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FEATURE ARTICLE

THE EBB AND FLOW OF THE FEDERAL CLEAN WATER ACT— EPA RELEASES NEW PROPOSED 'WATERS OF THE UNITED STATES' RULE DEFINING THE SCOPE OF THE ACT

By John Sittler and Paul Noto

The U.S. Environmental Protection Agency (EPA) released its new proposed "waters of the United States" (WOTUS) rule on December 11, 2018. The proposed rule has not yet been officially published in the *Federal Register*, but is expected to be published soon. The new proposed rule would replace rules enacted under President Obama and repeal protections on large stretches of U.S. waterways.

Background

The federal Clean Water Act (CWA) was passed in 1972 with the goal of reversing significant water pollution across the country by protecting "navigable waters." The general understanding of the term was that used by the Supreme Court in *The Daniel Ball*, 77 U.S. 557, 563 (1871)—waterways are navigable:

> . . .when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

By the time of the CWA, U.S. Supreme Court precedent had expanded the term to include non-navigable tributaries, if that was necessary to protect the navigable waterway. *See, Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). Unfortunately, Congress did not further define "navigable," but rather left it up to EPA and the U.S. Army Corps of Engineers (Corps), paving the way for decades of litigation that attempted to determine what waters the CWA protects.

The last time the Supreme Court spoke on the issue was in 2006 in *Rapanos v United States*, 547 U.S. 715 (2006). That case was a plurality decision, further muddying the issue and resulting in unclear precedent. *Rapanos* particularly focused on wetlands and the extent to which they are covered under the CWA. The late Justice Antonin Scalia, writing for the four-justice plurality, said that WOTUS can only refer to "relatively permanent, standing or flowing bodies of water" not "occasional," "intermittent," or "ephemeral" flows. Justice Kennedy, who voted with the plurality, but only through his separate concurring opinion, said that wetlands need only a "significant nexus" to a navigable water in order to be protected under the CWA.

The Clean Water Rule

In 2015, the Obama administration enacted the Clean Water Rule (2015 Rule) in an attempt to clarify what constituted navigable waters under the CWA. Key components included the inclusion of wetlands and ephemeral streams (those that only flow when it rains). Instead of adjudicating tributaries on a case-by-case basis, the 2015 Rule clarified that if a stream had a bed, bank, and high-water mark (physical features of flowing water), it garnered CWA protections. Regarding wetlands, the 2015 Rule used Justice Kennedy's "significant nexus" test but also provided they would be protected if they were within 100 feet, or within the 100-year floodplain, of a navigable waterway. This distance requirement in particular was met with opposition because it was not included in the proposed rule, only the final rule.

Although the EPA claimed that the 2015 Rule merely created certainty for 3 percent of the nation's

waterways, it was met with significant blowback, particularly from agriculture and industry groups. The 2015 Rule was repeatedly called a federal power grab, even with its explicit exemptions for certain farm waterways including puddles, ditches, artificial stockwatering ponds, and irrigation systems that would revert to dry land if irrigation were to stop.

One of the more vocal opponents of the 2015 Rule was then candidate Donald Trump who called the rule "destructive and horrible" during his campaign. Throughout the 2016 election cycle, he repeatedly promised to do away with the rule, a promise, which he began fulfilling immediately.

'Repeal and Replace'

Shortly after entering office, President Trump announced his plan to "repeal and replace" the 2015 Rule. On February 28, 2017 he issued an executive order instructing the EPA to begin this process. The plan is comprised of two phases: first, a repeal of the 2015 Rule to revert regulation back to the pre-Obama WOTUS definition for the immediate future, and second, to adopt a new rule with the goals of eliminating uncertainty and reducing regulatory costs.

EPA published a final rule on February 6, 2018 adding an "applicability date" to the 2015 Rule. That means that the 2015 Rule, which was scheduled to go into effect on August 16, 2018, now doesn't take effect until February 6, 2020. This essentially gives the Trump EPA additional time in which to repeal the 2015 Rule and to propose and implement a new rule. The applicability date rule was immediately challenged in several lawsuits across the country. The principle challenge was that the EPA was in violation of the Administrative Procedure Act because it did not solicit comments as part of the standard notice and comment rulemaking process. The EPA argued that the applicability date rule was not an entirely new rule, and therefore notice and comment was not required.

The Southern Environmental Law Center was the principal plaintiff in a challenge that resulted in the applicability date rule being invalidated on procedural grounds. The U.S. District Court for the District of South Carolina invalidated the rule in 26 states, creating a patchwork of jurisdictions where the 2015 Rule applies. Additional lawsuits have resulted in the 2015 Rule now applying in 28 states, the District of Columbia, and the U.S. Territories, while the pre-Obama WOTUS definition, thanks to the applicability date rule, controls in the remaining 22 states. The only western states where the 2015 Rule applies are California, Oregon, and Washington.

The actual repeal of the 2015 Rule has been a messy process with several comment periods. After initially publishing a proposed repeal rule on July 27, 2017, the EPA later republished the rule on June 29, 2018 clarifying that this proposed rule would repeal the 2015 Rule in its entirety. The comment period for that proposed rule closed on August 13, 2018, and a final rule has not yet been published.

The New Proposed Rule

Although the new proposed rule has not yet been published, the EPA and Corps released a "pre-publication" rule on December 11, 2018. The rule lists six categories of waters that will be protected under the CWA, while including language that specifically exempts any waterway not mentioned in those six categories.

The categories of protected waters follow.

Traditionally Navigable Waterways

The least controversial category, there is no doubt that the WOTUS definition includes traditionally navigable waterways. This term includes rivers, streams, large lakes, and oceans that could be traveled by boat or used for commerce. There is no question that these larger waterways were intended to be included as WOTUS.

Impoundments

There is no change from the 2015 rule regarding regulation of impoundments—this is also the same as the 1986 CWA regulations. This category includes check dams and perennial rivers that form lakes and ponds behind them. However if fill material, under a valid § 404 permit, transforms a water body into an upland (an area above the high-water mark that does not qualify as a wetland), the waters would no longer be considered WOTUS. The proposed rule notes that EPA will be seeking comment on the status of an unprotected wetland if, after being turned into a pond, no longer meets the standards for ponds, discussed below.

Tributaries to Navigable Waterways

The standard for tributaries under the new proposed rule is those that contribute "extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year" to traditionally navigable waters. This is a departure from the 2015 Rule physical standard of having a bed, bank, and high-water mark.

Although the new rule specifically excludes ephemeral streams, it is unclear how often, or how much, water a tributary would need to carry to be federally regulated. The proposed rule states that the tributaries would be evaluated on whether they contribute on a typical year—based on a 30-year average—but offers no further guidance. EPA noted in a press conference that it would require decisions in the field to determine what constitutes a typical year within the 30-year average. Several commentators believe that this classification includes streams that do not flow all year, provided the flows are predictable and continuous within the season of flows. That means that some, but not all, of western snowmelt-fed streams would continue to be protected.

Ditches

Regulation of ditches under the new proposed rule is split into two main categories. First, ditches that function like a traditional navigable waterway—such as the Erie Canal—will continue to be federally regulated as navigable waters. However, other ditches are regulated much like tributaries to navigable waterways. If the ditches contribute flow to a traditional navigable waterway in a typical year, they will continue to be regulated. Again, like tributaries, it is unclear how often, or how much water will need to flow from the ditches to a navigable waterway to meet the "typical year" standard. Ditches that relocate a protected tributary, or ditches built through wetlands with surface water connections would be regulated.

Lakes and Ponds

Lakes large enough to be considered traditionally navigable waters are of course still included as WOTUS under the proposed rule. However, smaller lakes and streams would now be subject to the same standard as ditches and tributaries—they will only be regulated if they contribute intermittent or perennial flow to downstream navigable waters. This is a departure from the 2015 Rule that covered all naturally occurring lakes and ponds either within 100 feet of a navigable waterway, or within 100-year floodplain and within 1,500 feet of its ordinary high-water mark. Lakes and ponds that contribute to navigable waterways via flooding, such as oxbow lakes, would be regulated provided that the contribution happens when examined on the rolling 30-year average standard. Artificial ponds, such as those constructed for stockwatering, would continue to be exempt from regulation.

Wetlands

The proposed rule would include all "adjacent wetlands", *i.e.* those that abut or have a direct hydrological connection to a federally regulated WOTUS. This is a split from the 2015 Rule's standard of having a "significant nexus," which itself was taking from Justice Kennedy's concurring opinion in *Rapanos*. The 2015 Rule also included specific distance requirements for jurisdictional wetlands—100 feet from a navigable water or within that waterway's 100-year floodplain. This controversial requirement would be eliminated under the new proposed rule. Waters that have been naturally or artificially (with a valid § 404 permit) transformed to uplands would no longer be considered wetlands.

Everything Else Is Not WOTUS

The new proposed rule specifically provides that any water that does not fit into one of the above categories is *not* a water of the United States subject to regulation under the CWA. This includes ditches (other than those listed above), prior converted cropland (excluded since 1993), and importantly, all groundwater. The regulation of groundwater under the CWA has been a contentious issue over the history of the act, most recently resulting in a circuit split between the Fourth and Sixth Circuits.

The main issue is whether discharges into groundwater that later end up in a navigable water are able to be regulated. The Fourth Circuit Court of Appeals held that, although it takes a specific fact inquiry, if groundwater can be hydrologically traced to a navigable water, then that groundwater is considered WOTUS. *Upstate Forever v. Kinder Morgan Energy Partners LP* (4th Cir. April 12, 2018). The Sixth Circuit later held the exact opposite, finding that

groundwater, by its very nature, can never be traceable to a navigable water. *Tennessee Clean Water Network, et al. v. Tennessee Valley Authority* (6th Cir. September 24, 2018). Although either, or both, of those cases are likely to be appealed to the Supreme Court, the issue of groundwater regulation would no longer matter under the proposed rule.

Interstate Waters

The 1986 CWA regulations first introduced separate sections for interstate waters, including interstate wetlands. Under the new proposed rule, that section would be eliminated, and the classification of all interstate waters would be under one of the other six categories, or not regulated.

Initial Reception

EPA and the Corps released a joint press release and held a press conference concurrently with the pre-publication rule to discuss the proposed changes. Acting EPA Administrator Andrew Wheeler said the new proposed rule would be "clearer and easier to understand" and "would end years of uncertainty over where federal jurisdiction begins and ends." This goal of simplicity was echoed by EPA Assistant Administrator for Water David Ross who said the "goal was to provide as few categories [of WOTUS] as possible."

As expected, industry and agriculture groups have been initially favorable to the proposed rule in its pre-publication form, while environmental groups have been opposed. American Farm Bureau Federation President Zippy Duvall said the new rule will "empower" farmers and ranchers to comply with the law. Other supporters included U.S. Secretary of Agriculture Sonny Perdue, U.S. Secretary of the Interior Ryan Zinke, the National Cattleman's Beef Association, the National Council of Farmer Cooperatives, and the Agricultural Retailers Association.

Several environmental groups immediately released statements condemning the new proposed rule, including the National Resources Defense Council, which said the proposal "would be the most significant weakening of the Clean Water Act protections in its history." Trout Unlimited also took aim at the reduction in tributary protections, noting that "more than 117 million Americans get their drinking water from small intermittent and ephemeral headwater streams."

There has also been controversy surrounding the exact number of waterways currently protected under the 2015 Rule that would no longer be classified as WOTUS under this proposal. Various environmental groups have claimed that the new proposed rule would eliminate protections on 60 percent of the country's waterways and up to 1/3 of the country's drinking water. Acting Administrator Wheeler responded to these claims in the press briefing, saying:

> . . .[t]hat 60 percent number is from the previous administration. But maps do not distinguish between ephemeral and intermittent waters. There is not map that identifies all the waters of the United States.

In a rebuttal to Wheeler's claim to not know exactly how many waterways would lose protection under the proposed rule, *E&E News* recently obtained a 2017 slideshow by EPA and Corps staff showing that 18 percent of streams and 51 percent of wetlands would not be protected under the new WOTUS definition. The slides, obtained through a Freedom of Information Act request, were prepared for a presentation to former EPA Administrator Scott Pruitt and former Corps Deputy Assistant Secretary Douglas Lamont.

Conclusion and Implications

The new proposed rule is expected to immediately be published in the *Federal Register*, upon which interested parties will then have 60 days to file comments. EPA and the Corps are planning to host an informational webcast on January 10, 2019, and then a listening session in Kansas City, Kansas on January 23, 2019, implying that the rule will at least be published before then. After the comment period closes, EPA will then review the comments and publish a final rule that takes into account those comments and is based on the record established throughout the process. This is often a long process, and it is possible that there will be a second comment period as with the repeal rule. Considering the amount of litigation that has already gone into the applicability rule, it is likely that there will be legal challenges to both the repeal rule and new proposed rule once they are published.

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LEGISLATIVE DEVELOPMENTS

ASSEMBLY BILL 747, THE STATE WATER RESOURCES CONTROL BOARD AND THE ADMINISTRATIVE HEARINGS OFFICE

Transparency, fairness and ultimately due process of law are bedrock principles to the foundation of our judicial system, which expands to administrative regulatory forums when acting in an adjudicatory role, such as California's State Water Resources Control Board (SWRCB) does when presiding over water rights proceedings. During this past legislative session, Assembly Bill No. 747 (AB 747) was passed, becoming effective July 1, 2019, for establishing an Administrative Hearings Office composed of lawyers to act as hearing officers in adjudicative proceedings involving water rights matters. Some stakeholders view AB 747 as facilitating greater protection of due process rights. After all, appearance does not always align with reality, meaning even well-intentioned and properly handled matters by the SWRCB might not be held in the same light in the eye of some stakeholders.

Background

AB 747 harkens back, albeit perhaps unintentionally, to 2009 when in *Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731 (2009), the California Supreme Court held that a water rights license holder's constitutional right to due process of law was not violated when a SWRCB lawyer served the SWRCB in an advisory function in a matter unrelated to another matter in which the same lawyer was part of the prosecution team in an adjudicatory proceeding seeking to revoke a license.

The trial and appellate courts had held that due process was violated based on existing case law (*Quintero v. City of Santa Ana,* 114 Cal.App.4th 810 (2003)) requiring a "bright-line" test. The California Supreme Court, however, reasoned in part that that absent:

> . . .financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. (*Id.* at p. 741.)

In that matter, evidence was not presented of bias.

Assembly Bill No. 747

Underlying AB 747 is existing law that declares the diversion or use of water other than as authorized by specified provisions of law is a trespass. Existing law authorizes the executive director of the SWRCB to issue a complaint to a person who violates certain use and diversion of water provisions and subjects the violator to administrative civil liability. Existing law also authorizes the SWRCB to issue an order to a person to cease and desist from violating, or threatening to violate, certain requirements relating to water use, including diverting or using water, other than as authorized.

AB 747 requires the Administrative Hearings Office to preside over hearings on the following matters: 1) a complaint subjecting a violator of certain water use and diversion provisions to administrative civil liability; 2) a proposed cease and desist order for violating, or threatening to violate, certain requirements relating to water use; and 3) a revocation of a permit or license to appropriate water.

AB 747 excludes from the office's purview a hearing that includes, in addition to any of those enumerated matters, consideration of a matter not enumerated. AB 747 authorizes the SWRCB to assign additional work to the office, as specified. The bill would prescribe procedures for hearings presided over by the office, including the adoption of a final order by the office for certain matters imposing administrative civil liability, and the preparation of a proposed order to be submitted for final review by the board for all other matters presided over by the office.

AB 747 is chaptered as Chapter 3.5 (commencing with § 1110) to Part 1 of Division 2 of the Water Code.

Conclusion and Implications

Trying to align and keep harmonious the principles of fairness, efficiency and competent decision-making can be challenging. AB 747 can be read to seek to achieve all three principles by having a separate unit of lawyers within the State Water Resources Control Board committed to presiding over water rights proceedings. In addition, with existing water use reporting requirements and increasingly competing interests for water use, the Administrative Hearings Office may become quite busy, making its existence all the more necessary for ensuring water rights holders have matters decided in a timely manner. For more information on the language of Assembly Bill 747, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB747
(Wesley A. Miliband)

DWR AND THE STATE WATER BOARD RELEASE PRIMER FOR IMPLEMENTATION OF 2018 WATER CONSERVATION BILLS SB 606 AND AB 1668

The California Department of Water Resources (DWR) and the State Water Resources Control Board (SWRCB) recently released a document for implementation of two significant water conservation bills that were enacted into law earlier this year. Senate Bill 606 (SB 606) and Assembly Bill 1668 (AB 1668) are complementary bills that establish a new foundation for long-term improvements in water conservation and drought planning in California. The recent release, entitled *Making Water Conservation a California Way of Life*, is a primer that highlights and summarizes the key authorities, requirements, schedules, and responsibilities of State agencies, water suppliers, and other parties subject to SB 606 and AB 1668 (Primer).

Background

In response to the intense California drought of 2012-2016, Governor Brown issued Executive Order B-37-16 (Order) mandating that state agencies prepare a long-term framework for water conservation and drought planning. Based on the Order, several agencies collaborated and released a report in 2017 that makes recommendations and proposes actions to achieve the goal of making water conservation a way of life (Framework Report).

The Framework Report outlined actions that can be implemented under existing authorities and, where necessary, recommended additional actions that could be implemented with new or expanded authorities, if/when given by the Legislature. SB 606 and AB 1668 were developed and enacted by the Legislature, in part, as a result of the Order and the Framework Report.

The Primer

The Primer is organized to mirror the four primary goals outlined in the Order and the Framework Report, which are: 1) using water more wisely; 2) eliminating water waste; 3) strengthening local drought resilience; and 4) improving agricultural water use efficiency and drought planning.

Goal 1: Using Water More Wisely

SB 606 and AB 1668 provide new and expanded authorities needed for the implementation of a budget-based approach to water conservation and efficiency use. As described in the Primer, the significant statutory amendments paving the way to achieve this goal center on several major areas including: mandating urban water use efficiency standards and urban water use objectives; requirements for commercial, industrial, and institutional (CII) performance measures; requirements for state-provided data and local reporting requirements; new compliance, enforcement, and legislative oversight; and, streamlining data reporting:

- Indoor Residential Use Efficiency Standard. DWR must develop efficiency standards for indoor residential use and recommend those efficiency standards to the California Legislature by January 1, 2021. All new requirements for urban water use objectives are effective after June 2022 when

the SWRCB anticipates adopting urban water use efficiency standards, performance measures, and related requirements.

•Outdoor Residential Use Efficiency Standards. DWR must conduct the necessary studies and investigations, and develop recommendations to the SWRCB on efficiency standards for outdoor residential use and CII outdoor landscape areas with dedicated irrigation meters. The SWRCB must adopt these long-term standards by June 30, 2022.

•Water Loss Standard. The SWRCB, in coordination with DWR, must adopt water loss standards for urban retail water suppliers by July 1, 2020.

•CII Performance Measures. DWR must conduct the necessary studies and investigations and develop recommendations to the SWRCB for CII water use performance measures by October 1, 2021. The SWRCB must consider and adopt CII water use performance measures by June 30, 2022.

•State-Provided Data. DWR is required to provide urban retail water suppliers with data regarding the area of residential irrigable lands to calculate aggregated outdoor residential use by January 1, 2021.

•Reporting Requirements. Each urban retail water supplier must submit an annual water use report to DWR by November 1 of every year, beginning in 2023. Following the SWRCB's adoption of urban water use efficiency standards, an urban retail water supplier will also need to adopt and submit to DWR a supplement to its adopted 2020 Urban Water Management Plan (UWMP) by January 1, 2024.

•Streamlining Data Reporting. The Primer summarizes additional data reporting standards that require DWR and the SWRCB to streamline water data reporting, and increase public access.

•Compliance, Enforcement, and Legislative Oversight. The Primer summarizes the civil and administrative enforcement authorized by the legislation for violations of inefficient water use, the enforcement of annual water use reporting, and certain aspects of water right enforcement orders.

Goal 2: Eliminating Water Waste

Both SB 606 and AB 1668 affirm existing requirements for water loss standard and reporting. DWR is required to conduct a feasibility study for extending water loss reporting requirements to urban wholesale water suppliers and make a recommendation to the Legislature; the SWRCB is required to adopt long-term urban retail water use efficiency performance standards for volume of system water losses; and, each urban retail water supplier is required to adopt and submit to DWR its 2020 UWMP with additional information related to compliance with adopted loss standards:

•Feasibility Study for Extending Water Loss Reporting Requirements. DWR must perform a feasibility analysis for developing and implementing water loss reporting requirements and submit recommendations to the Legislature by January 1, 2020.

•Adoption of Water Loss Standards. The SWRCB must adopt rules requiring urban retail water suppliers to meet performance standards for the volume of water loss by July 1, 2020.

•Water Loss Reporting Requirement. Each urban retail water supplier must adopt and submit to DWR its 2020 UWMP and demonstrate that they have met adopted water loss standard by July 1, 2021.

Goal 3: Strengthening Local Drought Resilience

The drought highlighted the need for stronger local drought resilience and protocols for communicating of response actions among various agencies and affected communities. Under the new authorities and requirements, each urban wholesale and retail water supplier must prepare, adopt, and submit a Water Shortage Contingency Plan (WSCP) and conduct a Drought Risk Assessment (DRA) in addition to conducting its annual water supply and demand assessment. The legislation also requires DWR, in consultation with the SWRCB and stakeholders, to

develop more specific, functional recommendations for small water supplier and rural communities, which are often more vulnerable during droughts because of their limited institutional and financial capacities to adapt to changed conditions:

- Urban Water Management Plans. UWMPs must include a compliant drought risk assessment for their service areas. The next deadline for submittal is July 1, 2021.

- Preparation, Adoption, and Submittal of WSCP. Each urban water supplier must prepare, adopt, and submit a WSCP as part of its UWMP to describe the method, procedures, response actions, enforcement, and communications during six levels of water supply shortage conditions.

- Annual Water Shortage Assessment Report. Each urban water supplier must conduct an annual water supply and demand assessment and submit to DWR a report by June 1 of each year.

- Annual Report to SWRCB. The DWR must release an annual report by September 30 of each year summarizing, among other things, water supply and demand assessment results, water shortage conditions, regional and statewide analysis of water supply conditions, and shortage response actions.

Goal 4: Improving Agricultural Water Use Efficiency and Drought Planning

Agricultural communities were severely impacted in the recent drought, resulting in unsustainable groundwater use in some areas. As such, the new legislation was intended to improve agricultural water use efficiency and drought planning by requiring a water budget-based approach to water management that is consistent with SGMA implementation, and by requesting the addition of a drought plan as part of an agricultural water supplier's agricultural water management plan (AWMP). The Primer discusses several of the requirements that must be included as part of its AWMP:

- Farm-Gate Delivery Reporting. Agricultural water suppliers must submit to DWR an annual aggregated farm-gate delivery data organized by groundwater basin or sub-basin by April 1 of each year.

- Adopt AWMP. Agricultural water suppliers must prepare and adopt an AWMP every five years. The next deadline for adoption of an updated AWMP that satisfies the new requirements is April 1, 2021.

The legislature provides new authorities and requirements for adoption and review of AWMPs, and for enforcement actions against non-compliant agricultural water suppliers, resulting up to fines of $1,000 per day until data is made available.

Conclusion and Implications

SB 606 and AB 1668 introduced a myriad of new requirements that will significantly shape water conservation and drought planning throughout the state. The Primer provides a comprehensive, helpful and timely summary of the new legislation and is designed to serve as a reference document for implementation and the allocation of responsibilities, requirements and timelines at both local and state levels. For more information on the new legislation and the Primer, visit the *Making Conservation a Way of Life* page on the California Department of Water Resources website at https://water.ca.gov/News/Blog/2018/Nov-18/DWR-and-State-Water-Board-Release-Primer-on-2018-Water-Conservation-and-Drought-Planning-Legislation

(Paula Hernandez, Michael Duane Davis)

REGULATORY DEVELOPMENTS

U.S. DEPARTMENT OF AGRICULTURE ANNOUNCES $449 MILLION LOAN TO ASSIST IN DEVELOPING THE SITES RESERVOIR PROJECT

In November 2018, the U.S. Department of Agriculture committed to a $449 million loan for the Maxwell Water Intertie, a component of the Sites Reservoir Project. The Sites Reservoir Project is a proposed off-stream reservoir, designed to provide new water storage to increase water supply flexibility, benefit fish and wildlife, and aid in drought relief. The Sites Reservoir Project would accomplish these goals by creating an additional source of water, which would allow existing water sources to retain more water when demand is high.

Background

A Joint Powers Authority composed of local public agencies, the Sites JPA, is pursuing the Sites Reservoir Project, a project intended to provide another source of water storage for the state. Located in the Sacramento Valley, the Sites Reservoir would divert high winter flows and storm event flows from the Sacramento River and would receive water diverted from the Glenn-Colusa and Tehama-Colusa canals.

With this new water storage source, one goal of the Sites Reservoir Project is to relieve the stress on California's water system by allowing other reservoirs to hold more water for a longer period of time. The addition of an extra reservoir would effectively increase the total storage in northern California by about 500,000 acre-feet of water. The project will also benefit the environment by providing up to half of its annual water supplies to environmental flows and lessen the impact of drought on sensitive species. Specifically, the project will improve water quality for endangered fish, reduced salinity levels in the Sacramento-San Joaquin Delta and improve habitat for migratory birds.

The Loan

After the California Water Commission approved $816 million of Proposition 1 bond funding earlier this year, the Sites Reservoir Project received yet another source of funding in the form of a loan from the U.S. Department of Agriculture and the Department of the Interior. This loan totals $449 million, the largest ever given by the Department of Agriculture. The loan will be used to build the Maxwell Water Intertie (MWI), a pipeline between the Tehama Colusa Canal and Glenn Colusa Irrigation District canal, which will deliver water for Sites Reservoir during high Sacramento River flows. However, the money received does come with a cost. The loan will need to be paid off in 40 years at 3.875 percent interest.

The Sites Reservoir Project is still undergoing environmental review, but the MWI is expected to be completed by 2024 and the reservoir is set for completion in 2030. As of the time of the receipt of this loan, the total amount of the project is estimated to be $6.4 billion. Most of this price tag still lacks a significant source of funding.

Conclusion and Implications

Taken together with the allocation of Proposition 1 bond funds, the U.S. Department of Agriculture loan provides a boost as the Sites JPA seeks more funding for the Sites Reservoir Project. However, it remains to be seen just how the rest of the project, which has a projected $5.1 billion price tag, will be financed. Given the current status of water management in California, the Sites Reservoir Project remains an attractive option to address future water concerns. For more information, *see: Sites Project: Introduction*, Sites Projects Authority, 30 Nov. 2017, https://www.sitesproject.org/

USDA Invests in Innovative Management of California Water Supply, Sites Project Authority, 27 Nov. 2018, https://content.govdelivery.com/accounts/USDAOC/bulletins/21e5d9b

(Geremy Holm, Steve Anderson)

FEDERAL DEPARTMENT OFFICIALS RESPOND TO PRESIDENT TRUMP'S DIRECTIVE TO COORDINATE AND STREAMLINE ENVIRONMENTAL REVIEW OF FEDERAL WATER PROJECTS IN CALIFORNIA

On November 19, 2018 the Secretary of the Interior and the Secretary of Commerce issued two documents in response to the President's October 19, 2018 directive to coordinate their respective departments' efforts to manage federal water infrastructure projects in California. Pursuant to that directive, the Secretaries appointed a single lead official to oversee environmental reviews of the federal water infrastructure projects on behalf of both the Departments of the Interior and Commerce. The Secretaries also identified individual projects subject to environmental review and recommended particular regulations and procedures to be suspended in order to streamline progress.

Background

The October 19, 2018 Presidential Memorandum (October Memorandum) directed the Secretaries to identify all major California water infrastructure projects that the Departments shared joint responsibility for under the federal Endangered Species Act (ESA) or individual responsibility under the National Environmental Policy Act (NEPA). The October Memorandum further directed the Secretaries to appoint a single official for each identified project to coordinate each department's compliance with ESA and NEPA. The October 19 Memorandum directed the Secretaries to set forth plans to:

> . . .suspend, revise, or rescind regulations or procedures that unduly burden the Projects beyond the degree necessary to protect the public or otherwise comply with the law.

Designation of Lead Official to Coordinate Federal Compliance with Environmental Review of California Water Projects

On November 19, 2018, the Secretaries responded with two documents. The first was a Memorandum of Agreement, which identified two California water infrastructure projects undergoing the environmental review process: the Central Valley Project and the Klamath Irrigation Project. The Secretaries designated Paul Souza, Deputy Assistant Director of the U.S. Fish and Wildlife Service, as the Lead Official to coordinate ESA and NEPA compliance for *both* water infrastructure projects managed by the Departments.

Efforts to Streamline the Regulatory Processes Affecting California's Federally Managed Water Infrastructure

The second document was a Response Memorandum that identified nine projects that agencies within the Departments share joint responsibility under ESA and NEPA. The Secretaries set forth the nine projects in a separate table, and then ranked each project as either a first or second priority for completing environmental review. The table also includes compliance deadlines. According to the Secretaries, the first priority projects require completion of the ESA consultation process by the end of 2019. Second priority projects are those that do not require completion of the ESA consultation process until after 2019.

The first priority projects are: Shasta Dam Raise Record of Decision; Re-initiation of Consultation on the Long-Term Operation of the Central Valley Project and State Water Project Environmental Impact Statement (EIS) and Biological Opinions; Reconsultation on Klamath Project Operations; and the B.F. Sisk Safety of Dams Raise Final EIS. The second priority projects are: Yolo Bypass Salmon Habitat Restoration and Fish Passage Final EOS; Temperance Flat (Upper San Joaquin Storage Study) Final Environmental Impact Statement; Los Vaqueros Reservoir Expansion Final Environmental Impact Statement; San Luis Low Point Final Environmental Impact Statement; and the North-of-Delta Offstream Storage (Sites Reservoir) Final Environmental Impact Statement.

Regulations and Procedures Identified by Secretaries to Be Suspended, Revised, or Rescinded

The October 19 Memorandum directed the Secretaries to set forth plans to:

> . . .suspend, revise, or rescind regulations or procedures that unduly burden the Projects beyond

the degree necessary to protect the public or otherwise comply with the law.

The Secretaries identified five recommendations to streamline the regulatory burden on water infrastructure projects:

- The Bureau of Reclamation should streamline cooperative agency review for the Re-initiation of Consultation on the Long-Term Operation of the Central Valley Project and State Water Project by including subject matter experts from cooperating agencies in the drafting process and limiting the number of administrative reviews.

- The Bureau of Reclamation should also streamline the NEPA review process by adopting guidance from the Secretary of the Interior. Specifically, this calls for adopting Secretarial Order No. 3355, which sets forth various means to streamline environmental review and permitting of infrastructure projects.

- Fish and Wildlife Service (FWS) and National Marine Fisheries Services (NMFS) should coordinate their ESA review processes and issue a joint Biological Opinion.

- The Departments should adopt proposed revisions to the ESA implementing regulations that the Secretaries . . . .The revisions are intended to make ESA implementation clear and consistent across agencies, reduce the regulatory burden on business and industry; modify the procedure for listing endangered and threatened species; revise the manner for how FWS issues regulations for future listed species; and streamline interagency consultation between FWS and NMFS.

- The Department of the Interior should streamline the process for compliance with the National Historic Preservation Act, including the consultation and mitigation process with the Advisory Council for Historic Preservation, the National Conference of State Historic Preservation Offices, and Tribal Historic Preservation Offices.

No Action Yet on Other Directives

In the October 2018 Memorandum, the President also directed the Secretaries to take specific actions to improve forecasting of water availability and for the Secretary of Interior to promote investments in technology. No action has been taken on this directive to date. Similarly, the Secretaries' joint Memorandums did not address the President's directive to consider "locally developed" hydroelectric projects and to complete the Columbia River System Operations Environmental Impact Statement. The Secretaries noted in the cover letter to the Memorandum of Agreement and Response Memorandum that they will update the Response Memorandum on a regular basis pursuant to the October 2018 Memorandum's directive to provide monthly updates.

Conclusion and Implications

The Secretaries Memorandum of Agreement and Response Memorandum are early steps in a longer process of streamlining the development of California's federally managed water infrastructure. By appointing Mr. Souza as the Lead Official to oversee the environmental review process, a joint effort between NMFS and FWS will guide ESA and NEPA compliance for two major federal water infrastructure projects in California. Although the Response Memorandum makes no direct change to on any existing statute or regulation, the Secretaries' recommendations favor more rapid environmental review and development of infrastructure projects.
(Brian Hamilton, Meredith Nikkel)

DWR WITHDRAWS DELTA CONSISTENCY AFTER DELTA STEWARDSHIP COUNCIL'S DRAFT DETERMINATION FINDS CONSISTENCY CERTIFICATION FOR WATERFIX NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

On Thursday, November 8, 2018, staff for the Delta Stewardship Council (Council) released a Draft Determination regarding the Department of Water Resources' (DWR) July 27, 2018 Certification of Consistency for the large-scale twin tunnels project, known as California WaterFix. The crucial fact-finding report prepared by Council staff concludes that "substantial evidence does not exist" in the Council's record to support DWR's certification that WaterFix will comply with five out of 12 applicable criteria of the long-term management scheme for the Delta, known as the Delta Plan.

Council staff presented the Draft Determination and accompanying report to the Council at a two-day workshop beginning on November 15, while DWR and other proponents of WaterFix critiqued and contested the staff's findings. On December 7, DWR sent a letter to the Council withdrawing its Certification of Consistency, citing "unresolved issues related to interpretation of the requirements of the Delta Reform Act and Delta Plan policies."

Background

The 2009 Delta Reform Act codified the "coequal goals" of ecosystem enhancement and water supply reliability in the Sacramento-San Joaquin Delta, requiring agencies to certify that a proposed covered action is consistent with the Delta Plan. A "covered action" under the Delta Reform Act is one that occurs in the Delta or Suisun Marsh, in whole or in part, that will have a significant impact on its surroundings. The Council was formed to implement the Delta Plan and approve actions that achieve the mandated coequal goals and attendant policies for the Delta.

WaterFix proposes a large-scale water infrastructure overhaul by constructing three new intakes in the northern Delta and two 9,000 cfs tunnels to convey Sacramento River water beneath the Delta for south-of-Delta State Water Project and potentially federal Central Valley Project water supply deliveries. On July 27, 2018, DWR submitted its Certification of Consistency with written findings, declaring WaterFix to be consistent with every applicable metric of the Delta Plan and its coequal goals of protecting the environment and improving water supply reliability in a manner that preserves the Delta as an "evolving place." Nine parties appealed the certification, challenging that the Project, as laid out, is inconsistent with the Delta Plan and threatens significant adverse impacts in contravention of twelve of the enumerated Delta Plan policies. At the request of one of the appealing parties and over DWR's strenuous objections, the Council's Executive Officer supplemented the Council's evidentiary record with the complete docket of the State Water Resources Control Board water right change petition hearings through the date of the certification.

The Council conducted a three-day public hearing on October 24-26, 2018, during which DWR, the appellants, and other stakeholders provided oral testimony and comments for the Council's consideration. At the hearing's conclusion on October 26, the presiding Chair, Randy Fiorini, instructed Council staff to prepare draft findings based on the evidentiary record. The staff's Draft Determination was released for public review and comment on November 8.

The Draft Determination

The Council staff's Draft Determination and accompanying report detail the procedural background and scope of their review. In short, the Draft Determination found that DWR failed to sufficiently demonstrate consistency with the following five Delta Plan Policies:

- Overall consistency with the coequal goals;
- Best available science;
- Reduced reliance on the Delta through regional self-reliance;
- Delta flow objectives; and
- Respect of local land use.

A covered action must be consistent with every applicable Delta Plan Policy. However, failure to meet a particular Policy is not necessarily fatal if, "based on the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible." DWR argued that it is infeasible for WaterFix to comply with all policies simultaneously, with specific reference to the Policy to reduce reliance on the Delta, due to other conflicting statutory requirements, limits on DWR's authority, and its inability to assemble sufficiently comprehensive data. Council staff found, however, that none of DWR's reasons supported a finding of excusable infeasibility.

Of particular note, the finding on consistency with the Policy concerning Delta flow objectives, concludes that the hydrologic modeling DWR and its experts have conducted over the last several years—modeling that has been the core foundation to DWR's impact analysis, and scrutinized in several WaterFix proceedings—fails to show that DWR will actually comply with existing water quality standards under D-1641. Further, DWR's historical record of compliance with D-1641 was intended to show that DWR can utilize real-time operations to comply with water quality standards better than the modeling may show, but the Draft Determination finds it inadequate to ensure compliance.

In addition, the Draft Determination found that the appellants failed to carry their burden of showing the record does not contain sufficient evidence to support that WaterFix is consistent with the following four Delta Plan Policies:

- Mitigation measures;
- Adaptive management;
- Preservation of opportunities to restore habitat;
- Avoidance of promoting invasive nonnative species.

The three remaining Delta Plan Policy challenges were found inapplicable to the WaterFix Project:

- Transparency in water contracting;
- Restoration of habitats at appropriate elevations;
- Prioritization of state investments in Delta flood protection.

The Draft Determination goes into elaborate detail regarding each challenge to DWR's consistency certification. In light of the findings, Council staff recommended that the matter be sent back to DWR to reconsider the Project and develop the information necessary for the Council to approve its certification.

On November 15 and 16, the Council held a public workshop in which it considered the Draft Determination and accompanying report, as well as further written comments and stakeholder presentations. On December 7, referencing comments by the Council Chair regarding the timing and sufficiency of the certification, DWR formally withdrew its Certification of Consistency, and requested that the Council dismiss the pending appeals related to that determination.

Conclusion and Implications

The Delta Stewardship Council does not independently determine whether a project itself is intrinsically consistent with the Delta Plan; rather, a Determination focuses on whether there is sufficient evidence in the record to show a covered action aligns with each of the criteria under the Delta Plan. The Council's regulations provide that even if DWR resubmits its certification, the Project may not move forward until all valid appeals are denied or otherwise resolved. It remains to be seen when and how the process will resume at the Delta Stewardship Council. (Rebecca Smith, Austin Cho, Meredith Nikkel)

DWR STAFF SUMMARIZES PAST AND PROSPECTIVE SGMA IMPLEMENTATION

At a recent meeting of the California Water Commission (CWC), representatives of the California Department of Water Resources (DWR) delivered a lengthy and informative presentation (Presentation) regarding statewide implementation of California's Sustainable Groundwater Management Act of 2014

(SGMA). In just the first four years of the SGMA era, the regulatory framework and tools for managing California's groundwater basins have experienced monumental change. This, however, is only the beginning of a lengthy process.

Background

The CWC comprises nine members appointed by the Governor and confirmed by the state Senate. CWC members are selected for their general expertise related to water management and environmental matters. The roles and responsibilities of the CWC are set forth by statute and include advising the Director of the DWR regarding water management and environmental issues, approving certain DWR rules and regulations, monitoring and reporting on the construction and operation of the State Water Project, and implementing the State's Water Storage Investment Program.

SGMA Overview

As summarized in the Presentation, SGMA emphasizes groundwater management at the local level. SGMA requires newly-formed Groundwater Sustainability Agencies (GSAs) to develop and implement Groundwater Sustainability Plans (GSPs) for all high- and medium-priority groundwater basins, and permits the voluntarily development of GSPs for low- and very-low priority basins. The deadline for the development and adoption of GSPs for the twenty-one "critically-overdrafted" basins is January 2020, and is January 2022 for all other high- and medium-priority basins. SGMA mandates that GSPs evaluate basin conditions, establish sustainable management criteria, and identify projects and management actions to achieve long-term basin "sustainability," which is generally achieved by the avoidance of certain statutorily-defined "undesirable results." DWR is required to review and approve all GSPs for compliance with SGMA's mandates.

SGMA Application throughout California

As summarized in the Presentation, the high- and medium-priority groundwater basins to which SGMA applies, together with previously adjudicated groundwater basins, collectively represent 96 percent of statewide groundwater use and 88 percent of California's overlying population. Adjudicated groundwater basins are generally exempt from SGMA with the exception of certain reporting requirements. SGMA allows local agencies to propose certain alternatives to GSPs (Alternative Plans) for DWR approval, though they are still required to meet SGMA objectives.

As of the date of the Presentation, there are 517 identified groundwater basins and sub-basins in California. DWR representatives reported that local agencies have formed more than 260 GSAs to manage 140 groundwater basins; and that, as of July 1, 2017, over 99 percent of required basin areas were under GSA jurisdiction, leaving very few unmanaged areas. The formation of GSAs throughout California, under the tight legislative timelines, required monumental efforts at every level and was not without controversy.

Phases to Implement SGMA and Achieve Sustainable Groundwater Management

SGMA imposes aggressive deadlines and requirements. In the Presentation, the DWR described four general phases of SGMA implementation:

- Phase 1—Development of Regulations, Realignment of Basins, & Establishment of Basin Governance. This intensive first phase occurred primarily between years 2015 and 2017. During that time, DWR accomplished many significant SGMA-mandated milestones, including but not limited to: 1) Development of basin boundary regulations (completed October 2015) 2) Completion of the initial basin boundary modification process (completed March 2016) 3) Development of GSP regulations (completed June 2016) 4) Implementation of GSA formation review and notification procedures (completed June 2017) and Commencing review and assessment of SGMA-authorized Alternative Plans (ongoing)

- Phase 2—Development and Adoption of GSPs. This second phase is generally the current phase of implementation through GSP adoptions in January 2020 for critically-overdrafted basins and January 2022 for all other high- and medium-priority basins. This second phase is equally, if not more intensive, than Phase 1, including: 1) Continued review and assessment of SGMA-authorized Alternative Plans (target early 2019) 2) Release of final basin boundary modifications for 2018 applications (target February 2019) 3) Update to basin priori-

tizations based upon basin boundary modifications (target early 2019) 4) Finalization of Proposition 1 grant funding award agreements (in progress) 5) Implementation of Proposition 68 grant funding (draft proposal solicitation package [PSP] target mid-2019) 6) Development and adoption of GSPs and submission to DWR (January 2020/January 2022) and 7) Review of GSPs (beginning January 2020/ January 2022)

•Phase 3—Early Implementing GSPs through Outcome Based Metrics. This third phase will occur commencing with the adoption of GSPs in 2020 and 2022, and continue through the 20-year sustainability period required by SGMA. It will generally be comprised of regular updates to GSPs and assessments by DWR.

•Phase 4—Sustainable Groundwater Management. This fourth and final phase must be achieved by the end of the twenty-year implementation period for each basin.

Notably, the phases of SGMA implantation are not necessarily linear. Changes to basin boundaries, the establishment of new GSAs and other actions may well alter or trigger SGMA implementation requirements on a different schedule and under different requirements.

Alternative Evaluation and Assessment Update

Because SGMA authorizes local agencies to submit Alternative Plans to DWR in lieu of GSPs, DWR must review Alternative Plans to assess whether they meet the SGMA objectives. Many GSAs and stakeholders are anxiously awaiting the results of DWR's assessment of their Alternative Plans as an indicator of what might be expected for GSPs that will follow.

As summarized in the Presentation, from among the three types of allowable Alternative Plans: nine existing groundwater management plans were submitted; eleven reports of ten-year sustainable basin operations were submitted; and, four additional adjudication areas were submitted but subsequently withdrawn. In total, DWR is currently assessing 20 Alternative Plans and reviewing annual reports that were submitted in April 2018 for adjudicated areas.

DWR currently projects releasing its assessments of Alternative Plans in early 2019, though it has not identified a specific date. Alternative Plans determined to be insufficient to satisfy SGMA requirements may require local GSA formation and the development of GSPs, under aggressive timelines.

Basin Boundary Modifications

Prior to SGMA, California's groundwater basin boundaries were most recently updated in 2003. In order to facilitate SGMA implementation and incorporate more recent technical information, SGMA contains requirements for periodic updates to basin boundaries. In 2015, DWR developed basin boundary regulations governing the application and approval process. The first SGMA-era basin boundary modification process occurred in 2016 as local agencies were forming GSAs and grappling with basin boundaries that often do not align with jurisdictional boundaries. DWR approved 39 basin boundary modification requests and denied 15.

A second round of basin boundary modification requests commenced in January 2018 and ended, after extensions, in September 2018. DWR received 43 boundary modification requests in this second round, released draft basin boundary modifications in late November, held a public meeting in early December, and opening a public comment period scheduled to close January 4, 2019. As of the date of the Presentation, DWR anticipated presenting results to the CWC in January 2019 followed by a release of final basin boundary modifications in February 2019.

Basin Prioritization

Under SGMA, basin boundary modifications trigger a required re-evaluation of basin prioritizations. Prioritization is based upon several statutory factors. DWR released draft basin prioritizations earlier this year and, as of the date of this writing, anticipated publicly releasing final basin prioritizations for 458 unmodified basins in December 2018 followed by prioritization for 59 modified basins in May 2019. The results will be significant because they determine the high- and mediumpriority basins that must comply with SGMA.

Update on Financial Assistance Program

DWR and other agencies have also been busy implementing grant funding for SGMA-related purposes. Proposition 1 allocated $100 million in applicable grant funding. In February 2016, $6.7 million

was awarded to counties with stressed groundwater basins primarily to facilitate GSA formation; and, in April 2018, $85.8 million was awarded to nearly 80 applicants, including $16.2 million for projects benefiting Severely Disadvantaged Communities and $69.6 million for GSAs to develop GSPs. DWR is currently finalizing grant funding agreements for the April 2018 Proposition 1 funding awards.

In June 2018, Proposition 68 passed, authorizing approximately $150 million for SGMA-related purposes. Of that amount, approximately $50 million has been authorized for GSP development. DWR anticipates releasing a draft PSP for this portion in early 2019. According to DWR representatives, priority will likely be given to GSAs that did not receive Proposition 1 grant funding. $100 million of the Proposition 68 authorization will fund projects and programs to assist GSAs implement their GSPs. A draft PSP is anticipated in early 2020, and will likely give priority to critically-overdrafted basins.

Update on Planning Assistance Program

DWR offers a multi-faceted, ongoing support effort for GSAs. It has assigned regional office staff points-of-contact for each high- and medium-priority basin and sub-basin, to engage with GSAs during GSP development. DWR anticipates hosting a GSA forum in or around February 2019 to facilitate discussion among GSAs and stakeholders in exchanging ideas and approaches primarily focused on communication, coordination, engagement, and outreach.

Through DWR's Facilitation Support Services program, DWR offers participating GSAs with assistance in stakeholder identification and engagement, public outreach, GSA meeting facilitation and consensus building. DWR anticipates continuing to offer this program, with priority to GSAs in critically-overdrafted basins and basins that did not previously participate in the program.

Update on Technical Assistance Program

DWR has developed—at an impressive pace—an extensive set of reports, data and tools to facilitate SGMA implementation. DWR has released six Best Management Practices (BMPs) documents addressing specific aspects of GSP components. As of the date of this writing, only the Sustainable Management Criteria Best Management Practices remained in "draft" status. DWR has also released multiple Guidance Documents addressing specific aspects of GSP development and outreach.

DWR continues to offer assistance through its Technical Support Services program to GSAs primarily to fill critical data gaps. Field activities include monitoring well installation, groundwater monitoring training, downhole camera surveys and subsidence monitoring. DWR also offers assistance with groundwater-surface water modeling and related tools.

Finally, DWR has developed and released a host of statewide data sets and tools that are now available online, including but are not limited to interactive land use and GSA location maps, climate change data and tools, well completion report mapping tools, basin boundary assessment tools, groundwater modeling frameworks, disadvantaged community maps, and a host of related guides and materials. DWR promises to continue releasing new data and tools to assist GSAs and stakeholders.

Conclusion and Implications

DWR representatives will return to the CWC in January 2019 with an updated briefing on SGMA implementation, which continues to occur at a feverish pace. SGMA has dramatically changed the landscape for groundwater management in California, not only for groundwater users but also for those responsible for its implementation at the local and statewide levels. DWR has worked tirelessly to develop implementation tools and to meet SGMA's aggressive deadlines. Meanwhile, GSAs, particularly those for critically-overdrafted basins, are feeling the pressure to complete their development and adoption (hopefully consensus-based) of GSPs by January 2020. If the first four years of the SGMA era are any indication, the GSAs for the other high- and medium-priority basins are also feeling considerable pressure with their January 2022 GSP deadlines not all that far off.

(Derek R. Hoffman, Michael Duane Davis)

RECENT FEDERAL DECISIONS

THE CURIOUS CASE OF THE DUSKY GOPHER FROG— U.S. SUPREME COURT LIMITS AGENCY DISCRETION UNDER THE ENDANGERED SPECIES ACT

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, ___U.S.___, Case No. 17-71 (Nov. 27, 2018).

In a victory for landowners and other regulated entities, the U.S. Supreme Court unanimously limited the U.S. Fish and Wildlife Service's (FWS) discretion when designating critical habitat under the federal Endangered Species Act (ESA). In its recent *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* decision, the Supreme Court held that: 1) only "habitat" may be designated as "critical habitat" under the ESA, and 2) FWS decisions regarding whether to exclude property from critical habitat designation due to economic considerations are subject to judicial review.

Background

The ESA requires the Secretary of the Interior to designate "critical habitat" for a species upon that species' listing as endangered or threatened. Critical habitat is defined by the ESA to include:

> . . .specific areas outside the geographical area occupied by the species. . .upon a determination by the Secretary that such areas are essential for the conservation of the species.

Before the Secretary may designate an area as critical habitat, however, the ESA requires him to "tak[e] into consideration the economic impact" and other relevant impacts of the designation. The statute further authorizes the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]," unless exclusion would result in extinction of the species.

Weyerhaeuser stemmed from FWS' designation of 1,544 acres of private property in Louisiana as critical habitat essential for the conservation of the endangered dusky gopher frog—even though no such frogs had occupied the property since 1965, and even though the property in its current condition cannot be inhabited by the endangered frog.

The dusky gopher frog requires rare ephemeral ponds for breeding (*i.e*, ponds that are dry for part of the year) and open canopy forest. Though the subject property lacks open canopy forest, FWS nonetheless designated it as critical habitat "essential for the conservation of the species" on the basis that the property has five high quality ephemeral ponds, and that modification to the property—such as replacing portions of the property's closed-canopy timber plantation with an open-canopy pine forest—could allow the property to support a sustainable population of the endangered frog.

The private landowners opposed the designation. While a critical-habitat designation does not directly limit a landowner's rights, it does limit the federal government's authority to engage in action—such as issuing a permit—that could adversely affect designated critical habitat. Here, the landowners claimed that the designation could bar their ability to develop the property if such development were to require federal permits under the federal Clean Water Act; if this were the case, the critical habitat designation could potentially cost the owners up to $33.9 million in lost development potential. The landowners filed suit, challenging both the critical habitat designation and the sufficiency of FWS' determination not to exclude the subject property from critical habitat designation despite the designation's economic impacts. After the Fifth Circuit Court of Appeals upheld the critical habitat designation, the case was reviewed by the Supreme Court.

The Supreme Court's Decision

FWS May Only Designate 'Habitat' as Critical Habitat

The landowners contended that the subject property could not be critical habitat for the dusky

gopher frog because the property was not "habitat" for the frog; in particular, the landowners noted that the frog could not survive at the subject property unless portions of the closed-canopy timber plantation were replaced with an open-canopy pine forest. In rejecting this argument, the Fifth Circuit dismissed the suggestion that the definition of critical habitat contains any "habitability requirement."

On appeal, the Supreme Court did not address whether the FWS erred in designating the subject property as critical habitat. Rather, the Court addressed the very narrow question of whether critical habitat must also be "habitat" under the ESA. Rejecting the Fifth Circuit's prior holding, the Supreme Court held that the ESA does not authorize FWS "to designate [an] area as *critical* habitat unless it is also *habitat* for the species."

This holding, however, constitutes only a limited victory for landowners. While the Supreme Court held that critical habitat must also be "habitat," the Supreme Court did not define "habitat" or determine that habitat cannot include areas where the species could not currently survive. Rather, the High Court remanded the case back to the Fifth Circuit to consider the definition of habitat and whether it may include areas, like the property in question, that would require some degree of modification to support a sustainable population of a given species.

FWS Decisions to Exclude Property from Critical Habitat Subject to Judicial Review

The landowners further contended that, even if the subject property could be properly classified as critical habitat for the dusky gopher frog, FWS should have excluded the property from designation. As noted above, the ESA requires FWS to consider the economic impact of specifying an area as critical habitat before acting. The ESA further authorizes FWS to exclude an area from critical habitat designation if FWS determines that the political, social, economic or other benefits of such exclusion outweigh the benefits of designating the area as critical habitat. For years, FWS has maintained that it enjoys full discretion on whether to exclude property from a critical habitat designation based on economic considerations, and that its discretion could not be reviewed by federal courts.

In the more momentous of the Supreme Court's two holdings, the Court held that FWS' determination of whether to exclude property from a critical habitat designation based on economic or other factors is subject to judicial review. In doing so, the Supreme Court rejected the Fifth Circuit's holding that a decision to exclude a certain area from critical habitat is unreviewable by federal courts. In particular, the Supreme Court held that a federal court may review FWS' economic analysis and determination to ensure that they are not arbitrary, capricious, or an abuse of discretion. The Supreme Court then sent the case back to the Fifth Circuit to determine whether the FWS' assessment of the costs and benefits of its critical habitat designation passed legal muster.

Conclusion and Implications

This case illustrates the potential intersection between the Endangered Species Act and the Clean Water Act. FWS' critical habitat designation effectively limited the federal government's authority to issue permits under the Clean Water Act for development of the subject property, and this limitation could have cost the landowners tens of millions of dollars in lost development potential.

The primary import of this case, however, is that property owners are not without redress when the FWS designates critical habitat, particularly as to economic impact analysis. The Supreme Court's holding provides property owners with potent legal arguments to challenge future critical habitat designations.
The Supreme Court's decision is available online at:
https://www.supremecourt.gov/opinions/18pdf/17-71_omjp.pdf
(Ali Tehrani, Steve Anderson)

TENTH CIRCUIT FINDS SETTLEMENT AGREEMENT BETWEEN BLM AND ENVIRONMENTAL GROUPS NOT RIPE FOR CHALLENGE UNTIL AGENCY IMPLEMENTS THE SETTLEMENT PROVISIONS

Southern Utah Wilderness Alliance v. Burke, 908 F.3d 630 (10th Cir. 2018).

Environmental groups and the U.S. Bureau of Land Management (BLM) entered into a settlement agreement requiring the agency to adopt new land use management plans taking into account specifically enumerated agency regulations and adopted guidance. The State of Utah's challenge to the settlement agreement was found to be unripe because the agency had yet to implement the settlement agreement.

Background

In January of 2017, the Bureau of Land Management, various environmental groups led by the Southern Utah Wilderness Alliance (SUWA) and intervenors entered into a Settlement Agreement to resolve "a longstanding, complex dispute dating from 2008" concerning BLM's adoption of "six resource management plans (RMPs) and associated travel management plans (TMPs) adopted by" BLM for federal lands located within Utah. *See*, http://suwa.org/wp-content/uploads/APPELLATE-349183-v2-SUWA_-_Final_Settlement_Agreement_Signed_with_Maps.pdf

The state of Utah had intervened in the litigation, but did not enter into the Settlement Agreement. When the settling parties sought to have the Settlement Agreement approved by the District Court and the underlying lawsuit dismissed, Utah challenged the Settlement Agreement on the grounds that it:

> . . .illegally codified interpretative BLM guidance into substantive rules, impermissibly binds the BLM to a past Administration's policies, infringes valid federal land rights (known as 'R.S. 2477 rights'), and violates a prior BLM settlement [the "Wilderness Settlement.]

The U.S. District Court did not agree and it approved the Settlement Agreement.

The Tenth Circuit's Decision

The settling parties opposed Utah's appeal on the grounds that the state's:

> . . .claims are not ripe for judicial review. . . .[T]he ripeness doctrine has two underlying rationales: preventing courts from becoming entwined in 'abstract disagreements over administrative policies,' and 'protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1191-92 (10th Cir. 2008).

Three Prong Factor Analysis for Ripeness

The Tenth Circuit applied the three-factor ripeness test set forth in *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1262-63 (10th Cir. 2002):

> 1) whether delayed review would cause hardship to the plaintiffs; 2) whether judicial intervention would inappropriately interfere with further administrative action; and 3) whether the courts would benefit from further factual development of the issues presented.

The Settlement Agreement was entered into in the following legal context. BLM manages the federal lands at issue under the Federal Land Policy and Management Act (43 U.S.C. §§ 1701-1787, FLPMA) and its associated regulations and adopted agency Instruction Memorandum, Handbooks and Manuals. R.S. 2477 rights are right-of-way interests across federal lands created without any administrative formalities, *i.e.*, requiring "no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested," obtained prior to 1976. *Utah*, 535 F.3d at 41. And BLM had previously entered into the Wilderness Settlement to resolve:

> . . .land-use litigation between several of the same parties to this litigation that concerned

wilderness study areas (WSAs) in Utah.

BLM conceded in the Wilderness Settlement "that its authority to establish new wilderness study areas expired no later than October 21, 1993," and the agency:

> . . .stipulated. . .that it would not utilize its general land use planning authority under FLPMA § 202 to establish, manage, or otherwise treat non-WSA public lands as wilderness or as WSAs.

The Settlement Agreement, as is typical, may only be amended with the written consent of all parties to it. Substantively, it provides at Paragraph 13 "deadlines by which BLM will issue five new TMPs for five specific travel management areas [and] details the process by which BLM will prepare the TMPs," including a catalogue of Instruction Memorandum, Handbooks and Manuals that BLM will apply in formulating the new TMPs. "Utah contends that Paragraph 15 elevates certain agency guidance to the level of substantive rules in violation of the [Administrative Procedures Act], and also provides SUWA with veto power," by way of requiring SUWA's written consent to any Settlement Agreement amendments:

> . . .over future BLM guidance and substantive rulemaking that could apply to the five specific travel management areas listed in Paragraph 13.

Various other provisions of the Settlement Agreement require that BLM take into account, and explain in writing how it has done so, various environmental considerations related to road configuration and wilderness designations, in developing the new TMPs.

Applying its ripeness test to the Settlement Agreement, the Court of Appeals observed that:

> . . .[a] common thread [runs] through all three factors point[ing] to our concluding that Utah's appeal is unripe: at this point, no one knows how BLM will implement the Settlement Agreement.

For example, there are no final travel management plans. Additionally, BLM has not rescinded any of the guidance referenced in the Settlement Agreement, and therefore SUWA has not had the opportunity to exercise its alleged veto power provided by the Settlement Agreement. Further, the Settlement Agreement has no effect on R.S. 2477 rights, App. 1107, and nothing in the Settlement Agreement requires BLM to protect wilderness characteristics when developing a TMP. Instead, the Settlement Agreement lays out criteria for BLM to consider as it develops TMPs in a complex regulatory scheme. BLM may ultimately develop a TMP that creates de facto wilderness, or may impermissibly consider guidance that has been rescinded or ignore future substantive rules. But BLM might not.

The Settlement Agreement neither requires BLM to create de facto wilderness, nor mandates that BLM reject future agency action taken by the present Administration. Accordingly, this court can more confidently address the substantive legal arguments raised by Utah when BLM finalizes the TMPs subject to the Settlement Agreement and ultimately reveals the Settlement Agreement's "true effect[.]"

The court concluded it could "more confidently" adjudicate any disputes Utah might have with specific new TMPs "with the benefit of insight into how BLM actually implements the settlement in practice."

Conclusion and Implications

Parties settling with agencies where the terms of the settlement require future agency regulatory action will typically bargain for the agency's future action to comply with specific, identified statutory and regulatory provisions. This case illustrates an equally common hurdle to challenging such settlement agreements prior to their implementation—until the agency performs under the settlement terms, courts are reluctant to consider with that implementation is unlawful.

(Deborah Quick)

DISTRICT COURT CONCLUDES FEDERAL AGENCIES' ENVIRONMENTAL ASSESSMENT OF COASTAL 'FRACKING' VIOLATED THE ESA AND COASTAL ZONE ACT

Environmental Defense Center v. U.S. Bureau of Ocean Energy Management, ___F.Supp.3d___, Case No. CV168418PSGFFMX (C.D. Cal. Nov. 9, 2018).

The U.S. District Court for the Central District of California recently granted in part and denied in part seven cross-motions for summary judgment relating to the issuance of a final environmental assessment for fracking and acidizing in oil production off the California coast. The federal Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) issued a Final Environmental Assessment (EA) on the potential impacts of offshore well stimulation treatments, more commonly known as "fracking" or "acidizing," on the Pacific Outer Continental Shelf. Plaintiffs claim BOEM and BSEE violated their statutory obligations under the National Environmental Policy Act (NEPA), federal Endangered Species Act, and Coastal Zone Management Act (CZMA) when they issued a Final EA. The court found the federal agencies had complied with NEPA requirements, but had violated provisions of the Endangered Species Act (ESA) and CZMA. The court ordered prohibitory injunctions preventing the federal agencies from issuing any well stimulation treatments plans or permits until BOEM and BSEE 1) complete a formal consultation with Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act, and 2) complete the CZMA review process.

Factual and Procedural Background

This case consolidated two successor cases which culminated in settlement agreements where BOEM and BSEE agreed to conduct an EA and withhold any future application permits for well stimulation treatments. After the agencies issued the Final EA and subsequent Finding of No Significant Impact (FONSI), three groups of plaintiffs filed separate suits challenging the EA and FONSI. All three cases were transferred to the U.S. District Court and consolidated in the present case. The parties then cross-moved for summary judgment on seven claims under NEPA, the Endangered Species Act, and CZMA.

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) when federal action is proposed that will significantly affect the quality of the human environment. Alternatively, a federal agency may prepare an EA and provide a concise summary on whether an EIS is even required, and if the agency finds that there will be no significant impact, then it can forgo the EIS and issue a FONSI. BOEM and BSEE reviewed four proposed plans relating to well stimulation treatments and then issued a FONSI based on a determination that there would be no significant impact on the human environment. The federal agencies argued that they had not taken any "major federal action" to trigger the statutory requirements of NEPA. The plaintiffs disagreed, challenged the adequacy of the EA, and argued that the agencies should have prepared the more robust EIS.

Under § 7 of the Endangered Species Act, a federal agency must ensure that any action they authorize is not likely to result in the jeopardization of any endangered, or threatened species, or result in the destruction of critical habitat. 16 U.S.C. §1536(a)(2). The ESA requires procedural mandates, including at least informal consultation with Fish and Wildlife Services (FWS) and National Marine Fisheries Services (NMFS), even if a certain substantive outcome or determination is not reached. Plaintiffs allege BOEM and BSEE failed to initiate consultation with either FWS or NMFS before issuing the EA. The federal agencies argue that the consultation requirements were not triggered because they had not taken "action" within the meaning of the statute.

The CZMA gives coastal states the right to review federal agency activity and if the state finds that federal activity is inconsistent with the state's coastal management plan, the state may seek relief in federal court. The plaintiffs allege BOEM and BSEE violated the CZMA by failing to prepare and submit a determination to the California Coastal Commission on whether the proposed use of well stimulation treat-

ments is consistent with California's coastal management plan. The federal agencies argued that they had not taken the required federal agency activity that would have triggered review under the CZMA.

The District Court's Decision

The NEPA Claims

The court determined that NEPA claims were reviewable because the proposal to allow well stimulation treatments on the Pacific Outer Continental Shelf was a major federal action. The court then denied the plaintiffs' NEPA claims because the federal agencies took the requisite "hard look" at the environmental effects of "fracking" on the Pacific Outer Continental Shelf and reasonably concluded that there would be no significant impact. The court reviewed the agencies' action under a deferential standard that looks for agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Finding the federal agencies had made informed decision-making and satisfied public participation requirements for the EA, the court rejected the plaintiffs challenges to the substance of the EA. The court then considered whether an EIS should have been prepared instead of an EA, and found that the intensity factors required under the statute were not present. Lastly, the court found BOEM and BSEE had provided a reasonable range of alternatives in preparing the EA.

The ESA Claims

The Endangered Species Act claims were based on the federal agencies' failure to initiate consultation with the FWS and NMFS, as required by Section 7 of the act before issuing the Final EA. The NMFS claim was found moot because BOEM and BSEE adequately initiated and completed consultation with NMFS. NMFS issued a letter concurring with BOEM and BSEE's determination. In contrast, BOEM and BSEE asked FSW to engage in a formal consultation given the adverse effect of an accidental oil spill on certain species. The court determined that the federal agencies violated the Endangered Species Act, however, by issuing their Final EA before the consultation was complete. The court granted the plaintiffs' request for declaratory relief and issued an injunction prohibiting the agencies from proceeding with well stimulation treatments permitting until consultation with FWS is complete.

The Coastal Zone Managemnt Act Claims

Finally, the court granted the plaintiffs' motion for summary judgment on the CZMA claims and issued an injunction prohibiting the agencies from approving permits until they complete the required CZMA process. The court found that the broad statutory language of "federal agency activity" included the federal action at issue and the federal proposal as described in the Final EA is reviewable under 16 U.S.C. §1456(c)(1).

Conclusion and Implications

This case illustrates that issuance of plans or permits may constitute an "action" under the Endanger Species Act or a "federal agency activity" under the CZMA, triggering interagency consultation and review requirements. Even under a deferential standard of review, federal agencies may be ordered to refrain from any further action unless and until the Endangered Species Act and CZMA consultations are completed.
(Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT ADDRESSES PROPOSITION 218 AND A MUNICIPAL REFERENDUM SEEKING TO ALTER WATER RATES TO FACILITATE WATER INFRASTRUCTURE

Wilde v. City of Dunsmuir, ___Cal.App.5th___, Case No. C082664 (3rd Dist. Nov. 15, 2018).

The Third District Court of Appeal has held that Proposition 218 does not preclude placing a referendum on the ballot regarding legislatively imposed fees.

Factual Background

In March 2016, the Dunsmuir (City) city council passed Resolution 2016-02 by which it raised water rates. Resolution 2016-02 set forth a five-year plan for a $15 million upgrade to the City's water storage and delivery infrastructure. Consistent with the requirements of Proposition 218, the City provided notice of the public hearing on water rate adjustments and protest ballots with which residents could file an objection. The City received only 40 protest votes at a time when 800 were required for a successful protest, and Resolution 2016-02 went into effect.

After the resolution's adoption, petitioner Leslie Wilde (Wilde) gathered 145 voter signatures calling for a referendum to repeal the resolution. These signatures were verified. Nonetheless, the City's attorney informed Wilde the City refused to place the referendum on the ballot, stating:

> The setting of Prop. 218 rates is an administrative act not subject to the referendum process. Also, Proposition 218 provides for initiatives ([Cal.Const. art.] XIII C, 3), but not referenda.

Wilde filed a petition for writ of mandate to place her referendum on the ballot. In July 2016, the trial court denied the writ petition, agreeing with the City that the setting of new water rates constituted an administrative act that was not subject to referendum.

While Wilde's writ petition was pending in Superior Court, she gathered a sufficient number of signatures for an initiative to amend the City's water and sewer rate structure. The City placed Wilde's initiative on the November 8, 2016 ballot as Measure W. Measure W would have implemented a different water and sewer rate structure than that adopted by Resolution 2016-02. Measure W was rejected by the voters.

Legal Background

The powers of initiative and referendum are considered rights reserved by the people, and courts:

> . . .apply a liberal construction to this power… If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it. *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591. . . .The powers of referendum and initiative apply only to legislative acts by a local governing body. *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 516, fn. 6.

However, acts of a local governmental entity may be administrative in nature when they merely carry out previously determined policies rather than constituting new legislative policy.

In November 1996 the electorate adopted Proposition 218, which added Articles XIII C and XIII D to the California Constitution, which among other things imposed a two-thirds vote requirement for the passage of a special assessment (special taxes had already required a two-thirds vote under Proposition 13). Article XIII C, § 3 states that:

> . . .the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge.

The Court of Appeal's Decision

The court first addressed whether the lawsuit was moot in light of the fact that the City electorate had rejected Wilde's initiative, holding that it was not, as the initiative and proposed referendum concerned different things. Wilde's initiative sought to replace the City's water rates with a different set of water rates, whereas her proposed referendum sought to repeal the City's water rate resolution. As such, the voters' rejection of the initiative did mean that the voters would necessarily reject the referendum. Slip Op. at p. 6.

The court next discussed whether Proposition 218 in some manner restricted or precluded the use of a referendum, holding that it did not. The court noted that article XIII C, § 3 of the California Constitution, added by Proposition 218, "confirms voter initiative rights and contains no negative language that limits any power of the voters." Given this, the court held that "Section 3 cannot be read to repeal California voters' referendum power to challenge local resolutions and ordinances." While a referendum cannot be used to challenge a tax measure, here the parties agreed the water service charge was a fee, and therefore a referendum was permitted. Slip Op. at p. 13.

Next, the court examined whether the water rate resolution prescribed a new policy or simply administratively carried out previously determined legislative policies. Looking to the uncontested factual recitals in the resolution, the court found that:

> . . .[t]he new water rates are the product of a newly formulated set of policies that implemented a new set of choices: to replace a 105-year-old water storage tank as well as selected old water mains. In addition to these decisions to replace infrastructure, the 2015 Dunsmuir Water Master Plan also represents policy choices about how to allocate the new infrastructure costs. Slip Op. at p. 16.

Further, the resolution adjusted the allocation of rates and departed from continued maintenance of old facilities, which the court found to be new policy. Slip Op. at p. 17.

Finally, the rejected the contention that the proposed referendum was improper because it would undermine "essential government services," as it would not affect the "ordinary working or budgeting of the City," but rather would challenge "policy choices" regarding the City's water infrastructure and rates. Slip Op. at pp. 20-21.

Conclusion and Implications

This case is significant because it makes it clear the Proposition 218 did *not* limit the referendum power, and provides guidance for interpreting whether a local government action is legislative or administrative in nature. The court's published opinion is available online at: http://www.courts.ca.gov/opinions/documents/C082664.PDF
(Alex DeGood)

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