Volume 30, Number 2
November 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 NEWS

CALIFORNIA'S ENVIRONMENTAL BATTLE AGAINST THE TRUMP ADMINISTRATION RAGES ON AMIDST CLASH BETWEEN THE FEDERAL AND STATE ENVIRONMENTAL PROTECTION AGENCIES

Recently, California Governor Gavin Newsom received quite the letter from the Administrator of the U.S. Environmental Protection Agency (EPA), Andrew Wheeler. Alleging numerous failures by the state to properly implement the federal Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA), the letter gave an ultimatum for California to fix its water troubles: Either California is to take immediate action or the EPA will.

Concerns Addressed in the Letter

From the outset of the letter, Mr. Wheeler alleges a failure by California to fulfill its obligations in implementing the CWA and the SDWA as delegated by the federal government. Beginning with what he refers to as the "homelessness crisis," Wheeler takes specific aim at the City of San Francisco throughout the letter. Citing a 2018 article from *NPR*, Wheeler expresses the concern of the EPA that pathogens and other contaminants from untreated human waste might have potential water quality impacts by entering nearby waters. Reiterating that California's responsibility to implement proper municipal storm water management and waste treatment requirements, the letter's first allegation is a failure by California to adhere to this responsibility. Ending this first complaint, Wheeler asserts that the City of San Francisco and the state:

> . . .do not appear to be acting with urgency to mitigate the risks to human health and the environment that may result from the homelessness crisis.

Another allegation taking aim at San Francisco, Wheeler continues by discussing the city's discharge of more than 1 billion gallons of combined storm water and sewage into San Francisco Bay and the Pacific Ocean annually. The CWA demands that municipal waste be treated to certain levels, but in the letter Wheeler asserts that the city lacks biological treatment of this sewage and storm water, instead opting to remove only "floatables and settleable solids" in violation of the CWA. Additionally, the letter alleges the city's failure to maintain its sewage infrastructure. In quite the critical manner, Wheeler writes that:

> San Francisco must invest billions of dollars to modernize its sewer system to meet CWA standards . . . and keep raw sewage inside pipes instead of in homes and businesses.

Citing further alleged violations of the CWA, Wheeler asserts that the EPA found 23 significant exceedances of the Clean Water Act's National Pollutant Discharge Elimination System permits throughout the state (including exceedances of copper by 420 percent and the County of Marin's exceedances of cyanide by 5,194 percent).

Lastly, Wheeler turns to recent reports of health-based exceedances under the SDWA, totaling 665 health-based exceedances in 202 Community Water Systems, serving a population of nearly 800,000. Among the various instances cited here in the letter, Wheeler claims exceedances of arsenic, Ground Water Rule compliance issues, and violations of radiological standards.

Administrator Wheeler's Demands

In response to the problems pointed out in the letter, Wheeler concluded his letter to Governor Newsom by requesting a written response from the state, within 30 days, that details how the state intends to resolve the problems addressed in the letter—providing "specific anticipated milestones"—and how the state has the authority to accomplish the resolutions required.

In a similar fashion to the recent EPA/California

EPA run-in regarding air quality, Wheeler's letter alluded to federal intervention should California fail to correct the problems alleged in the letter.

Governor Newsom Responds

While reports have stated that staff at the EPA have claimed that the letter was a part of "routine monitoring," California officials have had other thoughts. In a statement following receipt of the letter, Governor Newsom's Chief Spokesman, Nathan Click, called the letter "political retribution," proclaiming that "this is not about clean air, clean water, or helping our state with homelessness." Providing more powerful words about the matter, Mr. Click described the letter as a way for President Trump's administration to "weaponize" a government agency.

Conclusion and Implications

With the 30-day mark fast approaching, it will certainly be interesting to see the state's response to Wheeler's demands—if any response is provided. October 10 represented the deadline set by the EPA regarding the previous conflict between it and the state, so California has certainly had an eventful month between the two demands put forth by Andrew Wheeler and the EPA. In any case, this clash represents yet another point of contention in the collision course between the Trump administration and the Golden State. While the California policy pendulum has been increasingly swinging to correct for rollback efforts by the federal administration of environmental protections, to have the federal administration calling foul on the state for not doing enough is an irony and a storyline with much more to be written.
(Wesley A. Miliband, Kristopher T. Strouse)

HABITAT RESTORATION PROJECT TO BE COMPLETED IN LOWER AMERICAN RIVER

In October, work was scheduled to get underway on the Lower American River (River) for a project referred to as the Gravel Augmentation Project at Sailor Bar (Project). The Project aims to protect salmon and steelhead habitats in the lower American River (River) area in the Sacramento region by compensating for the depletion of gravel spawning and rearing grounds that results from times of higher flows on the River. Multiple agencies at the state, local and federal levels partnered to plan, approve and implement the Project, which is the latest component of a larger effort undertaken in the region over the past twenty years to protect spawning grounds in the River. Restoration work is expected to continue in the River on an annual basis due to the ongoing nature of the threat to fish habitats in the area.

The Lower American River Gravel Augmentation Project

The Project supports fish spawning grounds in the lower River that have been depleted by high flows and other conditions that impact the River. Chinook salmon innately have used the loose rock in the riverbed to lay eggs upon their seasonal migration back to the River from the Pacific Ocean. Steelhead populations also nest in the gravel near the Project area, which is continually washed downstream by River flows. Because dams in the Project area, such as the Nimbus and Folsom dams, block the movement of sediment that would naturally replace the lost gravel, the protection of the fish requires human intervention, hence the partnership between federal, state and local agencies and environmental groups. As the fish use the area both for spawning beds and rearing to raise their young, the maintenance of the habitats is critical for the overall reproductive success of the affected salmon and steelhead populations.

To counter the degradation of the habitat, 14,000 tons of gravel taken from the floodplain was sorted and then added into the River to restore the spawning beds for use by the fish. Additionally, a new side channel was constructed in the area to create a protected area for juvenile fish to grow. The shallow and slow-moving water in the channel promotes the growth of insects and vegetation, providing important sources of food for the fish. The channel also provides the fish with some protection from larger predators. Organizers timed the implementation of the Project so that it would be completed prior to the seasonal spawning of the fish later in the fall. The Project's

cost has been estimated at approximately $1 million, paid for through a combination of local and federal funding.

Restoration projects of this kind are important in the River on an ongoing basis due to regular erosion of the habitat. As such, investment in the restoration of habitats in the region has totaled more than $7 million since 2008. Previous work has created over 1.2 miles of side channels and 30 acres of spawning bed habitat.

Project Participants

The Project is the work of a partnership among the U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, Sacramento Area Flood Control Agency and Sacramento Water Forum (Water Forum). The Water Forum, a central organizer of the Project, was formed in 2000 by an agreement among 40 stakeholder organizations including various public agencies located within El Dorado, Placer and Sacramento counties to implement programs for the management and protection of water supply in the lower River area. The Water Forum has a track record of success spearheading successful habitat restoration projects of this nature over the last decade in the River, with eight prior gravel projects located along Sacramento Bar, Sailor Bar, River Bend Park and Nimbus Shoals. The Water Forum currently has plans for additional restoration sites at El Manto Access, Sunrise Recreation area and Ancil Hoffman Park. Other partner agencies involved in the Project have been a part of past projects and will likely be involved in future efforts as well.

Conclusion and Implications

The Gravel Augmentation Project at Sailor Bar continues the ongoing efforts by the Water Forum and others to combat the depletion of critical wildlife habitats in the River. Past successes with similar restoration work in the area bode well for the success of the Project. The return of the fish populations to the area this fall for nesting, peaking in November, should provide an early indication of the effects of the Project. The Project and others of its kind are ultimately laudable not only for their support of wildlife populations in the River, but also for the coordinated efforts among government agencies and regional interests that make them possible.
(Wesley A. Miliband, Andrew D. Foley)

REGULATORY DEVELOPMENTS

OBAMA ADMINISTRATION-ERA CLEAN WATER RULE REPEALED, ADDITIONAL CHANGES TO WATERS OF THE UNITED STATES DEFINITION IN STORE

On September 12, 2019, the U.S. Environmental Protection Agency (EPA) announced the formal repeal of the Obama administration's 2015 Clean Water Rule (2015 Rule). The 2015 Rule was one step in an ongoing series of efforts to clarify the reach of the United States' jurisdiction under the federal Clean Water Act (CWA) by defining the jurisdictional waters of the United States (WOTUS) to which that jurisdiction extended. The repeal takes effect on December 23, 2019, and a new rule revising the definition of WOTUS is expected to be adopted in the same timeframe.

The Clean Water Act, *Rapanos*, and the 2015 Clean Water Rule

The jurisdiction of the federal government under the Clean Water Act is limited to the "navigable waters" of the United States, or WOTUS. In its 2006 *Rapanos v. Unites States* decision, the U.S. Supreme Court grappled with the scope of this definition, but was unable to reach a majority opinion. In a concurring opinion, Justice Kennedy opined that a non-navigable waterway falls within the United States' jurisdiction if it bears a "significant nexus" to a traditional navigable waterway. Justice Scalia's plurality opinion articulated a different standard: The United States only has jurisdiction over non-navigable waters where the waters have a somewhat permanent flow. That standard also would limit federal jurisdiction to those wetlands that had a continuous surface connection to a relative permanent water body. In the absence of a majority opinion, the scope of federal jurisdiction remained unclear.

In 2015, the Obama administration introduced new EPA regulations intended to address this lack of clarity. The 2015 Rule applied Justice Kennedy's "significant nexus" standard, and explicitly defined WOTUS to include headwaters, perennial streams, and seasonal wetlands. Under this rule, WOTUS included any water body within 4,000 feet of a traditional navigable water or tributary if the water body had a "significant nexus" to a traditional jurisdictional water. Per the 2015 Rule, a "significant nexus" exists where the water body, by itself or with another body of water, has a significant effect on the chemical, physical, and biological integrity of a traditional jurisdictional water. Headwaters, perennial streams, and seasonal wetlands were included within the scope of WOTUS under the 2015 rule.

However, legal challenges to the 2015 Rule resulted in patchwork enforcement and application of the rule. At the time of its repeal, 23 states were operating under the pre-2015 Rule definitions and guidance for the scope of federal jurisdiction under the Clean Water Act, while the remaining 27 operated under 2015 Rule definitions.

The Trump Administration Suspends and Repeals the 2015 Rule

President Trump campaigned on the issue of repealing the 2015 Rule, and almost immediately after assuming office began work on repealing the 2015 Rule. The Trump administration adopted a two-phased approach: it would first repeal the 2015 Rule and then implement a new rule applying a narrower definition of WOTUS. The Trump administration adopted a rule to delay the implementation of the 2015 Rule for a period of two years on February 6, 2018, but two separate federal District Courts in Washington and South Carolina vacated this rule nationwide in the end of 2018. Unlike the 2018 delayed-implementation rule, the new rule repeals the 2015 Rule entirely.

EPA stated four reasons for repealing the 2015 Rule. First, the EPA and the U.S. Department of the Army determined that the prior rule extended WOTUS beyond the scope permitted by the Clean Water Act and Justice Kennedy's significant nexus test in *Rapanos*. Second, the 2015 Rule did not adequately consider the primary role of the states in pollution control and the development and use of water resources. Third, the 2015 Rule's extension of jurisdic-

tion into realms traditionally regulated by states did not have express approval from Congress. Fourth, the adoption of the 2015 Rule was procedurally flawed and the rule lacked adequate support in the record.

On September 12, 2019, EPA formally adopted the rule repealing the Obama administration's 2015 Rule.

Redefining Waters of the United States

On December 11, 2018, the EPA and the United States Department of the Army, Army Corps of Engineers (Corps) released a proposed rule adopting a narrower WOTUS definition. The Trump administration has promulgated a rule that would replace the pre-2015 regulations and implement a narrower WOTUS definition. Instead of the case-by-case approach of the 2015 Rule, the new rule would apply blanket categories of waterways that would qualify as WOTUS, in line with Justice Scalia's plurality opinion in *Rapanos*. Categories include traditional navigable waters, tributaries to navigable waters, ditches that operate as traditional navigable waters or were constructed as navigable waters, lakes or ponds that act as navigable waters, impoundments on navigable waters, and wetlands adjacent to navigable waters. The new rule also includes a number of express exemptions from the definition of WOTUS. This would include ephemeral waters, groundwater, certain wastewater and recycled water facilities, waste treatment systems, and certain commercial and agricultural ponds and ditches.

Restores Pre-2015 Regulations

In addition to repealing the 2015 Clean Water Rule, the new rule restores the regulations defining the scope of WOTUS that were in effect prior to the 2015 Clean Water Rule. The comment period on the proposed rule closed on April 15, 2019, and the final rule is expected to be adopted this winter. If the new rule is not adopted, the pre-2015 rules will remain in effect, leaving stakeholders with an imprecise WOTUS definition that spurred the adoption of the 2015 Rule and the Trump administration's proposed rule.

Conclusions and Implications

The return to a pre-2015 definition of WOTUS is only the first step in a two-step process by the Trump administration to more narrowly and precisely define WOTUS, and additional changes are anticipated with the adoption of the new rule this winter. Proponents look forward to the clarity and new land development opportunities that will be afforded by the new rule, while opponents express alarm at the significant reduction in federal protection of waterways that would likely result. Additional information on the status of the WOTUS rule, as well as comments submitted on the new rule, can be found at: https://www.epa.gov/wotus-rule/step-two-revise
(Brian Hamilton, Meredith Nikkel)

FEDERAL AGENCIES RELEASE NO JEOPARDY BIOLOGICAL OPINIONS FOR THE CENTRAL VALLEY PROJECT

On October 21, 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) each issued Biological Opinions under the federal Endangered Species Act (ESA) regarding proposed operations of the federal Central Valley Project (CVP) and the State Water Project (SWP). Both FWS and NMFS found that proposed CVP and SWP long-term operations through 2030 would not jeopardize federally listed threatened or endangered species, including delta smelt and listed salmon, nor adversely modify their designated critical habitats, including those in the Sacramento-San Joaquin River Delta and in upstream tributaries. The U.S. Bureau of Reclamation's (Bureau) proposed action includes significant investment in protection of endangered fish, more robust hatchery operations, changes to cold water pool operations and other actions at Lake Shasta, and increased management oversight in the Delta.

Background

The Central Valley Project is operated in close coordination with the State Water Project administered by the California Department of Water Resources (DWR). Together, the Projects provide water to more than 25 million California residents and millions of

acres of farmland throughout California.

The Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce acting through NMFS may list any species, subspecies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary of the Interior acting through FWS may list and otherwise regulate the take of such species.

At its most basic level, a Biological Opinion evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.e. legal protection for incidentally taking a protected species.

The Bureau's Plans for New Long-Term Operations

In 2008 and 2009, FWS and NMFS, respectively, issued "jeopardy" Biological Opinions regarding ongoing operations of the CVP and SWP. These opinions included reasonable and prudent alternatives that effectively compelled the Bureau and DWR to operate many aspects of their water projects according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR. Many years of litigation followed which ultimately concluded with the Ninth Circuit Court of Appeals upholding the opinions.

Beginning in 2016, the Bureau began developing a new long-term operations plan for the CVP and SWP, in close coordination with DWR. As part of the review process, the Bureau and DWR undertook review of the effects the new plan might have on listed species under the ESA, including delta smelt, green sturgeon, and salmon and steelhead (aka "salmonid") species, many of which are considered keystone species in the Sacramento-San Joaquin Delta.

In 2018, the White House directed that the Bureau complete its Biological Assessment (BA) regarding its new proposed action (*i.e.*, the updated long-term coordination operations plan) no later than January 2019. The Bureau completed the original version of its BA on January 31, 2019 and submitted it to FWS and NMFS.

In June 2019, FWS and NMFS provided portions of their draft Biological Opinions to the Bureau. Those draft chapters suggested FWS and NMFS preliminarily believed the new proposed CVP and SWP operations would continue to have potential jeopardizing impacts on listed species, and thus lead to the issuance of another round of reasonable and prudent alternatives. Thereafter, the Bureau worked with DWR, NMFS and FWS to more closely examine the proposed operations plan in view of the most recent available science. This coordinated effort resulted in the issuance of the "no jeopardy" Biological Opinions.

Investment to Support Fish

The proposed operations plan will include an estimated $1.5 billion in investment to support threatened and endangered fish survival and recovery through research and restoration actions over a ten-year period, including for delta smelt and salmonid species. For instance, the Bureau will implement a program to supplement Delta smelt in the wild by using the existing U.C. Davis Fish Conservation and Culture Laboratory (FCCL). The Bureau will fund a process to supplement the wild delta smelt population with captive-bred fish from FCCL within three-five years following expansion, through additional funding, to increase rearing capacity up to approximately 125,000 adult Delta smelt within three years. Additionally, the operations plan will manage Old and Middle River reverse flows for limiting larval and juvenile delta smelt entrainment based on modeled recruitment estimates. The Bureau will also provide up to $700,000 for reconstruction of the Knights Landing Outfall Gates, to reduce the potential for fish

entrainment in the Colusa Basin Drain.

Shasta and Cold Water Management Tiers

The operations plan also provides a detailed description of Shasta Dam operations and Cold Water Management Tiers for the benefit of salmonid species. The operations plan also sets performance metrics for incubation and juvenile production of salmonids under a proposed "Shasta Cold Water Pool Management" strategy. Similarly, the operations plan sets performance metrics for managing Old and Middle River reverse flows to limit salmonid loss to similar levels observed under the previous Biological Opinion through explicit reductions in export pumping. Condition-appropriate actions will occur after two years of low winter-run chinook salmon egg-to-fry survival.

Fish Passage

Additionally, the Bureau will provide up to $1,000,000 towards a collaborative project to construct fish passage downstream of the Deer Creek Irrigation District Dam, which will provide spring-run chinook salmon and Central Valley steelhead with access to 25 miles of spawning habitat. The Bureau will additionally provide up to $14,500,000 over ten years to reintroduce of winter-run chinook salmon to Battle Creek. This includes accelerating the reestablishment of approximately 42 miles of salmon and steelhead habitat on Battle Creek, and an additional six miles on its tributaries.

Conclusion and Implications

The newly released Biological Opinions are controversial in some arenas. Interested parties, including environmental groups, have suggested they may file 60-day notices under the ESA and lawsuits to challenge the Biological Opinions. The FWS Biological Opinion is available at: https://www.fws.gov/sfbaydelta/CVP-SWP/documents/10182019_ROC_BO_final.pdf; *and* the NMFS Biological Opinion available at: https://www.fisheries.noaa.gov/resource/document/biological-opinion-reinitiation-consultation-long-term-operation-central-valley
(Miles B. H. Krieger, Steve Anderson)

DEPARTMENT OF WATER RESOURCES CONFIRMS CALIFORNIA KICKS OFF WATER YEAR 2020 WITH STRONG START

Water Year 2020 began, on October 1, with significantly more surface water in storage than previous years due to a wet winter and snowpack that surpassed expectations. According to recent reports from the California Department of Water Resources (DWR), statewide surface water reservoir storage began the water year at 128 percent of average, comprising 29.7 million acre-feet of water. Notwithstanding this strong start, water managers remain cautious that drought conditions could quickly return.

Background

The Water Year begins on October 1, prior to California's traditionally wetter winter months, and ends on September 30, following hot, dry summers. The quantity of surface water in storage in California' vast and interconnected reservoirs at the beginning of each water year is closely watched by water managers, including for evaluating projected and actual annual allocations from the State Water Project and federal Central Valley Project. Throughout each water year, DWR and the U.S. Bureau of Reclamation issue State Water Project and Central Valley Project allocation updates, respectively, and provide accompanying information regarding watershed runoff, precipitation, snowpack, and reservoir storage.

Surface Water Storage Conditions

According to the U.S. Geological Survey, there are nearly 1,300 surface water reservoirs throughout California, 200 of which are considered storage reservoirs. Roughly a dozen of those storage reservoirs hold approximately all of California's surface water storage, including off-stream reservoirs. These man-made lakes are often referred to as California's water supply "checking accounts" because of their relatively limited overall capacity and their regular fluctuations that result from contracted deliveries, flood control

releases and recurring though varying annual replenishment. California's groundwater basins, which collectively store far greater amounts of water than surface water reservoirs, are often referred to as water supply "savings accounts" as they are drawn upon more heavily during drought conditions.

As of late October, California's largest storage reservoirs held on average well more than half of their total capacity, and far more than their historical averages for this time of year. Among those reservoirs, recent conditions and totals were reported as follows:

•Lake Shasta (Shasta County) held approximately 73 percent of its total 4,552,000 AF capacity. This is 125 percent of the historical average for this time of year.

•Lake Oroville (Butte County) held approximately 59 percent of its total 3,537,577 AF capacity. This is 98 percent of the historical average for this time of year.

•Folsom Lake (Placer, El Dorado and Sacramento Counties) held approximately 66 percent of its total 977,000 AF capacity. This is 124 percent of the historical average for this time of year.

•Trinity Lake (Trinity County) held 81 percent of its total 2,447,650 AF capacity. This is 123 percent of the historical average for this time of year.

•New Melones Lake (Calaveras and Tuolumne Counties) held approximately 84 percent of its total 2,420,000 AF capacity. This is 150 percent of the historical average for this time of year.

•San Luis Reservoir (Merced County) held approximately 53 percent of its total 1,079,850 AF capacity. This is 105 percent of the historical average for this time of year.

•Don Pedro Reservoir (Tuolumne County) held approximately 81 percent of its total 2,030,000 AF capacity. This is 125 percent of the historical average for this time of year.

•Lake McClure (Mariposa County) held approximately 64 percent of its total 1,024,600 AF capacity. This is 145 percent of the historical average for this time of year.

•Pine Flat Reservoir (Fresno County) held approximately 48 percent of its total 1,000,000 AF capacity. This is 140 percent of the historical average for this time of year.

•Millerton Lake (Madera and Fresno Counties) held approximately 56 percent of its total 520,000 AF capacity. This is 146 percent of the historical average for this time of year.

•Castaic Lake (Los Angeles County) held approximately 89 percent of its total 325,000 AF capacity. This is 115 percent of the historical average for this time of year.

Each of these reservoirs is currently well over 100 percent of their historical averages for the beginning of the water year, with the exception of Lake Oroville which is at nearly 100 percent of average. If California has another wet winter, experts anticipate reservoirs will be required to release or bypass flows in order to avoid exceeding full capacity.

Conclusion and Implications

Although California began the 2020 Water Year with significantly above average water in storage, water managers remain cautious. They are careful not to overlook the reality of California's highly-variable weather and precipitation patterns, and that dry conditions could quickly and unpredictably return. DWR Director Karla Nemeth recently expressed this warning: "[W]hat we could have today could be gone tomorrow. Conserve. Recycle. Recharge. People and the environment depend on it."
(Paula Hernandez, Michael Duane Davis)

PROPOSED REGULATIONS IMPLEMENTING DELTA LEVEE INVESTMENT STRATEGY RESULT IN CRITICISM FROM SOME QUARTERS

On August 22, 2019, the Delta Stewardship Council (DSC) held a public hearing to consider proposed regulations implementing the Delta Levee Investment Strategy (DLIS) and public comments on those proposed regulations. The proposed regulations set priorities for state investments in levee operation, maintenance, and improvements by assigning islands and tracts in the Sacramento-San Joaquin Delta and Suisun Marsh (Delta) to one of three priority levels. The proposed regulations would also direct the California Department of Water Resources (DWR) to fund levee projects for the highest priority islands and tracts before funding lower priority projects.

Background

The Delta Reform Act of 2009 (Delta Reform Act) established the DSC to create a comprehensive plan (Delta Plan) for the sustainable management of the Delta's water and environmental resources. (*See*, Water Code § 85001(c).) The Delta Reform Act also provided the DSC with regulatory authority over certain actions that take place in the Delta. (*See, id.* at § 85210(i).) Under Water Code § 85306, the DSC is required to include recommendations in the Delta Plan for priorities for state investment in levee operation, maintenance, and improvements in the Delta.

In 2013, the DSC adopted Delta Plan Policy RR P1 (Policy RR P1) in the Delta Plan to outline a process to prioritize state investments in Delta levee infrastructure. (Cal. Code Regs., tit. 23, § 5012.) Pursuant to Policy RR P1, the DSC adopted the DLIS in April 2018. The DLIS established a three-tiered priority list for state investments in levee improvements for Delta islands and tracts. (DSC Staff Report, Agenda Item 11, Public Hearing on Proposed Rulemaking for § 5001 and § 5012 of Title 23 of the California Code of Regulations (Staff Report) (Aug. 22, 2019), at p. 3.) Specifically, the DLIS declares Delta islands and tracts as either Very-High Priority, High Priority, and Other Priority for purposes of state investments in levee improvements. (*Id.*) The assigned priority is intended to "generally address the relationship between the flood risk of each island or tract, and the number of state interests that island's or tract's assets encompass." (*Id.* at 3-4.) The DSC also directed its Executive Officer to initiate rulemaking to implement the DLIS. (DSC, Resolution 2018-1, ¶ 9.)

The Proposed Regulations to Implement the DLIS

The DSC issued its proposed implementing regulations on July 5, and held a public hearing to consider written and oral comments the proposed regulations on August 22, 2019. The proposed amendments to § 5012 of Title 23 of the California Code of Regulations would designate specific islands and tracts as either Very-High Priority, High Priority, or Other Priority. (*See,* Staff Report, Attachment 3, § 5012(b)(1), Table 1.)

Under the proposed regulations, 17 tracts or islands would receive Very-High Priority designations, 34 would be designated as High Priority, and more than 60 would receive Other Priority designations. (*Id.*) The proposed regulations provide that DWR should fund levee projects for High-Priority areas only after all Very-High Priority projects are fully funded, and should only fund Other Priority projects after all Very-High and High Priority projects are fully funded. (*Id.* at § 5012(b)(1).)

The proposed regulations also require DWR to submit an annual report identifying decisions to award state funds for Delta levee projects, and make an oral presentation of that annual report to the DSC. (*Id.* at § 5012(b)(2)(A).) If DWR's funding decisions deviate from the proposed regulations' priorities, its report must identify the inconsistency, describe why the decision is necessary, and explain how the decision:

> . . .protects lives, property, and the state's interests in water supply reliability and restoration, protection, and enhancement of the Delta ecosystem while considering the Delta's unique agricultural, natural, historic, and cultural values. (*Id.* at § 5012(b)(2)(B).

The August 22 Public Hearing on the Proposed Regulations

At least 29 comments on the proposed regulations were submitted on the proposed regulations.

The majority of the comments were critical of the proposed regulations. For example, the Central Valley Flood Protection Board (CVFPB)—the state agency responsible for regulating the construction, operation, maintenance, and protection of the Delta's flood control system—criticized the proposed regulations as directly conflicting with its identification of State Plan of Flood Control facilities as the state's highest priority for funding. (Leslie Gallagher, CVFPB, Letter re Comments on the Proposed Rulemaking to Implement Delta Plan Amendment Regarding DLIS (Aug. 22, 2019), pp. 1-2.) Other comment letters argued that the proposed regulations would exceed the DSC's statutory authority, are supported by an inadequate economic analysis, would jeopardize federal disaster assistance, and favor wealthier urban areas at the expense of historic rural communities and farms.

The DSC unanimously decided to move forward with finalizing the proposed regulations at the end of the hearing. Specifically, DSC Resolution No. 2019-2 directs the DSC's Executive Officer to prepare finalized regulations and a Final Statement of Reasons in support of the regulations for consideration and possible adoption at a future DSC meeting.

Conclusion and Implications

Despite the criticism it received, the DSC will proceed with finalizing the proposed regulations. Notably, DWR did not submit written comments on the proposed regulations, and it is unclear whether and how often it may exercise its discretion to deviate from the funding priorities in the proposed regulations. It is also unclear how the final regulations may differ from the proposed regulations. Final regulations will likely be approved before July 5, 2020.
(Samuel E. Bivins, Meredith Nikkel)

LAWSUITS FILED OR PENDING

MAYOR OF MAUI AND COUNTY COUNCIL WRANGLE OVER SETTLEMENT AUTHORITY WHILE U.S. SUPREME COURT PRESSES ON IN *MAUI V. HAWAII WILDLIFE FUND* CASE

A disagreement between City of Maui's Mayor and County Council over who has authority to settle lawsuits has injected a complex state law issue into the already tense proceedings of the closely watched federal Clean Water Act case, *Maui v. Hawaii Wildlife Fund*, pending before the U.S. Supreme Court. The Court is scheduled to hear arguments on November 6, 2019, on whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. Maui County Council recently voted to approve a settlement with the plaintiffs-respondents and to withdraw the petition. Maui's Mayor, however, has refused to withdraw the petition and maintained that the office of Mayor, not the office of County Council, has sole authority to settle lawsuits. Maui County Corporation Counsel has backed the Mayor, and so far, the Supreme Court has not taken any action to change the argument schedule or dismiss the case. [*County of Maui v. Hawaii Wildlife Fund et al.*, 886 F.3d 737 (9th Cir. 2018), petition granted S. Ct. No. 18-260 (Feb. 19, 2019).]

Background

Section 301 of the federal Clean Water Act (CWA) prohibits "the discharge of any pollutant by any person" except, in part, pursuant to a National Pollutant Discharge Elimination System (NPDES) permit. The CWA defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft," and "navigable waters" as "the waters of the United States, including the territorial seas."

The U.S. Environmental Protection Agency (EPA) and states administering NPDES permit programs historically have not required a federal permit for discharges to groundwater. The Fourth, Sixth, and Ninth Circuit Courts of Appeals have issued opinions with conflicting interpretations of whether the CWA covers such discharges.

The Ninth Circuit's Decision

In *Maui*, the Ninth Circuit Court of Appeals affirmed the U.S. District Court's holding that Maui County was required to obtain an NPDES permit to operate waste water injection wells that discharged to groundwater where the groundwater had a direct hydrologic connection to the Pacific Ocean and the pollutants were "fairly traceable" from the wells to the ocean "such that the discharge [was] the functional equivalent of a discharge into the navigable water."

The Fourth Circuit's Decision

Consistent with the Ninth Circuit's decision in *Maui,* the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) petition docketed No. 18-268 (Sept. 4, 2018) (*Upstate Forever*) reversed the District Court's dismissal of a conservation group's citizen suit, holding that a plaintiff asserts a viable claim under the CWA by alleging the unauthorized discharge of a pollutant to navigable waters through groundwater with a "direct hydrologic connection" to the surface water. The petition for a writ of *certiorari* is still pending at the Supreme Court.

The Sixth Circuit's Decision

Shortly thereafter, in two separate decisions, the Sixth Circuit Court of Appeals rejected the Fourth and Ninth circuits' analysis and held that the Clean Water Act does not regulate pollutants discharged to navigable waters through hydrologically connected groundwater. One of these decisions, *Tennessee Clean Water Network v. Tennessee Valley Authority,* was also appealed to the Supreme Court.

Grant of *Maui* Petition for *Certiorari* by the U.S. Supreme Court

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

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

Subsequently, the parties and numerous *amici* filed briefs with the Court.

The Dispute over Settlement Authority and Whether or Not to Settle

On April 15, 2019, the EPA issued an Interpretive Statement addressing whether the NPDES permit program applies to releases of a pollutant from a point source to groundwater. In this Interpretive Statement, EPA concluded that the:

> . . .CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water.

Five months after the Interpretive Statement was released, and before the Court acted on the petition for writ of *certiorari* in the *Tennessee Clean Water Network* case, the parties moved to dismiss the petition. The petition was dismissed on September 23, 2019.

During this same time, the Maui County Council approved a settlement with plaintiff-respondents. Council Chair, Kelley King, requested the County Corporation Counsel to execute the settlement agreement and take all necessary action to withdraw the petition. County Corporation Counsel responded to the Council Chair, noting that Maui's Mayor, Michael Victorino, must agree to withdraw the petition, which he refused to do.

Counsel for respondent Earthjustice filed a letter notifying the Supreme Court of the County Council's approval of the resolution approving the settlement on October 3, 2019. The next day, Maui's counsel of record submitted a letter to the Court, stating that the case had not settled because the Mayor did not agree to settle the case or withdraw the petition.

On October 9, 2019, Council Chair King filed a letter with the Court clerk informing the Court of the settlement, setting out the Council's position that the Maui County Charter grants it authority to settle and dismiss lawsuits, and requesting that the Court dismiss the petition or postpone argument until the dispute between the Mayor and Council is resolved.

In a letter also dated October 9, 2019, and submitted to the Court on October 10, 2019, Corporation Counsel apologized to the Court for King's letter requesting dismissal, asserted that as Corporation Counsel she is the "chief legal advisor and legal representative of the County," and stating that the County is not requesting a delay or dismissal.

On October 18, 2019, Mayor Victorino issued a statement explaining that he has decided not exercise his authority to settle the case because of the "staggering costs of retrofitting treatment plants," and that he believes a decision from the Court is needed to clarify the issue "once and for all" in order to avoid endlessly relitigating the dispute at taxpayers' expense.

On October 29, 2019, the County Council is set to consider a resolution to hire special counsel to resolve the County Charter interpretation dispute.

Conclusion and Implications

Wow. The dispute over the scope of a local government's charter under state law may affect whether the U.S. Supreme Court weighs in on a matter of national significance. The Supreme Court has stated its belief that:

> . . .post-*certiorari* maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.

No matter the outcome of the dispute, the petition for *certiorari* in the *Tennessee Clean Water Network* case remains pending. Thus, there is a good chance the Court may issue an opinion resolving "once and for all" the applicability of the Clean Water Act to discharges via nonpoint sources, such as groundwater. For more information, *see:* https://www.supremecourt.gov/docket/docketfiles/html/public/18-260.html
(Dakotah Benjamin, Rebecca Andrews)

RECENT FEDERAL DECISIONS

ELEVENTH CIRCUIT AFFIRMS EPA'S BROAD DISCRETION ON REVOKING STATE NPDES PERMITTING SYSTEM

Cahaba Riverkeeper et al. v. U.S. Environmental Protection Agency, 938 F.3d 1157 (11th Cir. 2019).

On September 12, 2019, the Eleventh Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency (EPA) has discretion to determine whether to revoke Alabama's authorized status under the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program. Because the EPA's determination was deemed neither arbitrary nor capricious, the Court of Appeals upheld its determination not to revoke the state's approval.

Factual and Procedural Background

Under the federal Clean Water Act (CWA), the EPA is permitted to authorize states to implement the NPDES requirements under state law. To allow a state to operate its own NPDES program, EPA must confirm that the state follows the CWA requirements and, at a minimum: 1) provides adequate public notice of certain actions, including notice of discharges, 2) has capable board members, 3) has the ability to inspect major dischargers, and 4) enforces regulations. The EPA is allowed to withdraw its approval of a state program if the state does not adequately implement the regulations described in the CWA after the EPA has provided opportunities to correct deficiencies. The question in this appeal is whether the EPA *must* withdraw approval if the state has been repeatedly out of compliance with the relevant federal law.

In 1979, the EPA approved the Alabama Department of Environmental Management's (ADEM) plans to implement the NPDES permitting program within Alabama. On January 14, 2010, fourteen environmental groups petitioned the EPA to end ADEM's approved status due to twenty-six statutory and regulatory violations. On April 9, 2014, the EPA responded to twenty of the alleged violations and deferred decision on the remaining six. Seven of the original environmental groups appealed this interim response and the court dismissed the appeal with prejudice since the appeal was not ripe. The court determined the decision could only be challenged once the EPA responded to all of the violations.

On January 11, 2017, the EPA issued its final response to the remaining six petitions. The EPA affirmed its previous decision and determined that the revocation of ADEM's authority was improper. The same seven environmental groups that appealed previously (petitioners) challenged this decision on the grounds that the EPA was required to initiate withdrawal proceedings based on the plain text of the CWA. Alternatively, the environmental groups argued that the decision to not commence withdrawal proceedings against Alabama was arbitrary and capricious given the NPDES violations.

The Eleventh Circuit's Decision

Before addressing the petitioners' substantive arguments, the court first noted that the EPA's decision on whether to begin withdrawal proceedings is a discretionary decision. It reasoned that the CWA does not impose any required method or specific time limits on the EPA. Judicial review of EPA's response to the withdrawal petition was limited to whether EPA reasonably exercised its discretion to refuse to commence withdrawal proceedings.

Petitioners argued that four violations of EPA's regulations obligated EPA to withdraw ADEM's approved status. The court disagreed on all four points.

Discharge Notices

First, the petitioners argued that the discharge notices required prior to issuing a NPDES permit were insufficient because they did not describe the proposed discharge points. Before issuing an NPDES permit, ADEM was required publish a notice within the area affected by the facility or activity, which included, among other information, a general description of the location of each existing or proposed discharge point and the name of the receiving water.

Instead, the newspaper notice provided a website that provided the required information. The EPA determined that ADEM substantially complied with federal regulations relating to notice but "encourage[d] ADEM to supplement its public notices with more specific notification." Because the court already determined that the EPA was not required to implement withdrawal proceedings, the agency was allowed to act within its discretion. The court concluded EPA's response to ADEM's discharge notices was not impermissibly arbitrary.

Board Conflicts

Second, the petitioners argued that the method of handling board conflicts was impermissible. The CWA prohibits certain conflicts of interests on boards and bodies that approve permit applications but is unclear on whether certain conflicts prohibit membership on the state board or require recusal in relevant circumstances. Alabama implemented a board recusal system that was approved by the EPA. Petitioners argued the recusal system was impermissible because conflicts should preclude board membership. Because the statute was ambiguous, the court determined that the approval of the board recusal system was permissible. Therefore, the EPA's decision not to implement withdrawal proceedings was not capricious.

Annual Inspections

Third, the petitioners also argued that ADEM did not comply with the annual inspection requirements. The CWA requires state NPDES programs to have the procedures and ability to annually monitor the major discharge facilities. The petitioners argued that the state did not have the means to monitor facilities because the state moved the allocated resources to other areas. The court reasoned that there was no proof that the resources could not be returned to perform the inspections if they became required. The state theoretically had the capability to do inspections. Thus, the EPA's decision not to commence withdrawal proceedings was reasonable.

Lawsuit Limitations

Finally, petitioners argued that the state program was impermissible because the sovereign immunity established by the Alabama Constitution prevented ADEM from using its state agencies or entities. Federal regulations require a state to be able to assess or sue to recover civil penalties and to seek criminal remedies for violations of the Act or a discharge permit. Petitioners claimed that because ADEM could not sue state agencies, recovery for any harm caused by the state was impossible. The court determined that Congress did not explicitly require the states to waive sovereign immunity, which allowed the EPA to determine if waiver was necessary. On balance, the court determined that requiring this waiver would raise a variety of constitutional problems. Thus, EPA's decision to permit Alabama to retain sovereign immunity was not arbitrary or capricious.

Conclusion and Implications

In this case of first impression, the Eleventh Circuit has articulated a clear position that the EPA has discretion on whether to commence withdrawal proceedings for an authorized state. Thus, the EPA may allow authorized state programs to remedy violations of the Clean Water Act so long as the decision is not arbitrary, capricious, or otherwise a violation of law. It remains to be seen what violations could mandate a withdrawal proceeding by the EPA. The court's decision is available online at: http://media.ca11.uscourts.gov/opinions/pub/files/201711972.pdf
(Anya Kwan, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FIFTH DISTRICT COURT FINDS CEQA CHALLENGE TO HYDROELECTRIC DAM RELICENSING PROCESS PREEMPTED BY FEDERAL POWER ACT

County of Butte v. Department of Water Resources, 39 Cal.App.5th 708 (5th Dist. 2019).

Plaintiffs filed suit against the California Department of Water Resources (DWR) and others, alleging a failure to comply with the California Environmental Quality Act (CEQA) as part of a federal relicensing application to operate a hydroelectric dam. The Superior Court dismissed the complaint and the Court of Appeal affirmed. After the California Supreme Court granted the petition and transferred the case to the Court of Appeal with directions to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017), the Court of Appeal found *Friends of the Eel River* to be distinguishable and re-affirmed.

Factual and Procedural Background

DWR applied to the Federal Energy Regulatory Commission (FERC) to extend its federal license to operate the Oroville Dam and related facilities as a hydroelectric dam. The Oroville hydroelectric facilities are operated for power generation, water quality improvement in the Sacramento–San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management. In connection with this process, DWR filed a programmatic Environmental Impact Report (EIR) as the lead agency pursuant to CEQA.

Under the Federal Power Act (FPA), federal and state licensing procedures are merged into a single procedure called an "alternative license process" (ALP), which combines the federal and state environmental review processes into a single process by which affected parties, federal and state agencies, local entities, and affected private parties agree to the terms of relicensing in a final "settlement agreement." The purpose of this process is to resolve all issues that have or could have been raised by the various participating parties in connection with FERC's order issuing a new project license. The settlement agreement then incorporates these requirements in to the license as condition of the license.

Here, some 52 parties including the plaintiffs and the Department of the Interior, representing all interested federal agencies, participated in the alternative license process. Plaintiffs, however, withdrew as parties and instead challenged the sufficiency of the EIR in state court, seeking to enjoin the issuance of an extended license until their environmental claims were reviewed. The Superior Court denied the petition on grounds that the environmental claims were speculative, and the Court of Appeal then held that the authority to review the EIR was preempted by the FPA, and that the superior court therefore lacked subject matter jurisdiction.

Plaintiffs petitioned for review to the California Supreme Court. Review was granted, and the matter ultimately was transferred back to the Court of Appeal with directions to reconsider the case in light of the Supreme Court's recent opinion in *Friends of the Eel River*. This opinion then followed.

The Court of Appeal's Decision

Federal Preemption

The Fifth District Court of Appeal began its analysis with a discussion of federal preemption principles. Generally, the FPA occupies the field of licensing a hydroelectric dam and bars environmental review of the federal licensing procedure in the state courts. The reason is that "a dual final authority with a duplicate system of state permits and federal licenses required for each project would be unworkable."

The only relevant exception is § 401 of the federal Clean Water Act, which requires the State Water Resources Control Board to issue a water quality certificate pursuant to § 401 of the Clean Water Act and the state Porter-Cologne Act before a FERC can issue a license to DWR. Preparation and certification of an EIR is required in connection with this process,

although the FPA places various time limits and constraints on the state's power under § 401. However, any disputes regarding the FERC licensing process or the adequacy of "required studies" are generally subject to FERC's jurisdiction and review.

Federal Court Jurisdiction

After analyzing preemption, the Court of Appeal concluded that plaintiffs could not challenge the environmental sufficiency of the environmental review studies for the relicensing in state court because jurisdiction to review the matter lies with FERC, and plaintiffs did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii). Further, the plaintiffs did not challenge and could not have challenged the State Water Resources Control Board's certification in their pleadings because it did not exist at the time that the complaint was filed.

Analysis under *Friends of the Eel River*

As directed, the Court of Appeal then reviewed *Friends of the Eel River* and found that the Interstate Commerce Commission Termination Act (ICCTA), which was at issue in that case, is materially distinguishable from the FPA. The specific question in *Friends of the Eel River* was whether ICCTA preempted application of CEQA to a project to resume freight service on a stretch of rail line owned by the North Coast Railroad Authority. The California Legislature had created the North Coast Railroad Authority and gave it power to acquire property and operate a railroad, to be owned by a subsidiary of the state. For this reason, the California Supreme Court found that the purpose of the federal law was deregulatory, and the state as the owner of the railroad was granted autonomy to apply its environmental law.

Conclusion and Implications

The case is significant because it is an example of federal preemption being applied in the context of CEQA and it distinguishes the California's Supreme Court's recent decision in *Friends of the Eel River v. North Coast Railroad Authority*. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C071785A.PDF.
(James Purvis)

FOURTH DISTRICT COURT UPHOLDS CONDITIONS IMPOSED BY CALIFORNIA COASTAL COMMISSION ON COASTAL DEVELOPMENT PERMIT

Lindstrom v. California Coastal Commission, ___Cal.App.5th___, Case No. D074132 (4th Dist. Sept. 19, 2019).

The Fourth District Court of Appeal found the California Coastal Commission (Commission) did not abuse its discretion when it imposed special conditions on a coastal development permit. The court found three of four conditions were consistent with the City of Encinitas' local coastal program and within the Commission's authority. The court, however, rejected one condition because it was overbroad, unreasonable, and did not achieve the Commission's purpose for imposing it.

Factual and Procedural Background

In 2012, petitioner applied for a Coastal Development Permit with the City of Encinitas (City) to build a 3,553 square-foot home atop a 70-foot high ocean-top bluff. Petitioner submitted a permit application pursuant to the City's Local Coastal Program (LCP) and hired an engineering firm to prepare a geotechnical report. The LCP required the report to: 1) certify that the development would not require coastal armoring in 75 years based on current erosion rates; and 2) calculate the project's setback distance, of no less than 40-feet, based off a 1.5 safety level. The report concluded the project would be safe from bluff failure with a 40-foot setback and no protective armoring in 75 years would be required.

In May 2013, the City's planning commission approved the development permit with conditions. One month later, two commissioners appealed the City's approval claiming it conflicted with the LCP. Petitioner requested the Commission delay its decision,

and retained a new engineering firm to prepare a revised geotechnical report. The report was completed in October 2015 and concluded the slope would be safe with a 40-foot setback at a 1.29 safety level.

The Commission heard the appeal in July 2016. A staff geologist claimed the proper setback should be 60 to 62 feet because the report's analysis relied on an improper safety level. Counsel for petitioners claimed the LCP's statutory language did not explicitly require a safety level of 1.5 over the course of the entire 75-year projection. The Commission rejected the report's calculations and approved the permit with four conditions. The first condition (Condition 1.a) imposed a 60- to 62-foot setback. The second condition (Condition 3.a) prohibited all use of coastal armoring devices. The third condition (Condition 3.b) required removal of the home in the event a government agency deems occupancy unsafe due to natural hazards. The fourth condition (Condition 3.c) imposed mandatory remediation measures that the landowners must take in the event hazardous bluff conditions threaten the structure.

Petitioner filed a petition for writ of mandate challenging these conditions. The trial court partially granted the petition and found in favor of petitioner as to the first and second conditions (Conditions 1.a and 3.a), but found the Commission did not abuse its discretion in imposing the third and fourth conditions (Conditions 3.b and 3.c). The parties cross-appealed.

The Court of Appeal's Decision

The Court of Appeal for the Fourth Judicial District partially reversed the trial court's holding. Under a substantial evidence standard of review, the court found the Commission did not abuse its discretion by imposing the first, second, and fourth conditions (Conditions 1.a, 3.a, and 3.c), but held the third condition (Condition 3.b) was improperly broad and not reasonably related to achieving the LCP's purpose.

The Minimum Setback Requirement

As to Condition 1.a, which imposed a 60- to 62-foot development setback, the court found that the plain language of the statute supported the Commission's decision. Petitioner urged the court to defer to the City planning commission's interpretation of the statute because it was the agency charged with initially issuing the permit. The Commission urged the court to defer to its analysis because it certified the LCP and case law requires deference to the Commission's interpretation of local programs. The court declined deferring to either interpretation, instead finding that a reasonable person could interpret the statute's plain language as requiring a safety factor of 1.5 from failure and erosion over 75 years. As such, the Commission's condition was proper because the geologist's 60- to 62-foot setback calculation conformed to the statute's methodology.

Waiver of Future Coastal Armoring

The court found the Commission properly imposed Condition 3.a because the agency may impose reasonable terms and conditions on permits, so long as they comport with the Coastal Act and local LCP. The condition, which waived the petitioner's future right to build a seawall, was consistent with the City's LCP and implemented a provision of the City's general plan that banned coastal armoring structures on new developments. The court also petitioner's related takings claims, finding that the condition simply restricted use of the property, rather than exacting a fee or demanding conveyance of a property interest. Petitioner would not be deprived of all economically beneficial use of their land because they would continue to hold title to their property. Lastly, petitioner would not suffer a physical taking because future bluff rescission on their property would be caused by forces of nature, not an unconstitutional government invasion.

Mandatory Structure Removal

The court held the Commission abused its discretion in imposing Condition 3.b, which would require petitioner to remove the home in the event a government agency deems it at risk of a natural hazard. Contrary to petitioner's argument, the court found that the Commission may impose permit conditions not expressly authorized by the LCP, so long as they are reasonable. Here, however, Condition 3.b was not reasonable because it was overly broad. As drafted, the condition's language could be interpreted to require petitioner to remove their home under unreasonable circumstances, including natural hazards that have nothing to do with blufftop instability. Because this failed to reasonably relate to the LCP, the court

issued a writ of mandate requiring the Commission to delete or revise and clarify the condition.

Bluff Rescission Management

Finally, the court rejected petitioner's argument that Condition 3.c unconstitutionally infringed on their substantive and procedural due process rights. The condition required petitioner to prepare a geotechnical report if the bluff erodes to within ten feet of the development and obtain an amended coastal development permit or remove any structures that are deemed unsafe. The court found the condition properly comported with the Commission's inherent authority because it aligned with the LCP and Coastal Act and did not unreasonably restrict use of the land.

Conclusion and Implications

The Court of Appeal's decision reiterates the Coastal Commission's inherent authority to impose special conditions on coastal development permits. The Coastal Act grants the Commission with oversight over local coastal programs and permitting. As such, the Commission may impose additional conditions of approval to protect bluff stability, including mandatory setback requirements, waivers on coastal armoring, and future retreat management measures. Mere restrictions on land use that do not exact a fee or deprive owners of all use do not violate the unconstitutional conditions doctrine. However, conditional language should not be so expansive that it could be interpreted in a manner that yields unreasonable results. Thus, conditions that are overly broad or inconsistent with a city's local coastal program are impermissible.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/D074132.PDF
(Bridget McDonald, Christina L. Berglund)

THIRD DISTRICT COURT AFFIRMS SUPERIOR COURT'S GRANT OF PRELIMINARY INJUNCTION ON SHASTA DAM RAISING PROJECT—CALIFORNIA SUPREME COURT DENIES REVIEW

Westlands Water District v. Superior Court for the County of Shasta,
S. Ct. Case No. C090139 (Sept. 26, 2019); (3rd Dist. Aug. 29, 2019).

In September, the California Supreme Court declined to review an appeal of a preliminary injunction preventing Westlands Water District (Westlands) from preparing an Environmental Impact Report (EIR) analyzing potential impacts associated with raising Shasta Dam, which the U.S Bureau of Reclamation (Bureau) has proposed. The preliminary injunction prevents Westlands from taking any action that constitutes "construction" of the Shasta Dam project pending trial. If the issue is resolved in a similar manner when the matter comes to trial next year, state water agencies may be prohibited by state law from partnering with the federal government on the Shasta Dam expansion project.

Background

Shasta Dam impounds the Sacramento and McCloud rivers in northern California and forms Lake Shasta, the largest reservoir in California. Lake Shasta is an important feature of the federal Central Valley Project, which is operated by the U.S. Bureau of Reclamation. Recently, the Bureau proposed raising Shasta Dam 18.5 feet, which would increase the reservoir's storage capacity. However, the 2016 Water Infrastructure Improvements for the Nation Act (WIIN Act) requires at least a 50 percent contribution from non-federal cost-sharing partners for expansion of a federally owned storage project. In March of 2018, Congress approved $20 million in funding for pre-construction and design engineering related to raising Shasta Dam. In November 2018, Westlands publically noticed its intent to prepare an EIR under the California Environmental Quality Act (CEQA) relating to the Shasta Dam project.

In May of this year, the State of California filed a complaint seeking declaratory and injunctive relief,

as well as a writ of mandate, against Westlands. The complaint seeks:

> 1) a judicial declaration that Westlands' "planning" efforts relating to raising Shasta Dam violate California's Wild and Scenic Rivers Act (Rivers Act);
>
> 2) a preliminary injunction enjoining Westlands from assisting or cooperating with any actions involving planning or construction of a project to raise Shasta Dam; and
>
> 3) a writ of mandate directing Westlands to halt all activities involving planning for or construction of a project to raise Shasta Dam that do not comply with the Wild and Scenic Rivers Act.

Superior Court Injunction and Writs That Followed

In July, the Shasta County Superior Court enjoined Westlands from:

> . . .taking any action that constitutes planning for or the construction of the Shasta Dam Raise project, pending trial of this matter.

The Superior Court also enjoined Westlands' CEQA process initiated by its public notice in November 2018 of its intent to prepare an environmental impact report. The Court of Appeal for the Third Appellate District denied Westland's appeal of the trial court ruling, and Westlands petitioned the California Supreme Court for review.

In September, the California Supreme Court declined to review the preliminary injunction, and the case is slated for trial in April 2020.

The Complaint

In its complaint, the state argues that the McCloud River is protected under the Rivers Act. The purpose of the Rivers Act is to maintain the free-flowing conditions of rivers named in the act, and to prevent the impairment of those flows by the construction of dams, reservoirs, diversions, or other impoundment facilities. According to the state, the Rivers Act:

> . . .bars any agency or department of the state from participating in any way in the planning or construction of any dam, reservoir, diversion, or other impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.

The state also alleges that a 2015 Environmental Impact Statement (EIS) prepared by the Bureau identified several impacts associated with its preferred alternative of raising Shasta Dam by 18.5 feet. According to the state, these impacts include inundating a large portion of the lower McCloud River, which could affect free-flowing conditions on the McCloud River; converting aquatic habitat, which could affect the wild trout fishery in the lower McCloud River; and reducing the total length of the McCloud River eligible for wild and scenic designation by 3,550 feet, among other impacts. Thus, the state argues that because raising the dam could have adverse impacts on the McCloud River, Westlands is barred by the Rivers Act from participating in any planning or construction activities related to raising the dam. The State further argues that preparing an EIR under CEQA is "planning" under the Rivers Act, and thus Westlands is barred from preparing the EIR.

Conclusion and Implications

The preliminary injunction against Westlands does not mean, at this point in time, that Westlands may not as a matter of law prepare an EIR to study the impacts of the Shasta Dam Raise project. Instead, Westlands may not continue to prepare the EIR or participate in any construction activities relating to the Shasta Dam Raise project until the matter is finally resolved, which at the earliest will be next spring.

(Miles Krieger, Steve Anderson)

SUPERIOR COURT DISMISSES CHALLENGE TO WESTERN MUNICIPAL WATER DISTRICT'S WATER RATE STRUCTURE

Heath v. Western Mun. Water, Case No. RIC 1806580 District, (Riverside Super. Ct. 2019).

The Riverside County Superior Court has dismissed a lawsuit challenging Western Municipal Water District's (Western) five-tier water rate structure. The Superior Court ruled that Western's budget-based, rates structure complies with the California Constitution in that it is supported by the costs of water service as required under Proposition 218.

Background

During and following California's historic drought, budget-based rates have become a popular approach among water districts as a means to incentivize water conservation. The methodology for establishing and implementing those rate structures is critically important is often subjected to legal challenges. Under the California Constitution, water suppliers are prevented from charging more for water service than the costs incurred to provide that service.

In the 2015 seminal case, *Capistrano Taxpayers Association v City of San Juan Capistrano*, the California's Fourth District Court of Appeal struck down the city's tiered water rate structure. The District Court of Appeal found that the city's rates were arbitrarily set and that the incremental rate increases among the four tiers were not tied to corresponding differences in the cost of service. While the court struck down the city's approach in that case, the court recognized that a tiered rate system may be upheld, so long as the rates are justified by the costs.

Western's Five-Tier Budget-Based Rate Structure and the Legal Challenge

In 2017, in an effort to promote water conservation within its district, and to pay for additional costs of providing water service to its customers, Western implemented a five-tier budget-based rate system. The five tiers are categorized as: 1) indoor, 2) outdoor, 3) inefficient, 4) wasteful, and 5) unsustainable water use. Western conducted a rate study in 2017 which linked the higher rates in Tiers 3, 4, and 5 directly to the higher costs of service.

In April 2018, two petitioners sought to invalidate the rate structure by filing a petition for a writ of mandate with the Riverside County Superior Court. The petitioners alleged that Western's rates violated Proposition 218 because the service rates did not correspond to the costs for their service.

The Superior Court's Ruling

The court ruled that Western's budget-based rates are compliant with the State Constitution, specifically Proposition 218, and satisfy the State's requirement that agencies implement measures to conserve California's water resources. In particular, the court found that as a direct consequence of inefficient water usage, Western's "wasteful" water users drive higher costs by requiring the District to acquire more expensive water, invest in capital improvements to expand water supplies and operate water efficiency programs to comply with California's water conservation laws. The court observed that Western derives 40 percent of its annual supply locally, which comprises relatively lower cost water, which it allocates to its Tier 1 rate for "health and sanitation." Western imports 60 percent of its water through the State Water Project, which comprises a significantly more expensive supply. The court found that Western's rates reflected those higher costs in a manner that is consistent with state law.

Conclusion and Implications

The Superior Court's ruling is viewed by many as a win for Western's customers, who will continue to pay less for water than those who do not conserve efficiently, and also for other local water agencies charged with promoting and following the state's water conservation goals. The ruling is also considered by many to be consistent with prior cases in meeting two important public policy goals in California: protecting the ratepayer from unjustified rate hikes and promoting water conservation.
(Chris Carrillo, Michael Duane Davis)

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