



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **ADMINISTRATION/WATER QUALITY** **Alaska/Clean Water Act/Pebble Mine**

On November 25, the Army Corps of Engineers (Corps) issued its Record of Decision (ROD) denying the Clean Water Act (CWA) §404 application for the Pebble Mine to discharge fill and dredged materials into Waters of the U.S (WOTUS). The Corps' analysis determined that the discharges would cause unavoidable adverse impacts resulting in significant degradation of aquatic resources. Despite the company's compensatory mitigation plan filed on November 4, the Corps determined that the company could not ensure the activities would comply with the §404(b)(1) guidelines, and would be contrary to the public interest.

Senators Lisa Murkowski (R-AK) and Dan Sullivan (R-AK) both support mining in Alaska, but opposed the Pebble Mine project. Murkowski said: "After years of review and analysis, the Army Corps has found that this project is 'contrary to the public interest'...affirming that this is the wrong mine in the wrong place. This is the right decision, reached the right way. It should validate our trust and faith in the well-established permitting process used to advance resource development projects throughout Alaska. It will help ensure the continued protection of an irreplaceable resource...and I hope it also marks the start of a more collaborative effort within the state to develop a sustainable vision for the region." Sullivan said: "I welcome the Army Corps' Record of Decision to deny the permit. Given the special nature of the Bristol Bay watershed and the fisheries and subsistence resources downstream, Pebble had to meet a high bar so that we do not trade one resource for another....the Corps rightly denied the permit." <https://www.murkowski.senate.gov> (WSW #2397 and 2360)

### **LITIGATION/WATER QUALITY** **Maui v. Hawaii Wildlife Fund/EPA**

On December 10, the Environmental Protection Agency (EPA) published a notice in the *Federal Register* seeking comments on draft guidance to apply the recent Supreme Court decision *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020) to the CWA §402 National Pollutant Discharge Elimination System (NPDES) permit program (85 FR 79489). The Court held

that an NPDES permit is required for discharges from a point source through groundwater to a WOTUS if the discharge is the "functional equivalent" of a direct discharge (see WSW #2397). It also outlined seven factors that industry and the regulated community should consider when evaluating whether to obtain a permit.

EPA's website said the guidance "places the 'functional equivalent' analysis into context within the agency's NPDES permit program. [It] reiterates the threshold conditions for triggering the requirement for a NPDES permit – an actual discharge of pollutants from a point source to a water of the United States. The guidance also proposes that the design and performance of the system or facility from which the pollutant is released is an additional factor that should be considered." Comments are due by January 11, 2021, and can be submitted under Docket Number EPA-HQ-OW-2020-0673 at [www.regulations.gov](http://www.regulations.gov).

### **LITIGATION/WATER RESOURCES** **Idaho/Groundwater Management Area**

On November 6, Idaho 5<sup>th</sup> District Judge Eric Wildman issued a ruling in *Basin 33 Water Users & Upper Valley Water Users v. Idaho Department of Water Resources* (IDWR) (#CV01-20-8069), upholding IDWR's designation of the Eastern Snake Plain Aquifer (ESPA) groundwater management area (GMA). The IDWR Director issued the designation order in 2016, and several petitioners contested the order in subsequent administrative proceedings. In May 2020, the petitioners sought judicial review of IDWR's administrative decisions. The designation of a GMA allows the Director to: (1) approve a groundwater management plan for the area; (2) require all water right holders in the area to report groundwater withdrawals and other information; and (3) order water right holders in the area "to cease or reduce withdrawals on a time priority basis upon the determination that the supply is insufficient to meet the demands of water rights within the area." Idaho currently has 12 designated GMAs.

The court reviewed the authority of the IDWR Director to designate GMAs in the provisions of the 1951 Idaho Ground Water Act (I.C. §§42-231 et seq.). The court held: "[W]hen the Director determines a ground water basin is approaching the point having insufficient

ground water to provide a reasonably safe supply for irrigation or other uses, the Act vests him with the discretionary authority to designate a ground water management area for that basin.” IDWR’s 2016 designation order found that the ESPA had experienced chronic declines over 60 years, and that the groundwater supply was “not sufficient to satisfy senior priority water rights diverting from the ESPA and hydraulically connected sources unless ESPA withdrawals under junior priority groundwater rights are curtailed, and/or the junior water right holders mitigate.” The court noted that this finding was not challenged by any party. Instead, the petitioners asserted that IDWR failed to hold a hearing or initiate rulemaking prior to the designation. The court held that, under the plain language of the Act, the Director is not required to do so, but may instead proceed on his own initiative and discretion. Parties “aggrieved” by the designation can then request a hearing, which they did.

The petitioners argued that the state’s conjunctive management (CM) rules (IDAPA 37.03.11.001) precluded IDWR from creating a GMA subsequent to the Final Unified Decree in the Snake River Basin Adjudication. The court disagreed, holding that “the CM Rules are limited in scope to prescribing the basis and procedure for responding to delivery calls made by the holder of a senior surface or ground water right against the holder of a junior ground water right in an area having a common ground water supply. No such delivery call has been made in this case. Therefore, the Court finds the Director’s designation of the ESPA [GMA] does not implicate the CM Rules.”

The court noted that IDWR may designate a GMA in response to a delivery call made within an area of the state where water rights have not been adjudicated, because a curtailment of individual water rights may be infeasible in areas where there has been no adjudication and there is no tabulation of existing water rights. The court then continued: “The Petitioners’ assert the CM Rules provide a binary choice for water right administration and that a [GMA] is only a pre-adjudication mechanism. They argue once an adjudication is completed the ground water resources in that area may only be managed...through CM Rules when responding to a delivery call. In part, the Petitioners rely on the decision of former Department Director David Tuthill in 2008 that a ground water management area was not required for the ESPA. At the time, there was an assumption that ground water management areas would not be necessary in areas of the state where adjudications had been completed and water districts created. This assumption was based on the belief that following an adjudication that the creation of water districts and the filing of delivery calls would work to protect the underlying water resource from depletion. Groundwater management would therefore be accomplished through the CM Rules exclusive of the

Ground Water Act. In practice this assumption proved to be incorrect.”

The court turned to the explanation provided by the current IDWR Director: “The past ten years of litigation arising out of individual delivery calls under the [CM] Rules are symptoms of a larger underlying problem, i.e., continuing declines in ESPA storage and spring discharges. Delivery calls under the [CM] Rules result in sporadic curtailment orders and mitigation plans to address particular injuries in particular years. Delivery calls are not an efficient or effective means of addressing the underlying problem of chronic declines in ESPA storage and spring discharges, which have resulted from several factors and have developed over many years.... The City of Pocatello and others correctly point out in their comments that [IDWR] took the position in previous litigation that a [GMA] is not necessary where a water district exists. However, as the above paragraph explains, an important management tool that a [GMA] provides is the opportunity to create a management plan to ‘manag[e] the effects of ground water withdrawals on the aquifer...and on any other hydraulically connected sources of water.’ In a conjunctive management delivery call, the primary focus is whether a junior is causing injury to the calling water right. As learned through [a recent] delivery call, sometimes the solution to mitigate injury to the calling water right does not address underlying issues with the source of supply. In [the recent call], IGWA mitigated the material injury by providing water from another spring source directly to [the senior water right holder]. While this mitigated the injury to [the senior water right holder], it did not address the aquifer. A [GMA] and accompanying ground water management plan are the tools to address broader concerns with ground water aquifers such as the ESPA and allow for the focus to be broader than just mitigating injury to a calling water right.”

The court added that other ESPA delivery calls brought under the CM Rules “have been resolved through water right buyout agreements or monetary arrangements that satisfy injury and allow junior ground water pumping to continue unabated. Once the injury is satisfied no further remedial action is taken to address the declining ground water levels that were the basis for initiating the delivery call. Nor do the CM Rules require or even authorize such further remedial action. Absent the Ground Water Act, the Director’s only option for addressing continuing ground water declines is to wait for the next delivery call. However, once again any remedial action at the Director’s disposal is limited by the means in which the delivery call is resolved. In theory, the pattern could continue until the ground water reaches critical levels or worse.” The court affirmed the ESPA GMA designation and subsequent administrative decisions. <https://idwr.idaho.gov/files/legal/CV01-20-08069/CV01-20-08069-20201106-Memorandum-Decision-and-Order.pdf>