details can be found in the Water Infrastructure Senate Bill 34 Study. Information in this update came directly from the Division's website.
(Robert Schuster)

LEGISLATIVE DEVELOPMENTS

NEW WATER-RELATED BILLS IN THE COLORADO GENERAL ASSEMBLY

This article gives a brief overview of the Colorado General Assembly's water-related bills that have been introduced so far in 2025. It also provides insight into the potential effects of a few of the many executive orders (EO) President Trump has signed since assuming office. Although both the Colorado General Assembly and the Trump administration have started off fairly quietly with water-related projects, increased focus and attention is expected on water matters both at the state and federal level throughout 2025.

House Bill 25-1014

The Colorado General Assembly introduced HB25-1014, titled, "Increasing Efficiency Division of Water Resources." This bill proposes multiple changes for the Division of Water Resources. First, it extends the deadline to construct a well under a well permit from one year to two years. Under the current system, once a well permit is issued, the applicant has one year to construct the well before that permit expires. This bill would extend that deadline to two years, which would eliminate the need for the Ground Water Commission or the state engineer to issue any one-year extensions. Extensions are fairly common, so this will alleviate some of the administrative burdens regarding wells. Additionally, the commission or state engineer would no longer need to mail a certified letter to the permit holder before the permit can formally expire. And this bill would allow the commission or state engineer to reinstate a permit so long as the applicant can demonstrate the well was constructed in a timely matter, and so long as the applicant pays a thirty-dollar fee.

The second change proposed by this bill would split the decennial abandonment process into two batches of review every five years. Under the current system, the division engineer is required to present the water court a list of water rights that meet the abandonment requirements every ten years. This change would require the Division Engineer to submit a list every five years. This would allow the water courts to have more time to review rights up for abandonment further ahead of time, eliminating some backlog in publishing the final list. This proposed bill does not change the abandonment cycles from the current ten-year system; it would provide an interim review for the water courts to hopefully get the final lists published sooner.

Lastly, this bill proposes to eliminate the final permitting requirements for non-Denver Basin bedrock aquifer wells in the designated basins. Like the other two measures, the general goal is to ease the administrative burden and streamline processes throughout the Division of Water Resources.

Senate Bill 25-040

The General Assembly introduced Senate Bill 25-040, which is a bill concerning the creation of the future of severance taxes and water funding task force. The Colorado severance tax is a tax imposed on nonrenewable natural resources that are removed—*i.e.*, severed—from the earth. This includes metallic minerals, oil and gas, oil shale, coal, and molybdenum (ore). Anyone receiving income from oil and gas production and the mining of nonrenewable natural resources must file a severance tax return.

Severance taxes are a volatile source of revenue for the state. Because approximately ninety percent of severance taxes are linked to oil and gas, the swings in prices and production levels make this a largely inconsistent source of income. Some members of the General Assembly have framed this income as being like a bonus rather than something to depend upon. Further, the transition away from fossil fuels towards renewables has resulted in small revenues. This bill would require the Department of Natural Resources to contract with a third party to develop recommendations for ways to continue funding water needs in the face of decreasing severance tax revenue. Regardless, proponents of the bill would like to see additional money from extractive industries direct to water projects, where possible.

House Joint Resolution 25-1004

The Colorado legislature also introduced HJR25-1004, titled, "Water Project Eligibility Lists." This law manages the lists that are administered by the Colorado Water Resources and Power Development Authority. The State of Colorado operates the Drinking Water Revolving Fund whose purpose is to provide financial assistance for certain drinking water supply projects throughout the state. Similarly, the Water Pollution Control Revolving Fund exists within the Authority, and its purpose is to provide financial assistance for certain wastewater treatment system projects.

The General Assembly proposed the Water Project Eligibility List, which includes additions to, modifications to, and deletions of projects on the Drinking Water Project Eligibility List and the Water Pollution Control Project Eligibility List. These laws seek to preserve and develop water resources of the state, create jobs in the state, improve economic welfare of people in the state, and will promote the beneficial use of waters and preservation of public health.

Executive Order: "Recission of Harmful Executive Orders and Actions"

The Trump administration issued an executive order on January 20, 2025, titled, "Recission of Harmful Executive Orders and Actions." One of many EOs rescinded is EO 13990 of September 13, 2021 (issued by former President Biden), which amended Executive Order 13778 (issued by President Trump during his first term). EO 13778 expressly adopted the definition of "Waters of the United States" as put forth in the opinion authored by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006). Through means of double-recission, the Trump administration has once again defined Waters of the United States according to Scalia's definition in his opinion in *Rapanos*, finding that the meaning of "waters" in the Clean Water Act encompasses "only those relatively permanent, standing, or continuously flowing bodies of water." This comes as no surprised given the ruling in Sackett v. EPA, 598 U.S. 651 (2023), which did essentially the same thing. More specifically, Sackett requires a waterbody have a "continuous surface water connection" to a traditional navigable water. This could be considered a merely symbolic executive order, or it could be viewed as a means to clean up some of the noise surrounding WOTUS rules. With Colorado being the first state to adopt *Sackett* Gap-Filling laws, these definitions may not have as much as a tangible impact on wetlands in the state. However, whether permits to dredge and fill wetlands must be issued through the U.S. Army Corps of Engineers versus an analogous state agency will be a relevant inquiry for practitioners. Hopefully more comes to light on these changes, with guidance from state and federal agencies, as this area of law continues to evolve.

Conclusion and Implications

Trump issued a different EO also on January 20, titled "Unleashing American Energy." Although not entirely clear, this EO appears to rescind funding from the Inflation Reduction Act relating to green energy infrastructure projects. There is some concern that it will affect water development projects in Colorado, such as the Shoshone Pipeline purchase. The Colorado River Water Conservation District was planning on millions of these federal dollars to assist with its purchase of the historic hydropower water rights. *See* "Colorado River Water Conservation District Completes Landmark Purchase of Large-Scale Water Rights," 28 W. Water Law & P'lcy Rptr. 75, 75-76 (Feb. 2024). However, it is expected that this EO will affect energy resource projects before it comes for water project funding.
(Lauren Hoover, John Sittler)

WASHINGTON STATE LEGISLATIVE UPDATE FOR WATER RESOURCES

Washington's recent election cycle in 2024 saw a great deal of turnover. Twenty of the state's 98 House members are newly in their positions, including two House members who have left since November for other positions in government. Eight of the 49 State Senators are newly in their positions. In addition, four of Washington's eight statewide offices are newly elected to their positions. The election of Bob Ferguson as Governor is expected to have a great deal of impact on all State agencies, including the Dept of Ecology which oversees Washington Water Resources and Water Quality efforts.

The Washington Legislature convened on January 13, 2025. The Washington Legislature functions on a biennial schedule. All House members and half of the Senate members are up for election in even-numbered years. The Legislature meets annually, with long sessions in odd-numbered years, including adopting a biennial budget, and short sessions in even-numbered years, which address supplemental issues.

The committee cutoff for bills to be heard and passed from their committees of origin is February 21st. Of the 1400 bills introduced as of the time of this writing, only three address water issues, summarized below.

SB 5212: Concerning Filing of Adjudication Claims for Precode Uses of Groundwater and Surface Water in the Water Resource Inventory Area 1 Water Rights Adjudication

In Washington, like many of the western states, water rights were established through beneficial use prior to statutory considerations for state application and permission. To address this, the legislature adopted the first Claims Registry act in 1969 which required pre-code. required filing of claims for all water uses predating the water code—1917 for Surface Water and 1945 for Groundwater. [Session Laws of 1969, Ch 284] In the original Claims Registry Act, Claims were due June 30, 1974. See RCW 90.14.041. Washington has only adjudicated a small number of these precode claims. Consequently, we have not fully addressed/understood the status of those claims. The Claims Registry was reopened on two other occasions---1985 [Session Laws of 1985, Ch. 438] and 1997 [Session Laws of 1997, Ch 440]. In light of the now pending WRIA 1 Adjudication, this issue is front and center, yet again, 80 to 108 years after the water codes were adopted.

SB 5212 reopens the Claims Registration process in the pending WRIA 1 (Nooksack) Adjudication to allow late claimants to file water rights claims even if they missed the prior three claim periods. This legislation is modeled on legislation passed in 1979 related to the Yakima Basin surface water adjudication. The Legislation allows water users with precode claims within the WRIA 1 Nooksack Basin adjudication commenced in May of 2024 to submit claims even if those claimants missed the prior claim filings. The legislation allows claimants to file claims in the adjudication to prove pre-code water use even if they have not met the prior requirements of the Claims Registry. SB 5212 has passed the Senate Ag and Natural Resources Committee and is awaiting floor action.

SB 5261: Issuing Water Rights Permits for Nonconsumptive Hydropower Use In Water Resource Inventory Areas In Which Minimum Instream Flows Are Not Being Met

SB5261 authorizes Ecology to issue water rights permits for nonconsumptive hydropower use in areas in which minimum instream flows are not met, provided the water is diverted and returned to the same stream reach, the project is less than 25 kilowatts, there is no detrimental impact to fish, and Ecology has consulted with all federally recognized Indian tribes with treaty fishing rights at usual and accustomed places within the area. SB5261 has not been scheduled to be heard by the Committee.

SB 5303: Extending the Water Supply Milestone for the Yakima River Basin Integrated Plan To 2035

The Yakima River Basin Integrated Water Resource Management Plan is a multiparty effort adopted in 2013 designed to "protect, mitigate, and enhance fish and wildlife habitat; provide increased operational flexibility to manage instream flows to meet ecological objectives; and improve the reliabili-

ty of the water supply for irrigation, municipal supply, and domestic uses." The original legislation set June 30, 2025, as the deadline for various actions to under the plan. At the time of the original legislation, an extension was expected given the complexity of the issues, but the interim timeline offered additional impetus to get the plan started. The proposed legislation seeks to extend those milestones to 2035. SB 5303 has been passed by the Senate Ag and Natural Resources Committee and is awaiting floor action.

Conclusion and Implications

The bulk of activity around the Department of Ecology will be in the Budget. Washington is facing a budget deficit of $10 to 14 billion over the next four years. Incoming Governor Ferguson has not yet unveiled his administration's budget proposal but has indicated that most agencies should expect 6 percent budget cuts. Of the Department of Ecology's $75m budget, $55m is its Water Resources Program. Ecology recently underwent a strategy planning effort and identified the need for up to 25 additional FTEs based on expanded program activities. With a 6 percent budget cut, we expect to see cuts in several areas, and will report further.
(Jamie Morin)

REGULATORY DEVELOPMENTS

U.S. EPA RELEASES DRAFT RISK ASSESSMENT ASSOCIATED WITH PFAS CHEMICALS IN BIOSOLIDS

On January 14, 2025, the U.S. Environmental Protection Agency (EPA) released a draft risk assessment, or scientific evaluation of the potential human health risks associated with the presence of toxic per- and polyfluoroalkyl substances (PFAS) chemicals in biosolids, also known as sewage sludge.

The findings for the draft risk assessment show that there may be human health risks associated with exposure to the "forever chemicals" PFOA or PFOS with all three methods of using or disposing of sewage sludge – land application of biosolids, surface disposal in landfills, or incineration. Once finalized, the assessment will help EPA and its partners understand the public health impact of forever chemicals in biosolids and inform any potential future actions to help reduce the risk of exposure.

EPA Acting Administrator Jane Nishida, said:

> EPA under President Biden's leadership has taken unprecedented actions to advance research and science on PFAS and to protect people from these dangerous forever chemicals," "This draft assessment provides important information to help inform future actions by federal and state agencies as well as steps that wastewater systems, farmers and other stakeholders can take to protect people from PFAS exposure, while ensuring American industry keeps feeding and fueling our nation.

Defining Biosolids

Wastewater produced by households and businesses, and sometimes industrial dischargers, is conveyed to a wastewater treatment plant, and ultimately treated. These treatment processes also produce a semi-solid, nutrient-rich product known as "sewage sludge" or "biosolids." EPA typically uses the term "biosolids" to mean sewage sludge that has been treated to meet regulatory standards and is thereby suitable to be land applied as a soil conditioner or fertilizer. In turn, biosolids can be beneficially reused as land applied fertilizer on agricultural fields or on nonagricultural lands to promote plant health and productivity.

The Draft Risk Assessment

This draft risk assessment focuses on a specific and narrow population of people that EPA considers most likely to be exposed to PFOA or PFOS from the land application of biosolids or through consumption of products from land where biosolids were used as fertilizer. The draft risk assessment scientifically models hypothetical human health risks for people living on or near sites impacted by PFOA or PFOS or for people relying primarily on those sites' products (e.g., food crops, animal products or drinking water). The preliminary findings of the draft risk assessment indicate that there can be human health risks exceeding EPA's acceptable thresholds, sometimes by several orders of magnitude, for some scenarios where the farmer applied biosolids containing 1 part per billion (ppb) of PFOA or PFOS (which is near the current detection limit for these PFAS in biosolids). These modeled scenarios include farms with one application of biosolids at a rate of 10 dry-metric-tons per hectare and 40 consecutive years of biosolids land application at this same rate. The modeling in this assessment also finds human health risks exceeding the EPA's acceptable thresholds in some scenarios where biosolids containing 1 ppb of PFOA or PFOS are placed in an unlined or clay-lined surface disposal unit. Once finalized, EPA will use the risk assessment to help inform future risk management actions for PFOA and PFOS in sewage sludge. For the incineration scenario, risk is not quantified due to significant data gaps.

EPA's analysis does not suggest that the general food supply is impacted by the use of biosolids that contain PFOA or PFOS. The U.S. Department of Agriculture and Food and Drug Administration are monitoring for PFAS in the food supply broadly and have taken protective actions to address impacted products from domestic and imported sources. Based on the best available data, biosolids account for less than one percent of the fertilized acreage of productive agricultural land in the United States per year. EPA recognizes that certain "hot spots" and specific farming operations may have higher levels of PFOA

or PFOS if contaminated sludge was applied, and that further collaboration with impacted operations and other federal agencies will be important to fully understand risks and support impacted farmers.

EPA's analysis finds that the risks of exposure to PFOA and PFOS through biosolids increases proportionally with the amount of those chemicals in the biosolids. This means that if you lower the concentration of PFOA or PFOS in biosolids or the amount of biosolids applied to agricultural land, you lower the risk. The actual risks from exposure to PFOA or PFOS will vary at farms that land-apply biosolids or at biosolids disposal sites based on the amount of PFOA or PFOS applied, as well as geography, climate, soil conditions, the types of crops grown and their nutrient needs and other factors. Where smaller amounts of PFAS-contaminated biosolids have been spread, or fewer applications have been made over time, or lower concentrations of PFOA and PFOS were in the biosolids, the risk will be reduced.

The findings of the draft risk assessment underscore the importance of proactive federal and state policies to control and remove PFAS at their source. Under EPA's PFAS Strategic Roadmap, the agency has provided tools to restrict PFAS from entering the environment and to hold polluters accountable, including increasing reviews of new PFAS before they enter commerce and encouraging states to use their Clean Water Act permitting authorities and industrial pretreatment programs to require industrial dischargers of PFAS to remove them before sending their effluent to the environment or to wastewater treatment plants. Moving forward, EPA is working to set technology-based limits on discharges from several industrial categories—including PFAS manufacturers, electro- and chrome-platers and landfills—under the agency's Effluent Limitations Guidelines program.

Forever Chemicals in Wastewater

PFOA and PFOS get into sewage sludge via the wastewater that enters municipal wastewater treatment plants (WWTPs), which do not intentionally use or add these substances in their treatment processes. WWTPs may receive PFOA or PFOS from manufacturers and other facilities that currently use, or historically have used, these PFAS and release contaminated wastewater to WWTPs. Households and businesses can also be sources, as PFAS from consumer products (*e.g.*, cookware, clothing or cosmetics that may contain certain PFAS) are washed down drains and make their way to a WWTP.

EPA and State Actions on Forever Chemicals

Under EPA's PFAS Strategic Roadmap, the agency has made historic progress in advancing the science and establishing standards to protect communities from PFAS pollution. These actions include finalizing the nation's first drinking water standards for PFAS, holding polluters accountable to clean up PFAS across the country and declaring PFOA and PFOS hazardous substances under the Superfund law. By releasing this draft risk assessment, EPA is providing stakeholders with a rigorous, data and science-driven report that, once finalized it may help the agency determine whether regulating PFOA and PFOS in sewage sludge under the Clean Water Act is appropriate.

Several states have begun monitoring for PFAS in sewage sludge and published reports and data that are publicly available. EPA's draft risk assessment document provides an overview of PFOA and PFOS occurrence data from peer-reviewed literature and state reports in Section 2.4 and Appendix A. Some states continue to collect additional sewage sludge PFAS monitoring data.

Conclusion and Implications

EPA's draft risk assessment document, *Draft Sewage Sludge Risk Assessment for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS)*, will be available for public comment for 60 days following announcement in the Federal Register. To learn more about the draft risk assessment and how to comment on it, *see:* https://www.epa.gov/biosolids/draft-sewage-sludge-risk-assessment-perfluorooctanoic-acid-pfoa-and-perfluorooctane

EPA risk assessments follow a scientific process to characterize the nature and magnitude of health risks to children, adults, and the environment from pollutants based on modeled exposure scenarios. An environmental risk assessment considers three primary factors: 1) presence (i.e., how much of a pollutant is present in the environment), 2) exposure (i.e., how much contact a human or wildlife has with the pollutant), and 3) the toxicity of the pollutant (*i.e.*, the health effects the pollutant causes in humans or wildlife).

(Robert Schuster)

U.S. EPA PARTIALLY APPROVES, PARTIALLY DISAPPROVES CALIFORNIA'S 2024 INTEGRATED REPORT REGARDING CLEAN WATER ACT 303(D) LISTINGS

As of December 13, 2024, the United States Environmental Protection Agency (EPA) partially approved the Clean Water Act Section 303(d) list portion of the 2024 California Integrated Report. While the majority of the 303(d) list was approved, EPA identified 53 waterbody-pollutant combinations that may need to be added to the list.

Background

Under Section 303(d)(1) of the Clean Water Act (CWA) and related EPA regulations, states, territories, and authorized Tribes must identify water bodies that are not meeting water quality standards. These water bodies may be added to a list called the "303(d) list." If the pollution controls already in place (like technology-based effluent limitations) are not enough to meet these standards, the water quality limited segment (WQLS) must be included on the list. Subsequently, there is a Total Maximum Daily Load (TMDL) that is to be determined for these WQLS.

Under 40 CFR 130.7(b)(6), the state, territory, or Tribe must include, as part of their submissions to the EPA, documentation to support the state's determination to list or not list its waters. This includes: description of the methodology used to develop the 303(d) list; description of the data and information used to identify the waters; a rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters; public participation documentation, such as public comments and the responses; and any documentation related to the assembly and evaluation of all existing and readily available water quality-related data and information in developing the 303(d) list.

States are required to report their 303(d) lists to the EPA by April 1 of every even-numbered year. The EPA reviews and either approves or disapproves the list within 30 days. If the EPA disapproves, it will add the missing water bodies and seek public comments before finalizing the list. If the list is approved, the state must include it in its Water Quality Management plan.

EPA's Actions

The EPA partially approved California's 2024 303(d) list, determining that the list encompasses waters consistent with the CWA 303(d) and 40 CFR 130.7 requires. California added 636 new waterbody-pollutant impairment listings to California's 2024 303(d) list. Moreover, the EPA approved of California's exclusion of waters identified on the previous 303(d) list, approximately 101 water bodies, finding that the state's decision to delist were reasonable and justified on existing and readily available water quality-related data and information.

The EPA partially disapproved California's 2024 303(d) list because the EPA found that California did not provide an approvable basis for excluding nine WQLSs that were incorrectly classified as Category 4b and 44 WQLSs that were incorrectly classified as Category 3 for benthic community effects. The EPA will seek out comment for 30 days on the inclusion of 53 impairments it has identified for inclusion on California's 2024 303(d) list.

The EPA reviewed and approved California's 2024 303(d) list, confirming it met the requirements of the Clean Water Act and EPA regulations. This approval was based on the state's data and its process for determining whether water quality standards (WQS) were met, along with public comments and responses.

California added 636 new waterbody-pollutant impairment listings to the 303(d) list compared to the 2020-2022 list, as detailed in the 2024 Integrated Report (IR). Fact sheets in Appendix B explained the evidence for these new listings. The state also removed 101 waterbodies from the list. These delistings were justified for reasons like corrected data, updated water quality standards, and evidence showing that the waters now meet the standards. The EPA agreed that the state provided sufficient justification for these removals.

According to the EPA, in California's 2024 IR, the state mistakenly placed nine waterbody-pollutant combinations into Category 4b, which is for waters with advance restoration plans (ARPs). These waters should have been placed in Category 5, the 303(d)

list, because ARPs are not approved by the EPA as alternatives to the required TMDLs under EPA regulations. These nine waterbodies still need TMDLs and the EPA has determined they should stay on the 303(d) list until water quality standards are met, or until the state identifies the pollutant causing the impairment.

Additionally, California included 44 waterbodies in Category 3, which means the water quality is improving. But these waterbodies were not placed on the 303(d) list (Category 5) for benthic (bottom-dwelling) community effects, despite California finding those effects exist, even if it had not yet determined the pollutant causing those effects. California uses a system called the California Stream Condition Index (CSCI) to assess the health of rivers and streams, and the 44 waterbodies scored low on this index. According to the CSCI scores, biological health of these waters is impaired, which means they are not meeting water quality standards for aquatic life.

The EPA disagreed with California's decision to exclude these 44 waterbodies from the 303(d) list. According to EPA rules, if a waterbody is impaired, it should be listed on the 303(d) list, even if the exact pollutant is unknown. The EPA's cautious approach conflicts with California's in that the EPA does not require an association between degraded benthic macroinvertebrate communities and at least one pollutant to be demonstrated as a condition to include a waterbody as impaired for benthic community effects on the 303(d) list. According to EPA guidelines, biological assessments (such as the CSCI scores used by California) can be enough to determine that a waterbody is impaired or threatened and, therefore, should be listed. The EPA reviewed the data and confirmed that these 44 waterbodies should remain on the 303(d) list until the pollutant causing the impairment is identified and TMDLs are developed, or until the state proves no pollutant is responsible.

Conclusion and Implications

The EPA's partial disapproval highlights EPA's approach to including impaired waterbodies on the 303(d) list: list and protect now, even if the exact cause is not yet known. This disapproval also underscores the EPA's preventative use of the Clean Water Act and related regulations. It remains to be seen how, if at all, the EPA's approach to listing allegedly impaired waterbodies will change under a new administration. EPA's Partial Approval/Disapproval is available at https://www.epa.gov/system/files/documents/2024-12/ca-2024-303d-list-epa-partial-approval-disapproval-2024-12-12.pdf

(Steven Moctezuma, Miles Krieger, Steve Anderson)

U.S. BUREAU OF RECLAMATION ISSUES FINAL DECISION REGARDING LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT

On December 20, 2024, the U.S. Bureau of Reclamation released its decision for the long-term operation of the federal Central Valley Project and State Water Project (the Decision). The Decision helps build the state's resilience to drought, benefiting both water users and the environment.

Background

The Bureau of Reclamation approved a new plan for the long-term operation of the Central Valley Project (CVP) and the Delta facilities of the State Water Project (SWP). The CVP and SWP play a vital role in California's water supply. Together, they deliver water to more than 30 million people, irrigate over 4 million acres of the state's agricultural lands, and generate up to 4 million surplus megawatt-hours of carbon-neutral energy annually. The U.S. Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) coordinate operations pursuant to the 1986 Coordinated Operations Agreement (COA), as amended in 2018, which provides the operational framework to guide the operations of project facilities and features to meet requirements and water management goals for the CVP and SWP. The Decision is to continue the operation of the CVP and SWP for authorized purposes while meeting the requirements under federal laws and the State of California's water rights, permits, and licenses pursu-

ant to Section 8 of the Reclamation Act. The Decision was completed in coordination with partners from the California Department of Water Resources, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Wildlife.

The Central Valley Project

The CVP is a complex, multi-purpose network of dams, reservoirs, canals, hydroelectric power plants, and other facilities, spanning 400 miles. The CVP reduces flood risk for the Central Valley, supplies domestic and industrial water, and provides water to major urban centers in the Greater Sacramento and San Francisco Bay areas. Additionally, the project provides water to restore and protect fish and wildlife and enhance water quality. The CVP is operated consistent with federal Reclamation laws, rules, regulations, promulgations, and policies. Section 2 of the Rivers and Harbors Act of August 26, 1937, transferred construction of the CVP from the Secretary of War to the Secretary of the Interior. The purposes of the CVP were modified by statute several times, including by the Waterfowl Management Act of August 27, 1954. Congress directed Reclamation to operate the CVP for the following purposes: (1) river regulation and flood control; (2) irrigation and domestic uses and fish and wildlife mitigation; (3) power and fish and wildlife enhancement.

The State Water Project

The SWP is a collection of canals, pipelines, reservoirs, and hydroelectric power facilities that extend more than 705 miles throughout the state. The SWP delivers clean water to 27 million Californians, 750,000 acres of farmland, and businesses throughout the state. The SWP was constructed through the Burns-Porter Act (Water Code Sec. 12930-12944). Recognizing the need for criteria for the coordinated operation of the CVP and SWP, Reclamation and DWR entered into an initial Coordinated Operations Agreement (COA) in 1960, followed by a more comprehensive and detailed agreement in 1986, authorized by P.L. 99-546.

The Final Decision

The Decision provides a long-term action plan for the continued operation of the CVP and SWP in the state. The Bureau's Decision includes: (1) a new framework for Shasta Reservoir operations to benefit Chinook salmon; (2) plans to benefit delta smelt through revised operational criteria for Delta exports; and (3) plans for early implementation of the Healthy Rivers and Landscapes (HRL) Program.

The Decision implements the Shasta Framework in Alternative 2, which includes actions by the Sacramento River Settlement Contractors to address the effects of multiple years of drought on water temperature management for winter-run Chinook salmon during egg incubation. The Decision also includes actions under Reclamation and DWR control within the Delta to minimize effects on delta smelt due to Delta exports. The Decision limits Delta exports in the south Delta based on flow and turbidity. Delta exports include any water diverted from the Delta for use outside the Delta, including water pumped by the State Water Project and Central Valley Project pumping plants, Contra Costa Water District, and other agencies. The Decision recognizes many stressors on delta smelt, many of which are not under Reclamation and DWR's control. The diversions are intended to better protect the habitat of the delta smelt. Incorporation of the HRL Program will increase Delta outflow, which may address ecosystem drivers on delta smelt populations.

The Decision incorporates and supports the early implementation of components of the Healthy Rivers and Landscapes Program. The HRL Program was previously called Voluntary Agreements. The HRL Program is intended to improve environmental flows and restore key habitats in California waterways. The HRL Program works to: (1) increase river flows, (2) restore aquatic habitat, and (3) use scientific data to guide decisions while encouraging collaboration from local, state, and federal agencies. The Decision includes the operation of CVP and Delta facilities of the SWP under the HRL Program, consistent with provisions included in the Memorandum of Understanding Advancing a Term Sheet.

Conclusion and Implications

Reclamation's recent Decision is to continue the operation of the CVP and SWP. This new plan provides a framework to increase the state's resilience to drought while improving environmental flows and restoring key habitats in the state's waterways. (Christina Suarez, Derek Hoffman)

CALIFORNIA'S DELTA STEWARDSHIP COUNCIL RELEASES DRAFT CLIMATE ADAPTATION PLAN FOR THE DELTA

In November 2024, the Delta Stewardship Council released for public review a draft adaptation plan for the Sacramento-San Joaquin Delta, called the Delta Adapts: Creating a Climate Resilient Future Adaptation Plan (Plan). The Plan is intended to be a comprehensive, regional approach to climate resiliency that relies on federal, state, local, and regional collaboration for the Delta and Suisun Marsh. The Plan is the second phase of a broader climate adaptation initiative started by the Council in 2018—in shorthand, Delta Adapts—and follows the Council's completion of the Climate Change Vulnerability Assessment in 2021.

Background

In 2009, the Legislature enacted the Delta Reform Act. In the Delta Reform Act, the Legislature found that the:

> Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources. (Wat. Code, § 85001, subd. (a).)

Accordingly, the Legislature established the "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem" as "the basic goals of the state for the Delta." (Pub. Resources Code, § 29702, subd. (a); Water Code, §§ 85001, subd. (c) [same], 85054 [defining the coequal goals].)

The Act created the Delta Stewardship Council (Council) as an independent state agency (Wat. Code, § 85200, subd. (a)) to help safeguard Delta assets. The Act directed the Council to prepare a Delta Plan that furthers the coequal goals. (*Ibid.*, § 85300, subd. (a)). The Delta Plan is intended to be "the comprehensive, long term management plan for the Delta" to further the coequal goals and "assist in guiding state and local agency actions related to the Delta." (*Id.*, §§ 85300, subd. (a), 85302, subd. (a)).

To respond to the challenge of climate adaptation, the Council developed the Delta Adapts: Creating a Climate Resilient Future (Delta Adapts). According to the Council, climate change must be considered to attain the Council's coequal goals, namely, securing a reliable water supply for California, protecting and restoring the ecosystem and wildlife it supports, and enhancing the Delta as a unique place, with its community, tribal, and agricultural heritage. Initiated in 2018 by the Council, Delta Adapts began with a Climate Change Vulnerability Assessment (CCVA) to understand how regional climate impacts will affect the Delta's ecosystems, water supply, infrastructure, agriculture, and communities, including socially vulnerable communities. The Adaptation Plan is intended to build upon the CCVA and proposes strategies to address how Delta communities, infrastructure, and ecosystems can adapt to climate change in a manner consistent with the Council's resilience goals.

The Climate Adaptation Plan

The Plan contains four categories of strategies: flood risk reduction, ecosystem, agricultural, and water supply reliability. Each category of strategy contains a description of the strategy and identifies associated implementation actions to effectuate the strategy. Strategies are also connected with existing Delta Plan policies and recommendations, and the Plan identifies the relevant policies or recommendations the strategies are connected with. Finally, the Plan also provides an intended implementation roadmap for the North, Central, and South Delta, as well as the Suisun Marsh and out-of-Delta areas.

With respect to flood risk reductions strategies, the Plan calls for: (1) the development of a comprehensive, climate-informed understanding of flood dynamics in the Delta, (2) improvements and modernization of levees based on asset importance and vulnerability, (3) restoration of climate-resilient ecosystems to act as nature-based solutions for natural flood mitigation and support biodiversity, (4) improvements to flood emergency preparedness, (5) promotion of innovative farming practices and technologies that minimize flood risks, (6) communicate flood risks, warnings, and mitigation strategies to all at-risk communities, (7) use land use and urban planning to reduce flood risks, (8) use adaptive resilience planning in high-risk

flood areas with consideration for existing land uses, and (9) manage and expand upstream water storage capability.

Ecosystem Strategies

With respect to ecosystem strategies, the Plan calls for: (1) improvement of capacity of ecosystems and native species to adapt to and thrive under future conditions, (2) protect at-risk ecosystems by halting and reversing subsidence and reducing the risk of levee failures, (3) building capacity and coordination to improve ecosystem function and resilience, and (4) protecting and enhancing urban ecosystems and use nature-based solutions to increase climate resilience of urban areas in and near the Delta and Suisun Marsh.

Agricultural Strategies

With respect to agricultural strategies, the Plan calls for: (1) expanding adoption and supporting implementation of climate-smart farming practices across Delta agricultural lands, (2) building a sustainable, equitable regional food system, (3) supporting diversification of income/revenue opportunities on operating agricultural lands, and (4) cooperatively identifying strategic agricultural land retirement opportunities where land uses would be of high value (monetary or non-monetary).

Water Supply Reliability Strategies

With respect to water supply reliability strategies, the Plan calls for: (1) reducing reliance on the Delta by improving regional self-reliance through conservation and development local water supplies, (2) increasing local storage of surface and groundwater supplies north and south of the Delta, (3) improving or modifying water infrastructure in the Delta to minimize the impacts of through-Delta conveyance, (4) modifying reservoir operations to adapt to changing climate conditions, and (5) reviewing and considering modifications to water quality standards to develop climate-informed objectives for agricultural uses, fishing, recreational, tribal, and other human beneficial uses of water.

Other Strategies

The Plan ascribes various strategies and implementing actions to portions of the Delta, *i.e.* the North, Central, and South Delta. For example, for North Delta water supply, the Plan suggests employing all five water supply reliability strategies, whereas for the Central Delta, it only recommends applying water supply reliability strategies 3-5. Accordingly, the Plan purports to tailor the various strategies to the unique regional needs of the Delta.

Conclusion and Implications

The Plan is intended to build on the CCVA and thus is in concept related to specific aspects of the Delta that are expected to be affected by climate change. It remains to be seen whether the strategies proposed by the Council will further the policies and recommendations of the Delta Plan as the climate continues to change. The Draft Plan available at: https://deltacouncil.ca.gov/pdf/delta-plan/2024-11-18-delta-adapts-draft-adaptation-plan.pdf
(Miles Krieger)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

Jan 17, 2025—Cattle feedlot operators Wickstrum Farms Inc. and Wickstrum Cattle LLC of Pottawatomie County, Kansas, will pay a combined $70,000 in civil penalties to resolve alleged violations of the federal Clean Water Act.

According to the U.S. Environmental Protection Agency (EPA), the companies failed to comply with multiple Clean Water Act permit requirements, resulting in discharges of pollution into local streams.

In the settlement documents, EPA alleges that the companies' facilities contained approximately 9,862 head of cattle combined. During a 2023 inspection, EPA observed uncontrolled discharges from the feedlots entering into tributaries to Pleasant Run Creek. The operators have since constructed additional runoff controls and have addressed the causes of the discharges.

Pollution associated with manure, feed, and other animal waste runoff may include nutrients (particularly nitrogen and phosphorus), organic matter, solids, pathogens, and odorous/volatile compounds.

Under the Clean Water Act, animal feeding operations that contain threshold numbers of livestock are required to obtain permits and follow the requirements outlined in those permits to reduce pollution runoff. Failure to obtain a permit or to follow the requirements of a permit may violate federal law.

Jan. 17, 2025— The U.S. Environmental Protection Agency (EPA) has initiated an Administrative Order on Consent with the C&H Sugar Company Inc. in response to Clean Water Act violations at the company's sugar refinery in Crockett, California. The order targets the plant's unauthorized discharges of pollutants into the Carquinez Strait, a body of water that connects with the San Francisco Bay, in direct violation of the Clean Water Act.

The C&H refinery in Crockett receives raw cane sugar from ships that dock at the facility. During unloading, loose raw sugar was discharged to the Carquinez Strait on at least three occasions in violation of federal law. Sugary wastewater can be high in Biological Oxygen Demand, which can rapidly deplete dissolved oxygen when discharged into water bodies and thus endanger fish and other aquatic life. Other violations include failure to properly operate and maintain a wastewater system, failure to implement the company's Stormwater Pollution Prevention Plan fully, and violations of the refinery's effluent limitations.

As a result of the order, C&H has modified its sugar offloading system and will demonstrate to the EPA that the new system adequately prevents discharges into the Carquinez Strait. C&H Sugar will also update its Stormwater Pollution Prevention Plan and sugar management practices.

Jan. 16, 2025— The U.S. Environmental Protection Agency announced that Tyree Oil, an Oregon-based petroleum distribution and storage company, has paid an $87,700 Clean Water Act penalty for systemic failures to adequately maintain its Portland facility and to maintain and implement an adequate plan to prevent or respond to possible releases of oil at the facility, which closed in early 2024.

During an inspection in October 2021 EPA inspectors found extensive violations of the Clean Water Act's Spill Prevention Control and Countermeasure (SPCC) regulations, which require facilities like Tyree Oil to prepare and implement a plan to protect local waterways and shorelines from the discharge of oil. The facility's sewer lines were connected to the City of Portland's stormwater system which eventually discharges into the Columbia River.

EPA inspections found that the company failed to implement important parts of the plan that could pre-

vent releases of oil. The agency cited the company for 13 counts of violating the Clean Water Act, among them: 1) failure to ensure that the facility's diagrams match the actual facility layout; 2) failure to maintain adequate secondary containment in the event of a spill; 3) failure to have inspection records for oil-water separators used as spill prevention equipment at the facility; and 4) failure of the facility's plan to include routine periodic leak testing procedures for underground oil piping.

At the time of the inspection, EPA apprised Tyree representatives of the deficiencies in the facility's SPCC plan and its implementation. In June 2022 Tyree updated its SPCC plan to address comments made by EPA during the inspection.

Jan. 16, 2025—The U.S. Environmental Protection Agency has finalized its third periodic review of the cleanup of polychlorinated biphenyls (PCBs) in the Upper Hudson River. The EPA looked at all the project data for water, fish and sediment collected between 2016-2021, and the fish data from 2022. The EPA's review concludes that the levels of PCBs in water and fish are going down overall, but more fish data is needed. The agency needs at least eight years of data after dredging to draw science-based conclusions about the rate of recovery in the fish. The eighth year of fish data was collected in 2024. The results of that sampling will be available in 2025. The EPA will release an addendum to the report when enough fish data is available, as soon as this year but no later than 2027.

The EPA released the draft version of its review in early July 2024 for public comment. The 120-day public comment period ended on November 7.

Some commenters asked the EPA to conclude that the cleanup is not protective of people's health and the environment. However, the EPA is not making a decision about protectiveness at this time. The EPA addendum will include a protectiveness determination.

The EPA prepared a separate document that responds to the variety of comments received.

As the EPA continues to collect and evaluate data, it is also enhancing the monitoring program to get a better understanding of the river's recovery. This includes a series of special studies that will be looking more closely at water, fish and sediment in specific areas of the river. Several of these studies are already underway.

Fish consumption restrictions and advisories will continue to be necessary to protect people's health. The primary risk to people at the site is from eating fish they catch that contains unsafe levels of PCBs. The cleanup plan that the EPA selected in 2002 for the Upper Hudson River called for dredging followed by an extended period of natural recovery – a gradual period of improvement in water, fish and sediment that the EPA projected would occur over a more than 50-year timeframe.

The fishing restrictions in the Upper Hudson River will need to remain in place until PCB levels in fish are reduced and New York State determines that changes can be made. In the Lower Hudson River, the general population can eat some types of fish that they catch, based on the New York State advice. However, anyone who can get pregnant and children under 15 should not eat any fish or crabs from the Hudson River. The EPA is working closely with the New York State Department of Health to support their education and outreach program to inform area newcomers and others who may be looking to the river as a food source.

The EPA is also committed to ensuring that General Electric Company (GE) remains accountable for the PCBs that came from its former manufacturing plants in Hudson Falls and Fort Edward and is actively working throughout the Upper and Lower Hudson River to study and address PCBs. An extensive floodplain study is underway in the Upper Hudson River to evaluate PCB contamination in soil in shoreline areas along a 43-mile stretch of river between Hudson Falls and Troy, New York. The EPA is also overseeing the deconstruction of the Powerhouse and Allen Mill in Hudson Falls, New York – two structures located adjacent to the former GE Hudson Falls plant. Under the latest agreement with GE, the EPA began an investigation in the Lower Hudson River in 2023 which includes extensive fish, water and sediment sampling between Troy and the Battery in New York City.

Jan. 16, 2025—The U.S. Environmental Protection Agency, the U.S. Department of Justice, the state of Idaho, and the City of Driggs, Idaho have agreed on a series of measures the city will undertake to address chronic violations of the Clean Water Act,

including a major upgrade of its wastewater treatment plant. The upgraded facility is estimated to cost $25 million and must be complete by December 15, 2028.

In a consent decree with EPA, DOJ, and the state of Idaho, the city will also pay a $400,000-penalty for ongoing failures to comply with its Clean Water Act permit and failing to meet compliance obligations it committed to in a 2018 legal agreement with the EPA. In 2018, the city also paid a penalty of $13,500 for violations of its permit.

However, after the city failed to meet the compliance deadlines in the 2018 legal agreement, DOJ, on behalf of EPA, filed a complaint on October 24, 2022, alleging the city exceeded its permit limits for ammonia, E. coli, biological oxygen demand, and pH thousands of times.

The consent decree, lodged in the U.S. District Court for the District of Idaho, is subject to a 30-day public comment period and final court approval.

In addition to upgrading its wastewater treatment facility, the city must also: 1) Submit an updated Quality Assurance Plan by March 1, 2025; 2) Conduct collection system monitoring, including monitoring flow from the city of Victor that contributes wastewater to the Driggs wastewater treatment plant; 3) Sample influent to the treatment plant and sample effluent from the lagoon monthly; 4) Annually measure the amount of sewage sludge in the lagoons and manage sludge as needed; 5) Continue its efforts to locate and quantify sources of inflow and infiltration during periods of high groundwater levels; 6) Develop a staffing plan and hire sufficient staff; and 7) Every three months, submit a report describing progress and challenges in meeting the consent decree requirements.

Jan. 6, 2025—Two truck stops in Iowa and Missouri—Iowa 80, advertised as "the world's largest truck stop," and Joplin 44 – agreed to pay a combined $390,784 to resolve alleged violations of the federal Clean Water Act.

According to the U.S. Environmental Protection Agency (EPA), the facilities failed to comply with regulations intended to protect water bodies from petroleum discharges. EPA discovered the alleged violations during inspections of the truck stops in 2023. According to the Agency, the truck stops, which are owned by Iowa 80 Group Inc., failed to adequately develop and implement Spill Prevention, Control and Countermeasure (SPCC) plans, as required by the Clean Water Act.

Facilities that store 1,320 gallons or greater of oil products in aboveground storage tanks are subject to SPCC regulations. Such plans require, among other things, proper containment to control petroleum releases, inspections of tanks and piping, and integrity testing of petroleum storage equipment.

In response to EPA's findings, the facilities revised their SPCC plans, conducted internal and external tank inspections, and completed the necessary repairs.

The settlements are detailed in Consent Agreements and Final Orders that will be subject to a 30-day public comment period
(Robert Schuster)

JUDICIAL DEVELOPMENTS

FEDERAL CIRCUIT COURT OF APPEALS REJECTS CALIFORNIA WATER CONTRACTORS' TAKINGS CLAIMS

City of Fresno v. United States, 124 F.4th 876 (Fed. Cir. 2024).

On December 17, 2024, the United States Court of Appeals for the Federal Circuit issued an opinion in *City of Fresno v. United States* rejecting Fifth Amendment takings claims by Friant Division Central Valley Project (CVP) contractors and water users who were denied water deliveries during the 2014 drought. The opinion affirms the 2020 dismissal and grant of summary judgment by the Court of Federal Claims in favor of the government, finding the plaintiffs failed to establish they possess property rights in the water deliveries under their CVP service contract with Reclamation (Friant Contract).

Background

The CVP is a major water infrastructure system operated by the U.S. Bureau of Reclamation (Reclamation) in the Central Valley of California, consisting of reservoirs, canals, dams, hydropower stations, and other infrastructure through which Reclamation diverts, stores, and distributes Sacramento and San Joaquin River water to contractors throughout the state. The Friant Division of the CVP includes the Friant Dam, which collects San Joaquin River water, and the Friant-Kern Canals. The plaintiffs are individual growers, irrigation districts, water districts, and the City of Fresno within the Friant Division, who either contract directly with Reclamation or pay to receive water supplied under the Friant Contract.

Prior to the formation of the CVP, Reclamation entered into a Contract for the Exchange of Waters (Exchange Contract) with senior San Joaquin River water right holders, to enable Reclamation to divert San Joaquin River water for the CVP so long as it ensures the Exchange Contractors receive specified quantities of "substitute water." Deliveries under the subsequent Friant Contract are expressly subject to the terms of the Exchange Contract, though Reclamation also agreed it would not deliver San Joaquin River water to the Exchange Contractors unless and until it was required to do so. From 1962 until 2014, Reclamation was able to deliver water to the Friant Contractors, including from the San Joaquin River, while its sourced substitute water for the Exchange Contractors from the Sacramento-San Joaquin River Delta (Delta).

In 2014, at the start of a three-year drought state of emergency, Reclamation determined it would not be able to meet its combined delivery obligations for the Exchange Contractors and Friant Contractors. Reclamation notified the Exchange Contractors that for the first time, it would need to source its critical year Exchange Contract deliveries from both the Delta and the San Joaquin River. Reclamation ultimately delivered a combination of San Joaquin River and Delta water totaling 540,000 acre-feet to the Exchange Contractors in 2014, while the Friant Contractors received essentially a "zero allocation" other than the minimum amounts necessary for public health and safety.

The Friant Contract Litigation

The plaintiffs sued the United States in the Court of Federal Claims in October of 2016, alleging Reclamation's "actions in 2014, and particularly Reclamation's diversion of San Joaquin River water to the Exchange Contractors instead of to them, constituted a breach of the Friant Contract." Without water deliveries that year, the plaintiffs alleged losses of annual and permanent crops, lost groundwater reserves, and millions of dollars spent on emergency water supplies. According to the plaintiffs, Reclamation appropriated their property in 2014, which constituted an uncompensated taking in violation of the Fifth Amendment.

Joined by the Exchange Contractors, the United States argued that there was no San Joaquin River water available to the Friant Contractors due to the drought conditions that year and the plaintiffs did not have a property interest in the water they expected to receive under the Friant Contract. Further, the terms

of the Friant Contract immunized Reclamation from liability during periods of drought as long as Reclamation was not "arbitrary, capricious, or unreasonable." The trial court granted summary judgment in the government's favor on the breach claims, agreeing with its interpretation of the contracts, and dismissed the plaintiffs' takings claims for lack of standing.

The Federal Circuit's Decision

On appeal, the plaintiffs challenged the takings dismissal and argued that Reclamation breached the Friant Contract because it was not required to deliver San Joaquin River under the Exchange Contract and, even if it was, the amount delivered exceeded what was required. The Court of Appeals rejected the breach of contract claims because Reclamation's actions were not arbitrary, capricious, or unreasonable. As for standing, the Court of Appeals found that while the Court of Federal Claims had jurisdiction to hear the plaintiffs' allegations, they failed to allege a takings claim upon which relief could be granted.

The plaintiffs argued they hold appurtenant rights to CVP water delivered to their customers or their lands, but the Court of Appeals held that under California law it is Reclamation, not the plaintiffs, that holds the appropriative water rights for the Central Valley Project. (*Id.*) It distinguished Reclamation's actions to construct the diversion and storage works that make water available from the plaintiffs' end use application of the water, finding a property interest vests in the former, but not the latter. (*Id.* at 897.) As such, the plaintiffs could not allege a takings claim for failed water deliveries under their service contract.

Conclusion and Implications

While plaintiffs may seek further review by the Supreme Court, the Federal Circuit Court of Appeals' decision reinforces a prevailing interpretation of California law that there is no cognizable property interest in a contract for water service to support a takings claim under the Fifth Amendment. The Federal Circuit's opinion is available online at: https://www.cafc.uscourts.gov/opinions-orders/22-1994.OPINION.12-17-2024_2437041.pdf
(Taylor Strain, Austin Cho)

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