



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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LITIGATION/ENVIRONMENT

NMFS/Chevron/Magnuson-Stevens Act

On May 1, the U.S. Supreme Court granted certiorari in *Loper Bright Enterprises v. Raimondo* (#22-451). The limited issue is whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

The Magnuson-Stevens Act requires marine vessel owners to make room on board for federal observers to ensure compliance with federal regulations. The National Marine Fisheries Service (NMFS) regulations require the owners to pay the salaries of the government-mandated observers. A divided panel of the D.C. Circuit deferred to the NMFS, identifying the silence in the statute as ambiguity that called for *Chevron* deference. The petitioners, family-owned fishing companies, argued: "One of the few practical constraints on agency overregulation is the need for sufficient congressionally appropriated funds to actually enforce the agency's regulations. One of the few legal restraints on agency overreach is sensible rules of statutory construction that recognize reasonable limits on agency authority. The decision below simultaneously eviscerates both constraints. It authorizes agencies to force the governed to quarter and pay for their regulatory overseers without clear congressional authorization. And it perceives ambiguity in statutory silence, where the logical explanation for the statutory silence is that Congress did not intend to grant the agency such a dangerous and uncabined authority."

Eighteen States filed an amicus brief in support of the petition, including Alaska, Idaho, Kansas, Montana, Nebraska, Texas, and Utah. They noted that *Chevron* deference, the most cited administrative case law in history, "gives agencies wide latitude to interpret statutes aggressively and shift course dramatically when administrations change. Regulation is costly; over-regulation and mercurial regulation even more so." The States argued: "This problem is not academic. Right or wrong, the lower courts treat *Chevron* as a heavy

thumb on the federal government's side of the scale. The real-world result? Agencies have all the incentives to push expansive constructions of their governing statutes. After all, if agencies – and the administrations most of them answer to – know that lower courts will almost certainly defer to a plausible interpretation, it is hard to hold the line on a more restrained view of agency power.... Even more when administrations change and the next set of officials come in to 'undo the ambitious work of their predecessors' by 'proceeding in the opposite direction with equal zeal.' Changed agency priorities are not inherently wrong, of course – and we have seen a lot of them as presidents ask federal agencies to enact 'partisan policy agendas' that are otherwise 'stymied by congressional stalemate.' But by encouraging ever-more-ambitious theories of agency power, *Chevron* expands the range. Now, waffling from one aggressive construction to its opposite becomes a whipsaw. That's a bad place to be. Litigation is expensive and can take years; the countless challenges involving *Chevron* seem a poor investment when lower courts virtually always defer to the work of another Branch. More to the point, regulation is expensive. And when the uncertainty in the law favors over-regulation, not under, our residents and businesses pay the higher price."

WATER RESOURCES

Drought/Floods/Water Supply Outlook

Early May brought anomalously wet weather in the Pacific Northwest, Northern Rockies, Great Basin, and California. While heavy winter snow and rain in many western states have provided relief from a two-decade plus drought, the U.S. Drought Monitor for May 11, shows much of Kansas, Nebraska, Oklahoma and Texas are still suffering from severe, extreme and exceptional drought conditions. Scattered thunderstorms brought pockets of heavy rainfall (more than 2 inches), to parts of Texas, central Nebraska, and the Midwest, but missing much of Kansas, and southern Nebraska. Wichita only received 0.72 inches of precipitation from March 1 to April 30, which made it the 2nd driest March and April on record and the driest since 1936. Moderate to Exceptional drought covers all of Nebraska, and most of Kansas and Oklahoma (with the exception of northeast Kansas and southeastern Oklahoma. Severe drought was

increased westward across west-central Nebraska following a very dry April. The City of North Platte tied the driest April on record. Extreme drought covers much of the State, with Exceptional drought conditions in northeast Nebraska. www.drought.gov

The Oklahoma Water Resources [Board] Bulletin, dated May 11, noted precipitation in the Panhandle for the past year is the 4th driest since 1921 at 12.21 inches of rainfall (59% of normal), while North Central Oklahoma is the 8th driest with 20.18 inches (64%). Conditions across northwest Oklahoma are Severe to Exceptional, as are conditions in the Texas Panhandle and much of central Texas. Extreme and Exceptional drought conditions continue around San Antonio and the Edwards Aquifer area.

Several smaller western reservoirs are evacuating water in May in anticipation of greater runoff as the temperatures increase. In Arizona, the Salt River Project moved up its annual testing of spillways at Roosevelt Dam from August to May due to the water levels reaching the flood control space in the reservoir. Ivan Insua, SRP Hydro Generation Director, noted that they are releasing about 2,000 acre-feet of water, which will flow downstream to Apache Lake where it will be stored for future use. (ABC15, 5/10/23)

In California, the Army Corps of Engineers is coordinating with downstream water users at Isabella Lake for controlled releases that are expected to be near or above channel capacity levels. "Extended high-volume releases are likely necessary to minimize flood damages associated with this year's historic snowpack. The district is working with [the California Department of Water Resources] and other local partners to assess and communicate any potential impacts to Bakersfield and the Tulare Basin."

In Utah, reservoir releases continue in anticipation of continuing high run-off. On May 10, Governor Spencer Cox issued an executive order requiring water conservation at state facilities. "While we are thankful for the record-breaking snowpack we received this season, we have to keep up the good work of conserving this precious natural resource."

WATER RESOURCES/ENERGY **WestFAST/Pumped Storage Hydropower**

On May 3, the Western States Federal Agency Support Team (WestFAST) hosted the third webinar in a series exploring pumped storage hydropower. In this webinar, non-governmental entities discussed their experiences pursuing new pumped storage hydropower projects in the West. The webinar covered lessons learned and current challenges in the field. Presenters

included Erik Steimle with Rye Development, Tim Hemstreet with PacifiCorp, and Lars Dorr with rPlus Hydro.

Steimle talked about the multi-year permitting process for two western closed-loop projects. Swan Lake, in Klamath Falls, Oregon, anticipates receiving a Notice to Proceed in early 2024, making it the first pumped storage project that will be built in the U.S. in over 30 years. The Goldendale project in Washington is located on a Brownfield redevelopment site. They anticipate a full Federal Energy Regulatory Commission (FERC) license in 2024. He noted that a significant lesson learned is the need for tailored messaging, and the importance of understanding who the stakeholders are and what matters to them.

Hemstreet talked about the important role of pumped storage in balancing the variability of solar and wind renewables and in diversifying and optimizing power transmission. He noted that the permitting process with FERC and other federal and state agencies can be confusing, lengthy, and burdensome, often presenting conflicting interests, priorities, processes, and data needs. The lack of standardization is a challenge unique to hydropower, due to the need to take advantage of specific geography (e.g., elevation difference) and geology, and the need for site-specific engineering. There is significant variation in the receptiveness of communities, stakeholders, and resource managers.

Dorr talked about the Seminole Reservoir open-loop project in Wyoming. The initial fill of the project would require 13,500 acre-feet, and they are obtaining water rights through the Bureau of Reclamation and the Casper-Alcova Irrigation District. The project has a water quality study pending. He noted that, compared with wind and solar development, the pumped storage hydropower projects are much more expensive and complex, involving a longer timeline (approximately ten years from development to permitting to construction) and more risk. The increased interest in pumped storage hydropower in the past decade corresponds to the increase in solar and wind projects. He said some of the challenges they've encountered include: (1) federal and state agency staff turnover; (2) new study requests from agencies that cause the permitting process to feel like a moving target; (3) detailed questions from FERC while the project is still early in the design process; and (4) agencies and individuals with a single priority or statutory mandate that don't consider the overall benefits of a project (economic, environmental, etc.) or the relatively benign impact as a whole.

The recorded webinar is available at: <https://westernstateswater.org/events/pursuing-pumped-storage-hydropower/>

The WESTERN STATES WATER COUNCIL is a government entity of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.