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FEATURE ARTICLE

THE SUPREME COURT REJECTS THE NAVAJO NATION'S BREACH OF TRUST CLAIM FOR WATER

By Miles Krieger

On June 22, 2023, in a 5-4 decision, the United States Supreme Court rejected a breach of trust claim by the Navajo Nation (Nation) that the United States failed to (1) assess the water needs of the Nation and (2) act so as to secure water to satisfy those needs as required by an 1868 treaty. The Court held that the Nation had not identified a specific, trust-creating duty in the treaty, which created the Nation's later-expanded reservation as a homeland for the Navajo people. The Court's holding is significant for several reasons.

First, the Court's decision clarifies that federally recognized tribes may only bring breach of trust claims against the United States if they can identify a specific, trust-creating statute, treaty, or regulation, and the United States has expressly accepted that duty. Second, the Court's decision confirms that the United States Congress has plenary authority over federally recognized tribes and may structure its trust relationship with tribes in its capacity as sovereign. Of note, the Court's decision raises the broader question of whether the judiciary must take a subservient role to legislative determinations regarding tribal water needs. Finally, as a practical matter, the Court's decision may present an opportunity for the Nation to pursue adjudication—including quantification—of *Winters* rights to the Colorado River under the *Arizona v. California* decree. [*Arizona, et al., v. Navajo Nation, et al.*, ___US___, Case No 21-1484 (June 22, 2023).]

Historical Background

With over 300,000 enrolled members, the Nation is one of the largest tribes in the United States. Today, the reservation spans more than 17 million acres across Arizona, New Mexico, and Utah. The reservation lies almost entirely within the Colorado River Basin and, as currently configured, abuts or encompasses the Colorado River, the Little Colorado River, and the San Juan River.

The reservation was established pursuant to two treaties in 1849 and 1868. In short, the 1849 treaty purported to end hostilities between the Navajo people and the United States, and the United States promised to create territory specifically for the Navajo people. Despite the treaty, hostilities persisted, and the United States forcibly removed the Navajo from their ancestral homelands to Bosque Redondo, resulting in several years of significant suffering and hardship among the Navajo. In 1868, the Navajo and United States agreed to a second treaty, formally ending hostilities and creating the Nation's original reservation as a permanent homeland for the Navajo people. Under the 1868 treaty, the United States agreed, among other things, to build schools, provide teachers, and supply seeds and agricultural implements for up to three years, in addition to providing funding for the purchase of sheep, goats, cattle, and corn.

Legal and Procedural Background

Under the *Winters* doctrine, when the federal government creates a federal reservation—whether for a tribe, the military, or for wildlife purposes—it impliedly reserves sufficient water appurtenant to the reservation to satisfy the purpose of the reservation, provided the water is surplus to existing uses. *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *United States v. New Mexico*, 438 U.S. 696, 700-702 (1978). Breach of trust claims, on the other hand,

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require a tribe to establish that an applicable treaty, statute, or regulation, creates a specific trust duty, and that the United States has expressly accepted that duty. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-174 (2011).

In 2003, the Nation sued the United States Department of the Interior (Interior), the Secretary of the Interior (the Secretary), the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively: Federal Parties), bringing claims under the National Environmental Policy Act and a breach of trust claim for failure to consider the Nation's as-yet-undetermined water rights in managing the Colorado River. Several parties, including Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities, intervened to protect their interests in the Colorado's waters.

The U.S. District Court dismissed both claims on standing grounds and sovereign immunity. The Ninth Circuit reversed as to the breach of trust claim, holding that it was not barred by sovereign immunity. *Navajo Nation v. Dep't of Interior* (*Navajo I*), 876 F.3d 1144, 1174 (9th Cir. 2017). After re-considering the breach of trust claim, the District Court again dismissed the Nation's complaint without leave to amend. The District Court reasoned that any attempt to amend the complaint was futile because the Supreme Court reserved jurisdiction over allocation of rights to the Colorado River in *Arizona v. California* (*Arizona I*), 373 U.S. 546 (1963), thus depriving the District Court of jurisdiction. The District Court also ruled that the Nation did not identify a specific treaty, statute, or regulation that imposed an enforceable trust duty on the federal government that could be vindicated in federal court. The Nation appealed.

At the Court of Appeals

The Ninth Circuit Court of Appeals held that the U.S. District Court erred in dismissing the complaint because, in contrast to the District Court's determination:

> . . .the amendment was not futile. Although the Supreme Court retained original jurisdiction over water rights claims to the Colorado River in *Arizona I*, the Nation's complaint does not seek a judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive. […]

The Ninth Circuit also reversed the District Court's ruling on the Nation's breach of trust claim. According to the Ninth Circuit, the Nation's unquantified *Winters* rights to the Colorado River provided a basis on which the Nation could predicate a breach of trust theory, "especially when considered along with the [Federal Parties'] pervasive control over the Colorado River." The Ninth Circuit thus remanded the case back to the District Court to allow the Nation to amend its complaint to assert a breach of trust claim. The Federal Parties and intervenors filed a petition for writ of *certiorari* with the United States Supreme Court, which the Supreme Court granted.

The Supreme Court's Decision

Each side made a number of arguments before the Court. According to the Federal Parties, United States Supreme Court precedent holds that a breach of trust claim only arises if there is a "specific, applicable, trust-creating statute or regulation." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*). Accordingly, the "general trust relationship" between the federal government and tribes is not a specific, applicable, trust-creating statute or regulation. (*Jicarilla*, 564 U.S. at 173.) Instances where the Court determined that a specific trust-creating duty existed include where the federal government assumed "full responsibility to manage Indian resources and land for the benefit of the Indians" (*United States v. Mitchell*, 463 U.S. 206, 224 (1983) (timber resources managed for the benefit of individual tribal members)), or where the applicable statutes expressly designated the federal government as trustee of a specific trust corpus (*White Mountain Apache Tribe*, 537 U.S. 465, 474-476 (2003) (federal government exercised plenary control of Fort Apache Military Reservation held in trust for tribe, including daily supervision and occupation)).

The Nation, on the other hand, argued that the United States promised it sufficient water for the reservation to serve as a permanent homeland when it entered into the 1849 and 1868 treaties. In other words, the treaties' promise of a permanent home land also included the promise of sufficient water.

Under principles of treaty interpretation, an Indian treaty must be read to give effect to the parties' intentions and the agreement's purpose, which means in favor of, and not against, tribal rights. *See*: *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 675-76 (1979). In addition, the Nation argued that an enforceable duty exists when a tribe can identify a specific rights-creating or duty-imposing source of law that bears the hallmarks of a conventional fiduciary relationship. *United States v. Mitchell*, 463 U.S. 206, 225 (1983). According to the Nation, the treaties provided the substantive source of law bearing the hallmarks of a conventional fiduciary relationship.

No Duty to Take Affirmative Steps to Secure Water for the Navajo Nation

The Court rejected the Nation's argument that the 1868 treaty imposed a duty on the United States to take affirmative steps to secure water for the Nation. First, the Court reasoned that the 1868 treat "set apart" the Nation's reservation for the "use and occupation" of the Nation, but did not contain any rights-creating or duty-imposing language that imposed a duty on the United States to take affirmative steps to secure water for the Nation. In support of this view, the Court observed that the 1868 treaty imposed a number of specific duties on the United States; for example, to construct schools, provide teachers, and supply seeds and agricultural implements for up to three years. Despite the implication that seeds and agricultural implements are only usable if water is also provided, the Court noted that the Nation's reservation already contains a number of water sources that the Navajo people have used and continue to rely on. In other words, the fact that the United States agreed to provide seeds and farm implements did not also mean that the United States agreed to secure necessary water, let alone to do so indefinitely into the future.

The Court also rejected the Nation's argument that the United States' control over the Colorado River, including its role as federal watermaster, supported a determination that the United States owed the Nation a trust duty to secure water. According to the Court, in agreeing with the Federal Parties, "control alone" does not give rise to a breach of trust claim. Supreme Court precedent holds that a breach of trust claim only arises if there is a "specific, applicable, trust-creating statute or regulation." *Jicarilla*, *supra*, 564 U.S. at 177; *Navajo I*, *supra*, 537 U.S. at 506. As a sovereign, the United States does not occupy the same position a private trustee, which means that Congress:

> . . .may style its relations with the Indians… without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is limited or bare compared to a trust relationship between private parties at common law. *Jicarilla*, *supra*, at 174.

Thus, the "general trust relationship" between the federal government and tribes is not a specific, applicable, trust-creating statute or regulation. *Id.* at 173.

In a concurring opinion, Justice Thomas questioned whether a cognizable trust relationship exists between the federal government and tribes at all, but the majority did not adopt Justice Thomas' reasoning.

Broad Limitations on the Role of the Court in Addressing Tribal Water Rights

Finally, the Court identified seemingly broad limitations on its role in federal Indian law, including tribal water rights. Notably, the Court stated that "it is not the Judiciary's role to update the law" in reference to the likelihood that the 1868 treaty did not provide for all the Nation's water needs 155 years later. Instead, the Court explicitly identified Congress' authority to "address the modern water needs of Americans, including the Navajos, in the West." For its part, the Court must stay in its:

> . . .proper constitutional lane and interpret the law (here, the treaty) according to its text and history, leaving to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water.

In other words, according to the Court, the 1868 treaty should be interpreted as a historical document, and only if it clearly provides for ongoing or contemporary obligations will the Court find a sufficiently articulated (and accepted) duty to compel action by the federal government.

Finally, the Nation may have an opening to assert *Winters* rights to the Colorado River. The Court

recognized that the Nation "may be able to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests." In dissent, Justice Gorsuch emphasized that:

> . . .it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim.

Conclusion and Implications

It is not clear, however, what the scope of the Nation's *Winters* rights to Colorado River may be, given that the original reservation did not abut the Colorado River, *i.e.* was not appurtenant to it, and was only later expanded to abut the river. As of the date of publication, the Nation is considering its options.

The Supreme Court's decision leaves intact Congress' authority to structure the United States' trust relationship with tribes, binding the federal government only to those obligations it expressly accepts. The Court's decision correspondingly limits the existence of enforceable trust duties to those specifically set forth in the specific text at hand, whether it be a treaty, statute, or regulation. Not only will the Court only enforce specifically set forth trust duties, it will not judicially create any such duties, for instance based on principles of treaty interpretation. It is not clear, then, what role the judiciary will play moving forward in formulating remedies for disputes involving tribal water needs, particularly if such needs are, in the words of the Court, the responsibility of the legislative and executive branches. Nonetheless, it is possible the Nation pursues a quantification of *Winters* rights in the Colorado River at a future date. The Court's opinion is available at: The Suprme Court's opinion is available at: https://www.supremecourt.gov/opinions/22pdf/21-1484_aplc.pdf

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LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE BILL 756 GIVES STATE WATER RESOURCES CONTROL BOARD ADDITIONAL AUTHORITY OVER UNLICENSED CANNABIS CULTIVATION SITES

Unlicensed cannabis cultivation presents threats to California's water supplies and quality through illegal diversions, improper use of pesticides and other chemicals. California law now grants the State Water Resources Control Board (State Water Board) authority to gain entry and perform inspections at unlicensed cannabis sites and streamlines legal service against those unlicensed cultivators found to be in violation of California law, and provides Regional Water Quality Control Boards the ability to participate in inspections.

Background

Governor Gavin Newsom signed into law Senate Bill No. 756 on September 1, 2023 [Chapter 158], granting the State Water Resources Control Board authority to inspect unlicensed cultivation sites or to gain lawful entry where consent is denied or otherwise withheld through the issuance of an inspection warrant. The newly enacted legislation also allows the State Water Resources Control Board more flexibility in the service of certain notices and legal documents required under existing law and gives Regional Control Boards the right to participate in inspections.

Authority to Inspect Property or Facilities of Unlicensed Cannabis Producers

Under the new statutory provisions, the State Water Resources Control Board now has the authority to inspect the "property or facilities of any person or entity" for the purpose of determining whether the person or facility is in compliance with state laws, regulations, order, permits and other governing determinations governing the lawful diversions of water and protect water quality. If consent is requested, but denied, the State Water Board is authorized to obtain an inspection warrant as provided under the Code of Civil Procedure Title 13, § 1822.50, *et seq*. to gain access for the purpose of inspecting the property.

The new law also affords the State Water Resources Control Board the authority to conduct an inspection without the issuance of an inspection warrant in the event of an emergency affecting the public health or safety relating to the site under which the inspection is being sought.

Additionally, the State Water Board is also permitted to participate in an inspection performed pursuant to a warrant issued pursuant to the Penal Code to investigate potential violations of the Water Code by an unlicensed cannabis cultivation producer.

Service of Process Revisions

Numerous sections of the Water Code were amended pertaining to the service of certain enforcement documents. The amended provisions include those governing complaints where civil liability may be imposed for unlawful water diversions or water quality violations, service of copies of decisions or orders arising from judicial review from a water rights decision or order, and cease and desist orders relating to the unlawful diversions of water or water quality enforcement. These amendments include the existing service by personal notice or certified mail, but also now authorize service made in the same manner the service of a summons under Code of Civil Procedure or by "any method of physical delivery that provides a receipt," meaning a physical delivery method that supplies an electronic confirmation of delivery to the recipient.

Regional Water Quality Control Board Participation

In addition to providing inspection authority to the State Water Board, the new law extends the authority of a Regional Water Quality Control Board to participate in an inspection of an unlicensed cannabis cultivation site pursuant to a warrant issued pursuant to the Penal Code. This authority provides regional boards additional tools to address potential violations of California laws impacting the watersheds serving the public.

Conclusion and Implications

Due to the significant impacts to available water supplies, both in quantity and quality, resulting from unlawful activities occurring on unlicensed cannabis cultivation sites, enhancing the State Water Resources Control Board's authority to gain access and inspect those sites represents a significant new tool allowing the State Water Board and Regional Water Quality Control Boards to protect public resources and public health. Further enhancing the mechanisms to deliver and serve notices and other legal documents will better equip the State Water Board to track the receipt of the documents and reduce evasive tactics used unlicensed cultivators to avoid responsibly for their actions. The full text of SB 756, Chapter 158, is available online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB756
(Micheline Nadeau Fairbank, Derek Hoffman)

CALIFORNIA STATE ASSEMBLY APPROVES AB 1572 TO BAN USE OF POTABLE WATER ON NON-FUNCTIONAL TURF BEGINNING IN 2027

Under a bill passed by the California Assembly on 12 September 2023, California businesses and institutions will have to stop watering their lawns with potable water. AB 1572, proposed by assemblymember Laura Friedman earlier this year, is now in the hands of Governor Newsom. If the bill is ultimately signed into law, the prohibition would be rolled out in phases beginning in 2027 with government owned properties. Although the Governor's office has yet to weigh in on this bill, Governor Newsom's Executive Order N-7-22 directed the State Water Resources Control Board to consider adopting measures similar to those proposed by AB 1572, namely the prohibition on the use of potable water for non-functional turf.

Rolling Out the Prohibition

While the general idea behind the bill is to reduce—or eliminate entirely—the use of non-native landscapes that require excessive watering, AB 1572 goes beyond that and makes several other findings and mandates. First and foremost, and unsurprisingly, the bill specifically includes legislative findings and declarations that the use of potable water to irrigate nonfunctional turf is wasteful and incompatible with the state's policies relating to climate change, water conservation, and reduced reliance on the Sacramento-San Joaquin Delta. In keeping with these findings, the bill would further direct state agencies to encourage and support the elimination of nonfunction turf irrigation using potable water.

As for the ban itself, the bill would specifically prohibit the use of potable water for the irrigation of nonfunctional turf located on commercial, industrial, and institutional properties, with exceptions carved out for cemeteries and properties of homeowners' associations, common interest developments, and community service organizations.

California's ban comes hot off the coattails of measures taken by neighboring states and cities therein, including Las Vegas, Tucson, Castle Rock, Aurora, and the State of Nevada. Many of these new water restrictions only apply to new developments, however. Nevada's AB356, signed into law in 2021, shares much of the primary goals and directives found in California's AB 1572. Just like with AB 1572, Nevada's ban won't take effect until 2027. California's ban under AB 1572, however, is more limited in its scope than its neighbor's. Nevada's nonfunctional turf ban is set to be implemented on any property that is not zoned exclusively for a single-family residence. So, while multi-family residences will be subject to the prohibition on using potable water for irrigation of nonfunctional turf in Nevada, California's bill explicitly limits its reach to the enumerated categories described above, meaning residential properties in California will not be subject to AB 1572.

Even without factoring in residential properties, however, grass covers an estimated 218,000 acres in the Metropolitan Water District's service area with up to 51,000 acres fitting into the category of nonfunctional turf. As a sponsor of the bill, the Metropolitan Water District has expressed great support for the prohibition, estimating that by replacing non-residential decorative grass across all of southern California with native or non-irrigated landscapes

would save as much as 300,000 acre-feet of water per year. On the larger, statewide scale, the Pacific Institute has made estimates of its own relating to the replacement of grass with low water demanding plants and landscapes, concluding that total water use across California could be reduced by 1 million to 1.5 million acre-feet per year if such measures were taken throughout the entire state.

The implementation of the ban won't take effect until 2027, starting first with government properties, and continue to be rolled out in phases with other institutional, commercial and industrial properties being subjected to the turf ban in 2028. AB 1572 does provide for some limited carve outs, however, as the State Water Resources Control Board can give three-year extensions if necessary and certain disadvantaged communities won't be required to comply until 2031 or when they receive state funding, whichever comes later.

Conclusion and Implications

With the issuance of Executive Order N-7-22, Californians have already been faced with many of the measures provided for in AB 1572. N-7-22 is currently set to expire in June of 2024, however, meaning there could be as much as two and a half years of a grace period between the expiration of the ban put in place by the executive order and the time when AB 1572 will take effect. In any case, the bill comes as a somewhat piecemealed approached to conservation in California. It is unclear just how much water has been saved thanks to the ban currently in place, but it can be said that at least *some* water savings are being had with estimates by the Metropolitan Water District and Pacific Institute showing significant conservation figures attributable to the replacement of nonfunctional turf with native and low water demanding landscapes. It's typically acknowledged that there is no one single solution that's going to cure all of California's water supply issues, but by taking a broader approach the state can continue to create water savings where the impacts may be felt the least. For the summary and full text of AB 1572, *see:* https://trackbill.com/bill/california-assembly-bill-1572-potable-water-nonfunctional-turf/2374456/ (Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

'WATERS OF THE UNITED STATES' REDEFINED—EPA AND THE CORPS ISSUE CONFORMING WOTUS RULE IN WAKE OF THE *SACKETT* DECISION NARROWING THE 'REACH' OF THE CLEAN WATER ACT

On September 8, 2023, the U.S. Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively referred to as the Agencies) published a new rule (hereinafter referred to as the Conforming Rule) amending their January 18, 2023 Revised Definition of Waters of the United States (WOTUS) rule (Revised Definition) to conform with the U.S. Supreme Court's holding in *Sackett v. EPA*. (88 Fed. Reg. 61964 [Sept. 8, 2023].) The Conforming Rule is a limited series of amendments that nip and tuck the Revised Definition to fit within the bounds of the Supreme Court's recent narrowing the "reach" of the Clean Water Act (CWA). The Conforming Rule is *effective immediately* and the Agencies are not providing opportunity for public notice or comment. Importantly, the Conforming Rule does not wholly replace the Revised Definition, but merely amends aspects of the Revised Definition that were considered nonconforming in the wake of *Sackett* (*e.g.*, eliminating the significant nexus standard and defining "adjacent" to mean "a continuous surface connection") while maintaining the other provisions.

As a result of ongoing litigation surrounding the Revised Definition, the Agencies will implement the Revised Definition, as amended by the Conforming Rule, in 23 states (including California), the District of Columbia, and the U.S. Territories. In the other 27 states the Agencies are interpreting "WOTUS" consistent with the pre-2015 regulatory regime, as it conforms with the decision in *Sackett*.

Relevant Background

In 1972, Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1252, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas" and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1362(7), 1311(a).) Those in violation of the CWA potentially face criminal and civil penalties. (*Id.* §§ 1319(c), 1319(d).) The term "waters of the United States" is not defined further within the CWA, thereby leaving federal agencies, through regulation and policy guidance, to attempt to define the what constitutes a WOTUS—including what wetlands are WOTUS. Courts have then been tasked, and rarely reached consensus, on identifying the boundaries of the geographic reach of "waters of the United States" to guide the scope of regulatory jurisdiction under the CWA.

The Agencies have separate regulations defining WOTUS, but their interpretations have been similar and remained largely unchanged from 1977 to 2015 (referred to in the Revised Definition as the 1986 regulations). Since 2015, the Agencies have revised the WOTUS definitions via three significant rule changes under differing political administrations (2015 Clean Water Rule, 80 Fed. Reg. 37054 [June 29, 2015]; 2020 Navigable Waters Protection Rule, 85 Fed Reg 22250 [April 21, 2020]; and the 2023 Revised Definition, 88 Fed. Reg. 3004 [Jan. 18, 2023].)

The Agencies' 2023 Revised Definition, relied heavily on the pre-2015 regulatory framework and associated case law, while simultaneously reinvigorating the "significant nexus" standard delineated by Justice Kennedy in the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) and the "relatively permanent" standard concurrently articulated by a plurality of the Justices in *Rapanos*.

The *Sackett* Decision

On May 25, 2023, the Supreme Court released its highly anticipated ruling in *Sackett v. United States Environmental Protection Agency*. While the Revised Definition was not directly before the Court in *Sackett*, the Court considered the "relatively permanent" and "significant nexus" jurisdictional standards set forth in that rule; the Court subsequently struck

down the significant nexus standard as inconsistent with the CWA. Moreover, the Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses:

> . . .only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.' *Id.* at 1336 (quoting *Rapanos*, 547 U.S. at 739).

The Court also agreed that wetlands are considered WOTUS when the wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between "waters" and wetlands.'" *Id.* at 1344 (citing *Rapanos*, 547 U.S. at 742, 755).

In response to the Court's decision, on August 29, 2023, the Agencies issued a pre-publication final rule to amend the Revised Definition to conform with the ruling in *Sackett*. The final rule was published in the Federal Register on September 8, 2023. The rule is effective immediately.

Jurisdictional Waters of the United States under the Conforming Rule

The Conforming Rule amended the Revised Definition's provisions on interstate waters, tributaries, adjacent wetlands, and additional waters. Ultimately, the Conforming Rule eliminated any use of or reference to the significant nexus standard and redefined adjacent to mean having a continuous surface connection. The Revised Definition, in conjunction with the amendments from the Conforming Rule, define WOTUS to include:

- Traditional navigable waters (interstate commerce; the territorial seas; and interstate waters) (referred to in the Conforming Rule as "(a)(1) waters");
- Impoundments of WOTUS;
- Jurisdictional tributaries—tributaries to traditional navigable waters, the territorial seas, interstate waters, or impoundments when the tributaries are relatively permanent, standing, or continuously flowing bodies of water;
- Adjacent wetlands; and
- Intrastate lakes and ponds that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to WOTUS.

Conclusion and Implications

Notably lacking from the Conforming Rule are definitions clarifying (1) what constitutes relatively permanent, standing, or continuously flowing body of water or (2) what makes up a tributary. The Revised Definition relies heavily on the pre-2015 regulations for interpretation of those terms, but the lack of formal clarification in the Conforming Rule has left some in the regulated community disappointed with the amendments. Additionally, the Agencies indicated that waters that are no longer jurisdictional under the Conforming Rule's definition of WOTUS may still be subject to CWA jurisdiction. Specifically, the Agencies mentioned that a discharge from a point source to a non-jurisdictional tributary may still need a 402 permit if that non-jurisdictional tributary connects to a jurisdictional water. The Conforming rule maintains a large portion of the 2023 Revised Definition, carving out non-conforming portions while attempting to salvage the remainder, leading to conflicting views on how the remaining provisions will be defined and, ultimately, how CWA jurisdiction will be implemented.

(Jaycee Dean and Megan Somogyi)

EPA AGREES TO INVESTIGATE FIRST-EVER TITLE VI CLAIM STEMMING FROM THE STATE WATER BOARD'S ACTIONS ON THE BAY-DELTA PLAN

On August 8, 2023, the Evironmental Protection Agency's Office of External Civil Rights Compliance (OECRC) (EPA) issued a letter to the California State Water Resources Control Board (State Water Board) stating that OECRC intends to investigate a complaint lodged against the State Water Board by a coalition of tribes and environmental organizations alleging violations of federally-based rights under the Civil Rights Act and Clean Water Act arising from the State Water Board's planning efforts related to the Bay-Delta Water Quality Control Plan.

Background

Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, and Save California Salmon (Petitioners) filed the complaint in December 2022. Petitioners allege that the State Water Board's failure to review water quality standards in the Bay-Delta violated Title VI of the Civil Rights Act of 1964 (Title VI) by disproportionately harming tribes and other communities of color. *See* Title VI Complaint, 2-4, 40-44.

Under the Clean Water Act, states review water quality standards every three years and hold public hearings for proposed changes. Petitioners further allege that the State Water Board intentionally excluded Petitioners and communities of color from the rulemaking process in favor of closed-door negotiations. *See* Title VI Complaint, 44-45.

Title VI

Title VI prohibits federal funding recipients from discriminating against anyone based on race, color, or national origin, and may apply to inaction and facially neutral policies that result in disparate impacts. EPA implements Title VI through regulations set forth in 40 C.F.R. Part 7 (Implementing Regulations). The Implementing Regulations allow any person of a protected class to file a complaint with the EPA if a recipient of EPA assistance subjects them to discrimination based on that protected class. Petitioners filed their complaint under these regulations, and it is the first that EPA has agreed to investigate.

Relief Sought

Petitioners seek several forms of relief to bring the State Water Board into Title VI compliance. First, Petitioners request that EPA withhold federal permits for the Delta Conveyance Project and withhold approval of water quality standards "crafted through exclusionary policymaking processes." *See* Title VI Complaint, 55. If the State Water Board refuses to comply, Petitioners ask EPA to terminate or withhold State Water Board funding. *Id.* Further, Petitioners seek EPA to exercise their oversight authority to promulgate water quality standards that would, among other things, designate certain tribal activities as beneficial uses for the Bay-Delta. *Id.*

EPA's Investigation

The OECRC's investigation will focus on two issues: (1) whether the State Water Board's delayed rulemaking and public participation subjects tribes and other communities of color in the Bay-Delta to discrimination based on race color and national origin and (2) whether the State Water Board has instituted nondiscrimination safeguards required under EPA's Implementing Regulations.

According to Petitioners' complaint, the State Water Board's failures to maintain federal Clean Water Act-compliant water quality standards have disproportionately harmed tribes by impairing tribes' access to fish, riparian resources, and waterways essential to their sustenance, ceremony, religion, and identity. Second, the same alleged failures have caused outsized harms to Bay-Delta communities of color, who are particularly vulnerable to harmful algal blooms, the loss of fisheries, and other forms of ecological damage. Third, Petitioners allege that by substituting negotiation of voluntary agreements for an open public process, the State Water Board has excluded tribes and communities of color from decision-making on water quality standards.

To establish a prima facie case of disparate impact, the EPA must: (1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity; and (4) establish causation. Starting on August 8, OECRC has 180 days to complete

its investigation and issue preliminary findings. According to its Case Resolution Manual, OECRC will issue Requests for Information soon after accepting a complaint. At its request, the State Water Board will be required to provide OECRC with its:

> . . .books, records, accounts and other sources of information, including its facilities, as may be pertinent to ascertain compliance with EPA's nondiscrimination regulation. EPA Office of External C.R. Compliance, Case Resolution Manual, 19 (Jan. 2021).

A refusal to assist OECRC may lead to a preliminary finding of noncompliance.

The Implementing Regulations prescribe informal resolution whenever possible. If both parties agree to engage in alternative dispute resolution (ADR) or OECRC's informal resolution agreement process, OECRC will suspend its investigation into the State Water Board. Assuming they agree to an informal resolution agreement process, OECRC's role switches from fact-finder to drafter, seeking input from Petitioners on resolution issues and preparing terms to share with the State Water Board. ADR provides a similar yet more formal process, with a mediator conducting the negotiations. If 180 days pass without resolution, OECRC will resume its investigation.

Recommendations for compliance will accompany OECRC's preliminary findings. Once those findings are issued, the State Water Board will have 50 days to accept those recommendations or:

> . . .[s]ubmit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended. 40 C.F.R. § 7.115(d)(2).

Failure to take action will result in a formal determination of noncompliance. At that point, EPA may terminate financial assistance or "use any other means authorized by law" to obtain compliance, including referring the matter to U.S. Department of Justice. § 7.130.

Conclusion and Implications

It is unclear how the State Water Board will respond to the investigation. The novelty of the complaint only raises further uncertainty about how the process will unfold. However, the deadlines are relatively short, and some activity within the next year is likely. For more information, *see:* Letter from Anhthu Hoang, Acting Dir., EPA Office of External C.R. Compliance, to Eileen Sobeck, Exec. Dir., Cal. State Water Res. Control Bd. (Aug. 8, 2023), available at https://www.restorethedelta.org/wp-content/uploads/2023.08.08-REC_Acceptance_01RNO-23-R9.pdf
(Miles Krieger, Steve Anderson)

U.S. BUREAU OF RECLAMATION RECEIVES SCOPING COMMENTS ON POST-2026 COLORADO RIVER OPERATIONS

On August 15, 2023, the U.S. Bureau of Reclamation (Reclamation) concluded a 60-day public comment period seeking input on long-term operational strategies for the Colorado River when current rules expire in 2026. Reclamation received comment letters from federal, state, and local agencies, Tribes, organizations, individuals, as well as the seven Colorado River basin states that share its water under an interstate compact. The scoping comments will help Reclamation identify the proper scope, issues, and a suitable range of alternatives for its environmental analysis of post-2026 Colorado River operations under the National Environmental Policy Act (NEPA).

Background

The 1,450-mile Colorado River is an essential resource for water supply, hydroelectric power, fish and wildlife habitat, recreation, and other beneficial uses in the southwestern U.S. and Mexico. Pursuant to a 1922 compact, the seven states within the Colorado River drainage basin (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) share consumptive rights to the River. Based on expected average annual flows of 16.4 million acre-feet (MAF), the compact provides for an equal division of 15 MAF between the upper basin states (Colorado, New

Mexico, Utah, and Wyoming) and lower basin states (Arizona, California, and Nevada), leaving each basin to split its 7.5 MAF by separate compacts. An additional 1.5 MAF of water is reserved for Mexico pursuant to a 1944 treaty. To date, quantification of the reserved water rights of the 30 federally recognized Tribes within the Colorado River basin remains incomplete.

The 1922 compact and Reclamation's storage of Colorado River water at Lake Powell and Lake Mead enabled a great expansion of agricultural irrigation and population growth in the Southwest. According to Reclamation, agricultural irrigation represents roughly 70 percent of consumptive Colorado River water use, while the municipal demands of 35 to 40 million people make up the remaining 30 percent.

An unprecedented eight-year drought beginning in 2000 caused significant water shortages and a first-time need for adaptive measures to safeguard the dwindling flows of the Colorado River. In 2007, Reclamation adopted interim guidelines for the coordinated operation of Lake Powell and Lake Mead during drought and low reservoir conditions. The 2007 interim guidelines defined shortage levels and triggers for limited reservoir releases when less than 7.5 MAF is available to the lower-basin states. Following additional shortages during the 2014-2015 drought, the basins each adopted drought contingency plans in 2019, with additional actions and conservation measures beyond those contemplated in the 2007 interim guidelines. Even with the contingency plans in place, elevations in Lake Powell and Lake Mead reached near-record lows during the 2020-2022 drought, prompting further voluntary cuts and calls for more robust plans.

The Scoping Process

The scoping process is an early planning stage for an Environmental Impact Statement (EIS) under NEPA, during which a federal agency engages with state and local governments, Tribes, and the interested public, and solicits comments regarding issues the EIS should consider. The more than 21,000 comment letters submitted on post-2026 Colorado River operations covers a wide range of positions on the appropriate range of issues and alternatives that Reclamation should consider.

In a 2020 report, Reclamation found that changed hydrologic conditions and increased severity of droughts in the Colorado River basin meant the 2007 interim guidelines were insufficient to reduce the risk of critically low reservoir levels. Average flows in the Colorado River over the past 20 years were 12.5 MAF on average, well below the 16.4 MAF average contemplated in 1922. Many of the submitted comment letters urge that the post-2026 operations include a management system that will provide reliability and water supply certainty, with flexible mechanisms to quickly respond to changed hydrologic conditions and protect storage levels against severe and prolonged droughts.

Upper Basin States

The upper basin states of Colorado, New Mexico, Utah, and Wyoming submitted a joint letter asking Reclamation to keep its scope narrowly limited to operations of Lake Powell and Lake Mead, and to keep the rules interim to allow further opportunities to adapt and revise based on results. They stated that the post-2026 operations should address the recurring imbalance between supply and demand by reducing the lower-basin's allotment to account for 1.5 MAF of annual evaporation and conveyance losses. The upper basin states suggest that other issues, such as Tribal water rights and species protection, are better addressed in separate programs and frameworks.

Lower Basin States

The lower basin states of Arizona, California, and Nevada submitted their own joint comment letter, which agreed the scope should not go beyond the water releases, deliveries, and conservation associated with the two reservoirs. Citing the Law of the River, the lower basin states assert that Reclamation may not disturb the body of agreements, laws, and court opinions governing existing priority rights on the Colorado River. The lower basin states seek predictable and easily understood criteria for releases from Lake Powell and Lake Mead, and clearer accounting of upper basin water use to address the supply and demand imbalance.

Agricultural Irrigations

Commenters that supply water for agricultural irrigation sought to preserve the priority system, consider alternatives to curtailment, and expand on the existing Law of the River rather than dismantle it. The three largest urban water users submitted a joint let-

ter, requesting stronger measures to limit agricultural water deliveries to no more than what is reasonably required for beneficial use.

Tribes

The Colorado River Indian Tribes, Hopi Tribe, Navajo Nation, and other Tribal organizations commented that the scope of the EIS should address the operations of the entire Colorado River system, coordinated endangered species issues, and environmental concerns, while protecting the reserved Tribal rights that remain unquantified. Several of the letters state Reclamation must fully account for the 1.2 MAF of water lost each year due to structural deficits like seepage and evaporation losses, and that those system losses may not be assessed against senior Tribal rights to mainstream water.

Conclusion and Implications

The scoping comments submitted by the upper and lower basin states and other stakeholders highlight a wide range of concerns and issues the Bureau of Reclamation will need to consider as it develops post-2026 operational strategies to address climate change and recurring drought. With the comment period now closed, Reclamation is working on a public scoping report for the fall of 2023.

After issuing its scoping report, Reclamation will work on EIS alternatives with partners and stakeholders through spring of 2024. By the end of 2024, Reclamation expects to release a draft EIS for public review. Before the expiration of the current interim guidelines in 2026, Reclamation will publish a final EIS and a record of decision.
(Austin C. Cho, Sam Bivins)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES GUIDANCE ON GROUNDWATER RECHARGE

The Department of Water Resources (DWR) released three new guidance documents to assist in the design and implementation of groundwater recharge programs. The first document, District Recharge Program Guidance (District Recharge), highlights critical considerations for Groundwater Sustainability Agencies (GSA) and other agencies when developing programs "beyond traditional and conventional recharge approaches." Second, the Central Valley Groundwater Recharge Incentives and Strategies (Recharge Incentives) outlines the various economic tools these agencies have to maximize recharge opportunities within their districts. Lastly, the On-Farm Recharge Methods Manual (On-Farm Manual) targets growers, technical assistants, and non-profits and provides them with practical guidance for on-farm recharge programs.

Background

In 2014, California adopted the Sustainable Groundwater Management Act (SGMA) in response to widespread overdraft across California, and in particular, the Central Valley. To achieve sustainable groundwater management, SGMA required the formation of GSAs for all high- and medium-priority subbasins. Under SGMA, these agencies have broad authority to manage the subbasin's groundwater, including the institution of groundwater recharge programs.

Groundwater recharge is often an important component of a GSA's Groundwater Sustainability Plan (GSP). GSPs detail the GSA's plan to reach sustainable yield within twenty years. The DWR is responsible for approving a GSP, and may deem a GSP incomplete with recommendations to correct deficiencies or, failing adequate corrective actions, reject a GSP as inadequate if it lacks projects and management actions necessary to meet sustainability goals. To date, DWR has rejected over 25 plans as inadequate or incomplete. If a GSP is deemed inadequate, jurisdiction to implement SGMA shifts to the State Water Resources Control Board (State Water Board), which may designate a basin as probationary and potentially impose an interim plan to meet sustainability objectives. Recharge programs may provide an important path forward for a GSP to be deemed approved by DWR.

A recharge program requires an agency to obtain the rights to divert surface water for underground storage. Before 2015, an agency could only obtain a standard or a 180-day temporary permit, both of which were subject to lengthy California Environ-

mental Quality Act (CEQA) review. In 2015, then-Governor Jerry Brown suspended CEQA requirements on 180-day temporary permits for underground storage projects. To issue a 180-day permit, the State Water Board needs to find: (1) an urgent need; (2) no unreasonable effect upon fish, wildlife, and superior rights holders; and (3) the diversion is in the public interest. In 2020, the State Water Board began offering two new permitting options designed specifically for SGMA recharge programs: five-year temporary permits and streamlined standard permits. Five-year permits require CEQA analysis, unlike a 180-day temporary permit. Streamlined standard permits are perpetual but are subject to certain conditions, including priority considerations for other water rights holders.

DWR's groundwater recharge guidance documents follow an historically wet winter where California experienced the largest snowpack in seventy years. *See*, Cal. Dept. of Water Res., *DWR Captures and Stores Water from Record-Breaking Snowpack* (July 19, 2023). According to DWR, over 90,000 acre-feet of potential flood waters were diverted over the winter. Additionally, the State Water Board permitted over 1.2 million acre-feet, primarily for recharge projects. *See* State Water Res. Control Bd., *Over 1 Million Acre-feet of Water Authorized for Groundwater Recharge since December* (June 7, 2023). These diversions contributed to an estimated 3.8 million acre-feet of recharge for 2023. *See*, Cal. Dept. of Water Res., *supra*.

The District Recharge Program

The District Recharge guidance:

> . . .equip[s] water districts, GSAs, and their technical consultants with the necessary considerations, publicly available tools, and examples to design and refine groundwater recharge programs that address the specific needs and priorities of all stakeholders in their subbasins.

Key objectives, *inter alia*, include aligning recharge programs with GSP goals, developing multiple benefit approaches, and enhancing technical considerations. The guidance walks through a step-by-step process to achieve these objectives, starting at the preliminary stage of identifying goals, water sources, and water rights, then the design stage, and finally, the implementation stage.

The first step in the preliminary stage is aligning a recharge program with applicable GSP goals, which include one or more of the following: (1) flood management; (2) meeting agricultural water demand; (3) community drinking water security; (4) subsidence reduction; and (5) ecosystem enhancement. The next step of the preliminary stage involves identifying potential water sources and existing water rights. Potentially, a district or GSA's existing water rights may need to be changed to accommodate using water for recharge purposes. While the State Water Board does not deem recharge to be a reasonable and beneficial use of water in and of itself, water rights holders may generally store water underground for later beneficial use consistent with the terms and conditions of their respective water rights. Thus, initiating or ensuring an adequate basis of right for the recharge program may be an important step before advancing to the design and implementation stages.

For the design stage, the guidance points to existing resources an agency can use to tailor its program to its subbasin. For example, the agency may utilize a completed Flood-Managed Aquifer Recharge (Flood-MAR). A GSA may "interpret the study's results to plan and implement practical recharge projects that address the subbasin's goals and objectives to meet the most critical groundwater issues and prioritize sites with multiple societal benefits." Other plans the guidance references include Regional Flood Management Plans, Habitat Conservation Plans, Integrated Regional Water Management Plans, and community drinking water plans. Next, the guidance compares the various public and private program types, including dedicated recharge basins, dry wells, injection wells, and on-farm recharges. Throughout this stage, the guidance encourages agencies to consider elements to achieve a multiple benefit design.

Finally, the guidance provides an overview of key implementation considerations. During this stage, the guidance stresses an agency should collaborate with public and private partners to achieve success. If the program involves on-farm recharge, for example, investing money in a pilot program can be used to highlight recharge benefits and refine the approach for future sites. Additionally, the agency could consider incentives such as fallow leases, cost-sharing programs, and, if feasible, groundwater pumping credits.

Central Valley Groundwater Recharge Incentives and Strategies

Like the District Recharge guidance, the Recharge Incentives guidance targets GSAs and other water districts "interested in customizing strategies best suited for their subbasins." The guidance summarizes the various incentives and water management strategies that GSAs and other agencies in Central Valley have developed to maximize groundwater recharge and mitigate overdraft in the area. According to the guidance, these policies help agencies achieve groundwater objectives primarily through three methods: (1) encouraging surface water use over groundwater use; (2) accelerating private implementation of recharge programs; and (3) incentivizing groundwater demand reduction. The guidance provides examples for each method and identifies the counties currently implementing them.

On-Farm Recharge Methods Manual

As the other two documents highlight, on-farm recharge can be a significant aspect of a GSP. However, for these programs to be successful, a GSA may consider fostering grower adoption through incentives, outreach, and education. The On-Farm Manaul tackles the third component, education, by providing growers and technical assistant providers with illustrated examples of tested recharge methods. The guidance identifies common annual and perennial crops where growers have implemented recharge programs.

Conclusion and Implications

SGMA charges GSAs and other local agencies to reach sustainable yield in subbasins suffering from years of overdraft. DWR's published guidance is aimed to assist these agencies in meeting SGMA's requirements. However, it remains to be seen to what extent an agency's adherence to DWR's guidance results in increased groundwater recharge, or if there are any funding, water rights permitting, or other benefits to demonstrating compliance with DWR's guidance.
(Miles Krieger, Steve Anderson)

STATE WATER RESOURCES CONTROL BOARD ISSUES PROPOSED REGULATIONS FOR IMPLEMENTATION OF DIRECT POTABLE REUSE IN CALIFORNIA WATER SYSTEMS

As part of the California's mission to expand the use of recycled water throughout the state, the State Water Resources Control Board (State Water Board) recently announced proposed regulations that would allow for water systems to add wastewater that has been treated to levels at or in excess of drinking water standards to their potable water supplies. At a glance, this process of "Direct Potable Reuse" will provide water systems in California with the ability to strengthen the resiliency of their water supplies and reduce the amount of wastewater released into our rivers and ultimately to the Pacific.

Background

Direct Potable Reuse (DPR) has been described by the State Water Board as the planned introduction of recycled water either directly into a public drinking water system or into a raw water supply immediately upstream of a drinking water treatment plant. The State Water Board's Division of Drinking Water (DDW) is currently in the process of carrying out several legislative mandates that direct the implementation of DPR.

Water Code section 13561.2 requires the State Water Board to adopt uniform regulations for water recycling via DPR no later than December 31, 2023. This deadline, however, was premised on an expert panel finding that the proposed regulations would adequately protect public health.

Pursuant to SB 918 and SB 322, the State Water Board's DDW investigated the feasibility of developing the uniform water recycling regulations for DPR as required by Water Code section 13561.2. The State Water Board completed this investigation in December of 2016 and submitted a report to the Legislature with its findings and recommendations, which can be found online at the State Water Board's

web page on Direct Potable Reuse.

Following its investigation, the State Water Board's DDW was tasked with developing uniform water recycling regulations for DPR that would be protective of the public's health. Specifically, AB 574 requires the State Water Board to develop and adopt uniform regulations on DPR through raw water augmentation by using information from the DPR research recommended in the State Water Board's 2016 report to the Legislature, and from the solicitation of stakeholder input, on or before December 31, 2023. To that end, AB 574 also required the State Water Board to establish and administer an expert review panel to review the proposed criteria and make a finding as to whether the proposed criteria would adequately protect public health.

The Proposed Regulations

The proposed DPR regulations would establish minimum uniform water recycling criteria for the purpose of adequately protecting public health with the planned implementation of DPR. Although these regulations would establish baseline requirements for DPR implementation, the proposed regulations would not preclude the Regional Water Quality Control Boards from imposing heightened requirements when issuing waste discharge and water recycling permits to water recycling agencies that choose to implement DPR. As such, agencies that do opt into implementing their own DPR projects may still have to meet the requirements of the National Pollutant Discharge Elimination System established by the U.S. Environmental Protection Agency.

In their current form, the proposed DPR regulations include: (1) permitting requirements for the DPR responsible agency and agencies that receive water through a DPR project; (2) requirements for the establishment of joint plans for agencies partnering to implement a DPR project; (3) minimum requirements relating to the origin and control of raw wastewater to be ultimately treated and used for DPR projects; (4) requirements to develop a monitoring plan with respect to contaminants and pathogens in DPR project water; (5) requirements to report compliance data and information for DPR projects; (6) and other general requirements relating to minimum standards for DPR projects as well as planning, monitoring, and reporting requirements.

In short, the net effect of the proposed regulations would be to establish specific regulatory criteria for general application by public water systems that choose to engage in DPR projects or receive water from DPR projects.

Conclusion and Implications

The development of the proposed DPR regulations, although now almost a decade in the making, goes hand in hand with Governor Newsom's Water Supply Strategy for the State, which includes the ambitious goal of recycling and reusing at least 800,000 acre-feet of water per year by 2030. At the end of the day, all the water we use is already recycled in one form or another, the only difference is whether it gets recycled by nature or by our own recycled water projects. DPR, being in that latter group of recycled water sources, allows us to speed up the process of water recycling by reintroducing water that has been treated and put back into our natural water supply sources—or in some cases directly back into our water treatment plants—and made available for reuse in the same instance it would otherwise be disposed of as wastewater. With the legislatively established deadline fast approaching, and with the final workshop on the proposed regulations having taken place on September 7, it is expected that the State Water Resources Control Board will take action on the proposed regulations by the end of this year.
(Wesley A. Miliband, Kristopher T. Strouse)

NEW CALIFORNIA WATER CONSERVATION RULES FROM THE STATE WATER BOARD HERALD BIG CHANGES FOR WATER SUPPLIERS

California Assembly Bill 1668 and Senate Bill 606, signed into law in 2018, have given rise to a newly proposed regulatory framework, which is intended to promote water conservation and bolster resilience to climate change. In August 2023, the State Water Resources Control Board (State Water Board) released the text of this proposed regulation, referred to as *Making Conservation a California Way of Life*.

Background

The proposed regulation establishes tailored efficiency goals for urban retail water suppliers throughout the state, regardless of whether drought conditions are occurring. These goals are expected to reduce urban water use by more than 400-thousand-acre feet by 2030. If adopted, it would require roughly 400 urban retail water suppliers to devise water-use budgets every year starting in 2025, or face significant fines.

Efficiency Goals

As part of the proposed regulation, urban retail water suppliers must meet an agency-specific urban water use objective by January 1, 2025, and continue doing so for each subsequent year. The new water use objectives move away from the uniform reductions previously applied in order to offer an approach that can be adapted by local suppliers to fit the needs of their service areas. As a result, however, some regions may face greater cuts than others under the rules.

The urban water use objective is a total water budget that is the sum of efficiency budgets for a subset of urban water uses such as residential indoor and outdoor water use, water losses, commercial use, and other factors. The formula uses statewide efficiency standards for the types of uses along with unique local service area characteristics. These characteristics include factors such as population and climate. Additionally, the calculation is based on the supplier's water use conditions for the previous state fiscal year.

To meet objectives, suppliers are encouraged to use a wide variety of tools such as education and outreach, leak detection, rate reform, and incentives such as rebates. Other measures may include limiting the hours and days of lawn watering year-round. The state's Save Our Water website offers templates that suppliers can adapt based on their needs.

The standard for indoor water use will be 47 gallons per person per day by 2025 and be reduced to 42 gallons per person per day by 2030. Whereas over 200 cities and water suppliers are set to meet the 2025 threshold, by 2030 the State Water Board estimates only 97 water suppliers would escape having to make additional conservation efforts.

Performance Measures

In addition to having to create and implement water use objectives, urban retail water suppliers will be required to implement performance measures for commercial, industrial and institutional sectors (CII). As of January 1, 2025, urban retail water suppliers would need to identify all disclosable buildings within the supplier's service area and, by July 1, 2025, ban the irrigation of non-functional turf on CII landscapes. Suppliers would also need to annually classify CII customers in accordance with ENERGY STAR Portfolio Manager categories and identify all CII large landscapes with mixed-use meters, in order to employ in-lieu technologies. Finally, for CII customers at or above the 80th percentile of water use for each classification, suppliers would need to design and implement a conservation program.

Annual Reporting Requirements

Moreover, as part of the proposed regulation, urban retail water suppliers must submit annual progress reports outlining their conservation efforts and achievements. This requirement begins on January 1, 2024 and reports must include, among other things, information on the supplier's urban water use objective, actual urban water use, and a description of progress towards meeting the urban water use objective.

Fines and Bonus Incentives

Urban retail water suppliers could face fines up to $1,000 per day for failing to meet targets, or as much as $10,000 per day during drought emergencies.

However, suppliers may also receive a bonus incentive if they deliver water from a groundwater basin, reservoir, or other source augmented by potable reuse water.

Water Use Objective Exploration Tool and Projected Impact of Proposed Standards

The State Water Board recently released an online "Water Use Objective Exploration Tool" designed to assist parties interested in the implementation of AB 1668 and SB 606 explore how the forthcoming efficiency standards may affect urban water use. The tool shows possible future scenarios and compares those to recent water use trends and the 2020 efficiency targets established by past legislation. The State Water Board indicates the tool is a work in progress and will be updated over time.

The State Water Board also released "Provisional Data and Examples of Water Use Changes Under Proposed Standards." This online table provides a preview of how the proposed regulation would likely impact each urban water supplier. Projected impacts include water use reduction requirements ranging from 0 percent in some areas to more than 20 percent reduction requirements in other areas. These projections are likely to draw significant scrutiny and responses from stakeholder water suppliers.

The tool and projections can be found at the following portal on the State Water Board website: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/water-use-explorer/

Conclusion and Implications

The regular rulemaking process for the proposed regulation is underway and the State Water Board will consider adoption of proposed regulation within one year. The rulemaking process includes opportunities for public comment, which the State Water Board will consider.

The State Water Board's proposed rules reflect a view that drought conditions will generally continue to persist in California into the future. The proposed regulation is designed to produce even greater water efficiencies among suppliers, including through increased investments in conservation infrastructure and programs. However, the costs could be substantial and prove to be a burden to both urban retail water suppliers and consumers, particularly in regions that have already significantly reduced water use in recent years. The *Making Conservation a California Way of Life* fact sheet is available online at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/docs/conservation-a-way-of-life.pdf

(Kendall Lovell, Derek Hoffman)

LAWSUITS FILED OR PENDING

U.S. EPA ENTERS INTO SETTLEMENT AGREEMENT TO FURTHER ASSESS PESTICIDE RISKS TO THREATENED AND ENDANGERED SPECIES

The Center for Biological Diversity (CBD) reached a settlement agreement with the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (FWS). This settlement strengthens consultation and information-sharing between EPA and FWS, as well as pushes EPA to propose new monitoring requirements on pesticide users, in order to better assess harms to threatened and endangered wildlife from the direct application of pesticides to waters. The settlement resolves a petition for review that CBD filed in the U.S. Court of Appeals for the Ninth Circuit, challenging EPA's issuance of a federal Clean Water Act permit without fully assessing the risks posed to freshwater endangered species by pesticides applied directly to water and EPA and FWS's alleged failures to comply with the ESA. [*Center for Biological Diversity v. U.S. Environmental Protection Agency*, Case No. 21-71306 (9th. Cir., Oct. 4, 2021).]

Factual and Procedural Background

The Clean Water Act (CWA) authorizes the EPA to protect water quality by creating various permitting regimes to regulate, *inter alia*, discharges from industrial activity into U.S. waters. Section 402 of the CWA regulates the discharge of pesticide applications through the National Pollutant Discharge Elimination System (NPDES). EPA and states issue Pesticide General Permits (PGP) under the NPDES program to regulate pesticide operators. In many cases, the state environmental protection department is the NPDES permitting authority. However, for areas and activities where the states are not authorized, the EPA issues the PGP to control pesticide discharges that leave a residue in U.S. waters.

The first PGP was issued in 2011, in response to the United States Sixth Circuit Court of Appeals vacating EPA's 2006 Final Rule on Aquatic Pesticides. The term of each PGP lasts for five years, with the second PGP issued in 2016 and the most recently in 2021. As part of the PGP process, FWS conducts a Biological Opinion on the effects of the 2021 PGP on threatened and endangered species, pursuant to Section 7 of the federal Endangered Species Act (ESA). The 2021 PGP did not substantially update either the conditions or the requirements of the 2016 PGP. On September 16, 2021, EPA issued the 2021 PGP.

October 4, 2021, CBD filed a petition for judicial review of the 2021 PGP. The petition alleged EPA and FWS violated the CWA and ESA for issuing the 2021 PGP. The petition claimed the FWS violated the ESA by failing to complete the Section 7 biological evaluation until after the 2021 PGP was issued. Further, the petition alleged EPA violated the ESA by failing to ensure that the agency would not irreversibly commit resources with respect to the agency action, which would foreclose reasonable and prudent alternative measures, by not completing the Section 7 consultation prior to issuing the 2021 PGP. The parties then entered into the Ninth Circuit Mediation Program to negotiate a settlement.

The Settlement

The substantive terms of the settlement are divided into three key areas: (1) 2026 PGP consultation and issuance; (2) interim actions by EPA and FWS; and (3) proposed changes to the 2026 PGP monitoring provisions. Nothing in the settlement affects the 2021 PGP.

In addressing 2026 PGP consultation and issuance, the FWS agreed to draft its Biological Opinion analyzing the effects of the PGP on threatened and endangered species and their critical habitats no later than August 30, 2024, with the final opinion issued by October 31, 2024. The EPA agreed to issue the final 2026 PGP by December 17, 2024, nearly two years before it would go into effect.

With respect to interim actions, the EPA agreed to update its NPDES e-reporting tool for the PGP, used for submitting notices of intent (NOIs) and annual reports for pesticide discharges, to ensure FWS can also review and respond to appropriate NOIs submit-

ted under the 2021 PGP. Both EPA and FWS agreed to review any NOIs that overlap with National Marine Fisheries Service (NMFS) Listed Resources of Concerns within 30 days before authorizing the pesticide discharges. EPA further agreed to give summaries of the annual PGP reports to FWS and NMFS, and FWS will include relevant information, such as the types of permits, the number of pest management areas, the number, location, size of treatment areas, and the amount and name of pesticides used, as it prepares its future Biological Opinion. As part of their PGP eligibility worksheet tool, EPA also agreed to direct operators of pesticide discharges to FWS's online tool that includes ESA-listed species and habitats that should be addressed with protective measures and to contact FWS for technical assistance if required. The settlement also obligates EPA and FWS to commit to several notification and information sharing measures, such as providing a link to FWS online tools on the PGP webpages and listing on the PGP webpage all biological opinions for pesticide registration decisions under the Federal Insecticide, Fungicide, and Rodenticide Act.

Finally, the settlement covers several proposed changes to the 2026 PGP monitoring regime. Those hired to apply pesticides must conduct visual monitoring and document the findings or give reason as to why no visual monitoring was conducted. In instances where the EPA determines more monitoring is needed to ensure compliance, EPA will notify the operator of additional monitoring requirements and give the reason. EPA also agreed to propose for public comment amendments to the Pesticide Discharge Management Plan for the 2026 PGP. These amendments mostly affect the visual monitoring procedures, establishing minimum requirements for the businesses and industries under PGP's purview (decision-makers) to set up a process for determining the location of any monitoring, the monitoring schedule, the person responsible for conducting the visual monitoring, and procedures for documenting visual monitoring. Other proposed amendments would also require decision-makers who submit annual reports to also include copies of monitoring records.

Conclusion and Implications

This settlement obligates the Environmental Protection Agency and the Fish and Wildlife Service to make several immediate and long-term changes to the PGP, largely aimed at improving monitoring, compliance, and information sharing. These changes alter the process by which EPA and FWS complete their respective obligations in issuing the PGP, pushing each agency to fulfill those obligations in a timely manner. More on the settlement can be found at: https://perma.cc/2DVD-N8SM
(Michael Ervin, Rebecca Andrews)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT APPLIES THE MAJOR QUESTIONS DOCTRINE TO LIMIT THE SCOPE OF THE CLEAN WATER ACT

North Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291 (4th Cir. Aug. 7, 2023).

The United States Court of Appeals for the Fourth Circuit relied on the "major questions doctrine" to determine that trawl nets brushing the ocean floor and the return of bycatch to Pamlico Sound did not require permits or violate the federal Clean Water Act.

Factual and Procedural Background

The North Carolina Coastal Fisheries Reform Group (Group) is a nonprofit organization dedicated to protecting North Carolina's coastal and marine public trust resources and to promoting sustainable fishing practices. The Group consists of both fishing captains, and employees or residents of North Carolina, who aim to repair the current state of fisheries following the enactment of the Fisheries Reform Act.

Defendants are commercial shrimpers in Pamlico Sound, a coastal estuary in North Carolina. Shrimpers harvest shrimp by dragging trawl nets along the ocean's floor. The nets trap shrimp and stir up sediment, which later resettles on the ocean floor. The nets also inadvertently snare other fish and marine organisms, many of which the trawlers cannot legally keep, and are known as "bycatch." Trawlers throw the bycatch overboard, returning it to the ocean.

The Group sued defendants under the Clean Water Act's citizen-suit provision, alleging defendants are violating the Act and must obtain Clean Water Act permits, in addition to the fishing permits already required. Specifically, the Group claimed the defendants needed a permit under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES), which permits "the discharge of any pollutant" and a permit under Section 404 of the act, which regulates the discharge of "dredged or fill material into the navigable waters."

The U.S. District Court dismissed the suit for failure to state a claim, holding that the Act does not regulate bycatch and that disturbing sediment with trawl nets does not violate the Clean Water Act. Defendants appealed.

The Fourth Circuit's Decision

The court first considered whether defendants violated the Clean Water Act by putting bycatch back into Pamlico Sound without an NPDES permit. The Group claimed the bycatch was a pollutant, citing to the Act's definition of "pollutant," which includes biological materials. The court rejected the Group's argument, relying on the major questions doctrine. Under the major questions doctrine, a federal agency must have clear congressional authorization before adopting an expansive construction of a statute or exercise powers in a new way under an old statute.

Here, the court found that the question raised by the Group was a major question because there is already a distinct regulatory scheme in place where the National Marine Fisheries Service (NMFS) regulates bycatch, not the EPA, and adopting the Group's reasoning would moot the established scheme to regulate bycatch. Under this doctrine, the court determined the Group must identify "clear congressional authorization" to regulate bycatch under the Clean Water Act. The court then rejected the Group's argument regarding bycatch, determining that an expansive, vaguely worded definition of "pollutant" is not akin to a clear congressional authorization in light of the established scheme for regulating bycatch and trawling.

Second, the court considered and rejected the Group's arguments that the disruption of sediment by the trawling nets required a Section 404 or an NPDES permit. The court determined the disrupted sediment did not qualify as "dredged spoil" to trigger Section 404 because it was not actually dredged. The court also determined the rock and sand disrupted by the nets were not "discharged" or "added" to the waters and did not trigger an NPDES permit requirement.

The court affirmed the trial court's full dismissal of the claims by the Group.

Conclusion and Implications

This case is one of the first federal appellate decisions to expressly invoke the major questions doctrine to limit the scope of the Clean Water Act. This decision may signal a willingness for courts to consider any statutory reading with significant political and economic consequences to be a major question, requiring clear congressional authority for the proposed statutory construction. The Fourth Circuit's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca4/21-2184/21-2184-2023-08-07.html
(Rebecca Andrews, Elleasse Taylor)

DISTRICT COURT DISMISSES GROUNDWATER PFAS COMPLAINT SEEKING TO HALT ONSHORE TRENCHING FOR LACK OF STANDING

Mahoney v. United States Department of the Interior, ___F.Supp.4th___,
Case No. 22-CV-1305 (E.D. N.Y. July 17, 2023).

The U.S. District Court Eastern District of New York recently dismissed the complaint of a group of citizens seeking to halt construction of an onshore trenching project for a wind farm in East Hampton. The plaintiffs claimed that the project would worsen existing levels of perfluoroalkyl and polyfluoroalkyl substances (collectively: PFAS) in their groundwater. The court determined that the group of citizens lacked standing to bring the claim, as they could not establish that their injury was "fairly traceable" to the conduct of the defending agencies. The court thus granted the agencies' motion to dismiss for lack of subject matter jurisdiction.

Factual and Procedural Background

Pamela and Michael Mahoney and Lisa and Mitch Solomon sued the U.S. Department of the Interior (Interior), the Bureau of Ocean Energy Management (BOEM), the U.S. Department of the Army, and the U.S. Army Corps of Engineers (Army Corps), collectively as defendants, to stop construction of a wind farm being built near East Hampton, New York.

The construction project consisted of both offshore and onshore trenches containing a cable that would transfer energy from the wind farm to an electric grid located in East Hampton. A portion of the onshore cable route was to pass under land adjacent to the plaintiffs. The plaintiffs worried that the construction would exacerbate existing levels of PFAS in their groundwater.

The portion of the project that the plaintiffs complained of–was under the jurisdiction of the New York Public Service Commission (NYPSC). The defendants had issued the necessary permits for the offshore portion of the project. NYPSC issued the necessary permits for the onshore trenching portion of the project.

The plaintiffs had participated in the notice and comment period before NYPSC issued the final permit for the project, and had unsuccessfully challenged the final permit in state court. BOEM issued a Final Environmental Impact Statement approving of the project, and the Army Corps adopted it. The Army Corps then issued the final permit pursuant to § 404 of the federal Clean Water Act. Plaintiffs brought this action claiming that the Final Environmental Impact Statement did not consider the potential increase in groundwater contamination in violation of the National Environmental Policy Act, the Clean Water Act, the Outer Continental Shelf Lands Act, and the Administrative Procedure Act. The defendants made a motion to dismiss for lack of standing and for failure to state a claim for which relief could be granted.

The District Court's Decision

In reviewing whether plaintiffs had standing, the court considered three factors: (i) whether plaintiffs suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) whether the injury was likely caused by the defendants; and (iii) whether the injury would likely be redressed by judicial relief. The specific element of focus was causation, and whether the plaintiffs' alleged injuries were:

> . . .fairly traceable to the defendant's actions, "not the result [of] the independent action of some third party not before the court.

The plaintiffs claimed their injury in fact was that the project would exacerbate existing PFAS contamination levels, and that their property value would decrease as a result of the onshore trenching. Their complaint alleged that the injuries were caused by the agencies' actions because the trenching company:

> . . .would not be planning to trench a cable. . .[ner their property]. . .but for Defendants requiring [the company] to use the route for the onshore cable as a condition of their approvals and permits.

Lastly, the plaintiffs claimed that their injuries were redressible by a judicial order to revise or withdraw the Army Corps' construction permit, as doing so would prevent further contamination.

The court, however, found that a "but for" test is not enough to meet the causation element for standing. The defendants claimed that while they issued the building permits for the trenching project, they had no jurisdiction over the construction itself. Interior's delegation of jurisdiction to BOEM extended only to the "outer continental shelf" of the project, which "extended seaward from New York state waters." Meanwhile, the Army Corps was granted authority under the Clean Water Act to permit discharge material into disposal sites located in United States waters, however, the plaintiffs did not claim that the affected water on their land was water of the United States. The defendants thus had no jurisdiction over the onshore portion of the trenching project; so while issuing the required permits necessarily would be a "but for" cause of the project, it was found unlikely that issuing the permits alone would make the groundwater contamination "fairly traceable" to the defendants.

Alternatively, both parties had cited documents stipulating that the state and local agencies were responsible for choosing the location of the trenching, and that they had done so before the defendants issued the permit. The court found that the injury was more directly traceable to the NYPSC, the agency who had exclusive jurisdiction over the location choice and construction of the trenching. The court further found that the NYPSC's conduct was precisely the "independent action of some third party not before the court" that the standing test prohibits.

Alleged Injuries 'Too Attenuated from the Agencies' Conduct'

The court determined that the plaintiffs' injuries were too attenuated from the agencies' conduct to establish causation. Because the causation element of the standing test was dispositive, the plaintiffs were found to have failed to establish standing and thus failed to show that the court had subject matter jurisdiction over the case.

The court granted the defendants' motion to dismiss and dismissed plaintiff's complaint with prejudice.

Conclusion and Implications

This case clarifies which agencies face potential liability for offshore versus onshore trenching projects. The federal agencies named as defendants in this case were found only to have jurisdiction over the offshore trenching portions of the project. The state and local agencies were found to have jurisdiction, and potential liability, over the onshore portions of the project. The court's ruling is available online at: https://casetext.com/case/mahoney-v-us-dept-of-the-interior-1

(Claire Copher, Rebecca Andrews)

DISTRICT COURT DISMISSES CLAIM THAT 2018 AMENDMENTS TO THE BAY-DELTA PLAN DISCRIMINATE AGAINST THE U.S. BUREAU OF RECLAMATION

U.S. v. State Water Resources Control Board, et al., ___F.Supp.4th___, Case No. 2:19-cv-000547-JLT-EPG (E.D. Cal, Aug. 30, 2023).

The United States Bureau of Reclamation (Reclamation) operates the New Melones Project on the Stanislaus River, a tributary of the San Joaquin River, as a component of the federal Central Valley Project (CVP). On August 30, 2023, a U.S. District Court dismissed Reclamation's claim that the California State Water Resources Control Board's (State Water Board) 2018 amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) illegally discriminated against Reclamation with respect to salinity objectives that apply to operations of the New Melones Project. The amended Bay-Delta Plan will increase the salinity objectives for the Sacramento-San Joaquin River Delta (Delta) while maintaining the existing lower objectives set forth in Reclamation's water rights permit for the New Melones Project. The State Water Board moved to dismiss the action on the ground that the issue was not ripe. Judge Jennifer L. Thurston agreed and granted the State Water Board's motion to dismiss.

State Authority over Federal Water Projects

The Supremacy Clause of the U.S. Constitution deems federal law the supreme law of the land. However, the United States has ceded its authority to states on certain issues, including water rights. Section 8 of the Reclamation Act of 1902 provides that federal water projects such as the CVP are required to operate subject to state water rights laws.

In *California v. United States*, 438 U.S. 645 (1978), the United States Supreme Court held that the State Water Board has the authority to require a Reclamation to have a water rights permit to appropriate water. The Court further held that the State Water Board could place conditions on the permit, so long as the conditions are consistent with federal law. Subsequent courts have applied Section 8 with "extraordinary breadth." For example, in 1992, in the case *Natural Resources Defense Council v. Patterson*, a federal district court concluded that permit conditions pursuant to California Fish and Game Code section 5937, which allows the state to reserve for instream use to protect species, were valid. According to that court, a state law was valid under Section 8 as long as the statute in question has a connection with or reference to the control, appropriation, use, or distribution of water used in irrigation.

The Bay-Delta Plan

The Bay-Delta Plan is a comprehensive water management and environmental protection plan for the Delta and the San Francisco Bay, which are critical to the state's water supply, ecosystems, and agricultural activities. Among other elements, the Bay-Delta Plan sets forth salinity objectives for the acceptable levels of salt or total dissolved solids in various parts of the Delta. These objectives are meant to ensure a minimum level of water quality for various uses, including agriculture and the protection of sensitive ecosystems.

Among other elements, the amended Bay-Delta Plan would increase flows in tributaries of the San Joaquin River (including the Stanislaus River) and ease salinity objectives measured at four specific points within the Delta. But Reclamation would still be required to discharge water from New Melones Dam sufficient to meet salinity objectives at one of the four measuring points that would be lower than what is required under the amended Bay-Delta Plan.

Reclamation Claims that the Amended Bay-Delta Plan Is Discriminatory

Reclamation filed a lawsuit in the United States District Court for the Eastern District of California to challenge the amended Bay-Delta Plan on the ground that it discriminates against the federal government in violation of the Intergovernmental Immunity Doctrine, which prohibits state laws that discriminate against the United States. According to the Reclamation, the amended Bay-Delta Plan discriminates against Reclamation because it improperly holds

Reclamation to a more stringent standard for salinity objectives.

The District Court's Decision

The State Water Board moved to dismiss Reclamation' claim on ripeness grounds. The State Water Board argued that the court cannot decide whether the amended Bay-Delta Plan treats similarly situated persons differently until the State Water Board implements the amended Bay-Delta Plan. According to the State Water Board, the amended Bay-Delta Plan is "not self-implementing," and achieving the new salinity objectives will occur through future actions by the State Water Board on water rights and water quality. According to the State Board, it would be impossible to determine at this stage whether releases required by Reclamation will be a greater burden than releases and other water supply and water quality actions that the State Water Board will require of others in order to achieve the salinity objectives.

Instead, the State Water Board asked the court to look more broadly at the overall regulatory scheme instead of taking a narrow focus on the permit salinity objectives compared to the amended Bay-Delta Plan's salinity objectives. The State Water Board set forth a number of examples of how the State Water Board will implement the amended Bay-Delta Plan with respect to other rights holders, such as standard permit terms that prohibit diversions by others of water released by Reclamation for the purpose of meeting Bay-Delta Plan water quality objectives. Moreover, in August 2022, the State Water Board initiated rulemaking on regulations implementing two components of the amended Bay-Delta Plan: flows on the Lower San Joaquin River and salinity in the southern Delta.

The State Water Board argued that the court cannot determine whether the amended Bay-Delta Plan discriminates against Reclamation until that pending rulemaking process is complete. The court agreed with the State Water Board's argument and granted the motion to dismiss on prudential mootness grounds. Reclamation has additional state law claims that are still pending, and the parties are briefing whether the court should simply stay those remaining claims until the federal claim is ripe.

Conclusion and Implications

Although it dismissed Reclamation's claims, the court found plausible Reclamation's argument that it is being held to a more stringent standard than other water rights holders and acknowledged the difficult position in which the amended Bay-Delta Plan places Reclamation. And the court acknowledged that the State Water Board's implementation efforts have no set timeline. As the court has made clear, Reclamation may yet have a viable claim against the State Water Board on the question of how salinity standards are applied under the amended Bay-Delta Plan. The District Court order granting the motion to dismiss is available online at: https://www.courthousenews.com/wp-content/uploads/2023/08/united-states-vs-state-water-resources-control-board-order.pdf
(Brian E. Hamilton, Sam Bivins)

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