



"The Voice of Water Quality in the Arid West"

WESTCAS 2019 Annual Conference

June 26-28, 2019 - San Diego, CA

State Reports

State: Arizona

Prepared and Presented By: Jason Bern, City of Tempe

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

Water Infrastructure Finance Authority (WIFA) News

- ***City of Flagstaff* – Awarded \$2.1M for the Red Gap Ranch Pipeline Feasibility Study**

The City of Flagstaff purchased Red Gap Ranch, located 35 miles east of Flagstaff, to secure additional groundwater supplies and to reduce the impact of pumping from its well fields. Currently, the city uses both surface water and groundwater to supply its customers. Surface water supplies have proven undependable and Flagstaff's two major well fields have experienced declining water levels. This WIFA loan funded pre-design work and engineering services to develop the conceptual design for the Red Gap Ranch water delivery pipeline, wells, raw water pipeline network, booster pump station(s) and reservoirs

- ***Eagletail Water Company, LLC* – Awarded \$174,000 for Storage Tank Replacement**

The Eagletail Water Company secured a WIFA loan to replace the existing 500,000-gallon storage tank, which was installed over forty-years prior and had been experiencing extended periods of leaking and rusting of the bottom. The WIFA funds provided for the design and construction of the new 250,000-gallon storage tank.

Source: <https://www.azwifa.gov/completed-projects/>

Legislative Recap

Key water quality laws and appropriations status during the First Regular Session of the 54th legislative session are highlighted below.

HB 2464: water infrastructure finance; municipal approval

Removes the requirement for cities under 150,000 people to seek voter approval of Water Infrastructure Finance Authority financed projects if the project is only financed using utility customer revenues.

HB 2747: General Appropriations Act; 2019-2020 (Water/Wastewater)

\$2,569,300 for the Nogales Wastewater Project – “The investment will help repair the International Outfall Interceptor to ensure that water flowing through it from Mexico into Arizona is treated and safe,” said Tamara Skinner, spokeswoman for the Governor’s Office, adding: “Arizona’s investment will be matched by funding from federal and private partners.”

\$1M each year in FYs 20-29 for deposit in the Non-native Vegetation Species Eradication Fund and an additional \$1M in FY20 for one-time funds for eradication of non-native vegetation

HB 2753: Environment; appropriation

The FY20 environment BRB establishes the Non-native Vegetation Species Eradication Fund to, among other objectives, provide cities and towns grants for local projects that remove non-native plant species to assist in water conservation, fire hazard mitigation and flood prevention. Section 132 of the general appropriations act appropriates \$1M to the fund each FY between FYs 20 through 29, with an additional \$1M appropriation in FY20. It also suspends the \$15M appropriation from the state general fund to the Water Quality Assurance Revolving Fund (WQARF). It appropriates in FY20 \$2.8M from the Vehicle Emissions Inspection Fund, \$2.6M from the Air Quality Fund, \$5M from the Underground Storage Tank Fund, \$1M from the Permit Administration Fund, and \$2.152M from the Recycling Fund to the WQARF, for a total of \$13,552,000. WQARF funding in FY20 includes \$2,000,000 of non-appropriated funds, for a combined total of \$15,552,000.

HB 2467 Committees: West Basin Water Users

Establishes the Mohave County West Basin Water Users Study Committee and the La Paz County West Basin Water Users Study Committee, each consisting of 11 members, including city and town elected officials as members of the committee, to study the rate of groundwater depletion in each of the basins and make recommendations to the Arizona Department of Water Resources, the governor and the legislature by December 31, 2021.

HB2405: Regulated Water Company

For a wastewater treatment facility or system or public water system that is regulated as a public service corporation by the Corporation Commission, the Department of Environmental Quality is authorized to make a written request to the Commission to take necessary corrective actions within 30 calendar days after the Dept either determines that the facility or system is out of compliance with an administrative order issued by the Dept for a violation, files a civil action against the owner or operator of the facility or system for a violation, and/or determines that an emergency exists with respect to the facility or system, and the Dept determines that the Commission taking necessary corrective actions would expedite the facility’s or system’s return to compliance.

SB 1544: Water Conservation; landscaping – Held in Senate

This bill would forbid the owner of a property or Homeowners Association from prohibiting the use of a water saving device or water conservation practice as part of a property contract or rental agreement.

ADEQ PFOA/PFOS State Survey Completed

ADEQ developed a PFOS/PFOA report that was released to the public (http://static.azdeq.gov/wqd/reports/pfoapfosepareport_final.pdf) in November 2018. They found that “out of over 1500 PWSs in Arizona, 68 were identified as having drinking water wells located near potential sources, and 109 wells met the selection criteria for sampling. Data showed 89 wells (81.7%) were non-detect, 14 wells (12.8%) were below the EPA Health Advisory and 6 wells (5.5%) were above the EPA Health Advisory. For those above the EPA Health Advisory, the data ranged from 72 to 166 ppt.”

And ADEQ is considering the following activities to address concerns about PFOA/PFOS in Arizona:

- Develop a strategy to help drinking water systems impacted by PFOA/PFOS contamination.
- Provide a summary of sampling results of PFOA/PFOS contamination to industrial, firefighting training facilities, manufacturing, airports and military sites near wells where these contaminants were detected.
- Participate in the potentially changing regulatory landscape for PFOA/PFOS and other Poly- and Perfluorinated compounds as additional information becomes available.

Surface Water Permitting - AZPDES

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

- Multi Sector General Permit 2019 – Effective January 1, 2019 – refile for new NOI between Jan 1 and Feb 28, 2020
- Construction General Permit –Public Notice Comment Closed and pending final permit issuance –
 - Developing a No Discharge Waiver option
- Phase I General and Individual MS4 Permits – Most Phase I Individual permits are expired, and owners are operating under administratively continued permits. Beginning stakeholder discussions for a general Phase I permit
- Pesticide General Permit – Currently being drafted but prioritized after stormwater permits
- 404 Program Assumption – “ADEQ has considered the possibility of assuming CWA 404 in the past based on stakeholder input. More recent interest in assumption of the program has been largely driven by ADEQ’s proven ability to improve permit processing times and a desire to align CWA programs across the state. ADEQ has demonstrated its process and customer service improvement capabilities over recent years and intends to incorporate these capabilities into the CWA 404 permitting process.” ADEQ held stakeholder meetings from June to December of 2018 but there has been no movement on the process since.

State: California

Prepared by Matthew Porras, Yucaipa Valley Water District

Presented By: Zoe Rodriguez del Rey, Coachella Valley Water District

Delta Conveyance (formerly 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 Delta Conveyance is a comprehensive solution proposed by state and federal agencies to ensure California has a reliable water supply for many years to come. It would modernize the decades-old delivery system through the building of new intakes in the northern Delta away from endangered species habitats, along with new conveyance to carry water to the existing aqueduct system in the southern Delta.

Recent updates:

- May 2, 2019 – As directed by the Governor, the State withdrew WaterFix approvals, and initiated planning and permitting for a smaller single tunnel. DWR is pursuing a new environmental review and planning process for a single tunnel solution to modernize the Delta conveyance.
- June 10, 2019 - DWR announced it will begin soil explorations in the Delta in June and July of 2019. This work will support and inform DWR's environmental review of water conveyance facilities as required by the California Environmental Quality Act (CEQA).

For more information on the Delta Conveyance visit <https://water.ca.gov/deltaconveyance>

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

On May 31, 2018, former 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.

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 Water Resources Control Board (State Water Board) will be developing guidelines and methodologies on how to calculate urban water use objectives by October 2021 through a public process.

On November 13, 2018, DWR and State Water Board released a final version of their summary document on the water conservation bills made into law in 2018. Entitled *Making Water Conservation a California Way of Life – Primer of 2018 Legislation on Water Conservation and Drought Planning, Senate Bill 606 (Hertzberg) and Assembly Bill 1668 (Friedman)*, the primer outlines the key authorities, requirements, timeline, roles, and responsibilities of State agencies, water suppliers, and other entities during implementation of actions described in the 2018 legislation.

For more information visit:

https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/california_statutes.html

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

On July 13, 2018, the State Water Board 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 State Water Board, 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.

State Water Board has begun a phased investigation of PFAS to systematically evaluate the potential presence of PFAS in waters of the state. On March 20, 2019, the State Water Board rolled out Phase 1 of its PFAS Phased Investigation Plan issuing Orders for information and investigation requiring source investigation and nearby drinking water wells sampling at:

- Airports that were identified as facilities that have accepted, stored, or used materials that may contain PFAS.
- Municipal Solid Waste Landfills.
- Drinking Water sources within a 1-mile radius of UCMR3 detections, plus adjacent small systems.

Each source well investigation phase lasts 1 year (quarterly sampling). The SWRCB plans to issue Orders under Phase 2 and 3 of the Plan this summer or fall which includes source investigation and nearby drinking water wells sampling at:

- Primary manufacturing facilities.
- Refineries, bulk terminals, & non-airport fire training areas.
- 2017-2018 urban wildfire areas.
- Secondary manufacturing sites where PFAS-containing materials were discharged into wastewater.
- Wastewater treatment & pre-treatment plants.

Sustainable Groundwater Management Act

The Sustainable Groundwater Management Act (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 3, 2019, DWR released the Draft SGM Grant Program Proposition 68 2019 Guidelines and Planning Grant - Round 3 Proposal Solicitation Package to conduct the third SGM Planning Grant solicitation in summer 2019 to make approximately \$47 million available for competitive grants. Grants will be announced in fall or winter of 2019.
- The Proposition 68 SGM Implementation Grant solicitation is anticipated to open in early 2020 with grants expected to be awarded by winter of 2020. At least \$88 million will be available for competitive grants for projects that address drought and groundwater investments.
- As of June 13th 2019, 137 Groundwater Sustainability Plan (GSP) Initial Notifications have been submitted and can be commented on at the SGMA portal.
- DWR decisions on submitted Alternatives expected by June 30, 2019.

State Wetland Definition and Procedures for Dischargers of Dredge or Fill Material

The State Water Board approved on April 2, 2019, a common definition for California wetlands and a regulatory program that amends and expands the permit requirements for the discharge of dredge or fill materials that impact or could impact state waters.

The State Wetland Definition and Procedures for Dischargers of Dredge or Fill Material to Waters of the State (Procedures) contains four elements: a wetland definition; a framework for determining if a wetland feature falls under state jurisdiction; wetland delineation procedures; and procedures for submittal, review, and approval of applications for dredge or fill activities. This includes applications for 401 Water Quality Certifications, Waste Discharge Requirements, and waivers of WDRs for dredge or fill activities.

California amended its own wetlands definition in order to maintain consistency statewide and protect against potential administrative and judicial changes to the federal definition, spurred by the release of the revised federal Waters of the United States (WOTUS) definition in December 2018 (published in the Federal Register on February 14, 2019), which the State Water Board believes could curtail regulatory protections for waters and wetlands handled under the federal Clean Water Act section 404 program. The Procedures will be incorporated as amendments to state water quality control plans and are intended to supersede any conflicting provisions in the Regional Water Quality Control Boards' (Regional Boards) water quality control plans and will apply to State and Regional Water Boards. The Procedures define wetlands as an area with continuous or recurrent saturation in the upper substrate, that supports anaerobic conditions in the upper substrate, and that is dominated by wetland vegetation or lacks vegetation. This definition therefore includes arid areas that would otherwise not be protected under federal law.

The Procedures go into effect nine months after the date of approval by the Office of Administrative Law, and will govern all applications for dredge or fill activities filed after that date.

Chromium VI MCL Economic Feasibility Analysis

On May 31, 2017, the Superior Court of Sacramento County issued a judgment invalidating the hexavalent chromium maximum contaminant level (MCL) for drinking water. The court's primary reason for finding the MCL invalid is that the California Department of Public Health (responsible at the time for the drinking water program) failed to properly consider the economic feasibility of complying with the MCL, one of the requirements in the Safe Drinking Water Act for adopting an MCL. The court also ordered the State Water Board to adopt a new MCL for hexavalent chromium. The development of the economic feasibility analysis and adoption of new MCL has been delayed. The State Water Board has directed the DDW to prioritize these two actions.

Statewide Toxicity Provisions

The State Water Board is developing statewide numeric water quality objectives for both acute and chronic toxicity and a program of implementation to control toxicity, which are collectively known as the Toxicity Provisions. The Provisions are expected to provide consistent protection of aquatic life beneficial uses in inland surface waters, enclosed bays, and estuaries throughout the state, and protect aquatic habitats and life from the effects of known and unknown toxicants.

The Draft Toxicity Provisions were released on October 19, 2019. The public comment period ran from October 19 to December 21, 2018. Among other things, the draft Toxicity Provisions proposes to change how toxicity is measured. The test would still be based on exposing organisms to effluent and observing endpoints, but the resulting data would be interpreted using a different statistical method. The new statistical method that will be required is the Test of Significant Toxicity (TST). Many have warned that the TST could lead to many more false positives for toxicity. Release of response to comments and State Water Board consideration is expected in September and October, 2019, respectively.

Resolution on Safe Drinking Water Funding

The State Budget Conference Committee, which is comprised of five members of the Assembly and five members of the Senate, met over second weekend of June to reconcile recommendations from each house on various budget related issues, including the safe drinking water funding package. On June 9, 2019, a resolution was achieved and the Conference Committee recommended a solution that does not rely on a water tax, and instead relies on \$100 million appropriation of Greenhouse Gas Reduction Funds (GGRF) for the 2019-2020 Fiscal Year. After the first year, the funding will be five percent of the GGRF continuously appropriated, capped at \$130 million annually. Beginning in Fiscal Year 2023-2024, the agreement includes a backstop by the General Fund if the GGRF revenues equate to less than \$130 million in any year. The funding will sunset in 2030. This funding package will be sent to the Governor, along with the remainder of the State Budget before the June 15, 2019, deadline. It is fully anticipated that the Governor will sign this budget. A compromise solution that addresses failing water systems but does not include a statewide tax on water is a significant victory for the California water community, and California water customers.

State: Colorado

Prepared By: Scott Miller, Esq., Patrick, Miller & Noto, P. D.

Presented By: Mike Eytel

Date: June 27, 2019

Litigation

Colorado Supreme Court clarified limited jurisdiction of water courts, *Allen v. State of Colorado*, 2019 CO 6 (Colo. 2019): The Colorado Supreme Court ruled in January that an inverse condemnation claim regarding shares in a mutual ditch company was not an exclusive water matter, and therefore not within the jurisdiction of Colorado’s water courts. Under Colorado law, the water courts have exclusive jurisdiction over “water matters.” C.R.S. § 37-92-203(1). Unfortunately, the legislature’s definition of water matters – “only those matters which [C.R.S. article 92] and any other law shall specify to be heard by the water judge of the district courts” – is sufficiently vague to give rise to an intricate body of case law. *Id.* The closest approximation to a bright line rule comes from *Humphrey v. Sw. Dev. Co.*, in which the Supreme Court explained that the “[r]esolution of what constitutes a water matter turns on the distinction between the legal right to use of water (acquired by appropriation), and the ownership, of a water right.” 734 P.2d 637, 640 (Colo. 1987). This case involved a plaintiff (Mr. Allen) who had separated ditch company shares from the land on which they were used, in violation of a conservation easement the prior owner had put on the land and water rights. After being forced to sell his water rights under a permanent injunction brought by the owners of the conservation easement, Mr. Allen then brought an inverse condemnation claim in water court against the state of Colorado claiming the injunction was a judicial taking of his water rights. On appeal, the Supreme Court elected to dismiss Mr. Allen’s claim for lack of subject matter jurisdiction, ruling that the case was about ownership of the water, and therefore not appropriate for water court.

Allen had argued that, by being forced to sell, he was deprived of “use” of his water; the Supreme Court did not buy this argument however, relying on the established case law to find that Mr. Allen’s claim was clearly about ownership and therefore not appropriate for the limited jurisdiction of the water courts.

1909 Water Rights “Decree” Overturned for Lack of “Indicia of Enforceability”, *Yamasaki Ring v. Dill*, 2019 CO 14 (Colo. 2019): A fundamental aspect of Colorado water law is that a decree must have certain “indicia of enforceability” to be valid against other water rights. This required information includes, among other things, a priority date, source, type of use, and location of use. This case involved a 1909 “decree” that conferred a right to “receive and conduct” water from certain springs. More than 100 years later, two parties using that spring water became embattled in a dispute as to who had a better right to use that water. One party had a decree that included the full indicia of enforceability but was for a diversion off a stream that was fed by the springs in question.

The other party had the abovementioned 1909 right to receive and conduct the springs. In 2016 a water court held that the 1909 right was invalid because it “fails to establish a priority number, date or flow rate” for the springs. On appeal, the Colorado Supreme Court ruled that, because of the state’s prior appropriation system, a priority date is “the most important stick in the water rights bundle. *Empire Lodge Homeowners Ass’n. v. Moyer*, 39. P.3d 1139, 1148 (Colo. 2001). Therefore, the Court used this case to confirm and emphasize the importance of the indicia of enforceability, particularly priority date, in the validity and legal enforceability of Colorado surface water rights.

Interstate Water Use

Utah-Colorado “zombie pipeline” revived again: A proposed Utah-Colorado interstate pipeline has again found new life. First conceived more than 15 years ago, this plan would bring water from Utah’s Green River to Colorado’s ever-growing Front Range. Often called the “zombie pipeline” because it has been raised and defeated numerous times since its inception, the newest version of the plan was started in January 2018 with an application to the State of Utah for 76 cfs (55,000 acre-feet). This application is only about 25% as large as the 2010 proposal (a Flaming Gorge Reservoir to Pueblo, Colo. pipeline) that was eventually rejected by the Colorado Water Conservation Board and the Federal Energy Regulatory Commission in 2012. The newest application has already been opposed by almost 30 parties, including Utah and Colorado river districts, the BLM and Bureau of Reclamation, and various environmental groups. At this stage the State of Colorado has elected to remain neutral. The biggest concern raised by opposers is that the plan is purely speculative, with only one potential buyer (the Central Colorado Water Conservancy District) having expressed interest in purchasing that transmountain water. In December the Utah State Engineer requested more information on the feasibility of the project, which was answered in a 250-page response from Applicants in February 2019. Opposers then submitted comments in late March – the plan is now in a holding pattern as the response and all comments are analyzed. With the history of the project, and the latest opposition, it is likely to be years before a resolution is reached on this latest iteration of the zombie pipeline.

Legislation

Colorado Legislature approves \$10 million in drought-related spending: Senate Bill 212 appropriated \$1.7 million for the Colorado Water Conservation Board (“CWCB”) to investigate and analyze demand programs to reduce the state’s Colorado River Use. Demand management programs essentially pay water users to not divert their water, instead letting the flows fill Lake Powell where the reservoir can be restored and the water saved for future use in drought years. SB 212 also included \$8.3 million to continue to fund the Colorado Water Plan. The Colorado Water Plan was created under former governor John Hickenlooper, and new governor Jared Polis has pledged to continue his work. To that end, Polis had asked for a total of \$30 million for the two programs. Although the eventual funding fell short of that goal, SB 212 sponsor Senator Rankin (R-Carbondale) noted that, “[t]his is the first time we’ve started to put general fund money against the water plan.”

Legislature redraws Republican River Basin map to include more wells: The Legislature also passed House Bill 1029 which redrew the boundaries of the Republican River Water Conservation District, including more wells that are in violation of the Republican River Compact between Colorado, Kansas, and Nebraska. The original district boundary, drawn in 2004, did not include all wells that reduce flows, or potentially could, to the Republican River. The expanded boundaries now allow the District to impose fees on well owners – the fees are critical in paying for a pipeline the District built at a cost of \$62 million to ensure compact compliance. To pay for that pipeline, the District charges farmers \$14.50 per acre, annually. HB 1029’s inclusion of the additional areas and wells now allows those well owners to be part of the District’s plan for augmentation and so they are now protected from curtailment.

Water Quality Issues

Denver Water Releases 2019 Water Quality Report: Denver Water, the entity that supplies domestic water service to more than 1.4 million people in Denver and its surrounding suburbs, released its 2019 Water Quality Report confirming excellent drinking water quality for the previous year. Denver Water serves approximately 25% of Colorado’s population, and last year conducted more than 70,000 tests to ensure that water quality is maintained on Colorado’s Front Range. There was only one violation in 2018, and that was minor oversight in failing to complete the required quarterly testing of all storage tanks. There were no water quality-specific violations reported in 2018 and all regulated contaminants were below maximum levels. Additionally, Denver Water tested for and reported on the levels of a variety of unregulated contaminants, as required by the Environmental Protection Agency. The EPA uses an Unregulated Contaminant Monitoring Rule that requires water utilities to test for these substances every five years, and then report to the EPA, to allow the agency to better understand these contaminants and analyze the possibility of adding them to regulated substances.

Legislature enacts HB 1279 to protect water quality: Governor Jared Polis signed House Bill 1279 on June 3, banning the use of Class B firefighting foams that contain “intentionally added” per- and polyfluoroalkyl substances. These additives (“PFAS”) are known as “forever chemicals” because of how long they last and the difficulty of removing them once they contaminate groundwater. PFAS in particular were used in firefighting foams for many years at Peterson Air Force Base in Colorado Springs. The heavy use of the foams, especially during training, led to the contamination of Fountain Creek, which in turn contaminated the Widefield Aquifer. The Widefield Aquifer serves the towns of Security, Widefield, and Fountain which have since had to install special filters in an attempt to purify the water before it is delivered to their customers. Under HB 1279, PFAS are permanently banned from use – technological improvements have resulted in the creation of foams that are effective without the damaging chemicals.

Regulation 84 – Reclaimed Water: The Colorado Water Quality Control Commission is in the process of revising Regulation 84 concerning the use of reclaimed water for the irrigation of edible crops and hemp. To that end, the Colorado Department of Public Health & Environment (“CDPHE”) conducted a stakeholder collaboration process from October 2018 to May 2019 to meet with various interested parties including farmers and consumers. The proposed changes to Regulation 84 would allow Category 1, 2, and 3 reclaimed water for non-edible hemp irrigation;

Category 2 and 3 reclaimed water for Commercial Food Crop Growing Operations; Category 3 Plus reclaimed water for edible hemp irrigation; and Category 3 Plus reclaimed water for Non- Commercial Food Crop Growing Operations. The distinction between commercial and non- commercial growing operations is whether the crops are considered “covered produce” under the Food Safety Modernization Act. Specifically regarding hemp, the various allowed categories would be determined by which part of the plant is intended as the end product. “Edible hemp” is defined as seeds, oils, flowers, and other materials used to make either edible, dermal, or internal products for human and animal consumption.

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 for Colorado.*

State: New Mexico

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Presented By: Joshua Rosenblatt, City of Las Cruces

Date: June 27, 2019

Change in Administration for New Mexico

At the beginning of the year, Michelle Lujan Grisham was installed as the 32nd Governor of New Mexico. She appointed James Kenney as Secretary of the New Mexico Environment Department (NMED). Secretary Kenney, an environmental engineer, had a 21-year career with the US EPA. He served as senior policy advisor for oil and gas and worked with senior agency leadership and designed strategies to support environmentally responsible development of oil and natural gas resources while working with states, tribes, federal agencies and industries on regulatory and policy matters. As senior environmental engineer, he led both civil and criminal investigations related to the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act and other EPA statutes and regulations as well as developing strategic compliance and enforcement approaches on oil and natural gas exploration.

Governor Michelle Lujan Grisham appointed John D'Antonio as the New Mexico State Engineer. D'Antonio served eight years as New Mexico state engineer, from 2003 through 2011, and built on decades of intensive experience in water resources engineering and management in New Mexico. D'Antonio has served as Cabinet secretary of the New Mexico Environment Department; spent four additional years in the Office of the State Engineer, as both director of the Water Resource Allocation Program and District 1 supervisor of water resources; and worked as a project engineer and manager as well as chief of hydraulics, hydrology, sediment and floodplain management in a prior stint at the U.S. Army Corps of Engineers. With vast experience in building coalitions across state, local and tribal governments, and a history of highly skilled project management. D'Antonio implemented Active Water Resource Management in seven key basins, sought collaborative solutions involving myriad stakeholders so as to minimize and mitigate conflict, and approved innovative water rights permits, among other accomplishments. With numerous awards and recognitions, including exceptional performance ratings from the U.S. Army Corps of Engineers every year from 2012-2016, D'Antonio also served as the WestFAST liaison for the U.S. Army Corps of Engineers.

Governor Lujan-Grisham's priorities:

- Climate Change and Energy Waste Prevention (EO 2019-003)
- Energy Transition Act (SB489)
- Fluid Oil and Gas Waste Act (HB546)
- Hemp Manufacturing Act (SB581)

Secretary Kenney's Initiatives:

- Robust valued workforce
- Developing rulemaking
- Ensure compliance
- Addressing federal legacy contamination

The Secretary also is interested in pursuing NPDES delegation for the State of New Mexico.

Ground and Surface Water Protection Rules

The NM Water Quality Control Commission approved revisions to the Ground and Surface Water Protection Rules (20.6.2. NMAC) in September 2018 that became effective in December 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), adopting language to allow NMED to control vapor intrusion through the ground water regulations, 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. The change to extend the length of a variance to more than five years (without a public hearing for the time beyond five years) is currently under appeal. The new administration appointed new members to the Water Quality Control Commission in April 2019. It is likely the variance provision will be changed in the future.

Nutrients Management

Implementation of the Temporary Standard (TS) provision in the New Mexico Intrastate and Interstate Surface Water Quality Standards is meeting several bumps in the road. The provision was developed to provide permittees some means of addressing requirements that are technologically infeasible of meeting TMDL driven WQBELs for Total Nitrogen and Total Phosphorus. NMED is working with EPA's contractor to develop proposals using the TS provision. The conclusions have shown that Reverse Osmosis is the selected treatment. The parties continue to explore other options, but the process may be more costly and without the desired results. NMED is making revisions to its listing methodology. Permittees are also review whether investing in developing site-specific criteria may be the more effective and long-term way to proceed.

HB 651: Water Data Act (Stansbury/G. Armstrong; Sedillo Lopez) An Act Relating to Water; Enacting the Water Data Act; Directing Water Agencies to Identify and Intergrate Key Water Data Sets; Proving Duties; Directing the Establishment of Water Data Account.

HB 651 was signed into law on April 2, 2019. HB 651 creates a Water Data Council, which will identify key water data sets, develop standards for water data, make water data available and useful, develop a platform for that data and identify information gaps and future needs. The council will, among other duties, develop an assessment of water data and information needs to support water management and planning in the state. Involved New Mexico agencies are the Bureau of Geology and Mineral Resources of the New Mexico Institute of Mining and Technology, the Interstate Stream Commission, the Office of the State Engineer, the Department of the Environment and the Energy, Minerals and Natural Resources Department.

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.

Texas filed suit that named Colorado and New Mexico as defendants. 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.

The case was argued before the Supreme Court on January 8, 2018. The Supreme Court issued a unanimous opinion on March 5, 2018. 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.

In March 2019, the Nathan Boyd Estate and other individuals with a “Pre-Federal Claimants” submitted a motion to intervene in the case due to NM’s Prior Appropriation Doctrine (PAD). “Claimants allege they hold senior rights to pump the water pursuant to PAD. U.S. v. CLC, 289 F.3d at 1176, states: “In New Mexico, state law provides for a hierarchy of water users along a river such as the Rio Grande. Those who first appropriate water for beneficial use have rights superior to those who appropriate water later.” See N.M. Const., art. XVI, § 2; Snow v. Abalos, 18 N.M. 681, 140 P. 1044, 1048 (1914) (affirming that N.M. follows the PAD). Claimants’ senior Rights should not be curtailed in order to meet NM’s and the U.S.’ delivery obligations to Texas under the Compact.”

The parties are responding on whether the Pre-Federal Claimants have standing in the case. The latest may be viewed at:

<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o141.html>

Colorado Basin Drought Contingency Plan

May 2, 2019 the Bureau of Reclamation announced the Department of the Interior, Bureau of Reclamation and representatives from all seven Colorado River Basin states gathered and signed completed drought contingency plans for the Upper and Lower Colorado River basins. These completed plans are designed to reduce risks from ongoing drought and protect the single most important water resource in the western United States. “This is an historic accomplishment for the Colorado River Basin. Adopting consensus-based drought contingency plans represents the best path toward safeguarding the single most important water resource in the western United States,” said Reclamation Commissioner Brenda Burman

State: Texas

Prepared and Presented by Peggy Glass, Ph.D.

Date: June 26, 2019

LEGISLATIVE ACTIVITY

The Texas Legislature concluded its 2019 session at the end of May. The Texas Legislature meets for five months every two years. Some say it would be better if they met for two months every five years.

That being said, it was a relatively quiet and productive session. Water issues were not a major consideration; and, for the most part, to the extent that water matters were addressed, the results were good.

At each of the recent legislative sessions, including this one, there has been a small group of citizens that want the State to prohibit land application of biosolids. That did not happen, again—which is good.

On the other hand, there was a company that wanted to mix grease trap waste with biosolids and land apply the resulting mixture. Legislation to prohibit this was progressing nicely and was down to a final vote during the last two days of the session. Then, it just disappeared and was not brought to a vote even though it had not encountered any opposition earlier in the session. This was not good.

REGULATION OF DISSOLVED SALTS

Texas permittees have continued to negotiate with the State agency, Texas Commission on Environmental Quality (TCEQ), seeking a more practical approach to the implementation of water quality standards related to dissolved salts in TPDES permits. Some progress seems to be occurring on the following modifications:

- When calculating a mass balance to determine if a water quality standard for dissolved salts will be exceeded, a different statistic than the harmonic mean flow would be used.
- At least in some cases, a record of passing Whole Effluent Toxicity (WET) tests can be used as evidence that aquatic life is not being harmed, and a permit limit for dissolved salts based on protecting aquatic life is not needed.
- Texas has Total Dissolved Solids (TDS), chloride, and sulfate water quality standards for all major water bodies, but not the upstream tributaries. In many cases, screening of proposed discharges to determine if provisions related to dissolved salts should be included in the permit, the screening is based on the water quality standard of the downstream water. This is frequently not appropriate, and other screening methods are being discussed.

Discussions are still underway regarding whether there could be a blanket allowance for a 400 mg/L increase in TDS in wastewater treatment plant effluent compared to the TDS in the raw water.

INDUSTRIAL PRETREATMENT

Texas requires (in the TPDES permit) that all permittees with a formal pretreatment program analyze both influent and effluent samples for all priority pollutants at least once a year, and frequently more often depending on the size of the discharge. This is a significant cost. Permittees are currently negotiating with TCEQ about reducing the sampling and analysis to influent-only and less frequently. This appears to be a requirement of TCEQ and not the US Environmental Protection Agency (EPA), since the EPA guidance only recommends influent sampling. NACWA is working with Texas permittees to seek this change.

NEW RESERVOIRS ARE STILL A POSSIBILITY IN TEXAS, EVEN AS CONSERVATION INCREASES

At one point in time, it was thought that there would not be any additional water storage reservoirs constructed in Texas. It was believed that reservoirs had already been built at all the best sites, and the environmental objections and cost of a new reservoir would be prohibitive. However, the regional planning process for water supply has indicated the need for a multi-faceted approach to developing sufficient new water supplies to meet projected growth. That includes the construction of additional reservoirs.

The reservoirs currently being considered and, in some cases being implemented, are somewhat smaller than many of the earlier reservoirs; but they are large enough to make a significant contribution to the water supply. One reservoir has successfully completed the permitting process (Lake Ralph Hall in northeast Texas). It should be noted that implementing this project will require extensive mitigation. Another project, Lake Bois d'Arc, is still in the permitting process but is progressing. Additional reservoirs are included in the water supply strategies for other regional planning areas.

These reservoirs are not being implemented in lieu of conservation and reuse. The initial regional water supply plans, which were completed in 2002, included a conservation component; but, in most cases, it was pretty perfunctory. Now, however, consideration of conservation and reuse strategies is a high priority.

IMPACTS OF HURRICANE HARVEY

Last year, Hurricane Harvey dumped an unprecedented 60 inches of rain on the City of Houston and adjacent coastal areas. There have been many impacts from this, and a significant one is the revision of storm statistics. Up until recently, a weather bureau technical paper, prepared in the 1950's, was the go-to source for information on storm intensity, duration, and return periods. But, using Hurricane Harvey records, NOAA has prepared Atlas 14, which has revised the data on storm statistics for Texas.

Changes are particularly notable in the eastern half of the state. The 100-year, 24-hour event for Austin increased from 10 inches to 13 inches, and the 100-year, 24-hour event for Houston increased from 13 to 18 inches. Values previously classified as 100-year events are now more likely to be 25-year events.

The Atlas 14 values are used for infrastructure design and for delineating flood risks. As a result, in the eastern half of the state, the revised 100-year flood boundaries can be close to the previous 500-year boundaries. This has a significant effect on the availability and cost of flood insurance.