Volume 29, Number 11
August/September 2019

CALIFORNIA WATER™

LAW & POLICY Reporter

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Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

CALIFORNIA WATER LAW & POLICY Reporter

FEATURE ARTICLE

WEED, WATERS AND WILDLIFE: THE ENVIRONMENTAL PERMITTING OF CANNABIS CULTIVATION IN CALIFORNIA—PART 1: FISH AND GAME PERMITTING

By Clark Morrison, Esq.

This article is the first of a two-part series describing California's environmental regulatory structure for cannabis cultivation as implemented by the California Department of Fish and Wildlife (Department) and the State Water Resources Control Board (SWRCB).

In part 1, the author provides a brief introduction to Proposition 64's environmental requirements as subsequently codified by the California Legislature through the passage of Senate Bill 94. Following this introduction, the author describes the Department's regulations under §§ 1602 and 1617 of the Fish and Game Code (lake and streambed alterations), which code provisions were amended or adopted by SB 94 specifically to address cannabis cultivation.

In the second part of this article, to follow in a subsequent issue, the author will discuss the cannabis policy and permitting requirements adopted by the SWRCB to implement the directives of Proposition 64 and SB 94.

Introduction

Last year, the California Department of Fish and Wildlife published a report entitled, *A Review of the Potential Impacts of Cannabis Cultivation on Fish and Wildlife Resources* (July 2018). The Department's report identified a variety of environmental challenges related to the production of cannabis, including the direct and indirect impacts of pesticides and rodenticides on wildlife; water diversion impacts on flow regimes (including dewatering) and water quality; the impacts of dams and stream crossings; the delivery of pollutants; terrestrial impacts associated with site development, use and maintenance (including road use, noise and artificial lighting); and health hazards to wildlife from the ingestion of crops.

The Department's findings were neither new nor surprising. California's regulatory agencies had long known that unregulated grows were affecting water quality, and fish and wildlife habitat, in areas of the state where cultivation was most concentrated. Accordingly, when Proposition 64 was crafted for consideration by California voters in 2016, significant funding was included for three conservation priorities: the restoration of watersheds and habitat damaged by cultivation; improved management of state parks and wildlife areas to minimize future degradation; and the enforcement of environmental laws that had hitherto been largely unenforced. According to the Conservation Strategy Group, Proposition 64 initially was expected to generate up to $200 million year for these purposes.

In 2017, Proposition 64 was codified through the passage SB 94. The law includes a number of provisions calling upon the state's environmental agencies, particularly the Department and the SWRCB to develop programs for the regulation of cannabis cultivation. In particular, the law requires the California Department of Food and Agriculture (CDFA) to include in any license for cultivation conditions requested by the Department or the SWRCB to:

- Ensure that the effects of diversion and discharge associated with cultivation do not affect the instream flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability;

•Ensure that cultivation does not negatively impact springs, riparian habitat, wetlands or aquatic habitat; and

•Otherwise protect fish, wildlife, fish and wildlife habitat, and water quality.

The law further directs CDFA, in consultation with the SWRCB and the Department, to implement a program for the issuance of unique identifiers to be attached to the base of marijuana plants grown under a state license. In implementing the program, CDFA is required to consider issues such as water use and environmental impacts, including 1) flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability and 2) impacts on springs, riparian wetlands and aquatic habitats. If a watershed cannot support additional cultivation, no new plant identifiers may be issued for that watershed.

With respect to the SWRCB and the Regional Water Quality Control Boards (RWQCBs) specifically, the law amended § 13276 of the Water Code to authorize the SWRCB and direct the RWQCBs to address discharges of waste from cultivation, including by adopting a general permit, establishing waste discharge requirements or taking action under Water Code § 13269. In so doing, the SWRCBs must include conditions addressing a dozen different considerations including, for example, riparian and wetland protection, water storage and use, fertilizers, pesticides and herbicides, petroleum and other chemicals, cultivation-related waste and refuse and human waste. The SWRCBs ' programs to implement these requirements, and SB 94's requirements relating to water rights, will be addressed in Part II of this article.

With respect to the Department, the law amended certain provisions of the Fish and Game Code governing the diversion of water from, and certain alterations and discharges to, rivers, streams and lakes in California. These provisions, and the Department's implementation of them, are further described below.

Finally, the law directs the Department and the SWRCB to prioritize the enforcement of environmental laws governing cannabis cultivation, and establishes steep penalties (including imprisonment) on those whose activities violate various provisions of, among other statutes, the Water Code (§ 1052 regarding diversions or §§ 13260, 13264, 13272, or 13387 regarding waste discharges) or the Fish and Game Code (§§ 5650 or 5652 regarding discharges of waste or, § 1602 regarding streambed alterations, § 2080 regarding listed species and § 3513 regarding migratory birds).

The Department of Fish and Wildlife's Lake and Streambed Alteration Program

SB 94 supplemented the Department's existing authority under § 1602 of the Fish and Game Code to issue "Lake and Streambed Alteration Agreements" for certain activities affecting rivers, streams and lake (*i.e.*, water diversions, modifications to bed and bank, certain deposits of waste). The Department's lake and streambed alteration program is one of California's original environmental regulatory structures, hailing from the days of the gold rush.

Under the statute, an "entity" (*i.e.*, permittee) intending to engage in a potentially regulated activity provides a "notification" to the Department. Upon receipt, the Department evaluates whether the activity is covered by § 1602 and, if it is, recommends a set of reasonable measures to protect fish and wildlife resources. Those measures are set forth in a draft Lake and Streambed Alteration Agreement (LSAA) delivered to the permittee, who then has the opportunity to objection to one or more of those measures and negotiate a final agreement with the Department. If the Department and permittee cannot resolve their differences, the matter is submitted to binding arbitration.

The LSAA process is generally fairly quick. The Department has 30 days to determine if a notification is complete and, if it is, 60 days to issue a draft agreement. In many cases the Department will simply decline to act within the 60-day period, in which case the proposed activity becomes authorized as a matter of law. LSAAs can be authorized for individual projects or in the form of long-term, programmatic agreements that might cover a complex or multi-phase project.

SB 94 Requirements Regarding LSAAs

Under SB 94, any cultivation license must contain a condition that it not become effective until the licensee has demonstrated compliance with § 1602 or receives written verification from the Department that an LSAA is not required. Given the potential

deluge of LSAA applications expected to swamp the Department as a result, even the efficiencies associated with the 1600 process were not expected to be sufficient to implement this requirement. Accordingly, the law amended to Fish and Game Code to further streamline the process.

First, it amended § 1602 to exempt any permittee from the need to secure an LSAA if, following notification and the payment of fees, the Department determines that conditions contained in the license in accordance with the Department's recommendations as described above (and codified at § 26060.1 of the Business and Professions Code) "will adequately protect existing fish and wildlife resources that may be substantially adversely affected by the cultivation without the need for additional measures" that would ordinarily be included in an LSAA. This process is described by the Department as "self-certification." Where this occurs, any failure to comply with the CDFA's license conditions will constitute a violation of the Fish and Game Code.

Second, SB 94 added a new § 1617 to the Fish and Game Code, allowing the Department to adopt a "general" LSAA (referred to as the "General Agreement") authorizing certain cannabis cultivation activities on an essentially automatic basis. As more fully described below, a permittee secures this coverage by submitting to the Department information to the Department demonstrating that the proposed project qualifies for coverage, and the Department issues its authorization on a perfunctory, non-discretionary basis. There is no need for a specific LSAA for the activities proposed. Under the General Agreement, however, there is no opportunity for a permittee to object to the required fish and wildlife protections or to arbitrate any disagreement with the Department.

The General Agreement

On January 2, 2018, the Department, acting on an emergency basis (as authorized by SB 94), added § 722 to the Department's existing regulations in Title 14 of the California Code of Regulations. Section 722 constitutes the the General Agreement authorized by the Legislature.

Although coverage under the General Agreement is more or less automatic, compliance is anything but simple. Anyone wishing to pursue authorization under the General Agreement must certify that he or she will comply with an exhaustive and detailed list of environmental protections. These are described below. Notably, neither § 1617 nor § 722 include any requirement for compensatory mitigation in the form of conservation easements or other tools typically required under § 1600, the California Endangered Species Act (CESA)and other state regulatory programs.

The General Agreement covers certain construction projects as well as certain water diversions associated with cannabis cultivation, including the planting, growing, harvesting, drying, curing, grading or trimming of cannabis. In particular, the General Agreement covers: 1) the construction, reconstruction, maintenance or repair of a bridge, culvert or rock ford in or over a stream or river, including all fill material within the crossing "prism"; and 2) water diversions on *nonfish* rivers, streams, and lakes where such diversions are used or will be used for the purpose of cannabis cultivation. Covered diversions include diversions of either surface flow or hydrologically connected subsurface flow for use or storage, including all infrastructure used to divert or store the flow (*e.g.*, rock dams, excavation pools in fast-moving water, and wells).

For an activity to be eligible for coverage, the permittee must certify to the Department that the proposed activity: 1) will meet certain design criteria and other requirements described in § 722, 2) will not occur on or in a "finfish" (*i.e.*, inhabited by any species of bony fish) stream or lake, and 3) is not already the subject of a complaint by the Department or other law enforcement agency or any resulting court order; provided, however, that the General Agreement process may be used on an after-the-fact basis to permit prior unauthorized work.

The permittee must also certify that the activity will not result in the "take" of a species that is listed under the CESA, the Native Plant Protect Act (NPPA) or the Fish and Game Code's provisions establishing statutory, "fully protected" status for certain species.

Section 722(e) establishes the Department's required design criteria for bridges, culverts, rock fords and water diversions, respectively.

Bridges, for example, must be single span with abutments located outside of top of bank and the tops of any abutment footings located below the scour line; allow 100-year peak flows with one foot of freeboard; and allow free passage of fish upstream and

downstream. Culverts must be comprised of a single pipe constructed in a particular manner and sufficient to, among other things, convey or withstand a 100-year peak storm flow. Rock fords must be located in a stable stream reach with a coarse gravel and cobble streambed, oriented particular to the flow, designed and constructed to withstand multiple flow velocities, and must not impede fish passage.

The design criteria for water diversions are more complicated. Among other things, diversions may not exceed ten gallons per minute and must allow a minimum 50 percent of the flow to bypass the diversion. Water diverted to storage must not exceed five acre-feet per year, with storage facilities located off-stream and outside the 100-year floodplain.

In addition to these design criteria, any authorized structure must be constructed in a manner consistent with a number of general and specific measures to protect fish and wildlife resources, which are described more fully below.

Applying for Coverage

To apply for coverage, a permittee must—in addition to paying certain fees and making the certifications described above—submit certain information to the Department (through the Department's website at https://wildlife.ca.gov/Conservation/LSA) describing the identity of the permittee and the nature and location of the project. Following the submittal of that information, the Department notifies the permittee of the issuance of coverage.

Among the required information is a certification that the permittee has in his or her possession and will retain at the project site: 1) a detailed design plan prepared by a licensed engineer, geologist, land surveyor, professional forester or professional hydrologist, 2) a detailed a property diagram; and 3) a detailed biological resources assessment prepared by a qualified biologist. This information, as well certain other information such as any cannabis cultivation license issued by CDFA, must be presented upon request to CDFW employees upon request. CDFW employees are permitted access to any project site for inspection purposes—without notice—between 8 am or 5 pm or at other reasonable times as may be mutually agreed between the Department and the permittee.

Biological Resource Assessment and Impact Avoidance

The biological resource assessment must identify the presence or potential presence of "Species of Greatest Conservation Need" (as listed in the state's *Wildlife Action Plan*), rare or endangered species (as defined in § 15380 of the California Environmental Quality Act (CEQA) Guidelines), any finfish or their habitat, and any invasive species. In so doing, the biologist must rely on certain classification systems promulgated by the U.S. Department of Agriculture (USDA), the Department, the U.S. Geological Service (USGS), the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), respectively. Notably, the species covered by the biological resource assessment are somewhat different from those whose take is expressly prohibited under the terms of the General Permit.

Because the primary purpose of the Department's LSAA program is to protect fish and wildlife resources, the General Permit establishes a long list of detailed measures to avoid and minimize impacts to those resources. These include the following:

- Seasonal restrictions on work within the bed, bank or channel (*i.e.*, June 15 to October 15 only) and dry-weather-only work requirements;

- Any wildlife encountered must not be disturbed or harmed;

- Disturbances to aquatic and riparian habitat must be minimized;

- Daily morning inspections of the project site for wildlife;

- Installation of overnight escape ramps in open trenches;

- Seasonal (*i.e.*, February 1 through August 31) focused surveys for nests and dens of birds and mammals, and the establishment of work buffers if any are found;

- Vegetation removal must be minimized and buffers established for any plant designated as a Species of Greatest Conservation Need;

- Implementation of measures to protect water flow and minimize turbidity, siltation and pollution.

- Prohibitions on the use of chemical herbicides and pesticides that are deleterious to fish, plants, birds or mammals where they may "pass into" any "waters of the State" as defined in Section 89.1 of the Fish and Game Code);

- Implementation of a variety or erosion control measures throughout all work phases
Measures related to the storage or migration of toxic materials and hazardous substances
Invasive species controls, including prohibitions on the stocking of fish;

- A variety of additional design requirements for all stream crossings, and also specifically for bridges, culverts, and water diversions.

Not surprisingly, the regulation includes significant reporting requirements, including a project completion report, water diversion and use reports, and reports on any observations of Species of Greatest Conservation Need (to be submitted to the Department's Natural Diversity Database, *i.e.* CNDDB). If a permittee fails to comply fully with the General Agreement, or if any activity undertaken by a person does not actually qualify for the General Agreement, the Department may take action, including suspension or revocation of the permittee's authorization or the pursuit of formal enforcement.

Conclusion and Implications

The Department's cannabis program website: (https://www.wildlife.ca.gov/Conservation/Cannabis#53534664-resources)

includes a number of helpful tools for the prospective permittee, including best management practices for watershed management and pesticide use, a compliance handbook issued by the Department's North Coast region, frequently asked questions, and other materials. A review of the Department's page for LSAAs is also helpful. It is cited above.

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CALIFORNIA WATER NEWS

REPORT ANALYZES EXTREME HEAT SCENARIOS LIKELY TO BECOME THE NORM IN THE UNITED STATES

Many of the studies and reports on the dangers of climate change focus on large-scale environmental impacts like floods, wildfires, sea-level rise and hurricanes. A July 2019 report from the Union of Concerned Scientists focuses on an area that is likely familiar to all of us: heat.

The report, entitled "Killer Heat in the United States: Climate Choices and the Future of Dangerously Hot Days" (Report) analyzes the extreme-heat scenarios that are likely to occur in the United States by the middle and end of this century if the United States does not reduce "heat-trapping emissions."

The National Weather Service's Heat Index

According to the National Weather Service (NWS), its "heat index" is "a measure of how hot it really feels when relative humidity is factored in with the actual air temperature." Generally, the heat index is used to determine the "Likelihood of Heat Disorders with Prolonged Exposure or Strenuous Activity" and the NWS breaks heat indexes into four categories: "Caution", "Extreme Caution," "Danger" and "Extreme Danger." For example, a day with a heat index of 100°F falls in the "Danger" category and a day with a heat index of 105°F falls in the "Extreme Danger" category.

Significant Increase in Number of Dangerous Heat Index Days

According to the Report, if no actions are taken to reduce heat-trapping emissions, the following is likely to occur in the United States:

- By midcentury (2036-2065), the average number of days per year with a heat index above 100°F would more than double when compared to historical averages (1971-2000) while average numbers of days per year with a heat index above 105°F would quadruple.

- By midcentury, "[m]ore than one-third of the area of the United States will experience heat conditions once per year, on average, that are so extreme they exceed the current NWS heat index range—that is, they are literally off the charts."

- By midcentury, "[a]ssuming no changes in population, the number of people experiencing 30 or more days with a heat index above 105°F in an average year will increase from just under 900,000 to more than 90 million—nearly one-third of the US population."

- By late century (2070-2099), the average number of days per year with a heat index above 100°F would quadruple when compared to historical averages and the average number of days with a heat index above 105°F would be eight times as much when compared to historical averages.

- By late century, "[a]t least once per year, on average, more than 60 percent of the United States by area will experience off-the charts conditions that exceed the NWS heat index range and present mortal danger to people."

- By late century, assuming no population change, more than 180 million people would experience 30 or more days with a heat index above 105°F.

One of the highlights associated with the Report is a website with an interactive United States map that shows potential future heat index scenarios by county: (https://ucsusa.maps.arcgis.com/apps/MapSeries/index.html?appid=e4e9082a1ec343c794d27f3e12dd006d)

An example of the data that can be gleaned from the interactive map is provided in Table 1.

Table 1. Average Number of Days per Year with a Heat Index above 100°F

County	Historical	Midcentury	Late Century
Cook (Chicago)	3	24	47
Los Angeles	1	12	32
Miami-Dade	41	134	166
Philadelphia	5	32	58
Riverside	33	69	91
Travis (Austin)	29	96	130

Report Recommends Suite of Federal and State Policies for Deep Cuts to Heat-Trapping Emissions

The Report recommends "deep cuts" in United States heat-trapping emissions and continued United States implementation and strengthening of the Paris climate agreement. The Report also recommends a suite of federal and state policies, including:

- An economywide price on carbon to help ensure that the costs of climate change are incorporated into our production and consumption decisions and encourage a shift away from fossil fuels to low-carbon energy options.

- A low-carbon electricity standard that helps drive more renewable and zero-carbon electricity generation and helps deliver significant public health and economic benefits.

- Policies to cut transportation sector emissions, including increasing fuel economy and heat-trapping emissions standards for vehicles…

- Policies to cut emissions from the buildings and industrial sectors, including efficiency standards and electrification of heating, cooling, and industrial processes.

- Policies to increase carbon storage in vegetation and soils, including through climate-friendly agricultural and forest management practices.

- Investments in research, development, and deployment of new low-carbon energy technologies and practices.

- Measures to cut emissions of methane, nitrous oxide, and other major non-CO_2 heat-trapping emissions.

- Policies to help least developed nations make a rapid transition to low-carbon economies and cope with the impacts of climate change.

Conclusion and Implications

Taking action often requires awareness and the Report (and the website) effectively highlight the dangerous conditions that likely await us if the status quo prevails. With the heat will come drought, challenging the states's water supply. It will be interesting to see if the information provided moves the action needle and if any of the Report's recommendations are implemented.
(Kathryn Casey)

INNOVATIVE GROUNDWATER ALLOCATION TRADING TOOL SET FOR RELEASE AS SGMA MANDATES LOOM

In response to looming mandates of California's Sustainable Groundwater Management Act of 2014 (SGMA), the Rosedale-Rio Bravo Water Storage District (District) is pioneering a new and innovative water trading platform in collaboration with the Environmental Defense Fund (EDF), WestWater Research, LLC and other participating entities. A preliminary version of the first online, open-source groundwater trading platform is scheduled for release in September 2019 and is projected to test real trades through a beta version of the platform in early 2020.

Background

The District is a public agency organized in 1959 in accordance with the California Water Storage District Law for the purpose of acquiring, storing, distributing, and replenishing water supplies within its boundaries in Kern County. The District area comprises more than 48,000 acres, the majority of which is in agricultural use including crops such as almonds, pistachios and grapes. The District supports groundwater extraction and use within its area by actively replenishing and banking groundwater from multiple supply sources, including the Central Valley Project, the State Water Project, the Kern River, and certain pre- and post-1914 appropriative water rights.

The Sustainable Groundwater Management Act

The District is a member of the Kern Groundwater Authority, which also functions as the Groundwater Sustainability Agency (GSA) for portions of the Kern County Sub-basin, DWR Basin No. 5-22.14 (Sub-basin). The Sub-basin is designated by the California Department of Water Resources as a high-priority, critically overdrafted basin. As a member of the GSA, the District is responsible for implementing SGMA within its Management Area of the Sub-basin, including drafting its own chapter for the Groundwater Sustainability Plan (GSP). The District recently released an Administrative Draft GSP Chapter for its Management Area (Draft GSP).

According to the Draft GSP, the District's Management Area has a projected a potential longterm water supply deficiency of more than 10,000 acre-feet per year (AFY). The Management Area seeks to eliminate that shortage over a 20-year period through various projects and management actions including water supply transfers, construction of direct recharge projects, and demand reduction.

Water Trading Program

The new and innovate water trading platform utilizes a combination of water allocations, technology and data to facilitate trading among farmers within the District. Because both the GSP and the trading platform are still being developed, details of the implementation remain to be determined. The program includes a concept where groundwater producers receive a tradable allocation comprising a fraction of total available groundwater, precipitation and supplemental project water supply components.

The web-based trading platform provides a user-friendly dashboard where offers to buy and sell water are posted. Each posted offer includes a posting date, status of the offer (*e.g.*, open, pending, closed), quantity of acre-feet offered, price per acre-foot, and comments from the offeror such as, for example, a desired timeframe to complete the transaction and whether the offer price is fixed or subject to negotiation. Other users can respond by either making a counter offer or by agreeing to the initial offer.

Users remain anonymous during the initial offer and response phase but disclose their identify later in the process in order to reach an agreement. Agreements are finalized outside of the platform between the negotiating parties. Once an agreement is final, the parties use the trading platform to notify the District, which updates the parties' allocation account balances. Landowners participating in the program can view and manage their allocation accounts online through personal dashboards showing their total allocation, transaction history, water usage and other information.

According to the District, the water trading platform is designed to meet certain objectives including reducing water trading transaction costs, facilitating effective water resources accounting and management, enabling movement of water to the highest and

best uses, and helping the District and other agencies and stakeholders in Kern County to achieve groundwater sustainability goals and minimize economic costs.

Cumulative trading impacts such as moving large quantities of production from one area of the basin to another would need to be monitored, and potentially managed, to ensure compliance with SGMA's requirement to avoid undesirable results. In its current early phase, the trading program is described in the Draft GSP primarily as a water supply accounting feature and not a major "Project and Management Action." As stated in the Draft GSP:

> The [Management Area] is developing a web-based water supply accounting database system on an APN (assessor's parcel number) basis that will provide parcel allocation of Native Yield, Precipitation, and Project Water supply as compared to consumptive use on a monthly time step by the end of the following month. This will enable landowners to track water supply and usage so as to meet management action demand reduction objectives. Currently the [Management Area] is working with the [EDF] to provide the [District] with a water accounting platform.

Conclusion and Implications

Though still in its early development, the water trading platform is a creative, technology- and datadriven tool that many GSAs will undoubtedly monitor as they develop and implement their own GSPs. Of course, in most basins, establishing groundwater allocations to be traded in the first place presents a formidable challenge.
(Derek Hoffman, Michael Duane Davis)

REGULATORY DEVELOPMENTS

U.S. ENVIRONMENTAL PROTECTION AGENCY ISSUES PROPOSED RULE LIMITING STATE AND AUTHORIZED TRIBAL AUTHORITY WHEN ISSUING SECTION 401 WATER QUALITY CERTIFICATIONS

On August 9, 2019, the U.S. Environmental Protection Agency (EPA) issued a proposed rule, which would limit the authority of the states and authorized tribes to review the water quality impacts of discharges from federally-permitted energy and other infrastructure projects. Review of projects by states and authorized tribes will be limited to a one-year review period (or shorter "reasonable" timeframe if established by relevant federal permitting agencies) that begins upon receipt of a Clean Water Act (CWA) § 401 certification application request, rather than when the application is deemed complete by the reviewing state agency or authorized tribe. If not completed within the firm one-year timeframe, the ability of the state or authorized tribe to impose conditions pursuant to CWA § 401 will be waived. More importantly, the proposed rule limits the states' and tribes' authority to consider only water quality impacts of projects, eliminating the ability of states to impose conditions other than those specifically related to the discharge of "pollutants" from a "point source" into "waters of the United States," such as conditions that pertain to "non-point" source discharges or other unrelated project elements. Because a limitation or requirement offered by a state or authorized tribe unrelated to water quality would not be considered a "condition" that the federal agency must include in the federal permit under the proposed rule, federal agencies are being provided what has been called a "veto" power over the state's or authorized tribe's conditions.

Background

Under § 401 of the CWA, states and authorized tribes have the authority to assess the potential quality impacts of discharges from federally-permitted or licensed projects into the navigable waters within their borders through a water quality certification process. Section 401 requires a state or an authorized tribe to finish its review within a reasonable period, which shall not exceed one year after "receipt" of such request, or the state certification requirement is waived. (33 U.S.C. §§ 1341(a)(1), 1377(e).) Further, CWA § 401(d) authorizes the states and authorized tribes to include conditions, including "effluent limitations and other limitations, and monitoring requirements" that are necessary to assure that the applicant for a federal license or permit will comply with the CWA and the appropriate state law requirements. (33 U.S.C. §§ 1341(d), 1377 (e).)

On April 10, 2019, President Trump issued Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth" (Exec. Order No. 13868, 84 Federal Register 15495 (Apr. 10, 2019)), directing the EPA to update the "outdated" guidance and regulations regarding the CWA § 401 water quality certification process. The Executive Order stated that the outdated guidance and regulations are the cause of "confusion and uncertainty and are hindering the development of energy infrastructure." As such, the Executive Order directed the EPA to issue new § 401 guidance within 60 days of the Order, and propose new § 401 regulations within 120 days of the Order.

Following the Executive Order, on June 7, 2019, the EPA issued an updated guidance document to modernize previous guidance and clarify existing CWA § 401 requirements. On August 9, 2019, EPA then issued the proposed rule to revise the CWA § 401 water quality certification regulations in accordance with the Executive Order.

Proposed Rule on CWA Section 401 Water Quality Certification

The EPA states that the proposed rule is based on consistency with the plain text of CWA § 401, and it:

> . . .increase[s] efficiencies, and clarif[ies] aspects of CWA § 401 that have been unclear or subject to differing legal interpretations in the past. The major changes of the proposed rule follow.

The proposed rule clarifies that CWA § 401 certification conditions are triggered only by the potential "discharge" into "a water of the United States" from a "point source." The proposed rule elaborates on the definitions of these key terms, but the intention is to strictly limit the scope of conditions that can be imposed. States and authorized tribes would no longer be able to consider effects and impose conditions unrelated to water quality as part of the water quality certification review process.

The proposed rule also mandates that any conditions resulting from a CWA § 401 certification be imposed not in the certification, but in a federal permit issued for the project.

The proposed rule limits the review period of the states and authorized tribes to a maximum of one year, and the federal agencies have the discretion to establish even a shorter review period, as long as the agency's determination is reasonable. This review period commences upon receipt of a certification application, rather than the receipt of a "complete application," as determined by the certifying authority. If not complete within the timeframe, the states or authorized tribes waive their ability to impose conditions under CWA § 401.

Conclusion and Implications

Once the proposed rule is published in the Federal Register (Docket ID No. EPA-HQ-OW-2019-0405), EPA will open a 60-day public comment period. Pursuant to Executive Order 13868. The Executive Order requires that the proposed rule must be finalized by May 2020. The proposed rule effectively narrows the scope and timeline of state review of the water quality certification and, to an extent, provides federal agencies with a veto power over the water quality certification conditions. If this proposed rule is finalized, in all likelihood, it would be subject to challenges from several states and tribes. In fact, Attorneys General of 16 states previously filed a comment letter with the EPA on May 24, 2019, stating that the proposal undermines the broad statutory authority of the states to vet projects for impacts on water quality under CWA § 401, (*see generally*, *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology,* 511 U.S. 700 (1994)), and the long standing principles of cooperative federalism. (Nicole Granquist, Hina Gupta, Meredith Nikkel)

NEW BIOLOGICAL OPINIONS ANTICIPATED TO IMPACT THE COORDINATED OPERATION AND WATER SUPPLY OF THE STATE'S LARGEST WATER PROJECTS

In August 2016, the U.S. Department of the Interior, the U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) requested reinitiation of Endangered Species Act (ESA) Section 7 consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) on the Coordinated Long-Term Operation of the federal Central Valley Project (CVP) and State Water Project (SWP). It is anticipated that pursuant to this consultation process, FWS and NMFS will soon issue new Biological Opinions for the coordinated long-term operation of the CVP and SWP. The new Biological Opinions may have significant implications for the operations and water supplies of the CVP and SWP—the two largest water storage and delivery systems in the State of California.

Background

The CVP is the largest water storage and delivery system in California and provides water to irrigate approximately 3.25 million acres of farmland and supplies water to more than 2 million people through long-term water contracts. The SWP is the largest state-operated water supply project in the United States. The CVP and SWP have been operated pursuant to a series of cooperative operating agreements between the Bureau and DWR.

The Bureau's operation of the CVP is subject to numerous laws, including the ESA, 16 U.S.C. § 1531 *et seq*. Under the ESA, since the early 1990s, the Bureau has engaged in what are referred to as "Section 7" consultations (16 U.S.C. § 1536) with the FWS and the NMFS. At the conclusion of these

Section 7 consultations, FWS and NMFS have issued Biological Opinions regarding the potential effects of the coordinated long-term operation of the CVP and SWP on certain species listed under the ESA and those species' critical habitat.

The coordinated long-term operations of the CVP and SWP are currently subject to two Biological Opinions issued pursuant to § 7 of the ESA—a 2008 Biological Opinion issued by FWS and a 2009 Biological Opinion issued by NMFS. The 2008 Biological Opinion concluded that the proposed coordinated operations of the CVP and SWP were likely to jeopardize the continued existence of the ESA-listed delta smelt and included a Reasonable and Prudent Alternative (RPA) designed to allow continued operations through various operating prescriptions. Likewise, the 2009 Biological Opinion concluded that the proposed coordinated operations of the CVP and SWP were likely to jeopardize the continued existence of certain ESA-listed salmonid species and included a RPA with several operating restrictions. The prescriptions in those two Biological Opinions have been estimated to have reduced the long term average annual combined deliveries by the CVP and SWP by about one million acre-feet.

Anticipated New Biological Opinions

In August 2016, the Bureau and DWR jointly requested reinitiation of ESA Section 7 consultation with FWS and NMFS on the Coordinated Long-Term Operation of the CVP and SWP, and FWS and NMFS accepted the reinitiation request. According to the Bureau, it requested reinitation of consultation based upon the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evolution of best available science. The new Biological Opinions are nearing completion and are anticipated to be released within the next few months.

Meanwhile, on July 11, 2019, the Bureau issued a Draft Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*:

> . . .evaluating the potential long-term direct, indirect, and cumulative impacts on the environment that could result from implementation of modifications to the continued long-term operation of the CVP and SWP. (Draft EIS at p. 1-2.)
>
> According to the Bureau, the:
>
> . . .EIS evaluates alternatives to maximize water supply deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements and to augment operational flexibility by addressing the status of listed species. (*Id.* at p. 1-1.)

The Draft EIS was available for public review, and the Bureau was accepting comments on the draft until August 26, 2019. The Bureau is not expected to decide on changes to CVP operations until late in 2019 or early 2020. The conclusions of the new Biological Opinions will certainly inform that decision.

Conclusion and Implications

If the new Biological Opinions conclude that the proposed coordinated operations of the CVP and SWP are likely to jeopardize the continued existence of ESA-listed species, they will contain RPAs designed to modify proposed operations so as to avoid a jeopardizing effect. The impact of the biological opinions' prescriptions on CVP and SWP water supply, whether it will increase or decrease, cannot be determined until the Biological Opinions issue.

NEPA requires that the Bureau analyze any new operating requirements contained in the Biological Opinions' RPAs for potentially significant environmental impacts. If the RPAs included in the new Biological Opinions impose new requirements that fall outside of the range of alternatives for operations analyzed in the Bureau's Draft EIS, the Bureau may be required to supplement its NEPA analysis. The coming months will therefore be very important in determining what new rules will govern CVP and SWP operations, and how CVP and SWP water supplies will be affected.

The only certainty is that litigation will follow. The final word on the next set of ESA rules governing CVP and SWP operations likely will not be known for a couple of years or more.
(Rebecca Harms, Dan O'Hanlon)

U.S. BUREAU OF RECLAMATION AND SANTA CLARA VALLEY WATER DISTRICT RELEASE DRAFT ENVIRONMENTAL DOCUMENTS FOR SAN LUIS LOW POINT IMPROVEMENT PROJECT

Supply reliability concerns in the San Luis Reservoir (Reservoir) persist as a result of storage limitations and the threat to water quality posed by increased algae growth the occurs in the Reservoir when water levels are lower in the summer and late fall. On July 25, 2019, the U.S. Bureau of Reclamation (Bureau) and the Santa Clara Valley Water District (SCVWD) released a draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for public comment regarding the San Luis Low Point Improvement Project (Project), an initiative aimed at addressing these reliability concerns. The draft EIS/EIR identifies the expansion of the neighboring Pacheco Reservoir (Reservoir) as the preferred option among several alternatives studied. Though the Project has critics and practical hurdles remain, the release of the preliminary EIS/EIR represents a significant step toward ensuring supply reliability in the Reservoir.

The Reservoir and Seasonal Supply Concerns

The Reservoir is located in Merced County and was completed in 1967, comprising part of the State Water Project and federal Central Valley Project (CVP). Jointly owned and operated by the Bureau and the Department of Water Resources, the Reservoir is the fifth largest dam in California, and one of the largest off-stream reservoirs in the United States. With a total capacity of over 2 million acre-feet, the Reservoir contains diverted water from the San Joaquin Delta and serves as a primary source of supply to Silicon Valley, the San Joaquin Valley, the Central Coast and Southern California. SCVWD receives deliveries from the Reservoir as a part of the San Felipe Division of the CVP.

A "low point problem" has historically plagued the Reservoir in the summer and late fall, when the water level falls below 300,000 acre-feet. Under such conditions, the water warms and causes algae to grow quickly, degrading the quality of Reservoir water to the extent that it can no longer be used for municipal or industrial purposes. This type of "algal bloom" also creates dangerous conditions for humans using the Reservoir for recreation, as exposure to toxic blue-green algae, or cyanobacteria, can cause adverse effects in humans including flu symptoms, skin rash and eye irritation.

In addition to contamination of Reservoir water due to algae growth, periods of drought can also lead to the water level in the Reservoir being lowered so far that it falls below intake pipes and can no longer be extracted for use by SCVWD and others that rely on Reservoir water. As the Reservoir is the only delivery point for SCVWD's CVP water, algae contamination and/or exposed intakes can mean that SCVWD has no access to a critical source of supply when low point conditions occur.

Preferred Project Alternative Identified

The Bureau and SCVWD are spearheading the Project to ensure that SCVWD and others in the San Felipe Division have reliable access to uncontaminated CVP allocations as scheduled. The recently-released draft environmental documents set forth multiple possibilities for addressing concerns about Reservoir supply reliability, including lowering intake pipes in the Reservoir, enhancing water treatment capabilities, the expansion of the Reservoir and the expansion of the Pacheco Reservoir.

Among the contemplated approaches, the draft EIR/EIS identifies the expansion of the Pacheco Reservoir as the most environmentally-sound option to achieve the Project's objectives. The expansion includes a new dam and reservoir near Pacheco Pass in Santa Clara County, and the expanded Pacheco Reservoir would hold approximately 140,000 acre-feet of water, over 20 times the current capacity of the existing reservoir. The Pacheco Reservoir alternative addresses the "low point problem" by allowing SCVWD's supply in the Reservoir to be diverted prior to the dry weather and stored in the expanded Pacheco Reservoir so that it can be released to SCVWD when Reservoir supplies are inaccessible.

SCVWD would finance, construct and operate the new Pacheco Reservoir. SCVWD intends to begin construction in 2024 provided that remaining hurdles to progress can be successfully overcome.

Project Hurdles Remain

One primary hurdle to the completion of the Project is financing. The expansion of the Pacheco Reservoir is one of the most expensive Project alternatives contemplated, and is expected to cost approximately $1.1 billion. SCVWD still needs to secure substantial funding to cover the entire cost, and hopes that federal assistance and partnerships with local water districts to share water will generate the necessary funds.

Other obstacles to progress include the private ownership of property surrounding the Project site, as a local area businessman purchased much of the land in 2017 before SCVWD could acquire it. The owner has limited SCVWD access to the property, and SCVWD may be forced to resort to a potentially costly process of gaining necessary access by way of eminent domain.

Additionally, environmental interests have expressed concerns about the impact of the Project, which may give rise to legal challenges. The effect of the dam to be built in connection with the expansion of Pacheco Reservoir on the immediately surrounding forest and stream habitats has been a primary criticism. Counter arguments in favor of the Project cite the environmental benefits described in the draft EIS/EIR, including support to the Bay-Delta ecosystem and recovery of a threatened steelhead population through increased water supply. SCVWD would take measures to ensure these benefits to wildlife, including the transfer of a portion of its CVP water in below normal water years to the Refuge Water Supply Program overseen by the Bureau and the United States Fish and Wildlife Services.

Conclusion and Implications

The draft EIS/EIR examines multiple options to address ongoing seasonal supply reliability concerns in the Reservoir, particularly with respect to the needs of the San Felipe Division, and identifies the expansion of the Pacheco Reservoir as the preferred and most environmentally-sound plan to solve the problem. Potential legal and financial impediments must be surmounted, but the release of preliminary environmental documents represents a key milestone for those local and regional interests seeking to stabilize a critical source of water supply. The environmental documents indicate that written comments on the EIS may be submitted to the Bureau, and comments on the EIR submitted to SCVWD, through the close of business on September 24.
(Wesley A. Miliband, Andrew D. Foley)

CALIFORNIA DEPARTMENT OF WATER RESOURCES APPROVES NINE ALTERNATIVES TO GROUNDWATER SUSTAINABILITY PLANS

On July 17, 2019, the California Department of Water Resources (DWR) announced its approval of nine alternatives to groundwater sustainability plans that had been submitted by agencies throughout the State of California in an effort to meet the requirements of the Sustainable Groundwater Management Act (SGMA) in their respective basins. An additional six alternatives were not recommended for approval; the submitting agencies for these remaining alternatives have 30 days to respond to DWR's initial recommendation before DWR issues its final decisions in mid-October 2019.

Background and Authority

The Sustainable Groundwater Management Act requires that any groundwater basin designated as medium- or high- priority by DWR be managed under a Groundwater Sustainability Plans (GSP) or an alternative to a GSP before certain statutory deadlines (January 2020 for critically overdrafted basins, and January 2022 for all other medium- and high- priority basins). Legally acceptable alternatives to GSPs include: 1) an existing groundwater management plan; 2) groundwater management pursuant to an adjudication action; or 3) an analysis of basin conditions that demonstrates that the basin has operated within its sustainable yield over a period of at least ten years. (Water Code §10733.6). The deadline for submitting these alternatives for DWR approval was January 1, 2017. (*Id.*)

Agencies in 15 separate basins submitted alternatives for approval relying on existing groundwater

management plans; ten-year sustainability analyses; or in some basins, a combination of the two. No submittals addressed groundwater management pursuant to an adjudication action. Each alternative was subject to a four-month public review and comment period, during which members of the comment were invited to provide feedback on the submittals, and submitting agencies were allowed to provide responsive materials. Following that comment period, DWR reviewed the submitted alternatives and issued its July 2019 recommendations.

Evaluation and Assessment by the Department of Water Resources

Alternatives that did not cover an entire basin; that were submitted in basins that were not in compliance with CASGEM® monitoring requirements; that failed to include information required by SGMA; or that were not submitted prior to the January 1, 2017 statutory deadline were not eligible for consideration by DWR. (Water Code §10733.6.) Once these preliminary criteria were met, agencies submitting an alternative for DWR approval were required to demonstrate that: 1) the elements of the alternative were "functionally equivalent" to the required elements of a GSP; and 2) that those elements were "sufficient to demonstrate the ability of the alternative to achieve the objectives of" SGMA." (Cal. Code Regs., tit. 23 (SGMA Regs), § 358.2(d).) To determine whether an alternative complies with the objectives of SGMA, DWR is additionally required to weigh the alternative against key regulatory requirements applicable to GSPs, including the ability of a GSP to meet the sustainability goal for the basin. (SGMA Regs. § 358.4(b).)

In addition to demonstrating compliance with SGMA's objectives and functional equivalency, agencies seeking approval of an alternative that were based on an existing groundwater management plan were required to demonstrate that implementation of that plan is likely to achieve sustainability in the basin within 20 years. (SGMA Regs., § 355.4.) Of the eight basins for which alternatives were submitted under these criteria, seven were approved. These include the Niles Cone; Indio; Pajaro Valley; Mission Creek; Santa Clara; Tahoe South; and Llagas Area Subbasin alternatives.

Local agencies that proceeded under Water Code § 10733.6(b)(3) (analysis demonstrating that the basin has operated within its sustainable yield for at least ten years) were additionally required to demonstrate that no undesirable results were present in the basin, or had occurred in the preceding ten years. Data submitted in support of those alternatives was required to include continuous data from the end of that ten-year period to current conditions. (SGMA Regs § 358.2(c).) Only two of the alternatives submitted on this basis (Coastal Plan of Orange County Basin; Livermore Valley Basin) were approved by DWR.

Next Steps for SGMA Compliance in Alternative Basins

Each approved alternative was analyzed in a DWR staff report, which was published at the time of the approval. Those staff reports include not only an assessment of the alternative's current sufficiency under the regulations, but additionally include staff recommendations for the improvement of the alternative. These latter recommendations are particularly noteworthy, because following the initial DWR approval, alternatives are to be re-submitted by the agency and reviewed by DWR at five-year intervals. In those five-year reviews, DWR will evaluate "the implementation of the corresponding groundwater sustainability program for consistency with this part, including achieving the sustainability goal" for the basin in question. (Water Code § 10733.8).

DWR's notice to agencies whose alternatives were not recommended for approval specifically noted that DWR "did not consider, and does not conclude" that the basin in question was unsustainably managed. The grounds upon which alternatives were rejected varied between basins; however, a perceived lack of objective thresholds or sustainability criteria was cited in multiple cases as the basis upon which DWR rejected the alternative in question. Agencies that submitted alternatives that were not recommended for approval were directed to inform DWR within 30 days if they believed that DWR missed information in the original submittal, but were asked not to submit any new information or data during that period. Three basins (Sutter Basin, Napa Valley Subbasin, and the Eel River Subbasin) were granted extensions of time to submit their responses to DWR's staff report. Following receipt of these responses, DWR staff will finalize DWR's assessment of the remaining alternative submittals. Decisions on these remain-

ing basins are anticipated by mid-October of 2019. If DWR does not ultimately approve an alternative for these basins, they will be required to prepare and submit groundwater sustainability plans no later than January 31, 2022.

Conclusion and Implications

The Department of Water Resources's long-awaited decision marks the end of a more than two-year review of the submitted alternatives. Agencies currently preparing GSPs will also review these decisions and the supporting materials closely: DWR will rely on many of the same operative regulations to review GSPs submitted in 2020 (critically overdrafted basins) and 2022 (all other high- and medium- priority basins). Given DWR's directive that alternatives should perform as the functional equivalents to GSPs, these early findings on alternatives may provide important insight for DWR's future review of GSPs. DWR staff recommendations and analysis of the submitted alternatives are available at https://water.ca.gov/Programs/Groundwater%20Management/SGMA-Groundwater-Management/Alternatives. (R. A. Smith, Meredith Nikkel)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES FINAL CALIFORNIA WATER PLAN UPDATE 2018

The California Department of Water Resources (DWR) publishes a California Water Plan Update every five years as required by the California Water Code. DWR recently released its latest update—the Final California Water Plan Update for 2018 (Plan). The Plan outlines the state's strategy for sustainably managing and developing California's water resources for current and future generations. It also presents the status and trends of California's water-dependent natural resources, water supplies and agricultural, urban and environmental water demands.

Background

DWR updates the California Water Plan Update every five years to incorporate the latest information and science. The Plan and the updating process provide a way for stakeholder groups to collaborate on findings and recommendations and make informed decisions regarding California's water resources. Policy makers, elected officials, government agencies, tribes, water and resource managers, businesses, academia, stakeholders and the general public all look to the Plan to inform decision-making.

While the Plan itself cannot mandate actions or authorize spending for specific actions, and while it does not make project or site-specific recommendations, it does require policy and lawmakers to take definitive steps to authorize the specific actions proposed and appropriate funding needed for their implementation. The ultimate goal for the Plan and each update is to receive broad input and support from Californians, meet California Water Code requirements, guide state investments and advance integrated regional water management and regional sustainability.

The Need for a Visionary Plan Moving Forward in California

The 2018 Plan update states that California has experienced significant effects of climate change since the last Plan update in 2013. Devastating drought, widespread flooding, sea level rise and historic wildfires have all been challenges California has faced over the past several years. In the past decade alone, California weathered the deepest drought and wettest period on record. These two extremes provide a good picture of the volatility and uncertainty of California's hydrology. The 2018 Plan update recognizes the need to adapt to these challenges by encouraging a greater collaborative and coordinated statewide water management throughout the state.

The Revisions and California's Water Roadmap to 2024

The most significant change in the 2018 Plan update is DWR's awareness and sensitivity to climate

change and its anticipated impact on water use in California. Within this context, the 2018 Plan update focuses on six primary goals and recommends many specific priority actions within those goals:

•Improve Integrated Watershed Management
Priority actions include: strengthen state support for vulnerable communities, support the role of working landscapes, and promote flood-managed aquifer recharge and sustainable groundwater management policies. The Plan recommends that DWR provide technical, planning and facilitation assistance for local and regional entities to evaluate opportunities and implement projects using flood flows and alternative water supplies for managed aquifer recharge.

•Strengthen Infrastructure Resiliency
The primary priority action for this goal is improving infrastructure and promoting long-term management. It prioritizes utilizing natural infrastructure and promoting partnerships, and strongly supports local and regional efforts to build water supply resilience across California.

•Restore Ecosystem Functions
Priority actions include: addressing legacy impacts, facilitating multi-benefit water management projects, and quantifying natural capital.

•Empower Under-represented Communities
Priority actions include: expanding tribal involvement in regional planning efforts and engaging proactively with disadvantaged community liaisons. The Plan addresses California's vulnerable communities that lack access to a safe and reliable water supply and suggests that the state work with disadvantaged community liaisons to provide technical, managerial and financial expertise to prepare proposals for infrastructure and operations and maintenance improvement programs.

•Improve Inter-Agency Alignment and Address Regulatory Challenges
Priority actions include: incorporating ecosystem needs into water management infrastructure planning and implementation, streamlining ecosystem restoration project permitting, and addressing regulatory challenges.

•Support Adaptive Management and Long-Term Planning
Priority actions include: facilitating comprehensive water resource data collection and management, coordinating climate science and monitoring efforts, improving performance tracking, developing regional water management atlas, reporting on outcomes of projects receiving state financial assistance, expanding water resource education, and exploring ways to develop stable and sufficient funding. It stresses the importance of the state assisting local agencies with their development of long-term solutions for infrastructure management, including water supply reliability, flood risk reduction, aquifer replenishment and remediation, and surface and groundwater storage. The Plan also underscores that effective water management requires access to reliable data and information, and as a result, recommends that state agencies should maintain data management best practices and work with local agencies to improve data gathering, accessibility, quality and related decision-support tools.

Conclusion and Implications

In April 2019, Governor Newsom signed an Executive Order calling for state agencies to work together to form a comprehensive strategy for building climate-resilient water systems through the 21st Century. The Plan's focus on regional and local partnerships reflects a timely response to that executive order and its important role in informing and better aligning state and local agencies, water suppliers and stakeholders on the best ways to build California's water resilience strategy as we enter a new decade. (Chris Carrillo, Michael Duane Davis)

LEGISLATIVE DEVELOPMENTS

GOVERNOR NEWSOM SIGNS SB 200 ESTABLISHING SAFE AND AFFORDABLE DRINKING WATER FUND

Beginning in fiscal year 2020-21 and until June 30, 2030, the California State budget will include a newly-established "Safe and Affordable Drinking Water Fund" to be appropriated by an allocation amounting to 5 percent of the proceeds of the state Greenhouse Gas Reduction Fund (GGRF), up to $130 million per year. If, beginning in fiscal year 2023-24 and until June 30, 2030, the annual transfer is less than $130 million, the difference will be covered by a transfer from the state's General Fund. In addition, in August 2019, the State Water Resources Control Board (SWRCB) also authorized $80 million to assist severely disadvantaged community projects. This latter one-time funding comes from Proposition 68 appropriations.

Governor Newsom's meeting with the families of a small community outside of Sanger, California highlighted his commitment to the issue of safe and reliable drinking water, while also serving well to illuminate the situation in which thousands of Californians find themselves in day in and day out. For instance, the families of the community of Tombstone receive their water through a grant program in the form of five eight-gallon jugs every other week. They receive their water this way because their own taps—when functioning—would spray air, dirt, and other contaminants along with any water produced.

This community is just one of many across the state in need of assistance, which is why the 2019-2020 state budget, enacted on June 27, 2019, allocated $130 million to safe drinking water solutions. Just shy of one month after the enactment of the state budget, SB 200 was signed into effect to help such disadvantaged communities in accordance with California's policy that safe, clean, affordable, and accessible water is a right that every human being is entitled.

The Life and Death of a Water Tax

The budget action came about in a surprise move by the Senate that undercut a multi-year effort to impose a tax on water agencies by some of the most powerful players in Sacramento, including former Governor Jerry Brown. The hope of certain non-governmental agencies and high-level administrative staff was to tax drinking water to provide a permanent funding source for the more than 300 disadvantaged communities currently without access to safe drinking water. While the goal was laudable, the method created a host of problems. Opponents argued that a tax on water is regressive and takes away funds from local investment in needed water infrastructure.

The Budget and the 'No Tax' Option

Although rumors of a "no tax" option in the Senate had made the rounds for weeks before the passage of SB 200, the speed of the last-minute budget play still came as a shock to many involved. On one morning, with little warning or fanfare, the budget item appeared on a budget subcommittee agenda and was passed, and Senate leadership let it be known that there would be no vote on any tax on the Senate Floor this year. It took several more weeks for all stakeholders to support the action, but all sides eventually did.

Allocating the money was the first and most significant part of creating the new program, but all budget items need control language to direct how the money will be spent. Usually that happens in a budget trailer bill, but in instance Senator Bill Monning was allowed to put the control language into one of his bills. That bill became SB 200, which passed with no opposition and significant bipartisan support.

Senate Bill 200

In brief, SB 200 creates the account to receive the funds from the GGRF and the General Fund, and requires the SWRCB to create a plan to identify public water systems that consistently fail to meet drinking water standards, and then prioritize the funding needs. Most importantly, SB 200 addresses the funding gap that has frustrated numerous attempts to address the problem in the past. Hundreds of millions

of dollars have been made available over the last ten years for safe drinking water, but new projects and infrastructure need operation and maintenance to be effective. These are the funds that most smaller water agencies lack. By providing a reliable way to fund operations and maintenance for safe drinking water, SB 200 will likely be viewed as one of the more significant steps in addressing the problem.

The bill establishes the operation of public water systems, wherein administrators of such public water systems may be contracted with or provided with grant funding to assist with the goal of providing an adequate supply of affordable, safe drinking water. Local agencies and privately owned public utilities may file applications with the SWRCB to serve as administrator and operate their designated water system, but eligible recipients of grant funding detailed in the Health and Safety Code § 116766(c) extend to nonprofit organizations, mutual water companies, Native American tribes, and others.

Grant funding under the bill will be provided to eligible applicants for a host of specified purposes (listed in California's Health and Safety Code § 116766) including activities related to the delivery of safe drinking water, consolidation and expansion of existing water systems, efforts to create self-sufficiency of water systems, and the accompanying board costs for implementation and administration of programs.

Conclusion and Implications

Recent statistics indicate that nearly one million Californians rely on water from non-public water systems or reside in disadvantaged communities that are disproportionately affected by a lack of access to clean drinking water. Senate Bill 200 makes funds available for projects aimed at providing safe drinking water to rural communities within the state including, without limitation by way of consolidation of water systems or extension of drinking water services to other public water systems, domestic wells and small systems; the development, implementation, and sustainability of long-term drinking water solutions; and certain costs related to the implementation and administration of the various programs eligible for funding under this bill. The bill also addresses adverse impacts related to climate change on water supply and water quality by helping secure water resources statewide.

It is expected that the first set of funding will be provided in the form of grant and awards to those water systems facing the most pressing issues. Funding may also be provided to facilitate longer term planning solution as well.

The Drinking Water Fund offers much needed funding to water systems in need of assistance in reaching that level of accessibility so demanded by the California Constitution and by the policy adopted in Water Code § 106.3(a). With the bill's implementation, local agencies and other eligible applicants will be able to seek the additional aid they need in providing safe drinking water to the people of California.

The full text and history of SB 200, signed into law by Governor Newsom on July 24, 2019, is available online at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB200

(Miles Krieger, Steve Anderson, Wesley A. Miliband, Kristopher T. Strouse)

LAWSUITS FILED OR PENDING

PLAINTIFFS SEEK TO INVALIDATE WILDFIRE FUND BILL ON CONSTITUTIONAL GROUNDS

Recently, a small group of plaintiffs filed suit in U.S. District Court against several California agencies and officials challenging the legality and implementation of Assembly Bill 1054 (AB 1054), which Governor Newsom signed into law on July 12, 2019. Among other things, AB 1054 establishes the Wildfire Fund to pay eligible claims arising from covered wildfires, and provides for the issuance of revenue bonds to help pay for the Wildfire Fund. Additionally, AB 1054 allows regulated utilities to recover costs and expenses arising from wildfires if certain legal standards and requirements are met, as established by the bill. In their complaint (Complaint), plaintiffs raise a handful of state and federal constitutional challenges to invalidate AB 1054 and prevent its enforcement by applicable state agencies and officials.

Background

The Complaint alleges that from 2007 onward, California electrical utilities committed a variety of safety violations that caused catastrophic wildfires, including the recent Thomas, Woolsey, and Camp fires. In particular, plaintiffs allege that various electrical utilities violated power line safety rules and, with respect to Pacific Gas & Electric specifically, fostered a dysfunctional safety culture that resulted in billions of dollars in damage from wildfires. The Complaint alleges that utility industry lobbying resulted in AB 1054, which provides regulated utilities: 1) a favorable cost-recovery standard for wildfire-related costs, and 2) a taxpayer-funded wildfire fund for future uninsured wildfire losses.

According to the Complaint, Senate Bill 901 (SB 901), which became effective January 1, 2019, codified a long-standing administrative standard used by the California Public Utilities Commission (PUC), known as the "prudent manager standard." Plaintiffs allege that this standard required utilities to affirmatively show that their actions relating to costs utilities seek to recover were "prudent." According to plaintiffs, SB 901's codification of this standard provided a 12-factor test relating specifically to wildfire ignitions. AB 1054, plaintiffs contend, eliminates these requirements and closely parrots communications from investor-owned utilities made to a Governor-appointed team recommending changes to public utility law.

Additionally, the Complaint alleges that intense utility industry lobbying is responsible for, among other things, capitalization of the Wildfire Fund by revenues from the sale of bonds issued by the California Department of Water Resources. According to the Complaint, the bonds will be repaid by charges to utility customers that were first imposed during the power crisis in 2001. While those charges are set to expire in 2022, AB 1054 extends them to 2035.

Claims Alleged

Plaintiffs allege six claims for relief in the Complaint on the grounds that defendants violated the: 1) due process clauses under the U.S. and California Constitutions; 2) takings clauses of the U.S. and California Constitutions; 3) urgency clause under the California Constitution; 4) right to access information under the California Constitution; and 5) prohibition against unlawful gifts of public funds under the California Constitution. Plaintiffs also seek declaratory relief as their sixth cause of action.

Due Process

The Complaint's due process cause of action alleges that AB 1054 impermissibly shifts the burden of proof relating to the prudency of a utility's conduct to ratepayers, at the same time as ratepayers have procedural and informational disadvantages in PUC proceedings that tend to favor utilities with expansive lobbying, legal, and public relations resources. Together, the Complaint alleges, these hurdles violate plaintiffs' due process rights.

In particular, AB 1054 allows electrical utilities regulated by the PUC to recover costs and expenses arising from wildfires if those costs and expenses are just and reasonable based on reasonable conduct by

the utility. Under AB 1054, an electrical utility's conduct is reasonable if, as it relates to wildfire ignition, the conduct was consistent with actions that a reasonable utility would have undertaken in good faith under similar circumstances, at the relevant point in time, and based on the information available to the utility at that time. AB 1054 places the burden of proof on a utility to demonstrate that its conduct was reasonable, unless the utility had a valid safety certification for the period of time in which the wildfire at issue ignited. If the utility had a valid safety certification, AB 1054 deems the utility's conduct reasonable unless a party creates a serious doubt as to the reasonableness of the utility's conduct. If the party does so, the utility then has the burden of dispelling this doubt to prove reasonableness. This burden shifting, coupled with perceived procedural hurdles, provides the framework of plaintiffs' due process claim.

Takings Claim

Plaintiffs also allege that AB 1054 violates U.S. and California takings prohibitions by allowing utilities to pass on wildfire costs to ratepayers through the re-configured prudent manager standard, which has the alleged effect of imposing unjust and unreasonable rates that do not balance the interests of utility customers against those of the utilities. Additionally, the Complaint alleges that ratepayers may be required to subsidize, without limit, the Wildfire Fund through electricity rates which, coupled with a diminished prudent manager standard, does not incentivize utilities to prevent wildfires and thus exposes ratepayers to potentially limitless wildfire liability costs.

Present Necessity Claim

The Complaint further contends that AB 1054 does not serve any present necessity; impermissibly limits the public's right to information by protecting an AB 1054-created advisory board's internal communications from disclosure; and gifts public money by covering the Department of Water Resources' initial costs in issuing new bonds and providing loans to utilities if ratepayer charges are not imposed.

Conclusion and Implication

The Complaint was filed on July 19, 2019 and, as of the time of this writing, no responsive pleading is due yet. Accordingly, it is uncertain how defendants will respond. Nonetheless, invalidating AB 1054 could have significant impacts on the certainty of wildfire claim recovery moving forward, but could also force a court to carefully examine the newly adopted legal standards regarding burdens of proof and the financing mechanisms behind the Wildfire Fund that could create uncertainty for the electrical utility industry if those standards and mechanisms are invalidated. For more information, *see:* "Complaint for Declaratory and Injunctive Relief for U.S. and California Constitutional Violations of (1) Due Process, (2) Takings Clause, (3) Urgency Clause, (4) Right to Access Information, and (5) Gift of Public Funds," available at: https://www.scribd.com/document/418815778/Complaint#from_embed
(Steve Anderson, Miles Krieger)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DELIVERS MAJOR CONSTITUTIONAL 'TAKINGS' DECISION

Knick v. Township of Scott, Pennsylvania, ___U.S.___, 139 S.Ct. 2162 (U.S. June 21, 2019).

On June 21, 2019, the United States Supreme Court delivered a major property rights victory by giving property owners a direct path to federal court that had been closed since 1985. In a 5-4 decision in *Knick v. Township of Scott, Pennsylvania*, the Supreme Court held that a property owner has an actionable federal claim under the Takings Clause of the Fifth Amendment, "when the government takes his property without paying for it" and may "bring his claim in federal court under [42 U.S.C] § 1983 at that time."

This decision overrules *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, (1985) (*Williamson County*) where the Supreme Court held that a property owner had not suffered a Fifth Amendment violation unless his claim for just compensation was first denied by a state court under state law. The decision also eliminates its 2005 decision in *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (*San Remo*), which caused the most difficulties in takings jurisprudence.

The majority opinion and the minority opinion both paint different pictures of the impact of this decision. The majority minimizes the impact of its holding, stating that it:

> . . .will not expose governments to new liability [and] will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

While the dissent states:

> Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes.

Both are, in part, correct.

Background

In *Knick v. Township*, Scott Township in Pennsylvania (Township) passed an ordinance in 2012 requiring all cemeteries to be kept open and accessible to the public during daylight hours. In 2013, a Township officer notified Rose Mary Knick (Knick) that "several grave markers" were on her property and that she was violating the Township's ordinance by failing to open her land to the public during the day. Knick sought declaratory and injunctive relief in state court claiming a "taking." The state court did not rule on Knick's request because "she could not demonstrate the irreparable harm necessary for equitable relief" as a result of the Township's withdrawal of its violation notice pending the court proceedings.

Knick then filed an action in the U.S. District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983. Knick alleged that the ordinance violated the Fifth Amendment's Takings Clause. The District Court, following *Williamson County*, dismissed Knick's claim and the Third Circuit Court of Appeals affirmed (also following *Williamson County*). The U.S. Supreme Court granted review to:

> . . .reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under Section 1983.

The Supreme Court's Decision

The Majority Identifies a 'Catch-22' and Overrules *Williamson County*

The majority's decision to overrule *Williamson County* was based in part on the widely accepted premise that takings plaintiffs were faced with a "Catch-22" as a result of *Williamson County* and the Supreme Court›s 2005 decision in *San Remo*. In *San*

Remo, the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." Thus, a takings plaintiff:

> . . .cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court.

The majority and dissent also had opposing interpretations on the text of the Takings Clause: "nor shall private property be taken for public use, without just compensation." Specifically, they disagreed on what action gives rise to a federal claim. According to the majority, it is the taking itself that gives rise to a federal claim. The dissent, however, opined that a Fifth Amendment violation only occurs if: 1) there is a taking *and* 2) there is a failure to provide just compensation, with the second condition only satisfied "when the property owner comes away from the government's compensatory procedure empty-handed." The disagreement between the majority and dissent is highlighted by the following exchange.

The majority decision stated:

> . . .[the Takings Clause] does not say: 'Nor shall private property be taken for public use, without available procedure that will result in compensation.'

Meanwhile, the minority position was as follows:

> [H]ere's another thing the [Takings Clause] does not say: 'Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures'

The majority ultimately opined that *Williamson County* was wrong and that its "reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." As a result, the majority held that *Williamson County's*:

> . . .state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.

The majority clarified that a government need not provide compensation in advance in order to protect its activities from injunctive relief as "long as the property owner has some way to obtain compensation after the fact." But even with such a procedure in place, "the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation" and may file his claim in federal court at that time.

Conclusion and Implications

What about the potential impacts of the decision in California? Only time will tell how California plaintiffs and California federal courts will apply inverse condemnation claims. For example, will plaintiffs first seek to adjudicate ancillary claims for invalidation of land use regulations before seeking federal court relief? How will the federal courts apply the California courts' requirements that to avoid the chilling effect of inverse condemnation claims on planning, plaintiffs must first seek to invalidate challenged land use regulations? While invalidation of the challenged land use regulations is not a prerequisite to an inverse condemnation claim in federal courts, it is possible that lack of an attempt at invalidation might have an impact on the claim.

Plaintiffs suing in state court first, will have to reserve their federal claims to have a "second bite" at the apple if they lose in California. Thus, due to the many state court claims a plaintiff can bring, will federal courts stay the federal claims and remand the state law claims to state court? There are a number of procedural issues that now have to be addressed.

Furthermore, the removal of the *Williamson County* procedural hurdle may not be a panacea for all takings claims. For example, California court precedent under rent control laws as to what is meant by a constitutional "fair return" may significantly impact whether there is a taking of property rights. As another example, California court precedent under the Coastal Act may limit whether mistaken assertion of Coastal Commission jurisdiction under the Coastal Act constitutes a taking. The substantive aspects of each particular inverse condemnation claim should be considered before filing in federal court.
(Boyd Hill, Nedda Mahrou)

IT'S ALL IN THE NAME—D.C. CIRCUIT FINDS TMDL FAILED THE CLEAN WATER ACT AS IT DIDN'T SPECIFY DAILY LIMITS ON *E. COLI*

Anacostia Riverkeeper, Inc. v. Wheeler, **___F.3d___, Case No. 16-cv-1651 (D. D.C. Aug. 12, 2019).**

Applying precedent, the D.C. District Court held that the U.S. Environmental Protection Agency (EPA) acted outside its authority under the federal Clean Water Act in approving Total Maximum Daily Loads for the discharge of *E. coli* from a Washington, D.C. sewage treatment plant, where the approved maximum values for single samples were described as variable daily limits that would fluctuate so as to allow an average "geometric mean" for the presence of fecal matter in surface water bodies used for recreational purposes.

Background

The Clean Water Act (33 U.S.C. § 1251 *et seq.*):

> . . .requires each State to develop water quality standards for any interstate water body in its boundaries, and to submit these standards to [the Environmental Protection Agency] for review and approval. 33 U.S.C. § 1313(a).

EPA's regulations specify that state water quality standards must include "designated uses" for each covered water body as well as "water quality criteria." 40 C.F.R. § 131.16. A water body's designated use "reflects" its uses by people, animals and plants. 40 C.F.R. § 131.10(a). "For example, a State might designate a water body for recreational use or agricultural use." Water quality standards, when met, "will generally protect the designated use," and include both numeric limitations on the concentration of specific pollutants as well as a narrative statements "applicable to a wide set of pollutants." 40 C.F.R. § 131.3(b); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 246, 349 (D.C. Cir. 1993).

To enforce the Clean Water Act's pollution limitations, "point source" discharge of pollutants, *i.e.*, from a "discernible, confined and discrete conveyance," requires the issuance of a National Pollution Discharge Elimination System (NPDES) permit requiring the discharge to meet the state's approved water quality standards. 33 U.S.C. § 1362(14). However, non-point source discharge "such as natural erosion, agricultural runoff, or overflows from urban areas" is not captured by the NPDES permit system, the NPDES system "alone does not ensure that pollution levels satisfy water quality standards."

Separately, states have a duty to monitor water quality in covered water bodies, and identify on a biennial basis "which of their water bodies do not, and based on existing pollution limitations are not expected to, attain the applicable water standards," submitting to EPA "so-called "303(d) lists.'" 40 C.F.R. § 130.7(d). For every water body on its 303(d) list, a state must "develop maximum daily loads" (TMDLs) that "specify the absolute amount of particular pollutants the entire water body can take on while still satisfying all water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F.Supp.2d 210, 215 (D. D.C. 2011), citing 33 U.S.C. § 1313(d)(c).

> The Act requires States to engage in a 'continuing planning process' to improve water body conditions, including by implementing TMDLs, 33 U.S.C. § 1313(e)(3)(C), and to consider TMDLs as part of water quality management plans to improve water conditions, 40 C.F.R. § 130.6(c)(1).

While "TMDLs themselves have no self-executing regulatory force," "NPDES permits must be 'consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. 40 C.F.R. § 122.44(d)(1)(vii)(B).'"

> In short, the TMDL process requires States to account for the background pollution caused by non-point sources and budget to each point source a daily discharge limit that will ensure compliance with the underlying water quality standards.

The District of Columbia, which is subject to the state-requirements of the Clean Water Act, classifies its covered water bodies as "Class A" waters for "primary contact recreation," or "activities that result in frequent whole body immersion or involve

a significant risk of ingestion of water." Its narrative water quality standards, therefore, state that the District's "surface waters of the District shall be free from substances in amounts or combinations that ... [c]ause injury to, are toxic to, or produce adverse physiological or behavioral changes in humans" and that they shall "be free of discharges of untreated sewage ... that would constitute a hazard to the users of Class A waters." The District adopted two numeric criteria, "a 'geometric mean' and a 'single sample value'—for *E. coli* concentration in the District's waters," specifying that:

> . . .'[t]he geometric mean criterion shall be used for assessing water quality trends and for permitting,' while '[t]he single sample value criterion shall be used for assessing water quality trends only.'

As a result of water sampling demonstrating the standards had not been met, in 2004 the District "for the first time developed TMDLs for fecal bacteria." The D.C. Circuit rejected EPA's approval of those TMDLs because they were expressed in "annual or season, rather than daily, terms." Following an extended process including multiple iterations of draft TMDLs and notice and comment periods, the District submitted revised TMDLs to EPA for approval in 2014. EPA approved the TMDLs in 2014, but subsequently withdrew the approval and its decision rationale after EPA was sued by D.C. Water, the operator of "Blue Plains Advanced Wastewater Treatment Plant, the world's largest advanced wastewater-treatment facility." It re-approved the TMDLs and issued a revised decision rationale in 2017.

The District Court's Decision

Applying the *Friends of the Earth v. EPA* Decision

The bulk of the District Court's decision applies the D.C. Circuit's opinion in *Friends of the Earth v. EPA*, 446 F.3d 140 at 144 (D.C. Cir. 2006), which held that the plain language of the Clean Water Act requires the adoption of total maximum *daily*, rather than seasonal or annual, pollutant loads. Environmental petitioners alleged the 2014 District TMDLs for the Blue Plains facility failed to comply with the *Friends of the Earth*, particularly as interpreted in the decision rationale.

The 2014 TMDLs establish "dry weather" "Max daily loads" for two separate outfalls at Blue Plains. The decision rationale explained that the Max daily load:

> . . .is not intended—despite its label—to function as a ceiling or limit applicable to discharges … [b]ut represents an average of the daily maximum loadings expected to occur. . .and still achieve the applicable water quality standard.

Further, the Max daily load is not a "'never-to-be-exceeded-on-a-daily-basis' target[] or value[]. … Rather, they "express on a 'daily' basis the modeled loads of *E. coli* predicted to meet'" the 30-day geometric mean numeric value. In other words, so long as the 30-day geometric mean numeric standard can be met, the daily maximum can be understood as, functionally, a "maximum daily load that varies on the basis of previous discharges."

The District Court held this rationale is contrary to *Friends of the Earth*, as it would:

> . . .allow[] the District to fold the first condition (establishing a daily maximum) into the second (ensuring the daily maximum is sufficiently low to achieve the water quality standard.

This conclusion is supported, the District Court reasoned, not only by the plain language of the Act but also by TMDLs' remedial and planning role. Remedial, because TMDLs are only required once a state concludes that its water quality standards cannot be met solely by enforcement of NPDES. Planning, because NPDES permits need only reflect and take account of TMDLs, rather incorporate TMDLs as strict limits on discharges:

> [T]he Act treats TMDLs as informational tools. They allow stakeholders—whether regulated sewer authorities, federal or local regulators, environmental groups, or recreational users—to plan and monitor water body anti-pollution efforts. Thus, regardless of whether identifying a daily maximum has immediate regulatory impact through NPDES permitting, it serves a purpose in the statutory scheme.

Faithfully applying *Friends of the Earth*, the District Court also rejected EPA's argument that *E. coli* is not a pollutant suited to the expression of maximum daily loads, noting that the agency—exercising statutory discretion granted by Congress—has the ability to revise its own regulatory pronouncement that *all* pollutants are suitable to be subject to TMDLs.

Conclusion and Implications

The D.C. District Court's application of *Friends of the Earth* reflects the Circuit split established by the D.C. Circuit when it "declined to follow the Second Circuit in holding that requiring daily loads" for all pollutants "would be 'absurd,'" *NRDC v. Muszynski*, 268 F.3d 91, 99 (2nd Cir. 2001)." That split may well persist so long as EPA declines to revise its blanket declaration that all pollutants are suitable for the expression of Total Maximum Daily Loads under the Clean Water Act. The court's opinion is available online at: https://earthjustice.org/sites/default/files/files/50_Judge_Memo%20Opinion_08-12-2019.pdf (Deborah Quick)

TRIBE INTERVENES AS REQUIRED PARTY AND CASE DISMISSED BASED ON TRIBAL SOVEREIGN IMMUNITY

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, ___F.3d___, Case No. 17-17320 (9th Cir. July 29, 2019).

In *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, the Ninth Circuit Court of Appeals affirmed a U.S. District Court for the District of Arizona decision to dismiss an action because a tribal corporation was a required party, but could not be joined because of tribal sovereign immunity. Similar assertions of tribal immunity and indispensable party status may arise in disputes over rights to surface and groundwater, in light of tribes' increasingly active assertion of their water rights.

Background

The Navajo Mine (Mine) is located on tribal land of the Navajo Nation, a federally recognized Indian tribe. The U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement issued a surface mining permit to the Mine pursuant to the Surface Mining Control and Reclamation Act of 1977. The Mine produces coal that the Four Corners Power Plant (Power Plant), also located on Navajo Nation tribal land, uses to generate electricity. Electric transmission lines run from the Power Plant to lands reserved to the Navajo Nation and Hopi Tribe.

In 2013, the Navajo Nation Council created the Navajo Transitional Energy Company (NTEC) to purchase the Mine from the private company that owned and operated it. The Power Plant is owned by several utility companies and operates subject to a lease agreement with the Navajo Nation. The agreement provides that the Mine sells coal only to the Power Plant, and the Power Plant buys coal only from the Mine. The Navajo Nation authorizes rights-of-way easements over Navajo lands for the Power Plant, and the Navajo Nation and Hopi Tribe authorize rights-of-way easements for transmission lines across tribal lands.

In 2011, the lease for the Power Plant operations was extended, causing the previous Mine owner to seek to renew the existing surface mining permit and apply for a new surface mining permit to expand operations. The lease amendment and its rights of way, and the permits were dependent on approvals from the federal defendants, who eventually granted them. NTEC, after taking ownership of the Mine, proceeded to make "significant financial investments" in its operations. At issue in the case were the federally approved leases and permits that permitted Mine and Power Plant operations expected to generate an estimated 40 to 60 million dollars of annual revenue for the Navajo Nation.

Procedural History

In April 2016, plaintiffs Dine Citizens Against Ruining Our Environment, San Juan Citizens Al-

liance, Amigos Bravos, Sierra Club, and Center for Biological Diversity (plaintiffs) sued the Bureau of Indian Affairs (BIA), the U.S. Department of Interior, the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE), the U.S. Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service, and David Bernhardt, the Secretary of the U.S. Department of the Interior, (federal defendants) challenging federal defendants' approvals that allowed the Mine and Power Plant to continue operations.

Plaintiffs alleged that: 1) the U.S. Fish and Wildlife's Biological Opinion violated federal Endangered Species Act (ESA) requirements; 2) the BIA, OSMRE, and BLM violated the ESA by relying on the flawed Biological Opinion; and 3) federal defendants violated the National Environmental Policy Act (NEPA) because they crafted "an unlawfully narrow statement of purpose and need for the project in the EIS," did not consider reasonable alternatives, and did not take the required "hard look" at mining complex impacts.

Plaintiffs requested that the court declare that the federal defendants violated the ESA and NEPA, order U.S. Fish and Wildlife to set aside its Biological Opinion, and order federal defendants to set aside their Record of Decision and Environmental Impact Statement (EIS) and remand for the agencies to further analyze their decisions. Plaintiffs' also sought injunctive relief, including stopping federal defendants from approving mining operations until they complied with NEPA.

NTEC filed a motion to intervene "for the limited purpose" of filing a motion to dismiss pursuant to Federal Rules of Civil Procedure §§ 19 and 12(b)(7). NTEC argued it was a required party because of its financial interest in the Mine and, because it could not be joined based on its tribal sovereign immunity, the action must be dismissed. The district court granted both motions. Plaintiffs appealed.

The Ninth Circuit's Decision

NTEC Was a Required Party That Could Not Be Joined because of Its Tribal Sovereign Immunity

The Ninth Circuit agreed with NTEC that it was a required party and joinder was mandatory because NTEC had a legally protected interest in the lawsuit's subject matter and NTEC's interests would be impaired if the lawsuit proceeded without it. Plaintiffs' lawsuit, if successful in vacating the federal defendants' approvals of the Biological Opinion and related environmental documents, could have retroactive effects that would impair NTEC's interests in the lease, rights-of-way, and surface mining permits relied on to operate the Mine and Power Plant. The court determined that:

> . . .without the proper approvals, the Mine could not operate, and the Navajo Nation would lose a key source of revenue in which NTEC has already substantially invested.

The Ninth Circuit determined that under Rule 19, NTEC could not feasibly be joined as a party to the litigation because of tribal sovereign immunity. The court considered the Rule 19(b) factors and a "wall of circuit authority" that favors "dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity" and concluded that the litigation could not continue without NTEC.

The "public rights" exception, which allows litigation to continue without a necessary party when litigation "seeks to vindicate a public right," did not apply. The court focused on "the practical effect" of the litigation on NTEC's rights. "[T]he question at this stage must be whether the litigation *threatens* to destroy an absent party's legal entitlements." Even though plaintiffs sought to require a redo of the NEPA and ESA process, it was with the implication that federal defendants should not have approved the mining activities, which presented a threat to NTEC's rights.

The Ninth Circuit noted that by not applying the public rights exception, it:

> . . .arguably 'produce[s] an anomalous result' in that '[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands.'

The court, however, concluded that:

> . . .[t]his result … is for Congress to address,

should it see fit, as only Congress may abrogate tribal sovereign immunity.

Conclusion and Implications

How *Dine Citizens* will be applied in other contexts, including water rights disputes, remains to be seen. *Dine Citizens* favors tribes' assertion of sovereign immunity and Rule 19 to halt litigation where that suits their interests. The Ninth Circuit relied on a "wall of circuit authority" favoring dismissal of actions under the Rule 19(b) factors when a tribe asserts its immunity. As the *Dine Citizens* court noted, the practical effect of its decision to not apply the "public rights" exception to avoid dismissal of the case may mean only a tribe may seek judicial review of some federal agency decisions. But, the court noted, any disagreement with that outcome is best addressed to Congress, which has granted tribes sovereign immunity.
(Jenifer Gee, Dan O'Hanlon)

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