



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

682 East Vine Street / Suite 7 / Murray, UT 84107 / (801) 685-2555 / Fax 685-2559 / www.westernstateswater.org

Chair - Jon Niermann; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

ADMINISTRATION/WATER QUALITY EPA/PFAS

On January 11, the Environmental Protection Agency (EPA) published its rule designating 329 Per- and Poly-Fluoroalkyl Substances (PFAS) as inactive on the Toxic Substances Control Act (TSCA) Inventory (89 FR 1822). The significant new use rule (SNUR) prohibits companies from starting or resuming the manufacture or processing of the inactive PFAS without notifying the EPA. The final rule will become effective on March 11.

TSCA Section 5(a) allows EPA to issue SNURs for new chemicals and mixtures. Companies wishing to manufacture or process a chemical identified in a SNUR must notify the EPA through a Significant New Use Notice (SNUN). On receipt of a SNUN, EPA is obligated to assess risks that may be associated with the significant new use, make a determination and, if appropriate, regulate the proposed activity before use. The TSCA Inventory, which catalogs chemical substances under TSCA uses, indicates whether a chemical is active or inactive. Inactive chemicals are those which have not been used in the United States since 2006. Prior to the new rule, companies could have resumed use of inactive PFAS without undergoing complete EPA review and risk determination.

Michal Freedhoff, Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, said: "Under President Biden's leadership, EPA has shut the door on the possibility of anyone restarting use of over 300 PFAS without first ensuring a robust safety review to stop uses that could be harmful to our communities and our planet."

ADMINISTRATION/WATER RESOURCES USBR/Infrastructure

On January 19, the Bureau of Reclamation (USBR) issued a Finding of No Significant Impact (FONSI) on the environmental assessment for Phase III Water Infrastructure Projects for the Fort Berthold Rural Water System (FBRWS) on the Fort Berthold Indian Reservation in North Dakota. Construction activities include: two new water distribution systems; replacement

of an existing water treatment plant; construction of a new administration building and a new O&M building. Currently, many homes still use hauled water or groundwater which does not meet Safe Drinking Water Act (SDWA) primary standards due to high concentrations of iron, manganese, sodium, and sulfate. Phase III expands water service to additional homes, meets SDWA quality standards, and will service critical facilities currently under construction.

The FBWRS was originally authorized in 1965 as part of the Missouri River Basin Project. Its authorization has since undergone multiple amendments, reformulating the project and authorizing updated funds. Most recently, the Dakota Water Resources ACT (DWRA) of 2000 authorized \$70M which Reclamation has almost exhausted through Phase I and II. Further funding will come through the Infrastructure Investment and Jobs Act (IIJA). A three phase approach was adopted in 1988: (1) Phase I, to deliver water to Reservation communities; (2) Phase II to deliver full Reservation-wide municipal, rural, and industrial water needs; (3) Phase III to provide and expand municipal, rural, and industrial water services to meet the public health, environmental, and economic needs of the Fort Berthold Reservation. <https://www.usbr.gov/newsroom/news-release/4721>

CONGRESS/ADMINISTRATION Colorado/Arkansas Valley Conduit

On January 9, Colorado Senators Michael Bennet (D-CO) and John Hickenlooper (D-CO) wrote to President Biden to request a \$15M increase for Colorado's Arkansas Valley Conduit (AVC) project in the FY25 Budget.

The letter said: "A priority for Coloradans for the past six decades, the AVC is the final phase of the Fryingpan Arkansas Project, a water diversion and storage project authorized by Congress in 1962. Many communities that the AVC would serve rely entirely on groundwater, with several facing water contamination from naturally-occurring radioactive elements, or radionuclides. Upon its completion, 50,000 people in nearly 40 communities living in southeastern Colorado

will finally have access to clean drinking water.” The Senators expressed appreciation for the \$160M from IJA, and the \$10.1M included in the FY24 Budget.

On completion, the AVC project will provide reliable water to 39 communities in Southeastern Colorado. The pipelines deliver water from Pueblo Reservoir to six counties and serve up to 50,000 people. These communities currently rely on groundwater supplies which often contain radium and uranium. Congress approved funding for 65% of the project in 2009. The requested funding would leverage previous investments from Congress, the State of Colorado, and the Southeastern Colorado Water Conservancy District, and accelerate the completion of the six decades-old commitment. www.hickenlooper.senate.gov

LITIGATION

CWA/Groundwater/Maui

On January 3, the Tenth Circuit court reversed and remanded a Colorado U.S. District Court finding of a Clean Water Act (CWA) violation under the “functional equivalent” standard (*Stone v. High Mountain Mining Company*, #22-1340). The decision is the second Circuit opinion – after the Ninth Circuit (*Cottonwood Environmental Law Center v. Edwards*, #22-36015) – to analyze how federal district courts should apply the “functional equivalent” standard set forth in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020).

The Tenth Circuit found that the district court had only considered some of the geophysical factors required by the Supreme Court’s *Maui* decision when it should have made additional findings on the other factors.

The plaintiffs alleged CWA violations by the mining company due to seepage from its settling ponds that flowed into groundwater and to the Middle Fork of the South Platte River. The district court agreed that the ponds constituted a point source and that High Mountain’s operation of them constituted an unpermitted discharge of pollutants into navigable waters. The district court relied on three *Maui* factors to make its determination: (1) transit time; (2) distance traveled; and (3) the nature of the material through which the pollutant traveled. The district court gave “no weight” to the remaining *Maui* factors because neither party presented evidence that the factors should weigh in their favor. High Mountain Mining Company appealed the decision.

The Tenth Circuit largely agreed with the district court’s analysis of time and distance. However, the Court found that the district court had erred by not making additional findings on the remaining *Maui* factors, and specifically highlighted the factors of: (1) dilution and chemical changes; and (2) relative amount of pollutant

entering the water. The Court also held that by omitting factually underdeveloped factors, the district court impermissibly shifted the burden of proof from the citizen plaintiffs to the mining company.

The Tenth Circuit also noted Colorado’s complex mining regulatory regime surrounding its 10,380 active mines, and that *Maui* indicates that courts should not undermine state regulations. The Court concluded that the case required a more “comprehensive and rigorous” application of *Maui*, and suggested that the court may wish to reopen the evidentiary hearing rather than dismiss the plaintiffs’ claims.

WATER RESOURCES

California/Groundwater

On January 18, the California Department of Water Resources (CDWR) announced that it had completed the review process of groundwater sustainability plans (GSP’s), covering 98% of the state’s groundwater use. The CDWR has reached a final decision for a total of 77 basins, 13 of which have been deemed incomplete and must resubmit. Under California’s 2014 Sustainable Groundwater Management Act (SGMA), local agencies are required to form groundwater sustainability agencies (GSAs) for basins designated as high or medium priority. GSAs are required to develop GSPs for each basin, outlining steps the GSA will take to achieve sustainability within the next 20 years.

Paul Gosselin, Deputy Director of CDWR’s Sustainable Groundwater Management Office said: “It is remarkable that now, for the first time under SGMA, groundwater basins that make up 98 percent of the state’s groundwater use are being actively managed by local agencies with locally developed groundwater sustainability plans that have undergone initial review... The work does not stop here and [CDWR] will continue to partner with local agencies to build a more sustainable water future for all Californians.” <https://water.ca.gov/News/News-Releases>

MEETINGS

Western States Water Council - Summer Meetings

The WSWC Summer (204th) Meetings will be held in West Fargo, North Dakota on July 24-26, at the DoubleTree by Hilton West Fargo Sanford Medical Center located at 825 E Beaton Drive, West Fargo, ND 58078. A block of rooms has been reserved. The cut off date is June 23. After this, reservations will be accepted on availability and at the prevailing rates. Further information will be posted as it becomes available. <https://westernstateswater.org/events/2024-wswc-summer-204th-meetings-in-west-fargo-north-dakota/>

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.