Volume 29, Number 5
February 2019

CALIFORNIA WATER LAW & POLICY Reporter™

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT CALIFORNIA DECISIONS

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, P.O. Box 506, Auburn, CA 95604-0506; 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

CALIFORNIA WATER NEWS

CITY OF SANTA MONICA REMAINS BEHIND SCHEDULE TO IMPLEMENT LANDMARK WATER INDEPENDENCE INITIATIVE

The City of Santa Monica is scheduled to achieve water independence in 2023, three years behind the original plan's schedule. The initiative seeks to provide the city a shield from increasing imported water costs caused by regulatory actions and drought conditions that have affected California for the past decade. The city initiative seeks to accomplish this goal through a mix of local projects, including increased water conservation efforts, greater reliance on groundwater, and water treatment plant upgrades. [*Sustainable Water Master Plan 2014*, City of Santa Monica: Water Resources Division, Dec. 2014, https://www.smgov.net/uploadedFiles/Departments/Public_Works/Water/SWMP.pdf (last visited Jan. 8, 2019).]

Background

Santa Monica provides water service to approximately 91,000 residents through a combination of local and imported water supplies. *Sustainable Water Master Plan 2014*, *supra*. In recent years, to meet customer demand, Santa Monica has relied heavily upon water purchased from the Metropolitan Water District of Southern California (MWD) due to the presence of contamination in Santa Monica's groundwater supply. The water MWD provides is imported from the Colorado River and the San Joaquin River Delta. However, recent environmental and regulatory conditions have resulted in an increase in demand for imported water and a subsequent jump in imported water costs to Santa Monica. Given these trends, several years ago Santa Monica approved a plan to cease all use of imported water by 2020.

The Goal of Water Independence

Santa Monica seeks to achieve water independence through a variety of means. As an initial measure, the city has implemented strict water conservation measures to reduce the amount of water used by its customers. These measures included imposing water-use allowances in order to curtail water usage. In addition to these new limitations, Santa Monica also incentivizes its customers to implement reduction measures through the ongoing implementation of programs similar to those may water agencies established during the drought years of the mid 2010s. These city programs include subsidies for installing drought-resistant landscapes and retrofitting existing indoor plumbing systems. Santa Monica is also focused on permanent water use reductions in the commercial sector.

Second, Santa Monica plans to upgrade facilities at its Olympic well field in order to increase groundwater production.. Seven wells have been constructed in this well field by the city; however, only two remain in operation. In order to maximize groundwater production, the city intends to repair some of its offline wells. At the same time, Santa Monica is also focused on addressing groundwater quality issues. Groundwater located within the Olympic well field has been adversely impacted by the actions of several industrial users over the years. The money to fund basin water quality restoration will come from settlement agreements the city has reached with the companies that contaminated the basin.

Further, Santa Monica plans to upgrade its Arcadia Water Treatment Plant. The plant provides for pretreatment, filtration via a three-stage reverse osmosis filtration system, aeration and water storage. These upgrades would seek to expand the plant's water treatment capacity. The rehabilitation process would also seek to make plant more efficient.

Santa Monica also seeks to expand its reliance on groundwater by drilling new wells to increase the amount of local water available for distribution. This city has acknowledged that this outcome may be difficult to achieve, given the lack of available land overlying the basin. Due to the land use density in the city, rehabilitating existing wells may be a more promising avenue that constructing new wells on new sites.

Initial studies carried out by the city have indicat-

ed that the aquifers underlying the city have sufficient supply to allow for an increase in groundwater production. However, according to the city, drilling new wells and increasing production may require more active conjunctive use or stormwater capture and infiltration in the basin. The anticipated city recharge plan may involve measures such as rain water capture and brackish water treatment, in addition to ensuring barriers continue to prevent seawater intrusion into these ocean-adjacent basins.

Conclusion and Implications

It remains to be seen if Santa Monica will accomplish water independence by 2023. If the past is any predicter of the future, the city faces daunting hurdles ahead. The large variety and number of projects and measures that will need to be implemented to reach the goal are significant.
(Geremy Holm, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION AND DWR REACH AGREEMENTS FOR COORDINATED OPERATIONS OF CENTRAL VALLEY PROJECT AND STATE WATER PROJECT

The Department of Water Resources (DWR) and the U.S. Department of the Interior, Bureau of Reclamation (Bureau) recently executed agreements updating the respective agencies' coordinated operation of the federal Central Valley Project (CVP) and California State Water Project (SWP) (collectively: Projects). Specifically, the parties executed an Addendum amending the 1986 "*Agreement Between the United States of America and the State of California for Coordinated Operation of the Central Valley Project and the State Water Project*" generally referred to as the "Coordinated Operation Agreement, or, "COA." The parties also executed a "*Memorandum of Agreement for the Implementation of the 2008 and 2009 Biological Opinions for the Coordinated Long-Term Operation of the Central Valley Project and State Water Project*" (BiOps MOA). The agreements were deemed necessary to maintain the Projects' coordinated and operational viability in response to significant restricting regulatory changes and operating conditions that have developed over several decades.

Background

The Projects comprise two of the largest water storage, conveyance and delivery systems in the world. Following severe late-1920s drought conditions, California voters approved constructing the CVP as part of the State Water Plan. However, as the Great Depression took hold in the 1930s, the state was unable to fund the bonds required for the CVP. The United States assumed responsibility for construction of the CVP in 1937, and the state consequently assigned many of its water rights filings to the United States. The CVP Friant Dam was completed in 1944, followed by many other large CVP facilities. Today, the CVP diverts, stores, conveys and distributes waters of the Sacramento River, the American River, the Trinity River and the San Joaquin River and their tributaries for a wide variety of purposes including irrigation, municipal, domestic, industrial, environmental, flood control, hydroelectricity, salinity control, navigation and other beneficial purposes.

During improved economic conditions following World War II, California began constructing its own massive water system, the SWP. Though the SWP generally developed larger pumping capacities than the CVP, the surface water diversion rights for the SWP were generally subsequent-in-time, and therefore junior, to the CVP water rights. Today, the SWP is composed of twenty-one reservoirs and lakes and eleven other storage facilities with a combined storage capacity of over 4 million acre-feet, five hydroelectric power plants and four pumping-generating plants, and over 700 miles of major canals and aqueducts.

Tensions arose over water rights priorities and operating issues as the CVP and SWP facilities were proposed, planned and constructed. The parties also share responsibility and operation over certain facilities that serve both Projects. In order to mitigate the litigation risks potentially deleterious to both Projects, DWR and the Bureau undertook to coordinate the Projects' operations.

The COA, which was originally signed in 1986, primarily establishes how the Projects share water quality and environmental flow obligations imposed by regulatory agencies. The COA also recognizes the need for, and requires, periodic review in order to determine whether updates are required in light of changed conditions.

Addendum to COA

In fact, conditions have changes significantly since the COA was executed in 1986.

As described in the Addendum, both the United States and California have added extensive facilities to the CVP and SWP. The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued highly-impactful Biological Opinions (BiOps) pursuant to the federal Endangered

Species Act (ESA) in 2008 and 2009, respectively, which restrict the Projects' abilities to achieve their intended water supply objectives. The California State Water Resources Control Board (SWRCB) established new Bay Delta standards restricting water exportation in order to protect aquatic Delta species. These and other complex regulatory processes continue to evolve, with intense controversy. Recent historic drought conditions also revealed certain shortcomings in the COA.

The Addendum acknowledges that the United States and California have thus far shared responsibility for meeting the requirements of these regulatory constraints, but that changed conditions warranted a review and update to the COA. The Addendum amends or expands upon several aspects of COA, primarily including:

- Establishing new allocation percentages and storage withdrawal obligations in order to meet Sacramento Valley in-basin demands based on specific water-year (wet/dry) designations.

- Establishing allocations and responsibilities for sharing export capacity during balanced and excess water conditions.

- Setting forth new terms regarding the timing, amount, transportation and utilization of water supplies reliant upon certain shared facilities.

- Requiring an update to COA Exhibit "A" to conform to Delta flow standards established by the SWRCB.

- Requiring COA Exhibit "B", which sets forth CVP and SWP water supply figures and responsibilities, to be updated based on a joint operations study of the amendments imposed by the Addendum.

- Establishing new timeframes and triggering events requiring joint review of the Projects' operations, as well as procedures for resolving disputes and implementing agreed-upon recommended changes.

Cost Sharing Agreement

The BiOps Agreement summarizes the key requirements imposed by the 2008 and 2009 BiOps. It further memorializes the August 2016 joint requests of DWR and the Bureau for Reinitiation of ESA Consultation on the Coordinated Long-Term Operation of the CVP and SWP. It also seeks to implement the mandate of President Trump's October 2018 Memorandum directing the Bureau to issue a Biological Assessment by January 31, 2019 and directing FWS and NMFS to issue final BiOps within 135 days thereafter.

Key aspects of the BiOps Agreement include:

- Identifies funding obligations for the joint and individual DWR and Bureau requirements set forth by the current FWS BiOps and NMFS BiOps, and the subsequent and/or superseding BiOps to be issued in mid-2019.

- Establishing procedures for cooperation and collaboration.

- Establishing procedures for tracking and reporting expenditures.

Conclusion and Implications

Many stakeholders, including the CVP and SWP contractors, have long expressed the need to update the COA in response to the increased regulatory burdens imposed on those Projects that have resulted in reduced water supply deliveries. Regarding these agreements, DWR Director Karla Nemeth said, "The state and federal projects are intertwined, and we have a joint interest and responsibility to ensure our water system meets California's needs, especially as conditions change." Perhaps the most robust aspect of these new agreements is the recognition that conditions continue to change and require greater coordination efforts to manage operation of these massive—and aging—water systems.

(Derek R. Hoffman, Michael Duane Davis)

SHASTA DAM PROJECT UPDATE: PROGRESSING THROUGH THE CEQA AND NEPA REGULATORY PROCESS

A new dam project is underway in California known as the Shasta Dam and Reservoir Enlargement Project (Shasta Dam Project). Although dams in California are not well-received by some stakeholder groups given potentially adverse environmental impacts to fisheries for some projects as well as safety issues to human populations if dam failure occurs, the Shasta Dam Project is gaining legs by recently undergoing a scoping and comment period under the California Environmental Quality Act (CEQA), with the federal environmental impact equivalent under the National Environmental Policy Act (NEPA) being much further along in the regulatory approval process.

Background

Shasta Dam and reservoir are located in northern California approximately ten miles north of Redding and about 100 miles south of the Oregon state border. The dam was built between 1938 and 1945, standing at 602 feet tall, providing flood control, hydropower supply and water for irrigation, municipal and environmental uses. The reservoir is also used extensively for various recreational activities.

Shasta Dam and reservoir is federally owned and operated by the U.S. Bureau of Reclamation (Bureau), and serves as the Bureau of Reclamation's largest reservoir in the federal Central Valley Project (CVP), comprising approximately 41 percent of the CVP's total 9 million acre-feet of storage.

Federal feasibility study efforts started back in 1980 under Public Law 96-375 to evaluate a 200-foot rise along with other options, followed in 2004 under Public Law 108-361 to confirm feasibility authorization, among other things, with such authorization confirmed. In 2006, a scoping report was done, and during 2015, the feasibility report and Environmental Impact Statement (EIS) under NEPA was sent to Congress. In 2018, Congress appropriated $20 million for Shasta preconstruction activities.

The current calendar year is set to be a big one for the Shasta Dam Project. The Bureau has indicated that it anticipates completing the Biological Assessment during February; 90 percent design plan completed during May; a final, executed Record of Decision under NEPA during September; and a construction contract award with a Notice to Proceed during December. The Bureau further anticipates the reservoir filling date will be during Spring of 2024.

The Shasta Dam Project

The Bureau states that the goals of Shasta Dam Project are to raise the dam by 18.5 feet, which increase Shasta reservoir's storage capacity by 630,000 acre-feet. More specifically, The Bureau states this project would improve water supply reliability for agricultural, municipal and industrial, and environmental uses, while also reducing flood damage and improving Sacramento River temperatures and water quality below the dam for anadromous fish.

All of these benefits, however, come at a price. An 18.5-foot raise requires an additional 2,500 acres of land, which would require the federal government to acquire approximately 200 parcels of non-federal land mostly located in the community of Lakehead. Another category of cost is construction itself to raise the dam 18.5 feet, which the Bureau estimates to be $1.4 billion in 2014 dollars. The Bureau has said it will pay for half the cost, but that local and state partners will need to pay the other half.

As with any large project, various governmental agencies and stakeholder groups are involved. Among interested federal agencies are the U.S. Forest Service due to National Forest System lands that may be impacted; the Bureau of Indian Affairs with the Winnemem Wintu Tribe and other tribal interests voicing strong concerns; the U.S. Army Corps of Engineers for regulatory permitting for construction and other activities; and the U.S. Fish and Wildlife Service for fisheries evaluations, which in its 2015 comments on the NEPA document said raising the dam will not benefit salmon.

Other stakeholder interests include the environmental protection groups, also commonly referred to as non-governmental organizations (NGOs) — the NGOs as well as other stakeholders have much to say, especially now that CEQA is underway and is being assisted with by Westlands Water District. Westlands is the Fresno County irrigation district often involved in state water projects with some reporting in a con-

troversial way. During a December 12, 2018 CEQA scoping session in Redding, one local member of the public said the purpose of the project is to send much more water to Westlands, while an NGO representative at that meeting said raising Shasta Dam would violate state law because a taller dam would result in the reservoir rising and further inundating the McCloud River, which is protected under state law. John Laird, the then-California Secretary of Natural Resources reportedly sent a letter to Congress last year making a similar point. With the change in state administrations on January 7, it is unclear whether current Natural Resources Secretary Wade Crowfoot will share his predecessor's position.

Conclusion and Implications

As with past water supply shortages, future shortages will happen due to drought, regulatory actions, or some combination thereof, making storage of water—whether in reservoirs or groundwater basins a highly-effective tool to help overcome or worse yet survive severe shortages. As for the fisheries science and related methodologies and interpretations, the conflict is tense between one school of thought advocating for more water releases in rivers and streams to benefit fish (hence, little-to-no purported need for new dams or increasing existing dams), while another school of thought favors better-managed and timed releases so that the quantity and quality of water (*i.e.*, temperature) improves given temperature is a critical factor for fishery health rather than simply looking to quantity of flows. Accordingly, at its broad conceptual level, the Shasta Dam Project implicates potential benefits for water users of all types, including fisheries, with much more to be determined as to this project's implications to local landowners, fisheries and water users downstream.
(Wesley A. Miliband)

DWR APPROVES ENVIRONMENTAL IMPACT REPORT AND FILES VALIDATION ACTION FOR STATE WATER PROJECT CONTRACT EXTENSION AMENDMENTS

On December 11, 2018, the Director of the California Department of Water Resources (DWR), Karla A. Nemeth, certified and approved the Final Environmental Impact Report (FEIR) for the Water Supply Contract Extension Project. This project will amend the 29 water supply contracts DWR has with public agencies throughout California as part of the State Water Project. The amendments will extend the water supply contracts from 2035 to 2085. (EIR, at 1-2.) The same day as the EIR approval, DWR filed a validation action in the Superior Court of Sacramento County, seeking a judgment confirming the validity and legality of the contract extension amendments. (*California Department of Water Resources v. All Persons Interested in the Matter*, Case No. 34-2018-00246183.)

Background

For over half a century, DWR has operated the State Water Project (SWP) to distribute water throughout California. The Burns-Porter Act (BPA), enacted by the State Legislature in 1959 and approved by voters in 1960, authorized the issuance of $1.75 billion in general obligation bonds for the construction of the SWP. (Water Code § 12935.) The BPA further directed DWR to enter into contracts for the sale, delivery, and use of water and power, the proceeds of which would be used to repay the bonds. (Water Code § 12937 (b).) Accordingly, DWR maintains 29 long-term water supply contracts with cities, counties, water districts, and other agencies (Contractors) throughout the state. (DWR, Bulletin 132-16, p. 151.) In turn, the Contractors deliver water to more than 27 million Californians and about 750,000 acres of farmland. The Contractors pay DWR for the cost of capital construction, improvements, and operations and maintenance of SWP facilities.

Each Contractor has its own long-term water supply contract with DWR, but the basic terms and conditions of all the contracts are substantially uniform. These contracts have been amended periodically to incorporate changes agreed upon by DWR and the Contractors. (Bulletin 132-16, p. 153.) Due to amendments in the 1990s, the contracts are in effect

for the longest of: the project repayment period (ending December 31, 2035); 75 years from the date of the contract; or the period ending with the latest maturity date of any bond used to finance construction costs of project facilities. (Bulletin 132-16, p. 152.) All 29 of the contracts are set to expire between 2035 and 2042. (*California Department of Water Resources v. All Persons Interested in the Matter*, Complaint, p. 2.)

Although bonds have historically been sold with 30-year terms, no SWP bonds have been sold with maturity dates beyond 2035. As that date approaches, the financial strain of repayment obligations grows, and it has become increasingly difficult to affordably finance SWP capital expenditures. (EIR, at 2-4.)

The Contract Extension Amendment

In advance of the end of the 2035 repayment period, DWR and the Contractors began negotiations to amend the contracts in May 2013. (EIR, at 1-1.) Just over a year later, the negotiators agreed on four project objectives: first, to "ensure DWR can finance SWP expenditures beyond 2035 for a sufficiently extended period to provide for a reliable stream of revenue from the Contractors and to facilitate ongoing financial planning for the SWP"; second, to "maintain an appropriate level of reserves and funds to meet ongoing financial SWP needs and purposes"; third, to "simplify the SWP billing process"; and fourth, to "increase coordination between DWR and the Contractors regarding SWP financial matters." (EIR, at 1-2; Bulletin 132-16, p. 151.)

The proposed amendments achieve the stated purposes by: 1) extending the term of the 29 contracts to December 31, 2085; 2) providing for increased SWP financial operating reserves; 3) establishing a new "pay-as-you-go" repayment methodology in which costs are recovered within the year they were incurred; 4) providing enhanced funding mechanisms and new accounts to address SWP financial needs; and 5) establishing a Finance Committee and provide other means to increase coordination between DWR and the Contractors. (EIR, at 1-2.)

DWR released a Draft Environmental Review (DER) in August 2016, in which it determined that there are no impacts of the proposed amendments in the resource topics analyzed. In particular, the proposed amendments concern financial provisions of the contracts and would authorize no new construction or water allocations. (DER, at ES-4.) Further, DWR determined that the amendments would have no physical environmental impacts and therefore would not contribute to any cumulative effect. (*Id.*) A public hearing was held on September 12, 2016 and the public comment period lasted until October 17, 2016.

Numerous parties commented on the DER. One comment from multiple commenters was that the Draft did not discuss the relationship between the contract extension amendments and California WaterFix. (EIR, at 2-8.) DWR explained that the California Environmental Quality Act (CEQA) does not require the contract extension amendments to be analyzed in combination with California WaterFix because the two projects are not reasonably foreseeable consequences of one another, and each has independent benefits, purposes, and objectives. (EIR, at 2-9.) Another comment was that DWR should amend the contracts to decrease SWP exports from the Delta. In response, DWR explained that the contracts are used only to determine the *proportion* of water each Contractor should get from available SWP, not the *amount* of supply, which is determined based on hydrology, reservoir storage, facility constraints, and regulatory constraints. (EIR, at 2-12 – 2-13.)

DWR certified the Final EIR on December 11, 2018.

The Validation Action

The California Government Code provides that a state agency may bring an action under the Code of Civil Procedure, § 860 (Validation Statute) to determine the validity of its contracts. (Gov. Code § 17700.) On the same day it certified the Final EIR, DWR filed a validation action asking the court to deny all challenges to the validity of the contract extension amendments and to find that the amendments are valid, legal, and binding. DWR also asks for a permanent injunction against any legal action to challenge the adoption or validity of the amendments. If DWR prevails, it would shield the contract extension amendments from future legal attack.

Conclusion and Implications

Individual contractors, such as Metropolitan Water District of Southern California and Santa Clara Valley Water District, have approved the contract extension amendments and more are expected in the

coming weeks. Interested parties may challenge the contract extensions in court by either answering the validation action or by filing a new lawsuit challenging the adequacy of DWR's environmental review. It remains to be seen whether the contract extensions as approved by DWR will be found to be binding and conclusive.
(Chelsie Liberty, Meredith Nikkel)

DWR MOVES FORWARD ON SALTON SEA HABITAT CONSERVATION PROJECT

The California Department of Water Resources (DWR) is moving along with a large-scale, multi-million-dollar species habitat conservation and air quality management project at the southern end of the Salton Sea (Project). The Project comprises a significant component for Phase 1 of the Salton Sea Management Program (SSMP). DWR recently released a Request for Qualifications (RFQ) seeking contractors for the Project. The release of the RFQ is a significant step forward in implementing the SSMP and combating one of the state's most significant public health and ecological challenges.

Background

The Salton Sea is a desert lake extending approximately 35 miles long and 15 miles wide between the Coachella and Imperial valleys. The Salton Sea was formed around 1904, when the Colorado River swelled, broke through extensive irrigation structures and flowed into the Salton Basin for many months. The Salton Sea, which is saltier than the ocean provides fish habitat and a food supply food for millions of migratory birds on the Pacific Flyway. Over the last several decades, water levels at the Salton Sea have declined and salinity concentrations have increased, posing threats to the ecosystem and wildlife. Dust emissions caused by the receding shoreline and exposed lake bed have also created air quality problems and other health hazards for local communities.

The Salton Sea Management Plan

In May 2015, then-Governor Brown created a Salton Sea Task Force (Task Force). He directed the Task Force to seek input from tribal leaders, federal agencies, local water districts, local leaders and other public and private stakeholders with an interest in the Salton Sea to develop a comprehensive management plan for the Salton Sea.

The Task Force developed a multi-phased SSMP to address the urgent public and ecological health issues resulting from decreasing water levels. Phase 1 of the SSMP is a ten-year plan that outlines a series of projects to expedite construction of habitat and suppress dust on areas of playa that have been, or will be, exposed at the Salton Sea by 2028 (Phase 1 Plan). Total project costs for the Phase 1 Plan are projected to be approximately $303 million.

The Project and Request for Qualification

The Project is the first step in implementing the Phase 1 Plan, it aims to suppress hazardous dust contributing to human health issues while creating habitat for endangered migratory birds at the quickly receding Salton Sea. The Project area encompasses approximately 3,770 acres of exposed lakebed at the southwest end of the Salton Sea, about eight miles from of the town of Westmorland in Imperial County.

The state is prepared to commit up to $190 million for the Project, though that funding is contingent upon obtaining the necessary easements from the Imperial Irrigation District in order to access property required to implement the Project. Through the RFQ, DWR seeks to establish a partnership with a design and build construction firm with the expertise, resources, and vision that will help advance the Project. The release of the RFQ is an important step for the state toward fulfilling its commitments to the Salton Sea.

Responses to the RFQ must be submitted by April 15, 2019. The RFQ and more information can be found on the DWR website at water.ca.gov/Program/Engineering-And-Construction/Design-Build-Contracting

If all goes according to plan, it is anticipated that the DWR will issue a request for proposals for the Project as early as July 2019.

Conclusion and Implications

The Salton Sea requires dedicated resources and effective, collaborative project management if it is to provide benefits that outweigh its mounting harm and challenges. After years of planning, the release of the RFQ marks a notable step forward in Project implementation and demonstrates the state's commitment to advance the SSMP toward successfully managing the Salton Sea.
(Paula Hernandez, Michael Duane Davis)

STATE WATER BOARD ADOPTS PHASE I OF BAY-DELTA PLAN UPDATE AND LAWSUITS FILED CHALLENGING THE ADOPTION

For the past ten years, the State Water Resources Control Board (SWRCB) has been considering updates for its 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The SWRCB has approached the Bay-Delta Plan update in two phases. Phase I of the Bay-Delta Plan Update addresses flow standards for the San Joaquin River and its tributaries, while Phase II addresses flows in the Sacramento River and its tributaries as well as Delta eastside tributaries, Delta outflows and interior Delta flows.

On December 12, 2018, the SWRCB approved its proposed Phase I Update by a 4-1 vote. A notable—and controversial—feature of the Phase I Update requires that 40 percent of the unimpaired flow of the Stanislaus, Tuolumne, and Merced rivers from February through June. Numerous water agencies, including the City and County of San Francisco (San Francisco), have since filed lawsuits challenging the SWRCB's decision to adopt the Phase I Bay-Delta Plan Update.

Phase I Update

The SWRCB and its Regional Water Quality Control Boards (RWQCBs) prepare water quality control plans for various hydrologic regions pursuant to the state's Porter-Cologne Act and the federal Clean Water Act. The Bay-Delta Plan was adopted by the SWRCB in 2006 pursuant to these legal authorities.

The Phase I Update ultimately approved by the SWRCB in December is set forth in Appendix K of the recirculated Substitute Environmental Document (SED) prepared by the SWRCB under the California Environmental Quality Act (CEQA). (SED at K-1.) The Phase I Update would create new water quality objectives for various beneficial uses of water in the southern Delta and lower San Joaquin River, including fish and wildlife uses. Specifically, the Phase I Update replaces various numeric standards for San Joaquin River flows at Airport Way Bridge in Vernalis with a narrative objective of ensuring inflow conditions from the San Joaquin River to the Delta at Vernalis:

> . . .sufficient to support and maintain the natural production of viable native San Joaquin River watershed fish populations migrating through the Delta. (SED at Appx. K, p. 18.)

As noted above, the Phase I Update seeks to achieve this narrative objective by permitting 40 percent of the unimpaired flow from the Stanislaus, Tuolumne, and Merced rivers to enter the lower San Joaquin River, with an adaptive range of flows between 30 and 50 percent of the unimpaired flow.

Voluntary Settlement Agreements

The Phase I Update does not propose any changes to habitat factors that affect fish and wildlife in the Delta other than flows. In recognition of the fact that other habitat factors can and do affect the status of fish and wildlife in the Bay-Delta watershed, and concurrently to protect and enhance water supply reliability, various stakeholders spent two years negotiating a Framework Proposal for Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan (Framework Agreement). These stakeholders include agricultural and municipal water suppliers, the U.S. Bureau of Reclamation (Bureau), the California Department of Water Resources (DWR), and the California Department of Fish & Wildlife (CDFW). The Framework Agreement would increase flows in the San Joaquin River by 140,000 acre-feet on an average annual basis. (Framework Agreement at 3.) In addition, the parties to the Framework Agreement propose to fund

and implement various non-flow habitat improvement measures to support fish and wildlife in the Delta ecosystem. (*Id.* at 3.)

The directors of DWR and CDFW presented the Framework Agreement to the SWRCB before its adoption of the Phase I Update. Although many parties to the Framework Agreement urged the SWRCB to postpone its decision to adopt the Phase I Update to allow further negotiations on the details of various voluntary settlement agreements, the SWRCB declined to do so. Instead, it approved the proposed Phase I Update, the SED, and a statement of overriding considerations pursuant to CEQA. (State Water Resources Control Board Resolution No. 2018-0059 at p. 6, ¶ 1.) The SWRCB encouraged the parties to the Framework Agreement to continue their negotiations, noting that implementing the Phase I Update's flow requirements would require a separate rulemaking in the future, and that the separate rulemaking process could account for the voluntary settlement agreements. (*See,* State Water Resources Control Board Media Release, *State Water Board Adopts Bay-Delta Plan Update for Lower San Joaquin River and Southern Delta* (Dec. 12, 2018).) The SWRCB also directed staff to assist DWR and CDFW in completing a watershed-wide agreement by March 1, 2019. (State Water Resources Control Board Resolution No. 2018-0059 at p. 7, ¶ 7.)

Lawsuits Filed by Water Agencies

Following the SWRCB's adoption of the Phase I Update, several water agencies that would be affected by the new flow requirements, filed lawsuits challenging the SWRCB's decision. While each complaint is different, all of them contain some combination of claims challenging the SWRCB's adoption of the Phase I Update under CEQA and the Porter-Cologne Act. The complaint filed by Merced Irrigation District alleges 51 discrete causes of action under CEQA, Porter-Cologne, the Clean Water Act, and the California Constitution.

In addition to lawsuits filed by Central Valley agricultural water agencies such as Merced Irrigation District and Westlands Water District, San Francisco also joined a petition filed by the San Joaquin Tributaries Authority and other irrigation districts to challenge the SWRCB's decision to adopt the Phase I Update. (*See, San Joaquin Tributaries Authority, et al. v. California State Water Resources Control Board, et al.*, Petition for Writ of Mandamus, ¶ 34.) San Francisco's residents receive as much as 85 percent of their water supply from Hetch Hetchy Reservoir, which diverts water from the Tuolomne River. (*See id.* at ¶ 90.) San Francisco's complaint alleges that the Phase I Update will result in "increased rationing" in the City and surrounding communities. (*Id.* at ¶ 17.) Other water agencies that filed suit have indicated that their water supplies could be reduced by as much as 50 percent as a result of the Phase I Update. (*See, Merced Irrigation District v. California State Water Resources Control Bd., et al.*, Case No. 18CV-05111, Verified Petition for Writ of Mandate and Complaint of Merced Irrigation District for Damages, and Declaratory and Injunctive Relief, at ¶ 4.)

Conclusion and Implications

The SWRCB has not yet responded to the lawsuits challenging the SWRCB's decision to approve the Phase I Update. Negotiations over voluntary settlement agreements are expected to continue despite these lawsuits, as the SWRCB has directed staff to provide technical and regulatory support to assist the California Natural Resources Agency in completing a Delta watershed-wide agreement by March 1, 2019. (State Water Resources Control Board Resolution No. 2018-0059 at p. 7, ¶ 7.) If such an agreement can be successfully negotiated, the SWRCB may consider it as part of a future, comprehensive Bay-Delta Plan update as early as possible after December 1, 2019. (*Id.*)

Under the Clean Water Act, the SWRCB must also submit the Bay-Delta Plan Update to the U.S. Environmental Protection Agency for approval. (33 U.S.C. § 1313.) At this time, it is unclear whether the SWRCB will obtain the EPA's approval of the Phase I Update.

(Sam Bivins, Meredith Nikkel)

LAWSUITS FILED OR PENDING

CALIFORNIA SUPREME COURT TO DECIDE WHETHER PERMITS FOR GROUNDWATER WELLS ARE SUBJECT TO CEQA

In yet another indication of the heightened scrutiny of groundwater pumping in California, the California Supreme Court will soon decide whether a county-issued permit for construction of a groundwater well is subject to review under the California Environmental Quality Act (CEQA). (Pub. Res. § 21000 *et seq.*) Such permits have long been issued without CEQA review, on the premise that issuance of such permits is a ministerial act, and hence not a "project" as defined by CEQA. However, in *Protecting Our Water & Environmental Resources v. Stanislaus County* the Fifth District Court of Appeal held that a county exercised discretion in deciding whether to issue a well permit, and hence CEQA applied. The California Supreme Court has accepted review of the *Protecting Our Water* decision, as well as a second decision by the same court at the same time reaching the same conclusion, and a third, earlier decision from the Second District Court of Appeal that reached the opposite conclusion. The second and third cases are stayed pending resolution of the *Protecting Our Water* case. [*Protecting Our Water & Environmental Resources v. Stanislaus County,* California Supreme Court, Case No. S251709; Fifth District Court of Appeal, Case No. F073634, *Unpub.*, August 24, 2018.]

Background

In general, one incident of the ownership of land is a right to use groundwater beneath the land for beneficial uses. Local authorities, however, typically regulate the construction, repair, reconstruction, or abandonment of wells. The task of ensuring wells are built, maintained and closed in accordance with good standards is typically assigned to the city or county health department. Under Water Code § 13801, local agencies must adopt standards for wells that meet or exceed standards developed by the Department of Water Resources (DWR) and published in Bulletin 74-81. Those standards were updated in Bulletin 74-90.

The Stanislaus County Well Ordinances and CEQA Process

Stanislaus County (County) ordinances required wells to meet specified standards, including Bulletin 74-81, as it may be amended or updated. The County designated issuance of well construction permits as ministerial, and hence not subject to CEQA, unless the applicant sought a variance from the standards. In 2014, the County adopted an ordinance prohibiting the unsustainable extraction of groundwater and the export of water from the county, with certain exceptions. Since November 2104 the county had issued over 400 permits without CEQA review. In that time six applications had been deemed subject to CEQA, and none resulted in a permit.

Plaintiffs Protecting Our Water and Environmental Resources and California Sportfishing Protection Alliance filed a complaint for declaratory relief alleging the County violated CEQA through a "pattern and practice" of approving well construction permits without applying the environmental review procedures of CEQA. The trial court concluded that the County's approval of exempt, non-variance well construction permits was "ministerial" and therefore not subject to CEQA.

The *Protecting Our Water* Decision and Other Rulings

In an *unpublished* decision issued in *Protecting Our Water* on August 24, 2018, the Fifth District Court of Appeal reversed. It found the County was making a discretionary decision when it applied standards in Bulletin No. 74-90 intended to keep wells untainted by potential pollution or contamination sources. The Bulletin provides estimates of distances from potential sources of contamination generally thought to be adequate to protect against contamination, but emphasizes that a case by case determination is required. The court concluded that judging how far a well should be from a contamination source called for a discretionary decision by the County. It ex-

plained that the County's determination of "whether a particular spacing is 'adequate' inherently involves subjective judgment."

The Court of Appeal was mindful of the impact that requiring CEQA review might have on homeowners seeking to install a well, explaining:

> . . .[w]e understand that requiring CEQA review for these relatively small, routine projects may seem unnecessarily burdensome and of little benefit. Yet, we are constrained by what the law says about ministerial versus discretionary government approvals. Given the discretion accorded to the County, that standard leads us to conclude that CEQA applies here.

The *Coston v. Stanislaus County* Decision

A second appeal decided at the same time, *Coston v. Stanislaus County*, involved the same CEQA issue between another set of petitioners and the County. (California Supreme Court Case No. S25172; Fifth District Court of Appeal No. F074209; *unpublished* opinion; Stanislaus County Superior Court; 2016561.) The *Coston* opinion repeats verbatim the analysis from the *Protecting Our Water* decision. The California Supreme Court has granted review of *Coston* as well, but has been deferred pending a decision in *Protecting Our Water*.

The Second District Court's Decision in *California Water Impact Network*

In contrast to *Protecting Our Water* and *Coston*, the Second District Court of Appeal held that issuance of a well permit under the ordinances of San Luis Obispo County is a ministerial act not subject to CEQA in *California Water Impact Network v. County of San Luis Obispo*, 25 Cal.App.5th 666 (2nd Dist. 2018). This court concluded:

> . . .that issuance of a well permit is a ministerial action under the ordinance. If an applicant meets fixed standards, County must issue a well permit. The ordinance does not require use of personal or subjective judgment by County officials. There is no discretion to be exercised. CEQA does not apply. *California Water Impact Network*, 25 Cal.App.5th at 672.

The petitioners in a *California Water Impact Network* argued San Luis County had discretion to deny or condition well permits based on cumulative depletion of the groundwater. The court disagreed, finding that the standards in Bulletin No. 74-81 are directed at protecting groundwater quality, not quantity. The issue raised in *Protecting Our Water* regarding discretion to decide adequate distance from potential sources of contamination apparently was not raised in *California Water Impact Network*. The California Supreme Court has granted review of *California Water Impact Network* and stayed briefing pending a decision in *Protecting Our Water*. *California Water Impact Network v. County of San Luis Obispo*, 2018 Cal. LEXIS 9068, 429 P.3d 827, 239 Cal.Rptr.3d 662.

Conclusion and Implications

The days in which groundwater pumping in California was subject to minimal regulatory review are rapidly coming to a close. The advent of the Sustainable Groundwater Management Act is the most noted development, but other longer existing laws are being used to bring new focus on the use of groundwater, whether through the public trust doctrine or as in this case CEQA.

If *Protecting Our Water* is affirmed, it may open the door to more challenges under CEQA, including challenges in which petitioners contend that CEQA analysis of well permitting must consider the cumulative impacts of pumping on a basin. That is, that the permitting decision should address water quantity as well as water quality. Those claims did not succeed in *Protecting Our Water* or *California Water Impact Network*, but petitioners can be expected to keep trying.

The court in *Protecting Our Water* was careful to note it was not ruling on the level of CEQA review required for a well permit, and observed that in many cases well permits in Stanislaus County may be appropriate candidates for negative declarations, mitigated negative declarations or perhaps even an exemption (other than the ministerial exemption). Even a limited level of required CEQA review will require a significant change from past practice however. (Dan O'Hanlon)

RECENT FEDERAL DECISIONS

INDUSTRIAL ACTIVITIES AND THE CLEAN WATER ACT: SECOND CIRCUIT DECISION HELPS CLARIFY WHAT ACTIVITIES MAY REQUIRE A CLEAN WATER ACT PERMIT

Sierra Club v. Con-Strux, LLC, ___F.3d___, Case No. 18-257 (2nd Cir. 2018).

The federal Clean Water Act (CWA) regulates the discharge of pollutants into the waters of the United States by requiring certain activities that lead to stormwater runoff to obtain a permit. 33 USC 1251(a). Specifically, the CWA lists several activities that require a National Pollutant Discharge Eliminations System (NDPES) permit which generally limits what can be discharged, establishes specific monitoring and reporting requirements, and implements requirements specific to the action to protect water quality and people's health. Thus, challenges often occur over whether a specific activity is covered by CWA and therefore, requires a NDPES permit. In *Sierra Club v. Con-Strux, LLC*, the U.S. Court of Appeals for the Second Circuit provided guidance to help determine what activities may require a NDPES permit as well as how the CWA provisions should be interpreted.

Background

The activities at issue in the *Sierra Club* case were conducted by a New York company Con-Strux, LLC, which, according to the court, operated a facility that:

> . . .recycles demolished concrete, asphalt, and other construction products that it then processes and resells on the wholesale market for use by the construction industry.

Thus, Con-Strux's operations involved two separate and distinct processes: 1) recycling construction waste and 2) selling the materials it created from the recycling to the construction industry.

The Sierra Club brought an action against Con-Strux claiming its activities required a NDPES permit which it did not have. Thus, the court was charged with assessing the requirements of CWA to determine if Con-Strux's failure to obtain a NDPES permit constituted a violation of the CWA.

The NDPES Permit Process

The CWA requires NDPES permits for facilities that "are considered to be engaged in 'industrial activity.'" 40 CFR 122.26(b)(14)(i)-(xi). To define the phrase "industrial activity," the CWA provides several "Standard Industrial Classifications" (SIC) which generally describe the types of activities that either require or do not require a NDPES permit. In the *Sierra Club* case, the court reviewed two of these categories.

The Second Circuit's Decision

First, the court reviewed SIC 5093, which is entitled "Scrap and Waste Materials" and applies to any facility engaged in "assembling, breaking up, sorting, and wholesale distribution of scrap and waste materials." To fit within this SIC, the activity must involve the use of certain materials listed within the SIC, including what the court identified as a "catch-all" category of "scrap and waste materials—wholesale." Sierra Club alleged that Con-Strux's activities involved scrap waste, and therefore required a NDPES permit pursuant to SIC 5093.

Con-Strux argued that its work instead fit under SIC 5032 which does not require a NDPES permit. SIC 5032 covers facilities:

> . . .primarily engaged in the wholesale distribution of stone, cement, lime, construction sand, and gravel; brick (except refractory); asphalt and concrete mixtures; and concrete, stone , and structural clay products (other than refractories).

After the lower court granted Con-Strux's motion

to dismiss, finding that Con-Strux's activites best fit under SIC 5032 and therefore did not require a permit, the Second Circuit took up the issue. Thus, the court was tasked with deciding how to properly classify Con-strux's activities.

First, the court acknowledged that Con-strux's operations were multi-faceted and therefore, the court addressed how to classify facilities that conduct multiple and distinct activities. The lower court, in ruling in favor of Con-strux, approached the analysis by deciding that Con-strux's activities on the whole best fit into the description of SIC 5032 and, therefore, found that Con-strux did not need a permit. The court rejected this analysis, finding nothing in the CWA indicating that the CWA created an "either or" process where the activities of a facility must be placed into one category. Instead, the court found that one facility could fit into multiple SIC if it engaged in distinct activities. Importantly, the court noted that this "either or" analysis would allow businesses to avoid the NDPES permit requirements by dedicating a portion of its facilities to clean activities, while the remainder creates pollution without consequence. Thus, the court establishes that one facility could fit into multiple SIC but be required to obtain a NDPES permit if any of the activities fit into a SIC that requires a permit.

The court went on to separately analyze the portion of Con-strux's operations dedicated to the processing of construction debris for recycling to determine if it required a NDPES permit. The court explicitly dismissed the theory argued by Con-strux that its operations had to be reviewed collectively and fit into one SIC that best fit its facilities as a whole. In this analysis, the court found that Con-strux's recycling of "demolished concrete, asphalt, and other construction products" fit within SIC 5093 and therefore, required Con-strux to obtain a NDPES permit. Even though the specific materials used by Con-Strux were not explicitly mentioned in SIC 5093, the court found that the "catch all" category in SIC 5093 covering "scrap and waste materials" applied to materials not listed in SIC 5093 that were treated as construction waste. The court reasoned that a strict interpretation of SIC 5093, which would require the material at issue to be listed in the language of SIC 5093, would make the catch-all provision in SIC 5093 superfluous.

Conclusion and Implications

Although the Second Circuit Court of Appeals ended its analysis by noting that its conclusion was limited to concluding that the lower court improperly dismissed Sierra Club's complaint and did not address the merits of the issue, there are a couple lessons that can be gleamed from the court's analysis. First, an NDPES permit can be required for a facility even if some of its activities do not fit into a SIC requiring the permit. In other words, facilities cannot shield polluting activities from the NDPES permit requirement by conducting non-polluting activities at the same site. Secondly, the language SIC 5093 can be interpreted broadly to cover recycling of construction waste and is not limited to the specific materials identified in the language of SIC 5093. Taken together, the court's analysis suggests that the NDPES permit requirements should be interpreted broadly to address any type of polluting activity, even if such activity is combined with other, non-polluting activities and the specifics of the polluting activity is not explicitly identified in the CWA. The court's opinion is available online at: http://www.ca2.uscourts.gov/decisions/isysquery/27928a3e-3711-44ac-ad0a-4403cb6117a6/1/doc/18-257_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/27928a3e-3711-44ac-ad0a-4403cb6117a6/1/hilite/

(Stephen McLoughlin, David Boyer)

NINTH CIRCUIT FINDS FISH AND WILDLIFE SERVICE COULD NOT WITHHOLD SOME DRAFT JEOPARDY OPINIONS FROM DISCLOSURE UNDER FOIA EXEMPTION

Sierra Club, Inc. v. U.S. Fish and Wildlife Service, 911 F.3d 967 (9th Cir. Dec. 21, 2018).

This action deals with materials generated during the U.S. Environmental Protection Agency's (EPA) proposed new regulations under § 316(b) of the federal Clean Water Act (CWA) for cooling water intake structures and its consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS; and together the Services) about potential impacts under the federal Endangered Species Act (ESA). The consultation was to ensure that the agency's action would not be likely to jeopardize the continued existence or result in the destruction or adverse modification of habitat of any endangered or threatened species. Plaintiff Sierra Club made a request under the Freedom of Information Act (FOIA) to the Services for records generated during EPA's rulemaking process in connection with the cooling water intake structure regulations. The Services withheld many of the documents under "Exemption 5" of FOIA, which shields documents subject to the "deliberative process privilege" and this appeal from the U.S. District Court's ruling followed.

FOIA Exemption 5: Must Be Pre-Decisional and Deliberative

Because FOIA mandates a policy of broad disclosure of government documents, agencies may only withhold documents under the act's exemptions. Under Exemption 5, FOIA's general requirement to make information available to the public does not apply to interagency or intra-agency memorandums or letters that would not be available by law to a party other than another agency in litigation with the agency. The deliberative process privilege, claimed by the Services in this case, permits agencies to withhold documents:

> . . .to prevent injury to the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency.

Thus, to qualify under this exemption, a document must be both "pre-decisional and deliberative."

> A document is pre-decisional if it is: . . .prepared in order to assist an agency decision-maker in arriving at his [or her] decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

Similarly, deliberative materials include subjective documents which reflect the personal opinions of the writer rather than the policy of the agency or that inaccurately reflect or prematurely disclose the views of the agency. Under the "functional approach," the Ninth Circuit considered whether the contents of the documents reveal the mental processes of the decision-makers and would expose the Services' decision-making process:

> . . .in such a way as to discourage candid discussion within the agency and thereby undermine [their] ability to perform [their] functions.

The Ninth Circuit's Decision

The court noted that although some of the biological opinions in this action were not *publicly* issued, they nonetheless represented the Services' final views and recommendations regarding the EPA's then-proposed regulation:

> Both the Supreme Court and this court have held that the issuance of a biological opinion is a final agency action. *Bennet v. Spear*, 520 U.S. 154, 178 (1997); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006). So our focus is on whether each document at issue is pre-decisional as to a biological opinion, not whether it is pre-decisional as to the EPA's rulemaking.

Where a document is created by a final decision-maker and represents the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document, it is not pre-decisional. Here, the record reflected the finality of the conclusions in many of the draft opinions, which had been approved by final decision-makers at each agency and were simply awaiting signature. Therefore, these opinions were not within the scope of FOIA's Exemption 5.

Only some of the draft jeopardy opinions could reveal inter- or intra- agency deliberations and were thus exempt from disclosure. Those documents were successive drafts of the Services' recommendations for the proposed rules, and comparing the drafts would shed light on the internal vetting process.

But many of the documents did not contain line edits, marginal comments, or other written material that exposed any internal agency discussion about the jeopardy findings. Nor did they contain any insertions or writings reflecting input from lower level employees. Since they did not reveal any internal discussions about how recommendations were vetted, those materials were not deliberative.

Conclusion and Implications

This opinion highlights the fact that FOIA's exemptions must be interpreted narrowly because the act is meant to promote public disclosure. For purposes of withholding documents under Exemption 5, an agency has the burden to prove that the documents are both pre-decisional and deliberative, and therefore are not subject to disclosure. The opinion may be accessed online at the following link:

http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/21/17-16560.pdf

(Nedda Mahrou)

DISTRICT COURT ADDRESSES CLEAN WATER ACT MOTIONS TO DISMISS IN INTERNATIONAL BOUNDARY WATER POLLUTION DISPUTE

City of Imperial Beach v. International Boundary & Water Commission, ___F.Supp.3d___, Case No. 18CV457 JM (S.D. Cal. Dec. 11, 2018).

The U.S. District Court for the Southern District of California recently denied the government's motion to dismiss a claim for a violation of the federal Clean Water Act (CWA) on sovereign immunity grounds, and granted in part and denied in part defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim under the federal Resource Conservation and Recovery Act (RCRA).

Factual and Procedural Background

This case arises of out the management and operation of facilities in the Tijuana River Valley in San Diego intended to direct and treat water flowing from Mexico into the U.S. The International Boundary and Water Commission (Commission), a bi-national organization comprised of the International Boundary and Water Commission—United States Section (USIBWC) and the Comisión Internacional de Limites y Aguas in Mexico. The Commission entered into a treaty in 1944 related to the use of water in the Tijuana River.

In 1990, the Commission entered into an agreement to address the border sanitation problems in San Diego and Tijuana. As a result, the South Bay Plant (Plant) was constructed in the Tijuana River Valley in San Diego and designed to treat 25 million gallons of sewage flowing from Mexico each day. USIBWC owns the plant and Veolia Water North America—West, LLC (Veolia) operates the Plant's wastewater systems. The Plant is subject to a National Pollutant Discharge Elimination System (NPDES) Permit that authorizes the discharge of pollutants at the South Bay Ocean Outfall only after the water has been treated.

Six canyon collectors are designed to capture polluted wastewater in shallow detention basins and convey the water via pipes to the Plant for treatment and eventual discharge at the South Bay Ocean

Outfall. When water cannot drain into the pipes for treatment, it overflows the basins and travels into the downstream drainages.

In 1978, USIBWC constructed a flood control conveyance that directs water, sewage, and waste flowing from Mexico into an area of the Tijuana River Valley in which the Tijuana River had not previously flowed. Unlike canyon collectors, the flood control conveyance is not subject to an NPDES Permit and Veolia is not involved in its operation. USIBWC constructed temporary sediment berms at the border to reduce the volume of flow entering the flood control conveyance via the Tijuana River from Mexico. However, the berm also temporarily detains and causes water to pool in the flood control conveyance.

On September 27, 2017, City of Imperial Beach, San Diego Unified Port District, and the City of Chula Vista sent defendants the U.S. and Veolia a notice of intent (NOI) to sue. On March 2, 2018, plaintiffs brought suit against defendants for violations of the federal Clean Water Act (CWA) and RCRA. On September 12, 2018, plaintiffs filed a Second Amended Complaint (SAC) alleging three causes of action: 1) against USIBWC, for discharges of pollutants from the flood control conveyance without an NDPES permit, 2) against both defendants, for discharges of pollutants from the canyon collectors in violation of the CWA, and 3) against both defendants, for contribution to an imminent and substantial endangerment in violation of RCRA.

Defendants filed separate motions to dismiss.

The District Court's Decision

The Clean Water Act Claims

USIBWC argued the CWA was barred by sovereign immunity because the application of the CWA to the flood control conveyance would affect or impair the 1944 treaty. Section 501(a)(1) of the CWA provides a partial waiver of sovereign immunity and allows suits against the U for violations of effluent standards or limitations. At issue was whether § 511(a)(3) of the CWA limited this partial waiver on the grounds that the CWA cannot be construed as "affecting or impairing the provisions of any treaty of the U.S." Following the Eighth Circuit Court of Appeals the court here determined the U.S. consented to suit under the CWA, but only to the extent that it does not affect or impair a treaty. The court then denied USIBWC's motion to dismiss on the grounds that impairment of the 1944 treaty is a factual question, and USIBWC failed to present sufficient evidence that compliance with the CWA would affect or impair the treaty.

The court next considered defendants' two arguments that the RCRA claims failed for 1) lack of subject matter jurisdiction, and 2) failure to state a claim upon which relief could be granted.

The RCRA Claims

Defendants argued they did not receive proper notice for suit under RCRA and the court lacked subject matter jurisdiction. Defendants alleged that the NOI Plaintiffs sent defendants focused on "the mere passage of wastewater through USIBWC's facilities." The court disagreed and determined that the NOI contained sufficient information to allow defendants to identify the alleged violations, and that the court had subject matter jurisdiction. However, the court also determined the NOI failed to place defendants on notice of plaintiffs' claim relating to waste dispersed by wind, and the court lacked subject matter jurisdiction over those claims.

Defendants next argued plaintiffs failed to state a RCRA claim because plaintiffs did not allege defendants "contributed" to the:

> . . .handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

The court disagreed, citing to the Ninth Circuit Court of Appeals' definition of "contribution," which requires active involvement or control over waste disposal. Plaintiffs' SAC adequately alleged defendants' active role in connection to the waste, alleging the design of the canyon collector detention basins and flood control conveyance changed the character of the waste to make it more harmful. The SAC also described the wastewater in the flood control conveyance and canyon collectors as "open toxic waste pits" plagued with "mosquitoes and flies" and more likely to contain carcinogenic compounds, heavy metals and pollutants. Thus, the court granted in part and denied in part defendants' motion to dismiss for failure to state a RCRA claim.

In two related cases, the court denied defendant USIBWC's motion to dismiss a CWA claim brought by Surfrider Foundation on sovereign immunity grounds for the same reasons expressed in this case, *see*, *Surfrider Found. v. Int'l Boundary and Water Comm'n*, (2018), and granted the California State Lands Commission's motion to intervene under § 505(b)(1)(b) of the CWA, *see*, *California ex. Rel. Regional Water Quality Control Board*, (2018).

Conclusion and Implications

This case highlights how a partial waiver of sovereign immunity under the Clean Water Act can be limited and still provide the U.S. with immunity protection. This case also provides an example of how insufficient notice to bring suit under the Resource Conservation and Recovery Act can result in dismissal of that claim.
(Joanna Gin, Rebecca Andrews)

RULE DELAYING APPLICABILITY OF REVISED DEFINITION OF 'WATERS OF THE UNITED STATES' VACATED BY THE DISTRICT COURT DUE TO SERIOUS PROCEDURAL ERRORS

Puget Soundkeeper Alliance v. Wheeler, ___F.Supp.3d___, Case No. C15-1342 (W.D. Wash. Nov. 26, 2018).

The much-contested revised definition of "waters of the United States" was adopted in 2015, which essentially defines the scope of the federal Clean Water Act. A 2018 rule delayed its effective date to 2020, and provided that the pre-2015 definition would be applied in the interim. During the 2018 rulemaking process, no comments were accepted or responded to regarding the substance of the pre-2015 definition or 2015 Rule. The U.S. District Court for the Western District of Washington, applying a Fourth Circuit opinion, held that the re-imposition, even on a temporary basis, of a previously superseded rule required compliance with the Administrative Procedure Act's notice and comment period provisions. Refusing to accept or respond to comments on the substance of the pre-2015 definition violated the act.

Background

In 2015 the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) issued a final rule (2015 Rule) defining "waters of the United States" (WOTUS), as used to define the jurisdiction of those agencies under the Clean Water Act (CWA: 33 U.S.C. § 1251 *et seq.*). The 2015 Rule "sought to make 'the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science. . . .'" 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 Rule became effective on August 28, 2015; multiple lawsuits were filed contesting the 2015 Rule. The Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 Rule, and then in early 2016 asserted original jurisdiction over challenges to the 2015 Rule. *In re U.S. Dep't of Def., U.S. EPA Final Rule: Clean Water Rule: Definition of Water of U.S.*, 817 F.3d 216, 274 (6th Cir. 2016). Overturning the Sixth Circuit, in:

> January 2018, the United States Supreme Court reversed the Sixth Circuit and held that challenges to the WOTUS Rule must be brought in federal District Courts. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018).

The nationwide stay was vacated. *In re United States Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018).

Meanwhile back at the agencies, a new rule was proposed to add an "applicability date" to the 2015 Rule, *i.e.*, that:

> . . .would delay the effect of the WOTUS Rule for two years from the date that final action was taken on the proposed rule, in order to maintain the status quo and provide regulatory certainty in case the Sixth Circuit's nationwide stay was vacated. 82 Fed. Reg. 55,542, 55,542 (Nov. 22, 2017).

A 21-day comment period was noticed, and comments were solicited "only the issue of whether add-

ing an applicability date would be desirable and appropriate"; comments were "expressly" not solicited:

> . . .on the merits of the pre-2015 definition of 'waters of the United States,' or on the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS [2015] Rule. *Id.* at 55,544–45.

The final rule adopting the applicability date (2018 Rule) was promulgated in February 2018 "suspend[ing] the effectiveness of the WOTUS Rule until February 2020." 83 Fed. Reg. 5,200, 5,200, 5,205 (Feb. 6, 2018). Until that time, "the Agencies would apply the pre-2015 definition of 'waters of the United States.'" *Id.* at 5,200. The plaintiff environmental group filed suit challenging, *inter alia*, the agencies' compliance with the Administrative Procedure Act (APA: 5 U.S.C. § 500 *et seq.*) in adopting the 2018 Rule.

The District Court's Decision

Analysis under the *North Carolina Growers* Decision

The District Court relied on the Fourth Circuit's analysis in *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012) (*NC Growers Ass'n*), in concluding that the agencies acted "arbitrarily and capriciously" in limiting the scope of the public comments to the desirability and appropriateness of delaying the effective date of the 2015 Rule.

NC Growers Ass'n addressed whether the Secretary of Labor ran afoul the APA in issuing a notice of proposed rulemaking that would temporarily suspend regulations adopted in 2008 "for further review and consideration"; during the reconsideration period, the prior regulations—dating from 1987—would be reinstated. *Id.* at 760. The proposed rulemaking provided a ten-day comment period, and stated that the Department of Labor:

> . . .'would consider comments concerning the suspension action itself, and not regarding the merits of either set of regulations (the content restriction).' *Id.* at 761.

The Fourth Circuit "rejected the defendants' argument that the reinstatement of the 1987 regulations did not constitute rule making under the APA," noting that:

> When the 2008 regulations took effect on January 17, 2009, they superseded the 1987 regulations for all purposes relevant to this appeal. As a result, the 1987 regulations ceased to have any legal effect, and their reinstatement would have put in place a set of regulations that were new and different "formulations" from the 2008 regulations. 702 F.3d at 765.

Having concluded that the temporary reinstatement of superseded regulations constituted rulemaking, the Fourth Circuit held that:

> . . .because the Department did not provide a meaningful opportunity for comment, and did not solicit or receive relevant comments regarding the substance or merits of either set of regulations. . .the Department's reinstatement of the 1987 regulations was arbitrary and capricious in that the Department's action did not follow procedures required by law. *Id.* at 770.

The District Court concluded that the agencies' rule suspending the 2015 Rule's effectiveness until 2020, and resurrecting the pre-2015 definition of WOTUS during the interim was "substantively indistinguishable" from the facts examined in *NC Growers Ass'n*. Promulgation of the 2015 Rule and "rendered the pre-2015 legally void" as of the 2015 Rule's effective date. Reinstatement, even temporary, of the pre-2015 Rule constitutes rulemaking under the APA:

> Although the Agencies held a 21-day comment period, they expressly excluded substantive comments on either the pre-2015 definition of "waters of the United States" or the scope of the definition that the Agencies should adopt if they repealed and revised the WOTUS Rule. 82 Fed. Reg. 55,542 at 55,545. Instead, the Agencies limited the content of the comments considered to the issue of "whether it is desirable and appropriate to add an applicability date to the [WOTUS Rule]." *Id.* at 55,544. By restrict-

> ing the content of the comments solicited and considered, the Agencies deprived the public of a meaningful opportunity to comment on relevant and significant issues in violation of the APA's notice and comment requirements. *BASF Wyandotte Corp.* [*v. Costle*], 598 F.2d [637,] 641 [(1st Cir. 1979). Therefore, the Agencies acted arbitrarily and capriciously when they promulgated the Applicability Date Rule.

The District Court remanded with *vacatur*, finding the agencies' "serious procedural error" warranted setting "aside the entirety of the unlawful agency action, as opposed to a more limited remedy particular to the plaintiffs in a given case," citing 5 U.S.C. § 706(2)(A).

Conclusion and Implications

The convoluted ins-and-outs regarding the scope of the Clean Water Act jurisdiction have undoubtedly engendered confusion and uncertainty in the regulated community. However, this attempt to provide a pause prior to implementation of the 2015 Rule was derailed by an ill-considered attempt to truncate the process for public involvement. Once again, attention to the niceties of the APA goes a long way towards reducing uncertainty and confusion.
(Deborah Quick)

RECENT CALIFORNIA DECISIONS

ENVIRONMENTAL GROUP WIELDS CEQA IN THE DISTRICT COURT OF APPEAL TO STRIKE DOWN IRRIGATION DISTRICT'S APPROVAL OF WATER CONSERVATION PROJECT

Oakdale Groundwater Alliance v. Oakdale Irrigation District, *Unpub.*, Case No. F076288 (5th Dist. Nov. 27, 2018).

Another project approval has fallen victim to noncompliance with the California Environmental Quality Act (CEQA). In *Oakdale Groundwater Alliance v. Oakdale Irrigation District*, California's Fifth District Court of Appeal, in an *unpublished* decision, upheld a decision that required the Oakdale Irrigation District (District) to vacate and set aside its approval of a water conservation project based on the District's failure to comply with CEQA.

In particular, the Court of Appeal held that the District violated CEQA by adopting a Negative Declaration—rather than an Environmental Impact Report (EIR)—despite substantial evidence that the project could have a significant impact on biological resources and air quality. The court additionally held that the District violated CEQA by failing to properly describe the entirety of the project and the project area's physical baseline conditions.

Background

The District sought to help landowners comply with the Water Conservation Act of 2009—which requires California to reduce urban water consumption by 20 percent by 2020—by proposing a project under which participating landowners within the District's service area would fallow up to 3,000 acres of farmland during the 2016 irrigation season, potentially conserving up to 9,000 acre-feet of water. The conserved water would then be transferred to San Luis & Delta-Mendota Water Authority and State Water Contractors in exchange for funds that the landowners would use to finance the implementation of water conservation measures on their fallowed land—*e.g.*, new pipelines, laser land leveling, tail-water recovery or pump-back systems, land conversions from high water use crops to lower water use crops, and conversion to higher efficiency irrigation systems (collectively: the Project).

In an effort to comply with CEQA, the District prepared an Initial Study/Negative Declaration (IS/ND) to examine the Project's potential environmental impacts. The District circulated the IS/ND for public comment pursuant to CEQA, and received a series of letters challenging the District's environmental conclusions and requesting that an EIR be prepared for the Project.

For example, a letter from the California Department of Fish and Wildlife (DFW) noted that the District had no basis for its conclusion that the Project would not adversely impact biological resources because the District did not prepare or rely upon any biological surveys for the project site. The District admitted that it had not relied on biological surveys, but responded that the burden should be on each landowner to conduct a biological survey on his or her land.

Certain members of Oakdale Groundwater Alliance (Alliance) further submitted a letter noting various violations of CEQA. Their letter explained that the IS/ND did not analyze the whole of the Project as it analyzed only the water transfer aspect of the Project, not the landowners' use of funds from conserved water to implement conservation measures. This letter also contended that the IS/ND's four-sentence analysis of air quality impacts was inadequate.

Unfazed, the District approved the Project and adopted the IS/ND. In response, the Alliance filed a petition for a writ of mandate directing the District to vacate and set aside its approval of the Project and to prepare an EIR. The trial court granted the petition and entered judgment in favor of the Alliance. The District appealed.

The Court of Appeal's Decision

The Court of Appeal held that the District violated CEQA because: 1) the District should have

prepared an EIR for the Project; 2) the District's IS/ND did not sufficiently describe the Project as a whole; and 3) the IS/ND did not sufficiently describe baseline physical conditions.

Project Significant Environmental Impacts

CEQA requires a public agency to prepare and certify an EIR—rather than adopt a Negative Declaration—when substantial evidence exists to support a "fair argument" that the project may have a significant effect on the environment. The Court of Appeal here held that the District abused its discretion when it adopted the IS/ND because there was substantial evidence supporting a fair argument that the Project could have a significant effect on biological resources and air quality. The District thus violated CEQA by failing to prepare an EIR for the Project.

With respect to biological resources, the Court of Appeal explained that the Department's letter detailing how various endangered species could be adversely impacted by the Project constituted substantial evidence sufficient to trigger an EIR. The court rejected the District's argument that each landowner should bear the burden of preparing biological surveys for his or her own property before implementing water conservation measures. The court explained that CEQA requires *the lead agency* to investigate potential environmental impacts and that an agency may not hide behind its own failure to gather relevant data. The court further explained that a fair argument that the project may have a significant impact may be based on the limited facts in the record where the lead agency fails to study an area of possible environmental impact.

The Court of Appeal similarly held that substantial evidence existed to support a fair argument that the Project could have significant air quality impacts, and refused to allow the District to hide behind its own failure to gather relevant data.

Analysis of the Entirety of the Project

An environmental document prepared under CEQA must describe "the entirety of the project, and not some smaller portion of it." This is because the adequacy of a project description is closely linked to the adequacy of the analysis of the project's environmental effects; if the description is deficient because it fails to discuss the entire project, the environmental analysis will likely reflect the same mistake.

The Court of Appeal here held that the District violated CEQA because the IS/ND's project description only described the water transfer component of the Project; it failed to discuss the water conservation measures to be carried out as part of the Project. The IS/ND's environmental analysis reflected this mistake, as the document's analysis of these conservation measures' environmental impacts was minimal—a fatal mistake under CEQA.

Description of Baseline Physical Conditions

CEQA requires a public agency to describe a project area's existing physical conditions—i.e., the environmental baseline—before determining a project's potential environmental effects. The environmental baseline is then compared to the anticipated physical conditions that would exist upon the project's completion to determine the nature and degree of a project's environmental impact.

The Court of Appeal held that the District's IS/ND was additionally fatally defective because it failed to sufficiently describe baseline physical conditions. For example, the IS/ND did not identify any of the endangered species documented to have been found within the District's service area. Similarly, while the IS/ND concluded that the Project would not change the baseline air quality conditions, the IS/ND failed to disclose exactly what constituted those baseline conditions. The Court of Appeal concluded that the IS/ND's inadequate description of the environmental baseline rendered a proper analysis of the Project's impacts impossible.

CEQA Claim was Not Moot Even Though Project Approval Expired

On appeal, the District argued that this matter was moot because the one-year term of the Project had expired well before the appeal was heard. The Court of Appeal rejected this argument and held that the matter fell under certain discretionary exceptions to mootness. In particular, the court allowed appellate review to proceed because the case concerned important issues of broad public interest (*i.e.*, preservation of biological resources and air quality) that were likely to recur.

Conclusion and Implications

This case illustrates the paramount importance of properly defining a project under CEQA. The project definition will dictate the scope of an environmental document's analysis. Here, the District failed to include the Project's water conservation measures as part of its project description, and the District's environmental analysis proved fatally defective as a result. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/F076288.PDF

(Ali Tehrani, Steve Anderson)

CALIFORNIA WATER™
LAW & POLICY Reporter

California Water Law & Policy Reporter
Argent Communications Group
P.O. Box 506
Auburn, CA 95604-0506

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108