California Water Views

2024 Outlook

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777 South Figueroa Street,
34th Floor, Los Angeles, CA 90017
nossaman.com
info@nossaman.com

California Water Views

contributors

Corey Boock offers clients more than 30 years' experience in structuring, procuring, financing and negotiating cutting-edge deals in the water/wastewater and solid waste sectors.

Elizabeth Cousins provides advice on critical water infrastructure projects delivered through public-private partnerships, progressive and fixed price design-build, design-build-operate/maintain and other alternative delivery methods.

Kyle Hamilton counsels clients on water infrastructure projects, with a focus on procurement and contract drafting through various project delivery methods, including progressive design-build-operate-maintain, construction manager at risk, and public-private partnerships.

Mary Lynn Coffee offers clients 35 years of experience in obtaining approvals for infrastructure projects under CEQA, NEPA and state and federal water quality, wetlands, endangered species and other natural resource protection laws.

Lori Anne Dolqueist represents clients in utility mergers and acquisitions, rate cases, investigations, rulemakings and other aspects of California and federal regulation. Lori has specialized expertise in water utility regulatory matters in California.

Willis Hon focuses on serving water industry clients across California on administrative and regulatory matters. He has extensive experience before the California Public Utilities Commission in ratesetting, adjudicatory and rulemaking proceedings.

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contributors

Jill Jaffe counsels clients on public contracting and procurement disputes, including defending bid protest challenges and litigating construction claims. She represents clients before dispute review boards, in arbitration and in courts across the country.

Brad Kuhn guides clients through complex real estate development and infrastructure projects – particularly with eminent domain/inverse condemnation, land use/zoning, construction, environmental and other property and business disputes.

Brenda Lin represents clients in the purchase and sale of real property. She reviews commercial real estate contracts including LOIs, as well as option, purchase, and lease agreements.

James Oleshansky guides clients throughout the condemnation process – from preparing pleading and discovery to final purchase and sale agreements.

Steven Silva is an eminent domain and real estate litigator, with a heavy emphasis on appellate litigation, trial practice, governmental interface and law and motion.

Alex Van Roekel provides counsel to clients on state and federal water law issues, including water rights, groundwater management and public policy within the water sector. He also assists clients in proceedings before the California PUC.

Water Agencies Beware Before Proceeding with Forced Municipalization

By James Oleshansky, Steven Silva & Brad Kuhn

California's state water system serves roughly 40 million people and irrigates nearly 10 million acres of farmland. The 2023 water year was ranked as California's 10th wettest since record keeping began 128 years ago. Despite the influx of rain, water remains scarce. Consequently, governments such as cities and counties have turned to using the power of eminent domain to acquire investor-owned utilities (IOUs) through condemnation under the theory of improving water service and costs for their communities. This process of a government acquiring an investor-owned utility is called "municipalization". Municipalization of IOUs through eminent domain, however, is more difficult than traditional condemnation because IOUs have the right to contest the government's findings authorizing the use of their eminent domain powers.

California law requires a governing body adopt a resolution of necessity (RON) before it can condemn private property. The RON outlines the findings that must be made before a public entity may exercise its eminent domain powers. The general findings required include:

a. The public interest and necessity require the project;

b. The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and

c. The property sought to be acquired is necessary for the project. *(Code Civ. Proc., §1240.030)*.

Further, when the property to be condemned is already appropriated to public use — such as when an IOU owns property used for utility purposes — then the governing body must also find that "the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated." *(Code Civ. Proc., §1240.610)*.

Generally, the adoption of a RON carries with it a conclusive presumption of truth concerning the required findings. Thus, a property owner cannot challenge the finding that the property is necessary for the project, or that the public interest requires the project. But when a public entity seeks to condemn water facilities already being put to a public use, there is a rebuttable presumption of truth concerning the RON's findings. This difference is extremely important. A RON carrying a conclusive presumption of truth is extremely difficult to invalidate, as it can only be attacked based on the administrative record and matters concerning the validity of the resolution itself. A RON carrying a rebuttable presumption of truth, however, grants an IOU the right to a trial on the merits of the government's decision to condemn the utility company's property.

In other words, when a RON is adopted, the governing body is

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engaging in a quasi-legislative action that does not require factual findings to be stated in support of its decision to exercise its eminent domain powers. In effect, the legislative process allows the governing body to pass the RON quickly, but does not prepare the governing body to defend its findings before the court.

In a take-over eminent domain action, an IOU is permitted to introduce extrinsic evidence to challenge whether the public entity's right to take conflicts with the findings in the RON. Disproving one of the RON's findings — by a preponderance of the evidence — will invalidate the RON and defeat the condemnation action. In essence, the IOU must prove its operation of the water system is more beneficial to the public than municipalization would be. While the IOU carries the burden of proof, litigation will require both parties to introduce evidence to defend their respective claims.

The City of Claremont's (the City) attempted takeover of Golden State Water Company (Golden State) illustrates the impact of the rebuttable presumption on an eminent domain action. In 2012, the City commissioned an appraisal and feasibility study regarding the acquisition of the Claremont water system. Two years later, voters approved Measure W — a $135 million revenue bond measure to finance the acquisition of the Claremont water system from Golden State through eminent domain. Shortly thereafter, the City adopted a RON. Neither the RON nor the City's complaint listed reasons supporting the taking. The City's First Amended Complaint provided many reasons why condemnation was in the public interest. Included in the stated reasons were lowering water bills and improving service quality.

In 2016, during the course of a 21-day bench trial, Golden State presented sufficient evidence to successfully rebut the presumption that the required findings had been established. Experts testifying on behalf of Golden State concluded that although acquisition may be feasible, bond financing would actually cause an immediate increase in water rates. Their economic analysis disproved the City's stated goal of lowering water bills. Despite evidence of the ratepayers' support for municipalization, the Judge held that 30 or more years of increased rates to service the debt was not in the public interest. Furthermore, Golden State demonstrated that it is more qualified to operate the Claremont water system through statistics regarding the size of its specialized workforce, its track record of maintaining safe water standards, and its network of customer support resources. The City offered no evidence to show that Golden State's ability to deliver water to its customers was deficient in any way.

In his Statement of Final Decision, the presiding Judge characterized the City's overarching argument that local control was inherently superior as "dubious." Golden State's expert testimony, economic analysis and water safety record persuaded the Judge that it was the premier operator of the Claremont water system. The City failed to introduce sufficient evidence to support its findings and justify the public's need for, use of, or benefit from municipalization. Ultimately, the Judge concluded that Golden State had met its burden to rebut the findings in the RON and dismissed the complaint.

The ability of IOUs to challenge the merits of a proposed acquisition, whether of certain utility facilities, or of the operation of the utility company itself, was affirmed by the California Court of Appeals,

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Third District, in September 2023. In clarifying the standard of proof to be applied in the trial of *South San Joaquin Irrigation Dist. v. Pacific Gas and Electric Co. (Pacific Gas and Electric Co. v. The Super. Ct. of San Joaquin County*, order issued Sept. 21, 2023, C097529), the Court confirmed that electric, gas, or water utilities can defend themselves from municipal takeover by disproving one of the RON's findings by a preponderance of the evidence. This ruling provides guidance and support for many IOUs currently fighting against municipalization efforts.

Condemning property owned by IOUs creates complex legal and practical challenges for governing bodies. The rebuttable presumption of truth alters the landscape of condemnation actions by empowering IOUs to contest the factual underpinnings of a governing body's decision and requiring evidentiary substantiation from the condemning entity. The battle between the City of Claremont and Golden State Water Company serves as a powerful reminder to government agencies of the importance of comprehensive factual findings that will withstand judicial review. Failure to do so risks protracted and costly litigation. As California's water systems continue to face challenges of scarcity and access, government agencies must navigate California's eminent domain laws with prudence and diligence to best protect the public interest.

Latest Developments in Standardized Cost Reporting for MS4 Permits

By Willis Hon and Alex Van Roekel

The California State Water Resources Control Board (State Water Board) recently issued a **notice** stating it was releasing a revised draft State Policy for Water Quality Control for Standardized Cost Reporting in Municipal Separate Storm Sewer Systems (MS4) Permits (the Policy). If adopted, this Policy would require permittees subject to MS4 permits to use a list of standardized cost categories to track and report their MS4 permit implementation costs.

Background

The United States Environmental Protection Agency (EPA) issued Phase I MS4 regulations in 1990 and required medium and large cities and certain counties with populations of 100,000 or more to obtain the Clean Water Act National Pollutant Discharge Elimination System (NPDES) permits for their municipal stormwater discharges. In 1999, the EPA issued the Phase II MS4 regulations requiring NPDES permitting for discharges from MS4s for smaller municipalities and counties. In California, which has assumed authority for federal Clean Water Act NPDES permitting, the nine Regional Water Quality Control Boards issue NPDES Permits to large cities and counties for discharges of storm water from Phase I MS4s. The State Water Board has issued a statewide Phase II MS4 Permit that governs discharges of stormwater from Phase II MS4s.

For the past few decades, municipalities in California have worked to comply with increasingly stringent MS4 permit requirements, which often require significant infrastructure investment. Although federal regulations mandate reporting of expenditures related to MS4 permit compliance (e.g., 40 CFR § 122.26(d)(2)(vi)), the State Water Board and nine Regional Water Quality Control Boards have adopted differing conditions in the various MS4 permits they have issued regarding cost reporting. Consequently, permittees are rarely consistent in their approaches in estimating the costs associated with stormwater programs due to the lack of existing standards for how costs are tracked and reported.

Efforts to Standardize Cost Reporting for MS4 Permits

In 2018, the California State Auditor published a **report** that highlighted the need for standardized cost reporting guidance. In 2020, the State Water Board issued **guidance** to provide non-binding cost categories and best cost accounting practices that would allow water board staff to consistently estimate MS4 permit compliance costs, which are an important consideration when MS4 permits are renewed and, typically, modified to incorporate more stringent and expensive to implement water quality control conditions. However, stakeholders voiced concerns, particularly about

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the lack of public process in developing the guidance.

Following public workshops and input from stakeholders, the State Water Board issued a **draft Policy** and **staff report** in August 2023 to incorporate public input on a proposed MS4 permit cost reporting framework. The initial draft Policy featured cost categories and a statewide cost submittal tool for reporting annual expenditures. After receiving comments on the draft Policy, the State Water Board conducted a six-month beta test where 11 MS4 permittees utilized the draft cost reporting framework and provided feedback.

Next Steps

The State Water Board plans to release a revised draft Policy on May 9, 2024 for a second round of public comments, which will be due on June 25, 2024, and hold a public hearing on June 4, 2024. Once the Policy is adopted by the board and approved by the Office of Administrative Law, it would require the regional water boards to incorporate the new cost reporting requirements when they next amend or renew Phase I MS4 permits. The reissued statewide Phase II MS4 permit would also address standardized cost reporting requirements for Phase II MS4 permittees.

For many permittees, the new Policy could mean significant changes in how they currently track expenditures and could present new administrative costs. At the same time, the Policy is intended to assist the State Water Board and the regional water boards in analyzing the economic impacts of the MS4 permits. It would also facilitate the evaluation of cost-effectiveness of different permit elements to improve receiving water quality. Thus, the Policy will almost certainly have a major impact on how MS4 permits are administered by water boards.

EPA Action on "Forever Chemicals"

By Alex Van Roekel & Willis Hon

Per- and polyfluoroalkyl substances (PFAS) are at the top of every environmental regulator's list in 2024. The focus on PFAS is fitting too, as PFAS are in the blood of nearly every American and have been linked to serious health impacts including cancer, impacts to fetuses, and more. While the primary focus has been on the U.S. Environmental Protection Agency's (EPA) maximum contaminant level (MCL), EPA has also taken other key steps in regulating PFAS.

On April 19, 2024, EPA **announced** that it finalized its **rulemaking** designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (also known as the Superfund law). **EPA notes** some of the rule's direct effects, but the most significant impact is that the listing would enable the government and private parties to sue potentially responsible parties under CERCLA. A variety of agencies and companies involved in the water industry may be exposed to substantial liability. EPA published guidance entitled "**PFAS Enforcement Discretion and Settlement Policy Under CERCLA**" to limit some of that liability, but it is yet to be seen whether EPA's policy will be enough. Please see additional analysis on this rule in **Part 1** and **Part 2** of Nossaman's analysis.

In February 2024, **EPA published** a **proposed rule** to list nine PFAS as hazardous substances under the Resource Conservation and Recovery Act (RCRA). The listing of nine PFAS is notable as well as it is the largest group of PFAS included in any PFAS regulation. The listing primarily impacts hazardous waste treatment, storage, and disposal facilities (TSDFs). The long-term impacts of the regulation are much broader though, as this listing is the first step for EPA to list PFAS as hazardous wastes, which would then trigger broad liability and the ability for private parties to sue under RCRA.

Beyond CERCLA and RCRA, EPA has also taken a variety of actions to better understand PFAS and to provide better information on the contaminants:

- One of those steps is the **fifth Unregulated Contaminant Monitoring Rule** (UCMR 5). UCMR 5 is focused on 29 PFAS (and lithium) and covers 2023-2025, with EPA releasing the data on a quarterly basis beginning in August 2023. UCMR 5 will provide EPA and the public with information on which PFAS are in drinking water and at what concentrations.
- A second step is **EPA** finalized its **PFAS reporting requirements** in September 2023. These requirements, which were promulgated under the 2020 National Defense Authorization Act, mandate that any companies that have manufactured PFAS at any point since January 1, 2011 must report seven different categories of information described in the Toxic Substances Control

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Act. The requirements apply to at least 1,462 different PFAS and include a chemical definition of what it considered PFAS.

- A third step is **EPA** released **three new analytical methods** to test for PFAS in January 2024.

The breadth of actions by EPA (as well as the fact that it developed a PFAS Strategic Roadmap) shows that the agency considers PFAS contamination a significant issue, notwithstanding delays in finalizing some of the proposed regulations. As an election year, 2024 could have major implications on these PFAS initiatives.

Should there be a change in administration, these anticipated regulations could be postponed significantly if they are not adopted this year and existing regulations may be rolled back. Either way, 2024 is a year to watch for regulation of PFAS at the EPA level.

Allocation of Risk: Differing Site Conditions

By Jill Jaffe and Brenda Lin

Inherent in the nature of water infrastructure projects is underground work, including excavations and installation or replacement of buried structures such as pipeline or pump stations. During this construction, one of the major risks a public entity and contractor face is encountering a differing site condition. If it turns out that the site condition is different than what is indicated in the contract, questions arise regarding which party should be responsible for increases in costs of the construction due to the differing site condition.

One option for making it clear who holds the risks of a differing site condition is a contractual disclaimer. For example, a general disclaimer in a construction contract may state that it is the sole responsibility of the contractor to evaluate the jobsite and make its own technical assessment of the site conditions prior to bidding. However, disclaimers need to be carefully drafted to comply with California law.

California Public Contracts Code Section 7104

California Public Contract Code Section 7104 requires certain public works contracts with a local public entity that involve digging trenches or other excavations deeper than four feet below the surface, include a clause setting forth a basic procedure the parties must follow in the event of a contractor's discovery of a differing site condition.

The statute designates the two types of differing site conditions. One type under Section 7104(a)(2) is a subsurface or latent physical condition found at the site which differs from the site conditions indicated by information made available to contractors prior to the deadline for submitting bids. The other type under Section 7104(a)(3) is an unknown physical condition of any unusual nature, which is materially different from a condition ordinarily encountered and generally recognized as inherent in the construction work.

As the first step in the procedure under Section 7104(b), when a contractor encounters either of these conditions it must promptly give written notice to the public entity before disturbing the site. Then, the public entity must promptly investigate the conditions to determine whether the differing site condition (1) is material and (2) causes a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work. If the public entity finds both elements exist, then the public entity must issue a change order to compensate the contractor for the differing site condition.

Essentially, under Section 7104, a public entity subject to that provision bears the risk of a differing site condition, but also has discretion over what is considered material and what increases the cost of, or

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time required for, performing the work. The contractor may dispute the findings but is still obligated to complete the work under Section 7104(c) and must pursue the dispute resolution procedures contemplated in the contract.

California Common Law

In one of the few cases that analyzes Section 7104, *Condon-Johnson*, the issue was whether a disclaimer in a Sacramento Municipal Utility District contract supported the District's decision to deny a change order request based on differing site conditions.[1] The disclaimer stated, "it is the sole responsibility of the Contractor to evaluate the jobsite and make his own technical assessment of subsurface soil conditions for determining the proposed drilling process, equipment and make his own financial impact assessment prior to bidding." [2] The court held that if the public entity provided information that invited the contractor to make certain inferences of what subsurface site conditions may be expected, then a general disclaimer that wholly denies responsibility for subsurface conditions is inconsistent with Section 7104.[3]

While the case leaves open questions regarding the validity of disclaimers, Condon-Johnson does provide an example of when a general disclaimer may be unenforceable.

Practice Tips in Drafting Contracts

Specific Disclaimers

The parties to the construction contract should be wary of relying on disclaimers that are overly broad or directly disclaim responsibility for site conditions that differ from what is expected or provided in reference documents. Disclaimers covering conditions for which there are no reference materials may be more likely to be upheld as valid notwithstanding Section 7104.

Definition of Differing Site Condition

The construction contract for a water infrastructure project may affirmatively define a "differing site condition" using the Section 7104(a)(2) and (3) language as to subsurface, latent, and unknown physical conditions. However, in doing so, a public works contract may incorporate a list of conditions that are excluded from the definition of a "differing site condition." These exclusions would narrow the definition to carve out information the contractor may not rely on. For example, the parties might exclude:

- Conditions that a contractor had, or should have had, actual or constructive knowledge of as of the deadline for submitting a proposal;
- Conditions that could have been discovered by the contractor by reasonable investigation or review of other available information; and
- Variations in certain relevant physical conditions at the site from those that are represented in reports, tests or other data included in the contract.

These exclusions clarify that to the extent a contractor has or should have knowledge of a certain condition, either by way of publicly available information or the opportunity to perform its own site inspections, it will not be considered a "differing site condition" eligible for a change order. Including these exclusions encourages the parties to coordinate so that the contractor may take advantage of the opportunity for early site inspections and other assessments.

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Conclusion

Given the legal uncertainties surrounding disclaimers, it is imperative for parties entering into such contracts to meticulously define what constitutes a "differing site condition" and which party bears that risk. Clear and carefully crafted contractual provisions can help mitigate disputes regarding the allocation of risk between the parties involved, ultimately contributing to the successful execution of construction projects.

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[1] *Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility District (2007) 149 Cal.App.4th 1384.*

[2] *Id at 1386.*

[3] *Id at 1387.*

Severing the Sales and Revenue Relationship to Increase Conservation

By Lori Anne Dolqueist

The future social, economic, and cultural success of California depends on a steady supply of safe, reliable, and affordable water. California's water supply is increasingly at risk as it confronts more frequent and extreme droughts and floods, rising temperatures, aging infrastructure, and other challenges made more acute by climate change.

In light of these challenges, the need for conservation will only grow more acute. Recovering sufficient revenue to cover the costs of providing water service while encouraging reduced consumer demand is a problem for water service providers. Many are turning to decoupling as a solution.

Water systems are capital intensive, with fixed costs comprising approximately 50-80% of total costs. These costs do not decline as usage drops. Because a decline in sales can hinder a utility's ability to recover fixed costs necessary to continue to provide safe and reliable water service, there can be a disincentive for water service providers to promote conservation. One way to remove these disincentives is through decoupling, which severs the relationship between sales volume and revenue, and therefore removes the financial disincentives to promote conservation.

Broadly speaking, under decoupling, an annual revenue target is established based on forecasted usage. Revenues collected above this target are returned to customers via refunds. If the annual revenues are less than the sales target, the shortfall is recovered via surcharges on customers' bills over a certain period. This is different from traditional rate making, which does not provide an opportunity to "true up" revenue collection based on changes in consumption. When water consumption is less than expected, the reduced revenues can be financially devastating for water service providers.

Decoupling allows service providers to take strong measures to encourage conservation while still being able to recover the costs necessary to provide safe and reliable service. Decoupling is well-established as a best practice in the energy sector, having been first established in California more than forty years ago. Studies by the Regulatory Assistance Project, the American Council for an Energy Efficient Economy, the Natural Resources Defense Council and others have shown that decoupling has resulted in increased conservation.

There are factors specific to the water industry that heighten the need for decoupling. Due to climate and constraints on surface and groundwater supply, water sales in California are highly variable. Water utilities experience significantly more sales energy variability than energy utilities and energy utility sales variations can be better anticipated than those of water utilities.

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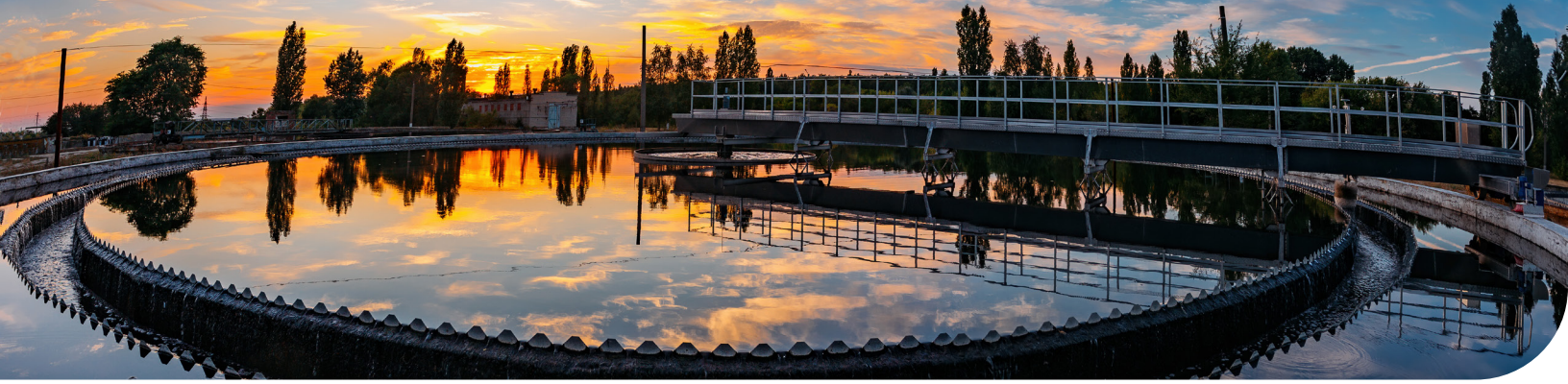
Additionally, water utilities have a higher proportion of fixed costs, which are not affected by sales volume, than energy utilities, making recovery of water utility fixed costs more challenging when conservation efforts are undertaken to discourage sales. In the time of drought, drastic reductions in water usage can result in multi-million-dollar shortfalls that have the potential to financially devastate water service providers.

This is why publicly-owned and investor-owned water service providers in California and across the country are considering and implementing decoupling. For example, the Los Angeles Department of Water and Power implemented decoupling so that it could more aggressively pursue conservation through rate design while ensuring recovery of its fixed costs. Several investor-owned water utilities adopted decoupling mechanisms beginning in 2008. Although the mechanisms enabled these water service providers to achieve significant conservation savings, they were eliminated in a 2021 decision from the California Public Utilities Commission (CPUC).

Beginning in 2023, however, CPUC, which regulates investor-owned water service providers, is required to consider revenue adjustment mechanisms that provide for a full decoupling of sales and revenue in order to further incentivize water conservation efforts.

Decoupling removes conservation disincentives, addresses the substantial variability of water sales, and allows water service providers to maximize conservation efforts. Given the challenges water service providers face, it is likely to become a key conservation tool for both public and private water service providers.



EPA Announces PFAS MCL – Details on the Multi-Billion Dollar Regulation

By Alex Van Roekel and Willis Hon

On April 10, 2024, the U.S. Environmental Protection Agency (EPA) **announced** its **final National Primary Drinking Water Regulation** (NPDWR) for six per- and polyfluoroalkyl substances (PFAS).

Changes from the Proposed Regulation

The final NPDWR includes two significant changes from the draft regulation that was issued in March 2023.

The first is in how it regulates hexafluoropropylene oxide dimer acid (HFPO-DA, commonly known as GenX Chemicals), perfluorohexane sulfonic acid (PFHxS) and perfluorobutane sulfonic acid (PFBS). In the draft regulation, those chemicals were only evaluated in combination; the final regulation includes individual limits as well as the limits on combinations.

The second significant change is that, in the proposed regulation, water providers only had the statutory default three years for compliance. In the final NPDWR, EPA utilized its discretion under 42 USCA § 300g-1 (b) (10) to provide the maximum possible compliance time of five years.

Regulation Details

The regulation includes two categories of standards – maximum contaminant levels (MCLs) and MCL Goals. EPA details each category in its **fact sheet for the regulation.** MCL Goals are health-based and are not directly enforceable. Conversely, MCLs are directly enforceable.

The final rule includes all of the same MCLs and MCL Goals from the **proposed regulation**, targeting perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) in addition to GenX Chemicals, PFHxS, and PFBS (chart below).

Implementation Dates

EPA's final rule presents two key implementation timelines for providers. The first is that public water systems must complete initial monitoring within three years (*i.e.*, by 2027). After the initial monitoring, starting in 2027, providers must notify the public about levels of PFAS in their water as well as complete ongoing compliance monitoring.

Compound	Proposed MCLG	Proposed MCL (Enforceable)
PFOA	0	4.0 parts per trillion (ppt) (also expressed as ng/L)
PFOS	0	4.0 ppt
PFNA	1.0 (unitless) Hazard Index*	1.0 (unitless) Hazard Index
PFHxS		
PFBS		
GenX Chemicals		

**The Hazard Index is a sum of fractions and is intended to represent the dangers from consuming a mixture of chemicals.*

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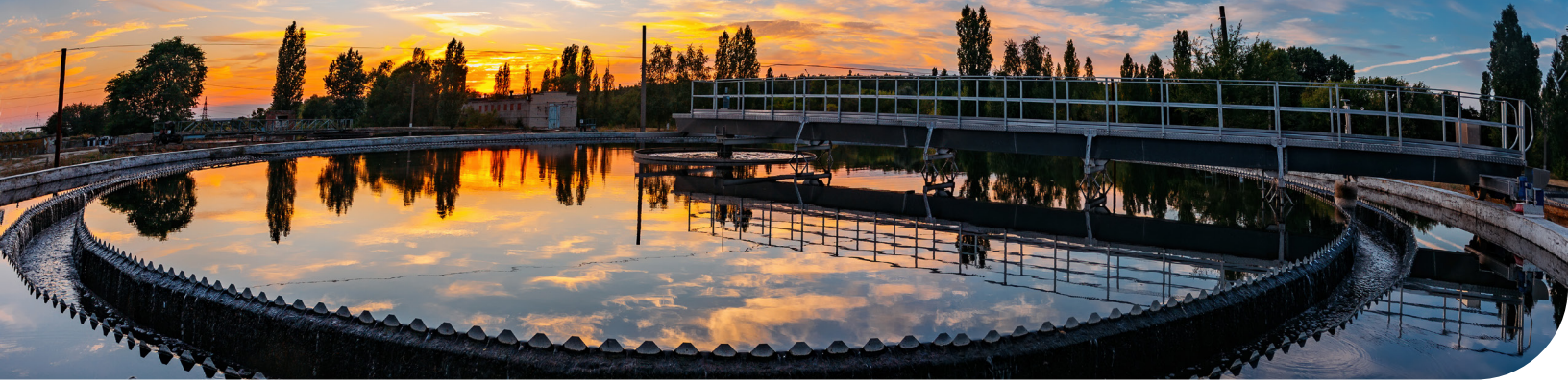

The second key date is 2029, when the MCL becomes enforceable.

Next Steps

There seems to be little debate about two key facts – PFAS are everywhere and they are dangerous. Notwithstanding that agreement, there is still contentious debate about how to address PFAS contamination, to what levels treatment is necessary (and even feasible), what timeline is appropriate, and more. Some of those key counter-arguments to the regulation can be found in the **comments on the draft regulation** from the American Water Works Association, a leading industry group. The fact that EPA's analysis shows the costs and benefits of this rule to be essentially equal, illustrates the complications of regulating in this space.

The next step for this rule is almost certainly a legal challenge. Given the current state of the Supreme Court and the possibility that it will scale back judicial deference to administrative rulemaking, the results of any such challenge are impossible to predict.

Atmospheric Rivers: Force Majeure, or Just Another Rainy Day?

By Kyle Hamilton & Corey Boock

In the first few months of 2024, Californians heard a lot about "atmospheric rivers" — a weather phenomenon involving concentrated corridors of tropical moisture that travel through the atmosphere.[1] Atmospheric rivers are endemic to California, but for many, this year may be the first time encountering the term. After years of devastating drought, extra rainfall should be welcome. However, due to an El Niño condition in the Pacific Ocean, the 2024 atmospheric rivers have been particularly strong, leading to much higher than average rainfall, flooding, landslides, and even blizzards.

Experts are predicting that atmospheric rivers will provide an increasingly large percentage of California's annual precipitation. Breanna Zavadoff, an assistant scientist at the University of Miami's Cooperative Institute for Marine and Atmospheric Studies said in an interview with Newsweek, "Predictions have shown that atmospheric rivers are going to bear the larger burden of being California's water resources in the future.... They're going to need them to get water, but they're going to be so strong that every time you're hit by one, or nearly every time, you're going to have a consequential impact. You're getting the water you need, but you're getting too much at once. You're busting a drought, but you're getting landslides." [2]

Agencies and contractors around the state have been grappling with the rain, floods, and landslides in managing the construction, operation, and maintenance of their projects, leading to delays, additional costs and setbacks. For many, the assumption is that these atmospheric rivers and the resulting floods and landslides are a clear-cut case of Force Majeure, but, as with all construction risk issues, the terms of the project agreement govern and relief may not always be provided. Contractors and agencies alike should closely review their project agreement before agreeing to grant schedule, cost or performance relief.

Contracts can define Force Majeure with various levels of detail. Some definitions of Force Majeure are very broad and grant relief to a party for just about any event outside of its control, including inclement weather, provided the event prevents the party from performing its obligations.

Consider the following Force Majeure provisions potentially applicable to weather events:

> *"No Party shall be liable or responsible to the other Party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations to make previously owed payments to the other Party hereunder) when and to the extent such failure or delay is caused by or results from acts beyond the impacted Party's (Impacted Party) reasonable control, including, without limitation,*

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the following Force Majeure events (Force Majeure Event(s)) that frustrates the purpose of this Agreement: (a) acts of God; (b) flood, fire, earthquake or explosion; … (g) national or regional emergency; … and (m) other similar events beyond the reasonable control of the Impacted Party."

Under this broad type of Force Majeure clause, a party could potentially pursue relief for floods and landslides caused by the 2024 atmospheric rivers through several clauses. The party could certainly argue that the atmospheric rivers were out of their reasonable control, that they are "acts of God," that they are floods, or that they have resulted in a regional emergency. If this form of Force Majeure provision was included in a contract, the rains, floods, and landslides caused by the atmospheric rivers would likely qualify as events of Force Majeure to the extent a party was unable to perform its obligations because of the weather events.

On the other hand, some contracts use a focused definition of Force Majeure which delineates specific events and greatly limits the circumstances in which a party may be relieved of performing its obligations. Consider the potentially applicable weather provisions in this definition of Force Majeure:

"**Force Majeure Event(s)** means the occurrence of any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under the Agreement:

a. any earthquake, tornado, hurricane, uncontrolled fire in an area of combustible vegetation, lightning, one in a 100-year flood or other natural disaster;

…

Excluding:

i. any physical destruction or damage, or delays to the Work which occur by action of the elements or weather events, except as specified in subsection (a);

…"

Under this type of Force Majeure clause, it would be significantly more difficult to claim that the weather events caused by the 2024 atmospheric rivers constitute an event of Force Majeure. The party requesting relief due to Force Majeure would need to establish that flooding from the atmospheric rivers constituted a "one in a 100-year flood," meaning that such a flood has only a 1% chance of occurring in any given year.[3] This is obviously a much higher standard than simply being beyond the reasonable control of a party.

Whether to adopt a broader or more focused approach to Force Majeure is an agency decision and should be based on a number of factors including project characteristics and goals, bidding competition and likelihood of the Force Majeure events. In that context, one often sees a more focused approach in alternative project delivery (i.e., design-build, public-private partnerships, construction-manager-at-risk) and a more general approach in traditional design-bid-build delivery.

With the effects of climate change increasing the severity of weather events, it is more important than ever for parties to a contract to consider Force Majeure before executing their contract. And it's not just weather that needs to be

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considered – war, terrorism, pandemics, supply chain issues, strikes, natural disaster and change in law are all impactful events that have occurred in recent years. For longer contracts, claims for events of Force Majeure, whether related to weather or something completely different, are increasingly likely.

Parties should ask themselves some questions before executing a contract: How likely is it that an event of Force Majeure will occur? How significant are the consequences of an event of Force Majeure? What are the likely costs, losses, and schedule impacts that would follow an event of Force Majeure? Which party is best situated to mitigate events of Force Majeure, perhaps by including float in a project schedule to account for potential Force Majeure? How much risk of an event of Force Majeure is a party willing to assume? How much is the party paying to avoid the risk of an event of Force Majeure?

When in doubt, speak to legal advisors about how to draft your definition of Force Majeure to meet your needs and to help mitigate the costs and schedule impacts faced when an atmospheric river causes a landslide affecting your project.

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[1] *Atmospheric Rivers "Double-Edged Sword" for Water in California (newsweek.com)*

[2] *Id.*

[3] *The 100-Year Flood | U.S. Geological Survey (usgs.gov)*

Water Alternative Delivery

By Liz Cousins

Through recent updates to California's Public Contract Code, public agencies are being equipped with new tools to deliver major infrastructure projects through use of the progressive design-build (PDB) model. Recent legislative developments include:

- Senate Bill 991 (2022), authorizing the use of PDB for up to 15 public works projects to provide for the production, storage, supply, treatment, or distribution of any water from any source, which went into effect on January 1, 2023;
- Senate Bill 706, which was signed into law on October 8, 2023, permitting cities, counties, or special districts to use PDB for up to 10 public works projects valued at $5,000,000 or more; and
- Senate Bill 146, adopted in July of 2023, authorizing the Department of Water Resources and the Department of Transportation to use PDB for up to 8 public works projects per department for projects estimated to exceed $25,000,000 in total cost.

In both PDB and fixed-price design-build (DB) projects, a single entity (the design-builder) is responsible for design, as well as construction, of the project. The key difference, however, is that, under a fixed-price DB model, proposers provide a lump sum fixed price for design and construction services. Where there is not sufficient project-focused information available for design-builders to appropriately price the cost and risk of the work, this may result in increased pricing to account for the risks inherent in agreeing to design and build a project that has not been fully designed. Alternatively, given the desire to compete, design-builders may include "heroic" assumptions about risk which, if untrue, may increase the risk of claims or future disputes.

PDB aims to mitigate some of the challenges of fixed price contracting methods through early collaborative involvement of the design-builder. In a PDB delivery model, a project owner selects a design-builder at the early stages of design through a qualifications-focused selection, sometimes before a design even exists. However, final price and schedule for construction are not typically established during selection — the idea being that the selected design-builder signs on to design the project in the early phases, progressing towards a clearer total cost and schedule commitment alongside the owner for the subsequent final design and construction phase. Though the design-builder is expected to complete construction after design is complete, PDB provides a project owner with "off-ramp" options at the end of the design phase if commercial terms or price cannot be agreed.

Early involvement of the contractor has the capacity to de-risk the project by enabling the design-builder to better understand the project through further investigation or design progression. It also can have the benefits of facilitating communication between the design-builder and the

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owner and fostering increased innovation — hopefully resulting in a more accurate price, with reduced contingencies. In an effective PDB design phase, the owner, designer and builder are in communication throughout the entire process to ensure the design meets the owner's budget and quality concerns. Of course, on the flip side, sole source pricing of the final design and construction work occurs without the "competition" garnered under a lump sum fixed price procurement, which represents a key challenge for owners considering the PDB tool. Managing this sole source negotiation, and ensuring the "off-ramps" are credible and viable, are crucial to PDB success.

Given the flexibility of PDB, it's no wonder recent PDB legislation has been embraced by both sides of the aisle, garnering significant support. As more public agencies gain access to the legislative tools available to use PDB, we expect to see an increasing number of water projects undertaken and completed successfully under the PDB or other early contractor delivery methods. PDB will not be a panacea for every project. While lump sum fixed price DB remains a viable and important tool for many projects, use of PDB may help both owners and design-builders alike, and could also help combat modern problems like drought and water scarcity from climate change.

California Water Views

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