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# WESTERN WATER LAW & POLICY REPORTER™

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## WESTERN WATER NEWS

# EASTERN SNAKE PLAIN AQUIFER GROUND WATER MANAGEMENT AREA GROUND WATER PLAN DEVELOPMENT EFFORT UNDERWAY IN EARNEST

On September 13, 2023, the Eastern Snake Plain Aquifer (ESPA) Ground Water Management Area Management Plan Advisory Committee (Committee) met for the first time since its creation/appointment in August. The Committee was formed at the request of Idaho Governor Little, and consists of water users from the following constituent groups, among other at-large appointees: the Idaho Ground Water Appropriators, Inc.; the Surface Water Coalition; Idaho Power Company; the Coalition of Cities; the Big Lost River Ground Water District; and the Hagerman area spring water users.

### The Problem

The Eastern Snake Plain Aquifer is the largest (estimated Lake Erie-sized), and likely most litigated aquifer in the state of Idaho. Measuring roughly 60 miles wide and 170 miles long between St. Anthony in the east and west of Bliss in the West, the ESPA has, according to some, been overdeveloped and over-drafted, for decades. Others changes, including drought cycles and the conversion from flood irrigation to more efficient sprinkler irrigation lessening seepage has also played a role in the aquifer's decline. The aquifer supplies irrigation water to somewhere between 1.5 and 2 million acres of agricultural lands, and serves as the drinking water source for dozens of towns and cities, including Twin Falls, Idaho Falls, Pocatello, Rexburg, Blackfoot, Burley and several others.

Based on spring flow discharge data (the ESPA discharges through surface springs throughout the Snake River Canyon, particularly in the "Thousand Springs" reach of the river), the Idaho Department of Water Resources estimates that ESPA water levels peaked in the early 1950s and they have been declining ever since with a handful of periodic rebounds merely slowing what is otherwise an overall declining trend from 1952 to today. For example, in 1952, the Department calculated a Thousand Springs reach discharge of approximately 6,700 cfs of water (equating to an estimated aquifer volume of slightly over 18 million acre-feet). In 2023, the Department calculated spring discharge of approximately 4,600 cfs (equating to an estimated aquifer volume of just over 4 million acre-feet).

After nearly 20 years of litigation between senior surface water users and more generally junior groundwater users resulted in a 2015 settlement centered around groundwater pumping reductions and state-sponsored managed aquifer recharge of as much as 250,000 acre-feet per year when available, spring discharges and aquifer volumes rebounded between 2016 and 2020 (spring discharges increased to above 5,000 cfs and estimated aquifer volumes increased to around 7 million acre-feet accordingly). But that rebound was short-lived and exacerbated by drought. Spring discharges and aquifer volumes have been steadily declining since—dropping approximately 300,000 acre-feet below 2015 settlement agreement era lows—triggering additional litigation, state intercession and mediation attempts, and a larger groundwater management plan development effort that has arguably been lacking since the ESPA groundwater management area was designated and its boundary was first drawn in 2016.

### The Primary Constituent Groups

The Idaho Ground Water Appropriators, Inc. is the representative entity of the groundwater users on the ESPA. Its members are comprised of several groundwater districts, including Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Carey, Jefferson-Clark, Madison, Magic Valley, and North Snake. IGWA members also include several municipalities, including American Falls, Blackfoot, Chubbuck, Heyburn, Jerome, and Rupert. IGWA members irrigate in excess of one million acres on the Eastern Snake Plain.

The Surface Water Coalition consists of senior surface water users—water diverted from the Snake River that is fed by baseflow and spring fed discharges

from the ESPA—including Twin Falls Canal Company, North Side Canal Company, Milner Irrigation District, Burley Irrigation District, A&B Irrigation District, American Falls Reservoir District #2, and Minidoka Irrigation District. The Surface Water Coalition members likewise provide irrigation water to several hundreds of thousands of acres in the Eastern Snake Plain.

As noted above, in 2015 IGWA and the SWC reached a settlement ending decades of litigation at the time. With the settlement terms reducing groundwater pumping and providing the SWC with additional storage water supplies rented from storage water owners elsewhere in the basin, the SWC was, hopefully, to be kept whole in terms of its senior surface water rights, and the ESPA was to, hopefully, stabilize if not increase in volume due to state recharge efforts. In large part the state of Idaho, IGWA, and the SWC were hopeful that their collective efforts would be enough to solve the problem without the need for a broader groundwater management plan.

### The Goal?—Conclusion and Implications

After ESPA levels began declining again after 2020, and litigation alleging breach of the 2015 settlement agreement ignited, the state, IGWA, and the SWC agreed that a broader effort was needed regardless of whether the 2015 settlement agreement was breached. Those efforts are underway with the next Committee meeting scheduled to take place in October.

The fundamental question for the group is what is the goal? What spring flow discharge and aquifer volume is considered stable and sustainable. Spring flow discharge and aquifer volumes during the 1950s is not only infeasible, but unrealistic given canal lining and sprinkler conversions over time. Water efficiency and conservation practices have a nasty habit of decreasing incidental seepage benefitting the ESPA. Population growth and groundwater development on the ESPA are not going to reverse either.

Once the goal is determined, crafting a groundwater management plan will likely prove even more difficult than reaching the 2015 settlement agreement due to the additional parties at the table. Chances are that more tributary basins than historically administered as part of the ESPA will be included in a new administrative boundary—the area hydraulic interconnection for larger groundwater management purposes needs be more comprehensive to have a chance of succeeding.
(Andrew J. Waldera)

## DROUGHT: WATER AVAILABILITY AND ALLOCATION CHALLENGES IN THE OGALLALA AQUIFER REGION OF THE GREAT PLAINS

Drought and water allocation issues in the United States have become synonymous with the Desert Southwest. Record-breaking dry spells, groundwater depletion, and allocation challenges, however, are in no way foreign to other regions of the country. The Great Plains region, which includes portions of eastern Colorado and eastern New Mexico, has increasingly become a focal point for water challenges in America. The Ogallala Aquifer, in particular, is under increasing stress from extended periods of drought and as populations grow and spread out across the Basin. This aquifer helps grow food in one of the world's most important food-producing regions, a region which spans across several States. Drought and allocation challenges make this problem only more complex. Ultimately, despite some regional improvements in infrastructure, what lies ahead remains challenging for water access and allocation in eastern New Mexico, as the Great Plains and the Ogallala Aquifer move on toward an uncertain future.

### The Aquifer

The Ogallala Aquifer is the largest freshwater aquifer in all North America. The aquifer lies beneath several states—including South Dakota, Wyoming, Nebraska, Kansas, Colorado, Oklahoma, New Mexico, and Texas. is no surprise that an aquifer of this size is responsible for supporting one of the most agriculturally productive regions of the world. The Great Plains region of the United States, which is currently

facing a historic drought, spans across the Ogallala Aquifer. As in other parts of the country, ongoing drought in addition to a quickly depleting aquifer call for appropriate solutions before it's too late.

Eastern New Mexico is in the Southern High Plains Section of the Great Plains. The Ogallala Aquifer lies directly beneath this section of New Mexico. Portales, New Mexico, home to approximately 12,000 residents and Eastern New Mexico University, temporarily restricted certain water usage to make up for hot, dry weather this summer and its impact on the City's water supply over the summer. Portales and its neighboring communities have relied on the Ogallala Aquifer for generations. However, decades of heavy usage is forcing Portales to begin changing course. This section of Eastern New Mexico provides a third of the agricultural products of the state, and most of the crops grown here feed livestock in both New Mexico and Texas.

Local officials are encouraging residents to cut back. Officials are working on a pipeline project that's been over a half-century in the making and will likely finish in the next few years, thanks to funding from the federal Infrastructure Investment and Jobs Act, which was enacted in 2021. The plan is to have a new pipeline system that will take water from Ute Reservoir, about 80 miles from Portales, and make the area less reliant on wells that strain the Ogallala Aquifer. Using less water directly from the aquifer will help conserve aquifer water levels. However, concerns remain about the completion of the project, as well as the demand that the change of water policy will cause to Ute Reservoir due to the ongoing drought.

### Impacts to Agriculture

Similar concerns plague many sections of the Ogallala Aquifer. The Aquifer's $35 billion yearly crop production has come at a cost—farmers are pulling water out of the Ogallala faster than rain and snow can recharge it. Between 1900 and 2008, 89 trillion gallons were drained from the Aquifer—equivalent to two-thirds of Lake Erie. In Kansas, for example, dry wells now account for about 30 percent of the Aquifer. It is projected that within 50 years the entire aquifer will have been 70 percent depleted. While both continuing drought and high farmer withdrawal are factors—there may be additional factors regarding the rapid depletion of the Aquifer. For example, farmers may be draining the Ogallala Aquifer because state and federal policies are encouraging them to do so. Federal subsidies are putting farmers on a "treadmill," working harder to produce more crops while draining the resource that supports their livelihood. Government payments are creating an unsustainable cycle of overproduction that intensifies water use—as subsidies encourage farmers to expand and buy expensive equipment to irrigate larger areas. Paradoxically, for quite some time, federal, state, and local conservation efforts have mainly targeted individual farmers, providing ways for individuals to voluntarily reduce water use or adopt water-efficient technologies. And, despite these efforts, the status of the Aquifer's decline has not improved.

Farmers in other states that depend on the Aquifer are just as concerned about the future. Following years of dry land and lack of rainfall, farmers in the High Plains are depending more and more on the Ogallala Aquifer. The consequences of such a high dependance are becoming clearer. A report from the High Plains Underground Water Conservation District shows water levels in the Ogallala Aquifer have dropped consistently in the region over the last five years. More than 1,300 wells were measured earlier this year, including ones from the smaller Edwards-Trinity Aquifer, all of which show varying degrees of decline. The biggest decrease in water levels was recorded in Parmer County, which sits on the New Mexico border in between Lubbock and Amarillo, where there was a noted decline of 1.30 feet in the Aquifer water levels. The ongoing situation has caused concern for the future of agriculture in Texas and the rest of the Great Plains. Climate change has pushed average temperatures higher in Texas, making heat waves and droughts worse and more persistent. With the limited amount of water that must be allocated throughout the Great Plains region between Texas, Colorado, New Mexico, Kansas, Nebraska, Oklahoma, Wyoming and South Dakota, the Ogallala running dry could have incredibly devastating consequences nationwide. The Aquifer is the direct source of water for 30 percent of the nation's irrigation systems, boosting up the farms and ranches that supply a quarter of the nation's agricultural production. Additionally, approximately 82 percent of Americans who live within the aquifer's boundaries obtain their drinking water from the Aquifer.

### Conclusion and Implications

As the challenges mount regarding the Ogallala Aquifer, the eight states under which the Aquifer lies must begin to work together to find compromises and solutions to preserving the largest freshwater aquifer on this continent. Places like Eastern New Mexico have begun planning on diversifying their sources of water—even while this diversification of water sources comes with concerns. In other parts of the Great Plains, farmers note that lack of rainwater leads them nowhere else but right back to groundwater reliance for their crops and overall livelihoods. Complicating federal and states policies that create a large incentive to rely on the Aquifer as a source of water will not alleviate the problem, but instead make matters worse. In order to significantly change the situation in the Ogallala Aquifer region—the several states it provides water for, and the federal government, will have to dissect current laws and policies in order to construct new and more appropriate policies to protect the agricultural industry in this region and the drinking water for millions of Americans. (Christina J. Bruff)

## LEGISLATIVE DEVELOPMENTS

# 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)

# 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 submitted 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)

## EPA AGREES TO INVESTIGATE FIRST-EVER TITLE VI CLAIM STEMMING FROM THE STATE WATER BOARD'S ACTIONS ON THE SAN FRANCISCO 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 letter, 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)

## PENALTIES & SANCTIONS

# RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

### Civil Enforcement Actions and Settlements—Water Quality

**Sept. 29, 2023—** The U.S. Department of Justice (DOJ), the U.S. Environmental Protection Agency (EPA), the Tennessee Attorney General's Office, and the Tennessee Department of Environment and Conservation (TDEC) announced today a federal Clean Water Act settlement with the Hamilton County Water and Wastewater Treatment Authority (WWTA). A consent decree was lodged in the U.S. District Court for the Eastern District of Tennessee in Chattanooga and resolves the claims identified in a joint federal and state complaint filed with the consent decree. The settlement will resolve WWTA's liability for Clean Water Act violations, including unauthorized overflow of untreated raw sewage at locations in the WWTA wastewater collection and transmission system and bypasses of treatment at WWTA's Signal Mountain wastewater treatment plant. Under the consent decree, WWTA will undertake a thorough assessment of, and implement extensive improvements to, its sanitary sewer system and the wastewater treatment plant. In addition, WWTA will pay a civil penalty of $598,490 to be equally divided between the United States and the State of Tennessee.

WWTA owns and operates a sanitary sewer system serving over 30,000 sewer customers. The system includes one sewage treatment plant, the Signal Mountain wastewater treatment plant, and a wastewater collection system that is composed of over 5,000 miles of sewer collection lines, 60 pump stations, and associated equipment.

Inadequacies in WWTA's separate sewer systems' infrastructure and management programs have resulted in unlawful discharges of millions of gallons of untreated and partially treated sewage into streams in the Hamilton County area. The sewage discharges have affected the Tennessee River and many streams that drain to the Tennessee River.

The major features of the consent decree relating to the sanitary sewer system will require WWTA to evaluate the capacity, design, and condition of the components of its sanitary sewer system and develop and implement remedial measures to eliminate sanitary sewer overflows (SSOs). The total estimated cost of remedial and compliance measures required under the Consent Decree is $300 million.

**Sept. 29, 2023**—The Justice Department, working with the U.S. Environmental Protection Agency (EPA) and the State of West Virginia, reached a proposed consent decree yesterday with Waco Oil and Gas Co. Inc. to resolve alleged violations of the federal Clean Water Act and West Virginia state law for unauthorized discharges of dredged or fill material into waters of the United States in Braxton County, West Virginia.

Under a proposed consent decree filed in U.S. District Court for the Northern District of West Virginia, Waco Oil and Gas agreed to pay a $825,000 penalty, restore the vast majority of the impacted waters and provide compensatory mitigation for waters that cannot be restored. Additionally, the company will place a deed restriction on its property to protect the restored waters in perpetuity.

A filed complaint alleged that beginning in approximately 2017, Waco Oil and Gas discharged dredged or fill material into tributaries of Bear Run and adjacent wetlands as well as tributaries of Cunningham Fork without the required federal or state permits.

The consent decree is available for public viewing at www.justice.gov/enrd/consent-decrees. The United States will publish a notice of the consent decree's lodging with the U.S. District Court for the Northern

District of West Virginia in the Federal Register and will accept public comment for 30 days after the notice is published. The Federal Register notice will also include instructions for submitting public comment.

**Sept. 28, 2023—** The U.S. Department of Justice, on behalf of the U.S. Environmental Protection Agency (EPA)finalized a consent decree with Transocean Offshore Deepwater Drilling, Inc (Transocean) for alleged violations of the National Pollutant Discharge Elimination System (NPDES) Gulf of Mexico - Outer Continental Shelf General Permit (general permit) and Sections 301 and 309 of the federal Clean Water Act (CWA). The complaint alleges that Transocean did not obtain coverage under the relevant general permit before discharging, discharged pollutants in excess of effluent limits, and submitted inaccurate discharge monitoring reports, among other violations. Transocean will pay a civil penalty of $507,000.

As part of the settlement, Transocean must comply with the CWA and its implementing regulations, as well as the general permit. To achieve compliance, Transocean must continue development and implementation procedures to track its vessels and mobile facilities engaged in oil and gas exploration and production activities in the Gulf, submit timely and accurate reports, and perform all required inspections and monitoring. In addition, Transocean is required to establish procedures for cooling water intakes that ensure fish and other aquatic species do not become trapped in filter screens.

Pursuant to the settlement, Transocean must hire a third-party auditor to review compliance plans and must demonstrate to EPA that it has completed all Third-Party Audit Corrective Actions. Transocean also must submit annual reports to EPA to demonstrate compliance with requirements set forth in the consent decree. The settlement was filed in the U.S. District Court for the Southern District of Texas on September 6, 2023 and is subject to a 30-day public comment period before final court approval of the consent decree.

**Sept. 28, 2023—** the U.S. Environmental Protection Agency (EPA) announced two settlements with the Navajo Tribal Utility Authority (NTUA) to address non-compliance with its Clean Water Act wastewater programs. NTUA operates the Shiprock and Window Rock wastewater treatment plants, which discharge treated wastewater within the boundaries of the Navajo Nation.

The two treatment plants collect and treat sewage from five communities in the Navajo Nation, serving over 13,000 people. The Shiprock plant serves the community of Shiprock, and discharges treated water into the San Juan River, while the Window Rock plant serves the communities of Fort Defiance, St. Michaels, Tse Bonito, and Window Rock and discharges treated wastewater into Black Creek.

Following an August 2021 inspection of the Shiprock plant, EPA determined that NTUA's wastewater treatment did not comply with federal Clean Water Act regulations. The plant discharged wastewater that exceeded the permitted limit for *E. coli* concentrations. These exceedances were caused by inadequate operation and maintenance of the ultraviolet disinfection system.

After completing a November 2021 inspection, EPA similarly determined inadequate operation and maintenance of the ultraviolet disinfection system at the Window Rock plant caused multiple exceedances of the limit for *E. coli* concentrations between April 30, 2020, and June 30, 2022.

Wastewater with high concentrations of *E. coli* discharged into waters such as the San Juan River and Black Creek poses risks to public health.

**Sept. 18, 2023**— Chief engineer Denys Korotkiy of the vessel *Donald* was sentenced on Sept. 15 to serve twelve months and a day in prison after being convicted of conspiracy to obstruct justice, obstruction of justice and failure to maintain an accurate oil record book. U.S. District Court Judge Todd W. Robinson for the Southern District of California sentenced Korotkiy.

Trial evidence showed that oily bilge water—typically containing oil contamination from cleaning and operating a vessel's machinery—was illegally dumped from the *Donald*, without being legally recorded, directly into the ocean through the vessel's sewage tank and not properly processed through required pollution prevention equipment. Korotkiy made false and fictitious entries in the oil record book claiming oily bilge had been transferred from the engine room bilge wells to the bilge holding tank. He also conspired with others to obstruct the U.S. Coast Guard from inspecting and investigating the mishandling of oily bilge water

on the *Donald*.

Vessel operating company Interunity Management (Deutschland) GMBH previously pleaded guilty for maintaining false and incomplete records relating to the discharge of oily bilge water and was ordered to pay a total of $1.25 million, including more than $312,000 to benefit marine and coastal natural resources in or near the Tijuana River National Estuarine Research Reserve.

Senior Trial Attorney Stephen Da Ponte of the Environment and Natural Resources Division's Environmental Crimes Section and Assistant U.S. Attorney Melanie K. Pierson for the Southern District of California are prosecuting the case.

### Civil Enforcement Actions and Settlements—Hazardous Chemicals

**Sept. 29, 2023—** the U.S. Environmental Protection Agency (EPA) announced a settlement with Integrated DNA Technologies Inc. for claims of violations of the Resource Conservation and Recovery Act tied to emissions at the company's San Diego, California facility. The company has agreed to pay a $15,890 civil penalty and has certified it is now in compliance with the requirements of federal law. Additionally, as part of the settlement, the company agreed to perform a supplemental environmental project valued at $61,388 to purchase equipment for the City of San Diego Fire-Rescue Department's use in safely responding to emergencies involving airborne contaminants.

"Failure to prevent emissions tied to hazardous waste and leaky equipment can pose a serious health risk to nearby communities. It's imperative that companies meet their obligations to properly manage hazardous waste," said EPA Pacific Southwest Regional Administrator Martha Guzman.

Integrated DNA Technologies Inc. develops and manufactures custom synthetic DNA that supports the life sciences industry and is a large quantity generator of hazardous waste. During a 2022 inspection, EPA determined that the company violated federal law by failing to comply with hazardous waste regulations related to air emissions standards for equipment leaks and tanks.

Hazardous waste that is improperly managed poses a serious threat to human health and the environment. The Resource Conservation and Recovery Act, passed in 1976, was established to set up a framework for the proper management of hazardous waste. The act requires effective monitoring and control of air emissions from hazardous waste storage tanks, pipes, valves, and other equipment.
(Robert Schuster)

## LAWSUITS FILED OR PENDING

# ENVIRONMENTAL AND HEALTH GROUPS FILE SUIT AGAINST UTAH STATE AGENCIES SEEKING TO ENFORCE PUBLIC TRUST DOCTRINE OBLIGATIONS AS TO THE GREAT SALT LAKE

A number of environmental and public health non-profits (Plaintiffs) have filed a complaint seeking a declaratory judgment requiring various agencies of the State of Utah to invoke and enforce their public trust obligations with regard to the Great Salt Lake. Specifically, the Plaintiffs seek the establishment of a minimum lake elevation of 4,198 feet above sea-level and demand that the state agencies take any and all necessary steps to ensure that this minimum lake elevation is maintained. [*Utah Physicians For A Healthy Environment, et al, v. Utah Department Of Natural Resources, et al.*, Utah 3rd District Court, *filed* Sept 6, 2023).]

### Background

The Great Salt Lake (GSL or Lake) is the largest saline lake in North America. It is a home to approximately 10 million migratory birds, which stop over at the GSL during their annual migrations. The GSL supports a variety of critical industries, including brine shrimp fishing, tourism, recreation, mineral extraction, and skiing, all of which depend on the Lake's waters and the conditions they create. These industries collectively contribute around 2 billion dollars each year to Utah's economy and provide thousands of jobs.

Recently, the GSL has come into the spotlight and media focus because drought conditions, climate change, and appropriative policy have all combined to cause a drastic decline in lake levels. Declining lake levels have already exposed, and will continue to expose, lakebed sediments containing arsenic, mercury, nickel, lead, and other pollutants toxic to humans. In many areas these sediments have become airborne and are potentially inhaled by millions of Utahns along the Wasatch Front. Additionally, the health of the lake is critical to provide habitat for shorebirds, waterfowl, brine flies and brine shrimp. Declining lake levels have the potential to the finely balanced ecosystem upon which these species depend.

It is undisputed that the elevation of the lake has been declining in recent years. Some media outlets and scientific reporting predict that unless substantial steps are taken to increase inflows, the lake could face systemic collapse in as little as five years. The recent snowfall in 2022-2023 has somewhat delayed this outcome, but unless changes are made, the lake is likely to continue to decline.

### The Complaint

Plaintiffs' complaint seeks a declaration from the court that state agencies comply with their public trust obligations and take steps to increase inflow to the lake. The complaint leaves the means and methods for accomplishing this largely to the defendant agencies but does suggest a review of all existing water diversions, which, if necessary, should be modified and monitored to ensure compliance with the public trust obligations.

### The Public Trust Doctrine

The public trust doctrine finds its roots in the common law which ensured that the public had a right to use navigable waters of the United States for navigation, commerce, and fishing. *See, e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997); *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). As a navigable body of water at the time of Utah's acceptance into the union, the waters of the GSL fall under the public trust doctrine and are held in trust by the State for the benefit of the public. *See: Utah v. United States*, 403 U.S. 9, 10–12 (1971); *Hardy Salt Co.*, 486 P.2d at 392–93; *see also Morton Int'l, Inc. v. S. Pac. Transp. Co.*, 495 P.2d 31, 32–34 (Utah 1972). The bed of the Great Salt Lake also falls within the public trust doctrine's ambit, as do the "lands surrounding the Great Salt Lake." *Hardy Salt Co.*, 486 P.2d at 392–93; *see also Colman v. Utah State Land Bd.*, 795 P.2d 622, 635–36 (Utah 1990).

The public trust doctrine requires that the myriad natural resources of the state are to be held in in trust

for the public. The doctrine is "founded upon the necessity" of "preserving" these resources for public use and enjoyment. *Illinois Cent.* 146 U.S. at 436. This doctrine has been applied to coastal waters and also inland rivers and lakes. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012); *Illinois Cent.*, 146 U.S. at 435–37. Utah courts have recognized this doctrine and have held that "the state holds navigable waters and the lands underlying navigable waters in trust for the public." *Utah Stream Access Coal. v. VR Acquisitions, LLC*, 439 P.3d 593, 601, 610 (Utah 2019); *Colman*, 795 P.2d at 635.

The public trust doctrine includes typical recreation activities, but likewise protects the "ecological integrity" of trust resources. *Nat'l Parks & Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1993).

Accordingly, under this doctrine the state has an obligation to maintain the "ecological integrity" of trust resources in order to protect the public's ability to use these resources for navigation, commerce, fishing, leisure, and other trust purposes. *Id.* The public trust doctrine also covers public lands, including the bed and shores of the GSL up to the highwater mark. The state's obligation to protect these lands dates from Utah's entrance into the union, when the state took title to all lands underlying navigable waters. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195–96 (1987).

The Utah Constitution further reinforces this public trust obligation, stating that all sovereign lands "are declared to be the public lands of the state; and shall be held in trust for the people." Utah Const. art. XX, § 1. These public lands include the bed of the Great Salt Lake. *Hardy Salt Co.*, 486 P.2d at 392–93. These obligations have been delegated by the legislature to the defendant agencies. Utah Code §§ 65A-1-1(6), 65A-1-4(1)(b), which acts under the supervision of DNR, *id.* § 65A-1-4(1)(a). These state agencies have confirmed their obligations and role as trustee of the GSL by adopting the 2013 Comprehensive Management Plan for the Lake, which was mandated by the Utah Legislature. That Plan requires the management of the GSL and its resources under multiple-use, sustained yield principles by implementing legislative policies and accommodating public and private uses to the extent that those policies and uses do not substantially impair Public Trust resources and or the lake's sustainability."

Utah courts have recognized that "common-law trust principles" are applicable when interpreting the public trust doctrine. *VR Acquisitions, LLC*, 439 P.3d at 610. Such principles include the fiduciary duties that "[a]ll trustees owe" to the beneficiaries of a trust. *Nat'l Parks &*

*Conservation Ass'n*, 869 P.2d at 918. Consequently, the state as trustee is required by law to manage public trust resources consistent with the terms of the trust, the interests of its beneficiaries, and the principles of loyalty, impartiality, and prudent administration. Restatement (Third) of Trusts §§ 76–79 (Am. L. Inst. 2007) (updated 2023); *see also* Utah Code §§ 75-7-801 to -804.

## Conclusion and Implications

As of the time of this writing, this complaint has not been served upon the defendant agencies. Consequently, no responsive arguments or counterfactuals have yet been offered by the defendants. What is clear is that should the court determine that the defendant agencies have violated their public trust obligations, it will require substantial action on behalf of the agencies to achieve the minimum lake level requested in the complaint. Such actions may involve the curtailment of many vested junior water rights and interests. Given the way that Utah was developed, many of the largest municipalities and water suppliers hold the most junior water rights on the system. Consequently, it will be necessary to balance the public welfare with the strict application of the prior appropriation doctrine. For more information, *see*:: https://www.sltrib.com/news/environment/2023/09/06/groups-sue-utah-try-save-great/ (Jonathan Clyde)

## JUDICIAL DEVELOPMENTS

# D.C. CIRCUIT FINDS U.S. SURFACE TRANSPORTATION BOARD FAILED TO TAKE A 'HARD LOOK' AT UTAH OIL RAIL PROJECT'S ENVIRONMENTAL IMPACTS UNDER NEPA

*Eagle County, Colorado v. U.S. Surface Transportation Board et al.*, ___F.4th___, Case No. 22-1019 (D.C. Cir. 2023);
*Center for Biological Diversity et al. v. U.S. Surface Transportation Board et al.*, ___F.4th___, Case No. 22-1020 (D.C. Cir. 2023).

On August 18, 2023, the U.S. Court of Appeals for the D.C. Circuit vacated an Environmental Impact Statement (EIS) for the Uinta Basin Railway project, effectively stopping construction through the Colorado River corridor. This decision, which also vacated a Final Exemption Order and Biological Opinion (BiOp), requires the railway's proponents to revise the EIS.

### Background and Procedural History

The Seven County Infrastructure Coalition is an independent political subdivision of the State of Utah, which petitioned the federal Surface Transportation Board (the "Board") to approve construction of the Uinta Basin Railway. The Uinta Basin Railway is proposed as an approximately 85-mile-long railway intended to connect the Uinta Basin in Utah with the national railway network. The Uinta Basin is an approximately 12,000 square-mile area spanning northeastern Utah and northwestern Colorado, which "contains extensive deposits of valuable minerals, including phosphate, crude oil, natural gas, oil shale, oil sands, gilsonite, natural asphalt, aggregate materials, and low-sulfur coal." *Eagle Cnty., Colorado v. Surface Transp. Bd.*, No. 22-1019, ___ F.4th ___, ___, 2023 WL 5313815 at *2 (D.C. Cir. Aug. 18, 2023) (internal quotations omitted). The Railway is intended to transport commodities out of the basin, which will largely include waxy crude oil. An increase in exportation of materials is expected to cause an increase in railway traffic through both the Basin and connecting railway networks. The Coalition anticipates that the project will add 3.68 to 10.52 two-miles-long trains on the railway each day. Many groups, including environmental groups and affected counties, oppose the project because of its environmental impacts on climate, waterways, water resources, and critical habitat for endangered species.

The Board is a federal agency that primarily regulates the railroad industry. *See* 49 U.S.C. §§ 1302, 10501. This includes the construction and operation of railroad lines. The Coalition first petitioned for an exemption from the Board's more onerous application and approval process. Over opposition to the petition, the Board issued a conditional exemption, citing the project's "transportation merits," while still awaiting the completion of the environmental review. As part of reviewing the environmental impacts, the Board published both a draft and final EIS under the National Environmental Policy Act (NEPA). *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.3–4. The Board also consulted with the Fish and Wildlife Service, which then developed a BiOp detailing the potential impacts of the project on endangered species and critical habitats.

Under NEPA, federal agencies are required:

> . . .to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that were considered in the agency's decision making. *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1150 (D.C. Cir. 2001).

This requires federal agencies to provide a "detailed statement" on the "environmental impact of the proposed action" for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Because the Board is a federal agency, it is subject to NEPA's requirements. Further, the Board is also subject to mandates by the

Endangered Species Act (ESA) "to insure" that their action:

> . . .is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat. 16 U.S.C. § 1536(a)(2).

**The D.C. Circuit's Decision**

Eagle County, Colorado and the Center for Biological Diversity appealed the Board's Final Exemption Order directly to the U.S. Court of Appeals for the D.C. Circuit. Several parties joined as amici curiae in support of the petitioners, including the City of Glenwood Springs, CO; Town of Vail, CO; Boulder County, CO; and Pitkin County, CO. The petitioners raised numerous challenges to the Board's proceedings, several of which alleged that the environmental impact analysis was flawed. The bulk of challenges related to water impacts involve the Railway's proposed travel through a portion of the Union Pacific Line, which traverses through Glenwood Canyon in western Colorado, parallel to the Colorado River. The canyon is located primarily in Eagle County, and its location was relevant as part of a standing analysis the court conducted, which looked at the injury to the petitioners, causation, and redressability.

Petitioners claimed that the Board failed to properly assess the impacts of increased train traffic of "loaded, miles-long oil trains traveling through difficult mountainous terrain." *Eagle Cnty.*, 2023 WL 5313815 at *17. The petitioners argued that the increase in trains through this difficult terrain is likely to cause a higher frequency of train accidents. And because the Union Pacific Line runs parallel to the Colorado River as it travels through Glenwood Canyon, petitioners and amici were especially concerned about the impacts that crude oil spillage would have on water resources, water quality, recreation, land use, and habitats for endangered species.

The court used the familiar administrative law standard of review, which examines whether an agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Specifically under NEPA, the agency must take a "hard look" at the environmental impacts of its actions. at 24 (quoting *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1082 (D.C. Cir. 2016).

The court noted that:

> . . .[t]he Board concededly fails altogether to mention the Colorado River in the Final EIS's discussion of impacts on water resources. *Eagle Cnty.*, 2023 WL 5313815 at *19.

It further found:

> . . .no evidence . . . that the Board even considered the potential impacts on water resources downline of running up to 9.5 loaded oil trains a day on the Union Pacific Line—about 50% of which abuts the Colorado River. *Id.*

Along that same vein, the court also determined that the Board's failure to include waterways downline or near the Union Pacific Line in the action area was:

> . . .unreasoned and fail[ed] to demonstrate a 'rational connection between the facts found and the choice made.' *Id.* at *21 (quoting *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

As for species in the Colorado River protected by the Endangered Species Act—including the pikeminnow, razorback sucker, humpback chub, and bonytail chub—the D.C. Circuit found it "entirely unclear" why the Board determined that increased train traffic would not have any effect on the severity of impacts on those species. *Id.*

However, the court did not entirely find against the Board, "disagree[ing] with many of Petitioners' objections." *Id.* at *10. Some of the failed claims include the attacks on the Board's characterization of climate impacts as cumulative instead of indirect, *see id.* at *27; the contention that the Board failed to consider cumulative impacts with reactivating certain out-of-service railways, *see id.* at *15; and other arguments on downline impacts because the County failed to raise those arguments before the Board, *see id.* at *18.

### A 'Limited Weighing' of Environmental Impacts

Ultimately, the court determined that the Board conducted "limited weighing" of the environmental impacts under the statutes. *Id.* at *27. Instead of weighing environmental harms against economic benefits, the Board impermissibly "just acknowledge[d] that both sides exist." *Id.* at *28. And while the Board tried to claim at oral arguments that it is merely a transportation agency and therefore cannot allow environmental impacts to influence its decision of whether to go forward with a project, the court flatly rejected that argument. *See id.* It explained how that argument ultimately ignores Congress's mandates with requiring reasoned agency decision in the first place. *See id.*

The court found the exemption arbitrary based on "[t]he poor environmental review" and the "fail[ure] to conduct a reasoned application" of the Board's mandated policies. *Id.* When a rule is unlawful, vacatur is the typical remedy. *Id.* (citing *Am. Pub. Gas Ass'n v. Dep't of Energy*, F.4th 1018, 1030 (D.C. Cir. 2022)). Accordingly, the court vacated the EIS. *See id.*

### Conclusion and Implications

The Board must complete a new EIS that conforms with the requirements in this opinion if it wishes to continue to move forward with the project. The Center for Biological Diversity quoted a senior campaigner in its press release on the issue, calling it an "enormous victory." This case is a reminder that an EIS must properly consider risks, that analyses cannot be confined to arbitrarily restricted geographical areas, and that economic and environmental benefits must be appropriately weighed and not merely mentioned. The Board is required to re-visit its analysis if it wishes to proceed, so the project will not continue forward until that updated EIS is submitted and approved. Individuals relying on the Colorado River for water resources and recreation are safe from the threat of any oil spills stemming from the Uinta Basin Railway—at least, for now.

(Lauren Hoover, John Sittler)

## 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)

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

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