

# The Water Report™

*Water Rights, Water Quality & Water Solutions in the West*

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## LAURA WATSON, ECOLOGY DIRECTOR

INTERVIEW WITH LAURA WATSON

DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF ECOLOGY

Interviewed by Chris Pitre, Coho Water Resources (Seattle, WA)

## INTRODUCTION

Laura Watson was appointed Director of the Washington State Department of Ecology by Washington Governor Jay Inslee in January 2020. This interview presents Director Watson's perspectives on her position, stewardship, priorities, constraints she will deal with, and the legacy she hopes to leave.

Before appointment as Ecology Director, Ms. Watson worked in the Washington Attorney General's Office for 22 years. Most recently, she served as Division Chief of the Attorney General's Ecology Division, managing 36 attorneys and professional staff and serving as chief counsel to the Washington State Department of Ecology (Ecology). Director Watson is an alumnus of the University of Pittsburgh and obtained her Juris Doctor from the University of Washington.

Director Watson was joined in the interview by Mary Verner, Ecology's Water Resources Section Manager, and Tom Tebb, Director of Ecology's Office of the Columbia River.



Laura Watson



Chris Pitre

## Ecology Director

### Climate Change & Water Quality

### Decision Maker

### Water Resources Focus

#### The Water Report

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#### A NEW DIRECTOR

**Chris Pitre:** Director Watson, Ms. Verner and Mr. Tebb, thank you very much for giving your time to speak to the readership of *The Water Report*. Director Watson, you've been in the job five months. Many congratulations to you! You were the division chief for the Washington Department of Ecology for five years, covering ten programs. Did you have certain areas of personal interest?

**Laura Watson:** Thank you. What did I focus on? In my role as division chief with the Attorney General's office, of course, I had to have my fingers on the pulse of all ten of Ecology's programs. So, I'd say I worked in all ten of those programs. But I did also have a personal focus, which in my last five years with the Attorney General's office, was climate change and water quality. Less so on water resources. So, I'd say how lucky am I to be in an agency where I am surrounded by people like Mary Verner and Tom Tebb and their fabulous staff. I have a lot of education that I need to undertake to come up to speed on some of the water resources issues, but I have absolutely the best team of educators and teachers within the agency to help me do that. So, thank goodness for staff.

**Pitre:** What's the biggest challenge in moving from legal counsel to being director? Was it much of a shift?

**Watson:** I say a pretty substantial shift in the way that I approach issues and problems. As the attorney, you get to sit down with the decision maker. You get to lay out the options. You get to lay out the legal risks and benefits of the various options. And then you get to step back and let the decision maker make the decision. And, of course, in this role I'm in now, I am the one who's making those decisions.

Your question makes me smile, because I can remember some of my earliest meetings at the department where I'd meet with staff and they'd brief me on an issue, and then there would be an awkward silence while everyone was waiting for me to say what my decision was. I was waiting for the decision maker to say what the decision was. I had to remind myself that I am the decision maker now.

**Pitre:** Given our limited time and the readership of *The Water Report*, we will talk mostly about the water program. How much time do you spend now focused on water resources as opposed to the other ten programs? How much attention are they going to get from you in water resources?

**Watson:** Water resources is going to get a lot of attention because it's just such a hugely important part of our profile. I'd say in terms of the time I spend on substantive environmental issues, although the water resources program is one of ten programs, I definitely spend much more than 10% of my time delving into water resources issues.

Having said that, I entered the agency at a very special and unique time. I've been at the helm for a little over five months. The first couple months were largely consumed by the legislature being in session. Also, there were a lot of opportunities to meet with stakeholder groups and tribes, because a lot of people were in Olympia based on the fact that the legislature was in session. That basically consumed my first couple of months.

And then my next couple of months were largely consumed with COVID and everything that was happening so quickly, and helping our agency respond. Sending everybody home for 100% telework, for example. COVID consumed probably the next two months of my time. And the last month has been not entirely consumed, but spending a lot of time on dealing with the budget impacts of lower revenues coming into state coffers.

So, it's a unique time to be running an agency. But I'm loving every minute of it. I'm spending a fair amount of my time on water resources issues for that amount of time that's allocated to working on substantive issues. But I will say a large portion of my time in this first five months has been dealing with just some of the workforce and budget issues that are coming out of COVID.

**Pitre:** How's Ecology handling COVID and working from home? There's morale, good feeling, leadership, and there's also efficiency and effectiveness of staff time. Are you seeing a bit of slowing down, adjusting to working from home and making sure the whole machinery is working well?

**Watson:** Two questions are tied into that. One is 'morale' and one is 'are we able to do our jobs as effectively from home?' I'll take the second one first, in terms of doing telework from home. I've actually been amazed at how effectively we've moved from having most people in the office four or more days a week to being a 100% telework agency. This is more anecdotal than data driven, but my sense is we've actually, in many respects, become more productive having folks working from home.



**Ecology  
Director****Telework  
Working**

There have been some delays, some bumps in the road to doing some of our work. We've had to shift from big in-person public meetings to virtual meetings and all the technological issues that go along with that, as well as making sure that our virtual formats are accessible to the members of the public who want to participate in those meetings. We've seen some slowdowns, at this point not very significant, but some schedule delays as a result of that. People are doing surprisingly well with telework.

I do think people miss the interactions with their colleagues and office mates. I think if you asked most people within the agency they would say, "I love the opportunity to telework. I'm so productive. But I sure wish I had the option of coming into the office and interacting with my colleagues, as well." So, I'd say it's been kind of a mixed bag from that perspective.

I would say also, though, that morale seems to be surprisingly good. There is, of course, a lot of consternation over budget, concerns over COVID, children being out of school and parents having to take care of school-age children while they're also trying to work from home. So, we're in, obviously, some stressful times.

Despite all of that, my sense is that morale is really quite high. And I attribute that to the fact that the Ecology staff are so committed to the mission of the agency, and so committed to public service that being able to continue with the great work that they do from their home offices or from their kitchen tables is a motivator in and of itself.

**GOVERNMENT-to-GOVERNMENT****Columbia Basin  
Treaty**

**Pitre:** I'd like to cover government-to-government relations at various levels. The only international one I can think of is the Columbia Basin Treaty. The federal government is supposed to be the lead from the American side. Does Ecology have a substantive role? What do you think the outcome might be? Do you think maintenance of the status quo is most likely? I know that the Americans think that the Canadians are getting too much money, but then, Canada is holding all the dams.

**Watson:** I'm going to turn this one over to Tom if he's comfortable running with this one.

**Thomas Tebb:** Thank you, Director. I participate on a state team that's chaired by J.T. Austin in the Governor's office, with a variety of folks, both in energy and water, as well as other interests around fisheries. We have been engaged with the Governor's office through the chief negotiator with the State Department — Jill Smail. We get periodic briefings from the [US] State Department, and I think we have a request in for a briefing right now. I think they've had up to nine different negotiation sessions with our Canadian counterparts. And again, of course, as you know, flood protection, power, the entitlement issues remain front and center.

**Tribal Interests**

But, more importantly this time around, I think tribal interests have been more embraced than they have in the past. In particular, the Canadian ensemble has provided a platform for First Nations to participate. We are seeing the US Bureau of Reclamation, the US Army Corp of Engineers and Bonneville Power Administration similarly reciprocate with Upper Columbia United Tribes on the American side. While not having a seat at the table, I think tribes are getting more engagement and more involvement than they have historically.

So, we're optimistic. I think we don't always know what's going on, just to be honest with you, on the treaty negotiations. But we do get periodic briefings, and we're being told that it will look fairly similar to what we have, and will have more emphasis on tribal and fishery issues than it has in the past.

**Cross-Border  
Tribal  
Connection**

**Pitre:** Are the tribes on both sides of the border working more in unison with each other, or are they working more in partnership with their respective national interests?

**Tebb:** You know, that would be speculation on my part. But, look, from an observer's point of view, I see they have family members on both sides of the border. They are interconnected just by their heritage. And so, we're seeing, I think, more collaboration and cooperation amongst the tribes on both sides of the border. I was able to go to Cranbrook, B.C. last year for a Columbia River Treaty session, and we had members from both sides of the international border participating in the Columbia River forum. That really helped to augment the importance of the Columbia River as a heritage for our tribes. I think that was very valuable for the negotiators to hear.

**Tribal Advisor****Tribal Relations**

**Pitre:** Ecology recently appointed Tyson Oreiro as Senior Advisor on Tribal & Environmental Affairs. I've heard good words about Mr. Oreiro. I understand he is a Lummi Tribal member.

What are your thoughts on shared governance? How might the relationship with tribes evolve? How much direct engagement or enhanced engagement might there be across the board with respect to Ecology, and you as director of Ecology?

**Ecology  
Director****Sovereign  
Nations****Adjudications****Developing  
Solutions****Tribal Liaison****Clean Water Act  
Confrontation**

**Watson:** I have learned that the term “shared governance” means something different depending on who’s using it. So, it’s a term that I shy away from just because it’s not always entirely clear what people mean by shared governance.

What I will say with our relationships with the tribes, of course, every time we’re participating with the tribes it’s in a government-to-government capacity. That’s true whether it’s an official government-to-government consultation, or whether we are dealing with them in more informal discussions, they are sovereign nations and they are our government partners. We’re always engaging with them in a government-to-government capacity.

In particular in the area of water resources, which is of most interest to your readership, we have numerous engagements with tribes across the state on water resource issues. They have, in almost all instances, the senior water rights in basins, but there’s a lot of uncertainty around what the measure of those rights are. And as things stand right now, the only way to accomplish that certainty in a definitive manner is through water rights adjudication, or perhaps a federal declaratory judgment action.

So, what we do in lieu of adjudicating the entire state is engage extensively with tribes on those water rights issues and community stakeholders, and try to develop solutions in basins that will be workable for everyone. But again, we’re always doing that in a government-to-government capacity when we’re dealing with a tribe.

**Pitre:** In some instances, tribes speak with a united voice, such as through the Northwestern Indian Fisheries Commission and the Upper Columbia United Tribes. But each tribe is their own nation. Do you find it difficult to be dealing with individual tribes, or are they consistent enough, or is that where you have to be careful?

**Watson:** I don’t find it difficult to deal with individual tribes. I think the key is to recognize that they are individual tribes. And, you’re right, there will be areas where you’ll have a number of tribes that are in agreement on issues, and a lot of that’s reflected through the Northwest Indian Fisheries Commission. But every time you’re dealing with a tribe, you’re dealing with a different sovereign nation.

Tyson’s been great, and the tribal liaison that preceded him was also great in helping us navigate those relationships. Understanding where a particular tribe might be coming from, what that tribe’s considerations might be. Even down to how that tribe is dealing with COVID. What have been the impacts to that tribe of COVID, and really understanding before we go into any conversation what that tribe might be struggling with, what their concerns might be, and what messages we might expect to hear.

**WATER QUALITY**

**Pitre:** Director Watson, you certainly don’t shy from confrontation (see “Section 401 Statement” sidebar). With respect to water quality, there’s the recent change in defining Waters of the United States (WOTUS), and relaxation of the water quality criteria. (See Bellon, “*Water Quality Certification*” — *TWR* #189 and Eisenberg et al., “*2020 WOTUS Rule*” — *TWR* #196).

With respect to the federal Clean Water Act, Washington State promulgates those standards, which must be at least as strict as federal standards, but may be stricter. Washington State’s position has flipped recently, in that the state wanted laxer criteria than the Obama administration, and now wants stricter standards than the Trump administration. It is currently a rocky relationship with the federal government. Can you move forward without the federal government?

**Section 401 Statement from Ecology Director Laura Watson****ON FEDERAL RULE UNDERMINING WASHINGTON’S WATER QUALITY PROTECTIONS**

**OLYMPIA, June 1, 2020** – Today, the U.S. Environmental Protection Agency Administrator Andrew Wheeler announced a new rule that would significantly restrict the role for states in protecting water quality within their borders by making major changes to Section 401 of the federal Clean Water Act.

Washington State Department of Ecology Director Laura Watson issued a statement in response:

“With the stroke of a pen, EPA intends to handcuff Washington’s ability to protect our waters, our environment and our communities. This action is a blatant attempt to rewrite the 1972 Clean Water Act by diminishing the role of the states in protecting water quality. It makes a mockery of the federal-state partnership that has protected our nation’s waters for nearly 50 years.

“EPA’s new rule is a solution in search of a problem. Section 401 of the Clean Water Act is working as Congress intended, and continues to be successfully implemented across the country.

“This massive federal overreach under Section 401 is unprecedented. It is also illegal and indefensible – and it will not stand. We will work with Attorney General Bob Ferguson to defend our state’s authority to protect water quality for the environment and for the 7.5 million Washingtonians we serve.”

**Background:** EPA’s new CWA Section 401 rule limits what types of pollution discharges a state can review under the Clean Water Act. It also limits the amount of information a state can request from an applicant, dramatically shortens the amount of review time states have to act on an application, and limits the conditions that states can put into 401 certifications to protect state waters from pollution. [See next article, this *TWR*].

**Ecology  
Director****EPA Region 10****Rolled Back  
Protections****Waters of the US****Wetlands  
Protection****Regulatory Gap****Permit Program  
Needed****State 401  
Certification****Dredge or Fill**

**Watson:** I'll begin by saying that the federal government, of course, is a very, very, very large entity with lots of arms, and lots of employees, and lots of bureaus, and lots of regions. And I'd be remiss if I didn't say we've actually partnered very well with a lot of our local federal partners. For example, the relationship with Region 10 of the EPA is a good, strong relationship. We work with them on enforcement actions. We work with them in implementation of our delegated programs. We've got a lot of areas of overlap and mutual interests, and we continue to have strong working relationships with them that we value. There are our relationships with the Bureau of Reclamation, relationships with the Department of Energy, which can run a little hot and cold, but we value that relationship as well.

I think most of our vocal opposition, mine in particular, to what we're seeing coming from the federal government is really coming from decisions that are being made by political appointees in the other Washington. And honestly, it has been really disheartening to see the Environmental Protection Agency falling all over itself to roll back environmental protections. It's just been one thing after another, sometimes it feels like without any rhyme or reason. The 401 rule is a good example (*see* "Section 401" in sidebar, and the next article in this issue of *The Water Report*). We had states across the political spectrum telling EPA, "Do not do this. This is a very significant states' rights issue." But they went forward and did it anyway.

So, it's disheartening, and you're right that we have been willing to be vocal about it. I am an optimist and glass half-full kind of person. I see it as more of a temporary blip than a permanent state of affairs. I think things will right themselves and we'll be in a good place again. In the meantime, we have very strong laws here in Washington State that we implement to protect the environment.

**Pitre:** When you say this is a state issue, can you promulgate the Clean Water Act without the federal government?

**Watson:** Well, it depends. Let me give an example. With the Waters of the United States rule, the definition of Waters of the United States was recently narrowed with the new rule that EPA adopted. And what that does for us in Washington State is that we go from having 30% of our wetlands federally protected, to now only about 10% of our wetlands federally protected. All of those wetlands continue to have state protection. The definition of water of the state in Washington is broader than the definition of Waters of the United States. So, we can still protect those waters under state law. They're no longer protected federally.

What that means for us as a practical matter is, it used to be that if a developer wanted to engage in development that could impact a federally protected wetland, they would get a 404 permit from the Army Corps of Engineers, or often they would be eligible for the nationwide 404 coverage (*see* sidebar). Now, that's no longer an option. But in Washington State, because the Army Corps used to issue those permits, we don't have a permit program set up to permit those types of projects. So, we're going to have some uncertainty for developers, and some period of time before we are able to basically fill the huge regulatory gap that the federal government has left. We are hoping that that rule will be stayed until it can be decided in court whether that's a valid rule.

**Pitre:** So, that really affects how business is done, like people asking for permits and moving their projects forward?

**Watson:** Yes, it does, because we don't have a permit program for that right now. We have a mechanism where we can issue individual administrative orders to allow that kind of work to go forward if it would impact a state protected wetland. But that's not a particularly streamlined process. So, losing the 404 permitting program for so many of our state wetlands is going to cause a big impact here in Washington.

**Clean Water Act Section 401 Certification**

The federal Clean Water Act (CWA) enables states to approve, condition, or deny projects proposed in waters of the United States when a federal permit is needed.

Issuance of a CWA Section 401 Certification means that the certifying state has reasonable assurance that the applicant's project will comply with the state's water quality standards. Conditions of the 401 Certification become conditions of the federal permit or license. [See next article, this *TWR*].

**Clean Water Act Section 404**

The US Army Corps of Engineers, through its Regulatory Program, administers and enforces Section 404 of the Clean Water Act. Under Section 404, a permit is required for the discharge of dredged or fill material into waters of the United States (WOTUS). Recent changes to WOTUS (*see* Eisenberg, et al. *TWR* #196) have left many previously federally-protected waters and wetlands without federal protection.

<div data-bbox="159 180 302 260">Ecology Director</div> <div data-bbox="142 336 318 405">Temperature (Dams)</div> <div data-bbox="142 476 318 546">Army Corps § 401 Appeal</div> <div data-bbox="131 756 328 821">Instream Flow Standards</div> <div data-bbox="125 930 334 963">§ 401 Authority</div> <div data-bbox="172 1138 284 1169">Elkhorn</div> <div data-bbox="125 1209 334 1241">Instream Flows</div> <div data-bbox="147 1560 311 1625">Impairment Standard</div> <div data-bbox="115 1698 342 1732">“Drop-for-Drop”</div> <div data-bbox="147 1875 311 1940">Legal Water Availability</div>	<div data-bbox="381 149 1531 323"> <p><b>Pitre:</b> What about the Snake River dams? They’ve been in the news for decades and there are arguments to keep them — for transportation, for hydro. There are arguments for taking them down — for the Endangered Species Act, salmon, and orca sustenance. Is the ship turning on this issue? Does the state have a position? Also, one of the water quality changes in federal regulation is the definition or enforcement of point sources. I suppose that means temperature in reservoirs. How do you deal with that?</p> </div> <div data-bbox="381 327 1531 472"> <p><b>Watson:</b> Thank you for asking about temperature, because that actually has been our focus on the federal dams both in the Snake River and the Columbia River. We recently issued 401 certifications to EPA for NPDES permits for the Army Corps of Engineers that contain temperature standards. We have an expectation and measures in place to make sure that federal operators of dams are meeting the same standards that we expect private operators of dams to meet.</p> <p>The Army Corps did appeal those 401 certifications, which is hugely disappointing to us. We would have liked to see them work with us to help implement them, because temperature is really critical and becoming more critical because of climate change in those river systems. We did get those 401s issued before EPA finalized its rule narrowing the scope of what can go into a 401. So, although the Army Corps in its notice of appeal seems to be raising issues that would implicate the proper scope of a 401, we did get those 401s issued before EPA issued its rule narrowing the scope of 401 certification.</p> </div> <div data-bbox="381 680 1531 737"> <p><b>Pitre:</b> Are you saying that even though the state can promulgate water regulations, the federal government can restrict what you can do?</p> </div> <div data-bbox="381 741 1531 1001"> <p><b>Watson:</b> I would say that is not our position. I would say that is, right now, EPA’s position, I think at least in regards to 401. We read the scope of our 401 authority as being extremely broad, not just based on the statutory language but the seminal <i>Elkhorn</i> case which came out of Washington State and recognized the ability to set instream flow standards in 401 certifications. In doing that, the Supreme Court recognized that 401 was broader than just point source discharges. [See “Court Cases” sidebar].</p> <p>We, and the vast majority of states across the political spectrum, believe that 401 grants expansive authority for states to condition federal projects, ensuring that water quality standards in the state are going to be met. I’m not just hopeful, but I’m actually pretty confident that EPA’s rule saying otherwise is ultimately going to be struck down.</p> </div> <div data-bbox="688 1043 1206 1075"> <p><b>Court Cases Referenced in this Interview</b></p> </div> <div data-bbox="394 1102 732 1129"> <p><b>United States Supreme Court</b></p> </div> <div data-bbox="394 1134 1531 1415"> <p><i>Elkhorn</i> (1994): On 31 May 1994, a landmark US Supreme Court decision expanded state authority to establish conditions to protect water quality and included stream flows, aesthetics, and, potentially, other elements in a broad definition of water quality. Called the “<i>Elkhorn</i> case,” the US Supreme Court ruled that the State of Washington Department of Ecology has authority to set instream flows for fish (primarily steelhead, chinook, and coho salmon) as a condition of a Water Quality Certification issued by the state under Section 401 of the federal Clean Water Act. The case surrounded the petitioners (applicants) proposed building of the Elkhorn Hydroelectric Project on the Dosewallips River, Washington. The project would have consisted of a dam near the boundary of Olympic National Park and a pipeline to carry diverted water around a 1.2-mile bypass reach to a powerhouse at Olympic National Forest’s Elkhorn Campground.</p> <p>The Washington State Supreme Court ruled in favor of Ecology on April 1, 1993. The case was taken to the US Supreme Court the following year, where the court ruled 7–2 in favor of the state. (<i>PUD No. 1 of Jefferson County v. Washington Department of Ecology</i>, 511 U.S. 700 (1994)).</p> </div> <div data-bbox="394 1530 779 1558"> <p><b>Washington State Supreme Court</b></p> </div> <div data-bbox="394 1562 1531 1961"> <p><i>Postema</i> (October 2000): This case established an absolute standard of one-molecule impairment for impacts on instream flows that are not being met — i.e., there is no “de minimus” impact allowance (<i>Postema v. PCHB</i>, 11 P.3d 726, (2000)).</p> <p><i>Foster</i> (October 2015): This decision required “drop-for-drop” mitigation. <i>Foster</i> re-affirmed that instream flows adopted in a rule must be protected from impairment. This case involved Ecology’s decision that granted the City of Yelm’s water right permit, conditioned on an extensive mitigation package. The Court said the permit would impair minimum instream flow water rights despite the mitigation proposed and therefore violated water law (<i>Foster v. Dept. of Ecology, City of Yelm and WA PCHB</i>, Case No. 90386-7 (2015); <i>Foster v. Yelm</i>, 362 P.3d 959 (2015)). See Moon, <i>TWR</i> #141 for additional information.</p> <p><i>Hirst</i> (October 2016): The Court ruled that Whatcom County failed to comply with Washington State’s Growth Management Act requirements to protect water resources. The ruling required the county to make an independent decision about legal water availability (<i>Whatcom County v. Hirst, Futurewise et al.</i>, Case No. 91475-3, 381 P.3d 1 (2016)). See Dickison &amp; Haensly, <i>TWR</i> #155 and Moon, <i>TWR</i> #153.</p> </div>
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## Ecology Director

### Acquavella Adjudication

### Forestalling Adjudication

### Minimum Water Supply

### Jurisdiction Issue

## ADJUDICATION

**Pitre:** We mentioned adjudication earlier. I think all that's left in the Yakima Basin's *Acquavella* adjudication is tying up loose ends. When the Yakima adjudication started in the mid-1970s, there were two universes — surface water and groundwater. Now, they're one universe. What's going to happen with groundwater? Is that on your radar?

**Watson:** It is on my radar. I'm going to turn it over to Tom as the expert. I'll just note that I was actually in kindergarten when *Acquavella* was filed.

**Pitre:** Well, Tom's good for this, because he's a geologist as well, aren't you, Tom?

**Tebb:** Yes, I am. We are essentially trying to jump over the groundwater adjudication issue by using the *Acquavella* adjudication as a foundation to implement the Yakima Basin Integrated Plan as the basis to provide additional water supply and additional habitat improvements that we hope will forestall any kind of groundwater adjudication. The idea is that if we can get proratable or junior irrigation districts and others their minimum water supply in times of drought, really the need to adjudicate groundwater we hope to forestall. So, the idea is that we're investing in the Yakima Basin Integrated Plan, which is a 30-year, \$3.8 billion plan, to address the water supply, fish passage, and habitat issues in the basin.

**Pitre:** So, what would be a trigger for adjudication of groundwater in the Yakima Valley?

**Tebb:** It might be something like one of the proratable irrigation districts with the May 10th, 1905 priority date, taking a city that has a groundwater right and saying that it's out of priority with their May 10, 1905 surface water right. And so, the idea here is to try to help those large-scale irrigation districts with junior proratable rights achieve their minimum water supply of at least at 70% during times of drought so that they don't make a "call" on that water.

**Pitre:** Director Watson, are you thinking of where the next adjudication might be? When one talks about adjudication, people think about Yakima. But is that representative of what the next adjudication might be?

**Watson:** I would begin by saying that we learned a lot of lessons in *Acquavella*. I think there are aspects of *Acquavella* that would find their way into any adjudication. There are certainly aspects of adjudication that would be the same in any future case we file. *Acquavella* took 42 years to get the final decree. Obviously, we don't want to embark on a path of basin-wide adjudication where it's taking us 42 years from filing to get to final answers.

But we learned through *Acquavella*, so we don't think that's going to be the situation. In fact, I understand the first ten years of *Acquavella* were largely taken up with fighting over whether the case

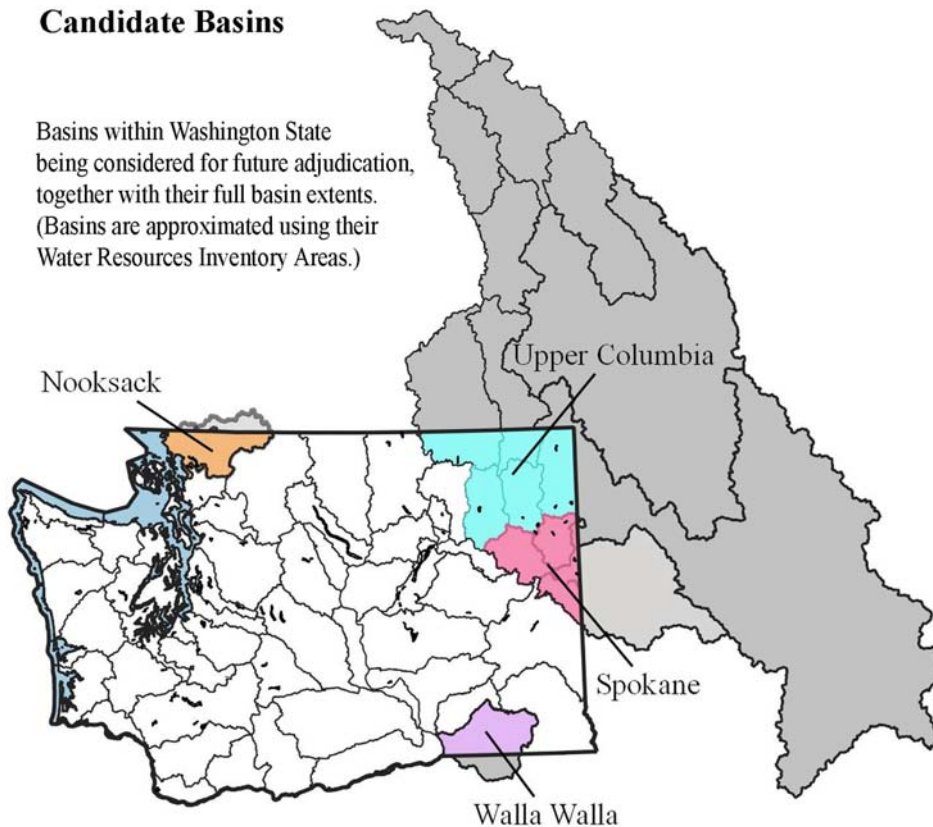
should be in federal court or state court. We have this really pretty amazing and somewhat humbling situation right now, where we've had tribes petition us to file state court adjudications, which would suggest that we're not going to have those fights over whether the case should be in state court or in federal court.

With respect to our plans moving forward, we are working on a report to the legislature in September, with the focus primarily on four basins right now: the Nooksack, Upper Columbia River, Walla Walla, and Spokane.

I think in a perfect budget situation, we might be going before the legislature and saying, "We think we should pursue adjudication on at least two of those basins." But we know we are not heading into a perfect budget situation, so I think we're probably going to have to right-size our expectations. No decisions have been made, but I think where we will land is probably to focus on one of those four basins as our recommended first basin to move forward on. But the report will comprehensively look at the pros and cons of each one of those basins. Mary, would you like to add to that?

## Candidate Basins

Basins within Washington State being considered for future adjudication, together with their full basin extents. (Basins are approximated using their Water Resources Inventory Areas.)



## Ecology Director

### Adjudication Basic

### *Acquavella* Wrap-Up

### Adjudication Assessments

### Exempt Wells Mitigation

### "Net Ecological Benefit"

**Mary Verner:** Laura, you did a great job of covering that. A little bit of maybe background, Chris, on how we came to conduct the assessment Laura referred to. An adjudication is really a basic water management tool. And unfortunately, using that tool on the Yakima took a couple of generations. But as it has wound up, our program began to look at where we should go next. Because determining the quantity and the priority date of water rights in a basin is pretty fundamental to the underlying rationale for the work that we do, issuing permits to use water.

So, we know that we need to do more adjudications, and we wanted to take that on deliberately. Over the years that the Yakima adjudication has wound down, of course, our staff correspondingly have been reduced. We have a couple of staff who are involved in the rather tedious details of wrapping up the *Acquavella* adjudication. Tom, I think you would attest that their work requires discipline to take care of all those wrap-up details, and they will be done.

There were some appeals that the Attorney General's office is helping us to wrap up. We just filed some briefs yesterday. So, there's still a few dangling things going on in *Acquavella*. But we do want to approach adjudication as the tool it was intended to be. The legislature agreed with us last year, and included in a short proviso enough funding for us to conduct an assessment of where we should go next. So, we brought on a very talented individual, Robin McPherson, and she is the project manager to conduct that assessment and then make recommendations to the legislature.

## WATERSHED RESTORATION & ENHANCEMENT COMMITTEES

**Pitre:** There are Watershed Restoration Enhancement Committees (WRECs) in eight watersheds, all around Puget Sound. They are charged with mitigating streamflow impacts from exempt wells that will be installed over the next 20 years. What about permit-exempt wells that were installed since an instream flow regulation was put in place, or even back further to after there were Surface Water Source Limitation letters, SWSLs, under the fisheries code in the '50s and '60s? Quantitatively, they may not be a big issue, but process-wise they are because of the *Hirst* decision. (See "Mitigating for Development," Pitre in *TWR* #169, pp. 11-21; and sidebar.)

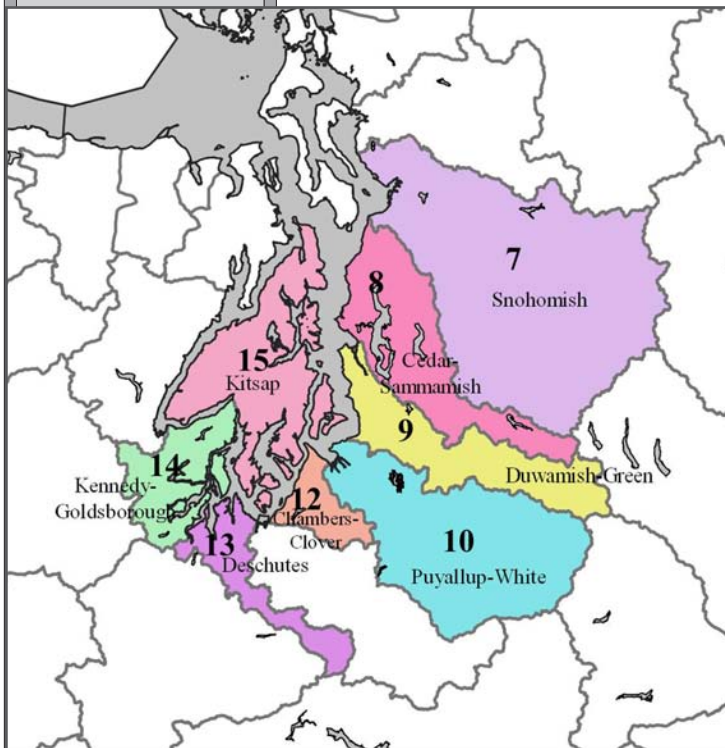
And then, there's looking at **net ecological benefit** (NEB) for mitigation of flow impacts in lieu of drop-for-drop mitigation. Maybe fish don't need that extra molecule of water. Maybe they would prefer to have that extra molecule of oxygen, which is largely temperature-controlled, and that

net ecological benefit can provide both. How can NEB as a mitigation tool fit into western water law that is drop-for-drop?

**Verner:** The legislation passed in early 2018, Engrossed Substitute Senate Bill 6091, was codified as Revised Code of Washington (RCW) 90.94, and establishes these committees around the state, as you mentioned. Some planning groups are Ecology-led — those are the water resource committees that you referred to — with the unfortunate acronym of WREC. And then there are those that are locally-led. The locally-led ones are required to update existing watershed plans. Back in the old RCW 90.82 process (watershed planning through the 2000s), these local groups adopted plans, and are now amending them. The WREC committees are for new plans where watersheds never adopted a plan.

As for the grandfathering of the wells, over the years after instream flows and SWSLs, RCW 90.94 was silent on that. RCW 90.94 requires us to predict the future, the 20 years of impacts of predicted future installations of permit-exempt wells. So, that's what we're focused on. The committees are required to estimate the number of wells based on coordination with local governments and building officials. Then they are to use a methodology approved by Ecology to quantify what they think the impact of those wells will be based on where they're going to be located.

Hydrogeologists love this, because we get to peel away and look underground and see what we think is going on. And then we are to plan to offset those impacts. We have two requirements. We have to offset those impacts and achieve net ecological benefit. That is an opportunity for us to be a bit creative.



### Mitigating for Wells

Watersheds around Puget Sound with  
Watershed Restoration & Enhancement Committees  
required to mitigate for permit-exempt wells for the next 20 years.  
(See Pitre. *TWR* #169 for details.)



## Ecology Director

### Implementation Funding

### Grant Program

### Drop-for-Drop Limitation

### Water-for-Water v. Mitigation Tools

### Integrated Plan

### Net Ecological Benefit Implementation

A major difference between the RCW 90.82 watershed planning and the RCW 90.94, the new round, is that there was some money associated with it. I would say, Chris, because I was in a different role back in RCW 90.82, that the big disappointment back then was that a lot of effort was put in but there was no funding to implement many of the recommendations. The legislature remembered that, and in RCW 90.94 they heard from a lot of constituents that this should not be an exercise in futility, and we're going to need some money for projects.

**Pitre:** Is that money still going to be there given the budget shortfalls?

**Verner:** Well, it is a capital funding stream from state-issued bonds, so we're very hopeful that we will be able to maintain the grant program. We issued our first round of solicitations and issued grants on the first round. We've recently issued our second round of solicitations, and are now evaluating the applications. That's for another \$20 million. We're really hopeful, Chris, that we'll be able to continue to fund those grants.

**Pitre:** Are you reconciled to living with the Western water law status quo, drop-for-drop mitigation? Is there room for net ecological benefit to factor into water right decisions, for instance? There are some constituencies that are strongly wedded to drop-for-drop. I don't know if it's realistic to think about changing. This concept gets brought up once in a while, but it hardly goes anywhere.

**Verner:** Well, drop-for-drop certainly makes it difficult in our permitting decisions, and has led to disagreements. We have one that I know Tom is familiar with, and Laura, you perhaps, too. In the Methow Basin, where we had closed tributaries for years, the drop-for-drop really does make the difference between whether a person could have drilled a well under the old instream flow rule, or now they can't drill a well after *Postema* and *Hirst* [see Court Cases sidebar, page 6] and the constellation of [Washington State] Supreme Court cases that led us to drop-for-drop. And so, now we're less likely to be able to get to yes. And it's frustrating for our constituents. Tom or Laura, let me give you a shot at that question, as well.

**Tebb:** Prior to the *Foster* decision [see sidebar, page 6], the Office of Columbia River would try issuing new water for supply or a new permit. For example, the Kennewick General Hospital permit application for Columbia River water, which was a long going, ongoing litigation with the hospital down there. We were actually able to issue them a new water right permit that did have water-for-water off-sets, but it also included a variety of habitat projects that the tribes and others were interested in, that they would then not appeal that permit.

That was prior to *Foster*, and I think Mary's correct with the constellation of some of these recent court cases. I don't know if the *Foster* task force has come out with any conclusions yet, but it has challenged us in terms of taking some additional tools out of our toolbox to try to solve problems. The gold standard and the standard that has been in play is water-for-water. Tribes expect us to do that, and we try to do that absolutely where we can. Where we can't, we have those conversations to see if there's any room for some other type of mitigation. Until we get some clarity around that particular decision on *Foster*, I think we are being very conservative with those types of decisions and those types of projects.

**Pitre:** Should the net ecological benefit component of the WREC process be given weight? I think some stakeholders are open to **net ecological benefits (NEBs)** and stepping away from drop-for-drop.

**Tebb:** Well, I would say that the Yakima was a great example. I mean, with the exception of Kittitas County who did some back mitigation for their well impacts, Yakama Nation was saying, "Hey, as long as we're making progress on these other issues, we're going to be okay if we follow the integrated plan and the plan that we've agreed with." I think there is some room there at least for some discussion. And, I think net ecological benefit is playing out in each of these individual watersheds. I suggest that it's still a viable tool.

**Pitre:** Regarding consistency of administration across the state, it sounds like it depends on whose tribal stomping grounds you're in. It's not just variation in tribal jurisdiction — there are other variations as well.

**Verner:** Well, Chris, with regard to net ecological benefit and what we're doing implementing RCW 90.94, as Laura indicated, we have a commitment to the government to government relationship with tribes, and we don't expect them to be one size fits all. We do have tribes actively involved in all of those planning efforts. We're very grateful for that, because we don't speak for them. So, we're pleased to have their natural resource directors and biologists and hydrogeologists sitting in on those committees and sharing their perspective.

## Ecology Director

### Direct Offset Options

### Over-Appropriated Groundwater

### Groundwater Replacement Project

### Reservoir Re-Operation

And we have been called to government-to-government points along the way, where there are staff who are attending our committees have brought issues back saying, “We need to talk about this offline and talk about some things that’s G-to-G.” But the committee challenge of first finding water-for-water, a direct offset of water-for-water is not so easy to do. We don’t just go out there and create new water. So, that’s a challenge. But we have seen tribes, as Tom is indicating, understand that there is opportunity embedded in that NEB. We can do habitat projects. We can restore riparian buffers and help add shade for water temperature. So, it’s there, it’s a tool, and we’re trying to lean more in that direction.

### OFFICE OF COLUMBIA RIVER

**Pitre:** One mandate of the Office of Columbia River (OCR) is to address the impacts from groundwater permits issued in the eastern Columbia Basin. These groundwater rights were intended to be temporary until the Columbia Basin Project Phase 2 was constructed — which never happened. Now groundwater is severely over-appropriated and groundwater levels are dropping precipitously.

**Tebb:** To be clear, the project that we are working on in the Columbia Basin Project is the Odessa Groundwater Replacement Project. We are not working on the second half of the Columbia Basin Project. We are working on trying to solve the problem that was created when we issued permits back in the ‘60s, ‘70s, and early ‘80s on the promise that the second half of the project would be built. Therefore, roughly about 100,000 acres is at jeopardy there.

Through the Odessa program, we are going to replace that groundwater with surface water from the Columbia River that we have worked very hard with the Spokane and Colville Tribes and others, the federal agencies, the fish agencies, to create some additional supply out of the re-operation of Lake Roosevelt (the reservoir created by Grand Coulee Dam). That water essentially will be transported through the East Low Canal. We have finished the entire infrastructure on the East Low Canal for the needed additional capacity. We have widened the canal. We’ve put in all the remaining siphons, gates on the canal. In addition, we are now in the stage of building pumping plants off East Low Canal to provide that replacement water out to the farms.



#### Selected Projects of the Office of the Columbia River:

- 1) Yakima Basin Integrated Plan (*see TWRs #106, #108, #135, #186*);
- 2) Icicle Creek (*see TWR #161*); 3) Okanogan Streamflow Enhancement;
- 4) Sullivan Lake Water Supply for Fish, Farms, & People;
- 5) Odessa Groundwater Enhancement Project (East Lower Canal);
- 6) Walla Walla Water Management Plan.

## Ecology Director

### Surface Water for Groundwater

And so, we'll have our first pumping plant online this year. It was not ready to take water early in the irrigation season, but it's being completed. The East Low 47.5 Pumping Plant will be complete. It'll serve 8,500 acres with the option to serve an additional 1,500 acres, for a total of 10,000 acres. We have two other distribution lines in the planning process, and there are about five others that are on the cusp of that process.

It's roughly over a \$200 million effort to complete all of those distribution lines. And that is meant to be a public/private partnership. In other words, the state and the feds have helped create the space in the canal, helped create the infrastructure to help serve. But from the pumping plants out, the farmers themselves will be paying for the pipes and for the distribution lines. And they're doing that through essentially water service contracts with the irrigation districts. They then take those contracts and go to the bond market and borrow money. So, every little bit of money that the public can bring into this project helps lower the cost for the farmers on a per acre basis.

It's been a challenge. You can imagine many of these folks have had groundwater rights that are a little bit more flexible than entering into the federal program. The acreage limitation, for example, is 960 acres is your total farm if you're in the federal Columbia Basin Project. Many of these farms are much bigger than that. So, they're having to make some decisions about how to diversify and how to sign up for the project, and whether they even want to be on the project.

### Replacement Water

**Pitre:** Who is the OCR serving? Is it trying to keep current acreage that is being irrigated with groundwater? Is it trying to replace that groundwater with surface water because the groundwater's not sustainable? Or, is it trying to wet up additional arable lands?

**Tebb:** This is not about new additional acreage. This is replacement acre for acre. There is a mix of corporate and family farms out on the Columbia Basin Project. This is intended strictly to try to protect a \$7 billion agriculture economy in the Columbia Basin Project.

### OCR Scope

OCR not only serves the Odessa. We are the principal office implementing the Yakima Basin Integrated Plan. We're also the principal office in moving integrated water resource solutions in basins like the Icicle Creek, or in the Walla Walla, where we're trying to begin developing strategies that we can begin to invest in long term. So, we serve a variety of interests across Eastern Washington.

And we are also partnering with other programs in Ecology, like Floodplains By Design, or even Mary's program, the Streamflow Restoration. We're providing water supply for the Okanogan for their rural program. We're also providing water supply out of our Lake Sullivan Project for Stevens County, which is another county that is part of the Streamflow Restoration Program. So, we're multi-diverse in our clientele, if you will.

## TRUST WATER RIGHTS PROGRAM

### Relinquishment & Trust Water

**Pitre:** Ecology has a Trust Water Rights Program in which water rights can be "parked", or essentially not used, without fear of relinquishment. Ecology has convened an advisory group. What is Ecology trying to facilitate through this group? What policy is Ecology trying to shape? Privatization? And is that consistent with Western water law anti-speculation?

**Verner:** In 2018, I asked my program staff, my policy staff, to revisit the statutes. The one for OCR is fairly straightforward. But the statute regarding the establishment of the state's water trust and the use of water in trust for banking, it just looks like an old dilapidated Christmas tree. A lot of ornaments have been hung on it, and it doesn't read very well. It's very confusing and has ambiguities embedded in that. So, I asked my staff to review it with outreach.

The legislature became interested in this. The Governor's office became interested in this. And then, the legislature kind of condoned what we were already doing, which is outreach, and condoned the establishment of this advisory committee. The advisory committee is active right now, and will develop recommendations that will be put in a report [for which] our target date is September 1st.

**Pitre:** The trust program was intended to wet up streams originally, and one perception now is it's being used as an end run around relinquishment, or for speculation.

**Verner:** Exactly, Chris. And there are those perceptions, that's why we have this advisory group. We're really drilling down into concerns and questions like that. Is the trust being used for speculation? Well, of course, if it is, we're very concerned. We're trying to determine is that true or is it an unfounded concern. Where it is true, what should we do about it? Where it's not true, how should we allay those concerns?

### Banking Trust Water



## CLOSING

Ecology  
Director

## Priorities

Environmental  
JusticeRacial  
InjusticeCOVID &  
Connections

**Pitre:** We haven't talked much about the budget. Are there particular programs that warrant being maintained and protected? Also, what kind of message do you want to get out to this readership?

**Watson:** I guess there may be two pieces of that. One is, coming into this role, what do I see as what the highest priorities are. We've already talked about some of them. Obviously in the water arena, one thing that continues to be really high priority moving forward is all the good work we're doing in the Office of the Columbia River. We just can't afford to lose ground on that right now, bad budget situation or not, and I'm really committed to that work going forward.

But, of course, I come in with some of my own priorities, as well. One of the ones that's really critical to me is to improve our environmental justice outcomes. We really, as an agency, need to take environmental racism head on. I think the racial pain, the racial injustice that we're seeing being played out across the country right now brings into a really sharp focus what our role is as an agency within our sphere of authority.

What can and should we be doing differently to make sure that we are not just refraining from making decisions that add burdens to disadvantaged communities and communities of color, but also actively dismantling some of those legacy decisions that have created those disproportionate burdens in the first place. It is a very high priority, and in my mind, can't just be one priority competing among many but has to be at the very top of the list for our agency.

**Pitre:** Can you give some examples?

**Watson:** I think taking a fresh look at where are we directing our enforcement resources. How are we making grant and loan decisions? How are we making decisions about what neighborhoods we're going into and collecting scientific data? Are we folding environmental justice considerations into each aspect of our decision-making? I think as an agency we've made great strides in that arena, and my goal would be to make bigger strides at this point.

**Pitre:** Director Watson, is there anything else that you would like to say?

**Watson:** I really appreciate, Chris, the conversation, the opportunity to share with you some of the work that we're doing, to answer some of the questions that might be the most pressing for your readership. I really appreciate the fact that I was able to have two of my water resources experts on the phone with me to help answer some of those more in-depth questions. I really appreciate the opportunity to speak to your readership in this fashion.

One thing I'd like to say is, in terms of relationships, I mentioned earlier that COVID has created a strange situation for me to be entering a new agency. I had a lot of great in-person meetings my first two months on the job, and now everything is kind of relegated to Zoom and Skype and virtual format. It makes it a little bit harder to get out there and make those connections that are easier to make, frankly, in person when I'm able to travel to various corners of the state.

But I am committed to making those connections, to forging those relationships, to building upon the great relationships that my predecessor had, to nurturing those relationships. And I'll do them virtually for as long as I have to, but I am looking forward to being able to get out there and visit every corner of our state and form some of those connections in person when I'm able to do that, when it's safe to do that.

**Pitre:** Director Watson, Mary, and Tom, thank you very much for the time you've shared. It is very much appreciated.

## FOR ADDITIONAL INFORMATION:

CHRIS PITRE , Coho Water Resources, 206/ 406-9596 or [Chris@cohowr.com](mailto:Chris@cohowr.com)

**Chris Pitre** is a principal owner of Coho Water Resources based in Seattle. His clients include the public and private sectors as well as tribes. He is a licensed geologist and hydrogeologist and a certified water rights examiner (Washington), with degrees in geology, chemistry (Carleton University) and hydrogeology (University of Waterloo). He has practiced hydrogeology and integrated water resources management in the Pacific Northwest since 1992, with two years (2011-2012) in Australia. He managed watershed planning projects in approximately a dozen watersheds across Washington State (2001-2010). His practice areas include: water rights; groundwater supply wells; watershed planning; wastewater management; reclaimed water; and expert witness services. He is currently involved in the installation of large municipal wells in the Yakima Valley and processing of a new water right application in a 203 watershed.

## CWA § 401 Rule

### Federal Licensing & Permitting

### Water Quality Certification Required

### State § 401 Implementation

### Regulatory Streamlining

### Significant New Rule Features

## STATE WATER QUALITY CERTIFICATION

EPA ISSUES STATE WATER QUALITY CERTIFICATION (CWA § 401) FINAL RULE

by Morgan Gerard, Troutman Pepper (Washington, DC)  
& Hallie Meushaw, Troutman Pepper (Atlanta, GA)

### Introduction

On June 1, 2020, the United States Environmental Protection Agency (EPA) issued the long-awaited pre-publication version of its final rule (Final Rule) to clarify state water quality certification substantive authorities and procedures under Section 401 of the Clean Water Act (CWA), U.S.C. 1341(a)(1). Section 401 is an important tool for states (and tribes approved for treatment as a state) that can be used to help protect water quality in federal licensing and permitting activities. Section 401 of the CWA requires that any applicant for a federal license or permit, that may result in a discharge to navigable waters, seek a water quality certification from the appropriate state or tribal authority in which the discharge will originate. The state's water quality certification may include conditions, which must be adopted in the federal license or permit. Some of the most common examples of federal approvals that may require a section 401 certification are: CWA section 404 permits for the discharge of dredged or fill material; Rivers and Harbor Act sections 9 and 10 permits issued by the United States Army Corps of Engineers (Corps); hydropower licenses and natural gas pipeline certificates issued by the Federal Energy Regulatory Commission (FERC); and CWA section 402 National Pollutant Discharge Elimination System (NPDES) permits where EPA administers the permitting program. If a certifying authority denies certification, the federal license or permit cannot be issued.

Over the years, states' implementation of section 401 has drawn scrutiny due to long approval delays (sometimes lasting a decade or more) and conditions unrelated to water quality (including, for example, biking and hiking trails, educational centers, and, in one instance, the creation and implementation of a feral pig task force). According to EPA Administrator Andrew Wheeler, the Final Rule intends to "curb abuses of the Clean Water Act that have held our nation's energy infrastructure projects hostage, and to put in place clear guidelines that finally give these projects a path forward."

EPA's Final Rule significantly advances the Trump Administration's policies to streamline regulatory obligations in infrastructure development. On April 10, 2019, President Trump issued an Executive Order to promote energy infrastructure and economic growth. In keeping with that Executive Order, on June 7, 2019, EPA issued a section 401 guidance document that provides an overview of the concepts that later were introduced in the section 401 rule proposal. On August 22, 2019, EPA's notice of proposed rulemaking (NPR) was published in the Federal Register. The NPR included substantial modifications to the scope, substance, and procedures related to state water quality certification. It also presented an opportunity for utilities, manufacturers, developers, environmental advocates, state and local governments, and other stakeholders to help shape a regulatory program that had not been updated since the early 1970s. Thousands of comments were submitted on the proposed rule before the comment period ended on October 21, 2019.

While the Final Rule comprehensively addresses substantive and procedural requirements for implementing CWA section 401, the most significant features of the rule address:

- The substantive scope of state and tribal authority to decide whether to grant water quality certification, and the scope of any conditions included in any certification
- The maximum time period under section 401 for a state or an authorized tribe to decide on a request for water quality certification
- Procedural requirements for states and tribes to properly grant, condition, or deny a request for water quality certification
- The role of the federal licensing or permitting agency in reviewing a conditioned or denied water quality certification
- The ability of states and authorized tribes to modify the certification or conditions once issued
- Enforcement of certification conditions during the term of the federal license or permit

These significant components of the Final Rule are further summarized below.

## CWA § 401 Rule

### Certification Scope

### Point Sources Only

### Applicants's Activities

### "Water Quality Requirements" Defined

### Water Quality Concerns Limit

#### Scope of Section 401 Review

The Final Rule's interpretation of CWA section 401 disallows a state's unfettered review and conditioning of a proposed federal licensed or permitted project. Moreover, the Final Rule clarifies which CWA sections and state water quality requirements may be considered for certification. In the preamble to its final rule, EPA stated that, in its view, the "scope of certification" established in section 121.3 of its new regulations "is the foundation of the final rule." Section 121.3 of EPA's final rule provides: "The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." Under this new requirement, the breadth of state and tribal authority to certify and condition federal licensing and permitting activities is largely driven by two factors: 1) the point-source discharge from the licensed or permitted activity; and 2) "water quality requirements," a defined term under the Final Rule.

#### Discharge from the Federally Licensed or Permitted Activity

In its Final Rule, EPA explains that it interprets section 401 water quality certification as pertaining only to point-source discharges associated with a federally licensed or permitted activity — and not the entire project proposal. The practical effect of this clarification on state review is that the certifying authority would no longer scrutinize the entire project and its impacts on, for instance, air emissions, climate change, nearby terrestrial species, public recreation, or other environmental and natural resources impacts. Instead, now the state's review is limited to the newly defined term "discharge" in this Final Rule, which means "from a point source into the water of the United States." In this regard, the Final Rule maintains an interpretation of section 401 consistent with Justice Thomas' dissenting opinion in the Supreme Court of the United States' landmark 1994 ruling in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). The majority opinion in *PUD No. 1* (relying on outdated EPA rules) reasoned that the state could regulate the "applicant," and, therefore, all of the applicant's activities. Justice Thomas rejected the majority's holding as stretching the "applicant" interpretation to create an outcome inconsistent with the text of section 401 and the purpose of a water quality certification, i.e., to only regulate water quality. Over twenty-five years later, the Final Rule, following Justice Thomas' dissent, explains that the federal regulations that guided the Court's *PUD No. 1* ruling were enacted prior to the 1972 CWA amendments and that the Court in *PUD No. 1* lacked the benefit of EPA's interpretation of the revised statute.

#### Water Quality Requirements

The Final Rule defines "water quality requirements" as "applicable provisions of §§ 301, 302, 303, 306, and 307 of the [CWA], and state or tribal regulatory requirements for point source discharges into waters of the United States." Thus, state and tribal certification can include: effluent limitations and standards of performance for new and existing discharge sources (CWA sections 301, 302, and 306); water quality standards under CWA section 303 (including designated uses, numeric criteria and narrative standards); toxic pretreatment effluent standards under CWA section 307; and other state or tribal regulatory requirements that apply to point source discharges. Notably, the NOPR solicited comment about the appropriateness of including CWA section 303 since this section is not enumerated in section 401(d) and is not necessarily a discharge standard. The allowance of CWA section 303 conditions in a water quality certification provides for the inclusion of certain ambient water quality conditions, including: anti-degradation requirements; narrative standards for certification conditions; and conformance with the designated and beneficial uses of a waterway. Further, the NOPR solicited comment about the meaning of the clause in section 401(d) stating "any other appropriate requirement of State law," and whether it applied only to EPA-approved water quality standards. In the Final Rule, EPA chose to include in its definition of "water quality requirements" both section 303 and state or tribal water requirements (whether approved by EPA or not).

While EPA's inclusion of CWA section 303 and its interpretation of "any other appropriate requirement of state law" allows for certifying conditions beyond water chemistry, the Final Rule makes clear that conditions must still be limited to water quality concerns.

EPA explained:

The imposition of conditions unrelated to water quality is not consistent with the scope of the CWA generally or section 401. There is nothing in the text of the statute or its legislative history that signals that Congress intended to impose, using section 401, federal requirements on licensed or permitted activities beyond those addressing water quality-related impacts. Indeed, Congress knows how to craft statutes to require consideration of multi-media effects (see, e.g., NEPA), and has enacted specific statutes addressing impacts to air (Clean Air Act), wildlife (Endangered Species Act), and cultural resources (National Historic Preservation Act), by way of example.

Final Rule, p. 77



<p><b>CWA § 401 Rule</b></p> <p><b>Conditions Beyond Scope</b></p> <p><b>Minimum Flow</b></p> <p><b>Timeline Deadline</b></p> <p><b>“Reasonable Period”</b></p> <p><b>One-Year Max</b></p> <p><b>Content Requirement</b></p> <p><b>One-Year Limit Absolute</b></p> <p><b>“Rare” Resubmittals</b></p> <p><b>Re-Opener Aspects</b></p>	<p>Although it is not yet certain the practical limits on what conditions might fall under the water quality umbrella, in the Final Rule’s preamble, EPA acknowledged that certification conditions that states and authorized tribes have imposed in the past “may be beyond the scope of certification as articulated in this final rule.” The conditions that EPA indicates may be beyond the scope, for example, include “building and maintaining fish passages, compensatory mitigation, temporal restrictions on activities to mitigate hazards or protect sensitive species, pre-construction monitoring and assessment of resources, habitat restoration, tree planting along waterways, spill management plans, stormwater management plans, and facilitating public access.” In addition, EPA expressly states in the preamble that the Final Rule does not “address minimum flow issues.” Rather than drawing a bright line on the types of conditions that exceed the scope of certification, EPA recognizes that “there may be unique project-specific facts or circumstances, including the nature of the discharge and applicable water quality standards and related designated uses, that must inform whether a particular condition is within the scope of certification, as defined in this final rule.”</p> <p><b>Time Period for Section 401 Review</b></p> <p>The timing for state section 401 review was scrutinized in 2019 by the D.C. Court of Appeals in <i>Hoopa Valley Tribe v. FERC</i>, 913 F.3d 1099 (D.C. Cir. 2019) where the court found that “Section 401 requires state action within a reasonable period of time, not to exceed one year.” There, the court was reviewing both an agreement to extend the one-year deadline and a withdrawal-and-resubmission “scheme” whereby the applicant and state would coordinate to have the statutory deadline re-start year-after-year in contravention of the plain language of section 401. The text of section 401 provides:</p> <p style="padding-left: 40px;">If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.</p> <p>The Final Rule establishes that states and tribes have a “reasonable period of time” to act on a water quality certification, which may be shorter than but cannot exceed one year or else the state’s certification authority is waived. In fact, the Final Rule establishes several procedural safeguards to ensure that the federal permitting agency, the state or tribal certifying agency, and the applicant all are aware of the beginning and ending points of the maximum one-year certification period.</p> <p>First, to relieve the ambiguity surrounding what constitutes a request for a water quality certification, the Final Rule includes the request’s specific content requirements. In addition, the Final Rule requires the applicant to submit the certification request not only to the state or tribal certifying agency, but also to the federal permitting agency, providing certainty as to the commencement date of the review period. Turning to the end date, the Final Rule requires the federal agency to establish the “reasonable time period for certification” — which an agency may do via a categorical basis (through a rulemaking) or a case-by-case basis. The federal agency must notify the certifying state or tribe of the applicable time to act on the certification request, specifying “the date upon which waiver will occur if the certifying authority fails or refuses to act” on the certification request.</p> <p>Once the reasonable time period begins, the federal agency may extend the period at the request of the project proponent or the certifying agency, “but in no case shall the reasonable period of time exceed one year from receipt.” In the preamble to the final rule, EPA explains that one year is the “absolute outer bound” for states and tribes to act on requests for water quality certification under section 401.</p> <p>This one-year statutory deadline cannot be tolled or extended, even by state information requests to comply with state environmental review procedures. EPA’s new regulations expressly provide that the certifying state or tribe “is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period,” except up to a total of a one-year certification period.</p> <p>EPA does recognize that in some circumstances, the project proponent may voluntarily seek to withdraw and resubmit its application; however, EPA expects that these circumstances would be “rare” and only take place if project plans “have been modified such that a new certification request is required, or if the project is no longer planned.”</p> <p><b>State Re-Opener Conditions</b></p> <p>In the NOPR, EPA requested comment on whether it should expressly prohibit certification conditions that may create regulatory uncertainty, including conditions that extend the effective date of a certification beyond the reasonable period of time and conditions that authorize certifications to be reopened. While the Final Rule does not have an express provision prohibiting a re-opener condition, the preamble to the Final Rule confirms that the “reasonable period of time” for the state to act on a certification request does not continue to run after a certification decision is issued. Thus, a reopener condition would inappropriately extend the established reasonable period of time into the future, potentially indefinitely.</p>
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<div data-bbox="138 178 316 262"><b>CWA § 401 Rule</b></div> <div data-bbox="138 304 316 399"><b>Four Choices &amp; Requirements</b></div> <div data-bbox="138 546 316 577"><b>Waiver Notice</b></div> <div data-bbox="138 724 316 787"><b>Exclusive Enforcement</b></div> <div data-bbox="138 966 316 997"><b>Challenges</b></div> <div data-bbox="138 1144 316 1207"><b>Congressional Rule Review</b></div> <div data-bbox="138 1312 316 1344"><b>Election Year</b></div> <div data-bbox="138 1491 316 1554"><b>Impacts on State Review</b></div> <div data-bbox="138 1774 316 1837"><b>State Review Processes</b></div>	<div data-bbox="548 142 1360 174"><b>Procedural Requirements for Certifications and Denials of Certification</b></div> <div data-bbox="381 174 1528 268"> <p>EPA's Final Rule gives certifying entities four choices upon receiving a request for certification: grant; grant with conditions; deny; or waive the certification. Except with regard to an express waiver, EPA's new regulations include precise content requirements for each of these choices.</p> <p>For example, a grant of certification must include a statement that the discharge will comply with water quality requirements. If a certifying authority grants a certification with conditions, the final rule requires that certification must include a statement explaining why that condition is necessary to ensure that the discharge will comply with water quality requirements, together with a citation to federal, state, or tribal law authorizing the condition. If a certifying authority determines that denial of certification is appropriate, the denial must include: the specific water quality requirements with which the discharge will not comply; a statement explaining why the discharge will not comply with the requirements; or, if the denial is due to insufficient information, the specific information that would be needed to ensure that the discharge would comply with water quality requirements.</p> <p>If the certifying agency fails or refuses to act, the federal licensing or permitting agency is required by the Final Rule to provide written notice to the EPA Administrator, certifying authority, and project proponent, that waiver has occurred.</p> </div> <div data-bbox="701 667 1205 699"><b>Enforcement of Water Quality Certifications</b></div> <div data-bbox="381 699 1528 882"> <p>The Final Rule confirms that the federal licensing or permitting agency has the exclusive authority to enforce water quality certification conditions that have been incorporated into a federal license or permit. In the preamble to the Final Rule, EPA addresses a comment received on the NOPR regarding section 401's enforcement provision, explaining that "if certification conditions were enforceable independent of the federal license or permit, there would have been no need for Congress to require conditions to become part of the federal license or permit under section 401(d)."</p> </div> <div data-bbox="802 913 1104 945"><b>Challenges on the Horizon</b></div> <div data-bbox="381 945 1528 1098"> <p>The rule takes effect 60 days after publication in the Federal Register; however, the rule faces almost certain litigation and a potential rollback under the Congressional Review Act. Moreover, the validity of some of the underlying principles of the Final Rule, including the completeness of a certification request, commencement of the reasonable time period for review and decision, and efficacy of the withdrawal-and resubmission, are currently percolating through the US Courts of Appeals.</p> </div> <div data-bbox="381 1098 678 1129"><b>Congressional Review Act</b></div> <div data-bbox="381 1129 1528 1224"> <p>The Congressional Review Act (CRA) provides Congress a time-limited opportunity to review final rules. Congress could issue a Joint Resolution disapproving a rule in its entirety — which would result in the rule having no effect.</p> </div> <div data-bbox="381 1224 1528 1470"> <p>The CRA is particularly important in election years because if a new rule is submitted during the "carryover period" (60 legislative days from the submission of the rule to the Congressional chamber), the review period is "reset" in its entirety in the next session of Congress. Based on the legislative calendars in both the House of Representatives and the Senate, the Final Rule was submitted within this "carryover period" and is now subjected to the uncertainty of the election year. To overturn the Final Rule, the Joint Resolution would have to be passed by both chambers of Congress and be approved by the President (or overridden by Congress if Presidentially vetoed). The use of the CRA is an uncommon occurrence but has gained attention during the Trump Administration, which repealed at least 15 Obama-era rules.</p> </div> <div data-bbox="381 1470 698 1501"><b>Amending State Procedures</b></div> <div data-bbox="381 1501 1528 1717"> <p>Many states have an environmental review statute similar to NEPA that requires the certifying agency to analyze project impacts, receive public comments, and issue a final environmental document before approving or denying an application for section 401 certification. The Final Rule provides that the one-year time period may not be tolled for any reason, including for the completion of state review. FERC has similarly held, based on <i>Hoopa Valley Tribe</i>, that the one-year period is not stopped or tolled to allow a state to complete its environmental review process. <i>Yuba County Water Agency</i>, 171 FERC ¶ 61,139 (2020).</p> </div> <div data-bbox="381 1717 1528 1871"> <p>In response to the Final Rule, the California Legislature introduced a bill, AB-92, that would allow the State Water Resources Control Board (SWRCB) to "issue a certificate or statement," before completing the environmental review required by the California Environmental Quality Act if SWRCB determines that waiting until completion of the environmental review poses a substantial risk of waiver of the state's certification authority.</p> </div> <div data-bbox="381 1871 1528 1986"> <p>Many other states may similarly need to pass legislation and amend environmental regulations to ensure that their review process conforms to the one-year requirement and to prevent state waiver. As states and authorized tribes seek to revise their environmental procedures, legislators and regulators should be mindful of conforming updated requirements to the Final Rule. The California bill, for example, would</p> </div>
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<div data-bbox="142 180 321 264">CWA § 401 Rule</div> <div data-bbox="142 338 321 401">FERC Orders on Appeal</div> <div data-bbox="123 512 342 575">Commencement of Period</div> <div data-bbox="131 722 334 821">Withdrawals &amp; Resubmissions</div> <div data-bbox="126 1173 339 1205">"New" Request</div> <div data-bbox="110 1352 354 1383">"Material Change"</div> <div data-bbox="172 1808 293 1906">Praise &amp; Criticism</div>	<p>also require SWRCB, to the extent authorized by federal law, to reserve authority to reopen and revise the certificate or statement as appropriate based on the information provided in the environmental review document. As discussed above, the Final Rule states that the one-year requirement cannot be circumvented by a re-opener clause in a water quality certification.</p> <p><b>Federal Court Challenges</b></p> <p>Several Federal Energy Regulatory Commission ("FERC" or "Commission") orders finding state waiver and interpreting section 401 are currently percolating through various United States Courts of Appeals, and the outcomes of these cases may have an impact on the Final Rule.</p> <p>First, in <i>Empire Pipeline, Inc.</i>, 164 FERC ¶ 61,084 (2018), <i>reh'g denied</i>, 167 FERC ¶ 61,007 (2019), the Commission found that the New York Department of Environmental Conservation (NYSDEC) waived its certification authority because the applicant and NYSDEC stipulated to a receipt date for the section 401 request, which caused the state's review to last longer than the one-year period. NYSDEC appealed the Commission's order to the United States Court of Appeals for the Second Circuit, where it is currently pending. <i>NYSDEC v. FERC</i>, No. 19-1610 (2nd Cir. June 28, 2019). The question under review in <i>Empire Pipeline</i> is whether section 401's one-year period commencement date may be manipulated to provide the state additional review time. The Final Rule codified that the one-year period could not be extended or tolled for any reason, which would include extending the one-year period by stipulating to the commencement of the period.</p> <p>Next, in <i>Constitution Pipeline Company, LLC</i>, 168 FERC ¶ 161,129 (2019), the Commission held that NYSDEC waived its section 401 authority applying <i>Hoopa Valley Tribe</i> to a withdrawal-and-resubmission scheme. In <i>Constitution</i>, the Commission found that a written agreement was not necessary to find an agreement between the certifying agency and the applicant to extend the one year deadline and that a coordinated scheme of withdrawals-and-resubmissions by the same filing (without any application changes year-after-year), supports state waiver. NYSDEC also appealed this Commission order to the United States Court of Appeals for the Second Circuit, and the case is currently in abeyance until the earlier of: 1) the date when <i>Constitution's</i> certification of public convenience and necessity for the pipeline is set to expire; or 2) the parties decide to re-activate the case. <i>NYSDEC v. FERC</i>, No. 19-4338 (2nd Cir. Dec. 30, 2019). The Final Rule confirmed that withdrawal-and-resubmission is not a permissible method to extend the one-year period and that the filing of the same application year-after-year would not constitute a "new request." The potential impact of <i>Constitution</i> would be an interpretation of whether the Second Circuit will follow the D.C. Circuit's holding in <i>Hoopa Valley Tribe</i> that a coordinated scheme of withdrawals-and-resubmissions violates the plain language of section 401.</p> <p>Finally, in <i>McMahan Hydro, LLC</i>, 68 FERC ¶ 61,185 (2019), the Commission found that the North Carolina Department of Environmental Quality (NCDEQ) waived its certification authority after only one withdrawal-and-resubmission since FERC did not consider the second application to be a "new" request. The Commission did not find persuasive that a new one year period was triggered because NCDEQ requested a new water quality monitoring plan after evaluating FERC's Environmental Assessment. FERC maintained that responding to a state's request for additional information "generally would not rise to the level of a material change to a project's plan of development" warranting a new section 401 application, as such requests do not involve "a material change to a project's plan of development." FERC Commissioner Richard Glick dissented on this issue. While Commissioner Glick agreed with the Commission's waiver determination, he stated that there may be situations where withdrawal and resubmission of a water quality certification application is appropriate, such as where an applicant withdraws a request for certification and resubmits "a wholly new" application or where additional information constitutes "a significant modification" to a pending section 401 application. Commissioner Glick, however, did not address how significant a modification would need to be to re-start the one-year clock. NCDEQ appealed FERC's decision to the United States Court of Appeals for the Fourth Circuit, where it is currently pending. <i>NCDEQ v. FERC</i>, Case No. 20-1655 (4th Cir. June 12, 2020). The potential impact of <i>McMahan</i> would be an interpretation of what constitutes a "new" request that would reset the one-year deadline. The Final Rule states that a "new" application would be "rare" and only appropriate when there is a significant project modification such that the old application no longer provides a representation of the project.</p> <p><b>Conclusion</b></p> <p>The section 401 Final Rule has drawn both praise and sharp criticism from interested participants. The Final Rule has received considerable attention as many states, including California and New York, have threatened litigation to challenge the Final Rule once it is published. Some commentators are theorizing that a single omnibus challenge to the Final Rule might provide the regulatory certainty promised to industry by dispatching any outstanding legal questions in one proceeding. However, the application of the Final Rule may have the patchwork effect experienced by the various Waters of the United States rules if states are capable of taking up challenges in multiple courts. While litigation appears imminent, if the Final</p>
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## CWA § 401 Rule

Rule is able to withstand judicial challenge, there may be opportunities for the revival of projects that have already been denied permits in the past, so that they can be judged under the new regulations. Furthermore, in the face of the potential for inconsistent application by states, federal agency oversight, at least in the procedural process, will be able to provide the consistency and uniformity to project review much needed by industry participants.

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**Morgan Gerard's** practice focuses on advising public and private sector clients on environmental and energy regulatory compliance, including permitting, rulemaking, and enforcement actions. Morgan's practice has focused on following the emerging energy trends and the associated environmental issues that arise in strengthening grid resilience and modernizing the energy system. Morgan has counseled clients ranging from those engaging in the hydropower licensing and re-licensing process to electric utilities and wholesale generators and distributed energy manufacturers, including electric vehicle manufacturers, solar installers, and energy storage providers.

**Hallie Meushaw:** With a comprehensive knowledge of the hydropower sector, Hallie represents electric utility and other clients doing business in the renewable energy arena. Her ability to gain consensus among multiple agencies and stakeholders allows her clients to structure and negotiate the right terms at the right time, enabling her clients to obtain favorable FERC license orders, often without litigation or rehearing. She is a recognized leader in this area. Hallie has practiced environmental law at Troutman for nearly eighteen years. She counsels clients on a range of issues arising under the Federal Power Act as well as the National Environmental Policy Act, the Clean Water Act, the Endangered Species Act, and other federal and state environmental requirements.

## CERCLA vs. Water Rights "Superfund" Law

### Superfund Site

### Water Diversions

## STATE WATER LAW VS. CERCLA

### CLASH OF THE TITANS

by Dylan Lawrence, Varin Wardwell (Boise, ID)

### Introduction

This article is a heavyweight bout between two juggernauts of the legal world. In one corner is the federal CERCLA or "Superfund" law, an expansive program for cleaning up the nation's most significant contaminated sites and allocating the associated liabilities, sometimes in unforgiving fashion. *See* Comprehensive Environmental Response, Compensation, and Liability Act, *codified at* 42 U.S.C. §§ 9601 – 9675 (2012). In the other corner are laws governing the allocation and distribution of water resources, an area consistently reserved for the states by Congress and federal courts.

The context in which these two juggernauts can clash — the ring, if you will — is when a remedial action conducted under CERCLA requires diversions of water that would otherwise require a state-issued water right. Is a water right still required, or does CERCLA preempt even state water allocation laws? Who would prevail in such a brouhaha?

As this article will show, CERCLA gets out to an early lead on the scorecard based on its broad application by the courts, the language of one of its provisions excusing compliance with permitting requirements, and the lack of a savings clause for state water laws. However, a detailed look at the nature of state water allocation laws and a particular US Supreme Court opinion give state water laws a "puncher's chance" in this battle royale.

Let's get ready to rumble!

### Factual Background

In order to provide some context to the issues explored by this article, let us posit the following factual scenario: beginning in the late 1890s, the "Old Mine Site" underwent decades of extensive mineral exploration and development. While the Old Mine Site is no longer actively mined, leftover adits, impoundments, and waste rock piles still release hazardous substances to soil, groundwater, and surface water. The US Environmental Protection Agency (EPA) designates Old Mine Site as a Superfund site and identifies Old Co. as one of the potentially responsible parties. EPA and Old Co. enter into administrative orders on consent, pursuant to which Old Co. must perform a long-term remediation of Old Mine Site. The remediation plan includes construction of dams on area creeks for sediment control and water storage, diversion of water out of their natural sources to avoid contact with contamination sources, and diversion of water to a treatment plant. While the treated water is discharged to Raven Creek after treatment, some of the water routed to the plant for treatment originates from a different watershed, Boarshead Creek, so is not returned to its original source.

## CERCLA vs. Water Rights

### Water Rights Applications

### Water Allocation

### Riparian Doctrine

### Prior Appropriation Doctrine

### New Right or "Transfer"

### CERCLA Basics

New Co. now proposes to develop a new mine adjacent to Old Mine Site. New Co. will need a source of water for mineral processing, reclamation, fire protection, and dust abatement, and applies to the state water resource agency for a new water right, to be diverted within the Boarshead Creek drainage upgradient of Old Co.'s diversions of water under its remedial action plan with EPA. Old Co. formally opposes New Co.'s application, arguing that New Co.'s proposed diversion will deplete the source of water available to Old Co. New Co., in turn, alleges that Old Co.'s diversions of water are illegal because they are not authorized by a state-issued water right. Old Co. responds that its federally approved remedial action plan preempts state water allocation laws and, therefore, that it does not need a water right.

While this may sound like a law school exam question, the author is aware of at least one instance with this set of facts. Ultimately, the parties settled, so the legal issues raised by this scenario did not receive formal resolution. This article explores the legal arguments in favor of each side's position.

### Question Presented

This situation raises this legal question: must Old Co. obtain a water right for its diversions of water under the remedial action plan? More specifically, do the federal laws pursuant to which its remedial action plan has been approved provide an exception to, or otherwise preempt, state water allocation laws?

To answer this question, one must understand CERCLA, state water allocation laws, and Constitutional federalism and preemption principles. This article provides a high-level primer on these three areas of the law, in order to lay the groundwork for the more detailed analysis.

The article then presents Old Co.'s case, *i.e.*, the reasons it does not need a water right because CERCLA prevails. The reader will be convinced this is a slam-dunk in favor of Old Co. and CERCLA and that this entire exercise is a waste of time. Next, New Co.'s case is presented, *i.e.*, the reasons Old Co. was required to obtain a water right and has been violating state water law. This will make the outcome a much closer call, though the reader is still free to conclude the entire exercise is a waste of time.

The article concludes with the author's evaluation. Any opinion expressed is solely that of the author.

### Legal Primer

#### Primer on State Water Law

Generally speaking, the states to the east of the 100<sup>th</sup> meridian follow the "Riparian Doctrine," pursuant to which one may legally divert water from an adjacent body of water so long as it is making reasonable use of the water. By contrast, the states that include and are to the west of the 100<sup>th</sup> meridian generally follow some form of the "Prior Appropriation Doctrine." Under this doctrine, the use of water must be "beneficial" and is governed by the rule, "first in time, first in right" — *i.e.*, those who first put the water to use are first in line to receive their full share of water in times of shortage. As a matter of federal constitutional law, each state owns all of the navigable waters within their borders. In addition, according to their constitutions and statutes, several western states own *all* of the water within their borders. *See* FRANK J. TRELEASE, *WATER LAW: RESOURCE USE AND ENVIRONMENTAL PROTECTION* 11-12 (2d ed. 1974); 2 HARRISON C. DUNNING, *WATERS AND WATER RIGHTS* §§ 30.01(a), 30.04 (Amy K. Kelley, ed., 3d ed. 2019).

A fundamental tenet of the modern Prior Appropriation Doctrine is that one must acquire a water right from the state before it may legally divert and use that water. In order to do this, one can apply for a new water right or purchase an existing water right from someone else and apply to the state to "transfer" it to the new place of use. In either scenario, the appropriator must demonstrate its proposed diversion of water satisfies certain legal criteria, including that the new or transferred appropriation will not injure other existing water rights. Typically, the application may be formally opposed by other parties. *See* 1 OWEN L. ANDERSON, ET AL., *WATERS AND WATER RIGHTS* §§ 14.02, 14.04(a), (c)(1.01), 15.01, 15.02(a.01), 15.03 (Amy K. Kelly, ed., 3d ed. 2019)

#### Primer on CERCLA

CERCLA is a comprehensive regime for evaluating and remediating contaminated sites and allocating the associated liability. It has two primary goals: (1) to allow EPA to respond efficiently and expeditiously to releases of hazardous substances; and (2) to impose cleanup liability on the parties responsible for, or with some connection to, those releases. The universe of "potentially responsible parties" (PRPs) with whom such liability may lie includes, among other categories, current owners and operators of the contaminated facility, and former owners and operators whose tenure included a release of hazardous substances. Generally speaking, EPA may perform the cleanup and recover its costs from the PRPs, or it may compel the PRPs to conduct their own private remediation. *See* 42 U.S.C. §§ 9606(a), 9607(a); *see also* *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2<sup>nd</sup> Cir. 1992).

## CERCLA vs. Water Rights

### Remedial Action

#### "ROD"

#### Permits

#### Preemption Doctrine

#### Preemption Categories

#### Federalism Principles

#### Permit Exemption

Liability under CERCLA is "strict," meaning no intent is required, and PRPs can be held responsible for contamination caused by others. In addition, liability under CERCLA can be "joint and several," meaning that any single PRP can be responsible for the entire cleanup. Because it is a "broad remedial statute," CERCLA is construed liberally to effectuate the two primary goals previously discussed. *See U.S. v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2<sup>nd</sup> Cir. 2003); *U.S. v. Monsanto Co.*, 858 F.2d 160, 171 (4<sup>th</sup> Cir. 1988); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197-1198 (2<sup>nd</sup> Cir. 1992).

Process-wise, candidate contaminated facilities are evaluated against a set of criteria for potential inclusion on the "National Priorities List" (NPL). Once a site is on the NPL, there is a public process for selecting and implementing the components of the remedial action, known as the remedial investigation / feasibility study. The particular components of the remedial action are highly specific to the particular site. Generally speaking, the components of the remedial action must be "relevant and appropriate under the circumstances" and must attain a degree of cleanup that "assures protection of human health and the environment." Upon completion of the remedial investigation / feasibility study, EPA issues a Record of Decision (ROD), which describes and explains the remedy for the site. The ROD, along with public comments and EPA's responses thereto, form the administrative record for judicial review. After the ROD issues, EPA designs the construction and operation of the remedial action, after which the remedial action phase — actual construction and operation of the remedy — occurs. *See* 42 U.S.C. §§ 9613(j)(1), 9621(d)(1); 40 C.F.R. §§ 300.425(b), 300.430, 300.435.

Once a remedial action plan has been adopted, CERCLA specifies that no federal, state, or local permits are required for the portion of the remedial action that is conducted entirely onsite. 42 U.S.C. § 9621(e)(1). This provision will be the subject of a more detailed discussion later in this article.

#### Primer on Federalism and Preemption Principles

Under the preemption doctrine, a state law may be unconstitutional if it conflicts or interferes with federal law. The doctrine is based upon the Supremacy Clause of the US Constitution, which states that "the Laws of the United States...shall be the supreme Law of the Land" and that "Judges in every State shall be bound thereby...the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, § 2.

There are three categories of preemption:

- "Express Preemption" occurs when Congress specifically states that it is preempting state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 538 (1977).
- "Occupation of the Field" — Even when Congress has not specifically stated it is preempting state law, "occupation of the field" preemption can occur when Congress has so comprehensively legislated in a particular area that there is no room remaining for states to legislate. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
- "Conflict Preemption" occurs if there is a conflict between state law and federal law. This can occur when state law is directly contrary to federal law, when compliance with both the state and federal law is physically impossible, or when state law is an obstacle to the full purposes and objectives of federal legislation. *Free v. Bland*, 369 U.S. 663, 666-70 (1962); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

It is also important to recognize that the power to preempt is not limited to Congress. Instead, a federal administrative agency may preempt state regulation if it is acting within the scope of its authority delegated by Congress. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-54 (1982).

On the other hand, when a court evaluates preemption, it must also be guided by federalism principles under the US Constitution, which states that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. More specifically, when "the regulated conduct touched interests so deeply rooted in local feeling and responsibility," a court will not invalidate state laws unless there is "compelling congressional direction" to deprive the state of the power to act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

#### The Case for Old Co. and CERCLA

As previously discussed, this section presents Old Co.'s arguments as to why CERCLA prevails and a state-issued water right is not required for its diversions of water. More specifically, this section will discuss the language of CERCLA itself, preemption, and Congressional intent manifested in the lack of a savings clause.

#### CERCLA's Permit Exemption

##### Detailed Review of Relevant Statutory and Regulatory Language

As referenced above, under some circumstances CERCLA provides an exemption from local, state, and federal permitting requirements, which this article refers to interchangeably as Section 121(e)(1) or the "Permit Exemption." The precise language of the Permit Exemption is:

No Federal, State, or local *permit* shall be required for the portion of any removal or remedial action conducted *entirely onsite*, where such remedial action is selected and carried out *in compliance with this section*. 42 U.S.C. § 9621(e)(1) (emphasis added).



## CERCLA vs. Water Rights

### "Permit" Defined

### Fill Use

### Dredging Discharges

### Permit Update

### General "Permit" Definition

### Water Right A Permit?

### Diversion "Onsite"

So, this statutory language establishes three requirements for a PRP to avoid having to obtain governmental approvals for its remedial action. First, the approval must be a "permit." Second, the activity must be conducted "entirely onsite." Third, the activity must have been selected and must be carried out in compliance with the remedy selection procedures and cleanup standards found elsewhere within Section 9621.

This article assumes the third requirement is satisfied. The next two sections discuss the "permit" and "entirely onsite" requirements in more detail.

#### Is a Water Right a "Permit"?

Neither CERCLA nor its implementing regulations define the term "permit." So, the next step is to review what courts have said. However, there is a curious dearth of case law regarding what constitutes a "permit" under Section 121(e)(1).

In *Rhode Island Resource Recovery Corp. v. Rhode Island Dept. of Ent'l Mgmt.*, a PRP imported processed bottom ash (residue left over after combustion) from out of state for use as fill. Normally, this would have required written approval from the state, and the state of Rhode Island issued a Notice of Violation to the PRP for its failure to obtain such approval. The state argued "written approval" under state law was different than a "permit" under Section 121(e)(1). The federal district court, however, stated such a distinction is "too fine," and held that the state's written approval constitutes a "permit" for the purposes of Section 121(e)(1). Case No. CA 05-4151 ML (D. R.I., July 26, 2006) (memorandum and order).

In *Town of Halfmoon v. General Electric Co.*, the PRP entered into a consent decree with EPA requiring the PRP to dredge the Hudson River to remediate PCB contamination. On a motion for partial summary judgment, the plaintiffs argued the dredging activity resulted in PCBs becoming resuspended and therefore violated New York's statutory prohibition against discharges of petroleum. The PRP argued that due to the Permit Exemption, such discharges were automatically permitted. The federal district court recognized that Section 121(e)(1) excused the PRP from having to obtain any federal, state, or local permits for the dredging activities, but also held that Section 121(e)(1) does not automatically authorize discharges are "deemed permitted" as a matter of law. 105 F.Supp.3d 202, 207, 219, 220 (N.D.N.Y. 2015) -- see also *Town of Acton v. W.R. Grace & Co.*, No. 13-12376 (D. Mass. Sept. 22, 2014 (memorandum and order)) (holding that a local requirement was not a "permit" under Section 121(e)(1) because a prior approval was not required).

In *U.S. v. State of Colorado*, the PRP United States Army was conducting a CERCLA response action at the Rocky Mountain Arsenal. The State of Colorado received approval from EPA to administer its own hazardous waste management program under the Resource Conservation and Recovery Act (RCRA), and issued a compliance order to the Army under the authority of that program. Among other things, the compliance order required the Army to update its existing application for a permit pursuant to RCRA. According to the Tenth Circuit Court of Appeals, this did not run afoul of Section 121(e)(1) because the compliance order "merely requires the Army to update its existing RCRA/[ ] permit application" for an area already subject to those requirements and not "to obtain a [new] permit." 990 F.2d 1565, 1568-69, 1573, 1582 (10<sup>th</sup> Cir. 1993).

In *McClellan Ecological Seepage Situation (MESS) v. Cheney*, the court recognized that a permit for storage and disposal of hazardous wastes under RCRA is a "permit" for the purposes of Section 121(e)(1), without providing any additional guidance or definition. 763 F.Supp. 431, 434-35 (E.D. Cal. 1989).

In summary, Congress, EPA, and the courts have not provided much guidance regarding the definition of a "permit" in Section 121(e)(1). Black's Law Dictionary (6<sup>th</sup> ed. 1990) contains multiple definitions of the term "permit." Paraphrasing, a "permit" is a document issued by a person in authority, granting someone the right to engage in some activity that would not be allowed without such authority.

Therefore, the next logical step is to examine the nature of water rights in the Western states to determine if they qualify as "permits." While a detailed analysis of each individual state's water right laws is beyond the scope of this article, based on the lack of administrative and judicial guidance, the general definition of "permit," and the liberal interpretation of CERCLA by the courts, there is a strong argument that a state water right is a "permit" for the purposes of Section 121(e)(1). Indeed, in many western states, the temporary, unperfected version of a water right is called a "permit." See ANDERSON, ET AL., *supra*, at § 15.03(d)(2). This is a compelling textual argument that one could reasonably conclude resolves the entire case.

#### Is the Diversion of Water Conducted "Entirely Onsite?"

Again, the second requirement under the Permit Exemption is that the activity to be exempted must be conducted "entirely onsite." The CERCLA statutes do not further define this phrase. However, the implementing regulations define the term "onsite" to include (1) "the areal extent of contamination," and (2) "all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. § 300.400(e)(1).

Conceivably, one could argue that diversions of water are not conducted "entirely onsite" if such diversions have downstream effects on water supply. However, the few courts that have addressed this type of argument have rejected it.

## CERCLA vs. Water Rights

### Action Boundaries

### Proximity

## Water Diversion

### Preemption Categories

### Zoning Ordinance

### Conflict Preemption

### Obtaining Water Rights

*Monterey Bay Unified Air Pollution Control Dist. v. U.S. Dept. of Army* involved remediation of an army base, and the remedial action plan included burning of vegetation to make it easier to locate unexploded ordinance. The plaintiffs argued that because such burning impacted air quality outside of the boundaries of the remedial action, it was not being conducted “entirely onsite” pursuant to Section 121(e)(1). The court disagreed, noting that, “[t]aken to its extreme, the [plaintiff]’s logic would hold that a remedial action that results in increased traffic from workers driving to the job site is not being conducted entirely onsite” and would render the Permit Exemption a “nullity.” 176 F.Supp.2d 979, 981-82, 990 (N.D. Cal. 2001).

Similarly, in *Rhode Island Resource Recovery Corp.*, the court held that use of processed bottom ash as fill material at the Superfund site itself qualified for the exemption, even if the processed bottom ash was being imported from out of state. And, in *U.S. v. General Electric Co.*, the court held that a processing facility located 1.4 miles away from the Superfund site being remediated was still “onsite” under Section 121(e)(1). That case involved remediation of a 43-mile stretch of the Hudson River, and the court reasoned that given the length of the site being remediated, 1.4 miles was “in very close proximity” to the site under the language of 40 C.F.R. 300.400(e)(1). 460 F.Supp.2d 395, 403-404 (N.D.N.Y. 2006).

Based on these authorities, it seems highly unlikely a court would conclude diversions of water under a remedial action are not performed “entirely onsite,” just because there are impacts to the downstream water supply. As long as the physical act of diverting water occurs within the area contemplated by the remedial action plan, a court would likely conclude that aspect of the remedial action is being conducted “entirely onsite.”

### Summary of Permit Exemption

Before moving on, it may be helpful to summarize CERCLA’s Permit Exemption and its potential application in this context. Again, the Permit Exemption states that no “permit” is required for the portion of a remedial action conducted “entirely onsite.” The courts have generally rejected arguments that offsite impacts run afoul of the “entirely onsite” standard. So, the fact that Old Co.’s diversions of water may have downstream effects does not mean its diversions are not “entirely onsite.”

CERCLA and its implementing regulations do not define the term “permit.” However, that is generally a broad term that includes any written governmental approval authorizing an action that would otherwise be unlawful. In many western states, the interim, unperfected form of a water right is described as a “permit.” Therefore, Old Co. has a strong textual argument that state-issued water rights are “permits” under the Permit Exemption.

### Preemption

The preceding section of this article analyzes the language within the “four corners” of the Permit Exemption. However, even if that exemption does not decide the issue, there is another way Old Co. and CERCLA can prevail: preemption.

As previously explained, there are three categories of federal preemption of state and local laws: express preemption, occupation of the field preemption, and conflict preemption. At least one federal court has analyzed Section 121(e)(1) within the preemption framework.

In *U.S. v. City and County of Denver*, as part of a remedial action, EPA ordered the PRP to construct a radioactive waste disposal site. The City and County of Denver issued a cease and desist order to the PRP, asserting the location of the disposal site violated Denver’s zoning ordinance. The federal government sued, arguing Denver’s actions were preempted by federal law and violated Section 121(e)(1). The court held the Permit Exemption does not provide a sufficiently “reliable indicium of congressional intent with respect to state authority” to conclude it preempts state and local requirements based upon either express preemption or occupation of the field preemption. Therefore, it analyzed the case under conflict preemption, and ultimately held that federal law preempted the local zoning ordinance because it was impossible for the PRP to comply with both. 916 F.Supp. 1058, 1059-62 (D.C. Colo. 1996).

Based on the analysis in *City and County of Denver*, the Permit Exemption likely does not preempt state water allocation laws based upon either express preemption or occupation of the field preemption. So, whether CERCLA preempts state water laws turns on conflict preemption, *i.e.*, whether: (1) the state law is directly contrary to the federal law; (2) compliance with both the state and federal law is a physical impossibility; or (3) the state law stands as an obstacle to the purposes and objectives of federal legislation.

Generally speaking, in the Western states, obtaining a water right from the state involves these steps: (1) filing an application; (2) evaluation of the application by the state, through either a contested or uncontested process; (3) issuance of an interim approval allowing the applicant to divert water; and (4) issuance of a final, perfected water right. See ANDERSON, ET AL., *supra* at § 15.03. There is nothing about this process that is “directly contrary” to CERCLA. And, if an EPA consent order requires a PRP to divert

## CERCLA vs. Water Rights

**Compliance  
Impossible**

**“Obstacle”  
to CERCLA**

**“Preservation”  
Missing**

**No Permit  
Required**

**Water Rights  
Distinction**

**Use Right**

**Real Property**

**Allocate  
Property**

**Real Property  
Use**

water to effectuate the cleanup, it does not necessarily follow that it would be “physically impossible” for the PRP to comply with the procedures for obtaining a water right — unless, of course, the state ultimately denies the application for a water right. In that case, it could be physically impossible for the PRP to comply with both the consent order from EPA and the state’s prohibition on diversions of water without a water right. However, it would behoove the PRP to submit to the state’s process first, as a preemption claim seems much stronger with a denial in-hand, rather than before even attempting to comply with the state laws.

Whether state water laws are an “obstacle” to CERCLA would likely depend on the facts of the particular case. The most likely scenario in which this issue would arise is when a state technically approves a water right application, but includes conditions of approval that the PRP believes are too onerous — much like the State of California did in a case discussed later in this article. So, it is conceivable that such conditions of approval could present an “obstacle” to the implementation of CERCLA, but it is a highly factual analysis that depends upon the language and practical effect of the particular conditions.

### **Federalism and Legislative Intent**

Another potentially persuasive argument in favor of Old Co. and CERCLA is to compare CERCLA to other federal acts expressly preserving state water allocation laws. For example, in the Reclamation Act of 1902, Congress stated that nothing in the act “shall be construed as affecting or intending to affect or to in any way interfere with” state water allocation laws and vested rights acquired thereunder. 43 U.S.C. § 383. Congress included nearly identical language in the Federal Power Act of 1920. 16 U.S.C. § 821.

CERCLA, by contrast, does not include a similar express preservation of state water laws. Therefore, one can persuasively argue that this omission reflects Congress’s intention not to preserve such laws, because it has expressly done so in the past.

### **The Case for New Co. and State Water Laws**

As previously discussed, there is a straightforward and compelling argument that the plain language of Section 121(e)(1) obviates the need for a PRP to obtain a state water right for diversions contemplated by its remedial action plan with EPA: the Permit Exemption says that no federal, state, or local “permit shall be required...” While the term “permit” is not defined in CERCLA or its regulations and has not received much judicial treatment, it is reasonable to conclude that the term “permit” includes water rights issued by a state. Indeed, as previously described, in some Western states, the temporary, unperfected form of a water right is described as a “permit.”

Because of this, up to now, the reader may be thinking the answer to the question posed by this article is a slam-dunk. However, the next two sections may make it a surprisingly close call.

### **A Closer Look at State Water Allocation Laws**

There is a critical distinction between water rights and other types of “permits.” Typically, a permit is a governmental approval that authorizes the permittee to engage in some conduct that would otherwise be prohibited, such as to emit pollutants into the atmosphere or to discharge them to bodies of water. Generally, the enforcement of the relevant laws and permit terms is the extent of the government’s interest, which is purely regulatory. Water rights — particularly in the Western states — are different.

In this regard, there are two important points about the nature of water and water rights in the Western states. First, in many Western states, by law, it is the state itself that actually owns the water. The holder of a water right is entitled to use that water, but ownership remains with the state. Second, in many Western states, water and water rights are considered real property. So, water rights are subject to the same rules and protections as land — they must be conveyed in a writing signed by the grantor, they are subject to Due Process protections, *etc.*

In other words, a statutory or regulatory program through which a state issues water rights is not just a permitting process, *i.e.*, a process to allow someone the right to engage in otherwise prohibited conduct. It is also a process the state has adopted in order to allocate its own real property to others. It is this real property aspect that distinguishes water rights from other types of permits. Legally speaking, a water right may be more akin to a license or a lease than to a “permit.” Indeed, in many prior appropriation states, the final, perfected form of a water right is called a “license” — *not* a permit. Reliance on the fact that the temporary, unperfected version of a water right is called a “permit” in some states seems overly textual, because they could just as easily be called “interim licenses.”

It seems highly unlikely a court would interpret the Permit Exemption broadly enough to allow a PRP to utilize state-owned land without permission as part of a remedial action. From a purely legal perspective, the same conclusion should apply to water rights, because they are both real property.



## CERCLA vs. Water Rights

### Reclamation Project

### Sanctity of State Water Law

### State's Control of Water

### "Plenary Power" Recognized

### "Deeply Rooted"

### CERCLA Arguments

#### The US Supreme Court Case of *California v. United States*

In *California v. U.S.*, the federal government was constructing a new water storage project, the New Melones Dam, as part of California's Central Valley project. As it had done with every previous federal reclamation project, the Bureau of Reclamation (Reclamation) applied to the state water resource agency for the water rights necessary for the project. After extensive hearings, the State of California approved the Bureau's water right applications, but imposed 25 conditions of approval, which Reclamation believed were too onerous. Reclamation then filed suit in federal court, seeking a judicial declaration that it did not need to comply with California's water allocation laws. 438 U.S. 645, 647, 651, 652-53 (1978).

Ultimately, the Supreme Court held Reclamation was required to comply with California water law. However, it is not just the holding that informs the question presented in this article. The Court's analysis in getting to that result is particularly significant. Overall, the Court engaged in a detailed recounting of the history and development of water projects in the western United States and related judicial and legislative history. Along the way, the Court made several powerful statements regarding the sanctity of state water allocation laws, including:

The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, *but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.*

*California v. U.S.*, 438 U.S. at 653, 679 (emphasis added).

Of particular importance is the Court's discussion of federal legislation from 1897 providing rights-of-way across federal lands for establishment of reservoirs. Like the Reclamation Act and Federal Power Act previously discussed, the Act of Feb. 26, 1897, 29 Stat. 599, also contained language stating that such reservoir sites were subject to the "control and regulation" of the states. However, based upon its review of the legislative history of the 1897 Act, the Court concluded that "[it] was clearly the opinion of a majority of the Congressmen who spoke on the bill...that such an amendment was unnecessary *except out of an excess of caution.*" (Emphasis added). In other words, according to the Court, the savings clause for state water laws was unnecessary because it was already understood that states had "plenary control" of waters within their borders. Therefore, "it is essential that each and every owner along a given water course, *including the United States*, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." *California v. U.S.*, 438 U.S. at 660-61, 678-79 (emphasis added).

This reasoning is particularly powerful because it negates the argument that the absence of a savings clause in CERCLA means Congress intended for CERCLA to preempt state water laws. In other words, if it has always been understood by Congress that the federal government must submit to the "plenary power" of the states over allocation of their water resources, then there would have been no need for Congress to include a savings clause for such laws in CERCLA.

On a related note, the reader will recall that when "the regulated conduct touched interests so deeply rooted in local feeling and responsibility," a court will not invalidate state laws unless there is "compelling congressional direction" to deprive the state of the power to act. Under this reasoning, the absence of a savings clause in CERCLA is not sufficient to conclude that CERCLA preempts state water laws, because the *California v. U.S.* Court would almost certainly agree with the proposition that state sovereignty over allocation of water resources is "deeply rooted in local feeling and responsibility." Therefore, absence of a savings clause is not enough; Old Co. would need to demonstrate "compelling congressional direction" to preempt state water laws.

#### Conclusion

Who wins — CERCLA or state water laws? Is Old Co. correct that CERCLA excuses it from obtaining a water right? Or, is New Co. correct that Old Co. has been violating state water laws by diverting water without a water right? There are several moving parts here, so let us recap the arguments:

Old Co. argues: CERCLA has a specific exemption stating that no "permit" is required for the portion of any remedial action conducted "entirely onsite." The fact that diversions of water may have downstream effects does not mean the remedial action is not conducted "entirely onsite," as long as the diversions themselves are onsite. CERCLA receives broad and liberal application by the courts, so a "permit" would certainly include a state water right. Heck, in many western states, the interim, unperfected form of a water right is called a water "permit" — a strong textual argument. And, Congress has specifically preserved state water allocation laws in other federal legislation. The lack of such a savings clause in CERCLA reflects Congress's intent that CERCLA should preempt state water laws.

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Water Rights  
Property**

New Co. argues: A “permit” is simply a document that authorizes one to engage in some activity that would otherwise be unlawful. Water rights in the Western states are different, however, because water and water rights are real property. Therefore, state water allocation laws are the means by which those states have chosen to allocate their own real property interests. Nobody could reasonably argue that CERCLA’s permit exemption excuses a PRP from obtaining a lease to utilize state-owned land as part of a remedial action, and the same analysis applies to water resources because they are both real property. And, according to the US Supreme Court, the absence of a savings clause in CERCLA is irrelevant because such savings clauses are only included in some federal legislation out of an abundance of caution. There is already a long history of both congressional and judicial deference to state water allocation laws.

In the opinion of the author, this is a very close call. If the issue were ever presented to the US Supreme Court, the outcome could depend upon the makeup of the Court at that particular moment in time. With the majority of the current Court appearing more sympathetic to preserving states’ rights under federalism principles, perhaps today, state water allocation laws would prevail. But, things change. Just as George Foreman underwent an image makeover and made a comeback to compete for the heavyweight championship at the age of 42, CERCLA could prevail over state water laws under the right circumstances.

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## WATER BRIEFS

## DAKOTA ACCESS PIPELINE US

## SHUT DOWN ORDERED

The DC District Court (Court) entered a decision on July 6th to vacate the US Army Corps of Engineers' Lake Oahe easement for the Dakota Access Pipeline, and to require the shut down of the pipeline and the removal of all oil flowing through it by August 5, 2020. *Standing Rock Sioux, et al. v. U.S. Army Corps of Engineers, et al.*, Civil Action No. 16-1534 (JEB), *Memorandum Opinion (Opinion)*. This decision ensures that the treaty-reserved rights of the plaintiff tribes — the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Yankton Sioux Tribe, and the Oglala Sioux Tribe — are adequately addressed, along with any other land and natural resource considerations, in a full-fledged and well-documented environmental review process. The Court has ordered the Corps to prepare an Environmental Impact Statement (EIS) on remand, in accordance with the National Environmental Policy Act (NEPA).

Lake Oahe is a large reservoir lying behind a dam on the Missouri River and stretching between North and South Dakota. Fearing severe environmental consequences, American Indian Tribes on nearby reservations have sought for several years to invalidate federal permits allowing the Dakota Access Pipeline to carry oil under the lake. Today [July 6] they finally achieve that goal — at least for the time being.

*Opinion* at 1.

Judge James E. Boasberg, who wrote the *Memorandum Opinion*, concisely summed up the case and what led to the remedy of “vacatur” — vacating unlawful agency action:

Following multiple twists and turns in this long-running litigation, this Court recently found that Defendant U.S. Army Corps of Engineers had violated the National Environmental Policy Act when it granted an easement to Defendant-Intervenor Dakota Access, LLC to construct and operate a segment of that crude-oil pipeline running beneath the lake. This was because the Corps had failed to produce an Environmental Impact Statement despite conditions that triggered such a requirement. The Court consequently remanded the case to the agency to prepare such an EIS, but it asked for separate briefing on the appropriate interim remedy. In other words, the Court asked the parties whether the easement should be vacated and the pipeline emptied during the remand process. Although mindful of the disruption such a shutdown will cause, the Court now concludes that the answer is yes. Clear precedent favoring vacatur during such a remand coupled with the seriousness of the Corps' deficiencies outweighs the negative effects of halting the oil flow for the thirteen months that the Corps believes the creation of an EIS will take.

*Opinion* at 1-2.

An important part of the tortured history of the case is that at one point the Corps announced that the Dakota Access pipeline construction would be suspended pending the Corps' reconsideration of its statutory obligations under NEPA.

A few months later, however, following the change of administration in January 2017 and a presidential memorandum urging acceleration of the project, the Corps again reconsidered and decided to move forward. (citation omitted) It granted the sought permit, construction was completed, and oil commenced flowing through the Dakota Access Pipeline. *Standing Rock III*, 255 F. Supp. 3d at 120.”

*Opinion* at 4.

The Court's discussion of the factors concerning vacatur issues — the seriousness of the NEPA deficiencies, the disruptive consequences of vacating (economic disruption), and environmental disruption — are recommended reading. Among other reasons for its decision the Court noted a guiding practical principle.

When it comes to NEPA, it is better to ask for permission than forgiveness: if you can build first and consider environmental consequences later, NEPA's action-forcing purpose loses its bite.

*Opinion* at 18-19.

Finally, the Court summed up its reasoning:

The Court does not reach its decision with blithe disregard for the lives it will affect. It readily acknowledges that, even with the currently low demand for oil, shutting down the pipeline will cause significant disruption to DAPL, the North Dakota oil industry, and potentially other states. Yet, given the seriousness of the Corps' NEPA error, the impossibility of a simple fix, the fact that Dakota Access did assume much of its economic risk knowingly, and the potential harm each day the pipeline operates, the Court is forced to conclude that the flow of oil must cease. Not wishing to micromanage the shutdown, it will not prescribe the method by which DAPL must achieve this. The Court will nonetheless require the oil to stop flowing and the pipeline to be emptied within 30 days from the date of this Opinion and accompanying Order.”

*Opinion* at 23-24.

**For info:** Memorandum Opinion available at: [ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv1534-546](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv1534-546)



## WATER BRIEFS

## WASTEWATER SETTLEMENT AZ

## INTERNATIONAL OUTFALL UPGRADE

Officials from the Arizona Department of Environmental Quality (ADEQ) and the United States Section of the International Boundary and Water Commission (USIBWC) recently announced a Settlement Agreement that addresses Clean Water Act (CWA) issues and sets forth a comprehensive plan to mitigate future discharges of untreated wastewater into the Nogales Wash and Santa Cruz River in Nogales, Arizona. With \$38,790,000 in federal, state, and local non-profit resources, this plan will bring much-needed infrastructure improvements to Santa Cruz County.

In 2012, ADEQ filed suit against USIBWC for alleged CWA violations. ADEQ and USIBWC entered into settlement discussions to establish a path forward for the much needed infrastructure upgrades for the International Outfall Interceptor (IOI) in 2018.

The IOI conveys wastewater from Nogales, Sonora, and Nogales, Arizona for nine miles north of the border to the NIWTP in Rio Rico. The IOI is intersected by piping from the City of Nogales, Arizona, and the unincorporated community of Rio Rico, Arizona, which also contributes wastewater to the NIWTP that the USIBWC operates.

Roughly 12 million gallons per day (13,442 acre-feet per year) is discharged from the NIWTP facility into the Santa Cruz River. The majority of that discharge originates in Mexico. This large quantity of water:

- Replenishes roughly 38 percent of safe groundwater yield in the Santa Cruz active management area (AMA)
- Maintains perennial surface water flows in an 18-mile stretch of the Santa Cruz River (accounts for roughly 12 miles of the 18)
- Sustains the Audubon-designated Important Bird Area and provides critical habitat for two endangered species, the Southwest Willow Flycatcher and the Gila Topminnow
- Constitutes a significant portion of the underflow from the Santa Cruz AMA to the Tucson AMA (over 15,000 acre-feet per year)
- Supports ranching, farming, and domestic water use in Santa Cruz and Pima counties

The scope of the settlement includes:

- Upgrading the aged wastewater conveyance pipeline, commonly known as the International Outfall Interceptor (IOI), from the U.S.-Mexico Border to the Nogales International Wastewater Treatment Plant (NIWTP) in Rio Rico, Arizona
- Installing protective measures for the upgraded IOI in locations vulnerable to damage from stormwater and debris

Treated water from the Rio Rico plant is an important contribution to the Santa Cruz River basin which supplies water for drinking, ranching, farming and other activities critical to the Arizona economy. The river also sustains habitat critical to migratory birds, bobcat, deer, javelina, and many other species.

“This agreement is a major win for Southern Arizona, helping resolve a decades-old issue that threatened the health and safety of residents and the environment in Nogales and Santa Cruz County,” said Arizona Governor Doug Ducey. “Working together, ADEQ and USIBWC have developed a plan that will upgrade this critical infrastructure, reduce hazards from storms and flooding, and protect people and businesses in this border community. Arizona is grateful for their hard work to reach this important agreement.”

“I’m pleased we’ve identified a path forward that will improve environmental conditions in the region,” said USIBWC Commissioner Jayne Harkins, “The USIBWC looks forward to getting to work to rehabilitate the IOI as soon as possible.”

Settlement details and path forward:

- USIBWC has identified \$34.2 million of existing funds to immediately begin upgrading the IOI.
- USIBWC has already finalized engineering plans and in cooperation with state and local officials, has begun negotiating agreements necessary to access the IOI from various locations along its length. USIBWC will put the construction contract out to bid this fall.
- Arizona is supporting the project with \$2.59 million in state funds.

Additional support from other partners includes:

- \$1 million from Freeport McMoRan Foundation
- \$1 million (in process) from the US Environmental Protection Agency (EPA) through the North American Development Bank for a companion project to work on City of Nogales, Arizona sewer pipelines that connect to the IOI.

ADEQ is currently working to find funds to install a metal screen in the IOI near the border to capture large debris that could otherwise cause sewage spills, estimated at \$2.6 – \$3.3 million to install, and \$360,000 for yearly maintenance. USIBWC is negotiating with the Mexican Section of the IBWC to secure Mexico’s cost participation in the pipeline rehabilitation.

“The Bank actively seeks out opportunities to collaborate and leverage several sources of funds through local, state and federal partners to deliver environmental infrastructure that improves the quality of life for border residents,” said Dr. Calixto Mateos-Hanel, Managing Director of the North American Development Bank. “It is important to highlight the partnership between EPA and the Bank over the last 25 years through the Border Environmental Infrastructure Fund including this Nogales, Arizona project, which will correct lateral connections to the IOI.”

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## WATER BRIEFS

**KEYSTONE XL PIPELINE US  
COURT DECLINES PERMIT**

On July 6, the US Supreme Court (Supreme Court) declined a request from TC Energy and the Trump administration to allow the Keystone XL pipeline to proceed under Nationwide Permit 12, a key water-crossing permit for pipelines that the federal district court found unlawful. The Supreme Court also issued a partial stay of the district court's decision as it applies to other pipelines while a full appeal of the decision moves forward. *U.S. Army Corps of Engineers, et al. v. Northern Plains Resource Council, et al.*, Case No. 19A1053, Order in Pending Case (July 6, 2020). The Order did not offer any explanation or provide noted dissent to further explain its decision, which keeps in place the federal district court's order that blocked the use of the general nationwide permit for Keystone XL. Canadian company TC Energy needed the Nationwide Permit 12 to continue building the 1200-mile oil sands pipeline from Canada across US rivers and streams. Following the Supreme Court's ruling, TC Energy must acquire a more time consuming and expensive individual permit.

In April, the US District Court in Montana ruled that the Army Corps of Engineers (Corps) violated the Endangered Species Act when it issued Nationwide Permit 12, vacating the permit and prohibiting the Corps from using this fast-tracked approval process for Keystone XL and other pipeline projects. The Corps had pushed to allow pipeline construction under Nationwide Permit 12 to continue during its appeal of the ruling in the 9th Circuit Court of Appeals. That court rejected the Corps' request.

The Supreme Court's short "Order in Pending Case" partially reversed the 9th Circuit's decision, allowing other pipelines to continue using Nationwide Permit 12 for their pipeline construction projects. The Order, however, continues to bar the construction of Keystone XL through rivers, streams, and wetlands while the appeal is heard: "The district court's May 11, 2020 order granting partial vacatur and an injunction is stayed, except as it applies to the Keystone XL pipeline, pending disposition of the appeal in the United States Court of Appeals for the Ninth

Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought."

TC Energy also faces additional roadblocks to completing Keystone XL, including other legal challenges, oil market chaos, and a recent commitment by Joe Biden to rescind the pipeline's permit should he be elected president. "Farmers, ranchers, tribal communities, and the clean water they depend on are a bit safer today thanks to the high court allowing the justice system to proceed in due course," said Dena Hoff, a Montana farmer and member of the Northern Plains Resource Council. "The Keystone XL pipeline is a threat to our air, land, water, and climate. We are glad the Supreme Court has rejected this effort to ram through this dangerous Canadian tar sands project."

For additional background information, *see* Moon, *TWR* #193, March 15, 2020; and the Native American Rights Fund webpage at: [www.narf.org/cases/keystone/](http://www.narf.org/cases/keystone/).

**For info:** Gabby Brown, Sierra Club, 914/ 261-4626 or [gabby.brown@sierraclub.org](mailto:gabby.brown@sierraclub.org); Dustin Ogdin, Northern Plains Resource Council, 406/ 850-6227 or [dustin@northernplains.org](mailto:dustin@northernplains.org)

**"TAKING" CASE CA/OR  
KLAMATH: TRIBAL RIGHTS SENIORITY**

During a severe drought in southern Oregon in 2001, the US Bureau of Reclamation (Reclamation) curtailed Klamath Project water deliveries to meet Endangered Species Act requirements and fulfill tribal trust responsibilities. Irrigators in Oregon's Klamath River Basin sued the government for nearly \$30 million in compensation for the water they did not receive and damages to their crops. Following a long history of litigation, on June 22 the US Supreme Court (Supreme Court) denied a petition requesting that it review a lower court decision that ruled Klamath Project irrigators were not entitled to compensation for the re-allocation of water under the Endangered Species Act (ESA) in 2001. The one-sentence order in the case, *Baley v. United States* (Case No. 19-1134), means that the Supreme Court declined to take up the case. By refusing to take up the case, the Supreme Court let stand the lower court decision that denied compensation to the irrigators, based on a finding that the

senior tribal water rights take priority over the rights of the Klamath Project irrigators.

The Klamath Project was authorized in 1905 under the Reclamation Act of 1902. Project facilities divert and deliver water from Upper Klamath Lake and the Klamath River to approximately 175,000 acres straddling the Oregon – California border.

The case arose after the Bureau of Reclamation precluded water deliveries to the Project in order to maintain water elevations in Upper Klamath Lake for suckers species in Upper Klamath Lake that are ESA-listed as endangered and to provide flows for coho salmon in the Klamath River. The plaintiffs in the case asserted that because water rights are property under state law, the federal government was required, under the Fifth Amendment to the US Constitution, to pay compensation for taking the rights.

The case, originally filed in the US Court of Federal Claims in the fall of 2001, has had an extremely long history, including previous appeals and the Oregon Supreme Court responding to a federal appellate court's request for clarification of Oregon water law. A trial took place in the Court of Federal Claims in 2017. The Court of Federal Claims confirmed that the Klamath Tribes and downriver Klamath Basin tribes have senior water rights that take priority over those of the Klamath Project irrigators. Ultimately in 2019, the US Court of Appeals for the Federal Circuit agreed with the trial court that the plaintiffs were not entitled to compensation because there existed senior, tribal rights for lake levels and flows in at least as great amounts as were required under the ESA. That finding meant that no property was actually taken, according to the trial court.

Although the decision hinged on recognition of the senior tribal water rights, the case technically was between the irrigators and the United States. The Klamath Tribes participated as amicus curiae (friends of the court) to assure that the courts did not ignore the role of tribal water rights. Native American Rights Fund (NARF) represented the Klamath Tribes as amicus curiae in the case. Klamath Tribes Chairman Don

## WATER BRIEFS

Gentry stated, “We’re pleased to have this case put to rest and the seniority of the Klamath Tribes’ water rights recognized and reinforced. The courts in this case were correct about our treaty rights, which include protecting and sustaining the endangered C’wam and Koptu in Klamath Lake. We look forward to healing and restoring our tribal fisheries.”

**For info:** 2019 Decision available at: [www.narf.org/nill/documents/20191114baley-v-us-opinion.pdf](http://www.narf.org/nill/documents/20191114baley-v-us-opinion.pdf); Background at NARF website: [www.narf.org/cases/baley-v-us/](http://www.narf.org/cases/baley-v-us/); Paul Simmons, Klamath Water Users Association, 916/ 769-6685 or [psimmons@somachlaw.com](mailto:psimmons@somachlaw.com)

## CALIFORNIA MARKETS CA PRICES RISING

According to *The Water Market Insider*, produced by WestWater Research, this year’s California water market outlook is dry and expensive. The current issue of *The Water Market Insider* explores how the spot-market price of water observed across California responds to certain hydrologic, institutional, and management indicators. Prices respond to water scarcity, which is driven by natural factors, policy decisions, and water management. Price transparency in California’s water market has increased significantly with the launch of the Nasdaq Veles California Water Index (NQH2O), a first of its kind index that provides a benchmark for the spot-market price of water rights across the state. WestWater Research, a leading economic consulting firm providing valuation, market analysis, planning, and transaction advisory services, is the exclusive data provider for the NQH2O.

California is off to a dry start for Water Year 2020. The recent May 1 forecasts of the Sacramento Valley and San Joaquin Valley Indices both projected a Dry hydrologic year. The water market has responded accordingly. While the NQH2O index held relatively stable through the beginning of the year, as water suppliers awaited better project allocations, the index value began to rise significantly in March as water supply conditions failed to dramatically improve.

California is home to one of the most active and dynamic water markets in the western US. In 2019 alone, the state saw over \$1.1 billion in water market activity. The purchases included surface water, groundwater, stored, and other supplies spanning several market regions and water systems. Market participants actively transact through exchanges, single-year and multi-year leases, and permanent sale arrangements. The market is expansive, with participants transacting across hundreds of miles of well-plumbed and interconnected systems.

WestWater Research noted what its indicators mean for California water suppliers this year:

- **Current Supplies:** Allocated surface water project and river supplies, derived from contracts or water rights, are likely to be well below their historical running averages.
- **Stored Supplies:** California is entering this water year following an extremely wet year. While dry conditions will reduce current year inflow, reservoir storage provides a decent buffer, particularly when comparing current year reservoir levels to those experienced during the most recent drought.
- **Future Prices:** The availability of stored supplies has muted some of the potential price shock. However, conditions over the next few months are likely to keep prices high as irrigation and municipal demand rise through the summer. Additional price increases beyond those already observed would not be unlikely.

**For info:** WestWater Research, 208/ 433-0255 or [www.waterexchange.com](http://www.waterexchange.com)

## COLORADO BASIN WEST CLIMATE & HYDROLOGY

In June, Western Water Assessment (WWA) released “Colorado River Basin Climate and Hydrology: State of the Science.” The report was conceived and commissioned by a group of federal, state, and local water agencies working to advance scientific understanding in the Colorado River Basin. With guidance from the agencies, the 17-author team led by WWA’s Jeff Lukas and Liz Payton integrated nearly 800 peer-reviewed studies, agency reports, and other sources to assess the state of the science and technical methods

relevant to managing water resources in the Colorado River Basin. By serving as a common knowledge base and identifying both challenges and opportunities, the report is intended to support ongoing efforts to improve forecasts and longer-term projections of water supply and system conditions, and also inform broader discussions about planning for the basin’s water future.

**For info:** Report available at: <https://wwa.colorado.edu/publications/reports/CRBreport/>

## DRINKING WATER CA VULNERABLE COMMUNITIES “SAFER”

Moving ahead with an ambitious 10-year commitment to bring vulnerable Californian communities access to safe and affordable drinking water, the State Water Resources Control Board (Board) recently approved the 2020-21 Fund Expenditure Plan that prioritizes up to \$130 million to numerous projects over the next 12 months.

The Board action will allow the SAFER (Safe and Affordable Funding for Equity and Resilience) Program to undertake several initiatives to ensure safe and reliable drinking water across the state. These funds will:

- Address community and school water systems that are out of compliance with health standards
- Assist disadvantaged communities throughout the state that lack access to safe drinking water
- Tackle contaminated private wells and state small water systems
- Accelerate consolidations for water systems that are at-risk of failing to provide safe drinking water and out of compliance for contaminants and other water quality issues

“Ensuring all Californians have access to clean, safe and affordable drinking water is a generational challenge,” said E. Joaquin Esquivel, Board Chair. “This first year’s adoption of the fund’s annual expenditure plan is a key milestone, with much work ahead. We’re fortunate for the continued collaboration and opportunity to bring these long- needed resources to communities and water systems struggling to provide safe drinking water in California.”

Last year, Governor Gavin Newsom outlined a vision to ensure all Californians have access to safe,



## WATER BRIEFS

clean and affordable water and pledged to remedy longstanding access issues over the coming decade. The Board is charged with implementing that vision and shepherding it from start to finish.

Assisted by the 19-member SAFER Advisory Group composed of stakeholders and community members, the Board is preparing a comprehensive needs analysis and establishing project priorities. The Safe and Affordable Drinking Water Fund was established as part of California Senate Bill 200, signed into law in July 2019. The fund provides up to \$130 million per year to assist struggling water systems sustainably and affordably provide safe drinking water to their customers. On May 5, the Board adopted a Policy that guides how this fund is administered.

The fund complements the Board's existing suite of financial assistance programs, generally limited to addressing capital infrastructure. It widens the net for entities and types of projects eligible for funding. This includes building local technical and managerial capacity, consolidating small systems to achieve economies of scale, and supporting critical operations and maintenance functions.

**For info:** SAFER program website: [www.waterboards.ca.gov/drinking\\_water/programs/safer\\_drinking\\_water/](http://www.waterboards.ca.gov/drinking_water/programs/safer_drinking_water/)

## FLOOD INSURANCE US

### PROPERTY ACQUISITION PROGRAM

#### GAO REPORTS FISCAL EXPOSURE

The Federal Emergency Management Agency (FEMA) administers three grant programs that can fund efforts to mitigate the flood risk of properties insured by the National Flood Insurance Program (NFIP). Together, these three programs funded \$2.3 billion in mitigation projects from fiscal years 2014 through 2018. The largest program's funding is tied to federal recovery dollars following presidential disaster declarations, while the other two programs are funded each year through congressional appropriations. States and localities generally must contribute 25 percent of the cost of a mitigation project, but some other federal program funds can be used for that purpose. One example of such a project is property

acquisition — i.e., purchasing a high-risk property from a willing property owner, demolishing the structure, and converting the property to green space.

From 1989 to 2018, FEMA has helped states and localities mitigate more than 50,000 properties; however, the number of non-mitigated repetitive loss properties (generally meaning those that flooded at least twice in 10 years) has grown. Mitigation efforts varied by state. Property acquisition accounted for about 80 percent of mitigated properties nationwide, but, in some states, elevation (raising a structure) was more commonly used. In addition, some states (e.g., Missouri and North Carolina) mitigated a high number of properties relative to their numbers of repetitive loss properties, while others (Florida, New York, Louisiana, and Texas) mitigated a low number.

While these efforts can reduce flood risk and claim payments, the federal government's fiscal exposure from NFIP remains high because premium rates do not fully reflect the flood risk of its insured properties. NFIP has experienced several catastrophic flood events in recent years, and the frequency and severity of floods is expected to increase. However, NFIP's premium rates have not provided sufficient revenue to pay claims. As a result, FEMA still owed Treasury \$20.5 billion as of March 2020, despite Congress cancelling \$16 billion of debt in 2017. As GAO has reported in the past (GAO-17-425), Congress will need to consider comprehensive reform, including mitigation and structural changes to premium rates, to ensure NFIP's solvency.

**For info:** GAO-NFIP Report at: [www.gao.gov/assets/710/707826.pdf](http://www.gao.gov/assets/710/707826.pdf)

## DOMESTIC WELLS US

### USGS GEONARRATIVE

A new US Geological Survey (USGS) online "geonarrative" illustrates where domestic (private) water wells are located and how many people are using them, based on the results of a 2019 USGS study. Nearly 40 million people in the United States rely on a domestic well for their drinking-water supply.

The geonarrative displays interactive maps that allow the user to

view the number of people who rely on domestic wells per square kilometer, and the number and percentage of people by state using domestic wells. Users can zoom in on any area, although the maps are not intended to be used at the scale of a single house.

The new research highlighted in the geonarrative uses population data from the two most recent censuses (2000 and 2010) to project the population relying on domestic wells for the years 1990 to 2010. The 1990 census was the last nationally consistent survey of the source of drinking water to a home; subsequent census questionnaires did not request this information.

The number of people using domestic well water in the contiguous United States is estimated to have increased 1.5% from 1990 to 2000 — from 36.70 million people to 37.25 million people — and increased slightly from 2000 to 2010 to 37.29 million people. Although the number of people has grown, as a percentage of the population it has decreased, from 16.4% in 1970 to an estimated 12.2% in 2010.

Knowing the location of domestic wells and the populations they serve can aid in optimizing groundwater-quality testing to help ensure safe drinking water in domestic wells nationwide. For instance, knowing where a high density of domestic well use overlies potentially corrosive groundwater could help focus water quality testing for lead.

**For info:** USGS website: <https://ca.water.usgs.gov/projects/USGS-US-domestic-wells.html>

## WATER WORKERS US

### NEW CDC WEBSITE

The Centers for Disease Control (CDC) recently posted a new coronavirus website for sanitation and wastewater workers. Additionally, EPA regularly updates its coronavirus website, which provides information on drinking water and wastewater. In addition to information for the general public, this website includes resources for state, local, and tribal agencies and intergovernmental associations.

**For info:** CDC website: [www.cdc.gov/coronavirus/2019-ncov/community/sanitation-wastewater-workers.html](http://www.cdc.gov/coronavirus/2019-ncov/community/sanitation-wastewater-workers.html)

# The Water Report

## CALENDAR

<b>July 15</b> <b>ID</b> <b>Water Law for Utilities - Idaho Rural Water Assoc. Class, Pocatello.</b> Police Station EOC Training Room, 5205 S. 5th Street, 8:30 am - 4:30 pm. Presented by Idaho Rural Water Association and Schroeder Law Offices. For info: <a href="http://www.idahoruralwater.com/Training/Training/TabId/5524/PgrID/17727/PageID/3/Default.aspx">www.idahoruralwater.com/Training/Training/TabId/5524/PgrID/17727/PageID/3/Default.aspx</a>	<b>July 23-25</b> <b>WEB</b> <b>66th Annual Rocky Mountain Mineral Law Institute, Salt Lake City.</b> The Grand America Hotel. Virtual Annual Institute. For info: <a href="http://www.rmmlf.org/conferences">www.rmmlf.org/conferences</a>	<b>August 4</b> <b>WEB</b> <b>Emergency Planning &amp; Storm Response 101 Course,</b> For info: <a href="http://www.euci.com/course/">www.euci.com/course/</a>	<b>August 18</b> <b>WEB</b> <b>Effective Utility Management (EUM) Roadmap Webinar: Taking the Next Step Toward Sustainability, Webinar.</b> 1:00 - 3:00 pm EDT. Presented by EPA Office of Wastewater Management. For info: <a href="https://rossstrategic.zoom.us/webinar/register/WN_FN_KDfIGTWCJDDjHrZvN4Q">https://rossstrategic.zoom.us/webinar/register/WN_FN_KDfIGTWCJDDjHrZvN4Q</a> or <a href="http://www.epa.gov/npdes">www.epa.gov/npdes</a>
<b>July 16-17</b> <b>WEB</b> <b>Groundwater Sustainability Plans (GSPs) in California - Virtual Update,</b> ZOOM. For info: Law Seminars International, 206/ 567-4490, <a href="mailto:registrar@lawseminars.com">registrar@lawseminars.com</a> or <a href="http://www.lawseminars.com">www.lawseminars.com</a>	<b>July 27-28</b> <b>WEB</b> <b>Endangered Species Act, Wetlands, Stormwater &amp; Floodplain Regulatory Compliance for Energy and Utilities Course,</b> For info: <a href="http://www.euci.com/course/">www.euci.com/course/</a>	<b>August 4-5</b> <b>WEB</b> <b>Texas Commission on Environmental Quality Public Drinking Water Conference,</b> Current & Upcoming Regulations in Texas, New Technologies, & More. Free TCEQ Event. For info: <a href="http://www.tceq.texas.gov/drinkingwater/conference.html">www.tceq.texas.gov/drinkingwater/conference.html</a>	<b>August 18-20</b> <b>CA</b> <b>POSTPONED: DATE TBA 4th California Adaptation Forum 2020, Riverside.</b> TBA. Presented by the Local Government Commission & the California Governor's Office of Planning and Research. For info: Kelsey Wolf-Cloud at <a href="mailto:kwolfcloud@lgc.org">kwolfcloud@lgc.org</a> or <a href="http://www.californiaadaptationforum.org">www.californiaadaptationforum.org</a>
<b>July 17</b> <b>ID</b> <b>Water Law for Utilities - Idaho Rural Water Assoc. Class, Fruitland.</b> Fruitland Treatment Plant, 1200 NW 6th Avenue; 8:30 am - 4:30 pm. Presented by Idaho Rural Water Association and Schroeder Law Offices. For info: <a href="http://www.idahoruralwater.com/Training/Training/TabId/5524/PgrID/17727/PageID/3/Default.aspx">www.idahoruralwater.com/Training/Training/TabId/5524/PgrID/17727/PageID/3/Default.aspx</a>	<b>July 28</b> <b>WEB</b> <b>Stormwater Management Today Webinar,</b> Technology & Best Management Practices. For info: <a href="http://www.foresteruniversity.com/content/Default.aspx">www.foresteruniversity.com/content/Default.aspx</a>	<b>August 5-6</b> <b>NH</b> <b>Fate of PFAS: From Groundwater to Tap Water Conference, Durham.</b> University of New Hampshire. National Groundwater Association Event; Social Distancing Accommodated. For info: <a href="http://www.ngwa.org/events-and-education/ngwa's-event-calendar">www.ngwa.org/events-and-education/ngwa's-event-calendar</a>	<b>August 19</b> <b>WEB</b> <b>Hydrology in Water Law Proceedings.</b> For info: Law Seminars International, 206/ 567-4490, <a href="mailto:registrar@lawseminars.com">registrar@lawseminars.com</a> or <a href="http://www.lawseminars.com">www.lawseminars.com</a>
<b>July 20-24</b> <b>WEB</b> <b>EWRI International Low Impact Development Conference,</b> Environmental & Water Resources Institute Event. RE: Low Impact Development (LID), Green Infrastructure (GI), Sustainable Urban Drainage Systems (SUDS) and Water Sensitive Urban Designs (WSUD). For info: <a href="http://www.lidconference.org/virtual">www.lidconference.org/virtual</a>	<b>July 29</b> <b>WEB</b> <b>All the Water We Will Ever Need Webinar,</b> Rethinking Past & Current Practices. For info: <a href="http://www.foresteruniversity.com/content/Default.aspx">www.foresteruniversity.com/content/Default.aspx</a>	<b>August 11-12</b> <b>OR &amp; WEB</b> <b>Shoreline Development &amp; Permitting Seminar, Seaside.</b> Seaside Civic & Convention Center, 415 First Avenue. Available Via Live Webcast. For info: The Seminar Group, 800/ 574-4852, <a href="mailto:info@theseminalgroup.net">info@theseminalgroup.net</a> or <a href="http://www.theseminalgroup.net">www.theseminalgroup.net</a>	<b>August 20-21</b> <b>WEB</b> <b>Natural Resources Damages 13th Annual Conference on Litigating NRD Cases, Santa Fe.</b> Interactive ZOOM Webcast If Necessary. For info: Law Seminars International, 206/ 567-4490, <a href="mailto:registrar@lawseminars.com">registrar@lawseminars.com</a> or <a href="http://www.lawseminars.com">www.lawseminars.com</a>
<b>July 22</b> <b>WEB</b> <b>PFAS: Messaging, Managing Risk, and Testing for Unregulated Compounds Webinar,</b> Presented by American Water Works Association. For info: <a href="http://www.awwa.org/Events-Education/Events-Calendar">www.awwa.org/Events-Education/Events-Calendar</a>	<b>July 29</b> <b>WEB</b> <b>FERC Hydropower Compliance Course,</b> For info: <a href="http://www.euci.com/course/">www.euci.com/course/</a>	<b>August 13-14</b> <b>WEB</b> <b>29th Annual Superconference: Arizona Water Law - Moving Forward: Development, Drought &amp; Climate.</b> For info: CLE International, 800/ 873-7130 or <a href="http://www.cle.com">www.cle.com</a>	<b>August 25-26</b> <b>Australia</b> <b>Australian Smart Water Utilities 2020: Reducing Water Leakage Across the Network Conference, Melbourne.</b> For info: <a href="http://www.australia.smart-water-utilities.com">www.australia.smart-water-utilities.com</a>
<b>July 22-24</b> <b>WY &amp; WEB</b> <b>ZOOM WEBINAR Western States Water Council 2020 (193rd) Meeting, Cody.</b> Holiday Inn / Buffalo Bill Village Resort. Presented by the Western States Water Council. For info: <a href="http://www.westernstateswater.org/upcoming-meetings/">http://www.westernstateswater.org/upcoming-meetings/</a>	<b>July 29-30</b> <b>WEB</b> <b>Asset Management for Water Utilities Course,</b> For info: <a href="http://www.euci.com/course/">www.euci.com/course/</a>	<b>August 17-18</b> <b>Alberta</b> <b>RESCHEDULED: 10/8&amp;9/20 5th Annual Canadian Frac-Sand Exhibition &amp; Conference, Calgary.</b> For info: <a href="http://www.canada.frac-sand-conference.com">www.canada.frac-sand-conference.com</a>	<b>August 27-28</b> <b>WA &amp; WEB</b> <b>3rd Annual Water Law in Central Washington, Ellensburg.</b> Central Washington University, 400 E. University Way. Available Via Live Webcast; PROMO Code SPP50 for \$50 off for TWR Readers. For info: The Seminar Group, 800/ 574-4852, <a href="mailto:info@theseminalgroup.net">info@theseminalgroup.net</a> or <a href="http://www.theseminalgroup.net">www.theseminalgroup.net</a>
<b>July 22-24</b> <b>WY &amp; WEB</b> <b>ZOOM WEBINAR Western States Water Council 2020 (193rd) Meeting, Cody.</b> Holiday Inn / Buffalo Bill Village Resort. Presented by the Western States Water Council. For info: <a href="http://www.westernstateswater.org/upcoming-meetings/">http://www.westernstateswater.org/upcoming-meetings/</a>	<b>July 30</b> <b>WEB</b> <b>Innovations in Drainage Technology Webinar,</b> For info: <a href="http://www.foresteruniversity.com/content/Default.aspx">www.foresteruniversity.com/content/Default.aspx</a>	<b>August 17-19</b> <b>WA</b> <b>RESCHEDULED: 9/9-10/20 StormCom Conference &amp; Expo, Seattle.</b> Washington State Convention Center. Advancing Stormwater Management. For info: <a href="http://www.stormcon.com/stormcon/375627">www.stormcon.com/stormcon/375627</a>	<b>August 27-28</b> <b>CA</b> <b>Clean Water &amp; Wetlands in California Conference, Los Angeles.</b> DoubleTree by Hilton Downtown. Interactive ZOOM Webcast If Necessary. For info: Law Seminars International, 206/ 567-4490, <a href="mailto:registrar@lawseminars.com">registrar@lawseminars.com</a> or <a href="http://www.lawseminars.com">www.lawseminars.com</a>
<b>July 23-24</b> <b>OR &amp; WEB</b> <b>3rd Annual Agriculture Law Seminar, Bend.</b> McMenamin's Old St. Francis School. Available Via Live Webcast. For info: The Seminar Group, 800/ 574-4852, <a href="mailto:info@theseminalgroup.net">info@theseminalgroup.net</a> or <a href="http://www.theseminalgroup.net">www.theseminalgroup.net</a>	<b>July 30-31</b> <b>WEB</b> <b>NGWA Workshop on Groundwater in the Northwest,</b> National Groundwater Association Presentation: Area Practitioners Share Experiences & Lessons Learned. For info: <a href="http://www.ngwa.org/events-and-education/ngwa's-event-calendar">www.ngwa.org/events-and-education/ngwa's-event-calendar</a>	<b>August 17-20</b> <b>OR</b> <b>Oregon Association of Water Utilities - Annual Summer Classic Conference, Seaside.</b> TBA. For info: <a href="https://oawu.net/training-events/annual-summer-classic-conference-seaside/">https://oawu.net/training-events/annual-summer-classic-conference-seaside/</a>	

**Note:** Events are being rescheduled, canceled, or adapted online due to coronavirus. Check with event organizers.



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## CALENDAR

(continued from previous page)

### **August 31-Sept. 1 ID & WEB**

**Water Law & Resource Issues Seminar - Idaho Water Users Association, Sun Valley.** Sun Valley Resort. Also Available Virtually. For info: IWUA, 208/ 344-6690 or [www.iwua.org](http://www.iwua.org)

### **September 1-3 WEB**

**2020 Virtual Texas Groundwater Summit, San Antonio.** Hyatt Regency Hill Country Resort. Virtual Event Questions to: [groundwater@iemshows.com](mailto:groundwater@iemshows.com). For info: <https://texasgroundwater.org/texas-groundwater-summit/>

### **September 9-10 MT & WEB**

**20th Annual Montana Water Law Seminar, Helena.** Great Northern Hotel. Available Via Live Webcast; PROMO Code SPP50 for \$50 off for TWR Readers. For info: The Seminar Group, 800/ 574-4852, [info@theseminalgrou.net](mailto:info@theseminalgrou.net) or [www.theseminalgrou.net](http://www.theseminalgrou.net)

### **August 17-19 WEB**

**StormCom Virtual Event.** Advancing Stormwater Management. For info: [www.stormcon.com/stormcon/375627](http://www.stormcon.com/stormcon/375627)

### **September 13-16 WEB**

**35th Annual WaterReuse Symposium: "Reaching New Heights in Water Reuse",** Moves Online. RE: Water Reuse Laws, Policy, Funding, Research, Technology, & Public Acceptance. For info: <https://watereuse.org/news-events/conferences/35th-annual-watereuse-symposium/>

### **September 14-15 WEB**

**PFAS Litigation in the Pacific Northwest Conference,** Interactive ZOOM Event. For info: Law Seminars International, 206/ 567-4490, [registrar@lawseminars.com](mailto:registrar@lawseminars.com) or [www.lawseminars.com](http://www.lawseminars.com)

### **September 14-16 WA**

**Greentech 2020, Seattle.** TBD. Presented by the Environmental Law Institute. For info: [www.greentechconference.org](http://www.greentechconference.org)

### **September 14-16 WEB**

**CASQA Annual Conference,** Presented by the California Stormwater Quality Association. For info: [www.casqa.org](http://www.casqa.org)

### **September 15 CO**

**Riverbank 2020, Denver.** Denver Botanic Gardens. Fundraiser for Colorado Water Trust. For info: <http://coloradowatertrust.org>

## 2020 AWRA Washington Annual State Conference

**The Challenges of Change:** *How Washington is Responding to Interdisciplinary Changes to Water Resources*



Photos by Tom Ring



**October 6, 2020**  
Virtual Webinar



Details and Registration at: [www.waawra.org](http://www.waawra.org)