



California Water Views

2025 Outlook

We see potential. What do you see?

From climate change and infrastructure funding to regulation and sourcing new supply, issues abound in California's water landscape. We're here to help, counseling clients from the source to the tap.



NOSSAMAN LLP

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A Look at Customer Assistance Programs for Utility Bills Today

By Willis Hon

The affordability of necessary utilities like electricity and water is a growing concern for many Californians. The State is focused on addressing this issue. Last October, Governor Newsom signed Executive Order N-5-24, directing several state agencies to take steps to manage rising electricity costs. California has long had programs to help low-income customers pay for their water service and more help may be coming. As we move through this year, it will be interesting to see how these efforts develop.

Existing Water Customer Assistance Programs

Many municipal and governmental water agencies currently offer low-income customer assistance programs. For example, East Bay Municipal Water District offers a program that provides discounts to the monthly water service and flow charges for eligible low-income residential customers and those in homeless shelters. However, one significant barrier for governmental agencies in implementing customer

assistance programs is Proposition 218. In simple terms, Proposition 218 prohibits rate programs where the costs for one customer are subsidized by others. As a result, customer assistance programs offered by public agencies must be funded through non-rate revenues.

Separately, each of the Class A investor-owned water utilities (i.e., those with more than 10,000 service connections) regulated by the California Public Utilities Commission (CPUC) offers a customer assistance program that provides a monthly discount to customer bills for income-qualified households. Because investor-owned water utilities are not subject to Proposition 218, these long-standing customer assistance programs authorized by the CPUC are funded through customer rates overall. More recently, the CPUC has also focused on exploring how these programs can be extended to reach low-income tenants who do not directly pay a water bill and has authorized various pilot programs aimed at assisting such Californians.

Current Initiatives for Improving Affordability of Water Utility Bills

The State is also exploring other solutions for improving affordability of utility bills, including for water service. Until recently, eligible low-income Californians could access financial assistance to pay for residential water utility bills through the federally-funded Low Income Household Water Assistance Program (LIHWAP). LIHWAP was a limited-term program established by Congress in December 2020 to assist low-income households across the country, but the program sunset on March 31, 2024. While a wide coalition of stakeholders has pushed for renewal of funding for the LIHWAP program, Congress has not provided further funding for this program since it sunset.

Separately, California has also explored the possibility of a statewide low-income water rate assistance program. Assembly Bill 401 (Dodd, 2015) directed the State Water Resources Control Board to

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prepare a plan in collaboration with the State Board of Equalization to implement a program for low-income water rate assistance. Following a significant public process and gathering of input from many stakeholders, a report providing recommendations for this plan was issued in February 2020.

This report recommended the development of a statewide customer assistance program, noting many water systems across the State have high percentages of low-income households, making system-level customer assistance programs there challenging or impractical. However, efforts

since that time to launch a statewide customer assistance program have not materialized.

As the 2025 Legislative session progresses, it will be interesting to follow potential new legislation aimed at improving affordability of water bills for Californians.



What Standard of Review Should Courts Apply for Utility Condemnations?

By Brad Kuhn

In 2024, we reported on a significant published appellate decision, *South San Joaquin Irrigation District v. PG&E*, which concluded that when a public agency uses eminent domain to acquire the assets of an electric, gas, or water utility, the court can exercise its independent judgment in determining whether the agency's acquisition satisfies the public use and necessity requirements. The decision provided guidance on the standard of review and the limited level of deference given to public agencies in their decision-making on such utility take-overs.

Recently, a different California Court of Appeal, in *Town of Apple Valley v. Apple Valley Ranchos Water*, was presented with the same issue and reached a conflicting conclusion. In *Town of Apple Valley*, the Court held that the trial court should apply a deferential standard of review of agency findings in utility takings cases and should

uphold the public agency's resolution of necessity if it is supported by any substantial evidence. In other words, the court should not exercise its independent judgment, but instead only determine whether the public agency's findings of necessity were a gross abuse of discretion. The Court in *Town of Apple Valley* also restricted the court's review of information that existed at the time the resolution of necessity is adopted, meaning neither the public agency nor the utility can introduce new information or evidence as to the public use and necessity findings.

With these conflicting Court of Appeal decisions, public agencies and utilities are presented with a direct conflict on the proper interpretation of Eminent Domain Law in actions seeking to take privately owned utility property for public use. A petition for review was submitted to the California Supreme Court and, on April 23, 2025, the Court granted Apple Valley

Ranchos Water's petition for review on one issue:

When a public entity files an eminent domain action seeking to take privately held public utility property and the owner objects to the right to take, what is the proper standard of judicial review for the trial court to apply to determine whether the property owner has rebutted the presumptions under Code of Civil Procedure sections 1245.250, subdivision (b) and 1240.650, subdivision (c)?

A California Supreme Court determination on this issue will not only resolve the dispute between conflicting Court of Appeal decisions, but it will clarify important questions of law that concern both the taking of private property and the provision of services to the public. It is not very often that the California Supreme Court takes up an eminent domain case, so we will follow the briefing closely.



The End of “End-Result” Permit Limitations in Clean Water Act Permits

By Mary Lynn Coffee & Willis Hon

On March 4, 2025, the U.S. Supreme Court issued its opinion in the case *City and County of San Francisco v. Environmental Protection Agency*, in which it held that “end-result” requirements routinely imposed by the U.S. Environmental Protection Agency (EPA) in permits were not allowed under the Clean Water Act (CWA). This pivotal opinion has major implications for the manner in which permits under the CWA National Pollutant Discharge Elimination System (NPDES) are administered across the country.

Case Background

This particular case dealt with a NPDES permit issued to the City and County of San Francisco (San Francisco) under the CWA for its Oceanside combined wastewater treatment facility. The dispute in this case centered on two so-called “end-result” provisions found in the NPDES permit:

- A prohibition against discharges that “contribute

to a violation of any applicable water quality standard” for receiving waters.

- A prohibition against performing any treatments or making any discharges that “create pollution, contamination, or nuisance as defined by California Water Code section 13050.”

Summary of Majority Opinion

In the majority opinion, the Supreme Court held that Section 1311(b)(1)(C) of the CWA does not authorize the EPA to include “end-result” provisions in its NPDES permits. The Court held that such “end-result” limitations neither fit the statutory interpretation envisioned by the CWA nor was supported by the legislative history of the CWA, holding:

- In sum, we hold that §1311(b)(1)(C) does not authorize the EPA to include “end-result” provisions in NPDES permits. Determining what steps a permittee must take to ensure that water

quality standards are met is the EPA’s responsibility and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer.

Implications for CWA Permittees and Other Stakeholders

This case addresses a longstanding dispute between EPA and many permittees regarding “end-result” permit requirements frequently found in NPDES permits. It could have major implications for both the EPA and permittees across the country:

- EPA Responsibility in NPDES Permits – The opinion now shifts the responsibility for developing explicit compliance measures onto EPA in crafting NPDES permit requirements rather than allowing the agency to rely on general language for ensuring water quality that previously placed the burden onto permittees.

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Impacts on Processing of NPDES Permits – One area to watch in the wake of the *City and County of San Francisco* opinion is how the EPA administers and processes NPDES permits, including critical general permits on which many businesses rely. The dissent cautions that if EPA must impose individualized conditions for each permittee under Section 1311(b)(1)(C) of the CWA, then it will “be more difficult and more time consuming for the Agency to issue permits.”

State Regulators – States like California not only have assumed NPDES permitting authority under the CWA, but also have independent discharge permitting authority under state laws (e.g., Porter-Cologne Act). With respect to NPDES permits under the CWA, many states previously had plans to place additional numeric limits in NPDES permits - this opinion may accelerate the implementation of these plans. However, this opinion is limited to implementation of the NPDES permitting program

under the CWA, so states with independent discharge permitting authority under state law might continue to use such “end-result” discharge permit conditions pursuant to state law.

Conclusion

The *City and County of San Francisco* opinion now prohibits the EPA from utilizing so-called “end-result” provisions in such permits. This case will have significant impacts on the EPA’s overall administration of the NPDES Permit program.



Proposition 4: California's Historic \$10 Billion Climate Investment and Path to Resilience

By Ashley Walker

In the November 2024 election, California voters approved Proposition 4, authorizing the state to issue \$10 billion in general obligation bonds to fund climate resilience and environmental conservation projects. Proposition 4 was authored by Senator Ben Allen as Senate Bill 867. The bond measure, titled the Safe Drinking Water, Wildfire Prevention, Drought Preparedness and Clean Air Bond Act of 2024, represents the largest climate investment in California's history.

There are several chapters in Proposition 4 that outline the key allocations for projects to be funded:

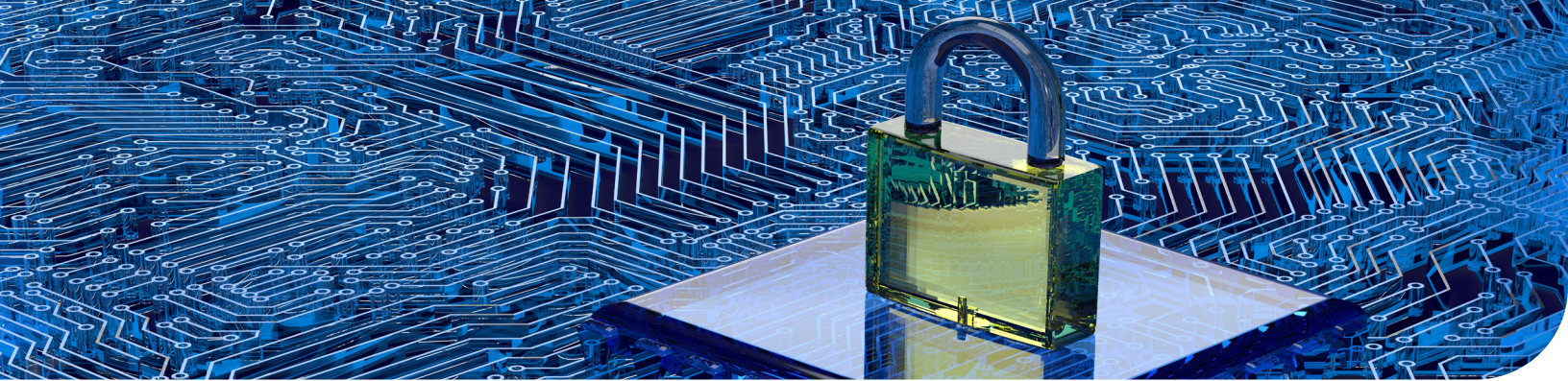
- 1. Water Projects (\$3.8 billion):** Enhancing safe drinking water access, water recycling, groundwater storage and flood control measures.
- 2. Wildfire and Extreme Heat Mitigation (\$1.95 billion):** Implementing forest health initiatives and community protection strategies against wildfires and extreme heat events.

- 3. Natural Lands and Wildlife Protection (\$1.9 billion):** Conserving parks, wildlife habitats and natural landscapes.
- 4. Coastal and Ocean Protection (\$1.2 billion):** Addressing sea-level rise and safeguarding coastal ecosystems.
- 5. Clean Energy Infrastructure (\$850 million):** Supporting renewable energy projects, including offshore wind and energy storage systems.
- 6. Agricultural Adaptation (\$300 million):** Assisting farms in adapting to climate change through sustainable practices.

Applicants will be able to apply for Proposition 4 funds through competitive grant processes administered by the California Natural Resources Agency and its subsidiary Departments. The bond measure specifies that at least 40% of the funds must be designated to projects benefiting disadvantaged communities, with a minimum of 10% allocated to projects serving severely disadvantaged areas within the State.

Currently, the Governor and Legislature are debating how the first round of funds should be allocated and how much funding will be available. Some organizations are hoping for a quick release of funds, while others are advocating for a slow rollout for their more expansive, long-term projects. The Governor's 2025-26 January State budget proposal outlines his proposal for Proposition 4 allocations, but the final State budget and allocation of these funds will be negotiated with the Legislature until a final State budget is enacted by June 30. Once the State budget is enacted, competitive grant solicitations for Proposition 4 funds are expected to open this year.

Proposition 4 reflects Californians' commitment to combating climate change and investing in sustainable environmental practices. Nossaman can assist clients in accessing Proposition 4 funds for projects intended to meet these climate change goals.



Water Systems & Information Security: Challenges and Solutions

By Thomas Dover

As recently as November 2024, the EPA Inspector General identified 97 drinking water systems (26+ million users) as “critical or high-risk” with regard to cybersecurity vulnerabilities.¹ The risks are compounded by recent cuts to personnel and funding for the Cybersecurity and Infrastructure Security Agency (CISA)² that only recently received a reprieve to restore funding to the Common Vulnerabilities and Exposures (CVE) database.³

The reason for the concern is that Water and Wastewater Systems remain one of the “16 critical infrastructure sectors whose assets, systems and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.

What are water systems and other sensitive utility

infrastructure organizations (and their worried IT personnel) to do?

The key here is that the vulnerabilities and threats are a moving target. Every time the information security community patches a vulnerability, a threat shows up somewhere else.

The threats can’t be 100% eliminated but here are a few strategies.

Back to Basics

Revisit the CA State Administrative Manual (SAM), Section 5300 – Information Security. SAM § 5300 directs the use of NIST Publ. 800-53 (“Security and Privacy Controls for Information Systems and Organizations”) and SAM § 5100 directs the use of FIPS 199 to evaluate the necessary level of security. Consider also whether the organization is in compliance with the recommended ISO 2700X Framework (establishing policies, conducting risk assessments, implementing controls and ongoing review and improvement).

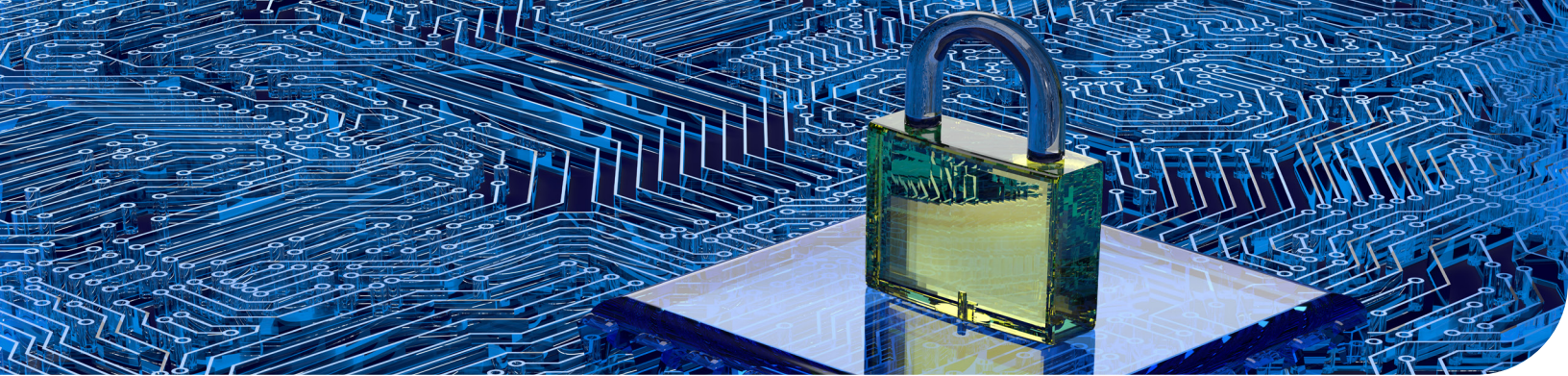
“Stress-Test” & Audit Systems

Use the currently available resources developed by CISA and the Environmental Protection Agency (EPA) (the Water and Wastewater Toolkit)⁴ that includes Vulnerability Scanning for Water Utilities, EPA Water Resilience Cybersecurity Help Desk, EPA Free Cybersecurity Assessment Service, Cybersecurity Performance Goals and Resources for Cyber Incident Response, among many others. Water organizations should maintain periodic (at least annual) audits to evaluate the organization’s cybersecurity strategy, identify security gaps and provide a clear pathway to repair known vulnerabilities.

Also consider:

- Periodic (at least annual) personnel training
- Encryption of all data
- Back up all sensitive data
- Periodic review (recommend monthly) of all software, operating systems and cybersecurity tools to ensure they are updated and current.

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Data Mapping

It will surprise most Water organization executives to know – exactly – what information, data and materials are collected, stored, processed and distributed through the organization.

More to the point, mapping the data life cycle may identify vulnerabilities in personnel access and handling of the data, routine system communications (SCADA, etc.) and even basic interactions with people and systems outside the organization. Some organizations treat this as a literal diagram so that IT staff and management can visualize, evaluate and...ask questions.

Contract & Vendor Management

The vendors are the problem. In recent surveys, more than 80% of surveyed organizations experienced a data breach caused by a 3rd party⁵ and 98% have a vendor that has suffered a data breach.⁶ First avenue of protection – contract provisions that require the vendor to maintain adequate information security and data breach reporting obligations.

Checklist:

- Information Security Policy
- Media and Access Limitations

- Removal, Return and Destruction
- Audits
- Encryption
- Access Control Information
- Security Incident Protocols

Next, maintain effective and routine oversight of the vendor to ensure that you are aware of issues prior to any security incident. Water organizations should develop clear statements of work, technical and functional specifications and information security requirements that can be updated during the term. Alternatively, make sure the organization can exit the contract.

Consider these common provisions and how they relate to information security vulnerabilities:

- Term/Termination (auto-renewal)
- Effects of Termination
- Confidentiality Obligations
- Personnel NDA, Background Check
- Public/Open Records Obligations
- “Data” as Intellectual Property; Vendor use of “Aggregated Data”
- Software/Platform License Rights/Restrictions

These challenges will continue and change, as the hackers continue to find value in the data and as the technology improves.

Constant oversight of data, proactive software/system maintenance and robust contracting and vendor management can be solid strategies to provide the best protection for Water and Wastewater organizations.

¹Memo, Management Implications Report: Cybersecurity Concerns Related to Drinking Water Systems (Report No. 25-N-0004), US Environmental Protection Agency, Office of the Inspector General, Nicolas Evans, Acting Asst. Inspector General, November 13, 2024.

²CISA cuts: ‘Open season’ for US?, Dana Nickel, Politico, April 14, 2025; <https://www.politico.com/newsletters/weekly-cybersecurity/2025/04/14/cisa-cuts-open-season-for-us-00288451>

³And What To Do Next, Kate O’Flaherty, Forbes, April 16, 2025; <https://www.forbes.com/sites/kateoflahertyuk/2025/04/16/cve-program-funding-cut-what-it-means-and-what-to-do-next>

⁴<https://www.cisa.gov/water>

⁵47 Third Party Data Breach Statistics: The Numbers You Need to Know, Nivedita James Palatty, Astra, February 5, 2025; <https://www.getastra.com/blog/security-audit/third-party-data-breach-statistics/>

⁶110+ of the Latest Data Breach Statistics [Updated 2025], Emily Bonnie, Secureframe, January 3, 2025; <https://secureframe.com/blog/data-breach-statistics>



Tariffs and their Impacts on the Life Cycle of Construction Contracts

By Jill Jaffe & Natalie Cuadros

The United States and several countries around the world have been compelled to revisit existing trade structures in light of the recent Executive Orders issued by President Donald Trump imposing varying degrees of tariffs.

While this development has widespread implications for a broad range of industries, construction projects face unique uncertainties that impact the life cycle of a contract, from procurement to completion. All parties to a construction project, from owners to contractors to designers, must prepare any contracts or Requests for Proposal in a way that proactively addresses the treatment of tariffs so that expectations are clear on all sides.

The Definition of “Force Majeure” in a Contract

A key feature of tariffs is their unpredictability. In contracts, “force majeure” provisions allocate the risk of loss if a party’s performance becomes impossible or impracticable, due to some exceptional, un-

anticipated event, outside the parties’ control. The underlying principle, outlined in Cal. Civ. Code § 3526, is that a person should not be responsible “for that which no man can control.” When applied, the clause generally excuses a party’s inability to perform or provides for an extension of the time by which that party may perform under the contract.

Parties to a contract may define what constitutes a “force majeure” event and commonly rely on categories such as natural disasters, labor strikes, or other events that are not foreseeable. Traditionally, regulatory changes, taxes, tariffs and other project impacts that may result in price escalation are not included in the definition of “force majeure.” Moreover, in California, the contractor or subcontractor who agrees to complete a specified scope of work for a specified price, usually bears the risk of price escalation.

Courts have emphasized the importance of using precise language in force majeure provisions in recent years, after

President Trump imposed tariffs during his first term in office. In *Shelter Forest Int’l Acquisition, Inc. v. COSCO Shipping (USA) Inc.*, 475 F. Supp. 3d 1171 (D. Or. 2020), a federal court determined that a force majeure clause of a maritime service contract between carrier based in China and a shipper based in the United States did not, on account of a “trade war” between the countries, excuse the shipper’s non-performance of the contract’s minimum quantity provision. The force majeure clause “excused either parties’ nonperformance for ‘acts of god, strikes, embargoes, or events similarly beyond the knowledge or control of either party’ but not ‘commercial contingencies, for example, changing markets, poor management decisions and business declines, etc.’” *Id.* at 1186. Because the shipper had been well-aware of this provision and the impending tariffs at the time of entering into the contract and also continued to ship *after* the tariffs were implemented, the court determined that it could not belatedly seek

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relief through the force majeure clause. *Id.*

Parties to construction contracts should be mindful of the language used in any force majeure clauses and scrutinize whether the definition of “force majeure” includes changes in the market. Alternatively, the parties may elect to expressly exclude tariffs from the definition of “force majeure.”

Commercial Contingencies – Allocating Risk of Material Cost Escalations

Another way parties can set expectations at the outset of a project is by defining limits of how much either party will pay in the event that construction materials escalate in price. Tariffs may result in impacts to the costs of commonly-used construction materials imported from other countries, such

as steel or other metals. If the parties set a “ceiling” on material costs that applies even where tariffs are imposed or include an escalation clause that is tied to an agreed upon index, then there will be less room for dispute if the price for materials exceeds this limit. Selecting the best arrangement will depend on the specifics of your project.



What's Up with WOTUS?

By Rebecca Hays Barho & Sara Johnson

Surprising to no one, the issue of what features will be regulated as waters of the United States (WOTUS) was not settled for good by the Biden Administration's promulgation of the "Revised Definition of 'Waters of the United States' Rule" (2023 Rule), the U.S. Supreme Court's (SCOTUS) 2023 decision in *Sackett v. EPA* (Sackett), or the Biden Administration's subsequent promulgation of the "Conforming Rule" issued to comply with *Sackett*.

Instead, project proponents today are faced with the prospect of fresh updates to the definition of WOTUS, as well as a series of changes to U.S. Army Corps of Engineers' (Corps) Clean Water Act (CWA) Section 404 permitting.

The purpose of this article is to provide an overview of actions already taken under President Trump's second administration and to describe what project proponents might be able to expect in the coming months and years. As with all things WOTUS, perhaps the only thing one can expect with certainty is that litigation will ensue.

Setting the Stage: Executive Orders

Since his inauguration, President Trump has issued a number of Executive Orders (EOs) that have or are expected to have implications for the administration of the CWA and, in particular, the definition of WOTUS and the Corps' Section 404 permitting program. For example, Section 4(a) of Trump's EO titled "Declaring a National Energy Emergency" specifically directs the Corps to identify within 30 days permit actions that would facilitate the Nation's energy supply for expedited permitting under the nationwide permit program and emergency provisions of the CWA. In support, Section 5(d) of the EO titled "Unleashing American Energy", directs the Secretary of Defense (and peer resource agencies) to "undertake all available efforts to eliminate all delays within their respective permitting processes, including through, but not limited to, the use of general permitting and permit by rule," i.e., the general permit approach of the nationwide permit (NWP) program.

Waters of the United States (WOTUS)

On March 14, 2025, EPA Administrator Lee Zeldin announced the availability of a guidance memorandum providing clarity on how Sackett should be applied in determining whether a given wetland should be considered jurisdictional (Sackett Guidance). In *Sackett*, SCOTUS held, among other things, that an adjacent wetland will only be considered a WOTUS where there is a "continuous surface connection" to a jurisdictional WOTUS. The Guidance rescinds all previous guidance and training materials that assume a "discrete feature" (e.g., non-jurisdictional ditch, swale, pipe, or culvert) will establish a continuous surface connection, including several memos to the field that were removed from the Corps' jurisdictional resource webpage. The Sackett Guidance establishes the following two-part test to determine whether an adjacent wetland is jurisdictional:

1. Is the water body adjacent to the subject wetland a traditional navigable water

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or relatively permanent water connected to a traditional navigable water?

2. If yes, does the wetland have a continuous surface connection to that water body (i.e., does the wetland directly abut the water where it is difficult to determine where the water ends and the wetland begins)?

In circumstances where there will be temporary interruptions to surface connections (e.g., drought and low tide events), the *Sackett* Guidance indicates the Corps will resolve these circumstances on a case-by-case basis.

On March 24, 2025, the EPA and the Corps (collectively, Agencies) published in the Federal Register a notice titled “The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations” (WOTUS Notice). The WOTUS Notice announced that the Agencies will hold listening sessions in April-May 2025 to solicit public input on future administrative action on “key topics” relating to implementation of the definition of WOTUS in light of *Sackett*. These topics include, among others:

- The scope of the definition of “relatively permanent”

waters and to what features the phrase applies.

- Whether certain characteristics (e.g., flow regime or seasonality) should inform the definition of “relatively permanent.”
- The scope of the definition of “continuous surface connection,” to which features the phrase applies and what it means to “abut” a jurisdictional water.
- Interpretation and implementation of the language in *Sackett* providing that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”
- The scope of jurisdictional ditches.

Each listening session is directed at a particular sector, with no date yet announced for a listening session for the general public or local governments.

Following these listening sessions and analysis of any public comments received, the Agencies will determine additional administrative actions (e.g., guidance, trainings, rulemakings) that are necessary to further clarify the definition of WOTUS. The Agencies

may move to publish a final rule without first publishing a proposed rule and receiving public comment under the Administrative Procedure Act’s (APA) “good cause” exception to the usual rulemaking process, which was encouraged in the President’s April 9th Executive Order “Directing the Repeal of Unlawful Regulations.” However, to minimize APA legal challenges the new WOTUS rule, the Administration may instead pursue the typical full rulemaking process.

In addition to the new *Sackett* Guidance and plans by the Agencies to potentially take further administrative action, there currently are at least four separate, ongoing challenges to previous WOTUS definitions and/or the implementation of the WOTUS definition following *Sackett*. Several U.S. District Courts have stayed proceedings on implementation of the Biden Administration’s Conforming Rule at the request of the Trump Administration with the defendant government filing status reports. In the meantime, the Corps is still implementing the pre-2015 regulatory framework in states that were named as plaintiffs in those suits (approximately half of the country), while the Conforming Rule is being implemented in the rest of the country. It

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is possible that the stays will continue to be extended to allow the Trump Administration additional time to take administrative action on WOTUS.

Expediting Permitting using CWA Emergency Provisions

As noted above, President Trump has directed federal agencies to use every means at their disposal to expedite permitting and eliminate other delays for domestic energy projects. In particular, this includes direction to the Corps to utilize its emergency permitting provisions to achieve the Administration's energy-related goals. Corps' CWA regulations define an emergency as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time." In practice, the emergency permitting procedures of the CWA are typically invoked following extreme weather or public safety events (i.e., prior Fort Worth District guidance gives hurricanes and bridge collapses as examples) rather than for instances of economic hardship. The relevant CWA regulations outline requirements for a reasonable public notice and comment attempt with the

division engineer ultimately instructing the district engineer on the emergency permit processing procedures.

To date, there do not appear to have been any permits issued by the Corps under these emergency provisions. Nevertheless, in the first few weeks of February, the Corps identified nearly 700 projects that could be subject to fast-tracking under the agency's emergency permitting provisions. Reacting quickly, on February 20, 2025 the Center for Biological Diversity (CBD) filed a 60-day Notice of Intent (NOI) to sue the Corps over the agency's emergency permit reclassifications, alleging that the Corps failed to comply with their notice requirements, failed to reasonably apply the defined term "emergency," and that the Corps' emergency permitting regulations are beyond the scope of the limited emergency authority explicitly referenced in the statutory text of the CWA. This last claim follows SCOTUS' decision in *Loper Bright*. Page 13 of the NOI identifies the projects the Corps allegedly identified as being eligible for emergency treatment. The same day, reports indicated the Corps had rescinded the list and planned to spend more time to determine which projects meet the criteria set forth in the declaration of a National Energy Emergency.

On April 1, 2025, the Corps' Northwestern Division announced that it had approved the use of special emergency processing procedures in accordance with the National Energy Emergency established by the EO of the same name. A similar announcement was then made by the Corps' Great Lakes and Ohio River Division that same day, along with an indication that the emergency procedures would be posted to that division's website no later than April 15, 2025.

Permitting Pause and Reclassification

In response to the EO *Unleashing American Energy*, the Corps temporarily paused permitting on February 5, 2025 for all "green energy" projects. "Green energy" projects seemed to be broadly interpreted with reports indicating renewable projects ranging from wind, solar, hydropower and battery energy storage (BESS) and electric transmission serving such facilities as being impacted by the freeze. The short-lived pause was lifted the next day for most projects except for wind energy facilities, which continue to be paused.

Forthcoming NWP Reissuance

The current NWPs and their general conditions that were issued in 2021 are set to expire

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in March 2026. On April 3, 2025, the proposed 2026 NWP reissuance arrived at the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review ahead of their publication in the Federal Register. Historically, the Corps publishes a proposed rule to reissue NWPs more than a year in advance of the expiration date in order to get through the CWA 401 certification and administrative rulemaking requirements. The outgoing Biden Administration signaled in the Fall 2024 Unified Agenda that the Corps would publish a Notice of Public Rulemaking in February 2025, as well as their intent to address prior comments received on NWP-12, which was the subject of much litigation. As noted above, the Trump Administration has indicated it will fully leverage the NWP program for streamlining traditional energy development. While the White House and Corps have not yet published any specifics on their intentions for the 2026 NWP reissuance, we can anticipate their review of the NWPs for energy and related transmission might be expanded to cover a broader swath of actions with fewer notice requirements. We might also see the Corps revising one or more General Conditions to aid in streamlining certain

energy projects. For example, it is possible General Condition 18 (relating to compliance with the Endangered Species Act) or General Condition 20 (relating to compliance with the National Historic Preservation Act) could be altered in a way that would reduce the instances in which a project proponent must provide pre-construction notification to the Corps. Given President Trump has issued several EOs that seek to slow or stop wind energy projects, it is also possible that the Administration may propose not to re-issue NWPs that would streamline wind energy or would otherwise alter when these NWPs would be available for use. Finally, agencies with NWP-adjacent jurisdiction, such as the U.S. Fish & Wildlife Service, may likewise alter their regulatory frameworks or guidance to accomplish the Trump Administration's objectives. For example, the U.S. Fish & Wildlife Service could narrow the set of circumstances that agency believes would trigger notification under General Condition 18.

Looking Ahead

As during President Trump's first 30-days, we expect permitting to remain a top priority for reform and developments, which means a fluid situation for project proponents. We recommend that permittees

monitor agency alerts, Federal Register notices and all related litigation closely, while staying in regular contact with the federal resource agencies overseeing your project permitting. While the highlights covered above directly implicate CWA 404 permitting, we could also see incidental delays to 404 permitting as a result of other Administration actions that disrupt the usual federal consultation process. For example, a significant reduction in the federal workforce as a result of the efforts of the Department of Government Efficiency could slow review of permit applications, jurisdictional delineations and verification of pre-construction notifications, while a pause in the U.S. Fish & Wildlife Service's consultations under Section 7 of the Endangered Species Act for renewable energy would also pause issuance of CWA 404 permits or NWP verifications while the Corps waits for clearance from their peer agencies. Executive Orders recently issued on April 9th and resulting agency actions will also have implications for the scope of permitting requirements and processes. At least for the next few months, uncertainty may be the only certainty – so be sure to stay tuned!



The AI Thirst Trap

By Lori Anne Dolqueist

Artificial intelligence (AI) has the potential to transform the water industry. AI solutions are being developed to detect potential water supply failures before they happen, optimize water quality monitoring and treatment, assess the lifespan of infrastructure components and assist with drought and flood predictions. As concerns about the availability of future water resources grow in tandem with concerns about water affordability, the possibility of harnessing this new technology to minimize costs and maximize productivity becomes even more enticing. The need for massive amounts of water to support the AI industry, however, could cancel out any potential gains in water efficiency and sustainability through the use of AI.

Shortly after taking office in January 2025, President Trump announced the Stargate Initiative, a \$500 billion joint venture to expand U.S. artificial intelligence infrastructure led by tech giants Oracle, OpenAI and SoftBank. The purpose of the Initiative is to ensure the

country's dominance in AI and prevent U.S. reliance on foreign AI infrastructure. The first phase involves expansion of AI facilities through the construction of AI data centers, beginning in Texas.

The data centers required to run large AI models use massive amounts of power, which in turn generates substantial amounts of heat. Natural language processing and deep learning – core components of AI – require computing capacity that can conduct more calculations more quickly. It has been estimated that the processing units optimized for these workloads now emit up to five times more heat than previous models. Cooling systems are necessary to prevent servers from overheating.

Although cooling systems can use air-cooling or water-cooling methods, water cooling appears to be the preferred cooling method for AI. Water is better than air at dispersing heat and water cooling uses less energy than air cooling, thus reducing the need for associated energy transmission,

distribution and generation capacity. Given the already vast energy consumption by AI data centers, the energy saved by water cooling (approximately ten percent), can mean the difference between success or failure for a data center project.

Large data centers are estimated to use approximately 300,000 to 550,000 gallons of water per day. By contrast, in 2024, the California statewide average residential use per capita was 59 gallons per day. This means that on an average day, a large data center can use almost as much water as 10,000 people. Moreover, a 2021 study of the environmental footprint of data centers in the United States showed that approximately one-fifth of the data centers were located in the water-stressed regions of the West and Southwest.

To avoid being forced to choose between shutting down operations or overtaxing community water supplies, technology companies must look for ways to reduce water use. Water recycling and/or

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reclamation of non-potable water at data centers is probably the most obvious option and is already being implemented at certain locations by companies such as Google. Seawater may also be used for cooling, if available at the data center location and if corrosion concerns can be addressed. Furthermore, for data centers

located in drought prone locations, air cooling technology may be the preferred option, despite the higher energy use. (Although, there may be offsets to water savings due to the water used in power generation.)

As AI evolves from novel technology to a business imperative, water suppliers may struggle to meet the

growing demand. Water usage by thirsty data centers could exacerbate already strained water resources in the U.S. and worldwide. New AI offerings promise to revolutionize the provision of water service by helping water utilities operate more efficiently, but to realize these benefits AI must face the issue of water sourcing head on.



WIFA's Call for Projects: A New Approach to Water Supply Development

By Liz Cousins, Kyle Hamilton & Kyle Howe

Water issues are some of the most complex we have. Practical considerations such as geography and population dictate water needs, but water providers seeking to develop projects must also consider how to fund them, finding the right contractor, compliance with regulatory requirements and numerous other issues that may halt or delay a project. Facing variable and multi-faceted issues, determining the optimal water project development solution may be complicated. So, what should water providers do when the best development solution is unclear?

The Water Infrastructure Finance Authority of Arizona (WIFA) is conducting a unique procurement that may provide an option. Last fall, WIFA issued a Solicitation for Procurement, inviting proposals to develop water supplies to be imported into Arizona, with funding through its Long-Term Water Augmentation Fund (LTWAF). However, WIFA's procurement was not a typical procurement where the owner lays out project requirements for contractors to

bid on. Rather than specifying the type of project, location, or anticipated parameters for a specific project, WIFA asked contractors to bring their own project ideas and concepts to the Solicitation. In WIFA's Solicitation for Procurement, it described its goals of importing water and asked contractors to propose project solutions. Contractors were asked to provide information on potential financing options, project schedule and locations, anticipated project outcomes, what challenges the proposed project would present and how any challenges would be mitigated. Notably, depending on the types of proposals received from the request for proposals, WIFA is considering pursuing more than one project to meet its water supply goals.

WIFA is conducting the procurement in three phases. In the first phase, WIFA solicited qualifications and water augmentation proposals from interested contractors. WIFA will score the qualifications and proposals to determine which teams and project

ideas are viable. Teams and projects that qualify and appear sufficiently viable will move on to the second phase. In the second phase, WIFA will pay qualified teams to advance their proposals under task orders – essentially mini contracts for the purpose of advancing the teams' ideas. The task orders are meant to consider various aspects of a project, including economics, technology, environmental and community impacts and sustainability benefits. In the third phase, WIFA will consider which project or projects will most likely meet its goals and will enter one or more implementation agreements to develop the project(s). It is not until this third phase that WIFA intends to fully flesh out the details of the project(s) such as permitting, financing, delivery method, construction, operations and water volume and cost.

WIFA's procurement is ongoing but has been considered a success so far. The initial qualifications phase resulted in 17 proposals from a wide range of teams. WIFA is currently evaluating the proposing teams

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and projects and narrowing them down to determine which project(s) will most likely meet its stated goals.

It remains to be seen whether this type of procurement will be used by California owners or agencies. WIFA's situation is unusual – WIFA has secured a significant amount of funding and its task is to bring in water for the benefit of the whole state rather than a particular city, town, or district. WIFA's broad mandate made this style of procurement easier to implement compared to, for example, a small California water agency with limited time, budget and real estate. However, there is potential for similar procurements to be used with great success in California if appropriate adjustments are made.

California agencies may find that inviting qualified industry players to advise on project concepts could lead to innovative proposals and concepts that may not have been considered under traditional approaches. Qualified industry contractors

may propose solutions that are more efficient and cost-effective or have a smaller environmental footprint or project timeline than what the agency may have considered on its own. Similarly, the best funding approach for a project may be unclear and having a process which is open to various funding approaches can result in cost savings and more dependable funding for the agency. Further, using task orders to advance parts of various proposals gives an agency time to eliminate proposals with significant issues and to get a clearer picture of what implementation may look like before entering a more substantial and costly construction agreement.

On the other hand, a call for projects approach similar to that being used by WIFA may not be the right fit for every project and will likely introduce risks and drawbacks that could discourage some agencies. Such an approach may not, for example, be suitable where an agency already has a clear picture of the needed project or desired

procurement method, based on their in-depth understanding of the needs of their customers and constituents. Further, contractors have different priorities than agencies. Contractors may look to remain involved in ways that do not benefit the agency or its operations – an agency hoping for a design-build project may receive proposals for public-private-partnerships where the contractor hopes to operate and maintain the project with continuing income streams. A more traditional proposal format allows the agency to define what the relationship will look like before going to bid.

WIFA's procurement model is innovative and is already showing promising results. While not a fit for all projects, California agencies looking for creative solutions to complex problems may benefit from WIFA's call for projects procurement approach and may consider similar procurements, with adjustments to accommodate their own project goals, in the near future.

California Water Views

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California Water Views

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