Volume 28, Number 1
November 2023

WESTERN WATER LAW & POLICY REPORTER™

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WESTERN WATER NEWS

COLORADO ENTITIES UTILIZE VARIOUS MONEY-FOR-WATER PROGRAMS IN ATTEMPTS TO MITIGATE DROUGHT, PROTECT EXISTING WATER RIGHTS

Several Colorado water and governmental agencies are in the process of implementing a wide variety of money-for-water strategies in hopes of protecting the state and its water users from increasing drought and water scarcity concerns. Although these programs appear to have wide-ranging support at the bureaucratic level, it is unclear if actual water users will match the same level of buy-in. These programs represent the latest water conservation measures throughout the state, and the entire Colorado River Basin, as water users wrestle with looming water shortage issues.

Groundwater Retirement

Last year the Colorado General Assembly passed Senate Bill 22-28 which appropriated $60 million to pay groundwater users to "retire" (permanently cease diversion) of irrigation water wells in the Upper Rio Grande and Republican River Basins. The state earmarked funding for this project under its "Groundwater Compact Compliance Fund." The money is intended to ensure the state meets various obligations with other states (primarily New Mexico and Nebraska). Under the bill, irrigators must have used the wells at least five years between 2009 and 2022 and pumped a minimum of 50 acre-feet per year. The bill contemplates a base payment of $250,000 per irrigated quarter section, in addition to $2,000 per acre-foot, with a total cap of $650,000 per quarter section. The focus on quarter sections reflects the General Assembly's intent to retire large-capacity wells from large, multi-well farms, not smaller family operations.

Specifically in the Upper Rio Grande Basin, the Rio Grande Water Conservation District (District) recently increased the per acre-foot compensation to $3,000 in an attempt to entice more users to join the program. The District has a stated goal to retire 40-50 quarter section irrigated circles, which would save 11,000-15,000 acre-feet of water per year. Along with the compensation increase, the District also implemented requirements for users to revegetate the land and help native plants take root. Irrigators may use up to 1.5 acre-feet per acre for the first three seasons of "retirement" to assist with this revegetation. The additional water will likely be critical to bolster native vegetation in the high desert climate of the San Luis Valley.

The District closed on the first of two retirement contracts in early October, resulting in payments of $1.2 million to two irrigators. The second round of applications is currently open and runs through December 29, 2023. The Trinchera Groundwater Management Subdistrict, which is part of the Trinchera Water Conservancy District, recently raised concerns that its users should also be eligible for SB 22-28 funding. The Rio Grande Conservation District noted that two pending applications from Trinchera users will be considered in the current funding cycle. However, it is unclear at this point if the retirement of wells in the Trinchera area will actually contribute to the state's goals to reduce groundwater use in the San Luis Valley. The Rio Grande Conservation District currently has almost $29 million remaining from its original $30 million appropriation under SB 22-28.

The State of Nevada is currently implementing a similar pilot program to retire wells in an effort to support existing surface water rights. Long-term groundwater pumping in the state has begun to affect surface stream flows, particularly in the last 20 years of drought. Six Nevada water entities recently applied to the state requesting $65 million in funds to retire wells under a program similar to Colorado's. However, the state currently only has $25 million for the "water buyback" program from federal American Rescue Plan funds. Therefore, this is essentially a pilot program to gauge interest. If Nevada users support the project, the state may make more money available to the program in the future. Like Colorado, the state envisions the program as attractive to farmers nearing retirement, those transitioning to more efficient irrigation practices, and all water users facing the threat of widespread curtailment in the face of continued drought.

Water Users Study

However, a recent study revealed an extreme reluctance by farmers and ranchers to join these voluntary programs. The Western Landowners Alliance partnered with the University of Wyoming to survey more than 1,100 Colorado River Basin water users, resulting in the "Agricultural Water User's Preference for Addressing Water Shortages in the Colorado River Basin." The study received almost half of its responses from Colorado, although every basin state except Nevada was represented in the study. The study revealed a near-unanimous concern for looming water-shortage-related changes in water policy and new constraints on water use. Yet more than 85 percent of respondents do not trust water agencies and are reluctant to include their water rights in programs run by far-off bureaucracies. There are likely political undertones in many of these responses, but the study demonstrated a clear preference for local programs and a clear distrust of multi-state options.

More than half of the respondents said they would undertake programs to improve efficiency, and thereby reduce water use if such programs were fully funded. But less than 10 percent of Upper Basin respondents and less than 20 percent of Lower Basin respondents would participate in any demand management program, such as the federal System Conservation Pilot Program, if it would require them to fallow the same field for multiple years.

Purchase of Existing Rights

In western Colorado, the Colorado River District is attempting to purchase extremely senior hydropower generation water rights from Xcel Energy. This unique strategy in which a quasi-governmental entity outright purchases water rights from a private company in furtherance of conservation goals may offer a blueprint for future conservation-focused transactions in the future.

Xcel Energy owns a senior 1902 water right for 1,408 c.f.s. for its Shoshone hydropower plant in Glenwood Canyon, just east of Glenwood Springs, Colorado. In addition to providing power for 15,000 users, the location of this right provides numerous recreation, fishery, and water quality benefits to the Colorado River. The hydropower right is nonconsumptive, meaning that it provides benefits to both Xcel customers and downstream users by virtue of that water being available below Shoshone at all times, whether through free river conditions or when that water right is calling. The Shoshone call limits non-augmented junior water rights development above the plant while improving water quality (through dilution) and supporting flows in the Colorado River all the way to the Utah border.

The River District, in collaboration with 17 local governments and municipalities, has been working for more than 20 years to preserve the flows at Shoshone for the benefit of the Colorado River. This work resulted in a current agreement whereby a "phantom" call is in place for the Shoshone rights even when the plant is offline for maintenance or repair. The River District and its partners are concerned that Xcel Energy may one day retire the plant or sell the water rights to Front Range entities, thereby depriving the western slope of this critical flow maintenance water right.

Historically, Xcel has not been interested in selling its Shoshone water rights, although recent discussions have resulted in a plan by which the River District would purchase the rights and then permanently lease them back to Xcel for as long as it desired to operate the Shoshone hydropower plant. The current estimated purchase price is $98.5 million, which the River District would acquire through its own funds, local governments, the state of Colorado, and the U.S. Bureau of Reclamation. Specifically, the River District earmarked $20 million from a recent property tax increase and believes it can obtain an additional $10 million from local governments and municipalities. The River District plans to apply for $49 million in Bureau of Reclamation funding that is available as drought mitigation funds from the Inflation Reduction Act, and a final $20 million from the Colorado Water Conservation Board's (CWCB) annual water projects bill, which is funded through energy severance tax revenues.

Project proponents are hopeful the sale will close by the end of 2026. Before that time, Xcel Energy must obtain certain approvals from the Colorado Public Utilities Commission. The River District would further like the CWCB to obtain an additional beneficial use for the Shoshone rights for instream flows. Instream flow rights are unique in Colorado in that they can only be claimed by the state, and they allow the state to place a call to protect the natural flow and environment of a specific stretch of river.

The instream flow use for the Shoshone rights would ensure the river operates as historically even in Xcel elected to no longer operate the hydropower plant.

Conclusion and Implications

Flows in the Colorado River Basin have steadily declined over the past several decades as the region experiences less precipitation, higher temperatures, and greater water demands through increased population. Water managers are constantly looking for solutions to the coming crisis, with a recent push to simply pay users to forego the exercise of their rights. Although expensive, many states and water entities believe the cost of these programs will be far lower than the impacts of widespread curtailment and water shortage. At least for now, there appears to be a divide between rural water users and bureaucratic water entities, but there is a clear consensus on the need to do something. Creative programs, such as those detailed above, may offer future water solutions for an ever-growing, and ever-drying, West.
(John Sittler)

WHAT HAPPENS TO FEDERAL FLOOD CONTROL OPERATIONS IN IDAHO IN THE ABSENCE OF A RENEWED COLUMBIA RIVER TREATY?

The answer is: we are not sure, and we arguably hope not to find out. Like many other western states, many large tracts of irrigation in Idaho are dependent on water stored in large federal reservoirs owned and operated by the United States Bureau of Reclamation (Reclamation) and the United States Army Corps of Engineers (Corps). These large reservoirs also provide for flood control in the Snake, and by extension Columbia, River basins—flood control needs and requirements that may be in flux absent successful renegotiation and renewal of a modern Columbia River Treaty.

The Columbia River Treaty

Executed in 1961 and operating in 1964, the United States and Canada entered into the Columbia River Treaty (Treaty) to provide each mutually beneficial hydropower production and flood control operations. From a flood control perspective, the existing Treaty provides the United States with nearly 9 million acre-feet of dedicated flood control storage space annually within Canadian reservoirs in the Columbia River Basin (assured storage). Over time, this flood control benefit has increasingly come at the expense of maximizing hydropower generation as western Canada's population has grown. This tension between flood control and hydropower generation potential are, together with more modern environmental (*i.e.*, fish and wildlife) considerations, at the center of ongoing negotiations between the two countries and their respective stakeholders seeking extension of the Treaty set to expire in September 2024. After 2024, there is no ongoing requirement for dedicated flood control storage in Canada. The loss of dedicated flood control space in Canadian reservoirs does not mean that the country will not provide any ongoing flood control whatsoever, only that the United States will need to make adjustments on this side of the border to counterbalance the loss of the dedicated space.

'Assured Storage' and 'On Demand' Storage

For its part, the Corps is concerned that the United States does not already have the additional reservoir space needed to offset the nearly 9 million acre-feet of dedicated flood control space historically provided in Canada. With the expiration of "assured storage," and in the absence of a renewed treaty providing more assured storage, Canada will transition to "on demand" or "called upon" storage—flood control storage provided by Canada after the United States demonstrates that it has maximized its own, internal flood control space/operations and more is needed "in real time" from Canada to prevent flooding. During Treaty negotiation sessions, ongoing since 2018 and occurring most recently over October 12-13 in Portland, Oregon (the 19th such session), Canada has taken the position that operations on all Congressionally-authorized reservoirs in the Columbia River Basin (and its tributaries, including Idaho's Snake River) must be adjusted to provide greater flood control benefit in the United States before the United States can "call upon" additional storage in Canadian reservoirs.

Impacts to Idaho

Idaho water users care about these potential regime changes for two primary reasons: (1) Canada seemingly treats Reclamation reservoirs as interchangeable with Corps facilities (*i.e.*, grossly and generally speaking, flood control is flood control regardless of Reclamation irrigation storage operations); and (2) what consequences will flood control operational changes have upon Endangered Species Act (ESA)-listed species Biological Opinions currently balancing irrigation and hydropower generation storage operations against salmon and other anadromous fish recovery in the region?

Flood Control Storage

Whether non-Treaty dams should be required to provide Treaty-related flood control storage in the United States is an open, and debated, threshold question (the Treaty resulted in the construction of Libby Dam in Montana, and Mica, Keenleyside/Arrow, and Duncan in Canada—Mica being, by far, the largest with a usable storage capacity of 12 million acre-feet and a Treaty commitment storage use of 7 million acre-feet). Assuming that non-treaty dams and reservoirs are fair game for purposes of increasing flood control management potential, irrigation water storage operations in the Payette, Boise, and Snake River basins in Idaho could be implicated, as well as stored water supplies providing for timed "fish flush" flow augmentation releases supporting Idaho's, Congressionally-approved 2004 Snake River Water Rights Act (a/k/a the Nez Perce Agreement) and the 30-year Biological Opinions supporting Snake River dams operations under the ESA.

Conclusion and Implications

While reports from both national governments suggest that the sides are close to an agreement in principle, September 2024 will be here soon. And, Idaho water users want to know sooner than later what flood control operations in the Columbia River Basin and, more importantly, the Snake River Basin will look like then.
(Andrew J. Waldera)

LEGISLATIVE DEVELOPMENTS

NEW STATE LAW GIVES THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO INVESTIGATE PRE-1914 WATER RIGHTS

On October 8th, 2023, Governor Newsom signed Senate Bill 389 (Bill) into law. The Bill, which amends Water Code section 1051, enables the State Water Resources Control Board (State Water Board) to investigate and ascertain the validity of pre-1914 appropriative and riparian rights. [S.B. 389, 2023-24 Leg., Reg. Sess. (Cal. 2023).]

Background

The Water Commission Act of 1913 created a permitting and licensing scheme for surface water rights established after the effective date of the Act—1914. The State Water Resources Control Board (State Water Board) has permitting and licensing jurisdiction over post-1914 surface water appropriations, in addition to its jurisdiction over the reasonable use of water to prevent waste. The State Water Board has reasonable use jurisdiction over pre-1914 appropriative rights to surface water, but does not have permitting and licensing jurisdiction over such rights because those rights pre-date the Water Commission Act. Accordingly, surface water rights in California are divided into two categories: (1) pre-1914 appropriative rights and (2) post-1914 appropriative rights. The board also exercises reasonable use jurisdiction over riparian rights, which are rights to use the natural flow of water from a lake, river, stream, or creek.

Appropriative rights allow rights holders to divert surplus surface water in excess of the needs of riparian rights holders, including for use on non-riparian land. After 1914, people or entities seeking to appropriate water were required to apply to the State Water Board for a water right permit that included the place of use for diverted water, the purpose of use, the method of diversion, and amount of water to be diverted. Accordingly, a water right holder must apply to the board to change any of those features of the water right. On the other hand, pre-1914 rights holders established their rights by providing notice of their diversions and actually diverting water; pre-1914 rights holders thus do not have permits. Importantly, pre-1914 water rights holders may freely change the purpose or place of use of water under their rights to the extent the changes do not injure other water rights holders or initiate a new water right (e.g., by increasing the amount of water appropriated under the right). Historically, pre-1914 rights have enjoyed greater flexibility in their exercise compared to post-1914 rights, making them valuable rights limited primarily by reasonable use.

Senate Bill 389

The Bill highlighted tensions in the regulated community. As initially introduced, the Bill would have granted authority to the State Water Board to "determine" the validity of riparian and pre-1914 water rights, thus potentially extending substantial regulatory authority over the exercise of such rights. Substantial opposition to the Bill prompted several significant changes.

In particular, the Legislature replaced "determine" with "investigate and ascertain," which recognizes State Water Board investigatory authority but stops short of granting authority to determine the validity of the right, thus aligning the Bill's language with the board's existing authority granted under Water Code section 1051. In particular, the Bill authorizes the State Water Board to:

> . . .[i]nvestigate and ascertain whether or not water heretofore filed upon or any claimed riparian or appropriative right is valid under the laws of this state. Wat. Code, § 1051(a)(3), *as amended by* S.B. 389.

Investigatory powers include:

> . . .issuing information orders to holders, claimants, and users. Under the orders, the holder or claimant must provide the State Water Board with information on the basis for the water

> right, including the patent date for the place of use, the notice date of the appropriation, and when the water was actually delivered. Orders issued to holders, claimants, and users may require information on prior diversions and use, including direct diversions and diversions to storage . . . . § 1051(b)(2)(E), (b)(3)(A), *as amended by* S.B. 389.

By authorizing the State Water Board to collect diversion and usage information, the board will be able to more closely scrutinize water usage under its reasonable use jurisdiction for pre-1914 and riparian rights holders.

Constraints

Despite granting investigatory powers to the State Water Board, the Bill imposes certain constraints on their exercise. For instance, the board must show that the benefit in issuing an information order must "bear a reasonable relationship" to the burden on the person under investigation. § 1051(c), *as amended by* S.B. 389. Additionally, the State Water Board must provide a written explanation of why the investigation is needed, along with supporting evidence. These procedural safeguards are important pre-requisites to the board exercising its investigatory powers and provide water rights holders an initial foundation from which to understand why the board is considering an investigation.

No Expansion of Circumstances Resulting in Forfeiture

Importantly, the Legislature also eliminated a provision that would have expanded circumstances resulting in the forfeiture of pre- and post-1914 water rights (riparian rights are not subject to forfeiture, although they may lose their historical priority in certain circumstances). As currently provided by statute, a water right may be forfeited after five consecutive years of non-use. However, under the common law, a right subject to forfeiture may be revived if water use is restarted and there was no conflicting claim asserted to the unused water. As originally proposed, the Bill would have allowed the State Water Board to determine a forfeiture occurred absent a conflicting claim. Such a change would have constituted a statutory override of the common law rule that "a forfeiture cannot occur in the absence of a 'clash of rights'. . . ." *Millview Cnty. Water Dist. v. State Water Res. Control Bd.*, 177 Cal.Rptr.3d 735, 752 (2014).

Although the Bill's elimination of the conflicting-claim requirement was itself dropped, the board's authority to order disclosure of diversion and usage information may result in more frequent findings of non-use against which a conflicting claim may be asserted, thus increasing forfeiture litigation and findings in the future.

Conclusion and Implications

How the State Water Resources Control Board will implement its new authority is unclear. Investigations that reveal inflated claims or abandoned rights may ultimately result in the diversions being deemed a trespass, subjecting the rights holder or user to a court order injunction. At a minimum, pre-1914 and riparian holders, claimants, and users should maintain detailed records of their diversion moving forward. (Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

EPA ISSUES NEW CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION RULES TO EXPAND AUTHORITY OF STATES AND TRIBES AND CLARIFY CERTIFICATION PROCEDURES

In September 2023 the U.S. Environmental Protection Agency (EPA) issued a final rule revising and replacing the 2020 regulatory requirements for water quality certifications under Section 401 of the federal Clean Water Act. EPA's final rule expands state and tribal powers to grant or deny water quality certifications for large infrastructure projects like pipelines and dams over water quality concerns. According to EPA, the rule is also intended to improve the certification process to make the procedures and timeline for obtaining water quality certifications more clear and efficient. This entire process has been the subject of multiple legal challenges and litigation, however, so it remains to be seen whether EPA's new rule will accomplish EPA's objectives.

Background

Under Section 401 of the Clean Water Act, any project applicant or proponent for a federal license or permit to conduct any activity, including the construction or operation of a facility, which may result in any discharge into navigable waters (*i.e.*, Waters of the United States), must provide the federal licensing or permitting agency a certification from the state in which the discharge originates or will originate, that any such discharge will comply with other applicable provisions under the Clean Water Act (*e.g.*, water quality standards, effluent limitations, new source performance standards) and other potentially applicable water quality requirements of state or tribal law. The federal agency may not issue the underlying federal permit or license unless the certification is issued or waived. States and authorized tribes where the discharge activities occur are generally responsible for issuing water quality certifications, but in situations where a state or tribe does not have authority, EPA is responsible for issuing the water quality certification. (*See generally* 33 U.S.C. § 1341.)

In addition, Clean Water Act Section 401 provides that certifying authorities (*i.e.*, states, authorized tribes, and EPA), must act on a water quality certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request." (33 U.S.C. § 1341(a)(1).) A certifying authority may waive certification expressly, or by failing to act within a "reasonable period of time." A federal agency may not issue a federal license or permit for an activity that may result in a discharge into waters of the United States prior to the completion of the Clean Water Act Section 401 water quality certification process.

EPA promulgated its first implementing regulations for Clean Water Act Section 401 in the early 1970s. Since that time, EPA's implementing regulations have undergone several changes. More recently, in 2020 EPA issued a new version of the rule (the "2020 Rule") that many viewed as an effort to roll back state and tribal authority to substantively review and actively participate in the water quality certification process. (*See:* EPA, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020).) The 2020 Rule also introduced several new procedures, including one that allowed federal agencies to review certification decisions and determine that the certification was waived if it was not consistent with other rules and requirements. The 2020 Rule also prohibited a certifying authority from requesting a project applicant to withdraw and resubmit a certification request to restart the clock for purposes of processing the water quality certification.

EPA's 2023 Rule

EPA's new rule is intended to roll back the 2020 Rule and reinstate the prior scope of the Clean Water Act Section 401 certification process. More specifically, EPA's new rule restores and strengthens the role of state and tribes to review and participate in the water quality certification process. States and tribes now have expanded and clarified authority to assess whether the proposed project or activity in its

entirety will comply with water quality requirements. However, the rule also emphasizes that states and tribes may only consider water quality related impacts from the activity, including the activity's construction and operation.

In addition, the new rule is intended to provide more regulatory certainty and to advance federally permitted projects such as pipelines and dams. EPA explained that the "reasonable period of time" will begin on the date that a request for certification is received by the certifying authority in accordance with its applicable submission procedures. The new rule also allows federal agencies and certifying authorities with the ability to jointly set the reasonable period of time, provided it does not exceed one year from the date that the request for certification was received (*i.e.*, the one-year statutory maximum). The final rule further clarifies that the joint determination of the reasonable period of time may happen on a case-by-case basis or categorically, but if the federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable period of time will be six months from the date that the request for certification was received. Finally, in order to try and limit delays, the rule sets forth required contents in a request for certification.

Conclusion and Implications

EPA's new rule becomes effective on November 27, 2023. While many are hopeful that EPA's new rules will lead to more efficient and clear procedures for processing water quality certifications, it is too early to tell whether EPA's objectives will be achieved in practice. For more information, *see:* EPA, Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023).)
(Patrick Veasy, Megan Somogyi)

WATER RECYCLING AND DESALINATION PROJECTS RECEIVE NEARLY $29 MILLION INVESTMENT FROM U.S. BUREAU OF RECLAMATION

The United States Department of the Interior, Bureau of Reclamation (Reclamation) recently announced $28.97 million to support planning and feasibility studies for 31 water recycling and desalination projects throughout the western United States, including projects in the States of California, Idaho, Nevada, New Mexico, Texas, and Utah.

Background

This latest investment, announced September 27, 2023, as part of the Reclamation's WaterSMART Program, adds to the agency's historic investments in water conservation, recycling and reuse projects throughout the western United States. This is part of the Biden-Harris administration's Investing in America agenda, aimed to supplement existing freshwater supplies through 31 projects for planning, design and related activities to support the development of new construction projects that will be implemented under Desalination Construction, Title XVI Water Reclamation and Reuse, and Large Scale Water Recycling programs.

Water Reclamation and Reuse Program

Reclamation's WaterSMART Water Recycling and Desalination program is part of the initiative to sustain America's natural resources for tomorrow through stretching and securing water supplies to serve present and future generations. The Title XVI Water Reclamation and Reuse Program, authorized pursuant to P.L. 102-575 in 1992, provides assistance to water agencies for the planning, design and construction of water reclamation and reuse projects. The planning and development of these projects increases water management flexibility, the reliability of western water supplies, provides supplemental and new water resources to support irrigation and urban water supplies.

California Projects

This funding announcement includes 21 California projects. These include feasibility and other studies to support the use of recycled water for direct and indirect potable use by the Cities of Burbank, Cloverdale, Los Angeles, Oceanside, San Diego, Santa Monica, as well as the Inland Empire Utilities Agency, Metropol-

itan Water District of Southern California, Montecito Water District, Palmdale Water District, Rancho California Water District, San Bernardino Valley Municipal Water District, Santa Clara Valley Water District, Town of Windsor, Valley Sanitary District, and Western Municipal Water District.

Additionally, several of these water reuse and recycling projects are also aimed to stabilizing or offsetting impacts to groundwater supplies. Specifically, the Los Angeles Donald C. Tilman Water Reclamation Plant Advanced Water Purification Facility Project will not only provide up to 17,000 acre-feet annually of recycled water for indirect potable reuse, but aims to replenish the San Fernando Valley aquifer. The City of Santa Monica's OneWater Project not only is exploring indirect and direct potable reuse, but is also addressing deteriorating groundwater quality due to of groundwater supplies. Another project focused on utilizing recycled water is the Inland Empire Utilities Agency's Chino Basin Advanced Treated Recycled Water, Storage and Production project, which strives to produce approximately 15,000 acre-feet annually to recharge the Chino Basin and offset degradation to the groundwater supply. The Montecito Water District is preparing a Groundwater Augmentation program through the direct injection of recycled water.

Other projects funded support studies exploring expansion of desalination for the City of Oceanside in addition to expansion of the City's water reuse and recycling options. County of San Luis Obispo is exploring desalination of brackish and saline water sources to develop new water supplies to offset projected long-term shortages. The City of Yuba City is studying the conversion of the existing wastewater treatment facility to a tertiary treatment facility allowing the distribution of recycled effluent in a cost-effective manner for outdoor and agricultural uses.

Idaho, Nevada and New Mexico Projects

The City of Boise, Idaho, received $1,000,000 to support the development of a feasibility study, planning, preliminary design and environmental compliance activities to support the City's Recycled Water Program. The project seeks to support site selection and the development of a recycled water, groundwater recharge, and recycled water facilities and infrastructure. This project aims to develop 5,000,000 gallons per day to be recharged into groundwater supplies that not only addresses aquifer concerns, but support stability of water supplies for later use.

The Southern Nevada Water Authority received $1,000,000 to evaluate water reuse expansion options for the Boulder City wastewater facility, which may provide an additional 800 acre-feet of recycled water for direct or indirect reuse. The purpose of this project is to provide a mechanism for Boulder City, which cannot return treated effluent to Lake Mead for return flow credits, to augment the City's Colorado River supply.

New Mexico was awarded $300,000 to conduct a feasibility study for the desalination of brackish groundwater from the Salt Basin and to evaluate brackish groundwater availability throughout southern New Mexico, particularly in the Lower Rio Grande area. This region of New Mexico experiences limited water supplies, which are influenced by growth, aridification, and regional water supply conflicts. The development of brackish groundwater will support a more resilient water supply for the region.

Texas Projects

Five projects were awarded in Texas including $1,000,000 each to the Canadian River Municipal Water Authority and El Paso Water Utilities Public Service Board, $250,000 to the City of San Marcos, $365,500 to the Gulf Coast Water Authority, and $490,000 to the Laguna Madre Water District. The Canadian River Municipal Water Authority is developing two feasibility studies relating to its Salinity Control Project in New Mexico and a proposed desalination facility near Lake Meredith to support enhanced drinking water supplies and meeting secondary drinking water standards, which are currently compromised due to chloride concentrations that exceed federal standards. The City of San Marcos is planning a feasibility study to explore potable and non-potable projects to support drought resiliency through potential expansion of the existing reclaimed water system and building on the City's efforts to increase reliance on water reuse, reducing its reliance on groundwater and preservation of critical habitat in the San Marcos River.

The El Paso Water Utilities Public Service Board is performing a feasibility study intended to explore water reuse options to meet the growing demands and to balance groundwater use and wastewater risks impacting the Rio Grande River. The Gulf Coast

Water Authority and Laguna Madre Water District are each evaluating the feasibility of sweater desalination projects in an effort to augment current water supplies and meet future demands and potential supply deficits.

Utah Projects

The City of South Jordan received $734,904 to complete planning for the development of a full-scale direct potable reuse project projected to produce up to 30 million gallons per day. The City has identified water reuse as an important component of securing its water supply in response to drought and climate change. Washington County Water Conservancy District received $1,325,638 to support planning for a Regional Reuse System, which is intended to incorporate recycled water into the water portfolio of the District allowing for 47,000 acre-feet of recycled water to be used for potable and secondary irrigation uses.

Conclusion and Implications

As the western United States continues to navigate the challenges associated with aridification and a changing climate, communities are exploring how to maximize available water supplies through water reuse, recycling and desalination of saline and seawater. Continued investments by the federal government through the Bureau of Reclamation's WaterSMART program provides critical funding to offset the costs of these programs. Additional information on these and future grant funding opportunities can be found at the Bureau of Reclamation's WaterSmart website at https://www.usbr.gov/watersmart/index.html. (Micheline Nadeau Fairbank, Derek Hoffman)

WASHINGTON STATE DEPARTMENT OF ECOLOGY IS REOPENING ITS STREAMFLOW RESTORATION COMPETITIVE GRANT PROCESS

Background

In January 2018, the Washington Legislature passed the Streamflow Restoration Act (RCW 90.94) to help improve streamflows. The law directed 15 planning groups to develop watershed plans that offset impacts from new domestic permit-exempt wells and achieve a net ecological benefit. The Legislature appropriated $300 million over 15 years to support projects that improve streamflows.

The law was in response to the Hirst decision, a 2016 Washington State Supreme Court decision that limited a landowner's ability to get a building permit for a new home when the proposed source of water was a permit-exempt well.

Funds for Streamflow Restoration are made available under the Streamflow Restoration Act. Under the Streamflow Restoration Act codified at RCW 90.94, money is made available for watershed planning and watershed restoration and enhancement projects, including collecting data and completing studies necessary to develop, implement, and evaluate watershed restoration and enhancement projects. Funds are made available in part through appropriations by the legislature, and in part a portion of the fees charged by local governments in approving mitigated groundwater withdrawals. Where funds are from fees paid to local governments, those funds must stay in the basin of origin, but otherwise both sources of funds are subject to protect approval by the Department of Ecology. RCW 90.94.060.

Funds are available statewide to Tribal governments with lands or treaty rights in Washington, public entities including local governments, and nonprofit organizations. Geographic priority is given to areas specified in the Streamflow Restoration Act which includes all or portions of 17 of the state's 62 Water Resource Inventory Areas. Four of the 17 are east of the cascades, with the bulk of the basins with priority for funding being part of the central Puget Sound and Grays Harbor area counties.

Eligible projects include water right acquisitions, Altered water management or infrastructure, environmental monitoring, water storage, watershed function, riparian and fish habitat improvements, and feasibility studies for any of the above. Priority is given to projects which improve streamflows.

Current Applications

The current application round is to provide up to $40m for eligible projects. Funds not expended will roll over to future funding requests, although it has yet to be determined if there will be another round in this biennium or if future applicants will wait until 2026 to see another opportunity to apply.

Grants will be approved for funding based on a 300-point criteria matrix which includes funding priorities, project benefits, project budget, project durability and resilience, project scope, and readiness to proceed.

This is the fourth round of funding since January 2019. The three previous rounds of funding have resulted in project funding for sixty-three projects (including two projects with two or more phases) brought by 43 different entities for a total obligation of more than $77 million. Funded entities include local governments, tribal governments, special purpose districts, salmon enhancement groups, and non-profit entities. More than half of the previously funded projects have been brought forward by state and local governments including special purpose districts with taxing authority.

Conclusion and Implications

Guidance for what will be required of a successful application has been updated and reissued by Ecology as part of this 4th round of funding and is available as Ecology Publication 23-11-015 dated October 2023. Ecology is holding Applicant workshops around the state in November and December of 2023. Applications must be submitted between January 2 and February 29, 2024. In additional, applications for the acquisition of water rights. For more information on the Streamflow Restoration Competitive Grant Process, *see*: https://ecology.wa.gov/About-us/Payments-contracts-grants/Grants-loans/Find-a-grant-or-loan/Streamflow-restoration-implementation-grants
(Jamie Morin)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Water Quality

Oct. 26, 2023—The U.S. Environmental Protection Agency announced that the Town of Coulee Dam, Washington will pay $70,881 for violations of Section 402 of the federal Clean Water Act at the town's wastewater treatment plant.

The wastewater treatment plant failed to meet the following requirements of their National Pollutant Discharge Elimination System permit:

(1) Submit monthly Discharge Monitoring Reports to EPA and the Colville Tribes

(2) Notify EPA and the Colville Tribes that their Operations and Maintenance Plan was developed and implemented

(3) Inform EPA and the Colville Tribes that their new plant had begun operations and their old plant had closed

(4) Apply for a new permit on time
(5) Provide the correct location of the discharge point.

EPA investigations began in 2019 when the treatment plant did not submit required Discharge Monitoring Reports. DMRs help track the amount of pollution discharged from permitted facilities into waterways like the Columbia River. A facility's permit assigns values for the type and quantity of pollutants it is allowed to discharge. Without the timely submittal of DMRs, EPA cannot monitor if wastewater treatment plants are complying with permits, effectively treating wastewater, and preventing excess pollution from entering the river. Follow-up investigations found that the wastewater treatment plant failed additional conditions of the NPDES permit.

Oct. 19, 2023—The U.S. Environmental Protection Agency (EPA) and BG Products Inc. have reached a settlement to resolve alleged violations of the Clean Water Act at the company's automotive products manufacturing facilities in Wichita and El Dorado, Kansas.

According to EPA, both facilities had over 1 million gallons of oil storage capacity and failed to develop required plans explaining how the company will prevent and respond to oil spills that have the potential to reach waters. EPA says that the facilities are on or near the Arkansas and Walnut rivers, respectively.

Under the terms of the settlement, the company agreed to pay a $258,978 civil penalty.

Shortly after EPA's inspection, BG Products submitted the required plans to the Agency.

Facilities that store 1,320 gallons or greater of oil products in aboveground storage tanks are subject to Clean Water Act regulations that require, among other things, proper containment to contain oil releases, inspections of tanks and piping, and integrity testing of oil storage equipment. Facilities with more than 1 million gallons of storage are subject to even more stringent management and spill response capability requirements.

Oct. 11, 2023—U.S. Environmental Protection Agency has issued orders to three water systems in Ohio for failing to meet requirements under America's Water Infrastructure Act of 2018, or AWIA. EPA took action to ensure the Village of McDonald, the Leading Creek Conservancy District in Rutland and the Buckeye Water District in Wellsville certify their risk and resilience assessments and emergency response plans.

A risk and resilience assessment evaluates the vul-

nerabilities, threats, and consequences from potential hazards to drinking water systems. An emergency response plan describes strategies, resources, plans, and procedures that systems can use to prepare for and respond to an incident, natural or man-made, that threatens life, property, or the environment. Incidents can range from localized flooding or hacking of cybersecurity systems to large scale hurricanes, earthquakes, or terrorist attacks, among other examples.

Under AWIA, any drinking water system which serves more than 3,300 people must develop or update a risk and resilience assessment and an emergency response plan. The law also establishes deadlines for certifying completion to EPA. Nationwide, more than 96 percent of water systems have complied with the requirements under AWIA.

EPA is ordering the systems to submit a detailed compliance plan within 30 days for review and approval.

EPA continues to work with drinking water systems to ensure they are compliant. To date, EPA has issued orders to a total of 17 drinking water systems in Michigan, Illinois and Ohio. Twelve orders were terminated after the systems returned to compliance.

Oct. 3, 2023—The U.S. Environmental Protection Agency (EPA) announced a settlement with Texas-based XTO Energy Inc., a subsidiary of ExxonMobil, resolving alleged violations of the federal Safe Drinking Water Act's Underground Injection Control program (UIC) at three injection wells within the Uintah & Ouray Indian Reservation in Utah's Uinta Basin.

The settlement was filed on September 29 and requires the company to pay a civil penalty of $19,718.08 for its violations of UIC requirements. XTO failed to timely provide the agency with all information necessary to transfer the permits from XTO to Utah Gas Corp and failed to notify the Agency of the loss of mechanical integrity for one of its wells and to take prompt action to repair the well. The wells are in Uintah County and are used for disposal of brine produced from nearby gas production wells that were also operated by XTO.

Injection wells are required to maintain mechanical integrity to ensure they remain free of significant leaks that cause unwanted fluids to impact drinking water aquifers. EPA's UIC program regulates injection activities to prevent contamination of underground sources of drinking water; the program relies on timely and accurate reporting by the regulated community.

Today's action aligns with the federal government's efforts to ensure environmental protection in tribal communities.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

Oct. 24, 2023—The U.S. Environmental Protection Agency (EPA) has announced the signing of a plan for an $85 million Superfund cleanup of the former Iron King Mine and Humboldt Smelter site in Dewey-Humboldt in Yavapai County, Arizona. This landmark decision—known as a Record of Decision—provides a comprehensive solution building on years of prior work by the agency and the State of Arizona to address arsenic, lead, and other heavy metals in soil at and near the site. The site was initially listed on the Superfund National Priorities List in 2008.

The Record of Decision documents the cleanup option EPA chose after considering and responding to public comments. Next, the EPA will comprehensively design the cleanup action and implement it.

The Iron King Mine site contains about 4 million cubic yards of mine tailings with high levels of arsenic and lead. The Humboldt Smelter is contaminated with mine tailings and other smelter wastes. Wastes have also washed into drainages that lead toward the Agua Fria River. Over many years, lead emissions from the smelter stack, dust from the mine and the smelter, spills from rail loading areas, and commercial processing of mine tailings all contributed to lead and arsenic contamination in the soil of some residential yards in Dewey-Humboldt.

EPA is addressing residential contamination by cleaning up contaminated soil from homes where levels of lead or arsenic are above dangerous levels, and exposure for long periods could threaten human health.

The non-residential cleanup portion will consolidate mine and smelter wastes into two repositories. A waste repository is a large, stable, permanently covered holding cell that encapsulates wastes, keeps water out, and prevents wastes from moving further into drainages or the river. Mine wastes and contaminated soils from the former mine and surrounding areas west of Highway 69 will be moved into a reposi-

tory on the existing mine tailings pile. Complementing ADEQ's removal of the abandoned smelter and stack in 2021, wastes under the former smelter and in the Chaparral Gulch east of Highway 69 will be moved into a second waste repository, most likely in a natural depression on the former smelter property. Both repositories will be inspected periodically and maintained to remain intact and effective.

Oct. 11, 2023—The U.S. Environmental Protection Agency announced a settlement with Slack Chemical Company Inc. to resolve alleged violations of the Emergency Planning and Community Right to Know Act (EPCRA) at the company's facilities in Carthage and Saratoga Springs, New York. The settlement includes a $231,300 civil penalty.

Slack Chemical Company, Inc. is a supplier of bulk chemicals. The company stores, repackages, and distributes bulk chemicals to municipalities and industry across the Northeast from three New York facilities using a substantial delivery fleet of tractor trailers.

According to EPA, the company failed to properly submit forms required by EPA and New York State with information about how much ammonia, methanol, nitric acid, and toluene were managed at and released from the company's facilities during 2019 and 2021.

Under the terms of the consent agreement and final order with EPA, Slack has voluntarily instituted a corporate compliance plan to prevent recurrence of EPCRA reporting violations. For example, to improve compliance, the company will add a written procedure detailing the steps required to identify Toxic Release Inventory chemicals, calculating reportable quantities and subsequent submittal. (Robert Schuster)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT UPHOLDS NINTH CIRCUIT RULING IN *SAN LUIS OBISPO COASTKEEPER V. SANTA MARIA VALLEY WATER CONSERVATION DISTRICT* REGARDING WATER RELEASES FROM DAMS TO COMPLY WITH THE ESA

In last year's case of *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District* (9th Cir. 2022) 49 F.4th 1242, the Ninth Circuit Court of Appeals held that the operators of a Southern California dam were required to make releases of water, consistent with the dam's authorizing legislation, in order to comply with the federal Endangered Species Act (ESA). Bringing this case to a close, the U.S. Supreme Court, on October 2, 2023, denied the request for further review brought by the operator's dam, leaving in place the decision made by the Ninth Circuit on September 23, 2022.

The Ninth Circuit's Ruling

The Twitchell Dam is located on the Cuyama River about six miles upstream from its confluence with the Sisquoc River and is ultimately a tributary to the Santa Maria River. The Southern California steelhead is an endangered species of salmonoid with a habitat ranging from the Santa Maria River system in the north to the US-Mexico border in the south. While the lower Santa Maria River remains dry most of the time, periods of heavy precipitation create enough flows in the Santa Maria River and its tributaries to allowed Southern California steelhead to migrate to and from the ocean to mature and replenish their population before the construction of Twitchell Dam.

In 2019, the San Luis Obispo Coastkeeper and Los Padres ForestWatch filed a lawsuit against the Bureau of Reclamation (Reclamation) and Santa Maria Valley Water Conservation District (District), claiming that their operation of dam interfered with the reproductive migration of Southern California steelhead and therefore amounted to an unlawful take in violation of the ESA. Accordingly, the core issue of the case revolved around the question of whether Reclamation and the District could be required to time releases of water in certain volumes and durations that would support Southern California steelhead reproduction.

Reclamation is responsible for setting the operational rules for the Twitchell Dam. From this responsibility, Reclamation argued that Public Law 774 ("PL 774"), the legislation from 1954 which authorized the construction of the Twitchell Dam, did not allow it for releases of water for the purpose of supporting Southern California steelhead migration, therefore creating a conflict with the requirements of the ESA. The rule in such a situation, as was argued by Reclamation, is that where two statutes are mutually prohibitive, an irreconcilable conflict exists that may cause the court to enforce one statute over the other. Naturally, Reclamation's main point of contention here was that the operational criteria for the Twitchell Dam took precedence over the ESA.

In this instance, however, the Ninth Circuit held that there was no irreconcilable difference between PL 774 and the ESA. The Ninth Circuit supported its decision by pointing to the language in PL 774 that allows the Twitchell Dam project to operate "for other purposes." From this generalized language, the Ninth Circuit held that Reclamation has discretion to provide for releases of water to support Southern California steelhead migration, thus preventing an irreconcilable difference with the ESA. On October 2, following a request for review from Reclamation and the District, the US Supreme Court denied review of the case. *See:* https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/23/21-55479.pdf

Conclusion and Implications

As recently as the 1950s, prior to the construction of the Twitchell Dam, the Santa Maria Watershed was one of the largest steelhead runs along the central coast, with over 10,000 fish utilizing the Santa Maria River and its tributaries for vitally important spawning habitat. Since the introduction of the Twitchell

Dam and other major projects in the watershed, however, those numbers have plummeted, with the Southern California steelhead being listed as an endangered species by the ESA in August of 1997.

The decision of the Supreme Court not to review the case affirms the Ninth Circuit's ruling that Reclamation and the District do in fact have the ability to release water from the Twitchell Dam and remain in compliance with both PL 774 and the ESA. Advocacy groups and proponents of the steelhead have claimed that amount of water necessary to provide sufficient flows to promote steelhead migration and pawning would only constitute equate to about 4 percent of the reservoir's average annual amount of stored water. Although this number may seem trivial to some, Californians have battled to maximize the utilization of the state's limited water supply, and the balancing of human versus environmental needs has been a difficult equation to say the least. In balancing these needs, however, the Ninth Circuit ultimately concluded—and the Supreme Court has now upheld that conclusion—that "the Agencies have discretion to operate Twitchell Dam for other purposes besides irrigation, conservation, and flood control—including, potentially, adjusting water discharges to support the migration and reproduction of Southern California Steelhead."
(Wesley A. Miliband, Kristopher Strouse, Farrah Ghaffarirafi)

FIFTH CIRCUIT UPHOLDS U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT 404 PERMIT FOR LIQUID NATURAL GAS PROJECT

Healthy Gulf v. United States Army Corps of Engineers, 81 F.4th 510 (5th Cir. 2023).

The United States Court of Appeals for the Fifth Circuit denied a petition for review of the U.S. Army Corps of Engineers' (Corps) decision to grant a permit for a facility that would convert natural gas into liquefied natural gas.

Factual and Procedural Background

Driftwood LNG and Driftwood Pipeline (jointly: Driftwood) proposed a facility that would convert natural gas produced in the United States to LNG to export internationally. This undertaking involved building an LNG production and export terminal and pipeline on the Calcasieu River in Louisiana. The Corps granted Driftwood a dredge and fill permit under section 404 of the federal Clean Water Act (404 Permit).

When issuing a 404 Permit, the Corps performs a three-step analysis of (1) avoidance, (2) minimization, and (3) compensatory mitigation. To satisfy these elements, the discharge of dredged material must be the least environmentally damaging practicable alternative (LEDPA); permittees must take "appropriate and practicable steps" to minimize potential deleterious consequences due to the discharge; and compensatory mitigation is required. There are three types of mitigation are to be considered in order of hierarchy: (1) mitigation banks, (2) in-lieu fee programs, and (3) permittee-responsible mitigation. This hierarchy sets as a default but the Corps may override it as appropriate.

Under state and federal law, Driftwood needed to offset the negative environmental impacts of its project. First, under Louisiana law, Driftwood had to use the dredged material beneficially because the project involved dredging more than 25,000 cubic yards. Second, under the Clean Water Act, Driftwood needed to provide compensatory mitigation for the permanent and unavoidable loss of coastal wetlands. As part of its compensatory mitigation, Driftwood proposed to offset 134.3 acres of impacted wetland by purchasing credits from an approved mitigation bank. But it would offset the remaining 185.0 acres through the beneficial use of dredged material by using it to restore an estimated 3,000 acres of emergent, estuarine intertidal, and scrub or shrub wetlands.

Petitioners, Health Gulf and Sierra Club, challenged the Corps' issuance of the 404 Permit, on two grounds. First, Petitioners alleged the Corps failed to identify an alternative site (Alternative Site 6) as the LEDPA. Second, Petitioners alleged the Corps did not adequately justify its deviation from the statutory hierarchy of compensatory mitigation schemes, and that even if the hierarchy were flexible, the Corps

failed to address serious concerns about the viability of the proposed dredged material plan.

The Fifth Circuit's Decision

The Court of Appeals first considered and rejected Petitioners' argument that the Corps did not adequately consider Alternative Site 6, and thereby failed to demonstrate the current location for the project was the LEDPA. The court rejected this argument, reasoning that Petitioners did not mention Alternative Site 6 during the public comment period or any sites, collections of sites, or even general areas as potential alternatives, despite recognizing that an alternatives analysis would need to include alternative locations. Ordinarily, a reviewing court will not consider arguments that parties failed to raise in a timely fashion before an administrative agency, and the court declined to do so here.

Petitioners argued that their failure to submit a comment on Alternative Site 6 should be excused for two reasons: (1) the obvious flaw exception; and (2) the independent knowledge exception. Under the obvious-flaw exception, the question is whether the flaw is so evident that there is no need for it to be pointed out at all during the public comment period. The court rejected this argument because Petitioners did not offer anything other than a conclusory contention that the Corps should have analyzed Alternative Site 6. Under this exception, when an agency has "independent knowledge of the very issue" that a petitioner is raising in challenge to the agency action, failure to raise that issue during the administrative process may be excused. The court similarly rejected the independent knowledge exception because it is not recognized in the fifth circuit and even if it were recognized, comments specifically identifying Alternative Site 6 were not submitted until months after the comment period closed.

The court next considered Petitioners' argument that the Corps violated the regulatory hierarchy for compensatory mitigation by allowing Driftwood to use permittee-responsible mitigation and failing to justify the grounds for allowing Driftwood to deviate from the established hierarchy. The court noted that the Corps has authority to override the regulatory preference where appropriate, such as where a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis. The court deferred to the Corps' reasoning for overriding the default hierarchy, as documented in the administrative record.

The Court of Appeals denied the petition for review of the permit issued by the U.S. Army Corps of Engineers to Driftwood.

Conclusion and Implications

This case reinforces the need for parties interested actions of administrative agencies to build a strong administrative record by participating in the comment and hearing processes. It also provides an example of a court deferring to an agency's scientific and technical expertise as the U.S. Supreme Court prepares to hear a case about the appropriateness of such deference. The Fifth Circuit's opinion is available online at:

https://law.justia.com/cases/federal/appellate-courts/ca5/22-60397/22-60397-2023-09-06.html
(Rebecca Andrews)

WASHINGTON STATE'S COURT OF APPEALS REJECTS STATE DEPARTMENT OF ECOLOGY'S NITROGEN-DISCHARGE LIMITS

City of Tacoma v. Department of Ecology, 535 P.3d 462 (Wash.App. 2023).

The Court of Appeals of Washington, on September 14, 2023, held that the Washington Department of Ecology (Ecology) violated Washington's Administrative Procedure Act (APA) when it placed nitrogen-discharge limitations in individual National Pollutant Discharge Elimination System (NPDES) permits for wastewater treatment plants (WWTP) without completing APA's notice and comment requirements. The total inorganic nitration (TIN) cap on individual permittees followed an Ecology-issued letter to an advocacy group where the agency committed to reducing nutrient loading in Puget Sound.

Factual and Procedural Background

Stretching from Olympia to Bellingham, Washington, the Puget Sound is a complex estuarine system composed of multiple basins and remote inlets. In almost all its basins, the Puget Sound suffers from anthropogenic eutrophication, or low dissolved oxygen (DO) levels, in ecologically significant strata. Excess nitrogen drives DO depletion by promoting algae blooms, which decompose and consume oxygen in the process. In 2019, Ecology published the Bounding Scenarios Report (Report), a predictive model study that calculated DO levels at various depths across the sound. The study confirmed that human nitrogen loading caused roughly 20 percent of the sound's surface area to fall below DO standards in 2006, 2008, and 2014. If the 79 WWTPs used biological nitrogen removal technology, the model predicted that depleted DO areas would decrease by 50 percent.

Immediately before publishing the Report, Ecology issued a letter addressed to Northwest Environmental Advocates (NWEA), a Puget Sound Nutrient Forum member, in response to the organization's rulemaking petition. NWEA sought a rule designating biological nitrogen removal technology as "All Known, Available, and Reasonable Treatment" (AKART) required under state law. AKART is "the most current methodology that can be reasonably required for preventing, controlling, or abating the pollutants associated with a discharge." All WWTPs in Washington must adopt AKART technology. Like the "best available technology" under the federal Clean Water Act, AKART must be economically achievable. Ecology denied the proposed rule due to costs, but committed to reducing nutrient loading through individual and general permit limitations.

Following the letter, Ecology issued a general permit in accordance with the APA. The general permit set action levels for annual TIN discharges on large and midsize WWTPs and required all WWTPs to produce a nutrient optimization plan. Under the general permit, when a large or midsize WWTP exceeds its action level, it must propose an approach to reduce its nitrogen discharges. If a WWTP violates the action level multiple times in a given timeframe, it must implement the reduction approach outlined in its report. During the process for issuing the general permit, Ecology began imposing similar requirements on individual NPDES permittees.

The City of Tacoma (City) and others filed a joint petition for judicial review. The City claimed Ecology promulgated three rules in violation of the APA. First, the City alleged the Report improperly amended testing and sampling procedures when it used a third dimension (depth) to determine DO impairment areas (DO standard rule). Traditionally, DO testing standards apply to surface water only. Second, the City alleged that Ecology effectively amended the agency's 303(d) list (DO impairment rule). Under Clean Water Act section 303(d), states prepare a list of impaired and threatened waterways. In turn, NPDES permits for discharges to these waterways may be subject to heightened standards. Lastly, the City alleged that Ecology's denial letter improperly established new TIN standards for individual permits (TIN cap rule).

At the Trial Court

The trial court found that all three rules—the DO standard rule, the DO impairment rule, and the TIN cap rule—violated the APA. Ecology appealed. The City conceded the DO impairment issue on appeal, leaving only two issues for review: (1) the DO standard rule and (2) the TIN cap rule.

The Court of Appeals' Decision

Washington's APA defines "rule" broadly. Relevant here, a rule is an agency directive of general applicability which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. Thus, the purported rules in the Report and Ecology's denial letter are subject to the rigors of the APA if (1) they are a directive of general applicability and (2) they establish, alter, or revoke any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.

The DO Standard Rule

The court first considered whether the DO standard rule constituted a rule that was promulgated without following the rigors of the APA. The City argued that the Rule effectively modified Washington law, which limits human-caused DO decreases to marine *surface* water, by designating areas as DO impaired if the model calculated DO levels below the standard at specified depths.

The Court of Appeals disagreed. The relevant text in the Report described the three-dimensional methodology and promised to supply information [to the Department to] design management strategies for anthropogenic nutrient inputs affecting DO. It stated further that the data would be used to inform and develop the nutrient management strategy for Puget Sound.

Relying on the dictionary definition for "directive," the court found that the relevant text did not amount to a rule because it did not "impel anyone to act. . . ." Nor did the text suggest that Ecology was going to apply anything but the existing standards.

The TIN Cap Rule

The court next considered whether the TIN Cap rule constituted a rule that was promulgated without following the rigors of the APA. Both parties agreed that the Department's nitrogen-discharge limitations applied to all WWTP permit renewals, meaning the rule satisfied the first element of general applicability. However, the parties did not agree on whether a "directive" can be an internal commitment by Ecology that its own staff would impose new requirements on permittees.

To support its position that internal directives fall outside the APA, Ecology noted that a prior state Supreme Court decision determined a similar agency document had no independent regulatory effect. The court here, however, remained unconvinced, noting that the document in the prior case allowed for case-by-case discretion. Instead, the court reasoned that there is no functional difference between a promulgated rule that adds new terms for renewing a permit and a directive to staff to add new terms for reissuing a permit.

On the second element, Ecology argued that the TIN cap did not establish, alter, or revoke any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. Instead, Ecology argued the TIN cap merely enforced existing DO limitations. Again, Ecology's argument left the court unpersuaded. The Court of Appeals reasoned that existing statutory standards set numeric levels for DO, not nitrogen, which Ecology had never regulated until now.

Conclusion and Implications

This case shows that nondiscretionary, internal directives applied to a regulated community as a class may fall within the Administrative Procedure Act's strictures. Agencies should tread carefully when committing—internally or externally—to new policies that may ultimately affect the privileges or benefits of those it regulates. The Court of Appeals' opinion is available online at: https://www.courts.wa.gov/opinions/pdf/394948_pub.pdf

(Rebecca Andrews)

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