

A close-up photograph of water splashing into a pool, creating ripples and bubbles. The water is clear and blue, and the background is a soft, out-of-focus light blue.

UNDERSTANDING YOUR CLUB'S WATER SUPPLY

Trends Affecting Availability, Cost and Regulatory Compliance

By Bradley J. Herrema

Water is essential to club operations, and a reliable supply is often taken for granted by clubs and their members. According to the United States Golf Association, on average, 80 percent of maintained turf grass is irrigated in the United States—for most golf and country clubs, irrigation water supplies serve as the lifeblood of their golf courses. Following labor, irrigation water supply costs are the second-largest expense for many clubs. The landscape surrounding water supplies is rapidly changing—more volatile weather, increasing users and demands for water are forcing clubs to rethink approaches to supply management and planning, and assumptions that a steady supply is a given.

Increasing Scarcity

Water supplies available to clubs continue to grow scarcer with climate changes and increasing claims on finite water supplies. According to the Environmental Protection Agency (EPA),

Climate change is changing our assumptions about water resources. As climate change warms the atmosphere, altering the hydrologic cycle, changes to the amount, timing, form and intensity of precipitation will continue. Other expected changes include the flow of water in watersheds, as well as the quality of aquatic and marine environments. These impacts are likely to affect the programs designed to protect water quality, public health and safety.

In the western United States, this is witnessed with a greater portion of annual precipitation falling as rain when it had previously fallen as snow, as well as altered timing of snowmelt runoff. This is a change in the paradigm in which snowpack was previously relied upon as a means of water storage. As existing surface water storage facilities such as dams and reservoirs were built based on potentially outdated assumptions, these facilities may not be able to capture the optimal amount of precipitation in the future.

At the same time, demands on water supplies are increasing. In many cases, water users are growing more efficient and using less water on a per capita basis, says the Pacific Institute in a report on water use trends. However, there are increasing demands for water for new uses, or uses that may not have been prioritized in the past, such as recreational uses or aesthetic concerns. There is also increased attention on ecosystem requirements, especially where endangered or protected species are involved.

Another example of how the perception of water supplies is shifting due to increasing demand is in the case of treated wastewater effluent, or “recycled water.” Years ago, when many clubs entered into arrangements with the owners of wastewater treatment plants, recycled water was viewed as a liability for the plant owner; a turf facility, such as a golf course, was seen as an ideal allocation for the treatment plant owner to discharge its recycled water—and the associated liability. Today, however, recycled water supplies are an asset due to their reliability and, in many cases, lower costs and public relations benefit.

Increasing Regulation and Oversight

Water supplies available to clubs are also the subject of increasing oversight and regulation. Regulators are seeking additional information as to quantities of water used and the purposes of the use. For example, California requires all water right holders diverting 10 acre-feet or more of surface water annually to measure, monitor and report water diversions with specific measurement devices.

Another example of greater regulation of particular supply types is seen in California’s 2014 Sustainable Groundwater Management Act (SGMA). Passed in the midst of one of the worst droughts in California history, SGMA represented the first statewide regulation of groundwater uses. SGMA requires that priority groundwater basins within the state be brought into a sustainable condition—extractions of groundwater roughly equal inflows into groundwater basins without causing certain identified “undesirable results”—within a 20-year time frame. In some groundwater basins, it is estimated that this could require a reduction in groundwater pumping by up to 60 percent.

The recent 2012-2016 California drought also provided state regulators with the opportunity to enact greater water conservation requirements—both prohibiting certain uses as well as requiring a set percentage water use reduction. While a break in the drought conditions has led to relaxation of the use reduction requirements, the prohibitions on “wasteful” uses remain and are anticipated to be made permanent. California restrictions that would affect clubs include:

- Restaurants may only serve water upon customers’ requests;
- Water may not be used to hose down hardscape;
- Water features and fountains must use recirculated water; and
- Outdoor irrigation may not be conducted within 48 hours of measurable precipitation.

In the area of water quality regulation, both federal and state laws regulate the impact that clubs’ activities may have on receiving waters—federal law extends to the impacts on surface waters, while state law may also regulate impacts to groundwater. Water quality monitoring and detection is one area in which technology continues to advance. One trend clubs should especially note is that as technology improves to allow detections of pollutants at lower levels, regulations and restrictions on those pollutants are sure to follow.

WOTUS

One area of uncertainty in regard to water quality is the reach of the federal Clean Water Act (CWA) jurisdiction. Since 1972, the federal Clean Water Act has regulated the discharge of pollutants and the placement of fill into “navigable waters,” which are defined by the act as “the waters of the United States,” (WOTUS). There has been substantial uncertainty, however, as to the extent to which certain non-navigable waters, like ephemeral tributaries to navigable waters, or certain aquatic features, like wetlands, may be considered “waters of the United States.” This definition might require clubs to obtain federal permits for land management activities involving pesticide and fertilizer applications, stream bank restorations, golf course renovations and new construction.

In June 2015 the Obama administration published the Clean Water Rule: “Definition of Waters of the United States,” which expanded federal CWA jurisdiction over many bodies of water.

In November 2017 under the Trump administration, the EPA and U.S. Army Corps of Engineers (Corps) issued a “rescind-and-replace” notice in which they stated that such action was necessary for “regulatory continuity and clarity.” On the heels of that decision and notwithstanding that the rule actually became effective in 2015, the EPA and the Corps issued a final decision providing that the rule will not become effective until an “applicability date” of Feb. 6, 2020.

Advocacy leaders like the National Club Association continue to provide their support to the current EPA and members of Congress, as well as advocating in court proceedings in an effort to change or stop WOTUS.

Under the Trump administration, it seems likely that prior restrictions will be relaxed, but additional litigation will follow, and it is unlikely a clear resolution will be reached in the near term. It is likely that enforcement will generally be less under the current EPA Administration. Finally, it can be expected that the EPA will continue to seek to use the regulatory process to limit federal jurisdiction to the greatest extent possible. However, the states, particularly those with more stringent environmental regulations, may in equal measure ramp up their enforcement activities.

The reach of the CWA jurisdiction in regard to its possible extension to groundwater has recently been put at issue

as a result of a Ninth Circuit Court of Appeal opinion from February 2018. In *Hawai'i Wildlife Fund v. County of Maui*, the County of Maui was disposing of its wastewater effluent through groundwater discharge wells, and the effluent eventually reached the Pacific Ocean. The Ninth Circuit, using a “fairly traceable” test, found these discharges were subject to the CWA and therefore potential federal permitting requirements, in addition to state requirements. This reasoning could be applied to clubs’ facilities, such as retention ponds, surface impoundments, underground storage tanks, septic tanks and injection wells that discharge to groundwater through various types of potentially “discrete conveyances.” There is a split among the circuit courts as to the potential extension of CWA jurisdiction to groundwater.

Following the Hawai'i Wildlife Fund decision, the EPA took the unusual step of seeking public comment on whether subjecting such releases to CWA permitting is consistent with the text, structure and purposes of the CWA. This is a topic to continue to watch—the deadline for comments was May

21, 2018, and it remains to be seen what the EPA will do with those comments.

Increasing Costs

Against the backdrop of increasing demands for water supply and increasing regulation and oversight, costs associated with water supplies are increasing. According to Circle of Blue, a water news organization, the cost of residential water in America’s 30 largest cities rose by 4 percent in 2017—following years of more drastic increases.

Water utilities face a difficult task of earning sufficient revenue to repair basic infrastructure, maintaining affordable rates for low-income customers, and achieving those goals while selling *less* product. Outside of lifeline or base rates for low- or fixed-income customers, these factors have led to water rate increases. Generally, there are two components to water rates: those that are fixed—paid regardless of the amount of water used, and those that are variable—paid based entirely on the quantity used.



DICK KOPPLIN KURT KUEBLER TOM WALLACE LISA CARROLL SAM LINDSLEY LEN SIMARD JACK SULLIVAN ARMEN SUNY

SPECIALIZING IN GENERAL MANAGER/COO, DIRECTOR OF GOLF, GOLF COURSE SUPERINTENDENT, EXECUTIVE CHEF, RACQUET SPORTS PROFESSIONAL, COMMUNITY ASSOCIATION MANAGER, ASSISTANT GENERAL MANAGER, CLUBHOUSE MANAGER/FOOD & BEVERAGE DIRECTOR AND FITNESS DIRECTOR SEARCHES, AS WELL AS STRATEGIC PLANNING AND CONSULTING SERVICES FOR PRIVATE, RESORT AND DEVELOPER-OWNED PROPERTIES.

KOPPLIN KUEBLER & WALLACE

THE MOST TRUSTED NAME IN EXECUTIVE SEARCH AND CONSULTING

WWW.KKANDW.COM

ATLANTA / CLEVELAND / DENVER / JUPITER / NAPLES / SCOTTSDALE

2017
EXECUTIVE SEARCH FIRM
OF THE YEAR
11TH YEAR IN A ROW

NATIONAL
CLUB
ASSOCIATION
EXECUTIVE PARTNER

In general, water users are becoming more efficient and using less water per capita. With water rates set based on forecasted water usage to achieve a specific amount of income, if water usage declines unexpectedly, funds collected through water rates will not meet the income requirement and would then need to be raised as water use drops to meet that income requirement.

Focus on Infrastructure

The condition of the nation's infrastructure—including its water supply delivery and water treatment infrastructure—has been and will continue to be a focus. The American Society of Civil Engineers gave the U.S. water infrastructure a D+ grade in 2017. It estimated that maintaining, operating, upgrading and replacing the U.S.'s water infrastructure could cost as much as \$4.8 trillion over the next decade. Replacing and expanding water pipes alone could cost \$1 trillion through 2035, according to the American Water Works Association.

Many cities are increasing rates to build funding for new infrastructure. Citizens Energy Group, a water provider for Indianapolis, plans to invest upwards of \$95 million. Rates (a monthly volumetric charge for water consumed) will increase 15 percent for a family of four using 50 gallons per person per day.

The Los Angeles Department of Water and Power is preparing to invest \$6.3 billion over the next five years on water infrastructure projects. Much, if not all, of these infrastructure improvements costs will be borne by water customers through their water rates.

The potential for federal funding for some of these projects may arise if the Trump administration is able to move forward with an infrastructure bill. While meaningful movement of an infrastructure bill seems unlikely at present, in the event infrastructure funding does become available, clubs should be aware of potential opportunities for additional water supply options.

Remain Alert

Between uncertainties over the federal focus on infrastructure, increasing water supply volatility due to climate change, and increasing demands on existing water supplies, getting a better handle on the details of your club's water supply and likely changes to its specific water sources is well worth your time. The checklist to the right is intended to help ensure your club is aware of its existing compliance obligations and to help it strategize on ways to optimize its supply.

For more information on timely water news, trends and topics, including an annual water rights compliance deadlines checklist for California, see Brownstein's Water Blog: <http://water.bhfs.com>. **CD**

Bradley J. Herrema is a shareholder at Brownstein Hyatt Farber Schreck where he serves as special water counsel and leader of the firm's water practice group. He can be reached at 310-500-4609 or bherrema@bhfs.com.

Compliance and Optimization Checklist for Private Clubs

What is my club's water source?

- Is it surface water, groundwater, local or imported, recycled?
- If delivered, is it by contract or regular utility service?
- Is my club paying for water treatment where it is not needed?
- Is my club exercising water rights associated with the real property itself?

What changes to my club's water source should I be anticipating?

- Increased demands on the water source—even sources like effluent that seemed reliable before.
- Increased attention on the quantity being used.
- Potential conservation regulations.
- Need for infrastructure repair or replacement.

What are my club's water supply and water quality compliance obligations?

- Water rights are defined by source, timing, quantity, and any purpose of use limitations.
- Reporting requirements.
- Water quality regulations and restrictions.

Does my club have a plan for ensuring regulatory compliance?

- Are the club's obligations centralized in one place—not solely in the head of a longtime employee?
- Does the club have a "dashboard" that easily displays information and facilitates obligations tracking and reporting?

What does my club pay for my water supply?

- What are the key drivers of the costs?
- Do the costs originate from contract or by utility's rates?

What water supply alternatives does my club have?

- Is it possible to change to other, more cost-effective or more reliable supplies?
- Does my club have access to other supplies arising out of water rights associated with the property itself?

Does my club have unused assets that could be monetized?

- Are there options to offset the upfront costs of becoming more water efficient (e.g., turf abatement)?
- If my club can change to a less expensive supply, can the club monetize its prior supply?