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CALIFORNIA WATER™
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CONTENTS

Continued on next page

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RECENT FEDERAL DECISIONS

RECENT CALIFORNIA DECISIONS

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CALIFORNIA WATER NEWS

FULL RESERVOIRS AND DENSE SNOWPACK: A LOOK AT CALIFORNIA'S WATER SUPPLY FOR 2019

The State of California is drought-free for the first time since 2011. A succession of storms in January and February this year dumped huge amounts of snow on the Sierra Nevada. The snow that melts from this snowpack plays a crucial role in recharging California's reservoirs. Climatologists are cautiously optimistic that the massive increase in snowpack this season will protect the state from drought this summer.

Background

The condition of the Sierra Nevada snowpack has consequences that go well beyond the duration of Mammoth ski season. Snowpack plays a key role in water management by accumulating water during the colder stormy winter months, and then releasing water as snowmelt into reservoirs during the drier, warmer months in spring and summer. Snowpack can vary significantly from year to year in response to rain and temperature fluctuations.

The California Department of Water Resources (DWR) and other organizations monitor the snowpack by conducting monthly snow surveys to measure water content in the snowpack. Data collected from the surveys help determine the amount of water that will melt and run off to state reservoirs during warmer months. The month of April is when the snowpack is usually at its deepest and water content is at its highest for the season. As such, the April results are a key indicator for the state's water supply for the rest of the year. This information is critical to water managers as they allocate water to regions downstream.

2019 Snowpack Conditions and Reservoir Statistics

Approximately five months ago, nearly 84 percent of the state was in moderate, severe or extreme drought. However, due to more than 30 "atmospheric river" storms that swept across the state this year, snowpack levels have increased exponentially. The Sierra Nevada snowpack is California's largest and most important water storage reservoir. Nearly one-third of the state's water needs on average are supplied by the Sierra Nevada snowpack.

As of April, the Sierra Nevada snowpack is 162 percent of the average statewide. This number is triple what the number was one year ago. Snowpack in California has only been above 150 percent a total of 11 times since 1950—and only twice in the last century.

Data shows that most reservoirs are already half-full and several have reached water levels that are above their historical averages and quickly reaching full capacity. The following are the most recent statistics (as of April 15) on storage levels for some reservoirs in California:

- Antelope—roughly at 104 percent capacity
- Pardee—roughly at 101 percent
- Lewiston—roughly at 99 percent capacity
- Shasta—roughly at 90 percent capacity
- Folsom Lake—roughly at 82 percent capacity
- Lake Oroville—roughly at 85 percent capacity
- Eastman Lake (Buchanan Dam)—roughly at 85 percent capacity
- Millerton Lake (Friant Dam)—roughly at 78 percent capacity
- Success Dam—Roughly at 125 percent capacity

Flooding and Overcapacity

Full reservoirs and a dense snowpack also create some challenges for water operators. Any abrupt change in weather could melt much of the accumulated snowpack and send it cascading into overfilled reservoirs, which could create the risk of flooding. It was a similar runoff two years ago that caused the col-

lapse of both the primary and emergency spillways at Oroville Dam in Butte County. Water operators must balance between water inflow and outflow in order to maintain room for flood control in the event of an abrupt snowpack runoff or weather storm, while at the same time ensuring that enough water is maintained to satisfy consumer demands. Local reservoirs are proactively releasing water at higher rates than usual in anticipation of increased inflows for the snowmelt.

Additional Man-Made Water Storage

Many hydrologists contend that climate change will cause California to receive more rain and less snow, which will have a massive effect on our water supply in future decades. For this reason, there is a controversy over whether additional man-made storage is needed to capture more winter rains that otherwise would flow to the ocean.

Conclusion and Implications

Higher snowpack levels increase the likelihood that California's reservoirs will receive ample runoff to meet peak demand through summer and fall. Although California may technically be "drought-free," the state has not fully recovered from the drought in terms of groundwater recharge. Many areas of the Central Valley have experience five to six feet of subsidence and forecasters anticipate that the Central Valley will need several average-to-wet years to fully recover.
(Paula Hernandez, Michael Duane Davis)

METROPOLITAN WATER DISTRICT TO SUPPLY WATER INSTEAD OF THE IMPERIAL IRRIGATION DISTRICT TO FINISH THE COLORADO RIVER DROUGHT PLAN

With California's Imperial Irrigation District (IID) baulking and a deadline looming, the Metropolitan Water District of Southern California (MWD) broke an impasse on a seven-state Colorado River drought contingency plan (Plan) by agreeing to contribute the necessary water from its own reserves on behalf of IID. This made it possible, over the objections of IID, for the Colorado River Board of California to approve the Plan, and for representatives from the seven states involved, including California, to sign a letter to Congress calling for legislation to enact the deal.

Background

The Colorado River Compact is a 1922 agreement among seven U.S. states in the basin of the Colorado River in the American Southwest governing the allocation of the water rights to the river's water among the parties of the interstate compact. The compact divides the river basin into two areas, the Upper Division (comprising Colorado, New Mexico, Utah and Wyoming) and the Lower Division (Nevada, Arizona and California), and requires the Upper Basin states not to deplete the flow of the river below 7,500,000 acre-feet (AF) during any period of ten consecutive years.

The Colorado River and its reservoirs provide water for more than 5 million acres of farmland and 40 million people, including Los Angeles, San Diego, Las Vegas, Phoenix and Denver. Nearly two decades of drought and overuse, exacerbated by worsening climate change, have pushed the river's reservoirs to historically low levels. In response to the drought and declining reservoir elevations in both Lake Powell and Lake Mead, the Secretary of the Department of the Interior worked with the seven Colorado River Basin States to develop the 2007 Colorado River Interim (Guidelines). Since the Guidelines were adopted, the Colorado River has remained in the historic drought and the risk of reaching critical elevations at Lake Mead has increased from under 10 percent when the Guidelines were developed to over 45 percent.

The Colorado River Drought Contingency Plan

The Plan consists of a short-term set of interstate agreements and one agreement between the states and the federal government designed to lower the risk of reaching critically low reservoir elevations to the risk level projected at the time the Guidelines were

adopted in 2007. Beginning no later than 2020, the Secretary, seven Basin States, and Contractors, including MWD and IID, will begin work on the renegotiation of the Guidelines. That process is expected to result in new rules for management and operation of the Colorado River after 2026.

The Lower Basin Plan involves the Department of the Interior, California, Arizona, Nevada, and the Contractors, and requires the parties to contribute additional water to Lake Mead storage at predetermined elevations. It also incentivizes additional voluntary conservation of water to be stored in Lake Mead by allowing more flexibility in deliver of interim surplus storage. Under the Lower Basin Plan MWD was supposed to contribute the lion share of nearly 2 million AF of water between 2020 and 2026 constituting California's share of the Plan. IID was supposed to make 125,000 AF of the state's contributions for the first two years that such contributions are required.

At Metropolitan's December 11, 2018 board meeting, the Board authorized participation in the Plan, including all underlying agreements. However, the day before, at its December 10, 2018 board meeting, the IID Board approved participation in the Plan agreement but suspended implementation "until the following conditions were met:

> All seven Colorado River Basin States and the United States have approved the interstate Plan documents in the form voted on and approved by the IID Board of Directors in a public meeting.

The IID Board of Directors have voted on and approved in a public meeting any proposed federal legislation that is to be submitted to Congress in conjunction with the Plan.

The State of California and the United States have irrevocably committed to providing sufficient funding for the full completion of the ten-year Salton Sea Management Plan at a 1:1 federal to state funding commitment in addition to mitigating any and all future considerations as a result of the implementation of the Intra-California Agreement and the Interstate Plan Agreements.

The Bureau of Reclamation

The Bureau of Reclamation's deadline for approval of the Plan was March 18, 2018. As IID's third condition concerning Salton Sea restoration could not be secured by the Bureau's deadline, if at all, the MWD board at its March 12 meeting approved breaking the impasse on the Plan by contributing the necessary water from its own reserves on behalf of IID.

This allowed the Colorado River Board of California on March 18 by a vote of 8-1-1 to sign onto the Plan with the understanding that IID could join the Plan later. The following day representatives of the seven Western states participating in the Plan met with Bureau Commission Brenda Burman in Phoenix and signed a joint letter to Congress endorsing the Plan.

Conclusion and Implication

The signing event in Phoenix was held amid bitter complaints by IID, which was excluded from the deal even though it controls the single largest share of Colorado River water. While signing was underway, a veteran board member of IID spoke angrily at a meeting on the shore of the Salton Sea, condemning his counterparts for writing his district out of the deal and suggesting they were sipping champagne while ignoring an urgent "environmental and public health disaster" at the shrinking lake.

Commissioner Burman, however, noted that the Plan was designed in a way that will avoid causing further declines in the Salton Sea, which has been receding as water has increasingly been transferred from the farmlands of the Imperial Valley to urban areas in Southern California. She added that it was IID that decided not to join the Plan, but is certainly invited to sigh on later if the district choses.

In their letter, the state's representatives have asked Congress to promptly pass legislation authorizing the Interior Secretary to implement the Plan. Hearings have been scheduled in the Senate and the House. Once legislation is passed, the agreements underlying the Plan will still need to be signed by representatives of the states.
(David D. Boyer)

REGULATORY DEVELOPMENTS

DEPARTMENT OF WATER RESOURCES AND BUREAU OF RECLAMATION ANNOUNCE INCREASED WATER ALLOCATIONS FOLLOWING EARLY SPRING STORMS

Following significant precipitation in February and March, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) both announced increases in water allocations to water contractors in 2019. DWR, which operates the State Water Project (SWP), increased allocations to SWP contractors to 70 percent, compared with 35 percent announced at the beginning of February. The Bureau, which operates the Central Valley Project (CVP), increased allocations to agricultural, municipal, and industrial water contractors. Each category of CVP contractor located in the Sacramento-San Joaquin Delta (Delta) area will receive 100 percent of its contract amount, while south of Delta agricultural contractors and municipal/industrial contractors will receive 55 percent and 80 percent of contract amounts, respectively.

Background

The State Water Project is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more than 700 miles from northern to southern California. According to DWR, the SWP supplies water to more than 27 million people across California, and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints.

According to the Bureau, the Central Valley Project spans roughly 400 miles from the Cascade Mountains near Redding in the north to the Tehachapi Mountains near Bakersfield in the south. CVP facilities include reservoirs on the Trinity, Sacramento, American, Stanislaus and San Joaquin rivers. In particular, the CVP takes water from the Trinity River and stores it in Clair Engle Lake, Lewiston Lake, and Whiskeytown Reservoir. The water is then diverted through a system of tunnels and powerplants into the Sacramento River for the Central Valley. Additionally, water is stored in Shasta and Folsom lakes.

In total, the project consists of 20 dams and reservoirs, 11 power plants, and 500 miles of major canals, as well as conduits, tunnels and related facilities. System wide, the CVP manages approximately 9 million acre-feet of water, delivers roughly 7 million acre-feet of water annually to various CVP contracts, and generates 5.6 billion kilowatt hours of electricity annually. The CVP was initially designed to protect the Central Valley from substantial water shortages and floods. However, the CVP is operated today in ways that increase the Sacramento River's navigability, provides domestic and industrial water supplies, generates electric power, and helps regulate environmental conditions.

The State Water Project and Water Supply Contracts

The SWP is primarily designed to provide a consistent water supply to 29 public agencies that entered into water supply contracts with DWR. These contractors distribute SWP water to agricultural, residential, commercial, and industrial users. The long-term water supply contracts, which are set to expire in 2035, establish the maximum amount of SWP water a contractor may request annually (known as Table A amounts), although the contracts also provide for situations where surplus water may be available. In turn, SWP contractors contractually agreed to repay principal and interest on general obligation and revenue bonds used to pay for the SWP's initial construction and additional facilities, respectively. Contractors also pay for the maintenance and operation of SWP facilities.

The Central Valley Project and Water Supply Contracts

Similarly, the CVP provides water for agricultural,

municipal, and industrial users in California's Central Valley and urban centers like San Francisco pursuant to contracts akin to those for SWP water. CVP contracts also contain surplus water provisions. CVP reservoir operations are managed to produce maximum yields and deliveries to mainstream river channels and artificial canals. According to the Bureau, irrigation and municipal water is delivered from the main canals pursuant to long-term contracts with irrigation districts and other local agencies, which in turn deliver water to individual water users.

Increase in Water Deliveries

Water deliveries for SWP and CVP water will increase as a result of the allocation announcements from DWR and the Bureau. Prior to storm events in late February and March, both DWR and the Bureau had announced the availability of project water far below contract maximums. Thus, DWR and the Bureau adjusted those allocations according to substantially changed hydrological conditions. Notably, operations for both projects appear to be capable of managing and distributing the increased supplies to water contractors. Local agencies in and south of the Delta receive the additional water as it moves from the northern portion of the projects south through the allocation system.

In addition, the Bureau has announced that surplus water may be available to south-of-Delta contractors who enter into temporary water service contracts for surplus water. Section 215 of the Reclamation Reform Act of 1982 provides for surplus water, and defines such supplies as those which are unusually large and not storable for CVP purposes. The act also provides for how such non-storable water may be used. The availability of surplus water is ultimately contingent on hydrological conditions in the near future.

Conclusion and Implications

Following the significant increase in available supply, the SWP and CVP have demonstrated notable flexibility in handling and distributing water throughout their respective systems. Local agencies and, ultimately, individual water users can anticipate increased allocations pursuant to their respective contracts. It is unclear, however, whether the amounts of water stored in the SWP and CVP following the February and March storm events will lead to similar or otherwise higher allocation amounts in 2020.

DWR Increases State Water Project Allocation to 70 Percent (March 20, 2019), *available at:* https://www.acwa.com/news/dwr-increases-state-water-project-allocation-to-70-percent/;

Reclamation Updates 2019 Central Valley Project Water Allocations (March 15, 2019), *available at:* https://www.acwa.com/news/reclamation-updates-2019-central-valley-project-water-allocations/
(Steve Anderson, Miles Kreiger)

DEPARTMENT OF WATER RESOURCES BEGINS RELEASING WATER FROM OROVILLE DAM TO ACCOMMODATE SPRING RAIN AND SNOWMELT

In March, the California Department of Water Resources (DWR) announced that the main spillway at the Oroville Dam is operational and would begin releasing water. Releases began in early April following completion of the spillway's reconstruction, which was required due to flood damage in February 2017. The releases from Oroville Dam may signify increased water supply due to wet winter conditions and anticipated spring snowmelt.

Background

Lake Oroville is the State Water Project's (SWP) largest reservoir. The SWP supplies water to approximately 25 million people and 750,000 acres of California farmland. Oroville Dam was completed in 1968. Oroville Dam and Lake Oroville are located on the western slope of the Sierra Nevada, one mile downstream of major tributaries to the Feather River. Lake Oroville is designed to store winter and spring storm runoff and snow melt, which are released into the Feather River as part of the SWP's operations. The lake also provides storage capacity, salinity control, and flood protection. Oroville Dam is the tallest earth-fill dam in the United States, rising 770 feet.

In February 2017, Lake Oroville's flood control outlet spillway was significantly damaged during flood

control operations. According to DWR, January and February 2017 were some of the wettest months on record in Feather River history, in which the Feather River watershed received its entire annual runoff average of 4.4 million acre-feet in just 50 days. As releases eroded the main spillway, necessitating a reduction in releases, lake levels increased. For the first time in the Oroville Dam's history, lake levels reached 901 feet, sufficiently high to activate the dam's emergency spillway feature. In turn, releases from the emergency spillway caused hillside erosion that raised concerns about a spillway failure that could threaten downstream communities along the Feather River. According to some reports, the spillway's potential failure caused the evacuation of approximately 188,000 people.

According to a final report issued by an independent forensics team, the spillway's failure resulted from a complex interaction of physical, human, organizational, and industry factors. The report broadly classifies failures into two groups:

1) inherent vulnerabilities in the spillway designs, including as-constructed conditions and deterioration of the chute, and

2) poor spillway foundation conditions in certain locations.

Repairs and Releases

Starting in March of that year, DWR began repairing the spillway, with partial reconstruction set for November 1, 2017 (Phase I) and entire reconstruction completed over a two-year period. Phase I included repairing and replacing portions of the upper and end chute of the spillway. DWR met its November 2017 milestone for completing partial reconstruction of the spillway, which in turn allowed DWR to release up to 100,000 cubic feet per second (cfs) from Lake Oroville. For 2018, DWR attempted to minimize use of the spillway while it remained under construction. As of November 1, 2018, DWR had met its goal of completely reconstructing the main spillway. The new spillway is capable of releasing 270,000 cfs, which reflects its original design capacity.

Additionally, DWR generates an operations plan for each annual flood season, and has done so for the 2018-2019 flood season. For 2019, the plan requires DWR to maintain lower than average levels in Lake Oroville during the winter months. The purpose for doing so is to increase operational flexibility to provide for flood protection, meet water deliveries to SWP contractors, satisfy environmental restrictions, and avoid using the emergency spillway during the winter. The emergency spillway is also being repaired, and is slated to be complete by early 2019.

In early April, DWR began releasing water from Lake Oroville through the main spillway. Initially, releases totaled 8,300 cfs but have been increased to 10,800 cfs. DWR projected that up to 30,000 cfs would be released by the end of the first week of April. As of April 22, approximately 9,000 cfs was being released from Oroville Dam, while Lake Oroville was receiving between 15,000 and 20,000 cfs. DWR may increase flows between 40,000 and 60,000 cfs to prepare for anticipated inflows. Due to forecasted snowmelt and rising lake elevations into the spring, DWR will likely continue releasing water from the spillway to accommodate increased inflow from wet winter conditions.

Conclusion and Implications

DWR appears to have successfully reconstructed the main spillway at Oroville Dam. With a fully functional spillway, DWR can continue managing increased flows into Lake Oroville, which entails releasing water to the Feather River. This, in turn, means that the SWP, which has facilities along the Feather River, will likely see an increase in water supply. Whether DWR increases its releases above 60,000 cfs remains to be seen, but the newly reconstructed spillway should be capable of handling up to 270,000 cfs of releases in the future.

Update on Oroville Operations—April 3, 2019 (April 3, 2019), *available at* https://water.ca.gov/News/News-Releases/2019/April/Update-on-Oroville-Operations-April-3-2019;

Oroville Dam spillway to be used Tuesday. The state says it's ready (March 31, 2019), *available at* https://www.sacbee.com/news/state/california/water-and-drought/article228663924.html
(Steve Anderson)

STATE WATER RESOURCES CONTROL BOARD ADOPTS 'STATE WETLAND DEFINITION' AND 'PROCEDURES FOR DISCHARGERS OF DREDGE OR FILL MATERIAL'

Well known is that water is a natural resource of limited supply, leading to what history and current events illustrate to be epic "water wars." What is less known is when or how use of water is regulated by the State of California. A common-sense approach in California is to assume that some regulatory oversight likely exists. From the legal perspective, that approach has proven true illustrated by the recent adoption on April 2, 2019 by the State Water Resources Control Board (SWRCB) with defining "wetlands," which creates broad implications for public and private interests around the state.

Waters of the State

While the federal definition of "waters of the United States" has ebbed and flowed in recent years as the political pendulum swings on the federal landscape, and notwithstanding California's long-standing definition of "waters of the State" as codified in Water Code § 13050(e), the state has been focused for over one decade to address declining acreage of wetlands premised upon the ecosystem benefits that wetlands provide to enhancing water quality and environments for aquatic and riparian habitats.

The Water Code defines waters of the state to include any surface or groundwater, including saline waters. While that definition leaves some room for interpretation, what has been unclear is what is meant by "wetlands." Clarity to that term is important for at least two reasons: 1) to conform to public policy set forth by California Executive Order (W-59-93) dating back to Governor Pete Wilson calling for "no net loss" of wetlands; and 2) to understand what permitting is required under the federal Clean Water Act, namely section 404.

Defining What is a "Wetland"

By way of brief background, common examples of California wetlands include rivers, lakes and the ocean. Well-found scientific benefits of wetlands consist of flood control during storm events, provision of fish and wildlife habitat and public enjoyment for touring around wetlands.

The SWRCB's efforts to defining "wetlands" traces back to its 2008 Resolution in which the SWRCB set its Wetland Riparian Area Protection Policy. The SWRCB's rationale was: 1) to strengthen protection no longer covered by the federal Clean Water Act, coupled with approximately 95 percent of historical wetlands eliminated; 2) to create consistency amongst the state's nine Regional Water Quality Control Boards (RWQCBs); and 3) to clarify new procedures for certain discharges, namely dredged or fill material, to all water of the state, not just wetlands.

Resulting from the SWRCB's decade-long effort is the adoption on April 2 of the "State Wetland Definition" and "Procedures for Dischargers of Dredge or Fill Material," summarily called here "The Procedures."

In light of the new definition, "wetland" consists of: 1) an area with continuous saturation from groundwater or surface water; 2) conditions in which duration of saturation is sufficient to cause anaerobic conditions (or water quality problems); and 3) an area's vegetation is dominated by hydrophytes (aquatic plants). In contrast to the federal definition, California's new definition allows a wetland to exist even if vegetation is not supported, thus providing a broader scope for determining what is a "wetland."

Ultimately, stakeholders and practitioners servicing those with projects involving wetlands will need to determine if "waters of the state" are involved, and if so, is a "wetland" involved with the project. If so, then an application must be adequately completed pursuant to California Code of Regulations title 23, § 3856. Various tiers exist for projects depending on the size of the project, thus dictating the level of environmental impact analysis necessary as well as the extent of related mitigation measures, including potential compensatory mitigation measures.

Exemptions

Under limited circumstances a stakeholder might be eligible for an exemption to either The Procedures altogether or the extent of environmental analysis under The Procedures. As to the former, exemp-

tions exist under the federal Clean Water Act, § 404, subsection (f), which generally relate to farming practices and maintenance of drainage or irrigation ditches and stock ponds. Exemptions to some of The Procedure's environmental analysis requirements relate generally to project discharges that are already covered by a SWRCB or U.S. Army Corp of Engineers General Permit. The key qualification factor to an exemption from the environmental analysis is that the subject project activities cannot be new use of water that would result in a reduction of flow or circulation.

Conclusion and Implications

The SWRCB's April 2 adoption of The Procedures imposes broad implications for stakeholders, namely for land developers and stakeholders with dredging or fill operations. While providing a definition of "wetland" theoretically provides the scope of what is or is not subject to The Procedures, stakeholders should expect additional complications with permitting as often happens as regulations expand or merely evolve, either or both of which occurred here. For instance, might federal or state endangered species requirements be heightened by species now deemed to be in a "wetland," and thus entitled to additional mitigation measures to limit adverse impacts to the species. Another unknown variable currently is to what extent the SWRCB might seek to impose more mitigation requirements when issuing new permits under the new regulations. Only time will answer these questions, and the ultimate question of whether any of these regulatory requirements and subsequent efforts achieve the nearly 25-year old goal of achieving "no net loss" of wetlands.
(Wesley A. Miliband)

LEGISLATIVE DEVELOPMENTS

THE CALIFORNIA ENVIRONMENTAL, PUBLIC HEALTH, AND WORKERS DEFENSE ACT OF 2019—CALIFORNIA PUSHES BACK

In its latest effort to shield California from the Trump administration's rollbacks on major environmental protections, the California Senate introduced the California Environmental, Public Health, and Workers Defense Act of 2019, Senate Bill 1 (SB 1). The bill seeks to put in place, the environmental, public health, and labor standards set by the Obama administration in 2017 as the baseline standard in California. This means that if the standards in the federal Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), and Endangered Species Act (ESA), Fair Labor Standards Act, Occupational Safety and Health Act, and Coal Mine Health and Safety Act are weakened, the change will not affect standards set forth in their state counterparts. The bill also authorizes citizens to bring suits and enforce the bill's new standards.

Trump Administration Environmental Rollbacks and Background of Senate Bill 1

The Trump administration consistently attempts to roll back federal environmental protections such as those in CAA, CWA, and ESA.

In July 2018, the administration unveiled its proposal to roll back various provisions of the ESA. The proposal sought to change the application of ESA's protections and decide the protection offered to a threatened animal on a case-by-case basis rather than applying its blanket rule under § 4(d), which automatically conveys the same protections for threatened species as for endangered species.

Additionally, in November 2018, the administration implemented a policy that loosened the EPA's review process regarding the permit requirements for emitting air pollutants under the CAA. This effectively allows power plants and other industrial facilities to increase its total pollutant emission. Similarly, in December 2018, the administration announced that the U.S. Environmental Protection Agency (EPA) would change its definition of "waters of the United States," to narrow the definition and limit the various types of waterways that received federal protections under the CWA. The change effectively repeals the definition set forth by the Obama administration in 2015, which broadened the definition to include more types of waterways, streams, and tributaries.

In effort to combat regulatory changes such as these, SB 1 was reintroduced at the end of 2018, as a revised version of SB 49 (2017-18)—a bill authored by California Senators De Leon and Stern but died in the Assembly. Now sponsored by Senators Atkins, Portantino, Hueso, and Stern, and numerous environmental groups, SB 1 was passed and referred to the Committee on Natural Resources and Water on March 20, 2019. On April 10, 2019, the bill passed as amended and was re-referred to Committee on Judiciary.

Procedural Changes to Regional Environmental Boards and Authority

SB1 focuses on maintaining the federal environmental standards in effect as of January 19, 2017, under the CWA, CAA, SDWA, and ESA.

As applied to the CWA and SDWA, the bill would set federal standards in effect as of January 2017 as the baseline federal standards. The bill requires that the State Water Resources Control Board (SWRCB) regularly assess proposed and final changes to federal standards and then assess and publish a list of changes identifying whether the change made to the federal standard is more or less stringent than the baseline federal standards.

Next, if SWRCB's assessment shows that the federal standard is now less stringent than the prior federal baseline standard, SWRCB must consider whether it should adopt the prior federal standard as a measure to maintain California's current standard of environmental protection standard. The bill allows SWRCB to skirt the standard procedural review by the Office of Administrative Law by treating the regulation as emergency regulations. In doing so, SWRCB must publish a list of regulations and assessments under consideration for adoption at least 30 days prior to

any vote. Any emergency regulation adopted automatically sunsets on January 20, 2021.

SB 1 also allows the public to enforce any prior federal baseline standard adopted by SWRCB through citizen suits. To protect this right, the bill deems any amendment which restricts or limits a private citizen's right to enforce the CWA baseline as an amendment to the baseline, which triggers the entire review process.

The bill offers similar changes to the definition of "baseline" and to the procedural requirements to regional oversight under the state counterparts to the CAA and ESA.

Challenges Ahead

While the goal of SB 1 seems straightforward and practicable, its adoption will change the administrative and procedural structure of many state agencies. Pinning the federal baseline standard to that existing on January 19, 2017 would effectively require agencies to review over two years of environmental proposals, reports, opinions, and assessments, potentially negating many environmental determinations and opinions issued within the last two years. Additionally, the bill does not define what each federal baseline standard from January 2017 actually is, leaving much room for future litigation over each variation of the baseline standard used.

The bill also fails to provide any practical guidance on how the state agencies should restructure or delegate to achieve its added requirements which include new rule-making, enforcement, and reporting requirements. Specifically, the bill fails to address the increase of administrative fees and staffing changes necessary for each affected agency to comply with the new law.

Conclusion and Implications

Senate Bill 1's goal is to maintain California's environmental standards in the event the current or any future federal administration repeals or weakens federal standards. The bill may be direct on first glance but is actually rife with ambiguous language upon further review. If passed, SB 1's application will rely heavily on agency and judicial interpretation of the law. On its surface, the bill fails to include any practical guidance for agencies to achieve its lofty goals. Following, heavy litigation over the interpretation of "federal baseline standard," could foreseeably arise from SB 1, adding more confusion to California's challenging environmental legal landscape. Tracking and the full text of the bill is available at: https://trackbill.com/bill/california-senate-bill-1-california-environmental-public-health-and-workers-defense-act-of-2019/1609416/
(Rachel S. Cheong, David D. Boyer)

PROPOSED WATER TAX AND LEGISLATIVE FUNDING PROPOSALS FOR WATER PROJECTS COMPETE FOR SUPPORT IN UPHILL CLIMB FOR APPROVAL

California Governor Gavin Newsom is proposing to tax water users throughout California to help fund projects and programs to assist low-income communities where water quality and water supply issues are dire. Competing proposals urge utilizing existing funding sources rather than imposing a new and controversial water tax. Meanwhile, some Democratic California legislators are also pushing to lower the voting threshold to impose new local special taxes.

Background

With more than supermajority democratic control of both houses of the California Legislature in place, Governor Newsom wasted no time proposing a new and controversial tax on water. In January, Governor Newsom released a California budget proposal that included spending millions of dollars for a "Safe and Affordable Drinking Water Fund." That money would be used to help water systems, domestic wells and water users secure and maintain clean water supplies, primarily in small and disadvantaged communities.

The Water Tax

The details of Newsom's plan trickled out recently, revealing that water customers would be taxed from

95 cents to $10 a month in order to raise about $140 million annually. The amount of the tax would vary depending on factors such as the size of water meters and would include exceptions for certain disadvantaged communities. More than 3,000 local water suppliers throughout California would be made responsible for collecting the tax. Animal farmers, dairies and fertilizer producers and handlers would also pay sizeable fees for programs to remedy nitrate and other types of groundwater contamination.

Newsom describes the water quality and water supply conditions for many in low income communities through the state, "a moral disgrace and a medical emergency." According to Newsom, one million Californians live without clean water for drinking or bathing, and hundreds of water systems are out of compliance with primary drinking water quality standards due to contamination. Many struggling systems are located in the Central Valley and San Joaquin Valley.

Opposition

Similar legislative proposals were made and killed last year, including under threat of veto by then-Governor Jerry Brown. Newsom's water tax also faces stiff opposition, not only from taxpayer associations but also from Democratic legislators representing largely agricultural districts and from the vast majority of public water agencies. Last year's recall of a Democratic senator who voted to raise California's gas tax also has many legislators nervous. Despite Democratic supermajorities, the water tax may have difficulty reaching the required two-thirds threshold of votes necessary to impose or increase new taxes.

Those opposed to the water tax note that voters have approved no less than eight water bonds totaling more than $30 billion since 2000, and they cite concerns that little of that funding has been used to create new water storage or develop new sources of water supply. Water tax opponents assert that statewide funding efforts should focus on these statewide water supply needs rather than directing funds to select local areas. Association of California Water Agencies (ACWA) representatives have taken the position that taxing a resource that is essential to living does not make sense and is not necessary when alterative funding solutions exist and the state has a substantial budget surplus.

The California Legislative Analyst's Office, which is the Legislature's non-partisan fiscal and policy advisor, recommends that the Legislature consider several issues as it deliberates and evaluates Newsom's Safe and Affordable Drinking Water proposal, including: 1) its consistency with the state's existing human right to water policy, 2) uncertainty about the estimated revenues that would be generated and the amount of funding needed to address the problem, 3) a comparison of the beneficiaries of the program with those who would pay the new charges, 4) the limited nature of alternative fund sources for the proposed program, and 5) trade-offs associated with the proposal's safe harbor provisions.

Competing Proposals

Democratic State Senator Anna Caballero (D - 12th Senate District) has proposed a competing proposal that appears to be gaining traction. Rather than imposing a new tax, Senator Caballero would utilize money from California's multi-billion-dollar budget surplus to create a trust fund to pay for water system and water supply related improvements.

Similarly, earlier this year California Assemblyman Devon Mathis (R - 26th Assembly District) introduced the Clean Water for All Act, a California Constitutional amendment that would cause, beginning with the 2021–22 fiscal year, not less than 2 percent of California's General Fund revenues to be set apart for the payment of principal and interest on bonds authorized under the Water Quality, Supply, and Infrastructure Improvement Act of 2014, for water supply, delivery, and quality projects administered by the California Department of Water Resources, and water quality projects administered by the State Water Resources Control Board.

Local Tax Thresholds

As these statewide tax proposals move their way through the legislative process, so too does a proposed major Constitutional amendment to reduce the voter approval threshold to approve bonds and impose or raise *local* special taxes. California Assemblywoman Cecilia Aguiar-Curry (D - 4th Assembly District)'s proposed amendment, which could potentially be placed on the November 2020 ballot, would reduce that threshold from a two-thirds vote to a 55-percent majority.

According to Assemblywoman Aguiar-Curry:

> I have heard about deteriorating buildings, decrepit community facilities and our extreme lack of affordable housing. This will empower communities to take action at the local level to improve the economies, neighborhoods and residents' quality of life.

Taxpayer advocate David Wolfe, legislative director for the Howard Jarvis Taxpayers Association, however, says "If this passes it's going to be devastating for property owners," asserting that the new taxes and bonds that might be approved under the lowered thresholds would significantly increase costs of homeownership and burden taxpayers with long-term debt that lasts for decades.

Conclusion and Implications

Funding water projects and programs at practically any level in California is often difficult. While stakeholders across California largely share the view that such projects and programs are necessary to sustain life and economy in California, there is significant disagreement in how to fund them. As the proposed water tax and competing and related proposals work their way through the legislative process, stakeholders will surely demand to know how existing revenues and funding sources are—or could be—utilized to tackle these significant challenges before imposing new taxes, fees or charges on all or any Californians. (Derek Hoffman, Michael Duane Davis)

CALIFORNIA LEGISLATION PROPOSES CHANGES TO MANAGEMENT OF THE STATE'S MARINE AND COASTAL RESOURCES

In January of this year, California State Senator Scott Wiener introduced Senate Bill (SB) 69, the Ocean Resiliency Act of 2019, coauthored by Assembly Members Tasha Boerner Horvath and Marc Levine. SB 69 seeks to improve water quality through a multi-pronged approach, restore ocean habitats that sequester greenhouse gasses, protect biodiversity, and convene a statewide advisory group to inform policy making that may impact the ocean. The Act would amend California's Public Resources Code, Fish and Game Code, Water Code, and Health and Safety Code to achieve these ends.

Background

The Ocean Resiliency Act of 2019 (Act) is not California's first response to ocean health. Rather, it is part of a larger movement that started over a decade ago. In 2004, then Governor Arnold Schwarzenegger signed into law the California Ocean Protection Act, which allowed the formation of the California Ocean Protection Council (Council). The Council coordinated state agency actions that impacted ocean health. Later, in response to the alarming failures of Pacific Northwest oyster hatcheries the 2006 and 2009 due to ocean acidification, California spearheaded collaboration with Oregon, Washington, and British Columbia to establish a West Coast Ocean Acidification and Hypoxia Science Panel to synthesize knowledge and determine management strategies. More recently, SB 136 required the Ocean Protection Council, in consultation with the State Coastal Conservancy, to establish and administer an Ocean Acidification and Hypoxia Reduction Program. Last year, the Ocean Protection Council adopted the State of California Ocean Acidification Action Plan that addresses changes to the chemistry of the world's oceans that are occurring as a result of carbon dioxide emissions.

The current scientific understanding of the problems of increased ocean absorption of carbon dioxide, including more acidic water (ocean acidification or OA) and decreased oxygen in the water (hypoxia), is that the ocean is changing and will continue to change at an accelerated rate. This problem is compounded by the fact that surface water exposed to the atmosphere today will be upwelled three to five decades from now. The chemical changes in the ocean today may for many years result in biological, ecological, and economic repercussions, as seen in the oyster hatcheries in the Pacific Northwest. Strategies for combatting OA and hypoxia include mitigation

of greenhouse gas emissions, adaptation to climate change and sea level rise, as well as increased ocean stewardship and maintenance of marine water quality. The proposed Ocean Resiliency Act focuses especially on the maintenance and improvement of water quality by reducing the land-based sources of acidifying pollutants.

SB 69 Proposes Multipronged Approach

SB 69 proposes amendments to 8 provisions of the existing California codes, as well as the addition of 24 entirely new sections. These provisions address OA and hypoxia in a multitude of ways—from rehabilitation of coastal wetlands, to new regulations for timber harvesting; from more stringent ballast water quality requirements, to vessel speed reduction in the Santa Barbara Channel and the San Francisco Bay Area.

SB 69 proposes new requirements on rivers and dams in connection with improving water quality for the benefit of marine water quality as well as anadromous fish and stream-related wildlife. One example is that SB 69 would amend the Fish and Game Code to require the California Department of Fish and Wildlife (CDFW) to establish an Endangered Rivers List. Under existing law, CDFW already maintains a list of streams and watercourses that meet certain conditions, for which CDFW determines minimum flow levels required to maintain stream-related fish and wildlife. (Public Resources Code, § 10001; Water Code, § 1257.5.) SB 69 would rename this list the California Endangered Rivers List, and CDFW would publish the list annually on its website.

As the law exists today, CDFW must initiate studies to determine minimum flow requirements within three years of appropriation of funds for a given stream or watercourse. (Public Resources Code, § 10004.) SB 69 would instead require CDFW to develop a program to study at least three streams or water courses each year. The funds to conduct these studies would be generated by imposing an $850 filing fee on any user of water, including a person or entity holding riparian or appropriative rights, upon application to the State Water Resources Control Board (SWRCB) for any permit, transfer, extension, or change of point diversion, place of use, or purpose of use if the diversion of water is from a waterway in which fish reside. If CDFW fails to initiate studies for at least three Endangered Rivers in any fiscal year, it must return the filing fees to the SWRCB. But the SWRCB would not return the money to the water users. Instead the fees would be deposited into the Water Rights Fund, which the SWRCB could use upon appropriation by the California Legislature.

Conclusion and Implications

The Senate Committee on Natural Resources and Water held a hearing on SB 69 on April 9, 2019. Sponsors of the bill include fishing organizations and the California Coastkeeper Alliance. Opponents include members of the forestry industry, the California Association of Sanitation Agencies and the State Water Contractors. A hearing before the Committee on Environmental Quality is set for April 24, 2019. The text of the bill, along with legislative history, is available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB69
(Chelsie Liberty, Meredith Nikkel)

LAWSUITS FILED OR PENDING

UNITED STATES SUES STATE WATER RESOURCES CONTROL BOARD UNDER CEQA OVER BAY-DELTA PLAN UPDATE'S APPLICATION TO NEW MELONES RESERVOIR

On March 28, 2019, the United States filed two coordinated lawsuits against the State Water Resources Control Board (SWRCB) in both state and federal court challenging the board's environmental review of its Phase One Bay-Delta Plan Update under the California Environmental Quality Act (CEQA). Both complaints are substantially the same, with the United States filing its state court complaint to ensure it can satisfy the statute of limitations in the event that the federal court action is not adjudicated on the merits. And both complaints seek injunctive relief to prevent the SWRCB from implementing the amended Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta-Plan) until the SWRCB conducts further CEQA review.

Background

The New Melones Dam and Reservoir project (New Melones Project) is located on the Stanislaus River approximately 60 miles upstream of the confluence of the San Joaquin and Stanislaus rivers, and is owned and operated by the U.S. Bureau of Reclamation (Bureau) as a part of the Central Valley Project (CVP). *United States v. State Water Resources Control Board, et al.*, Case No. 2:19-cv-00547-LJO-EPG, ECF No. 1 (Federal Complaint) at ¶¶ 4, 6. The New Melones Project has a storage capacity of approximately 2.4 million acre-feet, and supplies water to several irrigation and water districts for municipal, industrial, and agricultural purposes. *Id.* at ¶ 8.

On December 12, 2018, the SWRCB adopted Resolution No. 2018-0059, which approved the SWRCB's proposed Phase 1 Update of the Bay-Delta Plan. *Id.* at ¶ 30. The Phase 1 Update imposed, among other things, a flow objective requiring the maintenance of 40 percent of the unimpaired flow of the Stanislaus River measured on a seven-day running average. *Id.* at ¶ 31. Further, adaptive management provisions of the Phase 1 Update permit the unimpaired flow requirement to be adjusted upward to 50 percent on a long-term basis. *Id.* at ¶ 32.

To evaluate the environmental impacts of the Phase 1 Update as required by CEQA, the SWRCB prepared (and ultimately approved) a Substitute Environmental Document (SED) analyzing multiple alternatives for the Phase 1 Update. *Id.* at ¶ 1. The Federal Complaint alleges that the SED's description of the alternative that was ultimately adopted as the Phase 1 Update by the SWRCB did not discuss any carryover storage requirements; however, the hydrologic modeling used for the SED's impacts analysis assumed the imposition of a "700,000 acre-feet end-of-September carryover storage target, maximum storage withdrawals, and that certain drought-refill criteria" would be met by the New Melones Project. *Id.* at ¶¶ 35-36. Other parts of the SED also contemplated the imposition of minimum reservoir carryover storage targets. *Id.* at ¶¶ 37-38.

The CEQA Claims

The Federal Complaint asserts three claims for relief against the SWRCB alleging violations of CEQA. The First Cause of Action alleges that the SED failed to provide an "accurate, stable and finite project description" because the Phase 1 Update's project description is inconsistent with its analysis of the impacts of the Phase 1 Update. *Id.* at ¶ 46. Specifically, the United States alleges that because the SED assumed that the Phase 1 Update would require a minimum end-of-September carryover storage target, maximum allowable withdrawals from storage over the irrigation season, and end-of-drought storage refill criteria, the SED's impacts analysis and project description are inconsistent and the project description thus violates CEQA. *Id.* at ¶ 47. The First Cause of Action also alleges that the project description's failure to disclose the carryover storage targets and reservoir controls it modeled were mitigation measures and not part of the Phase 1 Update itself. *Id.* at ¶ 50.

The Second Cause of Action avers that CEQA requires the impacts of a project to be disclosed without mitigation. *Id.* at ¶ 54. It further alleges that the SWRCB included carryover storage targets and other mitigation measures in its impacts analysis to "mask the true environmental impacts" of the Phase 1 Update's flow objectives. *Id.* at ¶ 55. Thus, the United States alleges that this improper conflation of the impacts of the Phase 1 Update and its mitigation measures violated CEQA. Accordingly, the Third Cause of Action alleges that the SED's impacts analysis failed to adequately evaluate the true environmental impacts of the Phase 1 Update on water temperatures, other water quality considerations, and water supplies for the Bureau's CVP contractors, in violation of CEQA. *Id.* at ¶¶ 60-67.

The United States state court complaint contains substantially the same allegations. *See generally*, *United States v. State Water Resources Control Board*, Verified Petition for Writ of Mandate Under the California Environmental Quality Act (Sacramento Superior Court, March 28, 2018). Pursuant to California Code of Civil Procedure §§ 1085 and 1094.5, however, its causes of action are styled as petitions for writ of mandate. *Id.* at ¶¶ 38-63. The federal court action was transferred from Judge Mendez of the Sacramento Division of the U.S. District Court for the Eastern District of California to Judge O'Neill of the Fresno Division of the Eastern District of California on April 18. *United States v. State Water Resources Control Board, et al.*, Case No. 2:19-cv-00547-LJO-EPG, ECF No. 5.

Conclusion and Implications

If the United States' CEQA claims are successful, the SWRCB's adoption of the Phase 1 Update will likely be invalidated, and the SWRCB will need to engage in another round of environmental review before it can be re-adopted. The SWRCB's deadline to file a responsive pleading in the federal court action is May 1, 2019. It is unclear whether or how the state court case will proceed pending resolution of its federal court action.

(Sam Bivins, Meredith Nikkel)

RECENT FEDERAL DECISIONS

SUPREME COURT ADDRESSES FEDERALLY RESERVED WATER RIGHTS, NATIONAL ALASKA LANDS ACT AND SCOPE OF THE PARK SERVICE'S AUTHORITY OVER ALASKA'S NATION RIVER

Sturgeon v. Frost, et al., ___U.S.___, 139 S. Ct. 1066 (U.S. Mar 26, 2019).

The U.S. Supreme Court has held that the National Park Service (Park Service) may not apply a regulation banning hovercraft use on navigable waters within national parks to the Nation River in Alaska's Yukon-Charley Preserve (Preserve). The Court's unanimous decision overturned a prior ruling of the Ninth Circuit Court of Appeals in favor of the Park Service, whereby the Ninth Circuit held that the reserved water rights doctrine permitted the Park Service to exercise regulatory authority over the state-owned Nation River in accordance with the Alaska National Interest Lands Conservation Act (ANILCA). *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017). The Supreme Court's decision addresses the extent of federal regulatory over national parks in the State of Alaska under ANILCA and the nature of interests retained by the federal government under the reserved water rights doctrine.

Factual and Statutory Background

The dispute before the Court arose when Park Service rangers in the Preserve informed John Sturgeon, a hunter traveling by hovercraft on a stretch of the Nation River leading to moose hunting grounds, that Park Service regulations prohibit the use of hovercraft on navigable waters located within the boundaries of national parkland (Regulation). 36 C.F.R. § 2.17(e). The rangers ordered Sturgeon to remove his hovercraft from the Preserve. Sturgeon complied with the order and subsequently filed an action for an injunction against the Park Service, claiming that the Regulation could not be enforced on the Nation River under § 103(c) of ANILCA. 16 U.S.C. 3103(c).

The Secretary of the Interior, through the Director of the Park Service, issued the Regulation pursuant to the National Park Service Organic Act, 39 Stat. 535 (Organic Act), which allows the Park Service to regulate both lands and waters within all national park system units in the United States, without regard to ownership. *See*, 54 U.S.C. §§ 100751, 100501, 100102. Specifically, the Organic Act allows the Park Service to issue rules thought "necessary and proper" for "System units," and that the Park Service may prescribe rules regarding activities on "water located within system units." 57 U.S.C. §§ 100751(a), 100751(b). While ordinarily the Regulation would fall within the broad regulatory authority granted by the Organic Act, ANILCA alters the Park Service's usual authority with respect to national parks in Alaska, such as the Preserve. As noted in the Court's decision, "if Sturgeon lived in any other state, his suit would not have a prayer of success." *Sturgeon*, 139 S. Ct. at 1081.

ANILCA set aside certain federal land in Alaska for conservation purposes, and divided such land into "conservation system units" that became part of the National Park System. 54 U.S.C. § 100102(6). Unlike most national park territory, ANILCA created conservation system units in Alaska with boundaries that follow natural features of the land rather than boundaries drawn to encompass only federal property. This approach resulted in the inclusion of an unusual amount of non-federally owned property within Alaskan national parks, referred to as "inholdings," which elicited concerns from the state and native Alaskans prior to ANILCA's enactment regarding the Park Service's regulatory powers over the inholdings. Partially in response to such concerns, ANILCA includes both a goal of protecting the national interest in public lands in Alaska as well as a goal of satisfying the economic and social needs of the people of Alaska. 16 U.S.C. § 3101(d).

In its discussion of § 103(c) of ANILCA, the language on which Sturgeon's claim relies, the Court's decision explains that the legislative history and stated purposes of ANILCA show that Congress intended to assure the state and native Alaskans that

their inholdings would not be treated the same as other federal property. *Sturgeon*, 139 S. Ct. at 1076. Section 103(c) of ANILCA provides that only "public lands" are deemed included as part of a "conservation system unit" over which normal Park Service regulatory authority extends, and that no lands conveyed to the state, a Native Corporation or any private party are subject to the regulations "applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Sturgeon argued that Nation River does not constitute "public lands" subject to federal regulation under § 103(c) of ANILCA; thus, the Park Service did not have the authority to enforce the Regulation on Nation River. *Sturgeon*, 139 S. Ct. at 1077.

Procedural History

Previous rulings by the U.S. District Court and Ninth Circuit have upheld the application of the Regulation to the portion of the Nation River within the Preserve. The Ninth Circuit determined that the Nation River qualified as "public land" under ANILCA due to the implied reservation of water rights retained by the federal government pursuant to the reserved water rights doctrine as interpreted by prior holdings of the Ninth Circuit by which that court was bound. *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017).

Following the lower court decisions in favor of the Park Service, the Supreme Court granted *certiorari* to examine whether: 1) the Nation River constitutes "public land" for purposes of ANILCA, and 2) if not, would the Park Service still have the authority to regulate Sturgeon's use of the hovercraft on the Nation River.

The Supreme Court's Decision

'Public Land' under ANILCA and Federal Reserved Water Rights

The Court determined that Nation River is not "public land" as defined under ANILCA. *Sturgeon*, 139 S. Ct. at 1079. As defined in ANILCA, "public lands" includes "lands, waters, and interests therein" to which the United States has title, except for certain lands selected for future transfer to the state or a Native Corporation. 16 U.S.C. § 3102(1)(2)(3). Accordingly, the Court reasoned that Nation River is non-public land because title cannot be held to running water, and the state owns the land beneath the Nation River as a result of the Submerged Lands Act, which vested title to the lands beneath navigable waters in the United States to the states in which such navigable waters are located. *Sturgeon*, 139 S. Ct. at 1078.

The Park Service argued that even if United States did not have title to the water flowing in Nation River or the land beneath it, but the United States has "title" to an "interest in the river under the reserved water rights doctrine," because ANILCA requires that waters within the land set aside by ANILCA be safeguarded from "depletion and diversion." *Id.* At 1079. The reserved water rights doctrine provides that:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappert v. United States*, 46 U.S. 128 (1976).

Dismissing the Park Service's contention, the Court explained that the reserved water rights doctrine merely permits the federal government to use (by withdrawing or maintaining) certain waters it does not own, and that such rights do not convey title. *Sturgeon*, 139 S. Ct. at 1079. Further, the Court explained that any federal right to Nation River under the reserved water rights doctrine would be limited, and if the right related to safeguarding against depletion or diversion as suggested by the Park Service, that purpose would not support the application of the Regulation to Nation River. *Id.*

ANILCA Exemption from Ordinary Park Service Authority

After concluding that Nation River constitutes non-public land for purposes of ANILCA, the Court further held that § 103(c) of ANILCA means that the Park Service does not have authority to enforce the Regulation on Nation River, because § 103(c) generally exempts non-public lands from the ordinary regulatory authority of the Park Service. *Id.* at 1081. The Court rejected the Park Service's assertion that language of § 103(c) stating that non-federally owned lands "shall be subject to the regulations applicable

solely to public lands within such units" should be interpreted to mean that non-public lands are exempt only from regulations specific to public lands, but not from rules that apply generally. *Id.* at 1082. The Court noted that if the Park Service's interpretation of this language were correct, it would mean that the sentence does "nothing but state the obvious." *Id.* at 1083. Further, the Court noted that the Park Service's construction would severely impair the core function of the third sentence of § 103(c), which provides that inholdings acquired by the federal government become part of a conservation unit at such time and may be administered as other federally-owned lands. *Id.*

ANILCA and Navigable Waters

The Court also rejected the Park Service's argument that the "overall statutory scheme" of ANILCA at least gave it the ability to regulate navigable waters, finding that navigable waters are similarly exempt from the ordinary regulatory authority of the Park Service pursuant to § 103(c) of ANILCA. *Id.* at 1086. The Park Service specifically cited statements regarding the protection of rivers in ANILCA's general statement of purposes and in sections regarding specific conservation units formed thereunder. *Id.* Nonetheless, the Court found no reason to treat navigable waters differently than other non-federally owned lands under ANILCA, especially since the definition of "land" set forth in ANILCA specifically includes "waters." *Id.* In its concluding discussion, the Court's decision emphasizes that ANILCA provides the Park Service with alternate methods for safeguarding rivers in Alaskan national parks, including the regulation of lands flanking the rivers or at the very least, purchasing the submerged lands under a river and regulating it as part of the federally-owned conservation unit pursuant to third sentence of § 103(c). *Id.*

Conclusion and Implications

Though the much of the Court's ruling applies only to the Park Service's regulatory authority over national park territory in Alaska, the Court's holding as to the nature of rights held by the United States under the reserved water rights doctrine is more broadly applicable. The Court's decision confirms that reserved water rights relate only to the use of water and do not represent an interest in which "title" can be held within the common understanding of the term. The Court's decision further establishes that the reserved water rights doctrine does not grant absolute authority over a particular waterway; rather, the government may take or maintain only the amount of water required for the purpose of the land reservation giving rise to reserved water rights.
(Andrew D. Foley, David D. Boyer)

DISTRICT COURT DENIES STATES' REQUEST FOR PRELIMINARY INJUNCTION IN CHALLENGE TO CLEAN WATER RULE

Ohio v. U.S. Environmental Protection Agency,
___F.Supp.3d___, Case No. 2:15-CV-2467 (S.D. Ohio Mar. 26, 2019).

The U.S. District Court for the Southern District of Ohio has held that the States of Ohio and Tennessee were not entitled to a preliminary injunction in their challenge to the U.S. Environmental Protection Agency's (EPA) 2015 'Waters of the United States' (WOTUS or the Clean Water Rule).

Factual and Procedural Background

EPA and the U.S. Army Corps of Engineers (Corps) adopted the Clean Water Rule on June 29, 2015, clarifying the waterbodies covered by the Clean Water Act's (CWA) definition of "waters of the United States." *See*, 33 U.S.C. §§ 1251 *et seq*. Ohio and Tennessee (Plaintiff States) sued to enjoin the Clean Water Rule and moved for a preliminary injunction in November 2015. Plaintiff States alleged that EPA's and the Corps' (Defendant Agencies) Clean Water Rule impermissibly extends the scope of the CWA in conflict with the language of the CWA and the Tenth Amendment to the U.S. Constitution, and that the

Defendant Agencies violated the Administrative Procedure Act in promulgating the Clean Water Rule.

Before the U.S. District Court considered Plaintiff States' initial motion for preliminary injunction, the Sixth Circuit Court of Appeals issued an order staying application of the Clean Water Rule nationwide in order to determine whether circuit courts have original jurisdiction to hear challenges to the Clean Water Rule. *In re E.P.A.* 803 F.3d 804 (6th Cir. 2015). The Sixth Circuit's stay was lifted following the U.S. Supreme Court's opinion in *National Association of Manufactures. v. U.S. Department of Defense, et al.*, 138 S. Ct. 617 (2018), in which the Court held that the District Courts have original jurisdiction to hear challenges to the Clean Water Rule.

Subsequently, Defendant Agencies issued a rule suspending application of the Clean Water Rule until February 2020 (Suspension Rule), in order for Defendant Agencies to officially repeal the Clean Water Rule and replace it with a new set of regulations defining the "waters of the United States" subject to the CWA. However, in August 2018, the U.S. District Court for the District of South Carolina enjoined the Suspension Rule in all states that had not previously obtained an injunction against application of the Clean Water Rule, making the Clean Water Rule effective in Ohio and Tennessee. Accordingly, Plaintiff States renewed their request for a preliminary injunction prohibiting application of the Clean Water Rule in their states.

The District Court's Decision

The court first granted an unopposed motion to file *amicus* brief brought by the District of Columbia, the Commonwealth of Massachusetts, and the states of New York, Washington, California, Maryland, New Jersey, Oregon, Rhode Island, and Vermont (Amici States). Plaintiff States argued that the court should grant a preliminary injunction because: 1) they are likely to succeed on the merits of their challenge; 2) they are currently suffering, and will continue to suffer, irreparable harm without an injunction; 3) a balancing of interests favors granting an injunction; and 4) granting an injunction would serve the public interest. Defendant Agencies opposed Plaintiff States' motion on the basis that Plaintiff States have not shown they will suffer irreparable harm and that Defendant Agencies are in the process of repealing the Clean Water Rule. Amici States argued that Plaintiff States had not demonstrated irreparable harm, were not likely to succeed on the merits of their challenge, and that the balance of harms weighs against granting the requested injunction.

The court agreed with Defendant Agencies and Amici States that Plaintiff States had failed to demonstrate they would suffer irreparable injury in the absence of an injunction. The court recognized Plaintiff States' concern that the Clean Water Rule is in effect due to the South Carolina district court's injunction against the Suspension Rule, but explained that Plaintiff States had not articulated "any particularized harm they will suffer while this matter remains pending." The court also agreed with Plaintiff States that their allegations regarding the Clean Water Rule's usurpation of state rights and violation of the constitution were serious; however, the court noted that Defendant Agencies had rescinded the challenged government action, and that Plaintiff States' claims that would suffer monetary losses was unpersuasive. Accordingly, because Plaintiff States did not carry their burden to show they would suffer imminent and irreparable injury without an injunction, the court denied the motion.

Conclusion and Implications

This case adds another layer to the complex web of challenges to the Clean Water Act, Clean Water Rule. Despite the controversy surrounding the South Carolina District's enjoining of the Suspension Rule, the court found that Plaintiff States' protestations are more or less 'much ado about nothing' considering that Defendant Agencies are in the process of repealing the Clean Water Rule.
(Dakotah Benjamin, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT REFUSES TO BROADEN *TOMLINSON* INTERPRETATION OF NOTICE REQUIREMENTS FOR PROJECTS THAT ARE CATEGORICALLY EXEMPT FROM CEQA

Turn Down The Lights v. City of Monterey, *Unpub.*, Case Nos. H044656 & H045556 (6th Dist. Feb. 28, 2019).

In *Turn Down The Lights v. City of Monterey*, an *unpublished* decision, defendant City of Monterey appealed the trial court's decision to grant plaintiff Turn Down the Lights' (plaintiff) petition for writ of mandate on the city's determination that its project to replace high-pressure sodium lightbulbs with low electric LED light fixtures in street lights was categorically exempt from environmental review under the California Environmental Quality Act (CEQA). The appeal presented the question of whether on this record plaintiff was required to exhaust administrative remedies in order to challenge the city's project approval in court. The appellate court reversed the trial court's judgment, holding that plaintiff failed to exhaust administrative remedies by not objecting to the project before the city council approved it.

Factual and Procedural Background

Project Approval and Implementation

The agenda for a November 2011 meeting of the Monterey City Council included the following item: "Award Street and Tunnel Lighting Replacement Project Contract ***CIP*** (Plans & Public Works - 405-04)." A three-page staff report for that agenda item described the project as involving:

> . . .removal of existing high-pressure-sodium street light and tunnel light fixtures, and installation of new LED street light fixtures and new induction tunnel fixtures.

A section in the staff report entitled "Environmental Determination" stated:

> The City's Planning, Engineering, and Environmental Compliance Division determined that this project is exempt from CEQA regulations under Article 19, Section 15302.

The item was opened for public comment, and no member of the public commented. The City Council approved the contract with Republic ITS, Inc. by resolution.

Notice of Exemption and Lawsuit

The city filed a Notice of Exemption, citing the categorical exemption in CEQA Guidelines § 15302 for:

> . . .replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced.

Plaintiff challenged the categorical exemption determination by petition for writ of mandate in the trial court.

The trial court granted plaintiff's *mandamus* petition via written decision after briefing and a hearing. The court concluded the project was not exempt under CEQA Guidelines § 15302, reasoning that "new LED bulbs and light fixtures are neither a structure nor a facility, by any reasonable definition of these terms." The trial court also excused plaintiff from the duty to exhaust administrative remedies, finding that "the exhaustion requirement does not apply because the city did not provide the 'notice required by law.'"

The Court of Appeal's Decision

Exhaustion of Administrative Remedies

Plaintiff contended that the duty to exhaust administrative remedies was never triggered. The court reasoned that as it was undisputed that plaintiff did

not object to the project before the city council approved the contract, the only question before it was a legal one: whether the reference to CEQA in the supporting three-page staff report without reference to CEQA on the city council agenda was adequate notice to trigger the duty to exhaust administrative remedies.

Public Resources Code § 21177(a) sets forth the general rule for exhaustion of administrative remedies under CEQA:

> An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.

Section 21177(e) provides an exception:

> This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law.

The *Tomlinson* Decision and Notice

The Court of Appeal relied on the Supreme Court case *Tomlinson v. County of Alameda*, 54 Cal.4th 281 (2012) (*Tomlinson*), which was the seminal case discussing § 21177 as it applied to categorical exemption determinations. Under *Tomlinson*:

> . . .the exhaustion-of-administrative-remedies requirement set forth in Section 21177(a) applied to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency *gave notice of the ground for its exemption determination*, and that determination was preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project.

Plaintiff argued that its duty to exhaust administrative remedies was never triggered because: CEQA was not referenced on the face of the city council agenda; the agenda "does not disclose that LED streetlights would be installed citywide including in the historic districts"; the staff report did not explain why the CEQA Guidelines section it referenced applied; and the collective effect of those deficiencies was that the hearing on the project did not qualify as an "opportunity for members of the public to raise those objections orally," citing § 21177(e).

The court rejected plaintiff's argument, explaining that it did not read *Tomlinson* as requiring that notice of a CEQA determination be given on the meeting agenda as opposed to in an accompanying staff report, nor did it interpret *Tomlinson* as mandating that any notice identify both an exemption and the reasoning for applying the exemption. The court explained that the agenda description here informed the public that the city was planning to "Award [a] Street and Tunnel Lighting Replacement Project Contract," which was sufficient to prompt residents concerned about the environmental effects of artificial lighting to investigate further by contacting city staff, reading the staff report, or attending the city council meeting. A member of the public accessing the staff report would have found its CEQA discussion with relative ease. The staff report was three pages long, and it unambiguously stated (under the section heading "Environmental Determination" in bold font and all caps) that the project was exempt from CEQA under Guidelines § 15302. Therefore, the court concluded on the facts of this case that notice of a claimed CEQA exemption was adequate under *Tomlinson* to trigger plaintiff's duty to exhaust administrative remedies.

Conclusion and Implications

In a postscript, the court explained that its opinion should not be interpreted as broadly concluding that CEQA need never be mentioned on a meeting agenda. Under a different set of facts, an agenda reference to CEQA might be necessary. But, the court pointed out, *Tomlinson* advised courts to employ a case-by-case approach to determine whether the exhaustion requirement was triggered. It would be a significant expansion of that decision to require a reference to CEQA on the face of the agenda whenever a CEQA exemption was considered. This is why the court concluded that the agenda description and staff report here, read together, provided adequate

notice of the nature of the project and the exemption determination, such that the city council meeting provided an "opportunity for members of the public to raise ... objections orally or in writing" before the project was approved.
(Giselle Roohparvar)

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