



"The Voice of Water Quality in the Arid West"

WESTCAS 2019 Fall Conference

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State Reports

STATE: Arizona

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DATE: October 2019

KEY WATER QUALITY LEGISLATIVE & REGULATORY ACTIVITIES SINCE THE 2019 ANNUAL CONFERENCE

CWA §404 Permit Program

In 2018, the State of Arizona, through the Arizona Department of Environmental Quality (ADEQ), embarked on an effort to assume primary enforcement authority for the Clean Water Act § 404 (Dredge and Fill) Permit Program. The 404 Program is currently administered by the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (USACE). Michigan and New Jersey are the only two states that currently have primacy for § 404 permits.

ADEQ's effort has included legislation to obtain authority to assume and implement the program (SB 1493 – April 2018), Outreach, and Tribal Engagement. The Outreach included 6 stakeholder meetings attracting 472 participants, 70 Technical Work Group meetings with 91 members, and 7 Executive Work Group meetings with 17 members. Technical Work Groups were convened in nine areas with white papers being prepared for the following key program areas:

- Compensatory Mitigation
- Cultural and Historic Resources
- Endangered Species Act
- Fees
- Jurisdictional Determinations
- Permit Process
- Significant Degradation, Alternative Analysis, Minimization

The white papers formed the basis of the ADEQ Clean Water Act and State § 404 Proposed Program Roadmap issued August 2019. The Roadmap describes the program, including fees and permit review process; next steps; comparison of USACE § 404 Program and State ADEQ § 404 Program; and includes, in the Appendices, Preliminary Rules Structure for the program. ADEQ is seeking comments on the Roadmap until November 18, 2019. The comments will drive next steps in the process.

myDEQ

myDEQ is the Arizona Department of Environmental Quality (ADEQ) electronic permit application and compliance reporting database. Over the last several years the system has expanded. It now includes air quality emissions reporting; Municipal Separate Storm Sewer System (MS4) Permit, Construction General Permit (CGP), Multi-Sector General Permit (MSGP), and De Minimis General Permit (DMGP) Notice of Intent (NOI) and MS4 Permit Annual Report submittals; AZPDES Permit Discharge Monitoring Reports (DMRs), and Aquifer Protection Permit Self-Monitoring Report Forms (SMRFs); and Sanitary Sewer Overflow (SSO) reporting. In the next several months Pretreatment Annual Reports, Biosolids Annual Reports, AZPDES Exceedance Reporting and MSGP Renewals will be added.

Compliance Monitoring Data Portal (CMDP)

CMDP is the ADEQ drinking water electronic reporting system. It will streamline drinking water compliance reporting. Where employed it will allow Public Water System (PWS) and contract laboratories to submit public water system (PWS) analytical results directly. Where contract laboratories upload the reports, the data would be on the portal, and presumably available for public review, prior to PWS review. However, it minimizes the potential for the late reporting. A couple of Arizona contract labs have contacted clients to offer direct electronic reporting via CMDP, as a service. The data uploaded to CMDP would subsequently be loaded to the Safe Drinking Water Information System (SDWIS), EPA's drinking water compliance database.

Underground Injection Control (UIC) Program

State passed legislation (SB 1494 – April 2018) to assume authority. An initial UIC primacy presentation was held in Phoenix and Tucson in June 2018, followed by stakeholder meetings in August and December of 2018, and a Tribal Consultation in May 2019. Assumption of this program could have impacts on the State's Aquifer Protection Permit Program. Sign on to the ADEQ website to subscribe to program development updates.

Waters of the State

With the recent signing of a final rule to rescind the 2015 "Waters of the United States" (WOTUS) Definition and re-codify the pre-2015 definition, in addition to the upcoming revised definition of WOTUS, the State of Arizona has started discussions on legislation and rulemaking to define waters of the State. This effort is to set the stage for a program to address discharges to waters that would no longer be determined WOTUS (e.g. ephemeral waters), but that still need some level of protection.

Arizona Drought Contingency Plan

For over a year 40 stakeholders across six western states and Mexico with the Bureau of Reclamation worked together to develop the Interstate Drought Contingency Plan (DCP). Signed on May 20, 2019, the Drought Contingency Plans for both the Upper and Lower Colorado River Basins were created to help stabilize the river system, reduce the potential for the system reservoirs falling to critical levels, and create incentives for "banking" water on Lake Mead.

The Lower Colorado River Basin DCP (LCDCP) includes operations below Lees Ferry which impact California, Nevada, Arizona and Mexico. For Arizona this means that Arizona will take voluntary cuts to our Colorado River allocations of 192,000 or 240,000 acre feet annually when Lake Mead elevations drops below specific levels. A wetter than expected 2018 kept us safe from cuts in 2019.

Current state-wide efforts with Arizona tribes, cities, agriculture, mining, development and the NGO community in an ongoing effort to hear all voices and incorporate (within reason) all needs. The DCP is an interim plan that provides a safe harbor while Arizona works on issues leading up to the expiration of the current Colorado River operation guidelines. Arizona's goal is to develop a shared vision regarding Arizona's Colorado River Supply and to work toward the next set of agreements beyond the 2026 deadline in a more drought prepared environment. Stay tuned for more to come and to get more information go to azwater.gov.

State: California

Prepared by: Matthew Porras, Yucaipa Valley Water District

Name of Presenter(s): Katie Hallberg / Ashley Gibson

Date: October 23, 2019

California Regulatory Update

California WaterFix (Delta Conveyance)

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 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 **were** planned to carry diverted surface water by gravity, under the Delta, to pumping facilities south of the estuary. DWR is withdrawing permits for the project in favor of a new approach. A **single** smaller tunnel project is in a renewed environmental review process. This effort is planned modernize the Delta conveyance and is consistent with the Governors recent executive order directing state agencies to develop a portfolio of statewide water actions and investments.

Recent updates:

- May 2, 2019 - State Withdraws WaterFix Approvals, Initiates Planning and Permitting for a Smaller Single Tunnel. Department of Water Resources is pursuing a new environmental review and planning process for a single tunnel solution to modernize Delta conveyance.
- June 10, 2019 - Soil Sampling Work to Advance Data for Delta Conveyance. DWR 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.
- September 30, 2019 – The Department of Water Resources continued to prepare the environmental review of the tunnel with the goal still being to modernize the State Water Project infrastructure. The CEQA process will officially begin later this year with the Notice of Preparation.

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, 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

- 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

- 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.

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) reduced to 5.1 ppt in August 2019
- PFOS – Notification Levels of 13 ppt reduced to 6.5 ppt in August 2019

On October 14, 2019, the State Water Resources Control Board posted the first results of PFOA and PFOS tests from approximately 600 drinking water wells in the effort of assessing the presence of the PFOA and PFOS in the groundwater around the state. This is the first phase focusing on areas near landfills, airports, or locations that may contain these contaminants.

Upcoming public health goals will be the next steps to establishing regulatory standards, maximum contaminant levels, in drinking water.

For more information visit:

https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/PFOA_PFOS.html

The Policy for Water Quality for Recycled Water

The Recycled Water Policy was first adopted in 2009 and amended the first time in 2013. The recent amendment was adopted in December 2018.

The purpose of the Recycled Water Policy is to increase the use of recycled water from municipal wastewater sources. The policy updates became effective April 8, 2019 and provides goals for recycled water use in California, guidance for use of recycled water that considers protection of water quality, criteria for streamlined permitting of recycled water projects, and requirements for monitoring recycled water for constituents of emerging concern (CECs)

For more information, please visit:

https://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/

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:

- In January 2019, the Department of Water Resources (DWR) released SGMA 2019 Basin Prioritization Phase 1 for 458 of the 515 basins that were not affected by the 2018 Basin Boundary Modifications. The results from the basin boundary modifications were released in February 2019.
- The 57 basins which were affected by these modifications were prioritized in SGMA 2019 Basin Prioritization Phase 2. Draft results from Phase 2 have been released and are expected to be finalized in early summer 2019.
- 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 GSP Initial Notifications have been submitted and can be commented on at the SGMA portal.

1,2,3-Trichloropropane Drinking Water Standard and Monitoring

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 and is currently available for review at:

https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/123TCP_page.html

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.

Statewide Map – Lead in Community Water Systems

The SCRCB launched an online map showing which community water systems have lead fittings. The new digital map highlights which community water systems have reported the presence of lead pipes and fittings is the latest legislatively mandated action to target the health risks of lead in drinking water and set a timetable to replace the potentially hazardous hardware. Released today, the map uses data from nearly 3,000 community water systems throughout California and places the information on an easy-to-read, color-coded document that is expected to change as testing continues statewide.

Community water systems were required by Senate Bill 427 to submit the results of a lead user service line inventory to the State Water Board's Division of Drinking Water. The deadline was July 1, 2018. A general overview of the first generation of the map shows plenty of good news – many water systems are entirely lead-free, indicated in gray – while also offering plenty of inconclusive information. In fact, upwards of 400 water systems have yet to provide enough complete data to provide an accurate picture of how much lead piping remains in the water supply infrastructure, indicated by large swaths of purple in many parts of the state map

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 State Water Resources Control Board (State Water Board) fine-tuned its pioneering cannabis cultivation policy Tuesday February 5th, 2019 to clarify implementation issues while ensuring growers continue to be environmentally responsible in an industry that has rapidly expanded with urban and rural grow sites throughout much of California.

The updates, focusing on four key issues – onstream reservoirs, tribal buffers, requirements for indoor cultivation sites, and winterization requirements -- were incorporated into the policy to increase and simplify compliance. The policy revisions were finalized after months of feedback from stakeholders. “The updates improve the rules that commercial cannabis growers must follow, while adhering to sound environment protection practices intended to keep waterways and lands from being contaminated, and water resources protected when there is more demand than supply,” said Eileen Sobek, Executive Director at the State Water Boards. The initial policy was approved in October of 2017 in response to Proposition 215, the Compassionate Use Act, establishing the medical cannabis industry, and Proposition 64, which legalized recreational marijuana use for adults 21 and older.

On October 11, 2019, the proposed recommendation has been updated and can be found at the website listed below.

For more information regarding the Cannabis Policy, Staff Report, and Cannabis Cultivation General Order visit <http://www.waterboards.ca.gov/cannabis/>

Harmful Algal Blooms

On May 23, 2019 the State Water Resource Control Board (SWRCB) provided a valuable reminder regarding Harmful Algal Blooms (HABs) being mindful of the summer months. Most freshwater HABs are formed by cyanobacteria (formerly called blue-green algae). They’re actually microbes that live in nearly every habitat on land and in the water, and they generally don’t become a problem until the right mix of higher water temperatures, slow-moving water and excessive nutrients causes cyanobacteria to rapidly multiply and form HABs. Cyanobacteria are capable of producing toxins, which have the potential to harm people, pets, wildlife, or livestock. Dogs and children are most likely to be affected by HABs because of their smaller body size, increased potential to ingest water, and tendency to stay in the water for longer periods. Exposure to cyanobacteria and associated toxins can cause eye irritation, skin rash, mouth ulcers, vomiting, diarrhea and cold or flu-like symptoms. The State Water Board and the nine Regional Water Boards (known as the Water Boards), in partnership with other programs and agencies, are actively supporting and coordinating a statewide HAB incident response with many publicly available resources. In 2018, the Water Boards received 190 voluntary reports of HABs from across the state. To learn how to stay safe around HABs, report a bloom and more, visit <https://www.cdph.ca.gov/Programs/CCDC/DEOD/EDD/EDD/Pages/HABs.aspx>

California Legislative Update

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-sight 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.
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State: Colorado

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

Presented By: Mike Eytel

Date: October 23, 2019

Litigation

Colorado Supreme Court rules that water court jurisdiction does not extend to unadjudicated water rights, *The Luskin Daughters 1996 Trust v. Young*, 2019 CO 74 (Colo. 2019): The Colorado Supreme Court recently ruled that the state's water courts' jurisdiction does not include unadjudicated water rights, or any issues related to those rights. In this case, the plaintiff sought damages and injunctive relief after the defendant built a house that obstructed the delivery of plaintiff's water. Importantly, the plaintiff's "water right," although it had been used for decades, was never adjudicated through the water court process. The Court held that the Water Right Determination and Administration Act of 1969 – the supreme law of Colorado water rights – provides a strict procedural framework for all water rights. Because the plaintiff's in this case had not followed that framework, they had no right upon which to bring their claims, and therefore the case was dismissed. This latest decision emphasized the critical need for water rights users to adjudicate their rights; this adjudication both secures the right's priority and gives the right the legal status necessary for judicial enforcement and protection in the future.

Colorado Supreme Court declines to embrace "character of exchange rule", *City & Cty. of Denver v. Consolidated Ditches of Water Dist. No. 2*, 2019 CO 68 (Colo. 2019): In choosing to "cultivate flexibility [and] optimize the beneficial use of the state's waters," the Colorado Supreme Court declined to fully embrace the so-called "character of exchange rule." This "rule" provides that water diverted by exchange takes on the "character" of the substitute supply. In this case, which involved a complex plan for augmentation and exchange diverting western slope water to the front range, Denver was prohibited from reusing water that it acquired or appropriated before 1940. If the exchange water under the plan were to take on the character of the substitute supply, that water was pre-1940 and therefore would be restricted. In its analysis, the Court first noted that it is unclear what is meant by "character" of the substitute supply. For example, does character mean type of source, priority date, decretal restrictions (e.g., type of use), contractual limitations, or even "all legal characteristics?"

The Court also noted that the "rule" has never been expressly defined or embraced by the court or legislature. Therefore, the Court elected to side with Colorado's "longstanding water management policy of maximizing the beneficial use of the waters of the state." Imposition of the character of exchange rule would be a severe detriment to the toolbox currently available to Color water users. Provided that an exchange comports with the four main statutory provisions of Colorado water law, it will not be held to the strict standards of the character of exchange rule. That being said, the Court did hedge its opinion on the specific facts presented in this case.

Interstate Water Use

West Slope Basin Roundtable Drought Study completes Phase III: There are nine basin roundtables in Colorado, one for each of the state's sub-basins, created to allow water districts, citizens, water users, and other interested stakeholders to have a process to plan for the state's water future. The four West Slope Basin Roundtables (Colorado, Gunnison, Southwest, and Yampa-White-Green) originally commissioned a drought study in December 2014. Phase I focused on demand management programs while Phase II used the Bureau of Reclamation's Colorado River Simulation System ("CRSS") to further study the Phase I results, especially how water banking could be combined with demand management programs to protect Colorado water users against prolonged drought. Phase III then analyzed Colorado water use in the scenario of a Lower Basin (California, Nevada, Arizona) Compact Call.

Essentially, the study asked, if a call were to happen, how would that call be administered in Colorado? The study first noted that while Colorado uses approximately 2.5maf/year, only about 932,000af of that is post-1922 Compact rights. And of that 932,000af, almost half of the water is sent to the Front Range via transmountain diversions. Phase III then examined two possible call administration scenarios: pure prior appropriation, and percentage based. Implementing a pure prior appropriation scenario, the youngest rights would simply be called out first. Under a 300,000af or 600,000af call, the oldest rights would be September 1940 and August 1935, respectively. The other method would be curtailing each sub-basin's post-compact water usage as a percentage of state-wide post-compact use (essentially the age of water rights is not as important here). Under this plan some sub-basins, such as the Gunnison, would be responsible for less curtailment. Other sub-basins, like Southwest Colorado, would be responsible for 17,000 *more* acre-feet of curtailment than it would have based upon a pure priority call. The study specifically pointed out that these implementation plans, and the study as a whole, is purely for discussion and informational purposes, and no potential outcomes or ideas have officially been raised by any of the involved basin roundtables.

Legislation

Legislature authorizes online sports betting with tax revenues to benefit Water Plan: The Colorado Legislature passed House Bill 1327 which will now appear on the ballot this November as Proposition DD. HB 1327 is a referred measure meaning that the legislature's passage simply allows the issue to be voted on by the state at large in the general election. Proposition DD would legalize online sports betting in Colorado along with authorizing a 10% tax on the proceeds. Of that tax revenue, the large majority – estimated at almost \$15 million annually – would go to fund projects outline in the Colorado Water Plan. The tax money would go into a newly created Water Plan Implementation Cash Fund which could be spent on grants, “to ensure compliance with interstate water allocation compacts ... including ... compensation to water users for temporary and voluntary reductions in consumptive use [e.g. demand management programs].”

The bill enjoyed wide bipartisan support in the legislature, and Proposition DD is supported by Conservation Colorado, American Rivers, the Colorado Water Conservation District, and Aspen Skiing Co., among others. Opposers to the plan include Save the Colorado and Coloradoan for Climate justice who believe that fossil fuel companies should fund programs necessary because of climate change. If Proposition DD passes, the new law and tax would go into effect May 1, 2020.

Ditch easement rights-of-way clarified: Gov. Jared Polis signed HB 1082 into law on March 28, 2019, implementing a new law clarifying the rights extent of ditch rights-of-way. The law states that, unless expressly inconsistent with its creation, “ditch right-of-way” includes the “right to construct, operate, clean, maintain, repair, and replace the ditch, to improve the efficiency of the ditch, including by lining or piping the ditch, and to enter onto the burdened property for such purposes, with access to the ditch banks, as the exigencies then existing may require, for all reasonable and necessary purposes related to the ditch.” Although this was essentially already the law in Colorado, the legislature wanted to codify these provisions, especially as the state's population grows and new property owners may be purchasing property burdened by ditches without knowledge of the laws of access granted to the dominant ditch owners. The bill enjoyed bipartisan support, passing the House 50-12 and the Senate 34-0.

Water Quality

Revisions to the Cadmium Aquatic Life Standards: The Colorado Water Quality Control Commission (“CWQCC”) has proposed revisions to the Numeric Cadmium Harness-Based Aquatic Life Standards found in Regulation Nos. 31-38. The state's current framework, which has not been revised since 2005, includes two acute standards (for trout and non-trout waters) and one chronic standard. In 2016, EPA updated its cadmium criteria, after more than a decade of research and review, to include more stringent standards to protect aquatic life. The EPA standards include only two categories – acute, specifically lowered to protect trout, and chronic. Upon review, the CWQCC noted that the EPA's acute category is too stringent for warmer waters where trout are unlikely to live, and that Colorado has numerous “warm” water bodies and streams.

Therefore, CWQCC has recommend Colorado update the cadmium regulation to include acute (cold water), acute (warm water), and chronic standards. The current acute (trout) standard does not apply to every cold water segment, so this regulation will increase protections for non-trout cold water species including sculpin. A hearing on the proposed change to the regulations will be on December 9, 2019.

Ongoing TENORM Regulations, Publication of Report: In 2018 the Colorado legislature passed Senate Bill 245 giving Colorado Department of Health and Environment (“CDPHE”) the authority to promulgate new rules for the management of Technologically Enhanced Naturally Occurring Radioactive Material (“TENORM”). As part of that authority, CDPHE was required to prepare a report that considers “background radiation levels in the state, waste stream identification and quantification, use and disposal practices, current engineering practices, appropriate test methods, economic impacts and data gaps.” To prepare this report, CDPHE hired Rule Engineering to complete the research and drafting – the report was delivered on June 4, 2019. As noted in the report, it was created purely for educational purposes; it does not make conclusions or recommendations, or provide opinions, on TENORM regulation. To that end, CDPHE has been holding an ongoing series of stakeholder meetings, each covering a separate topic, to address how TENORM should be regulated. There are two remaining substantive meetings, on October 24 and November 6, discussing setting regulatory limits for beneficial reuse (other than land application of biosolids) and setting regulatory limits for radioactive materials licensing, respectively. The final scheduled, on November 20, will cover what CDPHE has learned from the stakeholder process as well as outline TENORM regulatory topics.

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

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Presented By: Aaron Chavez, San Juan Water Commission

Date: October 23, 2019

Nutrients Management

Implementation of the Temporary Standard (TS) provision in the New Mexico Intrastate and Interstate Surface Water Quality Standards has progressed. NMED issued a draft TS for the City of Raton (<https://www.env.nm.gov/surface-water-quality/ts-raton/>) and has is drafting a TS for the City of Santa Fe. The proposed draft TS for Raton is a huge accomplishment, however there is concern that this approach will not provide the desired relief. Comments are due by Oct 31. NMED would like to submit for a Water Quality Control Commission Hearing (standards change) this year. Permittees are also reviewing whether investing in developing site-specific criteria may be the more effective and long-term way to proceed.

New Mexico Comprehensive Assessment and Listing Methodology (CALM): Procedures for Assessing Water Quality Standards Attainment for the State of New Mexico Clean Water Act (CWA) §303(d) /§305(b) Integrated Report.

NMED proposed revisions to its listing methodology in June 2019 and finalized them on September 3, 2019 without much notice. Changes included:

- Changing the minimum sample size for assessment to 4;
- Adding temporal independence language and outlier identification to chronic ALU assessments.
- Clarifying:
 - the handling of concurrent hardness and turbidity data for total recoverable aluminum exceedance determination.
 - how adjusted gross alpha is determined in assessment table footnotes
 - that data will be re-assessed if the assessment methodology for a specific parameter has significantly changed and clarified which data older than five years old will be considered for assessment purposes.
 - that data from distinct hydrologist events collected within a seven-day period are not considered duplicates.
 - added additional discussion regarding setting the minimum number of data points needed to assess.
 - added reference to the critical low flow calculations used to develop point source discharge requirements.
 - added a discussion of the handling of surface water highly influenced by groundwater input with respect to assessment, as well as adding “extreme drought” to the list of catastrophic events.

This last point was a change in response to public comment. This language may be evidence of NMED imposing requirements (or policy) without the benefit of public input. <https://www.env.nm.gov/wp-content/uploads/2019/09/FINAL-Main-CALM-190903.pdf>

Innovation in Reclaimed Water Storage for Municipal Recreation

The City of Deming, NM has created a reclamation storage/recreation “park” (see image below). An old gravel pit underwent some earthwork and lining and is now filled with 25 million gallons of water. Depths are only around 15 feet. The initial filling is with untreated well water that will transition to recirculating reclaimed water. The NM Fish and Game are stocking a warmwater fishery Bass/bluegill and minnow mix with some trout in the wintertime for recreational fishing. Initial plans are for the park to be a “catch and release” site. Fish tissue monitoring will be conducted to determine if the fish living in the reuse water are safe for consumption. These two precautions/requirements appear to be excessive or overly protective if one compares Class A reclaimed water with Elephant Butte Reservoir. The final permitting and creative utilization of reclaimed water as fish stocked urban water feature is a trail blazer and president setting on the permitting side and don’t want to see a good idea go sour. So far, they seem to have the checks and backups in place. The City is seeking expert advice on monitoring and maintaining a healthy fish stocked “lake.”



Waters of the US in New Mexico – Las Cruces testing the waters exploring dropping one NPDES

1. The rescinding of the 2015 WOTUS brings up the currently double State & Fed permit with the City of Las Cruces East Mesa Water Reclamation Plant. The plant discharges approximately 0.45-0.6 MGD of unutilized reclaimed water into an ephemeral arroyo which dead ends East of the Las Cruces Dam. If Las Cruces cancels the NPDES permit, it isn't clear whether the City will need to add the track of arroyo as one of the discharge locations on the State Permit. (Perhaps a recreational fishpond like Deming may be an option.) The City has been in discussions with the local Army Corps of Engineers (ACE). It appears that office will no longer be issuing 404 permits and SWIPPs for projects affecting the East Mesa of Las Cruces. The COE does expect a slew of lawsuits after the 60-day comment to the rescinding of the present definition is over and suggests a site-by-site determination be made so landowners/developers will have documentation of the Federal disconnect from certain jurisdictional oversight.

Navajo-Gallup Water Supply

U.S. Secretary of the Interior David Bernhardt announced an \$83.7 million construction contract for the Navajo-Gallup Water Supply Project to bring clean and reliable water to tribal and rural communities in northwestern New Mexico. As part of the Department of the Interior, the Bureau of Reclamation's water supply project is the cornerstone of the Navajo Nation San Juan River in New Mexico Water Rights Settlement Agreement. Work under this contract will include construction of nearly 30 miles of 48-inch and 42-inch diameter pipeline spanning from the Navajo communities of Little Water to Naschitti, New Mexico.

When completed, the San Juan Lateral of the Navajo-Gallup Water Supply Project will provide water for municipal, industrial, and domestic use to Navajo communities in New Mexico, as well as the City of Gallup. Work is also proceeding along the Cutter Lateral, the other main pipeline for this project. Reclamation anticipates that the first project water will be delivered through that system next summer. Work under this contract will begin in January 2020 and is expected to last for approximately 2 years. Construction on this stretch of the pipeline will be visible from U.S. Highway 491. Navajo-Gallup Water Supply Project will provide a long-term, reliable water supply for 43 chapters on the Navajo Reservation, the southwest area of the Jicarilla Apache Reservation, and the City of Gallup, New Mexico. When completed, it will include approximately 300 miles of pipeline, two water treatment plants, 19 pumping plants, and multiple water storage tanks.

Animas-La Plata Project

In 2019 the Animas La Plata Project's Lake Nighthorse was at 6,881.03 feet of pool elevation and 113,634 acre-feet of live storage on September 2, 2019. Pumping began at the Durango Pumping Plant on June 10, 2019 and was completed on June 27, 2019. Total volume pumped was 1,734 acre-feet. The Animas Basin snowpack for winter 2018/2019 was 158% of median peak. The April – July 2019 Runoff observed Totals at the Animas River in Durango, CO was 654,000 acre-feet (170% of median).

San Juan River Recovery Implementation Program

The San Juan River Recovery Implementation Program (SJRIP) is a nationally recognized program designed to recover the endangered species and continue water development and use. In WY 2019, the SJRIP has requested Available Water over the End of Water Year Storage Target of 6063 ft be used to augment baseflows in the critical habitat reach (Farmington to Lake Powell), as recommended in the Flow Recommendations decision tree (1999, updated 2016). Available water over this target will be used to increase the downstream target baseflow to 1500 cfs through September, as long as excess water is available. Starting in early November, the release will drop as low as needed to make the lowest baseflow (as low as 250 cfs). By mid-November, operations will resume as normal and releases will range between 350 and 650 cfs on average.

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. 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).

The parties responded on whether the Pre-Federal Claimants have standing in the case in April 2019. New Mexico, Colorado and Texas filed separate responses stating that the Claimants’ motion to intervene should be denied. The latest may be viewed at:

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

State: Texas

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PRODUCED WATER

What is “produced water” and why is it important?

In Texas, oil deposits, and many gas deposits, contain substantial quantities of formation water as well as oil/gas. When the oil/gas is pumped out, water comes with it. Typically the ratio of water:oil is in the range of 5:1 to 10:1. These waters can contain high concentrations of dissolved salts (in the Permian Basin in Texas/New Mexico, total dissolved solids (TDS) concentrations frequently exceed 100,000 mg/L), in addition to volatile organics, heavy metals, and radionuclides.

Managing these waters is a particular problem in Texas. Texas provides 40% of U.S. oil production and 25% of U.S. gas production. (The Permian Basin has replaced Ghawar in Saudi Arabia as the world’s top producing oilfield.) That means Texas generates A LOT of produced water. Some estimates put it at close to one billion (that is a b) gallons per day.

Because of the quality issues, at the present time in Texas, produced water is either recycled for use in frac water or disposed in deep wells. The demand for frac water is much less than the volume of produced water that is generated. Continued deep well disposal also has limitations because the formations accepting the re-injected produced water have a finite capacity.

Ultimately, it would be desirable to clean up the produced water so that it can be used for purposes other than frac water. However, in addition to the existing technological limitations, there are also Federal regulatory limitations. East of the 98th meridian (approximately the middle of Texas) produced water cannot be discharged. West of the 98th meridian, produced water can only be discharged specifically for wildlife and agricultural uses, if the quality is suitable and limitations on measurable oil in the water are met. Produced water cannot be discharged to a publicly owned treatment works (POTW) under any circumstance. Centralized Waste Treatment facilities, which by definition cannot be a POTW, are allowed to treat produced water, if the technology to do so exists.

The Texas Water Conservation Association (TWCA) is discussing a policy statement that would recognize “the importance of treating produced water for beneficial use in the hydrological cycle to federal and state regulatory water quality and discharge standards established under the EPA and TCEQ through proper permitting.”. It further supports allowing POTWs to provide the requisite treatment to the extent they have the capability to do so. Specifically, the policy would support the following,

- “a) continued development and refinement of technology to treat produced water;
- b) development of appropriate technology-based effluent limitations to establish the minimum level of control to be implemented in a permit to discharge produced water; and
- c) combining technology-based effluent limits with applicable water quality-based effluent limits in permits for the discharge of produced water to protect state water quality in the receiving stream.”

Whether this policy will be adopted by the TWCA Board is still an open question.

In other action in Texas in this area, the State Legislature, in the session that ended in May of this year, assigned responsibility for regulating discharges associated with the oil and gas industry (produced water, hydrostatic test water, and gas plant effluent) to the Texas Commission on Environmental Quality (TCEQ) and directed TCEQ to seek delegation from EPA to issue permits. On September 17, 2019, TCEQ initiated a rule-making process. (Before this legislative action, management of oil and gas wastewater was under the purview of the Railroad Commission of Texas (RRCT)—an agency that has very little to do with railroads and everything to do with oil and gas production—and TRRC had not sought delegation from EPA.) EPA currently has NPDES permitting authority for discharges of produced water west of the 98th meridian for wildlife and agricultural uses.

NATIVE MUSSELS AS ENDANGERED SPECIES

Zebra mussels are a catastrophe wherever they appear, and that seems to be just about everywhere in Texas. Therefore, it seems strange that mussels would also be considered to warrant protection as an endangered species. However, native mussels are not undesirable, and there is currently work underway to determine if some of them should be listed.

This effort was triggered by the Settlement Agreement between WildEarth Guardians and the U.S. Fish and Wildlife Service (USFWS) in May 2011. In this agreement the USFWS agreed to look at some 600 species and make a 90-day petition finding regarding whether there is sufficient evidence of potential endangerment that a more in-depth assessment should be made. The in-depth assessment would determine whether a listing as threatened or endangered is warranted, not warranted, or warranted but precluded. USFWS also agreed that at least 251 species would be subject to the in-depth assessment.

There are approximately 52 species of freshwater mussels in Texas. Of these, 15 species are considered as State-threatened by the Texas Parks and Wildlife Department. 12 species have been considered for listing pursuant to the Endangered Species Act (ESA). Based in the in-depth investigations, one species has been listed in the Rio Grande. The Species Status Assessment (SSA) has been out for several months for Central Texas water bodies, and two species are proposed for listing. The preliminary decision on these species is expected to be out any day now. That will trigger a one-year comment period before a final rule is published. It is possible that the listings for the Central Texas waters will not include Critical Habitat. This will substantially reduce the extent of the permitting requirements associated with obtaining a 404 permit, where one is required. River authorities have been heavily involved in obtaining and providing data (hydrology, water quality, and general basin information) in order to ensure that listings, if proposed, are based on sound science.

The SSA is not yet out for East Texas waters. A draft is expected to go to the expert reviewers soon. After their review, it will be available to the general public. Two species are subject to the in-depth investigation in East Texas.

LOW LEVEL PERMIT LIMITS

Permit effluent quality limits continue to become more and more stringent as treatment technologies improve and concern for protecting the environment grows. The primary effluent quality limit for most parameters is a 30-day daily average. Permits may also have a 7-day daily average limit and a single sample limit; these limits are derived from the daily average limit and a preset multiplier. However, as the 30-day average limit becomes lower and lower, it can become, in effect, more like a single sample limit because a single daily exceedance cannot be overcome. This can be because, once the limit is near the reliable detection limit, it is difficult or impossible to get sufficient measurements at the detection limit such that an average value that is at or below the detection limit is achieved. The Water Environment Association of Texas (the Texas affiliate of the Water Environment Federation) has formed a working group to work with the Texas Commission on Environmental Quality (TCEQ) to explore the possibility of using a statistic that is more representative of a monthly average condition. Possibilities include a percentile value, such as 50th percentile. Furthermore, the group will evaluate whether less restrictive 7-day daily average limits and single sample limits can be protective of the receiving waters. The first meeting of the group is expected to occur by the end of October.