

CALIFORNIA WATER TM

L A W & P O L I C Y

Reporter

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FEATURE ARTICLE

U.S. SUPREME COURT TO WEIGH IN ON DECADES OLD DEBATE AS TO WHETHER DISCHARGES OF POLLUTANTS TO GROUNDWATER HYDROLOGICALLY CONNECTED TO SURFACE WATERS REQUIRE A CLEAN WATER ACT PERMIT

By Nicole E. Granquist and Meghan Quinn

For decades, the debate whether discharges of pollutants to groundwater that is hydrologically connected to federally jurisdictional surface waters requires a federal Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit has been raging in federal courts throughout California and the nation. To state that “splits” in authority have occurred would be an underwhelming description of the battles being waged on this topic in both the judicial and administrative arenas.

However, on February 19, 2019, the U.S. Supreme Court simultaneously served hope and struck fear within those in the trenches of the debate when it granted *certiorari* and agreed to hear the *Hawaii Wildlife Fund v. County of Maui* case emanating from the Ninth Circuit Court of Appeals, 881 F.3d 774; <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/01/15-17447.pdf>

The Supreme Court’s determination in the *County of Maui* case has the potential to definitively answer this long-standing thorny permitting question and provide regulatory certainty to a variety of water storage and supply, recycled water, agricultural, and land disposal projects here in California.

Background of NPDES Permitting Program

Per the Clean Water Act, in the absence of an NPDES permit, “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. §1311(a). The term “discharge of a pollutant” is defined as:

...any addition of any pollutant to *navigable waters* from any point source [or] any addition

of any pollutant to the waters of the *contiguous zone* or the *ocean* from any point source. . . . 33 U.S.C. §1362(12) (emphasis added).

“Navigable waters” is defined as “waters of the United States, including the territorial sea.” 33 U.S.C. §1362(7).

The term “waters of the United States” another oft-litigated area of CWA jurisprudence, is currently defined by regulation, and includes:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands;”
- (c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such water:

- (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
- or

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- (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition; and
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition. See 40 C.F.R. § 122.2; see also 33 C.F.R. §328.3(a)).

While groundwater has not been included in the definition of “waters of the United States” or amongst the waters to which the “discharge of a pollutant” is prohibited without an NPDES permit, in 2006, on the heels of the separate “significant nexus” test proffered in the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006); <https://www.supremecourt.gov/opinions/05pdf/04-1034.pdf> (to establish whether a surface water is a “waters of the U.S.”), the Ninth Circuit Court of Appeals utilized the theory to find for the first time in California that an NPDES permit was required for the discharge of a pollutant to groundwater which was hydrologically connected to the Russian River. See, *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 – 03 (9th Cir. 2006).

Statutory Language of the Clean Water Act and Congressional Legislative History

Though the facts of the *Northern California River Watch* case created a particularly susceptible environment for such a finding, some observed that the determination by the Ninth Circuit seemingly fell out of step with the plain language of the CWA and Congressional legislative history on the topic. Within the four corners of the CWA, Congress identified four different and distinct types of water bodies addressed by various provisions of the CWA: 1) navigable waters, 2) groundwater, 3) the contiguous zone, and 4) oceans. See, e.g., 33 U.S.C. §§ 1251(a), 1254(a), 1256(e), 1288(b), 1314(a), and 1314(e). However, when establishing the NPDES permit program, only “navigable waters,” the “contiguous zone,” and the “oceans” were included within the definition of “discharge of a pollutant,” and thereby require an NPDES permit to discharge to these waters. 33

U.S.C. §1362(12). Those advocating that the NPDES permit program is inapplicable to discharges of pollutants to hydrologically connected groundwater assert that the omission of “groundwater” from the definition of “discharge of a pollutant” or “waters of the United States” indicates that Congress did not conclude discharges to groundwater trigger the need for an NPDES permit. Those advocating for application of the NPDES permit program assert that any “discharge of any pollutant” (to waters of the United States) from “any point source” must secure an NPDES permit irrespective of whether the pollutant first migrates through groundwater. 33 U.S.C. §§ 1342(a), 1362(12).

Legislative history of the CWA was, and continues to be, a flash point for those who disagree with the outcome of the *Northern California River Watch* case, and other cases that have made similar conclusions. While the CWA was being drafted, attempts were made by various members of the House of Representatives and the Senate to expressly include groundwater within the NPDES permitting requirements of CWA § 402 (33 U.S.C. §1342); all failed. For example, the report accompanying the Senate’s version of the CWA stated:

Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from state to state, the Committee did not adopt this recommendation. S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3739 (emphasis added). Instead, the Senate Committee recognized the role of state pollution prevention programs to regulate discharges to groundwater. *Id.*

Additionally, in 1972, the House of Representatives specifically rejected an amendment that would have brought groundwater within the jurisdiction of the NPDES permitting requirements of the CWA. When the amendment was introduced, Representative Aspin stated:

Groundwater is that water which lies below the surface of the earth. It is in reservoirs and pools,

it is well water, it is drinking water. In other words, it is subsurface water.

The amendment does two things, two very simple things. First, the amendment brings groundwater into the subject of the bill, into the enforcement of the bill. Groundwater appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study groundwater. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then groundwater is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, groundwater gets into navigable waters, and to control only the navigable water and not the groundwater makes no sense at all. 118 Cong. Rec. 10666-10667, 1 Leg. Hist. 589 (1972). After considerable debate, the amendment was rejected. *Id.*

Splits in U.S. District Courts and Circuit Courts of Appeals

Prior to the *Northern California River Watch* case (and now the *County of Maui* case as discussed below), U.S. District Courts within the Ninth Circuit disagreed on whether discharges to groundwater that is hydrologically connected to a navigable surface water falls within the purview of the CWA. Some District Courts held that the CWA's jurisdiction extends to discharges into ground water that is hydrologically connected to surface waters, as the "discharge of a pollutant" to ground water from a "point source" ultimately reaches a navigable surface water. *See, e.g., Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 989-90 (E.D. Wash. 1994); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1196 (E.D. Cal. 1988). Other District Courts within the Ninth Circuit Court of Appeals held that even hydrologically connected ground water is not subject to the NPDES permitting requirements of the CWA. *See, Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312 (D. Or. 1997); *Woodward v. Goodwin*, 2000 U.S. Dist. LEXIS 7642, *43 (N.D. Cal. 2000). The District Courts that determined such discharges are not within the purview of the CWA found a strong indication in the legislative his-

tory, partially cited above, that Congress considered ground water to be entirely distinct from navigable waters for purposes of the NPDES permit program, notwithstanding some site-specific connectivity.

This same split of authority has occurred at the national level. For example, the Fourth Circuit Court of Appeals recently concluded in *Upstate Forever, et al. v. Kinder Morgan Energy Partners, L.P., et al.*, 887 F.3d 637 (4th Cir. 2018); <http://www.ca4.uscourts.gov/opinions/171640.P.pdf>, that the federal court possessed jurisdiction to preside over a third-party citizen suit alleging violation of the CWA for an underground gasoline pipeline spill that, via subsurface transit, allegedly entered two nearby tributaries of the Savannah River, Browns Creek, and Cupboard Creek, and their adjacent wetlands. *Id.* at 649. The Fourth Circuit held that an indirect discharge of a pollutant through ground water, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA. *Id.* at 647 – 48. Defendants in that case requested review by the U.S. Supreme Court, and the Solicitor General responded seeking a stay of any action pending resolution of the *County of Maui* case. *Id.* Other Circuit Courts of Appeals have disagreed, concluding that discharges to hydrologically connected groundwater are not subject to the permitting requirements of the CWA for the reasons noted above. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992); *Rice v. Harkin Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001); *Oconomowoc Lake v. Dayton Hudson Co.*, 24 F.3d 962, 965 (7th Cir. 1994); *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), *reh'g denied*, 913 F.3d 592 (6th Cir. 2019).

The Ninth Circuit Court of Appeals' Decision in *County of Maui* Case

The County of Maui (County) operates the Lahaina Wastewater Reclamation Facility (Facility). The Facility receives approximately 4 million gallons of municipal sewage each day. After treatment, the facility releases three to 5 million gallons of effluent into four on-site injection wells. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 742 (9th Cir. 2018). The discharge then travels into a shallow groundwater aquifer and ultimately to the Pacific Ocean through the seafloor at points known as "submarine

springs.” *Id.* The U.S. Environmental Protection Agency (EPA), the Hawaii Department of Health, and others conducted a tracer-dye study that confirmed this pathway for at least two of the injection wells. According to the study, it took the leading edge of the dye 84 days to go from the two wells to the Pacific Ocean. The parties did not dispute that the dye’s appearance in the ocean “conclusively demonstrated that a hydrogeologic connection exists.” *Id.* at 742 – 43.

Upholding the District Court’s decision, and in accord with an EPA *amicus* brief, the Ninth Circuit Court of Appeals concluded that the County’s four discrete wells were “point sources” from which the County discharged “pollutants” in the form of treated effluent into groundwater, through which the pollutants then entered a “navigable water,” the Pacific Ocean. The wells, therefore, were subject to NPDES permit regulation.

Focusing its analysis on supporting predecessor cases, while avoiding entirely the issue of the CWA’s legislative history, the panel held that the CWA does not require that the point source itself convey the pollutants directly into the navigable water, concurring with the “indirect discharge” theory espoused by the Second Circuit Court of Appeals in *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 113, 119 (2d Cir. 1994). Ultimately, the Ninth Circuit found the County liable under the CWA because: 1) it discharged pollutants from a point source, 2) the pollutants were fairly traceable from the point source to a navigable water such that the discharge was the functional equivalent of a discharge into the navigable water, and 3) the pollutant levels reaching navigable water were more than *de minimis*. The court also rejected the argument that because the County’s injections were disposals of pollutants into wells, they were exempt from the NPDES permitting program and, instead, only subject to state law requirements. *Id.* at 750 – 51.

Proposed ‘Interpretative Statement’ by EPA Contradicts Position Taken by the Agency

One of the most fascinating developments during the ongoing deliberation of the *County of Maui* case is EPA’s recently-issued “Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater”

(Interpretative Statement), which departs significantly in several respects from the *amicus curiae* brief the EPA submitted to the Ninth Circuit in May 2016 (Amicus Brief). 78 Fed. Reg. 16810 (February 20, 2018). In its Amicus Brief, EPA supported the position that an NPDES permit was required for the County of Maui’s discharges to groundwater due to the direct hydrological connection that exists between the groundwater to which the County of Maui discharges and the Pacific Ocean. *See*, Brief for the EPA as Amicus Curiae, pp. 11 - 12, *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018).

In the Interpretative Statement, EPA now concludes that:

...the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under [§] 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water. 78 Fed. Reg. 16810 at 16811.

Notably, the EPA states that the Interpretative Statement does not apply in the Ninth or Fourth Circuits, *i.e.*, those Circuits that have held that an NPDES permit is required for discharges to groundwater. Thus, the Interpretative Statement provides guidance to the rest of the nation until the U.S. Supreme Court determines the appropriate scope of the NPDES permit program.

The Interpretative Statement’s conclusion appears to be a significant deviation from the “longstanding position” EPA expressed in its Amicus Brief (“It has been EPA’s longstanding position that discharges moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a “direct hydrological connection” between the groundwater and the surface water.”). Brief for the EPA as Amicus Curiae, p. 12, *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018). However, as the Interpretative Statement points out, the opinion expressed in the Amicus Brief is anything but “longstanding.” Rather:

...there have in fact been a range of prior statements by the Agency, some of which align with th[e] Interpretive Statement, that the Agency has now considered in its analysis for the first time. 78 Fed. Reg. at 16820.

Regardless of the EPA's expressions of the steadfastness of its position on discharges to groundwater, the discrepancy between the positions in the Interpretative Statement and the Amicus Brief (along with a list of permitting actions described more fully in the Interpretative Statement) will likely be viewed by many practitioners as a significant deviation in EPA's interpretation of the NPDES program's scope.

In most instances, regulatory agencies are afforded deference in their interpretation of an ambiguous provision of law where Congress has delegated authority to administer the law to the agency. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 - 43 (1984). However, the deference afforded an agency is not limitless. Changes in regulatory interpretation require a more searching analysis. Consequently, while agencies have the latitude to alter their regulations and interpretations of the law as a result of an administration's policy changes, agencies must meet additional requirements in order to do so.

An agency can only significantly depart from a settled interpretation of a law or one of its regulations, where the agency provides a reasoned analysis of the departure. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). While the level of analysis required for a changed interpretation to survive judicial challenge is determined on a case-by-case basis (*Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)), something more than a conclusory statement about changing priorities is required. See, e.g., *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43- 44 (D.C. Cir. 2004).

In some instances, an explanation of how a new policy or interpretation would be a more proper interpretation of a statute is a sufficient rationale for a change in direction. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991). EPA seems to be striving to meet this specific criterion in the preamble to its Interpretative Statement.

The Interpretative Statement acknowledges that the EPA is departing from the interpretation of the NPDES permitting program expressed in its Amicus Brief. According to EPA, the position expressed in the Amicus Brief:

...improperly rel[ies] on the broad goals of the Act to justify applying the definition of 'discharge of a pollutant'- which exclusively addresses point source discharges to navigable, ocean, and contiguous zone waters—to releases of pollutants to groundwater. 78 Fed. Reg. at 16820.

To justify its changed interpretation, EPA indicates that:

...views about the general purpose of the Act should not override Congress's evident intent not to regulate discharges to groundwater of any kind. *Id.*

Protecting the validity of the Interpretative Statement under the Administrative Procedure Act, EPA indicates that:

...[w]hile [it] disagrees with the reasoning of the Ninth Circuit's decision in *County of Maui*, as well as the reasoning of the Fourth Circuit in its *Kinder Morgan* decision, for reasons discussed [in the Interpretative Statement], it will nonetheless apply the decisions of those courts in their respective circuits until further clarification from the Supreme Court. 78 Fed. Reg. at 16812.

This manner of proceeding may allow EPA to avoid a challenge to the Interpretative Statement while providing guidance outside the Fourth and Ninth Circuits until the U.S. Supreme Court's decision.

Conclusion and Implications

In California, the state has effectively implemented Congress' intent by adopting a robust regulatory program for discharges to waters of the state, which includes groundwater. See, California's Porter-Cologne Water Quality Control Act, Cal. Water Code § 13000, *et seq.* Projects that must secure permitting under state law include groundwater recharge, water storage and supply, recycled water, agricultural, and land disposal projects. Until now, these projects, which often involve direct or indirect discharges to groundwater, have been regulated pursuant to state law, via the issuance of state only, non-federal, Waste

Discharge Requirements and/or Water Reclamation Requirements.

If the *County of Maui* decision is upheld, the scope of the CWA's NPDES permitting program will greatly expand in California (and the nation), which might overwhelm EPA and state permitting agencies. While many water quality standards are shared between the CWA and the state's water quality program, the

CWA's focus on protecting the most sensitive aquatic species (that do not exist in groundwater) can result in CWA discharge standards being more stringent than state standards adopted to protect municipal drinking supplies. As such, some projects will certainly feel the effects of such a regulatory change. The shift to NPDES permits also introduces third party citizen enforcement, where none exists under California's state regulatory program.

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Opinions expressed in this article are those of Ms. Granquist and Ms. Quinn alone and do not represent the views of Downey Brand, LLP or any of its clients.

CALIFORNIA WATER NEWS

GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER FOR A STATE WATER POLICY REBOOT

On April 29, 2019, California Governor Gavin Newsom issued Executive Order N-10-19 (the Executive Order), calling for the preparation of a “water resilience portfolio” consisting of a suite of comprehensive strategies aimed at addressing the long-term challenges of water resource management in California.

Background

Governor Newsom’s Executive Order directs the California Natural Resources Agency, the California Department of Food and Agriculture and the California Environmental Protection Agency (Agencies) to collectively develop the portfolio by assessing the current water situation in California and recommending approaches that respond to projected future needs in the era of climate change. While the Executive Order appears to contemplate more of a review and refinement of existing water policy rather than a dramatic overhaul, the Executive Order signifies at least a partial departure from the Brown administration’s approach, directing the Agencies to reevaluate the priorities of the California Water Action Plan and, notably, downsizing the Bay Delta tunnel project to a one-tunnel design.

Broad Mandate to Assess Conditions and Find Solutions

To develop the water resilience portfolio, the Governor’s Executive Order instructs the Agencies to “inventory and assess” the current state of affairs in California by examining current water supply and demand as well as evaluating the quality of the state’s aquifers, rivers, lakes and beaches. Additionally, the Agencies are to consider future water needs for California residents, the state economy and environmental sustainability, consistent with the Executive Order’s emphasis on formulating comprehensive approaches to water policy that balance varying interests across the state. Further, the Agencies will conduct a thorough review of existing government

water policies, programs and investments, considering ways they can be built upon or otherwise improved. More specific directives to be pursued by the Agencies include an expansion of the state’s drinking water program and the completion of voluntary agreements for the Sacramento and San Joaquin river systems regarding flows and habitat.

Addressing Water Needs in the Age of Climate Change

In addition to prioritizing solutions to water challenges that work for a wide array of interests in the state, the Executive Order calls for strategies that can withstand the increasing turbulence of the climate change era, citing threats to water supply posed by recent intense shifts in weather patterns such as the reduction of mountain snowpack and heightened risks of extreme drought and flood conditions. To that end, the Executive Order tasks the Agencies with conducting an independent analysis of climate change in connection with its preparation of the water resilience portfolio. This analysis will also serve as the basis for updating the state’s projections of the impacts of climate change on California water supplies in the coming decades.

Downsized Bay Delta Tunnel Project

While the Executive Order gives few specific directives regarding a state water policy reset, the reduction of the Bay Delta tunnel project from a two-tunnel to a one-tunnel design is perhaps the most concrete shift in policy set forth in the Executive Order. Governor Newsom previously announced his intent to scale back the project in his February 2019 State of the State address.

The Bay Delta tunnel project, officially known as “WaterFix,” was spearheaded by former Governor Brown and contemplated the construction of two massive 35-mile long tunnels under the Sacramento-San Joaquin River Delta in an effort to address the inadequacies of the current pumping system and to

make additional water from the Delta available to southern California. Prior to the downsizing of the project, an estimated \$240 million had already been spent to develop the two-tunnel approach that was expected to cost approximately \$16 billion. Downsizing the project is expected to reduce the total cost to approximately \$11 billion, with local agencies largely shouldering the financial burden of the project. In response to the Executive Order, the California Department of Water Resources and other state and federal agencies have withdrawn permits and approvals relating to the two-tunnel design.

Guiding Principles for Water Resilience Portfolio

In addition to outlining areas of focus for the water resilience portfolio, the Executive Order sets forth a number of principles to which the portfolio should conform. The principles include the promotion of an integrative approach to water policy that prioritizes local and federal government and agency involvement in the process, as well as solutions that offer multiple benefits. Accordingly, the Agencies are called upon to actively strengthen partnerships with other government entities and agencies. This effort

is to include “extensive outreach” to both the aforementioned entities and also to a broader array of interested parties, such as sovereign tribes, environmental organizations, agricultural groups, business leaders and academic experts. The Executive Order further instructs the Agencies to seek solutions that encourage regional approaches to problem solving among users sharing watersheds, as well as the utilization of forests, floodplains and other natural infrastructure where possible.

Conclusion and Implications

Despite the notable downsizing of the Brown administration’s Bay Delta tunnel project, Governor Newsom’s Executive Order largely appears to be an effort to build upon the goals of the California Water Action Plan, with an emphasis on finding solutions that are more broadly responsive to the many varying interests across the state. Only time will tell whether the strategies recommended in the forthcoming water resilience portfolio will produce innovative policy solutions that have a meaningful impact on the significant challenges of managing California’s water resources.

(Andrew D. Foley, Wesley A. Miliband)

EARLY RELEASE OF AGGRESSIVE GROUNDWATER SUSTAINABILITY PLAN FOR CRITICALLY-OVERDRAFTED BORREGO BASIN SETS STAGE FOR SGMA IMPLEMENTATION

One of the very first Groundwater Sustainability Plans (GSPs) required under California’s landmark Sustainable Groundwater Management Act of 2014 (SGMA) has been released in draft and is on track for final adoption in the coming months. With an average annual natural recharge of approximately 5,700 acre-feet of water per year (AFY), recent annual total pumping of approximately 22,000 AFY and no existing source of imported water supply, achieving sustainability for the Borrego Valley Groundwater Basin (Basin) is projected to require the full 20-year SGMA timeframe through implementation of drastic and coordinated projects and management action—including reducing pumping by nearly 75 percent. As SGMA deadlines are fast approaching for critically overdrafted basins and followed quickly by all

other high- and medium-priority basins, Groundwater Sustainability Agencies (GSAs) throughout California are taking note of this and other emerging GSPs while working feverishly to develop their own.

Background

The Borrego Valley Groundwater Sustainability Agency (Borrego Valley GSA), comprising the Borrego Water District and the County of San Diego (County), is charged with the responsibility to sustainably manage the Borrego Valley Groundwater Sub-basin, which is a 98-square mile basin located northeastern unincorporated San Diego County and identified by the California Department of Water Resources (DWR) as Basin No. 7-24.01.

The Basin is deemed critically overdrafted by the

California Department of Water Resources, making the GSP due in January 2020—two years before all other non-critically overdrafted high- and medium-priority basins. In March, the Borrego Valley GSA released its nearly 900-page Draft GSP for the Borrego Basin (Borrego GSP), commencing a 60-day public review period requiring comments to be submitted by May 21st. The Borrego Valley GSA is considering those comments and intends to adopt a final GSP for submission to DWR ahead of the January 2020 deadline.

Basin Setting and Conditions

The Borrego GSP finds and utilizes an average annual natural recharge for the Basin of approximately 5,700 AFY. Recent annual total pumping is determined to be approximately 22,000 AFY. No existing source of imported water supply exists, and prior studies cited by the Borrego GSP consider developing imported water supplies to be technically and financially infeasible. The majority Basin recharge comes from streamflow exiting the surrounding mountains onto the desert alluvial fans that abut the mountain front. Land uses for the Basin plan area comprise primarily private land within the County's jurisdiction, which is surrounded on nearly all sides by the Anza-Borrego Desert State Park. The developed land uses in the Basin include residential, agricultural, recreational, and commercial. Agriculture and recreational uses (primarily golf courses) comprise the vast majority of current pumping in the Basin.

Sustainable Management Criteria

SGMA requires basins to be managed sustainably, which means avoiding statutorily defined undesirable results. The Borrego GSP establishes minimum thresholds and measurable objectives for applicable sustainability indicators determined to be a current or potential future undesirable result, including chronic lowering of groundwater levels, groundwater in storage and water quality. Land subsidence, depletions of interconnected surface water and seawater intrusion are deemed to be insignificant nor non-existent.

Chronic Lowering of Groundwater Levels

Over the past nearly 70 years, groundwater levels have declined by more than 125 feet (approximately 2 feet per year) in the northern part of the Basin,

about 87 feet (approximately 1.3 feet per year) in the central part of the basin, and have remained relatively constant in the southern part of the Basin where less pumping has occurred. The Borrego GSP establishes three management areas that correspond to those trend areas. The Borrego GSP's sustainability goal is to stabilize or improve groundwater levels and to ensure that groundwater is maintained at adequate levels for specific municipal groundwater production wells.

Groundwater in Storage

The Borrego GSP establishes the Basin's water budget, which accounts for and assesses historic, current and projected average annual volumes of groundwater and surface water inflows and outflows for the Basin. From 1945 to 2016, approximately 520,000 acre-feet of water is estimated to have been removed from Basin storage. The sustainability goal is to halt the overdraft condition in the Basin by bringing the groundwater demand in line with sustainable yield by 2040. This will be monitored by estimating the change of groundwater volume in storage every year, based on the observed changes in groundwater levels.

Water Quality

The Basin's sustainability goal with respect to water quality is continued compliance with California Code of Regulations drinking water standards for potable water sources, and that water quality for irrigation wells remains suitable for agricultural and recreational irrigation use.

Projects and Management Actions

The primary management feature of the Borrego GSP is imposing aggressive pumping reductions on all non-*de minimis* producers in order to achieve an approximately 74 percent overall reduction in pumping down to a level of 5,700 AFY or less by 2040. In order to achieve Basin sustainability, the Borrego GSA has identified six primary projects and management actions (PMAs):

- PMA No. 1 – Water Trading Program
The Borrego GSA's Water Trading Program would enable groundwater users to purchase and sell groundwater resources to sustain economic activities in the Basin, to incentivize water conserva-

tion and to facilitate adjustments in pumping allocations as water demands and Basin conditions evolve during the 20-year GSP implementation period.

- PMA No. 2 – Water Conservation Program

The Borrego GSA's Water Conservation Program would comprise distinct conservation frameworks for agricultural, municipal, and recreational uses, and is contingent upon securing future grant funding and low interest loans.

- PMA No. 3 – Pumping Reduction Program

The Borrego GSP would assign each non-*de minimis* groundwater user an allocation of groundwater generally based on its historical groundwater use from January 2010 to January 2015 (the five years prior to SGMA). That allocation would be reduced incrementally during the GSP implementation period until total Basin pumping is reduced to 5,700 AFY by 2040. All non-*de minimis* groundwater users would be required to meter production once the Borrego GSP is adopted.

- PMA No. 4 – Voluntary Fallowing of Agricultural Land

The Fallowing Program would establish a framework and process to convert high water use irrigated agricultural land to land uses requiring less water such as open space, public land, or other development. Importantly, participation in the Fallowing Program is voluntary, and would allow property owners to transfer and receive allocations in exchange for land fallowing.

- PMA No. 5 – Water Quality Optimization

The objective of the Water Quality Optimization Program outlined in the Borrego GSP is to identify and prioritize direct and indirect water treatment options in order to optimize use of high-quality groundwater quality and minimize the need for expensive water treatment required to meet drinking water standards.

- PMA No. 6 – Intra-Basin Water Transfers

The objective of the Borrego GSP's Intra-Basin Transfer Program is to reduce reductions in ground-

water storage and groundwater quality by providing for conveyance of water from higher to lower production areas in the Basin. This would include evaluating the feasibility and potential impacts of spreading production throughout the Basin, particularly away from high demand areas, and evaluating potential construction of potable and non-potable distribution pipelines.

Implementation and Monitoring

The Borrego GSA must adopt and submit its GSP to DWR by January 31, 2020. The Borrego GSP indicates that the California Environmental Quality Act (CEQA) review would begin upon GSP adoption would be completed prior to the implementation of many of the PMAs. The Borrego GSA will monitor Basin conditions and the impacts of PMAs as they are implemented, and submit both annual reports and detailed five-year GSP updates to DWR. As Basin conditions evolve, the Borrego GSP may require substantial changes including new or different PMAs in order to adaptively manage the Basin along the path to sustainability. The currently estimated cost of implementing the Borrego GSP is nearly \$20.5 million over the 20-year implementation period (which does not include implementation of all PMAs or all administrative costs and is, of course, subject to change as the Basin is adaptively managed). The Borrego GSA intends to fund Borrego GSP implementation by a combination of pumping fees, assessments, parcel taxes, and grants.

Conclusion and Implications

The Borrego GSP and other GSPs soon to be adopted mark a significant milestone in SGMA implementation. The Borrego Basin, like all basins, is unique; and, the project and management actions identified in the Borrego GSP are tailored to achieve sustainability in response to those unique conditions. Nonetheless, the Borrego GSP's proposed primary management approach requiring nearly 75 percent reductions is certain to grab the attention of water users and GSAs throughout California that responsible for establishing GSPs in critically-overdrafted basins as they too confront SGMA's deadlines and requirements.

(Derek Hoffman, Michael Duane Davis)

IMPERIAL IRRIGATION DISTRICT PROPOSES EASEMENT AGREEMENT RELATED TO SALTON SEA HABITAT RESTORATION

In May, the Imperial Irrigation District (IID) approved an easement for the state, acting through the Department of Water Resources, to access an approximately 3,770-acre area designated for replacement fish and bird habitat at the Salton Sea. With access secured, the state could begin work on the Salton Sea Species Conservation Habitat Project, which is a restoration project for fish and bird habitat at the Salton Sea. [Salton Sea wetland projects access agreement afoot, available at: https://www.desertsun.com/story/news/environment/2019/04/30/california-imperial-irrigation-district-iid-near-agreement-salton-sea-wetlands-projects/3619654002/?mc_cid=16dd00a5a3&mc_eid=fd4304699d]

Background

The Salton Sea (Sea) is California's largest lake, spanning nearly thirty-five miles in length and 15 miles at its widest. The Sea extends from the Imperial Valley into the Coachella Valley, and was formed in the Salton Trough in Imperial and Riverside counties. Most of the trough is below sea level and, historically, has been inundated with storm water and Colorado River water from the shifting Colorado River Delta. In 1905, an irrigation canal gate along the Colorado River failed, sending significant volumes of water into the Sea. Over the past century, however, agricultural activities in the Imperial Valley have been the primary source of inflows into the Sea. Consequently, increased agricultural conservation efforts and cropping practices have reduced inflow into the Sea, causing water levels to decline and salinity concentrations to increase. These phenomena have been exacerbated by recent water transfers from the Imperial Valley, leaving behind dust contaminated with various agricultural chemicals. Despite its salinity, the Sea supports an abundance of fish, which is a food source for migratory birds along the Pacific Flyway.

In May 2015, the governor formed the Salton Sea Task Force, which has directed various agencies to develop a comprehensive management plan for the Sea. The plan sets a short-term goal of developing 9,000 to 12,000 acres of habitat and dust suppression projects, and a medium-term goal of constructing 18,000 to 25,000 of similar projects. These goals were

formalized in a ten-year Memorandum of Understanding (MOU) between the United States Department of Interior and the California Natural Resources Agency, which the parties entered into in 2016. The MOU will be implemented through the Salton Sea Management Program pursuant to a 2017 Phase I ten-year plan.

The ten-year plan contains the Species Conservation Habitat Project (SCH Project), which encompasses approximately 3,770 acres of exposed seabed and includes part of the New River, a tributary to the Salton Sea. The project is designed to prevent further degradation of air quality and habitat and will form the cornerstone of the Salton Sea Management Program, which focuses on constructing wetlands and other projects to reduce exposed seabed and health hazards posed by airborne dust over 50,000 acres around the Sea. The California Natural Resources Agency is currently seeking responses to a Request for Qualifications, from which a shortlist of bidders will be identified to participate in the agency's Request for Proposals for a design-build contract for the SCH Project.

The Easement Agreement

The IID owns property on the southern side of the Sea that the state has determined is necessary to access in order to develop the SCH Project. In particular, the Natural Resources Agency requires an easement for the SCH Project site before it can issue requests for proposals for the design-build contract. Additionally, the Department of Water Resources (DWR) desires an easement for all aspects of the SCH Project, including planning, design, construction, implementation, operation, restoration, and management of the SCH Project. Accordingly, on May 7, 2019, IID approved an easement agreement (Agreement) with the state, which acts through DWR. Under the Agreement, the easement would be permanent and continue in perpetuity, except that DWR may relinquish the easement at any time following permit amendments or issuances relating to any portion of the SCH Project on the IID's property subject to the Agreement. Accordingly, the Agreement contemplates flexibility in DWR's development

of the SCH Project while providing the state consistent access over the property on an as-needed basis.

The Agreement also contemplates IID having a meaningful role in SCH Project developments as they may affect IID property, facilities, or other interests. Generally, the Agreement contemplates that IID will be provided meaningful opportunities to participate in review and consultation during the design-build process. This includes opportunities to comment on SCH performance criteria for features that could impact IID improvements, adjacent land, and other facilities. IID will also have opportunities to review proposals prior to their selection and discuss any final selections with DWR and any other applicable state agency.

Importantly, IID reserved all water rights appurtenant to and associated with the easement property. The Agreement expressly provides that “no water rights or interests of any kind or nature whatsoever are conveyed, granted, licensed, assigned or otherwise transferred to DWR” by operation of the Agreement.

Moreover, DWR does not gain any right to water service or delivery of Colorado River water under the Agreement. Thus, any water DWR or other state agencies use related to the SCH Project will not be under rights granted by the Agreement.

Conclusion and Implications

If the state enters into IID’s proposed easement agreement, it will have ready access to the SCH Project site for all stages of its development and operation. Additionally, the Natural Resources Agency may begin seeking requests for proposals to design-build the SCH Project. Thus, IID’s proposed easement agreement provides an important first step to the development of the SCH Project and, ultimately, to effectuating long-term plans pertaining to the Salton Sea. It is unclear how any stage of the SCH Project may implicate IID’s interests, but the current draft of the Agreement likely gives IID meaningful opportunities to ensure its interests are preserved.
(Steve Anderson, Miles Krieger)

REGULATORY DEVELOPMENTS

EPA ISSUES INTERPRETIVE STATEMENT ON APPLICATION OF THE CLEAN WATER ACT TO POINT SOURCE DISCHARGES TO GROUNDWATER

The U.S. Environmental Protection Agency (EPA) issued a statement (Statement) interpreting the application of the federal Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permit requirements to point sources that discharge through hydrologically connected groundwater. The Statement repudiates the "direct hydrologic connection" theory EPA advanced fewer than three years earlier in the Ninth Circuit in *County of Maui v. Hawaii Wildlife Fund et al.*, 886 F.3d 737 (9th Cir. 2018), petition granted Case No. 18-260 (Feb. 19, 2019) (*Maui*). [84 Fed. Reg. 16,810 (Apr. 23, 2019).]

Background

Relevant to EPA's Interpretive Statement, § 301 of the CWA prohibits the discharge of any pollutant by any person except pursuant to an NPDES permit. "Discharge of a pollutant" means:

(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft . . . [and] . . . navigable waters. . . [as] . . . the waters of the United States, including the territorial seas. *Id.* § 1362(7), (12).

Historically, NPDES permit programs have not applied to most discharges to groundwater. In *Maui*, however, the Ninth Circuit determined the County of Maui was required to obtain an NPDES permit for injection wells that discharged to groundwater where the groundwater had a direct hydrologic connection to the Pacific Ocean and the pollutants were "fairly traceable" from the wells to the ocean "such that the discharge [was] the functional equivalent of a discharge into the navigable water." In its *amicus* brief in *Maui*, EPA urged the Ninth Circuit to reach this ruling, reiterating its "longstanding position" that a

discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements.

In February 2018, only 20 days after the Ninth Circuit issued its opinion in *Maui*, EPA solicited comments on whether it should consider clarifying or revising its position on the direct hydrologic connection theory of liability. Later in 2018, the Fourth Circuit Court of Appeals issued a decision aligned with *Maui*, and the Sixth Circuit issued two decisions rejecting the Fourth and Ninth circuits' analysis.

On February 19, 2019, the U.S. Supreme Court granted the County's petition for *certiorari* in *Maui* on the question of:

. . . [w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

EPA's Interpretive Statement

On April 23, 2019, the EPA released its Interpretive Statement concluding that the CWA does not regulate the discharge of pollutants to groundwater. In explaining this conclusion, EPA reviewed the CWA's structure, text, legislative history, case law, and public policy, finding that each supports its interpretation.

On structure, EPA noted that:

. . . [t]he CWA approaches restoration and protection of the Nation's waters as a partnership between states and the federal government, assigning certain functions to each in striking the balance of the statute's overall regulatory scheme.

Specifically, the CWA governs discharges from a point source, defined as "any discernible, confined and discrete conveyance," while Congress reserved

the regulation of nonpoint source pollution exclusively to the states.

‘Holistic Approach’ in Reading Section 301

As to text, EPA explained that a “holistic approach” is necessary, and § 301’s broad prohibition against the discharge of pollutants to jurisdictional waters must be read in the context of the specific provisions dealing with groundwater. The CWA generally describes four categories of waters: navigable waters, waters of the contiguous zone, the ocean, and groundwater, and that the CWA’s operative NPDES regulatory provisions only apply to the first three. In contrast, the CWA’s provisions related to groundwater pertain to EPA providing information, guidance, and funding to states in order to enable states to regulate groundwater pollution. EPA also relied on the fact that Congress left groundwater out of the definition of “effluent limitations,” and the important role effluent limitations occupy in NPDES permit programs.

In discussing the CWA’s legislative history, EPA focused on the numerous instances in which Congressmen and Senators acknowledged the hydrological connection between surface water and groundwater, but nonetheless rejected amendments that would have explicitly brought discharges to groundwater under the NPDES program.

Regarding relevant case law, EPA acknowledged the view expressed in the Interpretive Statement is difficult, if not impossible, to reconcile with its previous positions. Addressing its earlier support for the direct hydrologic connection theory in *Maui*, EPA explained that its *amicus* brief failed to take into account Congress’ unique treatment of groundwater in the CWA when interpreting the definition of discharge of a pollutant and improperly equated releases of pollutants to groundwater with releases of pollutants from a point source to surface water that occur above ground. EPA further reasoned that the CWA and its legislative history indicate Congress intended all discharges to groundwater to be left to state regu-

lation and control, regardless of any future contribution of pollutants to jurisdictional surface waters.

EPA also relied on cases from the Fifth and Seventh circuits that, in its view, took the necessary “holistic” approach in interpreting the statute and legislative history to hold that the CWA’s coverage does not include groundwater pollution.

A ‘Mosaic of Laws and Regulations’

Finally, responding to comments and criticism that its interpretation creates a massive enforcement loophole that could eviscerate the CWA’s explicit purpose to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” EPA explained that its position “does not preclude states from regulating these releases under state law,” and that other federal environmental protection laws govern discharges to groundwater omitted from the CWA, including the Safe Drinking Water Act, Resource and Conservation Recovery Act, Comprehensive Environmental Response, Compensation, and Liability Act. Thus, EPA concluded these statutes and state programs:

form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters.

Conclusion and Implications

EPA’s course reversal reflected in the Interpretive Statement comes as the U.S. Supreme Court considers a Circuit split on the issue of point source discharges through groundwater. It remains to be seen whether the Supreme Court adopts one of the EPA’s positions. For more information, see, <https://www.govinfo.gov/content/pkg/FR-2019-04-23/pdf/2019-08063.pdf>

(Dakotah Benjamin, Rebecca Andrews)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES PHASE 2 DRAFT BASIN PRIORITIZATION

In April, the California Department of Water Resources (DWR) released its second phase of groundwater basin prioritizations. The new prioritizations implicate the applicability of the Sustainable Groundwater Management Act (SGMA) to local agencies within certain priority basins, including the need to develop groundwater sustainability plans or alternative plans to sustainably manage groundwater within certain groundwater basins in the state. The Department of Water Resources has provided a 30-day public comment period for interested parties to submit comments on the second phase of basin prioritizations. [See: DWR Announces Draft Basin Prioritization under SGMA for 57 Modified Basins, available at <https://water.ca.gov/News/News-Releases/2019/April/DWR-Announces-Draft-Basin-Prioritization-under-SGMA-for-57-Modified-Basins>]

Background

The California Sustainable Groundwater Management Act, which went into effect in January 2015, requires that the Department of Water Resources (DWR) prioritize all groundwater basins by Jan. 31, 2015, and every time Bulletin 118 basin boundaries are updated or modified. Basins are prioritized as either high-, medium-, low-, or very low-priority, based on the components listed in the California Water Code § 10933(b).

A basin's priority informs which provisions of SGMA and the California Statewide Groundwater Elevation Monitoring (CASGEM) apply to that particular basin. CASGEM is a groundwater monitoring tool developed in 2009 to track seasonal and long-term groundwater elevation trends statewide. When SGMA went into effect in 2015, DWR used the 2014 CASGEM Basin Prioritization as the initial SGMA basin prioritization. Shortly after the passage of SGMA, 54 requests for groundwater basin boundary modification were submitted to the DWR. In 2016, DWR completed and released groundwater basin boundary modifications (Bulletin 118 – Interim Update 2016), and in 2018, DWR released the draft basin prioritization results for all 515 California groundwater basins (2018 Draft Boundary Modifications).

Phase 1 and Phase 2 Basin Prioritization Process

After the DWR released the Bulletin 118 – Interim Update 2016, several other requests for groundwater basin boundary modification were submitted for DWR review, which prompted DWR to initiate a two-phase basin prioritization process to reassess the priority of groundwater basins in accordance with SGMA requirements.

DWR finalized and released the “SGMA 2019 Basin Prioritization Phase 1” in January 2019. The SGMA 2019 Basin Prioritization Phase 1 focused on the 458 basins that were not affected by the 2018 Draft Boundary Modifications. Under the SGMA 2019 Basin Prioritization Phase 1, 25 basins were assigned as high priority, 31 as medium priority, nine as low priority and 393 basins as very low priority.

The final version of the 2018 Draft Boundary Modifications was released in February 2019 (2018 Final Boundary Modifications), affecting 57 basins, including 53 that were previously modified and approved, as well as two that were not approved by DWR as part of the 2018 Draft Boundary Modifications.

In April 2019, DWR released a draft version of the second basin prioritization phase (SGMA 2019 Basin Prioritization Phase 2). This draft covers the remaining 57 basins, which includes the subdivision of the San Luis Rey Valley Groundwater Basin into an upper and lower sub-basin when Assembly Bill 1944 was approved by then Governor Jerry Brown in September 2018. Under the draft SGMA 2019 Basin Prioritization Phase 2, 22 basins were designated as high priority, 16 as medium, two as low priority and 17 basins as very low priority. According to DWR, the priority designation for 75 percent of the basins prioritized in SGMA 2019 Basin Prioritization Phase 2 remains the same as the 2015 designation.

The prioritization affects which SGMA requirements apply to a basin, including the deadline by which a Groundwater Sustainability Plan (GSP) must be submitted to the DWR. Under SGMA, previously identified critically overdrafted high and medium priority basins in Bulletin 118 – Interim Update 2016 are required to submit a GSP by January 31, 2020. The remaining high and medium priority basins are

required to submit a GSP by January 31, 2022. In light of SGMA 2019 Basin Prioritization Phase 2, 38 basins are required to develop GSPs, while 12 will not.

Following release of the prioritizations, DWR opened a 30-day comment period ending May 30 to receive input from the public, and held a public meeting on May 13 for that same purpose. The basin prioritization results under this second phase are expected to be finalized in early summer 2019.

Groundwater basins that were previously categorized as low- or very-low priority and that are *newly* identified as high or medium priority are required to form a Groundwater Sustainability Agency (or submit an alternative to GSP) within two years from the date the SGMA 2019 Basin Prioritization Phase 2

prioritization is finalized, and are required to submit a GSP five years from that date. GSPs are optional for basins prioritized as low or very low priority.

Conclusion and Implications

Because basin prioritizations affect the applicability of SGMA to any given basin, DWR's newly released prioritizations could have a significant impact on basins that are designated as high or medium priority. It is unclear whether the public comment period ending May 30 will affect basin prioritizations, but it is likely that interested parties for high or medium priority basins will submit commentary. Once basin prioritizations are finalized, local agencies will begin developing applicable GSPs or alternative plans to ensure compliance with SGMA within the coming years. (Maya Mouawad, Steve Anderson)

CALIFORNIA STATE WATER BOARD RELEASES NEW INFORMATION AND RESOURCES TO ASSIST WITH SGMA IMPLEMENTATION

With the deadlines getting closer for Groundwater Sustainability Agencies (GSA) in critically overdrafted basins to complete the development of their Groundwater Sustainability Plans (GSP), and the GSAs in other high and medium-priority basins to obtain the data necessary to develop their GSPs, the California State Water Resources Control Board (SWRCB) has released new information and provided additional resources to assist GSAs to complete those tasks both timely and successfully.

Background

The Sustainable Groundwater Management Act of 2014 (SGMA) established January 31, 2020 as the deadline for the development of GSPs for critically overdrafted basins and January 31, 2022 as the deadline for the development of GSPs in all other high- and medium-priority basins. Though not initially perceived by many as urgent, those deadlines are just around the corner for critically overdrafted basins. To assist GSAs with the development of their GSPs, the SWRCB recently developed and released a series of fact sheets and related resources to help them with:

- GSA operations;

- Obtaining the required facts and data, and achieving successful plan development;
- Obtaining SWRCB, Department of Water Resources (DWR) and other governmental financial, technical and operational assistance;
- Obtaining SWRCB and DWR grants and other financial resources for GSP development and implementation;
- Better understanding the underground storage of water; and
- Avoiding SWRCB intervention and dealing with intervention if imposed.

Information on GSA Operations

Since many of the GSAs are newly created entities, the State Water Resources Control Board's SGMA fact sheet entitled "Stakeholder Inclusion" [https://www.waterboards.ca.gov/water_issues/programs/gmp/docs/sgma/sgma_stakeholder_inclusion.pdf] provides guidance and information on the operation of a GSA, from compliance with the Ralph M.

Brown Act [Gov. Code § 54950 *et seq.*] <https://www.cacities.org/Resources/Open-Government> and the Dymally-Alatorre Bilingual Service Act (Gov. Code, § 7290 *et seq.*), to the need for stakeholder inclusivity.

In fact, outreach is viewed as a cornerstone of the process [<https://water.ca.gov/Programs/Groundwater-Management/Assistance-and-Engagement>]. In the words of the SWRCB:

SGMA requires consideration of the interests of diverse, social, cultural, and economic elements of the populations within the basin during plan development. Collaborative and inclusive processes can make plans more resilient by increasing buy-in and trust, improving compliance, and enhancing the quality of information on which plans are based. It is important that GSAs send appropriate notices; hold meetings in times, places, and manners that support effective engagement; and acknowledge issues raised. GSAs should consult with individuals or groups when actions may impose direct or indirect costs on those entities. Good governance can build trust and reduce legal risk.

A list of required and suggested actions is supplemented by further guidance at: <https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management/Best-Management-Practices-and-Guidance-Documents>.

Obtaining the Required Facts and Achieving Successful Plan Development

Since GSPs basin boundaries are based on Bulletin 118, GSAs are directed to the DWR Bulletin 118 portal at <https://water.ca.gov/Programs/Groundwater-Management/Bulletin-118> and DWR's groundwater basin data sets at <https://data.cnra.ca.gov/dataset/ca-bulletin-118-groundwater-basins>. Water quality data is available at: https://www.waterboards.ca.gov/resources/data_databases/groundwater.html; and water rights data is available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/. Finally, in light of their knowledge about local groundwater conditions, trends, uses and needs, GSAs are advised to contact and engage local public water suppliers; and, through outreach, GSAs should obtain additional data and information directly from holders of overlying water rights, including agricul-

tural users, domestic well owners, surface water users and other local groundwater producers; land use planning agencies; small and disadvantaged communities; environmental users; federal agencies; and Native American Tribes.

Information on Obtaining SWRCB and Department of Water Resources Assistance

The SWRCB is clear in its objective that the state's "GSAs [] be successful in their implementation of [SGMA]." The SWRCB has made its staff available to GSAs to assist them through the GSP development and implementation process [SGMA@waterboards.ca.gov], and set up a SGMA program website at: <http://www.waterboards.ca.gov/gmp>. The SWRCB and DWR staff will attend meetings and information gathering and disseminating events to aid in the GSP development and implementation processes. Additional SGMA information is also available from DWR at: www.water.ca.gov/SGMA and <https://water.ca.gov/Programs/Groundwater-Management/Assistance-and-Engagement>.

Development and Implementation

Sustainability under SGMA is achieved by managing and using groundwater resources without causing "undesirable results." SGMA is not just about reducing production levels. It is also about planning for and implementing other measures that collectively allow a basin to function at a level of "sustainable yield." Among the numerous potential measures that collectively can achieve sustainability are groundwater contamination cleanup, importation of supplemental water supplies, groundwater recharge, increased use of reclaimed water, implementation of water conservation measures, stormwater capture and recharge, use of "in-lieu" sources, and improvements to water production, transmission and storage facilities.

Over \$1 billion is still available from the SWRCB and DWR for the planning, implementation and construction of SGMA direct and related projects. Nearly \$200M million in grants and loans is available from the SWRCB for water recycling programs, \$78 million for small community wastewater treatment projects, \$215 million for public water system infrastructure improvements, \$624 million for contamination cleanup, and \$95 million for stormwater capture and recharge. Nearly \$150 million in grants and loans is available from DWR for GSP development and

implementation, \$250 thousand (with \$2 million more available in mid-2019) for stakeholder communications during GSP development, \$194 million for project that are included and implemented in an adopted integrated regional water management plan, and \$100 million for water desalination projects and other measures to develop potable water for municipal uses.

Application process and timeline guidance, and project examples are available at: https://www.waterboards.ca.gov/water_issues/programs/grants_loans/ and <https://water.ca.gov/Work-With-Us/Grants-And-Loans>.

GSAs that take advantage of the funding sources can dramatically improve their chances of achieving balanced and successful groundwater basin sustainability.

Information on Groundwater

Groundwater recharge is the augmentation of groundwater, by natural or artificial means, with surface water or recycled water. Groundwater recharge is not a beneficial use of water on its own. Rather it is the diversion and storage of water in a groundwater aquifers, the effect of which, until withdrawn, is to refill the natural storage capacity of a groundwater aquifer. Under current law, in order to place water into underground storage, the GSA or other party storing the water must identify the eventual beneficial use of the water just as with above-ground surface water storage projects. Under SGMA, non-extractive beneficial uses include groundwater recharge, subsidence prevention, and use as a seawater intrusion barrier; whereas extractive beneficial uses include irrigation, municipal, domestic or industrial purposes.

The act of storing groundwater is not presently, in and of itself, a beneficial use. Rather, it is the act of addressing one of the six “undesirable results” that is the beneficial use.

More information on groundwater storage is available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/groundwater_recharge/.

Avoiding SWRCB Intervention and Dealing with Intervention if Imposed

Finally, despite the state’s GSAs’ best efforts, the SWRCB and DWR recognize that not every

GSA will successfully develop a GSP that meets the requirements of SGMA and/or timely achieves basin sustainability. In order to evaluate the GSAs’ efforts and the conditions of their basins, the SWRCB has developed “triggers” that will alert it to inadequacies, including: lack of coordination, lack of a timely developed GSP or an inadequate GSP, and inadequate GSP implementation. The complete list of “triggers” is at *Water Code* § 10735.2 (a)(1) through (a)(5).

The identification of a triggering event results in a public hearing at which a basin can be designated “probationary,” and by which the SWRCB can require groundwater extractors to install meters, measure and report all groundwater extractions, and pay fees (currently a base fee of \$300 plus \$40 per acre-foot of extracted groundwater) to cover the cost of SWRCB activities. The SWRCB can (and likely will) also conduct investigations and gather data necessary for the sustainably manage the groundwater basin. Local agencies and producers will be afforded a limited-time opportunity to correct the deficiencies that resulted in the “probationary” designation; however, if they fail, the state board will likely develop, impose and oversee the implementation of an “interim plan” that is designed to achieve sustainable levels as soon as possible.

Since the intent of SGMA is to achieve groundwater sustainability at the “basin scale,” an interim plan will require pumping volumes to be made consistent with sustainable yield as defined at the “basin scale”; it must be consistent with water rights priorities, which typically requires consideration of all rights to extract groundwater at the “basin scale”; and it will require basin-wide data collection in order to determine where efforts should be focused or if efforts should be basin-wide.

To end the SWRCB’s management of a basin’s groundwater, the GSA will need to demonstrate to the SWRCB that it is ready, willing and able to manage the basin’s groundwater sustainably, including satisfactorily addressing the issues that caused state intervention.

More information on state intervention is available at: https://www.waterboards.ca.gov/water_issues/programs/gmp/docs/intervention/intervention_fs.pdf.

Conclusion and Implications

Though California’s groundwater basins have until January of either 2040 or 2042 to achieve sustainabil-

ity, the deadlines by which GSPs must demonstrate how that will be achieved are rapidly approaching. The seeming magnitude of the task of developing and implementing these GSPs has prompted the State Water Resources Control Board to develop and transmit to the state's GSAs, a number of facts sheets

to help them timely develop GSPs that will achieve real on-time basin sustainability. We are all depending on the state's GSAs achieving that goal, and the SWRCB and DWR are making concerted efforts to assist GSAs in doing so.
(Michael Duane Davis)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL 658 SEEKS GROUNDWATER STORAGE TO BE A ‘BENEFICIAL USE’

Fundamental to California water law is that water be put to “reasonable and beneficial use,” with each of those terms being legal terms of art that have been defined to various extents by statutory and case authorities. With regard to beneficial use, groundwater storage has not been considered a “beneficial use” as have other uses, such as for domestic, irrigation, environmental and recreational uses. Assembly Bill 658 (AB 658) now presents the opportunity for groundwater storage to be deemed a beneficial use, albeit in limited circumstances as described below.

Background

While scientists have long recognized that surface water and groundwater often bear connectivity, the legal and regulatory frameworks have traditionally maintained distinct lines between these two sources of water. These lines have become blurred in recent years given passage of California’s landmark Sustainable Groundwater Management Act (SGMA) and case authority holding that the public trust doctrine may be invoked for groundwater operations that adversely impact interconnected surface water.

With the blurring of these lines—and specifically as to SGMA’s mandate that a “water budget” be developed to ensure long-term sustainability of groundwater resources—legislative efforts have been made to recognize groundwater storage as a beneficial use of water. The rationale is that lack of such recognition jeopardizes the water right holder who places the water into groundwater storage will be able to later extract that groundwater for a “reasonable and beneficial use,” much like how a bank account holder deposits funds into an account for later extracting for some use. To declare groundwater storage a beneficial use would protect the water right while also assisting with SGMA implementation to augment groundwater levels, which in turn mitigates the risk of groundwater adjudications between water users and the local regulatory agencies implementing SGMA, referred to as Groundwater Sustainability Agencies (GSAs).

Assembly Bill 658

This legislation was introduced by Assembly Members Arambula and Eduardo Garcia. AB 658 would authorize a Groundwater Sustainability Agency or other local agency to apply for, and the State Water Resources Control Board (SWRCB) to issue, a conditional temporary permit for diversion of surface water to underground storage for beneficial use that advances the sustainability goal of a groundwater basin. If the GSA or other local agency already holds a permit or license issued by the SWRCB, AB 658 authorizes that agency to petition for, and the SWRCB to issue, a conditional temporary change order that authorizes the diversion of surface water to underground storage. This change petition process reflects a current regulatory process that exists for temporary surface water changes in points of diversion, places of use, or purposes of use. Essentially, AB 658 seeks to apply the nimbleness afforded by the current temporary change petition process to groundwater storage uses as well.

AB 658 does require the SWRCB to make the following findings, whether the temporary change is requested by way of application or based on an existing permit or license:

- (1) the change advances the sustainability goal set by a GSA for the groundwater basin;
- (2) the change will not injure another legal user of water;
- (3) the change is in the public interest.

As part of the materials to be submitted to the SWRCB when seeking the temporary change, the proponent would have to submit evidence that environmental review was either completed or is exempt from the California Environmental Quality Act. Also required would be a certification from the Department of Fish and Wildlife (DFW) that the proponent has consulted with DFW at least 30 days before submission of the petition, and if DFW determines that it needs additional time, it may provide for a longer consultation period up to 60 days.

Also, in order to protect the water right holder's interest to be able to later extract the water being placed into the basin as groundwater storage, adequate accounting methods and reporting requirements must be established by one of the following:

(1) a Groundwater Sustainability Plan; (2) an interim or alternative plan (as contemplated by SGMA); or (3) the SWRCB as part of the terms and conditions approving the temporary change.

Currently, AB 658 is steaming ahead in the Legislature. As May 28, the legislation was read for the third time in the Assembly, passed and ordered to the Senate.

Conclusion and Implications

AB 658 presents the complex intersection of water rights law, SGMA implementation and regulatory jurisdiction of the State Water Resources Control Board. While groundwater storage being deemed a beneficial use should be hailed as a welcomed addition to the body of California water law, note must be taken that the SWRCB has not previously held jurisdiction over groundwater (unless subterranean stream flowing in "known and definite channels"). With SGMA clearly stating that local interests and agencies, namely GSAs, should govern local use of groundwater, the regulatory pendulum should not swing further to provide more authority than necessary to the SWRCB, with AB 658 walking that line to allow for nimbleness at the local level to manage the natural resource.

(Wesley A. Miliband)

LAWSUITS FILED OR PENDING

SUPERIOR COURT COORDINATES ELEVEN CASES CHALLENGING THE STATE WATER RESOURCES CONTROL BOARD'S APPROVAL OF AMENDMENTS TO THE BAY-DELTA PLAN

The Sacramento Superior Court has granted a petition to coordinate 11 cases challenging the State Water Resources Control Board's (SWRCB) approval of phase 1 amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) and related environmental review. The final decision on venue for the coordinated cases will be made by the Judicial Council. The court recommended to the Judicial Council that the cases be coordinated in Sacramento Superior Court, with appellate review by the Third District Court of Appeal. One case, filed by the United States, was not coordinated. The United States is seeking to stay its case in state court in favor of a parallel case it has filed in U.S. District Court. The court decided to leave the issue of coordination of the United States' case to whatever court is assigned the coordinated cases. [SWRCB Cases, JCCP No. 5013 (Sac. Super. Ct. May 8, 2019).]

Background

On December 12, 2018, the SWRCB approved the phase 1 amendments to the Bay-Delta Plan and related environmental review. The phase 1 amendments include changes to both the water quality objectives and the program of implementation in the Bay-Delta Plan. The amendments fall into two general categories: 1) amendments intended to protect the quality of water for fish-related beneficial uses, and 2) amendments intended to protect the quality of water for agricultural uses in the south Delta. Of greatest controversy, the new objectives specify that 30 percent to 50 percent of "unimpaired flow" remain in certain tributaries to the San Joaquin River. Many affected water users object that implementation of the new objectives regarding flow is expected to significantly limit existing diversions and water supplies. Other interests contend this flow is too little to restore affected fish populations.

Twelve lawsuits challenging the SWRCB's decision have been filed in state court, in various coun-

ties. The lead petitioners in each case are: California Farm Bureau Federation, California Sportfishing Protection Alliance, Merced Irrigation District, City of Modesto, Modesto Irrigation District, North Coast Rivers Alliance, San Joaquin Tributaries Authority, San Francisco Baykeeper, Santa Clara Valley Water District, Westlands Water District, Stockton East Water District, and the United States. The United States filed a parallel case in U.S. District Court as well.

The claims are wide-ranging. In general, the lawsuits allege the SWRCB's adoption of the phase 1 amendments to the Bay-Delta Plan violated the California Environmental Quality Act (CEQA), the Delta Reform Act, the Porter-Cologne Water Quality Control Act, and the federal Clean Water Act. There are also claims that the SWRCB violated the California Constitution, Article X, § 2 regarding reasonable use, as well as the constitutional protections of Due Process and Equal Protection.

The Coordination Ruling

The SWRCB filed a petition to coordinate the cases and moved to stay all proceedings pending appointment of a coordination trial judge. The Judicial Council assigned the Sacramento Superior Court to hear the coordination motion and motion to stay.

In an order issued May 8, 2019, the court granted coordination of all the cases except the case filed by the United States. In its case, the United States alleges that the SWRCB's approval of the phase 1 amendments violated CEQA. The United States has filed essentially the same case in federal District Court. The United States' case alleges violations of CEQA, including the failure to provide an accurate, stable, and finite project description, improper compression of impacts and mitigation, and the failure to adequately evaluate impacts. The federal government seeks injunctive relief and a writ of mandate directing the SWRCB to set aside and vacate its environmental review document. The United States' interest

arises from the potential effect of the phase 1 amendments on its New Melones Project.

The court declined to rule on coordination of the United States' case against the SWRCB, because the federal government has moved to stay its state court case while it litigates its case in federal court. A hearing on the United States' motion to stay is scheduled for late August 2019. In its petition, the United States alleges that it filed in federal District Court to preserve its "preferred choice of a federal forum to resolve its claims." It further alleges it filed a duplicate action in state court:

...only out of an abundance of caution in the event that, for any reason, Petitioner's federal suit is not adjudicated on the merits in federal court and to ensure that the state statute of limitations was scrupulously complied with.

The court indicated that the judge ultimately assigned as the coordination judge can revisit coordination of the United States' action on a renewed motion.

As to venue, the court recommended that the Chair of the Judicial Council coordinate the proceed-

ings in Sacramento County Superior Court, with the Third District Court of Appeal designated as the reviewing court.

Conclusion and Implications

Coordination of the cases challenging the phase 1 amendments will slow and complicate resolution of the individual cases, but is necessary given the overlap among the claims. In the meantime the SWRCB will set about implementation of the new objectives, which could trigger requests for preliminary injunctive relief.

More interesting is the effort by the United States to separately litigate its claim in federal court. If it proceeds separately, it could reach a determination on the CEQA claims it raises more quickly than the coordinated cases in state court. Whether that occurs may depend upon whether the United States' state court action is stayed. Courts are not inclined to hear the same claim concurrently being litigated in another court.

The Sacramento Superior Court looks to be the likely venue for the coordinated cases, though the Judicial Council will have the final say.
(Jenifer Gee, Daniel O'Hanlon)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REVIVES ENVIRONMENTAL GROUPS' NEPA CHALLENGE TO DEPARTMENT OF AGRICULTURE'S GRAY WOLF KILLING POLICY

Western Watersheds Project et al. v. Todd Grimm et al., ___F.3d___, Case No. 18-35075 (9th Cir. Apr. 23, 2019).

On April 23, 2019, the Ninth Circuit Court of Appeals overturned a U.S. District Judge's January 2018 dismissal of an action brought by plaintiffs Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (plaintiffs) to enjoin the federal government's participation in the elimination of gray wolves in Idaho, pending additional National Environmental Policy Act (NEPA) analysis. The U.S. District Court originally dismissed the suit based on the plaintiffs' lack of Article III standing.

Factual Background

In 1973, the U.S. Fish and Wildlife Service (FWS) listed the Northern Rocky Mountain gray wolf (*Canis lupus irremotus*) as endangered under the federal Endangered Species Act (ESA). This subspecies of gray wolf is native to the northern Rocky Mountains and preys on bison, elk, the Rocky Mountain mule deer, and the beaver. However, the gray wolves are known to prey upon many other species of animals given the opportunity. In 1994, FWS' goal was to assist the gray wolf reach a population of thirty breeding pairs by reintroducing them into central Ohio. In anticipation of conflict between the wolves, and humans and their livestock and animals, the FWS authorized the killing of those wolves that preyed on livestock, domestic animals, and ungulates in the area. FWS reached its wolf breeding goal and in 2011, the gray wolf was successfully delisted.

Back in 2002, the Idaho Department of Fish and Game (IDFG) prepared a plan to be executed upon the gray wolves' delisting under the ESA. IDFG would maintain responsibility for managing the wolves in Idaho with the goal of addressing these issues of predation by way of sport hunting as its primary method. Ever since its delisting, FWS supported IDFG's wolf management activities through both legal and non-legal methods, including aerial hunting.

In June 2017, plaintiffs sued the USDA alleging that the agency violated NEPA for its wolf killing policy. The USDA said that NEPA's law did not constitute a major federal action significantly affecting, individually or cumulatively, the quality of the human and natural environment."

Procedural History

In June 2016, plaintiffs brought the following NEPA-based claims against the U.S. Department of Agriculture, Wildlife Services (Wildlife Services) in District Court: 1) Failure to prepare an Environmental Impact Statement (EIS); 2) Failure to take a hard look at the effects of actions and alternatives; 3) Violations under 5 U.S.C. §706 (2)(A) for decisions not to supplement NEPA analysis as arbitrary and capricious; and 4) Violations under U.S.C. §706 (1) for failure to supplement the 2011 Environmental Assessment as an action unlawfully withheld or reasonably delayed.

Specifically, plaintiffs alleged that NEPA requires Wildlife Services to prepare an EIS and supplement the Environmental Assessment for the agency's killing of the gray wolf. The District Court held that plaintiffs failed to show that Article III standing because plaintiffs failed to show redressability. The District Court explained that plaintiffs failed to show that eliminating the USDA's rule would actually result in fewer wolf killings therefore, making their injury not redressable.

The Ninth Circuit's Decision

NEPA violations constitute procedural injuries. To prevail on a cause of action involving procedural injuries, plaintiffs are required to:

...show that the procedures in question are designed to protect some threatened concrete

interest of his that is the ultimate basis of his standing.

Further, to establish injury in fact, the plaintiffs may demonstrate that they:

...use the affected area and are persons or who the aesthetic and recreational values of the area will be lessened by the challenged activity.

Standing: Injury in Fact

In order to prevail, plaintiffs needed to establish injury in fact:

Environmental plaintiffs may establish injury-in-fact by demonstrating that “they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000)).

In this case, plaintiffs submitted declarations from their members stating that the wolf-killing threatened the aesthetic and recreational interests in tracking and observing wolves in the wild, often in specific regions. The Court of Appeals deemed those interests to fall under the scope of NEPA’s protections. Thus, plaintiffs successfully established injury-in-fact.

Standing: Redressability

Next, the Ninth Circuit reviewed the District Court’s ruling that the plaintiffs’ injuries were not redressable:

To establish redressability, “[p]laintiffs alleging procedural injury ‘must show only that they have a procedural right that, if exercised, could protect their concrete interests.’ *Salmon Spawning*, 545 F.3d at 1226 (quoting *Defs. of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *overruled on other grounds by Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)). Thus, the proper inquiry here is whether Plaintiffs have shown that halting Wildlife Services’ wolf-killing activities pending additional NEPA analysis could protect their aesthetic and recreational interests in gray wolves in Idaho. We hold that they have.

The Ninth Circuit overturned the District Court’s conclusion and emphasized that the court erred because it relied on an incorrect standard by relying on an unpublished case that lacks precedential effect. Additionally, to properly establish redressability, plaintiffs must show that they have a procedural right and if exercised, *could* protect their concrete interests—a more relaxed standard applied to procedural injury cases. Under this standard of redressability, plaintiffs need only show that merely halting Wildlife Services’ wolf-killing activities pending additional NEPA analysis would have the potential to protect their aesthetic and recreational interests in gray wolves in Idaho. This differs from the District Court’s heightened standard which ruled the plaintiffs must show that fewer wolves would be killed.

Wildlife also argued that based on its current wolf-maintenance responsibilities, IDFG would exercise its independent authority and continue wolf-hunting to address the predation issues thus, defeating redressability. The Ninth Circuit quickly held that IDFG has not expressed an intent or ability to replace Wildlife Services’ lethal wolf-management operations. Therefore, whether IDGF would implement an identical program as such is a matter of speculation.

Conclusion and Implications

In a win for the conservation groups, the Ninth Circuit Court of Appeals reversed the U.S. District Court’s ruling and held that the plaintiffs’ procedural injuries were indeed redressable. Though courts generally grant a high level of deference to oversight agencies such as the Fish and Wildlife Service, a win on a procedural challenge, like Article III standing, may be a new avenue for conservation groups to challenge controversial laws to better protect endangered species. Interestingly the court pointed out in a footnote why it did not directly address the additional issue of demonstrating causation: “Causation is not at issue here. However, because standing is a constitutional requirement, we note that Plaintiffs’ injury—reduced aesthetic and recreational enjoyment of wolves in Idaho—is ‘not too tenuously connected’ to Wildlife Services’ alleged NEPA violation, thus establishing causation under the relaxed standard for procedural injuries. *Salmon Spawning*, 545 F.3d at 1229.” The Ninth Circuit’s decision is available online at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/23/18-35075.pdf> (Rachel S. Cheong; David D. Boyer)

DISTRICT COURT FINDS FEDERAL GOVERNMENT WAIVED SOVEREIGN IMMUNITY FOR NEGLIGENT RESPONSES TO FLINT WATER CRISIS

Burgess v. United States, ___F.Supp.3d___, Case Nos. 17-11218, 18-10243 (E.D. Mich. Apr. 18, 2019).

The U.S. District Court for the Eastern District of Michigan denied the federal government's motions to dismiss residents' suit against the United States under the Federal Tort Claims Act (FTCA) for the U.S. Environmental Protection Agency's (EPA) role in the Flint water crisis. A group of Flint residents alleged that EPA officials were negligent in carrying out the agency's oversight authority under the federal Safe Drinking Water Act (SDWA). The federal government moved to dismiss plaintiffs' action for lack of subject matter jurisdiction, contending sovereign immunity had not been waived because: 1) state law would not impose liability in similar circumstances (the premise for waiving immunity under the FTCA), and 2) the discretionary function exception to liability would apply. The District Court rejected both contentions.

Factual and Procedural Background

Plaintiffs' suit against the United States, arising from what is now known as the Flint Water Crisis, follows earlier actions brought against the City of Flint, the State of Michigan, and related officials.

The Safe Drinking Water Act

Section 1414 of the SDWA requires the EPA to notify a state and provide technical assistance when a public water system does not comply with the act. If the state fails to take timely enforcement action, the EPA is required to issue an administrative order requiring compliance or commence a civil action. Section 1431 of the SDWA further grants the EPA emergency powers when it has information that (i) a contaminant has entered or is likely to enter a public water system, (ii) which may present "an imminent and substantial endangerment to the health of persons," and (iii) state or local authorities have not acted to protect the public health.

The Flint Water Crisis

In April 2014, the City of Flint (City), Michigan changed the source of its water supply, suspending

the purchase of finished drinking water from Detroit to draw on raw water from the Flint River processed through Flint's outdated water treatment plant.

Within weeks after the switch, EPA received a record number of resident complaints about skin rashes, hair loss, and foul smelling and tasting water. After some investigation, EPA determined that: (1) the water service lines in Flint were galvanized iron, (2) water drawn from the Flint River was highly corrosive and lead-based service lines posed a significant danger of lead leaching out of pipes, (3) Michigan was not requiring corrosion control treatment in Flint (despite communications from EPA staff urging otherwise), (4) the City was distorting its water samples to give residents false assurances about water lead levels, and (5) water samples from residents' homes showed noncompliant lead levels. The EPA was also aware of the health risks posed by lead exposure, particularly to children and pregnant women.

Internal reports established that EPA had the authority and sufficient information to issue an SDWA § 1431 emergency order to protect Flint residents from lead-contaminated water as early as June 2015. The EPA did not issue an emergency order until January 2016. In at least some of its communications with Flint residents, EPA also indicated that the City's drinking water met applicable health standards.

The District Court's Decision

The United States must waive its sovereign immunity in order for a court to have jurisdiction over a claim against the federal government. Through the FTCA, Congress waived the federal government's immunity from claims of injury arising from an act or omission of an employee, if state law imposes liability on a private person under similar circumstances. The FTCA excludes from its waiver of immunity any claim based on a discretionary function.

Liability under State Law

Rejecting the federal government's contention that Michigan law would not impose liability on pri-

vate individuals in similar circumstances, the District Court found plaintiffs stated a cause of action under Michigan's Good Samaritan doctrine. The doctrine provides that undertaking services to protect another person creates a duty of care and liability for negligent performance, if the negligence increases the risk of harm. The court found that EPA had undertaken to render services to plaintiffs by engaging in the oversight of state and local actors under the SDWA. By alleging EPA's negligent oversight increased the risk of harm to Flint's residents, plaintiffs' stated a claim for liability under state law sufficient to proceed under the FTCA.

The Discretionary Function Exception

To determine whether plaintiffs' suit was barred by the discretionary function exception, the District Court applied a two-step analysis. The court first determined whether the challenged act or omission was discretionary in nature, and second, if so, whether the challenged discretionary conduct was susceptible to policy analysis. The discretionary function exception applies only to judgments based on policy.

Plaintiffs alleged that EPA was negligent in failing to timely respond to the crisis as mandated by §§ 1414 and 1431 of the SDWA, including failing to warn residents of the health risks posed by Flint water. Plaintiffs also alleged the EPA was negligent when responding to residents' complaints by misleading them about the safety of the water and the character of state and local management.

On plaintiffs' first claim, the District Court found that EPA had discretion to issue warnings under the SDWA, but that the agency's failure to warn residents

could not be justified by any permissible exercise of policy judgment. While regulatory decisions are generally presumed to be based in policy, the court found that the SDWA authorized EPA to exercise discretion in oversight based only on objective scientific and professional standards. Moreover, the facts of the crisis presented:

... a safety hazard so blatant that [officials'] failure to warn the public could not reasonably be said to involve policy considerations.

Given the "obvious danger" to the community and EPA's knowledge of the facts, the court concluded "this is an instance where decisions by government actors, even if discretionary, may pass a threshold of objective unreasonableness" that bars exemption from liability.

On plaintiffs' second claim, the court again found EPA's decision regarding whether and how to respond to residents' complaints was discretionary, but that once the government decided to act, "it was required to do so without negligence." Exemption from liability was thus denied.

Conclusion and Implications

The exercise of administrative discretion is presumed to be grounded in considerations of public policy, and thus beyond the reach of tort liability. This case provides a rare example of discretionary conduct that falls outside the presumption of regulatory immunity. The court's decision is available online at: <https://www.courthousenews.com/wp-content/uploads/2019/04/burgess-flint.pdf> (Kathy Shin, Rebecca Andrews)

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