



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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

Chairwoman - Jeanine Jones; Executive Director - Tony Willardson; Editor - Michelle Bushman; Subscriptions - Julie Groat

### **ADMINISTRATION/WATER QUALITY** **Corps/EPA/Clean Water Act/Pebble Mine**

An interagency meeting held March 9-11, revealed lingering questions about the environmental review of the Pebble Mine site in Alaska located within the Bristol Bay and Cook Inlet watersheds. The site contains the largest gold, copper, and molybdenum deposits in the world. It is anticipated mining would have substantial impacts on waters of the United States (WOTUS), including the permanent loss of 3559 acres of jurisdictional waters, including 3443 acres of wetlands, 55 acres of ponds and lakes, 50 acres (81 miles) of stream channels, and 11 acres of marine waters. An additional 2807 acres of jurisdictional waters would be degraded, and 510 acres temporarily affected due to dredge and fill activities. To treat discharges from the mine, two tailing storage facilities encompassing 3867 acres with five associated dams are proposed and would operate in perpetuity to ensure water quality in the region. The Bristol Bay watershed is about the size of West Virginia and is home to some of the world's most productive fisheries. Many stakeholders, including regional tribes and fishermen, are concerned about the permanent impacts to fish habitat and water quality that would affect fishery productivity.

The Army Corps of Engineers (Corps) released a preliminary final environmental impact statement (PFEIS) in February that was the focus of the meeting. The Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), National Parks Service (NPS), the Curyung Tribal Council, and others were present to discuss the PFEIS. Specifically, notes of the meeting said EPA questioned the comprehensiveness of the data used to determine: (1) impacts on wetlands, streams, and fish; (2) how "regionally important" wetlands were determined; (3) water treatment plans, as water treatment has not been shown to be viable at the proposed scale; (4) gaps in the groundwater model parameters; (5) "non-conservative" chemical release rates, which they believe underestimate release of metals; and (6) the representativeness of samples used for toxicity testing, among other things.

NPS had questions regarding the comprehensiveness of the survey of species and biological communities included in certain assessment

areas, and the impact of nutrient deficiencies on downstream habitat due to effluent discharges into headwaters stream habitat. Both agencies were also concerned about statements that seem to downplay the cumulative effects on fish habitat. USFWS agreed with EPA and NPS concerns and noted that there were internal inconsistencies throughout the document regarding cumulative impacts. There were also broad fears that the current compensatory mitigation plan is too high level, and that the Corps would not be holding public hearings regarding the development of the plan. The Curyung Tribal Council concurred with many of the agencies' concerns and raised many of their own with regard to habitat, water, and fisheries impacts.

In 2014, EPA pre-emptively vetoed the Clean Water Act Section 404 permit for the Pebble Mine before the Corps had completed their environmental review based on hypothetical scenarios that were not part of the actual permit application. In 2019, EPA withdrew their veto, noting there were better processes to resolving issues with the Corps review as the record developed (WSW #2360). Three legal challenges to EPA's 2019 decision were rejected on April 17, by Judge Sharon Gleason, U.S. District Court for the District of Alaska, citing the fact that the decision is not subject to judicial review.

The Corps is scheduled to release its final EIS this summer, with a final permit determination at least 30-days later.

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

On April 23, the U.S. Supreme Court issued a ruling in *County of Maui v. Hawaii Wildlife Fund*, vacating and remanding the 9<sup>th</sup> Circuit's decision. The Court held that the provisions of the Clean Water Act (CWA) require a National Pollution Discharge Elimination System (NPDES) permit when there is a "functional equivalent of a direct discharge," which may include some discharges through groundwater. Justice Breyer's opinion was joined by Chief Justice Roberts and Justices Ginsberg, Sotomayor, Kagan, and Kavanaugh. Justice Kavanaugh also filed a concurring opinion to emphasize some additional points. Justices Thomas and Gorsuch wrote one dissenting opinion, and Justice Alito wrote a separate dissenting opinion.

The Court rejected the 9<sup>th</sup> Circuit’s “fairly traceable” interpretation, noting that Congress did not intend to give EPA such broad authority. The structure of the CWA makes clear that the States have substantial responsibility and autonomy when it comes to groundwater pollution and nonpoint source pollution, and EPA does not have authority to seriously interfere with this state responsibility. On the other hand, the interpretation offered by the plaintiff County of Maui and the Solicitor General on behalf of EPA, that all discharge to groundwater is excluded, would create an unreasonable loophole. The Court sought to identify a middle ground between the two extreme interpretations, and noted that EPA has applied the NPDES permitting provision to some discharges through groundwater for over 30-years, with no evidence such permits could not be administered, or that it was an unmanageable expansion of the statute’s scope.

The Court said: “The statute’s words reflect Congress’ basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater. We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be ‘from any point source’ when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.”

The Court noted that many factors may be relevant in determining whether a pollutant discharged through groundwater is a functional equivalent of a direct discharge to navigable waters. Time and distance will be the most important factors in most cases. The Court offered the examples of: (1) a 100-year migration of pollutants through 250 miles of groundwater to a river, which would not ordinarily require a permit; (2) where a pipe ends 50 miles from navigable waters and the pollutants mix with groundwater and other materials in the aquifer, ending up in navigable waters many years later, in which case permitting requirements likely would not apply; and (3) where a pipe emits pollutants only a few feet through groundwater before discharging into a navigable water.

Other relevant factors might include the nature of the aquifer material, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount discharged at the point source, how or where the pollutant enters the navigable waters, and the degree to

which the pollution has maintained its specific identity. Additional future guidance may come from future court cases and administrative guidance from EPA, the Court said. Justice Thomas’ dissent argued that the functional equivalent standard creates practical problems of its own, and pointed out that EPA has so far only provided limited guidance and recently changed its position. Justice Alito’s dissent argues that this is a nebulous standard, leaving the regulated community subject to inconsistent and arbitrary application. [https://www.supremecourt.gov/opinions/19pdf/18-260\\_5i36.pdf](https://www.supremecourt.gov/opinions/19pdf/18-260_5i36.pdf)

## **WATER RESOURCES** **Groundwater/Southern Nevada Water Authority**

On April 17, the Southern Nevada Water Authority (SNWA) announced it would not appeal a recent decision by Judge Robert Estes in Nevada’s 7<sup>th</sup> Judicial District Court, effectively ending SNWA’s plans to pursue a 300-mile pipeline to pump groundwater from remote basins in Eastern Nevada to Las Vegas. On March 9, Estes denied an appeal by SNWA to grant it groundwater rights for Spring Valley, Cave Valley, Dry Lake Valley and Delmar Valley, which were needed to move forward with the pipeline.

The ruling states: “This Court finds that the water appropriations for Spring Valley threaten to prove detrimental to the public interest because the awards, at the current well configuration, result in water mining, will never reach equilibrium, and will result in depletion of the Spring Valley aquifer.... The Court also finds that the Engineer has provided substantial evidence that there is little or no water available for appropriations in Cave, Dry Lake or Delmar Valleys; [and] that the water the Engineer granted to SNWA is already appropriated down gradient, resulting in double appropriation, is inconsistent with Nevada law and will conflict with rights in the down gradient aquifers.” *White Pine County v. Nevada State Engineer*, Case No. CV-1204049 (and consolidated cases).

This is likely the end of a 30-year effort to develop the pipeline, which has faced significant legal challenges along the way (See WSW #2310, #1976, #1883, #1840, and #1694). SNWA still owns land with associated water rights in White Pine and Lincoln counties on the Nevada-Utah border and has an open application for the pipeline’s right of way with the Bureau of Land Management. SNWA plans to present an update after the current coronavirus pandemic calms down, focusing on “strengthening beneficial partnerships with other Colorado River states as well as further advancing Southern Nevada’s world-recognized water conservation efforts.”

---

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