The Foundation
FOR NATURAL RESOURCES AND ENERGY LAW
FORMERLY ROCKY MOUNTAIN MINERAL LAW FOUNDATION

fnrel.org

WATER LAW Newsletter

Volume 58 | Number 2 | 2025

In this issue

FEDERAL WATER QUALITY

Michelle Gaeng, Guest Reporter

***City & County of San Francisco v. EPA*: Effluent Limits Must Be Specific, Not Outcome-Based**

The Clean Water Act (CWA), 33 U.S.C. §§ 1251–1388, authorizes the U.S. Environmental Protection Agency (EPA) and state agencies to issue permits that impose requirements on entities that discharge "pollutants" into the "waters of the United States." 33 U.S.C. § 1342(b). A critical component of this CWA regulatory scheme is the National Pollutant Discharge Elimination System (NPDES), which makes it unlawful to discharge pollutants into bodies of water covered under the CWA unless authorized by specific permit. 33 U.S.C. § 1342; 40 C.F.R. pt. 401. NPDES permits generally include "effluent limitations" on discharges, which restrict the qualities, rates, and concentrations of chemical, physical, biological, and other constituents that are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean. 33 U.S.C. § 1362(11). NPDES permits also may include general "end-result" requirements, which are permit provisions that impose on the permittee responsibility for achieving water quality standards in the receiving water, but do not spell out what a permittee must do or refrain from doing.

On March 4, 2025, in a 5–4 decision, the U.S. Supreme Court held in *City & County of San Francisco v. EPA*, 145 S. Ct. 704, 720 (2025), that the CWA does not authorize EPA to impose end-result requirements in NPDES discharge permits. The Court held that not all "limitations" imposed under the CWA's effluent-limitations provision must qualify as effluent limitations; however, the provision giving NPDES permitting agencies authority to im-

page 2

COLORADO

Michael Daugherty, Lindsey Ratcliff & Bob Feit, Reporters

Colorado Continues to Tap into Its Sports Betting Market to Fund Water Projects

On May 15, 2025, Governor Jared Polis signed into law House Bill 25-1311, titled "Deductions for Net Sports Betting Proceeds." H.B. 25-1311, 75th Gen. Assem. (Colo. 2025) (HB 25-1311). In hopes of increasing funding for water conservation and research efforts, the Act fully phases out the ability of sports betting operators to deduct free bets from their proceeds, thereby increasing tax revenue collected by the state of Colorado. Money received via sports betting proceeds is used to fund various water projects under the Colorado Water Plan (CWP).

Since 2015, the CWP has facilitated various projects designed to meet water challenges across the state, including new water storage, stream restoration work and studies, ditch surveys, and alternatives to agricultural water transfers. *See* Fact Sheet, Water Educ. Colo., "Paying for the Colorado Water Plan," at 1 (Feb. 2021). Under the guidance of the CWP, the Colorado Water Conservation Board (CWCB) funds local water projects through several different sources, including the Water Plan Implementation Cash Fund. CWP at 62. Revenue for these funds comes from mineral leases, severance tax revenue, treasury interest, and, since 2019, sports betting taxes. *Id.* CWCB uses these funds to provide low-interest loans and grants for projects that will advance and implement the CWP. *Id.* Projects benefiting from the Cash Fund range from developing additional water storage to long-term planning strategies for land use and water efficiency. *See* CWCB, "Colorado Water Plan Grants,"

page 3

FEDERAL WATER QUALITY

(continued from page 1)

pose "any more stringent limitation" necessary to meet applicable water quality standards does not authorize EPA to include end-result provisions in NDPES permits.

In this case, the City and County of San Francisco challenged two new end-result requirements that were added to its NPDES permit in 2019. *Id.* at 710. The Court ultimately held that the CWA does not authorize EPA to enact such end-result requirements without spelling out what actions need to be taken to comply with the discharge permit and achieve the desired water quality standards. *Id.* at 711. The Court's ruling instructs EPA itself to determine what steps a facility should take to protect water quality and to ensure NPDES permit limitations contain clear and actionable restrictions. *Id.*

The Court's ruling will require EPA and state regulators to include more specific conditions and necessary steps for achieving water quality standards in wastewater discharge permits. The ruling is predicted to impact the enforceability of end-result terms in current discharge permits and could potentially delay and increase expenses to the permitting processes moving forward. However, the ruling's impact may depend on jurisdiction because many state and local agencies have authorized NPDES permitting programs that are more stringent than the requirements of the CWA.

WOTUS Notice: The "Final" Response to SCOTUS

On March 12, 2025, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) signed a memorandum that provided guidance for implementing the "continuous surface connection" requirement for determining "waters of the United States" (WOTUS). In this memorandum, EPA and the Corps stated that they planned to issue a public notice in the *Federal Register* to outline a process to gather recommendations for the meaning of key terms in light of the *Sackett v. EPA* decision in 2023 and to inform any potential future administrative actions to clarify the definition of WOTUS to ensure transparent, efficient, and predictable implementation. Specifically, the memo rejects the "discrete features" language in the previous 2023 rule, which provided, under the relatively permanent standard for adjacent wetlands, that wetlands meet the continuous surface connection requirement if they are connected to WOTUS by a discrete feature such as a non-jurisdictional ditch, swale, pipe, or culvert. *See* Conforming 2023 Rule, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (2023 Rule) (codified at 33 C.F.R. § 328.3 (USACE) and 40 C.F.R. § 120.2 (EPA)). The memo explains that this discrete features language is in tension with the *Sackett* decision and EPA seeks to align its interpretation of *Sackett* through future rulemaking and guidance. The memo further summarizes a "two-part test" for determining CWA jurisdiction over adjacent wetlands: (1) the adjacent body of water must be a WOTUS, generally meaning a traditional navigable water or a relatively permanent body of water connected to a traditional navigable water; and (2) the wetland, satisfying the definition at 33 C.F.R. § 328.3 and 40 C.F.R. § 120.2, must have a continuous surface connection to a requisite covered water.

Then, on March 24, 2025, EPA and the Corps published the notice in the *Federal Register* of their intention to engage with stakeholders to implement the revised definition of WOTUS in *Sackett* and to bring further clarity to the *Sackett* decision and the 2023 Rule, which implemented the *Sackett* decision. 90 Fed. Reg. 13,428 (Mar. 24, 2025), Docket No. EPA-HQ-OW-2025-0093. In *Sackett*, the U.S. Supreme Court rejected the "significant nexus" standard and held that EPA had no statutory basis to impose this standard in the determination of WOTUS. EPA then published the 2023 Rule implementing *Sackett*; however, stakeholders have expressed concerns related to the 2023 Rule as it relates to the implementation of which features are "connected to" "relatively permanent" waters and to which waters those phrases apply; the implementation of the "continuous surface connection" requirement and to which features that phrase applies; and lastly, which ditches are considered to be WOTUS.

EPA specifically sought input and recommendations on, among others, (1) the scope of "relatively permanent" waters and to what features this phrase applies; (2) whether certain characteristics, such as flow regime, flow duration, or seasonal-

WATER LAW NEWSLETTER

EDITORS

Amy K. Kelley
Professor, Gonzaga University School of Law

Jesse J. Richardson, Jr.
Professor, West Virginia University College of Law

REPORTERS

Alaska - Tina M. Grovier & Shannon M. Bleicher
Stoel Rives LLP

Arizona - Rhett A. Billingsley
Fennemore Craig, P.C.

California - Alf W. Brandt
Senior Counsel to California State Assembly Speaker Anthony Rendon

Colorado - Michael Daugherty
Somach Simmons & Dunn

Federal Water Quality
Dietrich C. Hoefner
Womble Bond Dickinson

Georgia - Lewis B. Jones & John L. Fortuna
Jones Fortuna LP

Idaho - Norman M. Semanko
Parsons Behle & Latimer

Kansas - Burke W. Griggs
Washburn University School of Law

Minnesota - Gregory A. Fontaine
Husch Blackwell LLP

Montana - Ryan McLane
Franz & Driscoll, PLLP

Nebraska - Anthony Schutz
University of Nebraska-Lincoln College of Law

Nevada - Gregory Morrison
Morrison Law NV

New Mexico - Nicole Russell
Hobbs, Straus, Dean & Walker, LLP

North Dakota - Matthew A. Sagsveen
Office of Attorney General

Oklahoma - Dean A. Couch
H2O Law, PLLC

Oregon - Kirk B. Maag & Merissa Moeller
Stoel Rives LLP

Pennsylvania - Lisa M. Bruderly
Babst Calland

South Dakota - Sean M. Kammer
University of South Dakota School of Law

Texas - Emily Willms Rogers
Bickerstaff Heath Delgado Acosta LLP

Utah - Jonathan R. Schutz
Cohne Kinghorn, P.C.

Julie I. Valdes
Office of the Attorney General

Virginia - Amanda J. Waters
AlexRenew

West Virginia
Jesse J. Richardson, Jr.
West Virginia University College of Law

Washington and Federal
Amy K. Kelley
Gonzaga University School of Law

Wyoming - Christopher M. Brown
Attorney General's Office

———————

Western Canada - Alastair Lucas
University of Calgary

David Percy
University of Alberta Law School

The *Water Law Newsletter* is compiled by Professors Amy K. Kelley and Jesse Richardson, and edited jointly with The Foundation for Natural Resources and Energy Law. The Foundation distributes the *Newsletter* electronically on a complimentary basis to Foundation members and on a paid circulation basis, three issues per year (print version on request); 2025 price—$80 per year.

ity, should inform a definition of "relatively permanent" as well as to which features this phrase should apply in light of *Sackett*; (3) the scope of "continuous surface connection" and to which features this phrase applies; (4) the definition of "continuous surface connection" including what it means to "abut" a jurisdictional water; (5) interpretation and implementation of *Sackett* language providing that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells"; and (6) the scope of jurisdictional ditches. Such feedback will inform any future administrative actions.

Powering the Great American Comeback Initiative

On May 21, 2025, the U.S. Environmental Protection Agency (EPA) issued a memorandum clarifying the specific and limited role that states and tribes play in the federal licensing and permitting processes under section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341. Section 401 provides for the state and tribal certification of water quality and under this section, a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into WOTUS unless a section 401 water quality certification is issued, or certification is waived. Where states or tribes do not have jurisdiction, EPA is responsible for issuing certification.

In its memorandum, EPA emphasized its commitment to reinforcing the limits of section 401 certification to support "energy, critical mineral, and infrastructure projects that are key to economic growth and EPA's 'Powering the Great American Comeback' initiative," which are often subject to CWA Section 401. Memorandum, Office of Water, EPA, "Clarification Regarding the Application of Clean Water Act Section 401 Certification" (May 21, 2025). The memorandum clarifies that a state or tribe's evaluation is limited to considering negative impacts to water quality and only such impacts that prevent compliance with applicable water quality requirements. The memorandum also announced EPA's intent to issue a notice in the *Federal Register* and docket to obtain public input on implementation challenges and regulatory uncertainty related to the 2023 rule's scope of certification. EPA signaled its intention to address challenges and uncertainty in future guidance or rulemaking. As of the time of this report, notice has not been issued in the *Federal Register*.

EPA Draft Sewage Sludge Risk Assessment: PFOA and PFOS

On January 15, 2025, the U.S. Environmental Protection Agency (EPA) published a notice of availability and announced the "Draft Sewage Sludge Risk Assessment" for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) and the following comment period. 90 Fed. Reg. 3859 (Jan. 15, 2025), Docket No. EPA-HQ-OW-2024-0504. This draft risk assessment reflects the agency's latest scientific understanding of the potential risks to human health and the environmental posed by the presence of PFOA and PFOS in sewage sludge that is applied as soil conditioner or fertilizer in agricultural, forested, and other lands, surface disposed, or incinerated. Sewage sludge is a semi-solid, nutrient-rich product created when domestic sewage is transported and conveyed to a wastewater treatment plant and treated to separate liquids from solids. 40 C.F.R. pt. 503 regulates the standards for the use or disposal of sewage sludge, and it is intended to be applied to land as a soil conditioner or fertilizer. PFOA and PFOS are two chemicals in a large class of synthetic chemicals called per- and polyfluoroalkyl substances (PFAS) that persist in the environment for long periods of time and are linked to adverse human health effects and are likely carcinogens to humans. PFOA and PFOS can be released in industrial and non-industrial sources of sewage sludge.

The draft risk assessment focuses on those living on or near impacted sites or those that rely primarily on products produced from those sites (e.g., food crops, animal products, or drinking water). Once the draft risk assessment is finalized, it will provide information on risk from use or disposal of sewage sludge and will inform EPA's potential future regulatory actions under the CWA. The comment period closes on August 14, 2025.

EPA has authority to regulate consistent with section 405(d)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1345(d)(2), as it periodically reviews its existing regulations to identify additional toxic pollutants that may be present in sewage sludge and assess whether those pollutants may adversely affect public health or the environment based on their toxicity, persistence, concentration, mobility, and potential for exposure. This notice of availability of the draft risk assessment is consistent with section 405 (g)(1) of the CWA, 33 U.S.C. § 1345(g)(1).

Clean Water Act Methods Update Rule 22 for the Analysis of Contaminants in Effluent

On January 21, 2025, the U.S. Environmental Protection Agency (EPA) filed a proposed rule to promulgate new methods and update the tables of approved methods for the Clean Water Act (CWA), which requires EPA to promulgate test procedures for the analysis of pollutants. Clean Water Act Methods Update Rule 22 for the Analysis of Contaminants in Effluent, 90 Fed. Reg. 6967 (proposed Jan. 21, 2025) (to be codified at 40 C.F.R. pt. 136). In the proposed rule, EPA seeks to add new methods for per- and polyfluoroalkyl substances (PFAS) and polychlorinated biphenyl (PCB) congeners, and add methods previously published by voluntary consensus bodies that industries and municipalities would use for reporting under EPA's National Pollutant Discharge Elimination System (NPDES) permit program. EPA also proposed to withdraw the seven Aroclor (PCB mixtures) and to simplify the sampling requirements for two volatile organic compounds and make a series of minor corrections to existing tables of approved methods. EPA's test procedure regulations for CWA programs are codified at 40 C.F.R. pt. 136. EPA has authority to propose such regulation under sections 301(a), 304(h), and 501(a) of the CWA, 33 U.S.C. §§ 1311(a), 1314(h), and 1361(a).

COLORADO

(continued from page 1)

https://cwcb.colorado.gov/funding/colorado-water-plan-grants. One ongoing project funded by these grants specifically protects lands irrigated by *acequias*—shared irrigation canals and a system for water sharing in the San Luis Valley of Colorado—by providing financial support that encourages water conservation, soil health, and wildlife habitat restoration. *Id.* The 2023 update

EDITOR'S NOTE ON UNPUBLISHED OPINIONS: This *Newsletter* sometimes contains reports on unpublished court opinions that we think may be of interest to our readers. Readers are cautioned that many jurisdictions prohibit the citation of unpublished opinions. Readers are advised to consult the rules of all pertinent jurisdictions regarding this matter.

to the CWP identified a $1.5-billion gap between the CWCB's funding needs and funding sources just for its grant and loan programs, without even counting funding needs for other state projects related to water. *Id.* at 64.

Voters in Colorado passed Proposition DD in 2019, which legalized sports betting in the state and provided that a 10% tax on operators' proceeds would be directed toward the Water Plan Implementation Cash Fund. H.B. 19-1327, 69th Gen. Assemb. (Colo. 2019). Codified at Colo. Rev. Stat. § 44-30-1501, and known as the Colorado Limited Gaming Act, the original version of the law allowed operators to deduct the full value of all free bets placed. In 2022, H.B. 22-1402 passed, allowing sports betting operators to deduct a percentage of free bets offered when calculating proceeds. H.B. 22-1402, 72nd Gen. Assemb. (Colo. 2022). Then, last November, voters passed Proposition JJ, which allowed the state to keep sports betting tax revenue in excess of the original $29-million cap. H.B. 24-1436, 74th Gen. Assemb. (Colo. 2024). Prior to HB 25-1311, free bets that could be deducted were capped at 2.25% for fiscal year 2024–25, decreasing by 0.25% for each of the next two fiscal years. Fiscal Note for HB 25-1311, Legislative Council Staff (Apr. 29, 2025).

The new bill, HB 25-1311, reduces the deduction for free bets placed to 1% of all bets for the current fiscal year 2025–26. *Id.* By fiscal year 2026–27, HB 25-1311 will completely end the deduction for free bets. *Id.* Proponents of the bill estimate HB 25-1311 will increase revenue by $3.2 million for the current fiscal year and upwards of $12 million for the next two fiscal years. *Id.* Prior to HB 25-1311, the House Democrats reported that sports betting companies were paying effectively only a 5.89% tax rate due to the allowable deductions for pay-outs to customers, federal excise tax, and free bets. Press Release, Colo. House Democrats, "Bipartisan Bill to Protect Colorado's Water Future Passes House" (Apr. 28, 2025). HB 25-1311 should bring the revenue closer to the "voter-approved tax rate of 10 percent," increasing funds available for critical water projects across the state and helping to close the gap between funding needs and current allocations. *Id.*

Sports betting in Colorado continues to grow, with the Department of Revenue reporting over $4 billion wagered between July 1, 2024, and February 2025. Fiscal Note for H.B. 25-1311, *supra*. During that period, Colorado collected more than $24.5 million in taxes—a 19.07% increase in fiscal year-to-date tax revenue. *Id.* Colorado is now rolling back incentives for gambling companies, as they are well-established in the state. As revenue increases, this shift benefits the CWCB and supports the implementation of the CWP. This bill continues the policy trend of recent years and is expected to further boost state revenue, allowing the CWCB to fund additional projects.

FEDERAL – TAKINGS

Amy K. Kelley, Reporter

Alert: Potential Landmark Water-Related Takings Decision from the Federal Circuit

Years ago, the water bar was riveted by the decision in *Casitas Municipal Water District v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (*Casitas I*), addressing whether government actions pursued for the preservation of aquatic species, and resulting in less physical water in a particular year for the water rights holder, should be evaluated under a categorical physical takings analysis ala *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or under a regulatory takings analysis. *See* Vol. XLII, No. 2 (2009) of this *Newsletter*. The litigation continued but ultimately concluded, somewhat anticlimactically, with a finding that the case was not ripe. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340 (Fed. Cir. 2013) (*Casitas II*) (this conclusion involved discussion of the requirement for injury to one's *right* to beneficial *use* of water, and is thus intrinsically important for *that* reason—but still . . .); *see* Vol. XLVI, No. 2 (2013) of this *Newsletter*.

United Water Conservation District v. United States, 133 F.4th 1050 (Fed. Cir. 2025) (*UWCD*), not precisely the child of *Casitas*, but rather, because the new case involved some starkly different facts regarding *where* the government's actions occurred, more like the sibling of *Casitas*, raises the "should the court use the physical or the regulatory takings analysis" question again. Like the trial court before it had, in *United Water Conservation District v. United States*, 164 Fed. Cl. 79 (2023), *see* Vol. 56, No. 2 (2023) of this *Newsletter*, the U.S. Court of Appeals for the Federal Circuit decided that the case presented a regulatory takings scenario.

Again like the trial court in taking a deep dive into prior relevant case law (primarily both *Casitas* decisions, as well as *International Paper Co. v. United States*, 282 U.S. 399 (1931)), the appellate court determined that regulatory takings analysis was appropriate. *See UWCD*, 133 F.4th at 1055–58. The court in *UWCD* noted that in *Casitas*, the government "actively caused water to be physically diverted away "after the water had left the Ventura River and was in the Robles-Casitas Canal." *Id.* at 1057 (emphasis omitted) (quoting *Casitas I*, 543 F.3d at 1291–92). In the current case, however, water was *not* diverted away from the plaintiff's facilities (no physical occupation or invasion), but rather the water was required to be left in the stream. Nor had the plaintiff "alleged that the government completely cut off its access to the water or caused it to return any volume of water it had previously diverted." *Id.*

The regulations in question in the regulatory takings analysis were those under the Endangered Species Act, specifically Reasonable and Prudent Alternatives, relative to which the Conservation District had never applied for an Incidental Take Permit. Hence—awkward!—another case that ultimately was resolved not on the merits of a takings' claim but on lack of ripeness. *Id.* at 1058. The appellate court also revisited the "one doesn't have a prior appropriation right to set quantities of water, as such, but rather to the beneficial *use* of water" issue that had been pivotal in *Casitas II*, *id.* at 1056, and distinguished cases involving riparian rights (which doctrine does not hinge on beneficial use), *id.* at 1058.

As of the writing of this report, the time for a request for rehearing en banc had lapsed; but several weeks remained for a timely application for a writ of certiorari. If such an application was to be made, and certiorari was to be granted, we potentially all could be in for a thrill ride.

As it stands now, the *UWCD* litigation and *Casitas*, cut short of their full flowering by that pesky ripeness doctrine ("when will they ever learn, when will they ever learn," thank you, Bob Dylan, although this flower has not gone, but has never come), have not given us the final word on a critically important issue in the arid West, where consumptive uses and instream flow rules are in constant tension. The rigorous investigation of prior case law, and fact-specific inquiry in *UWCD*, however, has cast some good light on the issues. Perhaps next time the issues tee up, we might get past the ripeness (or failure to exhaust administrative remedies) barrier.

GEORGIA

Ari Gordin, Reporter

D.C. Judge Rejects Alabama's Challenge to Corps' Allatoona Lake Water Supply Decisions, Avoiding Potential Circuit Split

On March 31, 2025, the U.S. District Court for the District of Columbia granted summary judgment against the State of Alabama, rejecting its challenge to the U.S. Army Corps of Engineers' (Corps) reallocation of storage at Allatoona Lake, Georgia, to serve water supply users in metro Atlanta and North Georgia. *See Alabama v. U.S. Army Corps of Eng'rs*, No. 1:15-cv-00696, 2025 U.S. Dist. LEXIS 60988 (D.D.C. Mar. 31, 2025). If upheld on appeal by the U.S. Court of Appeals for the D.C Circuit (Alabama filed a notice of appeal on May 29, 2025), this decision could mark the end of the decades-long "water wars" between Georgia, Florida, and Alabama. Affirmation could also avoid a circuit split with the Eleventh Circuit over the scope of the Corps' authority under the Water Supply Act of 1958 (WSA) to reallocate storage from hydropower, flood control, and other purposes to water supply.

Allatoona Lake is a Corps reservoir in Georgia that sits atop the Alabama-Coosa-Tallapoosa River Basin (ACT Basin), which flows into Alabama. Together with Lake Lanier, a Corps reservoir that lies at the head of the Apalachicola-Chattahoochee-Flint (ACF) River Basin in Georgia, Florida, and Alabama, these reservoirs supply approximately 85% of the water supply for 4.5 million people and thousands of businesses in Metro Atlanta. These reservoirs also provide essential services such as flood protection and recreation while generating hydroelectric and supporting navigation lower in the system.

In 1989, the Corps proposed reallocating storage in both reservoirs to meet water supply needs in metropolitan Atlanta. Alabama sued to block both proposals, and Florida and Georgia intervened. This case was stayed for a period, and then interrupted by negotiations pursuant to two interstate compacts. But eventually those negotiations failed, additional parties joined, and the litigation was bifurcated along basin lines. It has been bouncing around the courts ever since.

The latest chapter began in 2015, when the Corps tried to update the ACT Master Manual without addressing the Georgia parties' long-standing water supply requests. Alabama, Alabama Power, and others filed suit in the District of Columbia to challenge the 2015 update, asserting it violated the National Environmental Policy Act (NEPA) and improperly prioritized recreation over navigation.

While Alabama's challenge to the 2015 update was pending, the Georgia parties filed and won a separate "failure to act" claim to force action on their water supply requests. The resulting record of decision was issued in 2021. That decision authorizes a new water supply storage contract for the Georgia users and adopts new "water storage accounting methods" that grant credit to water supply users for any "return flows" or other "made inflows" allocated to them under state law. Alabama then amended its complaint in the district court case, which was still pending, to include a challenge to the 2021 record of decision on the Georgia parties' water supply requests.

Alabama argued the reallocation was barred by precedent from the D.C. Circuit, *Southeastern Federal Power Customers v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), which held that prior proposed reallocation at Lake Lanier exceeded the Corps' Water Supply Act authority because a reallocation involving 22% of a reservoir's "total storage" would involve "major operational change." Alabama argued that *Geren* established a rigid, percentage-based threshold applicable to all federal reservoirs. The Corps and the Georgia parties countered that neither the statute nor precedent mandates such a bright-line rule.

The district court sided with the Corps and the Georgia parties, holding the WSA does not establish "stiff, categorical rules," but rather envisions a qualitative test that gives the Corps ample discretion and "flexibility to manage its reservoirs." To that end, the court affirmed the Corps' determination that a "major operational change" under the WSA occurs when a reallocation "fundamentally departs" from the operations Congress envisioned when it authorized the project. The court also rejected Alabama's challenge to the Corps' decision to credit water return flows and other "made inflows" in accordance with state law. Rather than treating this as a "reallocation" involving "major operational change" subject to the Water Supply Act constraints, the court concluded the new accounting merely "corrected prior accounting errors and more accurately credited the [water authority] for its inflows into Allatoona Lake." *Id.* at *50 n.16.

The decision avoids—at least for now—a potential split with the Eleventh Circuit, which held in 2011 that the WSA did not impose limits based on the percent of storage to be reallocated and directed the Corps to consider in the first instance the appropriate metrics of "operational change" under the WSA. *See In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011). A recent decision by the U.S. District Court for the Northern District of Georgia upheld the Corps' "fundamentally departs" test in separate litigation by Alabama challenging a 2017 reallocation of storage at Lake Lanier. *See In re ACF Basin Water Litig.*, 554 F. Supp. 3d 1282 (N.D. Ga. 2021); *see also* Vol. 57, No. 1 (2024) of this *Newsletter*.

Two "water wars" cases remain pending: the appeal in this case and a separate appeal involving Lake Lanier and the ACF Master Manual before the Eleventh Circuit. Due to a 2023 settlement between Alabama, the Georgia parties, and the Corps, however, Alabama's appeal in the ACF matter is stayed and likely to be dismissed, leaving only three environmental groups' appeal challenging the sufficiency of the Corps' NEPA analysis and priority given to fish and wildlife conservation in the ACF manual update. If the D.C. Circuit affirms the district court's ruling, the decision could close the book on the interstate water wars between Georgia, Florida, and Alabama, at least for now.

Editor's Note: The reporter's law firm represents the Georgia Water Supply Providers in these cases.

IDAHO

Kaycee M. Royer & Payton Hampton, Guest Reporters

Idaho Amends Domestic Use Water Right Exemption

During the 2025 legislative session, the Idaho legislature enacted changes to the domestic water exemption under Senate Bill No. 1083. Idaho S.B. 1083, 68th Leg., 1st Reg. Sess. (2025) (codified at Idaho Code §§ 42-111, 42-227, 42-351, 42-1701c, 42-1805, 31-3805, 31-3806, 50-1334, 67-6508 and 67-6537). The Act amends several sections of the Idaho Code related to the regulation and development of domestic water rights to address the unregulated impacts of domestic use wells on groundwater reservoirs. This report outlines the changes to the domestic use exemption that became effective on July 1, 2025.

Under existing law, the drilling and use of wells for domestic purposes is excepted from the requirements of obtaining a permit for the appropriation of water (the "domestic use exemp-

tion"). Idaho Code § 42-227; *see also id.* § 42-229. However, in light of increasing demands upon the water supply in Idaho, there have been concerns that the use of the domestic use exemption has caused significant impacts to groundwater reservoirs and negatively affected water right holders throughout the state.

In an effort to curb these impacts, the Idaho legislature passed Senate Bill No. 1083. The new law limits the domestic use exemption, requires proposed subdivisions near existing municipal systems to connect to those municipal systems, and requires domestic well users to utilize existing surface water rights to irrigate lawns and acreage.

Domestic Purpose Redefined

Under current provisions related to domestic water use, the use of water for homes, organization camps, public campgrounds, livestock, and irrigation up to ½ acre of land is permissible without obtaining a permit from the Idaho Department of Water Resources, so long as the volume does not exceed 13,000 gallons per day. *Id.* § 42-111(1). There is also a general exemption from the requirement to obtain a permit for "other uses" so long as the total use does not exceed a diversion rate of .04 cubic feet per second and a diversion volume of 2,500 gallons per day. *See id.* "Other uses" includes water diversions for multiple ownership subdivisions, mobile home parks, and commercial business establishments. *Id.*

Under the new law, the definition of domestic purposes will remain largely the same as before. However, there will be a change to the diversion rate for "other purposes" from 2,500 gallons per day to 2.8 acre-feet per year, a negligibly smaller amount of allowed diversion. Additionally, the law further clarifies that domestic purposes do not include uses for mobile home parks, RV parks, apartments, condominiums, multiple dwelling units, and commercial or business establishments that exceed 2.8 acre-feet per year. There are also significant changes to the application of the domestic use exemption to subdivisions.

Use of the Domestic Exemption for Subdivisions Limited

The new law makes significant changes to the ability of subdivisions or multiple dwellings to utilize the domestic use exemption from a single well. *See id.* §§ 42-111(3), -227(4). Under the new provisions in Idaho Code § 42-227, the domestic use exemption is not available for subdivisions in any area where the Director has established a moratorium order or has designated a critical ground water area or ground water management area. In-home use and water for livestock, however, are seemingly exempt from this requirement. *See id.* § 42-227(4).

Additionally, subdivisions may only utilize a single point of diversion when the use does not exceed 2.8 acre-feet per year *or* if (1) the use is limited to residential, in-home use; and (2) a water meter capable of measuring the total volume diverted is installed at the point of diversion. Notably, the domestic use exemption for subdivisions does not allow for yard irrigation, as explained in the new provisions at Idaho Code § 31-3805 and Idaho Code § 67-6537. Instead, subdivisions must utilize any reasonably available surface water or irrigation rights to water lawns.

Finally, any new subdivisions located near cities must connect to the city's municipal system. Under the new Idaho Code § 31-3805, any subdivision within the service area of a city, area of city impact of a municipal provider, or within one mile of either, must design any shared well or public water system to meet requirements of the municipal provider and to integrate the subdivision's system with the municipal provider's system. The municipal provider must be consulted in the design of the shared well or public water system to ensure proper future integration. Once connected to the city system, the well or public water system must be conveyed to the municipal provider.

What's Next?

The new law went into effect on July 1, 2025. Prior enforcement mechanisms and penalties were largely insufficient to deter overuse of the domestic use exemption. The new law incorporates enforcement and penalty provisions that could result in significant costs to violators. If a party intends to utilize the domestic use exemption for a planned groundwater diversion, it is important to ensure that any proposed uses will remain within the new definition of domestic use exemption or fall within the limitations on subdivisions or multiple dwellings.

Editor's Note: The reporters represent various entities with interests in the development and use of water within the state of Idaho.

KANSAS

Burke W. Griggs, Reporter

Legislative and Litigation Update

This report attempts to collect all noteworthy developments since June 2, 2024. Many of the cases and materials cited in this report may be found on the Kansas Department of Agriculture, Division of Water Resources (KDA-DWR) website, https://www.agriculture.ks.gov/divisions-programs/dwr.

Legislation

S.Sub. for HB 2172 (Enacted)

The Kansas legislature passed S.Sub. for HB 2172, which establishes a "water program task force" to evaluate the state's water program and submit reports to the legislature and the governor. The task force consists of 13 voting members, seven drawn from various legislative committees and six Kansas residents, as well as three non-voting, ex officio members (the chief engineer of KDA-DWR, the director of the bureau of water at the Kansas Department of Health and the Environment, and the director of the Kansas Water Office).

The task force shall evaluate "major risks to the quality and quantity of the state's water supply," recommend steps to "define and achieve a future supply of water for Kansans," and evaluate funding for its sufficiency for the state's water infrastructure needs. It shall present its findings in a preliminary report due to the legislature in January 2026 and a final report a year later. In the meantime, it shall also appoint five more people to a "water planning work group" to conduct a study of the State Water Resource Planning Act, Kan. Stat. Ann. § 82a-901 to -945.

HB 2345 (Not Enacted)

Kansas is the only state in the Union in which the agency charged with the granting, regulation, and administration of water rights (DWR) is subordinate to a department of agriculture (KDA). The chief engineer of DWR, a classified employee, is thus subordinate to, and largely reversible by, a political appointee, the secretary of agriculture. In apparent recognition of this unique and embarrassing problem—placing Kansas's chief water rights administrator squarely beneath the state's chief official irrigation advocate—the Kansas legislature introduced House Bill 2345 in February 2025.

Although it is unlikely to pass, the bill has two noteworthy components. The first is bureaucratic. HB 2345 would establish the Kansas Office of Natural Resources (something short of a cabinet-level agency) within the executive branch, and an office at least bureaucratically separate from KDA. The new office would be composed of the following divisions, assembled from pre-existing divisions and offices across state government: DWR (water rights administration, dam safety, and water resources management); the Division of Conservation (also presently part of KDA, and charged with conservation district management and related programs such as CREP); the Division of Water Policy and Planning, replacing the Kansas Water Office (water planning, water policy development, and reservoir operations).

The second noteworthy component of HB 2345 is its elimination of administrative review of certain decisions of the chief engineer by the secretary of agriculture. If the housing of DWR within KDA is largely an accident of bureaucratic history, the subordination of the chief engineer to the secretary of agriculture is a product of intentional agency capture. Under Kan. Stat. Ann. § 82a-1901, the secretary of agriculture has the power to review and to reverse orders and other decisions made by the chief engineer. These include: the granting of new water rights (Kan. Stat. Ann. § 82a-711); the granting of applications to change existing water rights (Kan. Stat. Ann. § 82a-708b); water rights forfeitures for nonuse (Kan. Stat. Ann. § 82a-718); the granting of certificates of appropriation following the statutory perfection period (Kan. Stat. Ann. § 82a-714); the assessment of civil penalties (Kan. Stat. Ann. § 82a-737); the establishment of Intensive Groundwater Use Control Areas (IGUCAs) (Kan. Stat. Ann. § 82a-1038); and the establishment of Local Enhanced Management Areas (LEMAs) (Kan. Stat. Ann. § 82a-1041). Under HB 2345, section 82a-1901 would be repealed, and these orders, like all other orders of the chief engineer, would be subject to review under the Kansas Judicial Review Act. The bill has not yet advanced, and will likely attract more attention in the next legislative session.

Litigation

Quivira NWR Litigation Update: Draft EIS for "Augmentation"

The senior water right held by the Quivira National Wildlife Refuge (QNWR) remains impaired by junior groundwater rights in the Rattlesnake Creek Basin in south-central Kansas. Since the last update, discussions among "stakeholders" (irrigation interests, KDA-DWR, conservation groups, and federal agencies—the U.S. Fish and Wildlife Service and the USDA's Natural Resources Conservation Service (NRCS)) concerning the impairment of the Refuge water right continue. As of this writing, no junior rights which KDA-DWR has found to be impairing the Refuge water right have been administered. Flows in Rattlesnake Creek in 2023 and 2024 were the lowest in recorded history.

To address this impairment and low stream flow—problems caused by over-appropriation and excessive groundwater pumping—irrigation interests have naturally decided to pump more groundwater and shunt at least some of it into Rattlesnake Creek. This is called "augmentation." Big Bend Groundwater Management District No. 5 (GMD5), together with the NRCS, have developed an "augmentation" plan which would pump groundwater from 56 proposed wells in the North Fork Ninnescah Creek watershed (adjacent to the Rattlesnake Creek watershed and sharing the same Big Bend Prairie Aquifer) and discharge that pumped groundwater into Rattlesnake Creek, just upstream of QNWR. Pursuant to the National Environmental Policy Act (NEPA), in March 2025 GMD5 and NRCS issued a Draft Watershed Plan-Environmental Impact Statement for the Rattlesnake Creek Watershed (DEIS).

The DEIS evaluated three alternatives. The first, misnamed the "No Action Alternative," would result in the chief engineer administering junior rights in the basin that had previously been found to be impairing the QNWR right. The NEPA term is a misnomer because the chief engineer has refused in the past to actually act and administer junior rights. *See* Vol. 57, No. 2 (2024) of this *Newsletter*. The second alternative proposes an augmentation wellfield, combined with some voluntary pumping reductions; this alternative would cost approximately $61 million, about $11 million borne by GMD5 and the remainder borne by federal matching funds. The third alternative would focus on collective groundwater pumping reductions through the establishment of either an IGUCA or a LEMA, thereby avoiding priority administration. Although the DEIS did opine that the first, No Action Alternative, was the best alternative from an ecological standpoint, it ultimately concluded that the second alternative, that of stream "augmentation," was the preferable alternative. The comment period for the DEIS closed on June 2, 2025; a final EIS is due later in the year.

Hays-Russell Water Transfer Update

There is nothing new to report here. As described more fully in Vol. LIV, No. 2 (2021), Vol. 55, No. 2 (2022), and Vol. 57, No. 2 (2024) of this *Newsletter*, the cities of Hays and Russell have been seeking since 2015 to secure state approval to change and then transfer approximately 6,700 AF/Y of water rights (owned by Hays) from irrigation use in Edwards County to municipal use in Ellis and Russell County, as part of a $140-million project. Opponents of the transfer, consisting of irrigation interests in Edwards County, challenged the approvals of the water rights changes administratively and then in court, arguing that the move would impair existing rights and that the chief engineer had not followed the correct procedures. The cities then intervened. In June 2022, the Edwards County district court found mostly for Hays and Russell, upholding the approvals. The plaintiffs appealed, the Kansas Supreme Court took the appeal, and the cities moved to dismiss based on standing. In June 2023, the court stayed the case and remanded back to district court, mostly to all the supplementing of the record regarding the cities' standing. The case remains pending.

NEBRASKA

Anthony B. Schutz, Reporter

Recent Developments Regarding Nebraska Groundwater Management

The two cases in this reporting period relate to enforcement of groundwater regulations and the availability of judicial review. To understand the cases, a general review of Nebraska laws governing groundwater management is necessary. Nebraska regulates groundwater with Natural Resource Districts (NRDs) under the Ground Water Management and Protection Act (GWMPA), Neb. Rev. Stat. §§ 46-701 to -756. NRDs are local governments comprised of elected boards and administrative staff that create rules for water management. As local governments, they execute legislative and executive functions. But they have no inherent authority to do so. Rather, NRDs must always look to their enabling statutes for authority to act. *Med. Creek LLC v. Middle Republican Nat. Res. Dist.*, 892 S.W.2d 74, 79 (Neb. 2017). Moreover, because they are not agencies, well-worn administrative law principles and processes are generally

not applicable, and judicial review can sometimes raise separation of powers problems because local governments sometimes wield legislative authority.

On the water management front, NRD functions are bound by the statutory authority that the state has delegated to them to, for instance, make choices about the appropriate level of groundwater use over time. Such choices are generally made in "groundwater management plans." NRDs are also empowered to make choices in collaboration with a state agency about the appropriate level of impact groundwater pumping may have on surface-water users through streamflow depletions. This latter set of choices, in Nebraska, is labeled "integrated management," which obligates the NRD to work with the Department of Natural Resources (DNR) to make judgments about allowable impacts, with DNR managing surface-water appropriators to ensure interstate compact compliance and sundry other goals like aquifer recharge and compliance with obligations the state has under the Endangered Species Act. These choices are generally made in "integrated management plans."

NRDs execute these choices through the adoption of "controls" that are statutorily available to them. Neb. Rev. Stat. § 46-739. Implementing these controls usually involves rules and regulations adopted at the local level that are administered by the NRD. Local administration involves the NRD's employed staff and the elected board members. Unlike agencies, there is not a clear demarcation between the executive/administrative functions of an NRD and its policymaking functions. Like many local governments, the legal nature of decision making is muddled, with various decisions made in board meetings with the assistance of staff and, sometimes, legal counsel.

Enforcement of the NRD's controls is typically accomplished through the issuance of cease-and-desist orders. Neb. Rev. Stat. § 46-707(h) allows for the issuance of such orders following "three days' notice to the person affected stating the contemplated action and in general the grounds for the action and following reasonable opportunity to be heard." NRDs may also institute suits to enforce its orders, seeking, for example, injunctive relief. To aid in enforcement, the NRD may impose administrative penalties under Neb. Rev. Stat. § 46-746(1) for the violation of a cease-and-desist order as long as they are "imposed through the controls adopted by the district," which most take to mean pursuant to its rules and regulations. Such penalties can include the reduction of water allocations or a reduction of certified irrigated acres. Notably, the administrative-penalties provision allows for enforcement in the absence of a cease-and-desist order if the person "violates . . . any controls, rules, or regulations adopted by a natural resources district relating to a management area." *Id.* § 46-745(1). All administrative penalties require "notice and hearing." *Id.* Such hearings must be "of record and available for review." *Id.* § 46-747. Beyond administrative enforcement, NRDs may also seek civil penalties in district court for violating its cease-and-desist orders under section 46-745(1).

District courts are directly involved in the imposition of civil penalties, and they are involved in an appellate capacity when it comes to the issuance of cease-and-desist orders and the imposition of administrative penalties. "Any person aggrieved by any order of the district . . . issued pursuant to the [GWMPA] may appeal the order." *Id.* § 46-750. While NRDs are not agencies that are subject to the Nebraska Administrative Procedures Act, the statute provides that "[t]he appeal shall be in accordance with the Administrative Procedures Act." *Id.*

This has caused a certain level of difficulty for the courts, as many actions taken under the GWMPA involve an "order," including the designation of management areas, the adoption of groundwater-management and integrated-management plans, the adoption of controls, and the issuance of cease-and-desist orders. Indeed, the GWMPA defines "order" broadly to "include[] any order required by the [GWMPA], by rule or regulation, or by a decision adopted by a district by vote of the board of directors of the district taken at any regularly scheduled or specially scheduled meeting of the board." *Id.* § 46-706(26). Whether a board decision "require[s]" an order is far from clear, but it also appears to be clear that not every board decision is an "order."

This judicial review provision has resulted in much of the standing doctrine that has so dominated my reports of Nebraska case law. *See, e.g.*, *Cent. Neb. Pub. Power & Irr. Dist. v. N. Platte Nat. Res. Dist.*, 788 N.W.2d 252 (Neb. 2010); Vol. XLIV, No. 3 (2011) of this *Newsletter*. In such cases, the judiciary tends to focus on the parameters of the "person aggrieved" language, reading it as incorporating the court's "common-law standing" jurisprudence, and disposing of cases that do not suit appellate review. *See In re Application A-19594*, 995 N.W.2d 655, 667 (Neb. 2023); Vol. 57, No. 2 (2024) of this *Newsletter*. Perhaps a more coherent explanation of at least some of those cases is that these "orders" are in the nature of legislative judgments under the GWMPA (e.g., the selection of water-use controls or the level of protection to give surface-water users from groundwater pumping) and, thus, not subject to appeal under separation of powers principles.

Be that as it may, the most recent cases are revealing complexity in the application of the APA's appeal provisions to NRD orders in enforcement scenarios and permitting decisions. Under the APA, appeals are reserved for judicial review of "contested cases" in which adversarial formalities are observed, including the presence of a hearing officer. In such cases, a single person usually makes a judgment based on a record that is developed and available for judicial review. Such judgments generally must be final orders, before they can be appealed. The GWMPA, however, simply says that an NRD must, in the case of an individual violator, provide notice and a hearing, and create a record. Sometimes, it may proceed with a cease-and-desist order, but sometimes it may not. Further, some decisions affecting the regulated community may not be formalized with robust statutory or regulatory standards that govern decision-making. Such informal decisions may not involve a process that resembles contested cases. In other words, the GWMPA does not provide the detailed precursors to appellate review found in the APA. Rather, it simply provides that all "orders" may be appealed "in accordance with" the APA.

Hauxwell I

Bryan and Ami Hauxwell are irrigators in the Middle Republican NRD. The Nebraska Supreme Court recently handed down two cases dealing with their saga of disputes with the NRD. These disputes began in 2020, resulting in seven separate lawsuits. The two reported decisions from the Nebraska Supreme Court are *Hauxwell v. Middle Republican NRD,* 21 N.W.3d 34 (Neb. 2025) (*Hauxwell I*), and *Hauxwell v. Middle Republican NRD,* 21 N.W.3d 21 (Neb. 2025) *(Hauxwell II*).

The Hauxwells (and an entity they own) irrigate land within an NRD management area that is subject to an integrated management plan and associated controls. Those controls limit groundwater pumping to a certain number of acre-inches over a period of years on each irrigation-certified field. These allocations are tracked, which entails further controls that require well

meters and reporting. The NRD also allows, with permission, "pooling" arrangements that enable farmers with multiple tracts of land to use some of their allocations on fields under common ownership. Pooling is controversial because it can increase overall consumption above the level of consumption that would occur in its absence (due to soil types, crop-rotation choices, or casualty losses like wind or hail).

NRD staff learned in 2020 that the Hauxwells were not complying with the regulations that the NRD had adopted to control water use. Various violations were alleged, including meter problems and the irrigation of acres that had not been certified for irrigation. After an investigation, staff brought the matter to the board, issuing a notice of intent to issue a cease-and-desist order, which included an opportunity to be heard.

The Hauxwells appeared before the board, generally claiming that they thought they could pool their allocations and use the water on any land they owned. They also assumed the NRD would remedy the meter problems in the course of inspections. The general manager and the NRD's attorney presented the matter to the board and sat in on the deliberations during closed session. The board issued a cease-and-desist order.

The Hauxwells appealed that order to the district court, and the district court concluded the NRD had erred by failing to follow its own rules and regulations and by failing to provide the Hauxwells with adequate notice. It remanded the matter back to the NRD. In 2021, a month after remand, the NRD took the matter up again, this time without NRD counsel and the general manager sitting in the deliberations. Instead, a hearing officer was hired to conduct the hearing and provide counsel to the board. After the hearing, the board again decided that the Hauxwells had violated NRD rules in 2020, but it also concluded that there were no continuing violations so it did not issue a cease-and-desist order. It also found that the Hauxwells had participated in a separate violation of another cease-and-desist order that had been issued in a different matter. After making those conclusions, it decided to take up the matter of penalties at a future date.

The Hauxwells appealed the 2021 decision to the district court, but the district court concluded that the Hauxwells' rights had not been harmed by the decision. It is unclear if an "order" was the basis for that appeal. In any event, the Hauxwells did not appeal the district court's decision on the 2021 NRD decision.

In 2022, the NRD took up the question of administrative penalties under section 46-745(1), based on its findings of violations in the 2021 hearing. It reduced the Hauxwells' groundwater use and their ability to pool allocations. The Hauxwells appealed the matter to the district court, and the district court concluded that the general manager's involvement in the 2021 hearing, along with NRD counsel, violated Hauxwell's due process rights. However, those two individuals were not involved in the 2021 hearing. Rather, they were involved in the 2020 hearing. This point was raised on appeal to the Nebraska Supreme Court.

This was, however, only one of many points the court covered in *Hauxwell I*. Both parties challenged jurisdiction. The Hauxwells challenged the Nebraska Supreme Court's jurisdiction, arguing that the APA required the NRD to file its 2022 decision with the district court because the district court had remanded the matter in 2021 for further proceedings. *See* Neb. Rev. Stat. § 84-917(5)(a), (b). To the Hauxwells, this was a jurisdictional error that deprived the Nebraska Supreme Court of jurisdiction. The court did not address the latter point, instead concluding that no such filing was necessary because the 2021 decision to remand was not for the purpose of allowing the board to take up matters that were necessary to resolve the case. Rather, the district court simply reversed the NRD and remanded for further proceedings.

The NRD challenged the district court's (and thus the Nebraska Supreme Court's) jurisdiction over the appeal of the 2022 penalty decision, insofar as the district court determined that the Hauxwells were not given a fair hearing in 2021 on the question of rule violations. To the NRD, the Hauxwells' failure to further appeal the district court's resolution of the 2021 NRD decision precluded the district court and the Nebraska Supreme Court from reopening that aspect of the case. The Nebraska Supreme Court rejected that claim as mischaracterizing the district court's decision. On appeal of the 2021 NRD decision, the district court concluded, effectively, that there was not yet a final order. And while any "order" might be appealable under 47-750 for purposes of the GWMPA, the order at issue (a bare finding of rule violations and a violation of a cease-and-desist order), did nothing to "aggrieve" the Hauxwells because their rights had not yet been affected through a penalty, which is why the district court rejected the appeal. To the Nebraska Supreme Court, the lack of an appeal of the district court's decision on the appeal of the 2021 NRD decision in no way precluded the district court from taking up the matter in toto after the NRD imposed administrative penalties in 2022.

This is a significant connection between administrative law and the local government review procedures in the GWMPA. While the GWMPA does not explicitly incorporate the requirement of a "final order" under the APA, the "person aggrieved" standard implicitly requires a similar NRD decision.

With jurisdiction settled, the court concluded that the district court erred when it concluded that the NRD's general manager and its counsel's participation so tainted the overall process as to deprive the Hauxwells of due process. The district court erred in referring to that participation as occurring in the 2021 hearing. The Nebraska Supreme Court apparently regarded this as misstatement, and proceeded to evaluate whether the 2020 participation tainted the further proceedings in 2021 and beyond. As reported in Vol. 57, No. 2 (2024) of this *Newsletter*, mixing the prosecutor role of NRD counsel and staff with the adjudicative role of the board violates due process under *Uhrich & Brown Ltd. P'ship v. Middle Republican NRD*, 998 N.W.2d 41 (Neb. 2023). But, here, the court concluded that involvement in a prior iteration of the hearings was not a problem where a subsequent proceeding observed the separation of these functions. Indeed, had the court concluded otherwise, it would be difficult to remedy the due process problem. Of course, sometimes errors do not have remedies that allow further prosecution.

With that, the court remanded the matter to the district court to continue its evaluation of the Hauxwells' other claims regarding the rule violations, the violation of a related cease-and-desist order, and the appropriateness of the administrative penalties imposed by the NRD. The saga continues.

Hauxwell II

Hauxwell II raised the interesting question of what is an "order" for purposes of Neb. Rev. Stat. § 46-750 (allowing "persons aggrieved" by an "order" to appeal pursuant to the APA). In that case, the Hauxwells applied to the NRD for permission to pool their allocations among their irrigated acre, which was something they should have done to avoid some of the problems uncovered in their 2020 experience with the NRD. The application was denied by the board at a regular meeting.

The district court concluded it could not entertain the matter because no contested case had been conducted before the NRD and, thus, there was nothing for it to review on appeal. The Nebraska Supreme Court affirmed, but on different grounds that raise significant questions about the scope of judicial appellate review.

The NRD argued that a contested case was necessary in order to support appellate review under the APA and preserve separation of powers principles. The court did not expand on the separation of powers argument, but it appears to be an argument that the judiciary ought not review some discretionary executive actions. In administrative proceedings, contested cases are statutorily required under the APA, and judicial review follows. The GWMPA, however, does not explicitly require such a proceeding before an appeal is available. Instead, it allows persons aggrieved by orders to appeal, and the appeal is to be governed by the APA. While this cross reference incorporates the APA standard of appellate review—de novo on the record, Neb. Rev. Stat. § 84-917(5)(a)—it does not incorporate contested-case requirements on NRD proceedings. As a result, the court rejected the NRD's argument that a contested case was necessary. It did not further address the separation-of-powers argument.

The Nebraska Supreme Court focused on the term "order" in the GWMPA, which is defined in section 46-706(26), to "include[] any order required by the [GWMPA], by rule or regulation, or by a decision adopted by a district by vote of the board of directors of the district taken at any regularly scheduled or specially scheduled meeting of the board." Neb. Rev. Stat. § 46-706(26). To the court, the letter did not qualify as an order, even though it was a decision of the NRD's board reached at a regularly scheduled meeting. This was because there was no showing that the letter was "required" by the statute, the NRDs rules and regulations, or a board decision.

Given its "include" language, the statute does not provide an exhaustive list of possibilities. Beyond the statutory definition, "order" often has a term-of-art meaning. For example, it is used in this sense for civil-procedure purposes to refer to things the judiciary does short of judgment. In that term-of-art sense, "order" connotes a judicial pronouncement, often produced at the request of a party after a hearing in an adversarial context. Here, of course, the letter denial does not fit that bill.

It is unclear why the court did not consult statutory interpretation maxims like ejusdem generis in its evaluation. There may be very little to be gleaned from that exercise. The GWMPA contemplates "orders" on many things, from "cease and desist orders" to orders designating management areas or adopting management plans. And NRD rules and regulations are as varied as the statutory text, often significantly different among the 23 NRDs involved. Finally, the decisions NRDs make range from personnel matters to spending. There is little to be gleaned from analyzing the nomenclature NRDs use when they make these decisions in an effort discern some common thread from the statutorily listed examples.

Going forward, those seeking to appeal NRD decisions would do well to build a record of evaluation and attempt to get an NRD to issue a formal decision of some sort. The Hauxwells might have been better off requesting a hearing on their application or a transcript of the board's proceedings to establish something in the nature of an application of law to facts. As the court noted, "nothing in this opinion should be read to determine that the denial of a pooling application can never be subject to appeal. Rather, our conclusion is based on the facts and circumstances surrounding the specific denial in this case." *Hauxwell II*, 21 N.W.3d at 44.

NEVADA

Gregory Morrison, Reporter

District Court Affirms State Engineer's Factual Findings on LWRFS

Conjunctive management in the large carbonate aquifer underlying multiple southern Nevada groundwater basins has cleared another major hurdle. On May 22, 2025, the Eighth Judicial District Court in Clark County affirmed the State Engineer's findings of fact in Order 1309.

As previously reported in Vol. 57, No. 1 (2024) of this *Newsletter*, the State Engineer issued Order 1309 in June 2020. The order designated all or portions of seven hydrographic basins as the Lower White River Flow System (LWRFS)—a unified management area—and made findings of fact applicable to management of the area. On judicial review, the district court held that the State Engineer had exceeded his statutory authority when he combined the previously discrete groundwater basins into a single management unit. Because the district court reversal was based on the conclusion that the State Engineer exceeded his statutory authority, the court did not reach the issue of whether the findings of fact were supported by substantial evidence.

In *Sullivan v. Lincoln County Water District*, 542 P.3d 411, 426 (Nev. 2024), the Nevada Supreme Court overturned the district court and remanded the matter to the district court "to continue its review under NRS 533.450 to determine whether substantial evidence supports Order 1309 . . . ." The district court held oral argument on the evidentiary issues in October 2024, and issued its Findings of Fact, Conclusions of Law, and Order Affirming in Part and Reversing in Part State Engineer Order 1309 on May 22, 2025 (the "2025 Order").

The following factual findings were in issue on remand: (1) the LWRFS would be comprised of Kane Springs, Coyote Spring, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and a portion of the Black Mountains Area Hydrographic Basins; and (2) the maximum long-term quantity of groundwater that could be safely pumped from the LWRFS is 8,000 acre-feet annually and maybe less.

Multiple parties challenged the boundary of the LWRFS; inclusion of Kane Springs Basin and the Black Mountains Area were of particular concern. The court cited extensive data gathered from the Order 1169 pumping test in 2010, new data and reports compiled for the administrative hearing preceding Order 1309, and historic hydrologic and geologic evidence available to the State Engineer and found that substantial evidence supported the State Engineer's boundary determination. Further, the criteria that the State Engineer applied to the data in Order 1309 to define basin connectivity was reasonable and defensible. Given the evidence before the State Engineer, the boundary of the LWRFS was reasonable.

The district court also upheld the State Engineer's finding regarding the maximum long-term quantity of groundwater that could be safely pumped from the LWRFS. Stakeholder estimates for safe pumping ranged from "no safe pumping" to as much as 30,630 acre-feet annually. The State Engineer found that the volume of water that could be pumped annually is 8,000 acre-feet "and maybe less." The court found that 8,000 acre-feet was a reasonable conclusion based on the evidence presented in support of those estimates. The court reiterated that 8,000

acre-feet was just a starting point, and that limit would be evaluated and adjusted as pumping continued.

Order 1309 was a fact-finding exercise, just the first step in a planned two-part process to LWRFS management. Phase Two will be the development of a management plan, which will be challenging given the disparate goals of the various stakeholders. Further exacerbating that challenge are the facts that in Nevada: (1) conjunctive management of surface and groundwater is an evolving area of law, and (2) multiple previously discrete hydrographic basins have never been managed as a unit.

For now, barring a Nevada Supreme Court reversal, there is an accepted set of facts on which management can be based. Stakeholders in the LWRFS can begin preparing management strategies for Phase Two of LWRFS management, which will undoubtedly take years to wind through the administrative and judicial processes.

Editor's Note: The reporter participated in this matter from the initial administrative proceeding, through the district court matter, and in the supreme court appeal. The reporter also presented briefs and oral argument to the district court on remand.

Nevada Water District Maintains Discretion in Setting Water Lease Rates

The Nevada Supreme Court recently decided a case involving a lease of irrigation shares in the Virgin River near the city of Mesquite. *Virgin Valley Water District v. Paradise Canyon, LLC*, 567 P.3d 962 (Nev. 2025), was, at its heart, a simple contract case. However, it was a contract involving the lease of water rights from a governmental entity to a private party, and it raised the question of which party had the responsibility to prove beneficial use of the water.

Central Issue—The Lease Rate

In 2011, the Virgin Valley Water District (District) leased shares of Mesquite Irrigation Company (MIC) water to Paradise Canyon, LLC (Paradise Canyon), for irrigation of a golf course. The District owns shares in the privately held MIC, entitling it to a portion of MIC water, which it in turn leases to end users such as Paradise Canyon. The lease agreement provided for a lease rate of $250 per share through 2019, but gave the District "sole and absolute discretion" to determine the rental rate after January 1, 2020, if Paradise Canyon renewed the lease. In 2019, the District informed Paradise Canyon that the lease rate would adjust to $1,115.667 for 2020, based at least in part on the lease rates the Southern Nevada Water Authority was offering for similar water.

In the trial court, Paradise Canyon argued that the increase did not reflect the local market rate in Mesquite and that the District had violated the implied covenant of good faith and fair dealing when it increased the lease rate for 2020. The trial court agreed with Paradise Canyon, tasked the jury with determining a fair lease rate, and ordered the District to refund the difference between the lease rate it charged and the rate set by the jury, totaling $893,869.33 in damages.

On appeal, the supreme court relied on the plain language of the lease to overturn the district court. It held that the lease gave the District the sole and absolute discretion to set lease rates, and that this express contractual provision trumped the implied covenant of good faith and fair dealing. Paradise Canyon had freely contracted to allow the District discretion to set rates and could simply decline to renew the lease if it objected to a rate. *Id.* at 970. To hold otherwise would contravene the intention and spirit of the lease agreement.

Beneficial Use

The supreme court also addressed the issue of who is responsible for demonstrating beneficial use of the leased water. The District argued that it was the responsibility of Paradise Canyon as the actual party placing the water on the ground. Paradise Canyon argued that demonstrating beneficial use was the responsibility of MIC, the actual owner of the water. The court agreed with Paradise Canyon that it is not the lessee's obligation to prove beneficial use; rather, that responsibility rests solely with the water-rights permittee—in this case, MIC. *Id.* at 972.

Takeaways

The District argued that a finding in favor of Paradise Canyon would strip it of its sovereign authority to set rates for leases of water within its control. Paradise Canyon would have the power to control how District water was used in perpetuity at an artificially low lease rate. In the end, that fear was resolved through strict interpretation of contract terms, and the sovereign authority of the District was not implicated.

The ruling on beneficial use strengthened the existing understanding among lessors and lessees that it is the responsibility of the owner of the real property water right—and not the lessee—to ensure that the ownership interest is protected by demonstrating beneficial use.

Editor's Note: The reporter submitted an amicus curiae brief in favor of Virgin Valley Water District in this case.

PENNSYLVANIA

Lisa M. Bruderly, Jessica Deyoe & Christina M. Puhnaty, Reporters

Environmental Quality Board Proposes Changes to Notification Rules for Unauthorized Spills into Waters of the Commonwealth

On April 5, 2025, the Environmental Quality Board (EQB) published a public notice proposing to amend 25 Pa. Code § 91.33 (relating to incidents causing or threatening pollution). *See* 55 Pa. Bull. 2589 (Apr. 5, 2025). This proposed rule intends to clarify which unauthorized discharges require immediate notification to the Pennsylvania Department of Environmental Protection (PADEP) but does not change which unauthorized discharge incidents require immediate PADEP notification.

Section 91.33 currently requires the person responsible for an unauthorized discharge to immediately notify PADEP if a discharge results in pollution, creates a danger of pollution of the waters of the Commonwealth, or would damage property. The proposed rule would require a person responsible for unauthorized discharges to either report the discharge to PADEP immediately, or create and retain a written analysis of certain factors determining that an unauthorized discharge does not cause or threaten pollution. A signed statement attesting the document's accuracy must accompany the documentation if it is provided to PADEP at PADEP's request. The proposed rule would require analysis of the following factors:

(1) the properties of the substance or substances discharged;

(2) the location or locations involved;

(3) the weather conditions before, during, and after the incident;

(4) the presence and implementation of adequate response plans, procedures, or protocols; and

(5) the duration of the accident or other activity or incident.

If any one of the above factors, or a combination of the factors, can adequately establish that there is no risk of the substance reaching waters of the Commonwealth, no further analysis of the other factors is required to determine whether immediate notification to PADEP is required. The proposed rule also allows the person responsible to choose to report an unauthorized discharge rather than undertaking the evaluation and documentation of the above-listed factors.

The proposed rule also incorporates a federal list of reportable quantities—by referencing 40 C.F.R. § 117.3—that if discharged in a quantity greater than or equal to those reportable quantities, must be immediately reported to PADEP without undergoing analysis of the above factors. While the reportable quantities listed at section 117.3 are not exhaustive of all possible substances that may cause or threaten pollution to waters of the Commonwealth, the quantities listed in the federal regulation are considered large enough by PADEP that an unauthorized discharge involving those quantities of those substances would likely cause or threaten pollution of waters in the Commonwealth, making it appropriate to incorporate in this regulation.

Volume 58 | Number 2 | 2025
ISSN 0737-044X