



WESTCAS 2018 Fall Conference

October 22-24, 2018

Phoenix, AZ

WESTCAS STATE REPORTS

STATE: Arizona

PREPARED AND PRESENTED BY: Justin Bern, City of Tempe

DATE: October 2018

KEY WATER QUALITY LEGISLATIVE & REGULATORY ACTIVITIES SINCE THE 2018 ANNUAL CONFERENCE

Water Infrastructure Finance Authority (WIFA) News

- *Redesign of the Technical Assistance Program for Water and Wastewater Infrastructure Projects*

The program awards funding for design and project development activities for water and wastewater capital improvement projects throughout the state. The program's redesign includes a higher per-project funding limit and expanded project support. Beginning in July 2018, the amount awarded to selected applicants increased from a maximum of \$35,000 to a maximum of \$50,000 per qualifying project. In addition, technical assistance funding will coincide with the application and approval of a WIFA construction loan, intended to ensure that infrastructure projects are able to move forward through construction following the planning, design and environmental review phases. WIFA will manage all available funding sources to provide the best possible funding package. Two types of technical assistance will be available: Project Design and Support for Federal Requirements. The Project Design funds will help cover the cost of designing a water or wastewater project and are intended for communities who are in the planning stage of construction. The Support for Federal Requirements funds will help cover the cost of required project development activities necessary for some projects to move forward with construction. In total for fiscal year 2019, \$300,000 will be available for drinking water projects and \$150,000 for wastewater/stormwater projects.

- ***Town of Marana Neighborhood Wastewater Improvement Loan for nearly \$1.5Million Closing***

The Water Infrastructure Finance Authority of Arizona (WIFA) has closed a low-interest \$1,481,990 loan with the Town of Marana. The loan will fund a project associated with the Adonis Neighborhood, allowing the 142-home community to connect to the Town of Marana's modernized sewer system. The WIFA loan closed with a Board-approved 50 percent forgivable principal, which will reduce the overall cost to the Town. The remaining 50 percent of the loan has a 2.508 percent interest rate, saving the Town of Marana approximately \$1 million over the life of the loan. Adonis' nearly 50-year old sewer system has been a topic of concern for the residents of the community and environmental officials for several years. As it currently stands, the sewage flows into two over-capacity lagoons, running the risk of overflowing in wet weather, potentially causing an environmental and health hazard. The WIFA funds will be used by the Town of Marana to design and construct a new lift station and force main to convey sewage from the Adonis collection system to the existing Town of Marana municipal system. The sewage from the neighborhood will be treated at the recently completed Marana Water Reclamation Facility to the highest quality, allowing the Town to reuse the water in various ways.

PROPOSED RULEMAKING TO AMEND THE PINAL AMA ASSURED WATER SUPPLY RULES

On August 17, 2018, the Department filed a Notice of Proposed Rulemaking with the Office of the Secretary of State to amend the Pinal Active Management Area (AMA) Assured Water Supply (AWS) Rules. This rulemaking: (1) modifies the method of calculating extinguishment credits in the Pinal AMA for new certificates of AWS, (2) limits the amount of groundwater that may be made consistent with the Pinal AMA management goal with the use of extinguishment credits for new certificates of AWS, and (3) eliminates the groundwater allowance for new certificates of AWS. The rule changes related to extinguishment credits are designed to eliminate the concerns of Pinal AMA Irrigation Grandfathered Right (IGFR) holders that the current rules may result in IGFR holders prematurely extinguishing their grandfathered groundwater rights. The rule changes may also reduce the amount of future unreplenished groundwater use by new subdivisions.

ADEQ State Survey, Testing and Report of Water Systems that found PFOS/PFOA during UCMR3 Sampling

ADEQ contacted water systems to conduct screening for PFOS/PFOA at some sources with detects within those systems even if they tested below the new health advisory level. ADEQ sent the Drinking Water Section Manager to the PFOS/PFOA Leadership Summit in Washington, DC, to represent the Department, Arizona water systems and Region 9. ADEQ sought additional comments, suggestions, challenges, or any other information from the regulated community that they could take on behalf of the water systems to the Leadership Summit in DC. Because of this close collaboration and study, the agency will develop a comprehensive PFOS/PFOA report that is set to release for public consumption at the beginning of November 2018.

Arizona Surface Water Permits and Programs in Process

ADEQ permits and programs under review and currently in progress and at various stages of the process:

- Multi Sector General Permit – Informal stakeholder meeting held and feedback to ADEQ requested
- Construction General Permit – Administratively continue permit as of June 2, 2018
- Phase I General and Individual MS4 Permits – Most Phase I Individual permits are expired, and owners are operating under administratively continued permits.
- Pesticide General Permit – Currently being drafted. Informal stakeholder meetings were held last year.
- 404 Program Assumption

Arizona Surface Water Quality Standards Triennial Review Stakeholder Process Update –

The Arizona Department of Environmental Quality (ADEQ) Water Quality Division started the stakeholder engagement process in June of 2017. As a result of the process, the agency developed independent workgroups with the goal of addressing key issues and producing final recommendations for consideration during the drafting on the surface water quality standards

Use this link: <http://azdeq.gov/node/3933> to view all of the stakeholder proceedings including the minutes and recordings from each meeting and each of the final workgroup recommendations for each topic. ADEQ closed the informal stakeholder review process at the end of May 2018 and published the draft standards in August 2018 and requested written comment returned by September 28, 2018. The Final 2018 Surface Water Quality Standards should be issued soon.

STATE: California

PREPARED AND PRESENTED BY: Matthew Porras

Date: October 2018

California WaterFix

Water from California's State Water Project (SWP) flows through the Sacramento San Joaquin Delta to supply water to California's Bay Area, San Joaquin Valley, Central Coast, and Southern California. Twenty-seven SWP contractors rely on the Department of Water Resources (DWR) to deliver water from the SWP. California's state Legislature recognizes the current water delivery system in the Delta, with its 700 mile web of waterways, sloughs, canals, and islands, supported by about 1,100 miles of earthen levees, is unsustainable. Threats of earthquakes, floods, subsidence, climate change, rising sea levels, and increasing regulatory constraints on water operations, as well as other risks and uncertainties in the Delta, are contributing to a decline in water supply reliability and a decline in ecosystem health.

The California WaterFix is a comprehensive solution proposed by state and federal agencies to ensure California has a reliable water supply for many years to come. It modernizes the decades-old delivery system through the building of three new intakes in the northern Delta away from endangered species habitats, along with two underground tunnels to carry water to the existing aqueduct system in the southern Delta. Two 40-foot wide tunnels located 150 feet below ground will carry diverted surface water by gravity, under the Delta, to pumping facilities south of the estuary. Water would be lifted into canals that flow several hundred miles through the state as far south as San Diego.

Recent updates:

- April 10, 2018 - The Metropolitan Water District Board of Directors voted 61 percent to 39 percent to provide additional financing necessary to allow for the construction of the full California WaterFix project.
- May 8, 2018 - The Santa Clara Valley Water District Board of Directors voted 4 to 3 to participate fully in California WaterFix.
- May 11, 2018 - DWR entered into a Joint Exercise of Powers Agreement with the Delta Conveyance Design and Construction Authority (DCA), forming a partnership for the design and construction of California WaterFix. The newly established [Delta Conveyance Office \(DCO\)](#) within DWR will provide oversight for the project. The DCA, a public agency composed of local public water agencies who are investing in California WaterFix, will be responsible for the design, construction, and delivery of the project. DWR will own and operate the project as part of the SWP once construction is complete.
- May 17, 2018 - The DCA held its initial Board Meeting on May 17, 2018. At the inaugural meeting, the DCA Board approved and signed the Joint Exercise of Powers Agreement.
- July 17, 2018 – DWR published the draft supplemental environmental impact report/environmental impact statement (EIR/EIS) for public review with the proposed changes to the facilities in compliance with CEQA. The Bureau of Reclamation will release the draft separately in compliance with National Environmental Policy Act (NEPA).
- July 27, 2018 – The Delta Reform Act, implemented by the DSC, requires a project to certify that the proposed actions in the Delta are consistent with the co-equal goals in the Delta Reform Act and all applicable Delta Plan policies. The final Certification of Consistency for California WaterFix has been submitted.
- September 20, 2018 - The WaterFix Benefit-Cost Analysis released by DWR finds that the investment in the WaterFix results in positive net benefits for the SWP contractors. The analysis concludes that the WaterFix benefits to SWP urban agencies could see about \$3.1 billion in net benefits. SWP agricultural agencies could see about \$400 million in net benefits.
- September 21, 2018 – the Bureau of Reclamation's issuance of the California WaterFix draft EIR/EIS is available for public review and closes on November 5, 2018.

For more information on Cal WaterFix including fact sheets, timelines, and maps visit <https://www.californiawaterfix.com/>.

Long-Term Conservation Bills – Senate Bill 606 (Hertzberg) and Assembly Bill 1668 (Friedman)

On May 31, 2018, Governor Jerry Brown signed two long-term conservation bills, Assembly Bill (AB) 1668 and Senate Bill (SB) 606, creating a new structure for water suppliers to develop water efficiency strategies in California.

AB 1668 requires the State Water Resources Control Board (State Water Board) and the California Department of Water Resources (DWR) to adopt water efficiency regulations, outlines reporting requirements for water suppliers, and specifies penalties for violations. AB 1668 includes the following key provisions:

- Establishes water use objectives, standards, and reporting requirements for indoor and outdoor residential water use, commercial, industrial, and institutional (CII) landscape areas, water losses, and other unique local uses.
- Revises the Agricultural Water Management Planning Act to increase the efficiency of agricultural water use.
- Requires DWR, the State Water Board, and other relevant stakeholders to identify small water suppliers and rural communities that may be at risk of drought and water shortage vulnerability and provide recommendations for drought planning.

SB 606 requires the State Water Board and DWR to adopt water efficiency regulations, outlines requirements for urban water suppliers, and specifies penalties for violations. The bill contains distinct provisions on water shortage planning and water loss reporting for urban wholesale water suppliers and establishes a bonus incentive for potable reuse water. SB 606 includes the following key provisions:

- Establishes urban water use objectives and reporting requirements for urban water suppliers by requiring an urban water supplier to calculate an aggregate urban water use objective.
- Substantially revises the requirements under the Urban Water Management Planning Act. Specifically, requires urban water suppliers to conduct annual drought risk assessments and to submit an annual report to DWR.
- Requires the adoption of a water shortage contingency plan, which must include certain elements, annual drought risk assessment procedures, and standard water shortage levels.

The pair of bills will require urban retail water suppliers to develop annual urban water use objectives based on a formula including an indoor residential water use efficiency standard, an outdoor landscape standard based on local conditions, and a leak loss standard, as well as other components. DWR and the State Board will be developing guidelines and methodologies on how to calculate urban water use objectives by October 2021 through a public process. The indoor residential standard was set by the Legislature and changes over time:

- 55 gallons per capita per day (GPCD) until January 1, 2025;
- 52.5 GPCD between January 2, 2025, and January 1, 2030; and
- 50 GPCD after January 1, 2030.

Urban retail water suppliers will be required to implement performance measures to increase water use efficiency among their commercial, industrial, and institutional consumers (CII) by educating those users regarding best management practices or conducting water use audits.

The SWRCB Adopts Open Data Resolution

On July 10, 2018, the SWRCB adopted a resolution on open data principles with the focus of providing broader access to the data used to make local, regional, and statewide water management and regulatory decisions in California. The goal of the resolution is to make data easily accessible and understandable to assist the State Water Board and Regional Water Board in making transparent decisions.

For more information on how the State Water Boards use data, visit the Data and Databases webpage here:

https://www.waterboards.ca.gov/resources/data_databases/

Guidelines for Testing and Reporting on PFOA and PFOS in Drinking Water

On July 13, 2018, the State Water Resources Control Board (SWRCB) established new drinking water guidelines for local water agencies to follow when detecting and reporting the presence of contaminants that were once used in firefighting foams and grease/stain resistant coatings in consumer products. The SWRCB Division of Drinking Water (DDW) set interim notification levels for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as follows:

- PFOA – Notification Levels of 14 parts per trillion (ppt)
- PFOS – Notification Levels of 13 ppt

The establishment of a notification level may be the initial step in the process of adopting a formal state regulatory standard. In addition to the notification levels, the guidelines include an interim Response Level of 70 ppt for the total combined concentration of PFOA and PFOS. If the Response Level is exceeded in drinking water, DDW recommends that the water agency remove the source from service.

For more information visit: https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/PFOA_PFOS.html

Proposed Amendment to the Recycled Water Policy

On May 9, 2018, the State Water Board announced that the Proposed Amendment to the Recycled Water Policy was available for public comment. California’s Recycled Water Policy, which includes a “Mandate for the Use of Recycled Water,” was adopted in 2009 and amended in 2013. In 2014, California adopted indirect potable reuse rules that provide detailed criteria for treatment processes, contaminants to test for, and how long treated water must remain underground.

State Water Board staff accepted written comments on the proposed amendment to the Policy for Water Quality Control for Recycled Water and the Draft Staff Report, including the Draft Substitute Environmental Documentation until June 26, 2018. The State Board will review comments received and prepare responses to the comments. In November 2018, the revised policy will be published, one month before the Dec 11, 2018 Board meeting for consideration and possible action.

If adopted, the proposed amendments would:

- Remove statewide mandates for the use of recycled water but retain the goals.
- Add a narrative goal to minimize the direct discharge of treated municipal wastewater to enclosed bays, estuaries and coastal lagoons, and ocean waters.
- Require recycled water producers to report recycled water use data annually.
- Require municipal wastewater treatment facilities to report monthly influent, treatment level, and volume of treated wastewater discharged.
- Clarify the requirement to comply with Water Code section 1211 (wastewater change petitions).
- Require regional water boards to identify groundwater basins where salt and nutrient management plans (SNMPs) have not yet been developed but are still needed to achieve water quality objectives for salts and nutrients.
- Clarify the process for regional water boards to approve stakeholder-developed SNMPs.
- Require regional water boards to evaluate data from SNMPs periodically to determine whether updates are warranted.
- Remove monitoring for priority pollutants in recycled water used for landscape irrigation.
- Clarify the permitting and antidegradation analysis required for non-potable recycled water projects, groundwater recharge projects, and reservoir water augmentation projects.
- Provide permitting criteria intended to aid in compliance with Resolution No. 68-16 (the “Antidegradation Policy”) for eligible non-potable recycled water projects.
- Update the monitoring requirements for CECs for recycled water used for groundwater recharge and reservoir water augmentation, including adding bioanalytical screening using estrogen receptor-alpha and aryl hydrocarbon receptor.
- Require regional water boards to evaluate, and if necessary, update recycled water permits for consistency with applicable regulations, plans, and policies.
- Terminate coverage under existing regional water board general orders for non-potable recycled water use and encourage enrollment under statewide water reclamation requirements.

On March 6, 2018, the State Water Board adopted regulations setting requirements for the quality of treated recycled water that can be added to a surface water reservoir that is used as source of drinking water. The regulations also specify the percentage of recycled water that can be added and how long it must reside there before being treated again at a drinking water treatment facility. The State Water Board is also working on regulations for direct potable reuse that are expected by 2023.

Sustainable Groundwater Management Act

Signed into law by Governor Edmund G. Brown Jr. in 2014, SGMA is landmark legislation that empowers local agencies to manage groundwater resources sustainably. SGMA requires governments and water agencies of high and medium priority basins to halt overdraft and bring groundwater basins into balanced levels of pumping and recharge. Under SGMA, these basins should reach sustainability within 20 years of implementing their sustainability plans. For critically over-drafted basins, that will be 2040. For the remaining high and medium priority basins, the deadline is 2042. In areas where groundwater users and local agencies are unable or unwilling to sustainably manage their groundwater, SGMA authorizes State Water Board intervention. The long-term planning required by SGMA is intended to provide a buffer against drought and climate change and contribute to reliable water supplies regardless of weather patterns in the state.

Recent updates:

- On May 18, 2018, the California Department of Water Resources (DWR) released a draft prioritization of groundwater basins. The 2018 SGMA Basin Prioritization is scheduled to be finalized by mid-November after a public comment period that ran through August 20.
- A second round of Basin Boundary Modifications opened in January and closed on September 28, 2018. DWR will consider modification requests and will develop draft recommendations in winter 2018-2019.
- In coordination with this effort, DWR plans to finalize the 2018 SGMA Basin Prioritization results in February 2019 for those basins not affected by the 2018 Basin Boundary Modification process. The priority of basins with proposed boundary modifications will be finalized in May 2019, after the 2018 Basin Boundary Modification process is complete and after any new boundaries are defined.
- DWR comments on Alternative GSPs are expected in winter 2018-2019.

1,2,3-Trichloropropane Drinking Water Standard

On July 18, 2017, the State Water Board adopted a drinking water standard at 5 parts per trillion (ppt) for 1,2,3-Trichloropropane in tap water. The manufactured chemical, used historically in industrial cleaning solvents and some soil fumigant pesticides, is a recognized carcinogen that may cause cancer after long-term exposure. Commonly known as 1,2,3-TCP, it has been found in groundwater sources, primarily in California's Central Valley. There is currently no Federal MCL for 1,2,3-TCP.

Following approval by the Office of Administrative Law (OAL), on December 14, 2018, the new regulation became effective for enforcement on January 1, 2018. Public water systems statewide began quarterly sampling for 1,2,3-TCP in January 2018. Systems will be in or out of compliance with the new standard based on the average of four quarters of sampling. If a water system's four-quarter average is above the 5 ppt standard, it must publicly notify its customers of the violation. The State Water Quality Control Board (SWQCB) will issue compliance orders for public water systems found in violation.

Based on 2015 data, the Division of Drinking Water has estimated that 103 water systems serving approximately 920,000 Californians have detected 1,2,3-TCP above 5 ppt in at least one drinking water source. Communities in several counties within the Central Valley are particularly impacted due to their reliance on groundwater and past use of pesticides containing 1,2,3-TCP in many agricultural areas. Public water systems are pursuing lawsuits against Shell and Dow, producers of the pesticide found to be the source of 123-TCP in some agricultural areas of the State, to fund treatment systems.

Mandatory Lead Sampling Program for Public Schools

The State Water Resources Control Board notified community water systems statewide on January 16, 2018, that they are now required to complete lead sampling on the drinking water supplies of public schools built before 2010. This new requirement took effect January 1, 2018, when AB 746 became law.

Community water systems are required to sample for lead in drinking water at public, K-12 schools and day care and preschools on public school properties. Water systems must complete this mandatory sampling by July 1, 2019. Water systems that fail to comply with the law may face enforcement action from the Division of Drinking Water. Water systems will conduct sampling at drinking fountains and faucets used for consumption and preparing food. A water system must report the testing results within two business days if any samples show lead levels above 15 parts per billion (ppb). Water systems have 10 business days to report results if samples show lead levels less than, or equal to, 15 ppb.

If a school's lead level exceeds 15 ppb, then the water system is required to sample water entering the school to help determine the possible source of lead. The school must also take several actions, including shutting down all fountains and faucets with high lead levels, providing potable drinking water until the situation is resolved, and notifying parents and guardians of students. Additional testing may be required to determine if all or just some of the school's fountains and faucets are required to be shut down. Public schools that requested and received sampling from their water systems under the voluntary program have met the requirements of AB 746 and do not need to be sampled again.

Standards for Cannabis Cultivation

On October 17, 2017, the State Water Resources Control Board (SWRCB) adopted a new statewide policy establishing strict environmental standards for cannabis cultivation in order to protect water flows and water quality in California's rivers and streams.

The policy applies to cannabis cultivation and is specifically designed to address Proposition 215, the Compassionate Use Act, which established the medical cannabis industry, and Proposition 64, the Adult Use of Marijuana Act, which legalized recreational cannabis cultivation, and possession and use of limited amounts of cannabis by adults over 21 years of age. The policy does not apply to personal cultivation for recreational use.

The new Cannabis Cultivation Policy establishes statewide requirements that will be implemented through a water quality permit known as the Cannabis General Order and as conditions for cannabis-related water rights referred to as Cannabis Small Irrigation Use Registrations. The policy protects California's waters from cannabis-related waste discharges, establishes protections for riparian areas and wetlands, and protects stream flows.

Three primary updates to the policy are proposed and include tribal buffers, requirements for conditionally exempt indoor cultivation sites, and onstream reservoirs. The SWRCB is accepting public comments on the proposed updates to the Cannabis Policy, Staff Report, and Cannabis Cultivation General Order until November 27, 2018.

Draft updates to the Cannabis Policy, Staff Report, and Cannabis Cultivation General Order are available at: <http://www.waterboards.ca.gov/cannabis/>.

Statewide Toxicity Provisions

The State Water Resources Control Board will propose the Establishment of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California and Toxicity Provisions. The Provisions would establish numeric water quality objectives for both acute and chronic toxicity and establish a program of implementation to control toxicity. The Provisions would replace the State Water Resources Control Board's previous proposal to control toxicity, the Draft Toxicity Policy. The next draft State Toxicity Plan is tentatively scheduled to be released for public comment on October 19, 2018.

The new statistical method that will be required by the State Toxicity Plan, based on the preliminary draft State Toxicity Plan released in April 2017, is the Test of Significant Toxicity (TST). This test is already required by some Regional Water Boards.

The Southern California Alliance of Publicly Owned Treatment Works (SCAP) is arguing against the legality of the TST test method and the test method being written into NPDES permits. The TST test method is concerning because it has a big burden on agencies and it can lead to false positives. When toxicity is found, even if false, the agency has to investigate what is causing the toxicity by performing costly activities such as Accelerated Monitoring, Toxicity Reduction Evaluations (TRE), and Toxicity Identification Evaluations (TIE). False positives can also lead to permit violations or fines for the agency.

Safe and Affordable Drinking Water Act/ Legislation to Implement a Water Tax

SB 623 was introduced to establish a Safe and Affordable Drinking Water Fund within the State Treasury that will be continuously appropriated to the State Water Resources Control Board to address safe drinking water and affordability issues in areas where systems fail to provide safe and reliable drinking water. Revenues for the Safe and Affordable Drinking Water Fund would come from four sources:

- Fertilizer fee
- Dairy fee
- Confined animal fee – excluding dairies
- Water tax based on meter size

Raw water, recycled water, and meters used exclusively for fire flow would be exempted from the water tax.

SB 623 failed passage at the conclusion of the 2017 legislative session, however at the start of the 2018 session SB 623 language was incorporated in a budget trailer bill that was introduced in February 2018. The Assembly Budget Subcommittee Number 3 passed the Administrations version of the budget trailer bill and then later rescinded this action, while the Senate Budget Subcommittee Number 2 approved action to fund drinking water needs initially through the State General Fund and Proposition 2 Rainy Day Funds in order to better define the scope of the funding need.

Due to the division in proposed funding efforts the Safe and Affordable Drinking Water Act Budget Trailer Bill was sent to Conference Committee, where the Conference Committee declined action to implement the Safe and Affordable Drinking Water Act and the related water tax. The Budget Conference Committee did allocate \$28.5 million to implement clean drinking water objectives. The Department of Finance and the Governor's office have committed to continue discussions to long term funding for the Safe and Affordable Drinking Water Fund throughout the summer.

Governor Brown Acts on Key Bills of Interest: Sunday September 30, 2018, marked the deadline for Governor Brown's final bill signing session where in total the Governor acted upon 1,217 bills; 201 of which he vetoed. This veto total represents the greatest number of bills vetoed; however, the Governor also considered nearly 100 bills more than he has in the past. This increase is largely due to the fact that the number of bills that individual legislators could introduce was increased for the 2018 legislative session. The following outlines the final results of some of water agency priority bills:

- AB 2447 (Reyes) Environmental Quality Act: Land Use: Justice: A broad coalition of associations voiced considerable concern over AB 2447, a bill that was ultimately vetoed by the Governor. AB 2447 sought to vastly expand the public notification and public meeting processes under California Environmental Quality Act for projects located within a specific distance of a disadvantaged community. This bill would have significantly increased the cost and opportunities to be deemed in noncompliance due to a number of technical inconsistencies within the bill. Governor Brown ultimately sided with opponents of the bill (including water agencies) and issues a veto on September 30, 2018.
- AB 2501 (Chu) Drinking Water State Administrators: Service Extension: AB 2501 was signed into law and will expand the ability of the State Water Resources Control Board (SWRCB) to force consolidations of failing water systems with a larger water provider to now address state small water systems and individual residential wells; and, the bill requires an administrator, who is appointed to take over a failing water system, to develop reporting procedures back to the SWRCB on whether the water rates have resulted in significantly higher rates and whether those rates are affordable. EMWD had concerns about AB 2501. AB 2501 was amended the last week of the Legislative session to include priorities for the Administration of which includes a requirement that payment for consolidation efforts may not include funding for streetlights, curbs, or other unrelated infrastructure; and, includes enhancements provisions of the SWRCB to force consolidations regardless of drought conditions.

- SB 966 (Wiener) Onsite Treated Nonpotable Water Systems: SB 966 was signed into law and requires the SWRCB to develop a risk-based water quality standard for on-site treated reuse of nonpotable water. Following the development of standards, a local jurisdiction would be able to develop a program, following consultation with a water or sewer provider that would allow for the local application of onsite treated nonpotable water systems. On August 23, 2018, an amendment was incorporated that required additional consideration and mitigation on the impacts to a system, facility, project, or receiving waters, which would occur before adopting a proposed ordinance.
- SB 998 (Dodd) Discontinuation of Residential Water Service: SB 998, which water agencies vigorously opposed throughout the legislative session, was signed into law by the Governor and it directly impacts the ability of a water provider to disconnect residential water service for the failure to pay. Water agencies have a long history of working with customers to ensure payment flexibility, yet this vastly limits flexibility.
- SB 1215 (Hertzberg) Provision of Sewer Service: Disadvantaged Communities: SB 1215, which many wastewater agencies expressed concern over, was signed into law by the Governor. SB 1215 expands the ability of the SWRCB to order a sewer provider to provide sewer service to a disadvantaged community with failing sewer or septic service. Additionally, SB 1215 requires the regional water quality control board to develop a process where members of a disadvantaged community may petition for sewer service.
- SB 1422 (Portantino) Safe Drinking Water Act: Microplastics: SB 1422, which was signed into law, was vigorously opposed by a broad coalition of water providers as this bill requires rules to be adopted for the testing of microplastics in a manner that circumvents the Administrative Procedures Act (APA) and would instead adopt rules through a policy handbook, absent the necessary research and availability of approved labs and monitoring procedures. SB 1422 further requires public disclosure of the test results without context – as standards haven't been adopted – under which the public would be able to determine the significance of the contaminants if it is present.

STATE: Colorado

PREPARED BY: Scott C. Miller, Esq., Patrick, Miller & Noto, P.C.

DATE: October 2018

Litigation:

Colorado Supreme Court Rules that Right to Return Flows Not in Plans for Augmentation, *Coors Brewing Co. v. City of Golden*, 2018 CO 63: Coors has been operating three augmentation plans to replace water diverted for its brewery in Golden. In normal to wet years, there is often excess water that returns to Clear Creek as return flows – Coors has leased this water to downstream users since the 1970s, with the approval of the State Engineer. In 2014, the State Engineer changed course and denied a planned lease, saying that the decreed uses of the augmentation plan did not allow for reuse of that water by Coors. Coors then challenged this decision in water court arguing that replacement water from an augmentation plan should be treated the same as foreign water – the user may use and reuse that water to extinction. The water court found for the State Engineer, so Coors then attempted to amend the plan for augmentation to include use and reuse. That application was dismissed by the water court, leading to an appeal to the Colorado Supreme Court. The Supreme Court again found for the State Engineer, holding that replacement water from an augmentation plan is to be treated like any other diversion – it may be used once, for its decreed beneficial use, and then any excess water must be allowed to runoff as return flows. Additionally, the right to use and reuse the return flows may not be granted through simply amending a plan for augmentation – if Coors wishes to continue its leasing program, it will have to file a new application, and those return flows would then be a junior water right.

Tenth Circuit hears oral arguments over planned reservoir expansion, *Audubon Society of Greater Denver v. US Army Corps of Engineers*, 18-1004: The Tenth Circuit Court of Appeals heard oral arguments on September 23, 2018 to determine whether the Corps acted correctly in applying Clean Water Act standards to a plan to expand Chatfield Reservoir. The reservoir, and its accompanying Chatfield State Park is located south of Denver and is home to 15 protected species of birds as well as the threatened Preble’s jumping mouse. The reservoir has a dual mandate as a reservoir and nature reservoir, and the Corps is in the middle of a \$180 million plan to expand the lake by 587 acres. In planning this project, the Corps undertook NEPA review for the entire plan, but CWA review was only used to assess the alternative plans for environmental litigation. The Audubon Society sued in 2014 claiming that 1) the Corps failed to choose a less environmentally damaging alternative, and 2) a CWA assessment should have been done for the entire project. The Corps admitted that the CWA was only used to assess discharge from mitigation efforts, but that it was a correct reading of the law – a view which a federal district court agreed with in December 2017. The Audubon Society appealed, and the issue now awaiting ruling the Tenth Circuit is: does the term “project” under the CWA mean full the construction, or can it mean parts of an overall project?

Water Use:

Western Slope continues risk study without State funding: The Colorado River Water Conservation District and Southwestern Water Conservation District recently announced plans to continue with the third phase of a water quantity risk study, even after the Colorado Water Conservation Board decided it would not award financial support. The CWCB gave the two western Colorado district’s \$72,000 for the first two phases of a study that found an additional 1-2 million acre-feet of restrictions will be needed to bolster Lake Powell. Several Front Range water entities have opposed this study, claiming this is a state-wide issue and therefore should be studied by the entire state, not just the western slope.

The western slope currently diverts approximately 1.3 million acre-feet per year, and an additional 541,000 acre-feet of western slope water is piped to the Front Range via transmountain diversions. The Colorado River District claimed the Phase II questions were geared to avoid Front Range opposition and still secure state funding. In an effort to avoid conflict, the two western slope districts are conducting Phase III without requesting CWCB funding. The issue of water restrictions is always contentious, and the west slope / east slope divide in Colorado only amplifies those tensions. The questions for Phase III are: 1) if water use was restricted 10% through a voluntary and compensated demand management program, would that be enough to keep Powell full and still deliver on compact obligations and 2) if so, how much cutback should come from each of Colorado's seven basins? Regardless of Front Range opposition, the Colorado River District noted that it was trying for an "open and transparent modeling process" to work through the issues.

Colorado River District GM issues manifesto on water-use reductions: Colorado River Water Conservation District General Manager Andy Mueller gave a talk at a September 19 River District seminar in which he outlined six principles to reduce Upper Basin (specifically Colorado) usage to avoid the threat of a compact call on the Colorado River. The Pilot System Conservation Program managed by the Bureau of Reclamation allows the Upper Basin states (CO, UT, WY) to bank water in Lake Powell through a system of voluntary, compensated demand management programs. These programs, which pay farmers to not divert, form the backbone of water-use reduction manifesto. Along those lines, Mueller stressed that water stored in Powell from those programs should not be subject to the interim guidelines "balancing program" between Mead and Powell. The goal of the programs is to raise (or at least sustain) the levels on Powell to protect the Upper Basin from a compact call. If that excess water is allowed to flow into Mead, where it is then used by the Lower Basin, the lower states would be able to keep "sucking too much water down the river." In an effort to avoid a situation of mandatory curtailment, any demand management programs must be "voluntary, temporary, and compensated," and also must reflect proportionate contributions from Colorado, Wyoming, and Utah. The final three aspects of the plan involve protecting individual Colorado water rights: Mueller said there must be no injury to any rights, no disproportionate impact to any basin or region in Colorado, and any program must be consistent with the 2015 Colorado Water Plan, especially as it relates to transmountain diversions.

Colorado Water Conservation Board discusses future potential for mandatory use restrictions: Following the trend of water restriction discussions, the CWCB's September 19 meeting included talks about the shortcomings of voluntary demand management programs and contingency plans for curtailment if voluntary programs are unsuccessful. At the end of another dry year, Denver Water CEP Jim Lochhead said, "with the repeat of historic hydrology beginning in the year 2000, Lake Powell will be dry, and when I say dry I mean empty, within about three years." He went on to say that he does not want and is not asking for mandatory curtailments, but is advocating for a contingency plan to be put in place for a worse-case scenario. Representatives from Northern Water (the other main supplier on the Front Range) noted that voluntary, compensated demand management programs only work as long as there is someone to pay the bills – when the money runs out, mandatory curtailments will no longer be a question but a requirement. Western slope water entities expressed concern that, as the major water users in Colorado (because of irrigation) they will be forced to bear the brunt of any mandatory restrictions, and therefore fully support demand programs like those outlined in the Colorado River District's manifesto discussed above. Various groups tried to allay those concerns, including Denver Water's desire that "the same rules apply to everyone." The CWCB's Interstate, Federal & Water Information section noted that they are not "assessing, pursuing, or recommending to the CWCB board any type of involuntary or anticipatory curtailment scenario."

Water Quality Issues:

Colorado Water Quality Control Division/Commission Regulation No. 82: Regulation 82, which governs federal 401 certifications, has been unchanged since 2003. Therefore, the Colorado Water Quality Control Commission is holding a series of public hearings on updates to the rule that will bring it in alignment with changes to Rule 401. A 401 water quality certification is required for projects that also require individual 404 dredge and fill permits from the Army Corps of Engineers. Proposed changes to Regulation 82 include updating the new 401 certification fees (at the federal and state level) and clarifying language to specify that potential water quality impacts must be addressed during both construction and operation of the project – applicants must include construction, long-term, and permanent impacts. The new Regulation 82 will also match the antidegradation language found in Regulation 31 (basic standards) and expand the definition of “project area” to include all river segments both impact and benefited by the project. Finally, Regulation 82 clarifies that the Water Quality Control Division cannot base its assessment on a prediction of future standards, nor can it reopen a certification if standards change.

EPA awards \$575k for wetlands health and water quality research: The EPA recently announced that it will award a total of \$575 thousand to two Colorado groups studying the health of wetlands and corresponding water quality. The Colorado Natural Heritage Society was awarded \$221,250 to survey and assess critical wetlands in the Roaring Fork watershed between Aspen and Glenwood Springs on Colorado’s western slope. The primary goal of that study is “to provide stakeholders, including private landowners, with scientifically valid data on the condition, rarity, location, acres, and types of wetland within the watershed.” The Colorado State University Natural Heritage Program was awarded also awarded \$221,250 for the fifth phase of its ongoing wetlands database in the Aurora watershed east of Denver. The database includes vegetation classification, floristic quality assessments, and general Colorado wetlands and stream restoration data. The CSU Natural Heritage Program was awarded an additional \$132,833 to assess critical urban wetlands in Aurora. That money will be used for field-based wetlands mapping and assessments including water quality.

Intense fire season impacts to Colorado rivers: Colorado is now on the tail end of the second worst fire season on record, with approximately 1,600 fires burning more than 500,000 acres across the state. Five out of the twenty largest first on record burned in 2018 including the 108,000 Spring Creek Fire in southwest Colorado that is the second largest ever. These fires, and the corresponding ash runoff have degraded water quality across the state, particularly in the extremely dry southwestern region. The 416 Fire, which burned 34,000 acres near Durango, resulted in ash runoff that turned the Animas River black. The Animas, turned orange only a few years ago from the Gold King mine accident, was filled with both suspended sediment and an overflow of nutrients that otherwise would have been consumed by living vegetation. The sediment and excess nutrients can lead to a quick and severe rise in the acidity of rivers, causing fish die off and algae blooms. The impacts from the fires were much more severe than that of the Gold King Mine spill, causing Colorado Parks and Wildlife to implement plans to try to rescue fish and move them to hatcheries until the water cleared. The impacts were magnified by near record low flows – the Animas peaked at 1,000 cfs in May of this year when normal flows should have been 4,700 cfs. No official population surveys have been conducted yet, but it is estimated that thousands of fish died and that all aquatic life is gone or dramatically depleted in the 126-mile stretch of river from its headwaters in Silverton to the confluence with the San Juan River in Farmington, New Mexico.

1 The author wishes to acknowledge the research and drafting of John Sittler, associate for Patrick, Miller & Noto, PC, in support of this State Report.

STATE: New Mexico

PREPARED BY: Jane DeRose-Bamman, DeRose-Bamman Consulting

DATE: October 2018

Revisions to Ground and Surface Water Protection Rules

The NM Water Quality Control Commission (WQCC) approved revisions to the Ground and Surface Water Protection Rules (20.6.2. NMAC) in September 2018. This rule covers ground water quality standards, permitting requirements for discharges to groundwater, certification procedures for surface water discharge permits, abatement requirements, and underground injection control requirements. Revisions include changing most of the ground water quality standards to match Safe Drinking Water Maximum Contaminant Levels (MCLs) (numeric ground water standards for Chromium, Fluoride, and Total Xylenes were not changed and remain more stringent), giving more prominence to language regarding “narrative standards”, adopting language to control vapor intrusion for abatement projects, allowing the state to issue variances for ground water permitting requirements for more than five (5) years and eliminating the exemption for permitting if a discharge meets groundwater standards through treatment or blending. An environmental group has challenged the change to allow variances to last more than five (5) years. The most contentious issues from the municipal perspective were removing two exemptions in the rule:

1. the proposed removal of an exemption requiring a discharger to obtain a permit when treatment is needed to meet all quality standards. (20.6.2.3105.A NMAC) In the past, the New Mexico Environment Department had exempted municipal discharges from the permitting requirement when the discharge met standards after treatment or blending. No change was made to that language during that proceeding.
2. the proposal to require a permit for aquifer storage and recovery projects. (20.6.2.5006 NMAC) NMED had previously exempted two pilot ASR projects from needing a ground water discharge permit. The proposed rule change was contrary to previous approvals. The WQCC approved removing the exemption – so now all ASR projects (even those injecting drinking water) must obtain a groundwater discharge permit to operate.

NMED has been regulating reclaimed water discharges using policy instead of rules for years. This circumvents statutory requirements – as the policy was not subject to public hearing. NMED has promised to start the rulemaking process within the next year. Stakeholders plan to seek general permits or a revision to this recent change to 20.6.2.5006 NMAC to address such projects.

Texas v. New Mexico Lower Rio Grande Valley

The 1938 Rio Grande Compact and other “Downstream Compacts” allocated the Rio Grande water among Colorado, New Mexico, Texas, and Mexico. Annually, New Mexico’s allocation is based on measurements at Otowi gage north of Santa Fe. New Mexico delivers Texas’ allocation of Rio Grande water to Elephant Butte Reservoir, about 90 miles north of the state line. Built by the U.S. Bureau of Reclamation over 100 years ago, Elephant Butte Dam holds back water for what’s called the Rio Grande Project—water the federal government must deliver to farmers in New Mexico and Texas, downstream cities, and Mexico.

More than 10 years ago, Texas alleged that by allowing southern New Mexico farmers to pump water from underground that is connected hydrologically to the river, New Mexico was reducing the amount of river water available to Texas. Texas filed suit that named Colorado and New Mexico as defendants. New Mexico filed a motion to dismiss the case, but in February 2017 the U.S. Supreme Court’s special master—appointed to research the issues and report to the court—recommended the court reject that motion and allow the case to proceed to the U.S. Supreme Court. The special master’s report also recommended that the Supreme Court hear claims by the federal government against New Mexico.

The U.S. government alleges that by allowing farmers to divert water from the river and pump it from below-ground, the state is illegally allowing people to either use water they're not supposed to or use more water than they're allowed. The U.S. also alleges that New Mexico's diversions have interfered with its contractual obligations to deliver water to downstream users, including Mexico.

During 2017, Amicus briefs were filed by the Albuquerque Bernalillo County Water Utility Authority, City of Las Cruces, New Mexico Pecan Growers, New Mexico State University, City of El Paso, and State of Kansas. Elephant Butte Irrigation District and El Paso County Water Improvement District #1 filed motions to intervene, which were denied. On October 10, New Mexico's motion to dismiss Texas's complaint was denied. Additional motions were filed.

The case was argued before the Supreme Court on January 8, 2018. The Supreme Court issued a unanimous opinion on March 5, 2018. Justice Gorsuch started out the opinion with a quote: "Will Rogers reportedly called the Rio Grande "the only river I ever saw that needed irrigation." In its long journey from the Colorado Rockies to the Gulf of Mexico, many and sometimes competing demands are made on the river's resources." However, in the end, the Court agreed to hear two exceptions to the report concerning the scope of the claims the U.S. government can assert in the matter; all other exceptions were overruled; and the case was remanded.

Texas winning and the settlements and appropriations of water which may be partially federalized are to be scheduled by 2020. A lot is in the air as to how and what southern NM Mesilla Valley (Las Cruces area) agriculture will look like but transfers, fallow fields, drip irrigation, growing houses, solar farms, and cannabis are all up for the current farmers next spin of the wheel of fortune.

STATE: Texas

PREPARED BY: Peggy Glass, Ph.D., Principal, Alan Plummer Associates, Inc.

DATE: October 2018

Texas regulatory affairs have been relatively quiet recently, except for individual permittees with challenging problems. However, some of the recent regulatory actions of note are as follows:

Triennial Review of Texas Surface Water Quality Standards: The proposed triennial revisions to the Texas Surface Water Quality Standards were adopted by the Texas Commission on Environmental Quality (TCEQ) on February 7, 2018 and submitted to EPA Region 6 for review and approval on February 27, 2018. The EPA 90-day review period ended before the end of May; but, as of September 26, 2018, the TCEQ has not been notified of any approvals, disapprovals, or requests for additional information. It can be noted that there are some standards adopted by TCEQ in 2000, 2010, and 2014 that are still under review by EPA.

Integrated Report and List of Impaired Waters prepared pursuant to Section 303(d) of the Clean Water Act-2018: TCEQ issued the draft 2016 (that is not a typo) 303 (d) list for review and comment on May 4, 2018. They have now started on the 2018 version in an effort to get back on schedule. On August 24, 2018, the Surface Water Quality Monitoring Guidance Advisory Work Group met to discuss any potential changes to how data is assessed to determine compliance with water quality standards. One topic of discussion was how to identify drought periods and how to assess data collected during those periods. Comments were invited, and the Texas Association of Clean Water Agencies, Water Environment Association of Texas, and WateReuse Texas submitted joint comments regarding assessments of dissolved salts, taking into consideration drought periods.

Nutrient Water Quality Standards: Nutrient water quality standards for 35 reservoirs that were adopted by TCEQ in 2010 were subsequently approved by EPA. Texas now has its first 303(d) listings for nutrients on the draft 2016 list. Two water bodies were listed: White River Lake and Lake Cypress Springs. Both listed as Category 5c, which signifies that additional data or information will be collected and/or evaluated for one or more parameters before a management strategy is selected.

Regulation of Dissolved Salts: Because an increasing number of permittees are being challenged to regulate dissolved salts in their discharge, the Texas Association of Clean Water Agencies and the Water Environment Association of Texas have formed a coalition to work with TCEQ to develop methods for establishing standards for dissolved salts and methods for determining whether Reasonable Potential exists that a water quality standard may be violated if the discharge is permitted; and, therefore, a permit limit or other regulatory measure should be imposed. This coalition has been expanded to include WateReuse.

The Texas TDS Coalition is working in coordination with the National Association of Clean Water Agencies (NACWA). Other NACWA members also have identified this as a high priority, national issue. As a result of meetings facilitated by NACWA, it is anticipated that the U.S. Environmental Protection Agency (EPA) Office of Research and Development will place increased emphasis in Fiscal Year 2019 on developing better methods to determine appropriate standards for dissolved salts for the protection of aquatic life. The TDS Coalition is continuing to stay in contact with EPA to determine if this comes to pass and what form it takes.

Changes to criteria and water quality standards may provide relief at some time in the future, but that will not happen soon. To address issues with the regulation of dissolved salts until then, the TDS Coalition is meeting with TCEQ to suggest changes to the procedures used to implement the standards. Concepts being discussed with the TCEQ include the following:

- Screening to determine Reasonable Potential
 - Standards for dissolved salts that apply to classified downstream waters would not be applied to unclassified tributaries
 - In mass balance calculations to project the concentration of dissolved salts that will be present below a proposed or expanded discharge, the median upstream flow would be used rather than the harmonic mean upstream flow.

- Exemptions
 - A specific incremental increase in Total Dissolved Solids (TDS) (300-400 mg/L probably) in the effluent of domestic discharges compared to the TDS in the water supply would be allowed without and would not trigger a permit limit.
 - Permit limits for dissolved salts would not be established if the effluent passes Whole Effluent Toxicity (WET) tests.
 - Permit limits for dissolved salts would not be imposed if there is no evidence of environmental harm or if there is net environmental benefit.

- The possibility of using permit provisions requiring Best Management Practices or Adaptive Management in lieu of numeric permit limits is being explored.

- The potential use of a Temporary Standard (the Texas version of the EPA variance provisions) is being explored for those cases when it appears that numeric limits should be established, but there is no feasible treatment process that will achieve the limits. Discussion includes when and how a Temporary Standard might be applied, as well as its advantages and limitations