Volume 29, Number 7
April 2019

CALIFORNIA WATER LAW & POLICY Reporter™

CONTENTS

FEATURE ARTICLE

CALIFORNIA WATER NEWS

LEGISLATIVE DEVELOPMENTS

LAWSUITS FILED OR PENDING

RECENT FEDERAL DECISIONS

Continued on next page

ARGENT COMMUNICATIONS GROUP

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) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 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.

FEATURE ARTICLE

THE PUBLIC TRUST DOCTRINE AS APPLIED TO GROUNDWATER—FROM *NATIONAL AUDUBON SOCIETY* TO *ENVIRONMENTAL LAW FOUNDATION*

By Roderick E. Walston

In *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (*Illinois Central*), the U.S. Supreme Court held that under the public trust doctrine, the states hold their navigable waters and underlying lands in trust for the public, and that the state has the right to revoke private interests in the underlying lands in order that they can be used for public purposes. In *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983) (*National Audubon*), the California Supreme Court, extending *Illinois Central*, held that the public trust doctrine applies not only to lands underlying navigable waters but also to the state's regulation of the waters themselves, and that the state is required to consider, although not necessarily protect, public trust uses in its planning and allocation of the state's surface waters. In *Environmental Law Foundation, et al. v. State Water Resources Control Board, et al.*, 26 Cal. App.5th 844 (2018) (*Environmental Law*), the California Court of Appeal, extending *National Audubon*, recently held that the public trust doctrine applies not only to surface waters but also to groundwater, to the extent that extractions therefrom affect public trust uses in the surface waters, and that the state and its counties are required to consider whether such groundwater extractions affect public trust uses.

This article will trace the development of the public trust doctrine from *Illinois Central* to *National Audubon* and to *Environmental Law*, and will conclude that—in light of California's recent enactment of a comprehensive statutory system for regulation of groundwater, the Sustainable Groundwater Management Act(SGMA)—*Environmental Law* may result in potentially inconsistent regulation of groundwater in California, under which different and potentially conflicting standards of regulation apply to the same groundwater resource, and that courts in future cases may need to grapple with these potential inconsistencies in providing for uniform and consistent regulation of groundwater in California.

Development of the Public Trust Doctrine: *Illinois Central*

As a result of the American Revolution, the original 13 states acquired sovereignty over all navigable waters and underlying lands within their respective borders that had formerly belonged to the English Crown, subject to the rights granted to the United States by the Constitution. *PPL Montana, LCC v. Montana*, 565 U.S. 576, 590 (2012); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). Under the equal footing doctrine, new states are admitted to statehood in an equal footing with other states, and thus also acquire sovereignty over their navigable waters and underlying lands. *PPL Montana*, 565 U.S. at 591. When California was admitted to statehood in 1850, California acquired sovereignty over the waters and lands within its borders.

In *Illinois Central*, 146 U.S. 387, the Supreme Court in 1892 held that the states hold their navigable waters and underlying lands in trust for the public for certain purposes, namely navigation, commerce and fisheries, *id.* at 435, 452, although the list of public trust uses has been expanded to include other water-related uses. *Illinois Central* stated that a state could:

> . . .no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, than it can abdicate its police powers in the administration of government and the preservation of the peace. *Id.* at 453.

Illinois Central applied this principle—the public trust doctrine—in upholding the right of the Illinois Legislature to revoke its grant of a fee interest to a private railroad company in the submerged lands of Lake Michigan, so that the state could provide for commercial development of the lands for the benefit of the people of Illinois.

Although the public trust doctrine is a doctrine of federal law in holding that the state acquires sovereignty over its navigable waters and underlying lands upon its admission to statehood, and in determining whether the waters were navigable when the state was admitted to statehood and thus has sovereignty over them, the doctrine is a state law doctrine to the extent it addresses the nature and scope of a state's public trust duties. *PPL Montana*, 565 U.S. at 603-604. As the Supreme Court recently stated:

> . . .[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine. *Id*.

Thus, the public trust doctrine does not establish nationally-uniform regulatory standards that apply equally in all states; rather, each state is responsible for determining its own public trust responsibilities. Although *Illinois Central* on its face appeared to embrace the public trust doctrine as a principle of federal law, since the decision cited federal cases and not Illinois cases, the Supreme Court subsequently held that *Illinois Central* was based on Illinois law rather than federal law. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997); *Appleby v. New York City*, 271 U.S. 364, 395 (1926).

California's Public Trust Doctrine: *National Audubon*

In a series of decisions in the 1970s and 1980s, the California Supreme Court embraced the public trust principles established in *Illinois Central*, holding that the state has sovereign ownership of lands underlying navigable waters, such as tidelands, and that the state has the right to regulate the lands notwithstanding that private landowners might ostensibly have title to the lands. *E.g., City of Berkeley v. Superior Court*, 26 Cal.3d 515 (1980); *Marks v. Whitney*, 6 Cal.3d 251, 260-61 (1971). In *City of Berkeley*, the California Supreme Court, in a split 4-3 decision, ruled that—notwithstanding that the state had conveyed certain interests in tidelands to private parties—the tidelands were still subject to the public trust, and would remain so as long as the lands were still physically capable of supporting public trust uses. *City of Berkeley*, 26 Cal.3d at 534. As in *Illinois Central*, the California Supreme Court applied the public trust doctrine only in determining the state's ownership interest in lands underlying navigable waters, and not to the state's regulation of the waters themselves.

In *National Audubon*, 33 Cal.3d 419, however, the California Supreme Court held in 1983 that the public trust doctrine applies to the state's regulation of the navigable waters themselves. There, the National Audubon Society (NAS) brought an action against the Los Angeles Department of Water and Power (DWP), alleging that DWP, by diverting water from Mono Lake tributaries for use by people in the City of Los Angeles, was violating the public trust doctrine by impairing public trust uses in Mono Lake. DWP argued that it had a vested right to divert the water because California's State Water Resources Control Board (SWRCB), which regulates appropriative water rights, had issued an appropriative permit to DWP in 1940 authorizing the diversions. The State of California, which intervened on behalf of the SWRCB, argued that the SWRCB was authorized to reconsider its permit to DWP and impose additional conditions to protect public trust uses in Mono Lake, and that the SWRCB's authority to reconsider the permit derived from Article X, § 2 of the California Constitution, which provides that water may be used in California only if the water is put to reasonable and beneficial use.

The California Supreme Court held that the SWRCB was authorized to reconsider its decision granting an appropriative permit to DWP in order to determine whether to impose additional conditions to protect public trust uses in Mono Lake, and that the SWRCB's authority to reconsider its decision was based on the public trust doctrine. (The Court did not reach or decide the state's argument that the SWRCB was authorized to reconsider its decision under the constitutional reasonable and beneficial use provision.) The Court undertook to "integrate" the public trust doctrine and the statutory water rights system, which the Court viewed as on a "collision course." *National Audubon*, 33 Cal.3d at 425.

Specifically, the Court held that the state as sovereign retains "continuing supervisory authority" over navigable waters and underlying lands under the public trust doctrine; that the state has an "affirmative duty" to consider public trust uses in the planning and allocation of water resources, and to protect public trust uses when "feasible"; and that the state has a "duty of continuing supervision" over the appropriated water after the state has approved an appropriation. *Id.* at 445-447. The Court also recognized, however, that as a "matter of current and historical necessity" the Legislature and the SWRCB may authorize water diversions even though they may impair public trust uses, *id.* at 446; that the state has the right to "prefer one trust use over another," and thus to determine whether to prefer commerce uses over fishery uses, or vice versa, *id.* at 439 n. 21, 440; and that the state is required to protect public trust uses only to the extent consistent with the "public interest." *Id.* at 447. *National Audubon* also held that the public trust doctrine applies to non-navigable tributaries of navigable waters, because activities in the tributaries may affect public trust uses in the navigable waters. *Id.* at 435-437.

In short, *National Audubon* held that state is required to *consider* public trust uses in the planning and management of the state's water resources, but is not necessarily required to *protect* such uses. *National Audubon* reflected the state's argument that the state had continuing authority over water rights in order to impose additional conditions, but reflected NAS's argument that the state's continuing authority was based on the public trust doctrine. *National Audubon* flatly rejected DWP's argument that it had a vested water right that could not be reconsidered as a result of the state-issued permit.

Although many heralded the *National Audubon* decision as establishing a new principle of water law that would significantly change how water rights are regulated in California, the doctrine, to date, has not had this effect. Instead, the lower courts have relied principally on the statutory laws and the traditional common law in considering the SWRCB's regulation of water rights. The statutory laws establish precise and detailed standards that the SWRCB must apply in regulating water, Cal. Water Code §§ 1200 *et seq.*, and the courts have applied these precise and detailed statutory standards rather than the more amorphous standards of the public trust doctrine in reviewing the SWRCB's decisions. For example, in *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986), the Court of Appeal extensively discussed and applied the statutory standards in determining whether the SWRCB had properly imposed conditions in appropriative permits issued to the federal Central Valley Project and the State Water Project, 182 Cal.App.3d at 115-149, and applied the public trust principles established in *National Audubon* only as a basis, among others, for the Board's continuing authority to impose the conditions. *Id.* at 149-152. Similarly, in *State Water Resources Control Board Cases*, 136 Cal.App.4th 674 (2006), the California Court of Appeal spent more than a hundred pages addressing whether the SWRCB had properly fulfilled its statutory responsibilities in adopting a water quality control plan for the San Francisco Bay-Delta, 136 Cal.App.4th at 720-77, 779-844, and only a few pages in dismissing the plaintiff's public trust arguments, *id.* at 777-79. Thus, the SWRCB's regulatory authority, at least as judicially interpreted to date, appears to primarily rest on the statutes rather than the public trust doctrine.

The Public Trust Doctrine as Applied to Groundwater: *Environmental Law*

Background and Issues

In *Environmental Law*, 26 Cal.App.5th 844, the Court of Appeal considered whether the public trust doctrine applies to groundwater extractions from new wells—to the extent that the groundwater extractions affect public trust uses in nearby surface waters—and if so, whether California's counties and the SWRCB have public trust duties to regulate such groundwater extractions. The public trust doctrine does not directly apply to groundwater itself, because groundwater is not navigable. Although counties are authorized to regulate groundwater under their police power, *Baldwin v. Tehama County*, 31 Cal.App.4th 166 (1994), they have the option of deciding whether to do so. The question in *Environmental Law* was whether counties and the SWRCB nonetheless have public trust duties to regulate groundwater extractions that may affect public trust uses in surface waters.

Like many counties in California, Siskiyou County regulates construction of new wells, by requiring the wells to meet statewide construction standards

established by the California Department of Water Resources (DWR); the construction standards are enforced by issuance of building permits for the wells. The groundwater extractions by the wells might, conceivably, reduce the flows of the nearby Scott River and thus affect public trust uses in the river. In issuing the building permits, the county does not consider whether the groundwater extractions may affect public trust uses in the river, although the county imposes a setback condition in the permits that requires the wells to be located a sufficient distance from the river to avoid or minimize any harmful effects on the river flows.

In *Environmental Law*, the Environmental Law Foundation (ELF) brought an action to compel both the SWRCB and Siskiyou County, and by extension other counties, to consider whether groundwater extractions by new wells affect public trust uses in surface waters. ELF alleged, first, that the SWRCB has both the right and duty under the public trust doctrine to determine whether groundwater extractions from the wells affect public trust uses in the Scott River, and second, that Siskiyou County, in issuing building permits for new wells, also has a public trust duty to consider whether the groundwater extractions affect such public trust uses. ELF's argument relied on *National Audubon*, which had broadly construed the public trust doctrine in holding that the doctrine requires the state to consider public trust uses in the planning and allocation of water resources.

The SWRCB agreed with ELF's contention that the SWRCB has the *right* under the public trust doctrine to determine whether the groundwater extractions affect public trust uses, but the Board argued that it has discretion in deciding whether to regulate the groundwater extractions and does not have a *duty* to do so.

Siskiyou County, on the other hand, argued that neither the county nor the SWRCB has a public trust duty to determine whether groundwater extractions from the wells affect public trust uses. First, the county argued that a recent legislative enactment, SGMA, Cal. Water Code §§ 10720 *et seq*., provides for comprehensive regulation of groundwater and establishes the regulatory duties of agencies in regulating groundwater, including groundwater extractions from wells, and thus the county is not required to regulate the same groundwater extractions under the public trust doctrine. Specifically, SGMA provides that local agencies in a groundwater basin are required to form a Groundwater Sustainable Agency (GSA) to regulate groundwater in the basin, *id*. at § 10723(a), and that the GSA must adopt a Groundwater Sustainability Plan (GSP) that provides for management and regulation of groundwater in the basin, including groundwater extractions from wells. *Id*. at §§ 10725(a), 10727. The county argued that counties do not have an independent public trust duty to regulate the same groundwater extractions from wells that are regulated by GSAs under SGMA.

Second, Siskiyou County argued that SGMA limits the SWRCB's authority to regulate groundwater, by providing that the SWRCB may regulate groundwater only if the board designates the groundwater basin as a "probationary" basin, *id*. at § 10735.2, in which case the SWRCB may adopt an "interim plan" for the basin. *Id*. at §§ 10735.4, 10735.8. Siskiyou County argued that the SWRCB may not circumvent SGMA's statutory limitations by regulating groundwater extractions under the public trust doctrine where the Board has not designated a basin as a "probationary" basin.

Third, Siskiyou County argued that, apart from SGMA, California's counties are not responsible for the planning and management of water, or groundwater, and thus do not have a public trust duty to regulate groundwater extractions under *National Audubon*, which held that the state has a public trust responsibility to consider public trust uses in the planning and allocation of the state's water resources. *National Audubon*, 33 Cal.3d at 446.

The Court of Appeal's Decision

The Court of Appeal held that Siskiyou County and the SWRCB are required under the public trust doctrine to consider whether groundwater extractions from new wells affect public trust uses in the Scott River. Since the court held that the county and the board are required to *consider* whether groundwater extractions affect public trust uses, the court held, in effect, that they are required to *regulate* the groundwater extractions, because the only point of considering whether the extractions affect public trust uses would be to determine whether the new wells should be approved or disapproved, or should be subject to conditions to protect public trust uses.

Before addressing Siskiyou County's arguments that the county and the SWRCB did not have such

public trust duties, the Court of Appeal first addressed an argument the county did not make. Addressing what it described as the threshold issue in the case, the court held that—although the public trust doctrine may not directly apply to groundwater—the doctrine applies to groundwater extractions that affect public trust uses in navigable waters. *Environmental Law*, 28 Cal.App.5th at 859. The court reasoned that—since *National Audubon* held that the public trust doctrine applies to tributary diversions that affect public trust uses in navigable waters—the doctrine also applies to groundwater extractions that affect such uses, because groundwater extractions may have the same impact on public trust uses in navigable waters as tributary diversions. *Id.* In fact, Siskiyou County had conceded that the public trust doctrine may apply to groundwater extractions that affect public trust uses, and argued only that the county and the SWRCB did not have public trust responsibilities in regulating the extractions. The court apparently believed, nonetheless, that it was important to establish a statewide precedent that the public trust doctrine applies to groundwater extractions that affect public trust uses, even though the county did not contend otherwise.

The Court of Appeal then rejected all of Siskiyou County's arguments. First, regarding the county's argument that counties do not have a public trust duty because SGMA comprehensively establishes the regulatory duties of agencies in regulating groundwater, the court held that SGMA did not "occupy the entire field of groundwater management" and "abolish all fiduciary duties" of the county to consider the impacts of groundwater extractions. *Environmental Law*, 26 Cal.App.5th at 862. Citing *National Audubon*, the court stated that SGMA's statutory system and the public trust doctrine "can live in harmony," *id.* at 866, and that SGMA "accommodate[s] the perpetuation of the public trust doctrine." *Id.* The court concluded that in both *National Audubon* and the instant case, the Legislature established "parallel systems" of regulation, in that the regulatory duties of agencies are found in both the statutes and the public trust doctrine. *Id.* at 865, 867.

Second, regarding Siskiyou County's argument that SGMA limits the SWRCB's authority to regulate groundwater, the court did not directly address the argument. The court stated that—although the SWRCB has statutory authority to regulate water rights in surface water—the board's authority to regulate water, and groundwater, under the public trust doctrine is "independent of and not bounded by" the statutory limitations on its authority. *Id.* at 862. In fact, Siskiyou County acknowledged that the SWRCB's regulatory authority extends beyond its statutory authority, and argued instead that SGMA expressly limits the SWRCB's authority to regulate groundwater. But since the court held that the public trust doctrine and SGMA establish "parallel systems" of regulation, *id.* at 865, 867, the court implied that the SWRCB is authorized to regulate groundwater under the public trust doctrine regardless of any limitations on the board's authority imposed under SGMA.

Third, regarding Siskiyou County's argument that counties are not responsible for the planning and management of groundwater and thus do not have a public trust duty to regulate groundwater extractions that affect public trust uses, the court held that the "state" as sovereign is responsible for administering the public trust, and that—since the county is a "subdivision of the state"—the county shares responsibility for administering the public trust and must consider public trust uses in issuing building permits for new wells. *Id.* at 867-68.

'Parallel Systems' of Regulation

Perhaps the most significant and far-reaching part of *Environmental Law* is its conclusion that the public trust doctrine and SGMA establish "parallel systems" of regulation, and that the regulatory duties of agencies as applied to groundwater are found in both SGMA and the public trust doctrine. If SGMA and the public trust doctrine establish parallel systems of regulation, these parallel systems may result in the application of different and potentially conflicting standards of regulation to the same groundwater resource, and thus lead to inconsistent regulation of groundwater in California. For example, a county pursuant to its public trust authority may establish regulatory standards for groundwater extractions that conflict with statutory standards established by a GSA under SGMA. Or, the SWRCB may pursuant to its public trust authority establish regulatory standards for groundwater extractions from basins even though SGMA precludes the Board from establishing such standards unless it first designates the basin a "probationary" basin. Cal. Water Code § 10735.2.

Environmental Law did not address these potential conflicts, or indicate how they are to be resolved.

Although *Environmental Law* stated that its decision was consistent with *National Audubon* because *National Audubon* also established a "parallel system" of regulation, *Environmental Law*, 26 Cal.App.5th at 865, 867, *National Audubon* did not establish a parallel system that invites conflicts between the statutory system of regulation and the public trust doctrine. *National Audubon* sought to reach an "accommodation" between the statutory water rights system and the public trust doctrine, which the court viewed as having "developed independently of each other." *National Audubon*, 33 Cal.3d at 445. But the accommodation *National Audubon* reached was fully compatible with the statutory system, and did not infringe on the statutory system. Specifically, *National Audubon* held that the state is required to consider, but not necessarily protect, public trust uses in administering water rights, and is required to protect public trust uses only to the extent consistent with the "public interest." *Id.* at 447. The "public interest" standard is the standard that the SWRCB is expressly required to apply in administering the statutory water rights system. Cal. Water Code §§ 1253, 1255, 1257. *National Audubon* grafted onto the SWRCB's statutory responsibilities a common law responsibility to consider public trust uses that is fully compatible with the Board's statutory responsibilities.

Environmental Law raises an additional question, which the Court of Appeal did not answer, of whether a county that does *not* regulate construction of new wells nonetheless has a public trust duty to determine whether groundwater extractions from new wells affect public trust uses. The Court of Appeal held that Siskiyou County, in regulating construction of new wells, has a public trust duty to consider whether groundwater extractions from the wells affect public trust uses, but the court did not consider whether other counties that do not regulate construction of new wells have the same public trust duty. If *all* counties have a public trust duty to regulate groundwater extractions irrespective of whether they regulate construction of new wells, then those counties that do not currently regulate such new well construction, or regulate groundwater in other ways, would nonetheless apparently have a public trust duty to affirmatively adopt programs regulating groundwater extractions from wells. If, instead, only those counties that regulate construction of new wells have such a public trust duty, then the public trust duties of counties would vary from county to county, depending on whether they regulate new well construction. The Court of Appeal did not address whether the public trust duty it identified applies to all counties, or only those that regulate construction of new wells.

In support of its SGMA argument, Siskiyou County cited numerous California Supreme Court decisions holding that the California Legislature (Legislature) is responsible for administering the public trust, and that its judgment is "conclusive" as long as it does not impair the authority of future legislatures to administer the public trust. *E.g., Marks v. Whitney*, 6 Cal.3d 151, 260-61 (1971); *Mallon v. City of Long Beach*, 44 Cal.2d 199, 205-207 (1955); *City of Long Beach v. Mansell*, 3 Cal.3d 462, 482 n. 17 (1955); *People v. California Fish Co.*, 166 Cal. 576, 597 (1913). In *Marks*, for example, the Supreme Court stated that:

> . . .[i]t is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished. *Marks*, 6 Cal.3d at 260-261.

Environmental Law—mentioning only two of the decisions cited by the county, *Mallon* and *Mansell*—stated that the two decisions applied to tidelands and not water, and that the decisions held that the Legislature's judgment was conclusive only as applied to tidelands. *Environmental Law*, 26 Cal.App.5th at 868-69. Thus, *Environmental Law* held that the Legislature's judgment is *not* conclusive as applied to regulation of water, which means, apparently, that the Legislature is powerless to establish the public trust duties of agencies in regulating water, or groundwater—no matter how clearly the Legislature evinces its intent. *Environmental Law*'s suggestion that the Legislature does not exercise "conclusive" judgment in regulating water appears inconsistent with constitutional principles separating the legislative and judicial powers, which provide that the legislative branch is responsible for managing and regulating the state's water resources.

Environmental Law held that Siskiyou County's SGMA argument would "obliterate," "eviscerate" and "dismantle" the public trust doctrine, by absolving

counties of their public trust duty. *Environmental Law*, 26 Cal.App.5th at 862, 867, 869. The county argued that its argument would not have this effect, because the Legislature fulfilled its public trust responsibility in enacting SGMA, in that SGMA requires GSAs to consider beneficial uses, including public trust uses, in regulating groundwater. *Environmental Law* dismissed the county's argument as a "clever word play." *Id.* at 865 n. 7. The county's argument, however, went to the core issue of the nature of the public trust doctrine—whether the doctrine imposes a duty on the Legislature to consider public trust uses in enacting a statutory system of regulation, which the Legislature fulfills in requiring consideration of public trust uses, or instead whether the doctrine establishes a regulatory system that exists outside and independently of the statutory system, and which may override the statutory system in the case of conflicts. *Environmental Law* stated that it was not addressing whether the Legislature could "supersede or limit" the SWRCB's public trust authority, *id.* at 869, but the logic of the decision suggests that the public trust doctrine may override the statutory standards where conflicts occur. Perhaps the courts in future cases may probe more deeply into the nature of the public trust doctrine, to determine whether the doctrine establishes the Legislature's regulatory duties or instead establishes standards that may override the Legislature's judgments.

Conclusion and Implications

Although *Environmental Law* held that the public trust doctrine logically applies to groundwater extractions that affect public trust uses—and thus the Legislature is required to consider public trust uses in providing for regulation of groundwater, as the Legislature did in enacting the Sustainable Groundwater Management Act—*Environmental Law* went further by holding that the public trust doctrine establishes a "parallel system" of regulation to the Legislature's statutory system, which may result in the application of different and potentially conflicting standards of regulation to the same groundwater resource. Perhaps these potential conflicts may be avoided in future cases by agreements among regulatory agencies in sorting out their statutory and public trust responsibilities. Failing that, the courts in future cases may be called on to address more fully the nature of the public trust doctrine, in terms of whether the doctrine establishes common law standards that the Legislature must apply in regulating water or instead establishes common law standards that may potentially override the Legislature's statutory system of regulation.

Roderick E. Walston is Of Counsel with Best Best & Krieger LLP (BBK), in Walnut Creek, California. His practice focuses on natural resources and water law, and appellate litigation. As a California Deputy Attorney General, Mr. Walston represented the State of California and the State Water Resources Control Board in the *National Audubon Society* case discussed in this article, and, as an attorney with BBK, he represented Siskiyou County in the *Environment Law Foundation* case discussed in the article.

CALIFORNIA WATER NEWS

CALIFORNIA WATERFIX UPDATE: GOVERNOR NEWSOM CALLS FOR SINGLE-TUNNEL PROJECT WHILE LEGISLATIVE PROPOSAL SEEKS TO INCREASE OVERSIGHT

The California WaterFix project, also known as the "Twin Tunnels," is the statewide plan to address water supply and delivery needs by constructing two 30-mile long tunnels, each 40 feet in diameter, to transport up to 9,000 cubic feet per second of Sacramento River water to state and federal export facilities in the southern Sacramento-San Joaquin Delta. Originally proposed as the Bay Delta Conservation Plan in 2006, WaterFix has undergone a number of reconfigurations over the years. Now, in another major shift, Governor Gavin Newsom has announced that he intends to scale the project back to a single tunnel as part of a broader portfolio approach to water security. The Governor's announcement prompted requests to stay pending litigation and other proceedings, giving WaterFix proponents time to map out a path forward. Meanwhile, Delta legislators have introduced Senate Bill (SB) 204, which would impose additional review requirements on any contracts used to finance, design, and construct the project.

Governor Newsom's State of the State Address

Governor Newsom's first State of the State address on February 12, 2019 discussed water issues in California, including drinking water safety and infrastructure. Notably, the Governor broke from former Governor Jerry Brown's longstanding conveyance vision of two tunnels in the Delta, in favor of a single-tunnel WaterFix. Governor Newsom also announced his appointment of Laurel Firestone, co-founder of the Community Water Center, to the State Water Resources Control Board (SWRCB) and appointment of Joaquin Esquivel as the new SWRCB Chair. The Governor underscored that these changes will help balance the state's diverse water needs by promoting a portfolio approach to water infrastructure and long-term planning.

Ongoing Court and Administrative Proceedings Temporarily Stayed

Governor Newsom's February 12th announcement left participants in the various ongoing WaterFix proceedings guessing as to how the Department of Water Resources (DWR) intends to reconcile the two-tunnel version of the project that was approved in 2017 with the Governor's vision of a one-tunnel project. On February 28, 2019, parties in the coordinated WaterFix cases pending in Sacramento Superior Court sought a 60-day stay to allow DWR to determine the extent to which the Governor Newsom's direction affects the project's environmental review documents and approval. The following day, DWR itself requested a 60-day stay in the long-running SWRCB hearing on DWR and the U.S. Bureau of Reclamation's joint water right change petition, and a 90-day stay in federal court litigation challenging the validity of the federal Biological Opinions for the project. As of the writing of this article, stays have been granted in the SWRCB hearing and CEQA litigation, while the federal district court directed that DWR must confirm it will cease all preparatory activity related to WaterFix (other than review of the project in light of Governor Newsom's announcement) before it considers granting the 90-day stay.

Proposed Oversight under Senate Bill 204

On the legislative front, State Senator Bill Dodd introduced SB 204 on February 1, 2019, which would add an additional layer of legislative oversight and public scrutiny to the WaterFix implementation process. SB 204 would require DWR and the Delta Conveyance, Design and Construction Authority, the entity tasked with financing WaterFix through participant contracts, to provide information on pending WaterFix-related State Water Project contracts and contract amendments to the legislature for review

prior to finalization. Under the bill, all proposed contracts and amendments for the planning, design, or construction of WaterFix must be submitted to the Joint Legislative Budget Committee (JLBC) 60-days in advance of their execution. If the JLBC chooses to hold a public hearing to review a contract, DWR would be prohibited from approving the contract for 90 days after the first hearing.

SB 204 supporters argue that the proposed oversight is necessary to protect the Delta economy, culture, and environment, and to prevent increased contractor reliance on Delta water. Opponents of the bill contend that the additional restrictions will significantly and unnecessarily delay any action on WaterFix and undermine efficiency and cost-effectiveness in the contracting process. The bill cleared its first committee hurdle on March 12, 2019, passing the Natural Resources and Water committee with a unanimous 6-0 vote.

Conclusion and Implications

As can be expected for a project of this scale, WaterFix has undergone numerous revisions and refinements in the past 13 years. Advocates may see these changes as hurdles potentially slowing the project down, but not ending it. To that end, the Governor emphasized that he wants to build on the important work that has already been done. However, his departure from his predecessor's vision at this stage of planning may be a more significant setback that requires additional administrative, environmental and court or even legislative review. With the temporary stays of the SWRCB hearing and the state court proceedings, it can be expected that DWR will announce its plans to implement Governor Newsom's direction in the coming months.
(Austin C. Cho, Meredith Nikkel)

RIVERS AND DAMS—LOS ANGELES COUNTY SUPERVISORS URGE FEDERAL GOVERNMENT TO CONSIDER HANDING OVER OWNERSHIP AND OPENING FEDERAL FUNDING FLOODGATE

The Los Angeles County Board of Supervisors (Board) recently approved sending letters to Congressional leaders and the U.S. Army Corps of Engineers (Corps) regarding a path toward transferring the Corps' ownership and responsibility over to the county for stretches of the Los Angeles River (River) and urging federal funding to flow for immediate repairs to be made to Whittier Narrows Dam and Reservoir which were recently deemed at risk of failure.

The Los Angeles River

In the early-to-mid-20th century, most of the 51-mile River bottom was lined with concrete to manage and mitigate flood risk through vast and densely populated Los Angeles. Since then, the county and nearly every jurisdiction straddling the River—not to mention many environmental, non-profit and other organizations—has developed plans for the River's long-term management and revitalization. The Corps and the Los Angeles County Flood Control District (District) work collaboratively to operate the Los Angeles County Drainage Area (LACDA) system, a broad network of water management infrastructure components in Los Angeles County including the River, which provides flood risk management for approximately 10 million residents and 2.1 million parcels with a value of more than $1 trillion. The District is responsible for 14 major dams and roughly 500 miles of open channels. The Corps owns and is responsible for managing most of the River for flood control purposes, including four dams and 40 miles of open channels.

The Whittier Narrows Dam

The Whittier Narrows Dam and Reservoir (Dam) is located on the San Gabriel River and Rio Hondo—tributaries to the Los Angeles River—in a densely populated area approximately 11 miles east of downtown Los Angeles, a focal point for the combined 556-square-mile drainage area of the San Gabriel River and Rio Hondo watersheds. The 56-foot-tall earthen Dam was built in 1957 primarily for flood control protection of approximately 1.25 million downstream residents and for groundwater basin recharge. The Dam is owned by the federal government and operated and maintained by the Corps. The

Corps recently determined that the Dam is at very high risk of failure in a catastrophic flooding event and that it requires immediate major upgrades, retrofitting, and rehabilitation work.

Board Seeks Control over River, Urging Federal Funding for Dam Repairs

The Board recently authorized its Chief Executive Officer to send a letter, signed by all members of the Board, to the Los Angeles County Congressional Delegation requesting their support for a disposition study to examine transferring ownership and operations of Corps-owned River channels to the District. Last year, the District sent a similar letter requesting that the Corps initiate a disposition feasibility study to examine transferring ownership and operations of its channels in Los Angeles County to the District.

In these letters, the Board asserts that while the District has maintained its facilities over the years, many portions of the Corps infrastructure are "not being maintained at acceptable levels" due largely to what the Board describes as insufficient federal funding. The Board finds that the Corps needs approximately $193 million annually to address deferred maintenance, but only receives about 10 to 15 percent of that in any given year—a trend the Board expects will continue. According to the Board, assuming local control of the Corps-managed River channels would provide:

- efficiency in designing, building, and maintaining flood risk management projects;
- improved response to issues involving the homeless encampments in the River channels;
- greater opportunities for ecosystem restoration and recreation projects; and
- increased transparency and accountability among local cities with respect to River management.

At that same Board meeting at which the Board authorized the letter to the Los Angeles County Congressional Delegation requesting a disposition study to examine transferring ownership and operations of Corps-owned River channels to the District, the Board also approved sending a five-signature letter to the United States Department of Interior and the Los Angeles County Congressional Delegation, requesting an immediate allocation of Federal funds to expedite needed repairs and upgrades to the Dam. The Board also directed the County Director of Public Works to report back to the Board on efforts being made to coordinate with the Corps and downstream communities to ensure local measures are in place during emergencies.

Conclusion and Implications

The circumstances giving rise to the Board's letters are representative of much of California's vast and aging water infrastructure: Federally-funded, collaboratively managed, complex systems built in the mid-20th Century, subjected to 21st century regulation and now in desperate need of money and attention. While "local control" may—eventually—simplify the bureaucratic landscape (if there is such a thing), it would also accompany a hefty local price tag. When it comes to managing something as large as the River, defining "local" would itself present challenges as competing jurisdictions would likely seek to maximize benefits with minimal financial obligations. Of course, it doesn't hurt to start the conversation, and for that the Board should be commended.

(Derek Hoffman, Michael Duane Davis)

LEGISLATIVE DEVELOPMENTS

PROPOSED CALIFORNIA BILL SEEKS TO CREATE NEW AND RELIABLE SOURCE OF FUNDING FOR WATER QUALITY PROJECTS

Recently introduced Senate Bill 669 proposes to use state budget surpluses to address ongoing drinking water concerns in disadvantaged communities. The bill proposes to establish a trust funded by budgetary surpluses from which net income would be used to fund water assistance programs. SB 669 offers an alternative option to two prior legislative proposals addressing funding obstacles related to improving community water systems in disadvantaged communities. These competing proposals consist of a tax on higher income drinking water users and a constitutional amendment devoting a portion of the state's budget to water quality projects and water bond payments.

Background

Access to adequate drinking water remains an issue for some communities in California, including those that cannot afford higher water rates to fund water quality improvement projects. While most agree that programs to address these water issues should be developed, funding sources remain uncertain. Two proposed legislative solutions under consideration pre-date SB 669: a water tax included in the proposed state budget and a constitutional amendment.

The first proposal would establish the Safe and Affordable Drinking Water Fund (SADWF) and would be administered by the State Water Resources Control Board (SWRCB). The SADWF would be funded through a tax based on the policy framework of Senate Bill 623, a bill that died in the legislature in 2017. The proposed tax would result in an extra water fee on each person or entity that purchases water from a public water system. Low-income households would be exempt from the fee, while fee revenue would be used to implement programs in disadvantaged communities.

As an alternative to the water fee proposal, some lawmakers support a constitutional amendment related to water project funding that would avoid the imposition of additional fees on water users. Under such an amendment, the state would be required to set aside at least 2 percent of the state's budget for addressing water infrastructure issues and payment of water bonds. Recently, however, a third solution has been proposed in lieu of the existing proposals. Inspired by the record budget surplus for the 2019-2020 Fiscal Year, Senate Bill 669 seeks to provide funding from budget surpluses.

Analysis of Senate Bill 669

Senate Bill 669 proposes to create the Safe Drinking Water Trust (Trust) and the Safe Drinking Water Fund (Fund). The Trust would be funded with a one-time payment from the General Fund during a budget surplus year and would create a commission to manage the Trust. The commission would be responsible for investing Trust principal, the net income from which could be placed in the Fund. Depending on the amount generated by the Trust, the trustee could deposit the entire value of the net income into the Fund or retain it in the Trust as principal to increase net income the following year. The commission would be required to accurately account for investments and projected income to the SWRCB. In order to ensure that the money is used for water projects, Trust principal would not be available for appropriation or borrowing for any other purpose. Furthermore, in the absence of any other law, Trust principal could not be transferred to the General Fund.

While the net income from the Trust would provide a consistent funding stream, SB 669 would also allow other monetary sources such as voluntary contributions from citizens, federal funding, and extra transfers from the General Fund to be deposited into the Fund. The bill would also provide protection for the money located in the Fund by prohibiting unused Fund balances from being transferred back to the General Fund. The money would also be unavailable for appropriation unless authorized by a statute that receives an affirmative vote of two-thirds of the membership in each house of the state legislature.

Ultimately, the SWRCB would administer the Fund to assist community water systems in disadvantaged communities that are noncompliant under fed-

eral and state drinking water standards and which are deemed not to have the financial means to achieve compliance. Using Fund resources, the SWRCB would assist communities with operation and maintenance costs, consolidation costs for community water systems, replacement water as a short-term solution, and administrative services.

Conclusion and Implications

The issue of water quality in disadvantaged communities remains an area of public concern. The California Legislature continues to grapple with finding a funding solution that will allow these water quality issues to be addressed. While it remains to be seen which solution will be pursued, SB 669 adds a third, alternative option to the current mix of legislative proposals. For more information, *see*, Assembly Const. Amend. No. 3, 2019-2020 Reg. Sess. (Cal. 2019); *Governor's Proposed Budget 2019-20 Summary: Environmental Protection*, Officer of Governor Gavin Newsom, Jan. 10, 2019, http://www.ebudget.ca.gov/2019-20/pdf/BudgetSummary/EnvironmentalProtection.pdf (last visited Mar. 16, 2019);

S.B. 623, Cal. Leg., 2017-2018 Reg. Sess. (Cal. 2017); S.B. 669, Cal. Leg., 2019-2020 Reg. Sess. (Cal. 2019).

(Miles Krieger, Steven Anderson)

CALIFORNIA LAWMAKERS PROPOSE SEVERAL SWEEPING ENVIRONMENTAL MEASURES THIS YEAR ON SINGLE-USE PLASTIC, WASTEWATER REUSE, AND MORE

California lawmakers will be considering a variety of sweeping environmental measures on single-use plastics, wastewater recycling, ocean resiliency, and more this Legislative Session. These bills signal California's keen interest in environmental protection and its unabated commitment to implement aggressive environmental laws that strive to improve air quality, afford water protection, and guard endangered species.

Background

February 22, 2019 was the deadline for the introduction of bills for the first half of the 2019-2020 California Legislative Session. Lawmakers will break for Spring Recess on April 12 and reconvene on April 22. The last day for bills to be passed out of the house of origin will be May 31, 2019.

While the deadline to submit bills for the current session has passed, legislators may still rewrite or amend the language in their proposals, and may even substitute existing bills with different measures. The following environmental bills were recently introduced and, as such, are still in the early stages of the legislative process. They will likely be modified to varying extents.

Summary of Proposed Environmental Bills

The proposed legislation addresses issues on environmental protections, promotes recycling, reduces the use of plastic and solid waste, and provides tax breaks for businesses that create "green jobs." What follows is a summary of eight environmental bills to watch this year:

- **Senate Bill 1** (Atkins, D) California Environmental, Public Health, and Workers Defense Act of 2019

  SB 1 would make existing federal requirements and standards pertaining to air, water, and protected species enforceable under state law, even if the President or Congress rolls back those standards in the future. At its core, SB 1 would make sure that protections in existence prior to January 19, 2017 under the federal Clean Air Act, the federal Clean Water Act, the Safe Drinking Water Act, and the Endangered Species Act are not weakened and can be enforced by California state agencies.

- **Senate Bill 8** (Glazer, D) / **Assembly Bill 1718** (Levine, D) Ban Smoking on State Beaches

  SB 8 and AB 1718 both seek to prohibit smoking at designated picnic areas on state beaches and state parks. Legislators have passed similar bills with bipartisan support each of the previous three years, though each bill was vetoed by former Governor Brown.

•**Senate Bill 54** (Allen, D) / **Assembly Bill 1080** (Gonzalez, D) California Circular Economy and Plastic Pollution Reduction Act
The companion bills of SB 54 and AB 1080 would create a framework to dramatically reduce the amount of plastic waste generated in California, setting a goal that single-use packaging and products sold or distributed in California be reduced, recycled, or composted by 75 percent by 2030.

•**Senate Bill 33** (Skinner, D) Solid Waste Reduction
As introduced, SB 33 states that it is "the intent of the Legislature to enact laws that would address the collapse of foreign recycling markets by reducing solid waste generation, encouraging transition to compostable or recyclable materials, and fostering domestic recycling markets." Specific details on the requirements and incentives remain to be determined.

•**Senate Bill 69** (Weiner, D) Ocean Resiliency Act of 2019
SB 69 aims to improve and protect the health of the Pacific Ocean along California's coastline by improving water quality, restoring ocean habitats, protecting keystone species, and convening a statewide advisory group to work on these and other issues impacting our oceans.

•**Senate Bill 332** (Hertzberg, D) Local Water Reliability Act
SB 332 calls for wastewater treatment facilities to reduce the volume of treated wastewater discharged into the ocean annually by 50 percent in 2030 and 95 percent by 2040.

•**Assembly Bill 161** (Ting, D) 'Skip the Slip'
AB 161 provides that, beginning in 2022, stores would be required to provide receipts digitally unless a customer requests a hard copy.

•**Assembly Bill 176** (Cervantes, D) California Alternative Energy and Advanced Transportation Financing Authority Act
AB 176 would provide tax breaks for businesses that promote California-based manufacturing, California-based jobs, advanced manufacturing, reduction of greenhouse gases, or reduction in air and water pollution or energy consumption.

A Deeper Look into Water Specific Bills

The reality, that more frequent and persistent periods of limited water supply due to a changing climate is occurring, has forced the State to rethink water conservation and efficiency methods and to move towards implementing changes that will improve and sustain the State's water for future generations. Several of the bills introduced this Legislative Session seeks to address these concerns and to make a big impact on water conservation.

Senate Bill 1

The Clean Water Act, which was enacted in 1948, grants vital protections to the waters of the United States by establishing the basic framework for regulating discharges of pollutants, and regulating quality standards for surface waters.

SB 1 ensures that these protections afforded by the Clean Water Act, and others, remain enforceable in California despite any deregulation by the federal government. According to Senator Stern (D- Canoga Park), "SB 1 is Trump insurance for California's environment."

Under this law, state environmental, public health, and worker safety agencies would have the authority to take all actions within their power to ensure water standards in effect and being enforced as of January 2017 remain in effect in California, notwithstanding any loosing of federal protections and standards.

Senate Bill 69

A major part of SB 69, the Ocean Resiliency Act of 2019, aims to improve and protect the health of the Pacific Ocean by reducing land-based sources of pollutants that acidify the ocean; restoring ocean habitats, such as kelp; preventing greenhouse gas emissions; and convening a statewide advisory group to work on various issues that impact the Pacific Ocean off of California's coastline.

According to Senator Wiener, the author of SB 69:

> Our ocean habitat is being damaged by the impacts of climate change. . . [w]ithout immediate action, these impacts will only get worse."

> Senator Wiener believes that this legislation is "a key step to reduce and mitigate the impacts of climate change on these ecosystems as well as our state's coastal communities and economy.

SB 69 will require that all waters going into the Pacific Ocean from most freshwater discharges be denitrified by 2024. Nitrates are one of the most significant land-based acidifying pollutants. The proposed bill will also help increase salmon populations by direct the Department of Fish and Wildlife to develop and maintain a priority list of dam removal projects within the State and ensure that salmon-bearing rivers and streams are not inadvertently damaged by sediment flows created during the logging process.

Senate Bill 332

In California, a billion gallons of water is used only once, then released into the ocean, on a daily basis. A climatologist's estimate, reported in the Los Angeles Times, projected that more than 80 percent of the region's rainfall upon the urban areas of Southern California ends up, unutilized, in the Pacific Ocean. SB 332's backers argue that this water should be recycled and used for landscape and agricultural irrigation to reduce the diversion of water from the Colorado River and the Bay-Delta watershed.

The Local Water Reliability Act attempts will require treatment facilities to increase recycling, conservation, and efficiency efforts to meet reduction targets of 50 percent by 2030 and 95 percent by 2040 for the amount of water dumped into the ocean.

A similar bill introduced in 2015 faced overwhelming opposition from water agencies because of the immense costs that would accompany reuse mandates, and was unable to get out of committee.

Conclusion and Implications

California has been a global leader in environmental protection for decades. Though these bills are still in the early stages, and may ultimately be amended or even substituted with different measures, these bills are the Legislature's most recent attempts to maintain California's environmental leadership. Several of these bills are duplicates of earlier bills that were vetoed by former Governor Brown; however, with a new governor in office, a new era of California's environmental leadership may be born.

Governor Gavin Newsom has pledged to build on California's past efforts to combat climate change, put California on a path to 100 percent renewable energy, preserve clean air and clean water, and improve the reliability of the state's water supply. As Governor Newsom begins his first term as governor, it remains to be seen how he will endeavor to guide our state, country, and the planet toward solutions that truly protect the climate, ecosystems and public health in a meaningful, responsible and sustainable way.
(Paula Hernandez, Michael Duane Davis)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT WILL CONSIDER WHETHER THE CLEAN WATER ACT APPLIES TO DISCHARGES CONVEYED TO THE NAVIGABLE WATERS OF THE UNITED STATES THROUGH GROUNDWATER

On February 19, 2019, the U.S. Supreme Court granted a writ of *certiorari* to the appellants in *Hawai'i Wildlife Fund v. County of Maui*, where the Ninth Circuit Court of Appeals held that the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) applies to point discharges into groundwater that connect with navigable waters. 886 F.3d 737 (9th Cir. 2018), *amending and superseding on denial of rehearing en banc* 881 F.3d 754 (9th Cir. 2018), *and cert. granted sub nom.* Case No. 18-260, 2019 WL 659786, at *1 (U.S. Feb. 19, 2019). Facing a similar legal issue, the Sixth Circuit Court of Appeals rejected the "conduit" theory, leaving a circuit split for the Supreme Court to resolve.

Background on the Clean Water Act

The Clean Water Act's NPDES permit system regulates the discharge of pollutants from point sources into the navigable waters of the United States. 33 U.S.C. § 1311. The U.S. Environmental Protection Agency (EPA) and state agencies administer and enforce the program, and violations are also subject to citizen suits. 33 U.S.C. § 1365. A point source is:

> . . .any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . . 33U.S.C. § 1362(14).

The navigable waters of the United States are broadly defined to include traditionally navigable waterways and certain related wetlands and hydrological features. *See, Rapanos v. United States*, 547 U.S. 715, 730–731, 735 (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

The Ninth Circuit Adopts the Conduit Theory and the Fourth Circuit Follows

The County of Maui operated a municipal wastewater treatment facility. *Hawai'i Wildlife Fund*, 886 F.3d at 742. The facility discharged treated effluent into four injection wells. *Id.* Wastewater from the injection wells entered the groundwater, which carried the effluent to the Pacific Ocean. *Id.* at 742–43. The Ninth Circuit determined that the County of Maui was properly subject to liability for a CWA citizen suit:

> . . .because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable waters are more than *de minimis*. *Id.* at 759.

The Fourth Circuit soon thereafter followed suit and adopted the Ninth Circuit's "conduit" theory. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018).*Upstate Forever* involved an underground pipeline that burst, releasing petroleum directly into nearby groundwater. *Id.* at 641. Petroleum from the pipeline thereafter appeared in nearby navigable waters approximately 1,000 feet away from the pipeline. *Id.* The Fourth Circuit held that such a discharge into the groundwater constituted a point discharge into navigable waters because the groundwater served as a direct hydrological connection between the point source (the broken pipeline) and the navigable waters. *Id.* at 652.

Later that same year, the Fourth Circuit held in *Sierra Club v. Virginia Electric Power Co.*, 903 F.3d 403 (4th Cir. 2018), that the conduit theory did not apply to a coal ash heap and settling pond that leached arsenic into underlying groundwater on the basis that the heap and settling pond did not constitute point sources under the CWA.

The Sixth Circuit Rejects the Conduit Theory, Creating a Circuit Split for the Supreme Court to Resolve

The Sixth Circuit faced a similar set of facts as the Fourth Circuit's *Sierra Club*, but decided the case on different grounds, rejecting the conduit theory entirely. *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018). In *Kentucky Waterways Alliance*, an advocacy group brought a citizen suit against the operator of a coal-fired power plant, claiming that chemicals leached from the plant's coal ash ponds into groundwater that reached a nearby lake. *Id.* at 930–31. The Circuit Court concluded that the CWA does not apply to point source discharges that eventually reach navigable waters through a groundwater conduit or permeable rock. *Id.* at 938. The groundwater did not constitute the sort of "discernible, confined, or discrete" conveyance that satisfies the CWA's definition of a point source; instead, "groundwater is a 'diffuse' medium that seeps in all directions, guided only by the general pull of gravity." *Id.* at 933. Because the CWA applies to point sources that discharge directly into navigable waters, the court held that the statute does not apply to discharges that reach navigable waters through an intermediate conduit. *Id.* at 934.

In light of this split in authority, the losing parties in *Hawai'i Wildlife Fund* and *Upstate Forever* filed petitions for writs of *certiorari*. The U.S. Supreme Court invited the United States to submit an *amicus* brief. The Solicitor General argued that the Supreme Court should grant *certiorari*, but only to the appellants in *Hawai'i Wildlife Fund* on the basis that the discharge reached the navigable waters solely through groundwater. *Upstate Forever*, on the other hand, would have required the Supreme Court to resolve ancillary issues that did not warrant review by the Supreme Court. The Solicitor General further argued that the Supreme Court should only review the County of Maui's first question: whether the CWA requires an NPDES permit for point source discharges of pollutants into a nonpoint source such as groundwater that conveys the pollutant to navigable waters. The Supreme Court agreed and granted *certiorari* in *County of Maui* on that question alone.

Conclusion and Implications

Water resource agencies who supported the request for Supreme Court review have argued that the conduit theory should be rejected because the discharge of pollutants into groundwater is already heavily regulated. For example, the injection wells at issue in *Hawai'i Wildlife Fund* were already subject to underground injection control (UIC) permits pursuant to the Safe Drinking Water Act. Other relevant federal laws also control the discharge of pollutant into groundwater: the Coastal Zone Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Resource Conservation and Recovery Act, in addition to state-level regulation. Another reason water resource agencies have argued to reject the conduit test is that it could open wastewater treatment facilities to citizen suits for routine and difficult-to-detect leaks. Large scale water infrastructure such as the canals, reservoirs, and aqueducts essential to water delivery in California could also be affected by the conduit rule, as could large-scale groundwater recharge projects.

On the other hand, supporters of the conduit theory argue that the CWA broadly applies to discharges to navigable waters, not just discharges directly into navigable waters. Supporters point out that the injection wells in *Hawai'i Wildlife Fund* are simply an attempt to circumvent the CWA by using groundwater as an intermediary between the County of Maui's point source discharge and the Pacific Ocean. Supporters also reject fears that the conduit theory as applied in *Hawai'i Wildlife Fund* would result in a sweeping expansion of the NPDES program. Instead, it would only be applied on a case-by-case basis where a discharge through a groundwater conduit is functionally the same as a direct discharge.

The case will now be briefed to the Supreme Court and then set for oral argument, likely during the Court's 2019–2020 term.
(Brian Hamilton, Meredith Nikkel)

RECENT FEDERAL DECISIONS

THE TRUMP ADMINISTRATION BORDER WALL—NINTH CIRCUIT ILLEGAL IMMIGRATION ACT ALLOWS FOR DHS' WAIVER OF ENVIRONMENTAL LAWS

Center for Biological Diversity et al. v. U.S. Department of Homeland Security et al. ___F.3d___, Case Nos. 158-55474; 18-55475; and 18-55476 (9th Cir. Feb 11, 2019).

In August and September of 2017, the Secretary of the Department of Homeland Security (Secretary) published a notice of determination in the Federal Register that waived applicable environmental laws for the construction of the border wall in San Diego and Calexico. On February 11, 2019, a three-judge panel from the Ninth Circuit Court of Appeals determined the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the Department of Homeland Security's (DHS) waiver of environmental laws that environmental groups seek to enforce is appropriate.

Factual Background

On August 2, 2017, the Secretary published a notice of determination regarding the construction and evaluation of wall and replacement of 14 miles of fencing in San Diego County. The Secretary invoked § 102 of the IIRIRA's authorization to waive all legal requirements that the Secretary herself determines necessary to ensure expeditious construction barriers under the IIRIRA. Similarly, On September 12, 2017, the Secretary again invoked § 102's waiver in another notice of determination in the Federal Register in Calexico. The construction in Calexico involved a three-mile replacement of primary fencing along the border near Calexico. The secretary deemed both the projects as "necessary" and waived twenty-seven federal laws in its notice.

Plaintiffs, the State of California, Center for Biological Diversity (Center), and various environmental groups (Coalition) asserted three claims: 1) *ultra vires* claims, which alleging that the Department of Homeland Security exceeded its statutory authority in working on the border barrier projects and issuing waivers; 2) environmental claims contending that DHS violated various environmental laws by building the wall; and 3) constitutional claims asserting that the Secretary's waivers violate the U.S. Constitution.

The U.S. District Court rejected the constitutional claims and granted summary judgment to DHS with respect to the others. Plaintiffs each appealed the District Court's judgment. Now in a consolidated case, the Ninth Circuit Court heard the appeals and chose not to decide the environmental claims at this time stating that the claim was not ripe.

Then Ninth Circuit's Ruling

Jurisdiction

Section 102(c)(2)(A) states that the U.S. District Courts of the United States:

> . . .shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought or claim alleging a violation of the Constitution of the United States.

The Ninth Circuit Court interpreted this provision to mean that only constitutionally based claims are under the exclusive jurisdiction of District Courts.

Paragraph 1 includes a waiver provision that the:

> . . .Secretary of Homeland Security shall have the authority to waive all legal requirements… in such secretary's sole discretion, determines necessary to ensure the expeditious construction of the barriers and roads under this section.

Additionally, § 102(c)(2)(C) states that:

> . . .[a]n interlocutory of final judgment decree, or order of the district court may be reviewed upon petition for a writ of certiorari to the supreme court of the United States.

The Ninth Circuit Court interpreted the three provisions to mean that the Supreme Court's direct review only applies to claims under the District Court's exclusive jurisdiction—the constitutional claims—and have no bearing on any other claim including Plaintiffs' *ultra vires* and environmental claims.

Ultra Vires Claims Do Not Survive Summary Judgment

Plaintiffs argue that the San Diego and Calexico Projects are not authorized by § 102(a) ad 102(b) and challenge the scope of the Secretary authority to build roads and walls.

Under § 102 (a) of the IIRIRA states that:

> . . .[t]he Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install *additional physical barriers and roads* (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of *high illegal entry* into the United States. (Emphasis added.)

Specifically, plaintiffs argued that § 102(a) only applies to "additional physical barriers" and because the projects aim to replace the border fencing and do not technically create new and additional barriers, they fall out of the scope of the statute's authority. Plaintiffs contend that legislative intent was to only include construction of barriers that would add to the total miles of the border wall.

By relying on *Webster's Dictionary*®, the Ninth Circuit Court ultimately held that the term "additional" is equivalent to "supplemental" and that barrier means "a material object…that separates…or serves as a unit or barricade." The Ninth Circuit Court further opined that, common sense supports the court's analysis and to suggest that Congress would authorize DHS to build barriers but implicitly prohibit its repairs "makes no practical sense."

Plaintiffs also argued that the borders were not in areas of "high illegal entry" because there are other places with *higher* illegal entry. However, plaintiffs' argument failed because the IIRIRA does not define what constitutes "high illegal entry" and it certainly does not dictate that illegal entry is a comparative determination. Further, the panel found that plaintiffs did not dispute the DHSs' statistics that show that San Diego and El Centro are in the top 35 percent of the border where the most illegal immigrants are apprehended. In essence, plaintiffs were challenging the Secretary's discretion in selecting where to exercise her authority under § 102(a), which is barred under § 102(c). Finally, the Ninth Circuit determined that § 102(b) does not impose limits on the section's broad grant of authority.

The Dissent

In her dissent, Ninth Circuit Judge Consuelo M. Callahan's argued that the plain language of § 102 of limits appellate review of the lower California court's decision to the U.S. Supreme Court. Judge Callahan disagrees and reasons the majority ignores the plain language of the text which requires that for all actions filed in a District Court that arises from "any section undertaken, or any decision made, by the Secretary of Homeland Security," —that appellate review is limited to the Supreme Court.

Callahan criticizes majority's analysis and contends that the opinion ignored the statute's restriction on appellate jurisdiction by arguing that the *ultra vires* claims do not "arise out of" the Secretary's waiver of legal requirements under § 102 (c). Thus, § 102(c) restricts review of this case to the Supreme Court and should have never been determined by the Ninth Circuit.

Conclusion and Implications

In this 2-1 decision, the Ninth Circuit ultimately upheld the Trump administration's decision to reconstruct a border wall in Calexico and San Diego, supporting the Secretary's decision. The Ninth Circuit Panel's discussion of its interpretation of the statutes provides a seemingly iron-clad protection for the Secretary's decisions made under § 102(c) and even bolsters the Secretary's authority by holding that the section does not impose any limits. The Secretary's broad authority stems from legislative intent to prioritize border security and sacrifice other

federal policy concerns including many environmental considerations. The panel's ruling in *In Re Border Infrastructure Environmental Litigation* is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/02/11/18-55474.pdf
(Rachel S. Cheong; David D. Boyer)

DISTRICT COURT HOLDS ARMY CORPS' DECISION TO MAINTAIN TIDAL WATERS DEFINITION OF 'HIGH TIDE LINE' IS FINAL AGENCY ACTION FOR SUBJECT MATTER JURISDICTION

Sound Action v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. C18-0733 (W.D. Wash. Feb. 5, 2019).

In January of 2018, the Commander of the U.S. Army Corps of Engineers' Northwestern Division (Corps) issued a memorandum putting on hold any further consideration of a change in the Corps' method, in use since the 1970s, for determining its jurisdiction over tidal waters. That memorandum had the effect of bringing to an abrupt halt consideration of the recommendation of an interagency, multi-disciplinary working group to adopt a new method for establishing the high tide line, which would have brought an additional 8,600 acres of Washington state shoreline within the Corps' jurisdiction. The U.S. District Court for the Western District of Washington found the memorandum constituted final agency action sufficient to establish subject matter jurisdiction.

Background

The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1363. Tidal waters "up to the high tide line" are included within navigable waters. 33 C.F.R. § 328.4(b). Clean Water Act § 404 prohibits the discharge of dredged or fill materials into navigable waters, including tidal waters, without a permit. 33 U.S.C. § 1344. "The construction of seawalls, bulkheads, and similar structures for shoreline armoring within navigable waters constitutes a discharge" requiring a § 404 permit. 33 C.F.R. 323.2.

Since 1986, the Corps has defined the "high tide line" as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide." 33 C.F.R. § 328.3(c)(7). "The parties do not dispute that this is the current definition of high tide line." The Corps' definition provides that:

> . . .[t]he line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm. 33 C.F.R. § 328.3(c)(7).

Beginning in the 1970s, the Corps' Northwestern Division has used "the mean higher high water" (MHHW) datum to determine the high tide line and, consequently, the limit of its § 404 jurisdiction in tidal waters. According to plaintiffs, MHHW "is unequivocally significantly lower than the maximum height reached by a rising tide" and "is surpassed between three to five times a week in Washington state." In other words, "about a quarter of high tides" in the Seattle District's region are above MHHW.

In January 2016, the Corps along with the U.S. Environmental Protection Agency's Region 10 and the West Coast Region of the National Oceanic and Atmospheric Administration (NOAA) "formed an interagency workgroup to address the Seattle District's high tide line datum." The workgroup considered two other "datums" that could be used to establish the high tide line: the "highest astronomical tide (HAT) and mean annual highest tide (MAHT)." The court pointed out that, according to plaintiffs:

> . . .the difference between MHHW and HAT on a shoreline in Puget Sound varies by location, ranging from 15 to 32 vertical inches. The difference between MHHW and MAHT ranges from 13 to 29 inches. Plaintiffs claim that 'the area between [MHHW] and [MAHT] represents

up to 8,600 acres of shoreline area in Washington state.'

In November 2016, "the workgroup recommended to the Corps' Northwestern Division (which oversees the Seattle District) that the Seattle District use MAHT as its high tide line datum," explaining that MAHT[ ] is an elevation that is reasonably representative of the intersection of the land and the water's surface at the maximum height reached by the rising tide, is based on gravitational forces, is predictable, reliable, repeatable, reasonably periodic, measurable, simple to determine, scientifically defensible, and based on data that is reasonably available and accessible to the public.

Nonetheless, on January 19, 2019, the Corps' Northwestern Division Commander Spellmon issued a memorandum (Spellmon Memo) stating that while he had reviewed the workgroup's recommendation:

> . . .in light of the EPA and Army's efforts to review and revise the 'waters of the United States' definition as directed by. . . [President Trump's 2017 Executive Order] . . .the Corps' 'current focus must shift to other initiatives,' and that '[f]urther efforts to study, re-evaluate or reinterpret the [high tide line] definition would not be an organizationally consistent use of resources within the Corps.'

Further, the Spellmon memo stated that:

> . . .'elevations such as MAHT as they would be applied in Puget Sound are not consistent with the intent of the current definition of [high tide line]' [and] 'direct[ed]' the Seattle District 'to shift away from further consideration of changing the Corps Clean Water Act jurisdiction limit in tidal waters.'

The environmental group plaintiffs alleged that the Northwest Division's use of MHHW to determine the high tide line allows substantial amounts of environmentally-damaging shoreline armoring to proceed each year without first undergoing the § 404 permit process. The Corps sought to dismiss this claim on the grounds that the Spellmon Memo is not a final agency action subject to review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551(13), 704 and 706(2).

The District Court's Decision

Examining the motion to dismiss as a facial attack on the plaintiffs' assertion of subject matter jurisdiction, the District Court assumed the allegations in the complaint were true, and considered along with the complaint the Spellmon memo and the Workgroup Report.

The APA allows review of "final agency action[s]." 5 U.S.C. § 704.

When analyzing whether an agency action is final:

> . . .[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992).

The Supreme Court has established a two-part test to determine if an agency action is "final." *See, Bennett v. Spear*, 520 U.S. 154, 177-78 (1997):

> First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' *Id.* (citations omitted).

The District Court rejected the Corps' argument that the Spellmon memo "deferred" action on the Workgroup Report, or expressed an intent by the agency to "establish law and policy in the future." Quoting *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 777 (D.C. Cir. 1996). Rather,

> . . .the Spellmon memo direct[s]' the Seattle District to stop evaluating high tide line datum and 'shift away from further consideration of changing the Corps [CWA] jurisdictional limit.'

The District Court went to state that. . .

> By reiterating that the Seattle District will use MHHW as its high tide line datum, and by

> precluding future consideration of the issue, the Corps, 'for all practical purposes, has ruled definitively' on the Seattle District's § 404 jurisdiction. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016).

And the Spellmon memo was issued on the basis of an evaluation of "new information from a group of experts that the Corps assembled"—the workgroup—"support[ing] a finding of final agency action." Citing *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005):

> The Spellmon Memo's conclusion that the Seattle District maintain MHHW and halt any future consideration of its high tide line datum reflects the consummation of the Corps' decision-making process regardless of the documents that the Corps relied upon to reach that conclusion.

Thus, the court found:

> . . .that Plaintiffs have properly challenged a specific agency action: the Corps' decision to indefinitely maintain MHHW as the Seattle District's high tide line datum. The Spellmon Memo marks the consummation of the Corps' decision-making process on this point.

Conclusion and Implications

In this era of abrupt regulatory about-turns arising from executive agency communications in a wide variety of forms and guises, District Courts continue to apply established precedent to determine whether public interest plaintiffs have standing to challenge various agency decisions as "final" under the APA. It remains to be seen whether the Circuit Courts will shape the controlling law to shield any of these regulatory actions from review. The court's decision is available online at: https://earthjustice.org/sites/default/files/files/21_Judge_Order-Denying-MTD_02-05-2019.pdf
(Deborah Quick)

DISTRICT COURT FINDS IT HAS JURISDICTION UNDER CERCLA OF UK ENTITY FOR 'DIRECTED' ACTIVITIES CALIFORNIA DURING CORPORATE MERGER

Successor Agency to the Former Emeryville Redevelopment Agency v. Swagelok Co., ___F.Supp.3d___, Case No. 17-cv-00308 (N.D. Cal. Jan. 30, 2019).

A United Kingdom-based corporate entity may be sued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other environmental statutes in the Northern District of California based on its California "directed" activities during a corporate merger in the 1980s, by which the UK entity's affiliate took title to a contaminated industrial site in Emeryville, California. The U.S. District Court found the UK entity controlled the corporate merger, including the dissemination of press releases and advertising directed at the California market, and that the target of the merger had contributed to the contamination of the property at issue, and therefore the plaintiffs established a *prima facie* case the court could exercise personal jurisdiction over the UK entity.

Background

From 1910 through 1999, an industrial property at 5679 Horton Street in Emeryville, California, was the site of various manufacturing processes—including mechanical calculating machines, machine valves and vale parts—resulting in soil and groundwater contamination with "various oils, chemical solvents, and other chemicals." In 1999, the city's Redevelopment Agency purchased the property and investigated the contamination as well as the identity of various potentially liable parties.

In 2017 the city sued various individuals and entities, seeking contributions to clean-up costs. Defendant Hanson Building Materials Limited (HBML), a UK entity, was named on the basis of alleged successor liability arising from HBML's relationship

to Smith-Corona Marchant Inc. (SCM). SCM was created as a result of a 1958 merger involving the original owner-operator of the property, and owned the property until the mid-1960s. SCM was later, in the 1980s, the target of a successful hostile takeover by HBML.

The District Court's Decision

HBML moved for dismissal on the basis that the District Court had neither general nor specific personal jurisdiction over it; the city opposed solely on the basis that the court had specific jurisdiction. Therefore, the court analyzed only whether it had specific jurisdiction over HBML applying the "three-factor test:

> (i) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (ii) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (iii) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. Boschetto v. Hansing, 539 F.3d 1011, 1016 (9th Cir. 2008) (internal citation and quotations omitted).

Purposeful Availment

The court found that:

> . . .[t]he first factor may be satisfied by 'purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.' *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

The "purposeful availment" analysis is generally applied in the contract context, while "purposeful direction" typically is applied to torts. In *Pakootas v. Teck Cominco Metals, Ltd.* 905 F.3d 565, 577 (9th Cir. 2018), the Ninth Circuit applied the "purposeful direction" analysis to a defendant facing allegations of liability under CERCLA "because the statute sounded in tort more so than in contract":

> To determine whether activities directed at a forum are sufficient, courts require facts indicating the defendant: '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.' *Yahoo!*, 433 F.3d at 1206 (internal quotation and citations omitted).

HBML's hostile takeover of SCM was first considered in 1985, with discussions by HBML's board of directors "preceding any press release that HBML would announce a tender offer."

> When the takeover efforts began, HBML announced that the tender offer would be 'advertised nationally by use of the national financial press and by the interstate mail.'

HBML's "national press strategy" with respect to the takeover continued "[f]rom 1986 to 1993," during which time "HBML ran advertisements in California, at times through the Los Angeles Times." Also during this time HBML "periodically filed SEC documents involved in the tender offer and liquidation of SCM." The District Court rejected HBML's attempt to liken its actions to those of the facts in *Callaway Golf Corp. v. Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194, 1198 (C.D. Cal. 2000), where "the District Court found that a nationwide press release" issued by the defendant seeking to evade personal jurisdiction:

> . . .was not sufficient to establish purposeful availment because '[n]one of the four U.S. media publications ... [were] located in California, nor did defendant send press releases to any entity or person with a California address.' Quoting *Callaway*, 125 F. Supp. 2d at 1198–1200.

But HBML's nationwide press releases were accompanied by:

> . . .advertising directed towards California specifically. Given HBML's direct involvement in the nationwide press coverage of its tender offer, and subsequent ads in California, it purposefully availed itself of California.

Citing *Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), as:

> . . .finding that the decision to provide a nation-wide press coverage permitted jurisdiction in Montana where the claims happened to be filed . . . .Lord Hanson and Sir Gordon White, who were partners in managing HBML, lived part-time in California and conducted business there.

As for the second factor, whether the city's CERCLA claim "arises out of or relates to the defendant's forum-related activities," *Boschetto*, 539 F.3d at 1016, the District Court found that the city alleged sufficient facts to establish successor liability, thereby satisfying this factor:

> A court has personal jurisdiction over an alleged successor company, here HBML, if: (i) 'the court would have had personal jurisdiction over the predecessor' and (ii) 'the successor company effectively assumed the subject liabilities of the predecessor.' *Lefkowtiz v. Scytl USA*, No. 15-CV-05005-JSC, 2016 WL 537952, at *3 (N.D. Cal. Feb. 11, 2016).

Here, it was undisputed that HBML obtained the assets, rather than just the stock, of SCM and that SCM had owned and operated the property (thus, the court would have had jurisdiction over SCM). The city argued that HBML's "dominat[ion] and control[]" of the takeover established that HBML essentially owned and controlled SCM "while SCM allegedly contributed to the contamination of the Property." HBML's argument that affiliates it did not control had actually acquired SCM foundered on evidence from HBML's own witnesses that it was doubtful those entities:

> . . .had the resources (employees, bank accounts, phone and fax numbers) to perform the merger with SCM independent of HBML.

And even if HBML successfully spun-off SCM's liabilities via a series of entity-level transactions in 1988, that did not shield it from successor liability for SCM's pre-1988 contaminating activities.

Conclusion and Implications

The long-arm of successor liability for contribution costs under CERCLA and other environmental statutes drives the structure of many contemporary transactions. This case is a reminder that long-ago transactions can come back to haunt defendants, decades later. The court's decision is available online at: https://scholar.google.com/scholar_case?case=8469295132104795911&q=Successor+Agency+to+the+Former+Emeryville+Redevelopment+Agency+v.+Swagelok+Co&hl=en&as_sdt=2006&as_vis=1
(Deborah Quick)

RECENT CALIFORNIA DECISIONS

TRIGGERING THE STATUTE OF LIMITATIONS: WHAT COUNTS AS THE STATE WATER RESOURCES CONTROL BOARD'S 'FINAL ACTION'?

Millview County Water District v. State Water Resources Control Board, ___Cal.App.5th___, Case No. A146605 (1st Dist. Feb. 22, 2019).

The Court of Appeal has held that the final action of the State Water Resources Control Board (SWRCB) for purposes of triggering the 30-day statute of limitations under Water Code § 1126(b) "is not necessarily the last action" taken by the SWRCB, "but rather it is [the State Water Board's] substantive decision." *Millview*, No. A146605, 2019 Cal.App. LEXIS 152, at *12 (Cal. Ct. App. Feb. 22, 2019). Accordingly, Millview's petition for a writ of administrative *mandamus* challenging the SWRCB's revocation of Millview's water rights was time-barred because the petition was filed more than 30 days after the SWRCB adopted its order, despite later a modification of the order. *Id.* at *2, *13-*14.

Background

Millview County Water District acquired a license to divert water from the Russian River. Approximately two years later, the SWRCB's Division of Water Rights "issued a notice of proposed revocation to Millview." *Id.* Millview requested a hearing, after which the SWRCB issued a draft order revoking Millview's license. On May 20, 2014, the SWRCB held a public meeting to review the draft order. *Id.* It:

> . . .found the water at issue had not been put to beneficial use for a period of five years or more and formally adopted the draft proposed order. *Id.* at *3.

On May 30, 2014, the SWRCB emailed a copy of the May 20, 2014, order (Order) to Millview. The cover letter stated that the SWRCB had adopted the Order on May 20, 2014, and that the statute of limitations to request reconsideration ran from that date.

On June 2, 2014, the SWRCB emailed a Corrected Order to Millview that stated that the Order was corrected to reflect that the chairperson was not present when the SWRCB adopted the Order. The cover letter "stated: 'Enclosed is corrected Order WR 2014-0021, which was adopted by the [Board] on May 20, 2014 … .'" *Id.*

Procedural History

Millview filed a petition for writ of administrative mandamus challenging the adequacy of the public hearing and the Corrected Order on June 30, 2014. Millview requested the court set aside the "order," without specifying which order. The "Board filed a demurrer asserting Millview failed to file the petition within the applicable 30-day statute of limitations" as provided in Water Code § 1126(b). The trial court overruled the demurrer, and the SWRCB appealed.

The Court of Appeal's Decision

Statute of Limitations Runs from Adoption of Decision or Order

Millview and the SWRCB agreed that the 30-day statute of limitations applied. They disagreed, however, over what constituted the "final action by the board" that triggered the start of the limitations period. Water Code § 1126(b) provides, in part:

> Any party aggrieved by any decision or order may, not later than 30 days from the date of final action by the board, file a petition for a writ of mandate for review of the decision or order. *Id.*

The SWRCB contended that its Order adopted May 20, 2014, was the "final action" because "that adoption 'completed and finalized the decision-making process.'" It argued that the email notice on May 30, 2014, and the Corrected Order sent June 2, 2014, were only ministerial tasks. Millview countered that the SWRCB's "final action" was the Corrected Order or, in the alternative, when the board served the Order on May 30, 2014. The Court of Appeal concluded that the Order adopted May 20, 2014, was the "final

action" for statute of limitations purposes. *Id.* at *13.

The court compared Water Code §§ 1122 and 1126(b) to determine what "final action" meant within § 1126(b). Section 1122 requires that a petition for reconsideration be filed "not later than 30 days from the date the board adopts a decision or order." *Id.* at *7-*8. Section 1126(b) provides that if a party seeks reconsideration, "that petition extends the time period to file a writ petition." *Id.* The court reasoned that §§ 1122 and 1126 indicate that the SWRCB's "final action" in § 1126(b):

> . . .is dependent on whether there is a timely petition for reconsideration. If no such petition is filed, then the Board's order or decision, as it was adopted, is the Board's 'final action' in the matter. *Id.*

In *Millview*, the SWRCB's letters stated that the Order and Corrected Order were adopted on May 20, 2014, "and the petition for reconsideration began to run *on that date*." *Id.* at *9. Millview did not request reconsideration and the court concluded that "the Board's May 20, 2014 Order was, and remained, its 'final action' on the matter." *Id.*

The court also canvassed the case law, and concluded that "final action" is "not necessarily the last action taken by an agency, but rather is that agency's substantive decision." *Id.* at *12. The court determined that the SWRCB's "final action" was its May 20, 2014, adoption of the Order. *Id.* at *13. While Millview argued that "the Board could have modified the draft order at a subsequent closed session," the court noted that the record did not suggest that the closed meeting occurred after the Board adopted the draft order. *Id.* *13 n.6. Additionally, Millview did not "dispute that the Order gave rise to legal consequences—i.e., the revocation of Millview's license." *Id.* at *13.]

Limitations Period Not Restarted by Non-Substantive Amendment of Order

The court concluded that the Corrected Order did not negate the Order's finality for purposes of restarting the limitations period. The standard is whether "the modification 'materially affected' the appealing party's rights." *Id.* at *15. Millview did not argue that the Corrected Order made substantial modifications. Accordingly, the Corrected Order did not restart the statute of limitations period.

Limitations Period Not Triggered by Date of Service of the Order

Millview argued that the statute of limitations should be triggered by the date of service of the Order because service was part of the "final action"; that the California Legislature "intended a uniform statute of limitations period running from the date of service"; and that "practical considerations required the limitations period to being only after service." *Id.* at *17. The court rejected all three arguments because the Legislature could have specified that the statute of limitations ran from the date of service if it wanted to, and nothing in the legislative history indicted an intent "to create a uniform statute of limitations running from the date of service." *Id.* at *17-*20.

Equitable Estoppel Did Not Apply

The trial court found that the SWRCB was estopped from relying on a statute of limitations defense because the cover letter accompanying the Corrected Order induced Millview to consider the Corrected Order as the "final order." *Id.* at *22. The Court of Appeal disagreed.

The court concluded the Corrected Order was not:

> . . .intended to induce Millview to believe the statute of limitations would begin running from the date of the letter" because the cover letter was "entirely silent as to the limitations period for seeking judicial review. *Id.* at *23.

Accordingly, the court reversed the trial court's ruling, and directed that it vacate its writ.

Conclusion and Implications

Millview is instructive as to what constitutes a "final action" by the SWRCB that will trigger the 30-day limitations period for challenging a water rights decision or order. Practitioners will want to review *Millview* when bringing a writ petition under Water Code § 1126(b), and err on the side of caution before relying on a change in an order or decision as having restarted the 30-day limitations period. Notably, the *Millview* case did not involve a petition for reconsideration, which extends the period for filing a writ petition. The published opinion is available online at https://www.courts.ca.gov/opinions/documents/A146605.PDF

(Jenifer Gee, Dan O'Hanlon)

CALIFORNIA WATER™
LAW & POLICY Reporter

California Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

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