

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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CALIFORNIA WATER NEWS

CALIFORNIA AMERICAN WATER'S MONTEREY BAY DESALINATION PROJECT CONTINUES TO FACE OPPOSITION

California American Water (Cal Am), a private investor-owned utility that provides water and wastewater services to over 600,000 customers in the Monterey area, has been moving forward with plans for a desalination plant project (Desal Project) to be constructed near the Monterey One Water Regional Treatment Plant. Cal Am conceived the Desal Project as a response to current and anticipated supply challenges facing the company. Though Cal Am has been steadily working to obtain the requisite approvals and commence construction, the Desal Project has faced ongoing opposition, primarily as a result of the project's expected costs and environmental impacts.

The Cal Am Desalination Project

The Desal Project largely arose as a response to a State Water Resources Control Board cease and desist order limiting Cal Am's pumping from the Carmel River, with restrictions expected to take full effect by December 31, 2021. As contemplated, the project involves drawing seawater through the ocean floor using subsurface slant wells constructed near the tide line north of the city of Marina, which would then be sent to the new 6.4 million gpd desalination plant for treatment. A new pipeline was previously built in order to transmit the seawater from the wells to the plant.

The Desal Project is among three primary components included in the broader Cal Am initiative known as the Monterey Peninsula Water Supply Project (Water Supply Project), and is expected to cost a total of \$329 million over 30 years, according to Cal Am. Notwithstanding Cal Am's particular supply pressures, the company has characterized the Water Supply Project as a groundbreaking step toward the development of a sustainable water supply for the Monterey Peninsula.

Critics Cite Environmental and Economic Concerns

Primary criticisms levied against the Desal Project

involve anticipated environmental impacts as well as anticipated costs associated with the project. Environmental opponents claim that instead of seawater, the slant wells for the Desal Project will draw freshwater from a nearby aquifer that is recharging and protecting the Salinas Valley Groundwater Basin (Basin) against seawater intrusion. They argue that the Desal Project would contaminate and result in further depletion of the Basin, already been deemed to be in a state of critical overdraft by the Department of Water Resources. Cal Am asserts that monitoring wells will allow the company to closely observe the situation during operation and quickly respond by shutting down the slant wells should any seawater intrusion occur.

Substantial opposition to the Desal Project has also been based on expected short and long term economic impacts, as desalination remains one of the costlier solutions to water supply challenges generally. Some argue that the Desal Project could end up costing almost four times the \$329 million Cal Am projects, based on previous information disclosed by Cal Am in connection with prior permit approvals, claiming that the \$329 million figure cited by Cal Am represents only the capital cost of constructing the plant. Whatever the total cost, it is ultimately expected to be passed on in large part to consumers in Cal Am water bills, which Cal Am estimates could rise by about 50 percent on average. Local officials have also suggested that costs of remediating any seawater intrusion into the Basin caused by the Desal Project would be disproportionately borne by residents in lower-income areas, to the benefit of residents in more affluent areas serviced by Cal Am.

Some opponents believe that options for extensively treating recycled water for potable represents a much more cost-effective alternative solution to the region's water supply needs. This could include the expansion of Cal Am's Pure Water Monterey program, another component of the Cal Am Water Supply Project. While an expansion of the Pure Water Monterey program is being pursued in conjunction

with the Desal Project, that program faces obstacles of its own in obtaining approvals and otherwise moving ahead to generate water production within the timeframe Cal Am had anticipated.

Challenges to the Project and Recent Setbacks

The Marina Coast Water District (District) has taken the lead in several notable efforts to block the Desal Project, including the August 2019 filing of a lawsuit in Monterey County Superior Court to enjoin construction on the project, due to the alleged inadequacy of the California Environmental Quality Act (CEQA) review on which the County of Monterey's (County) board of supervisors relied in approving a key use permit for the project that enabled construction to commence. Specifically, the District argues that the environmental studies did not account for newly available information that substantially supports the position that the project could negatively impact the Basin on a much larger scale than previously believed, so further review needs to be conducted under CEQA. The District also alleges that the County's approval of the permit violated zoning laws and the Water Code because the District did not demonstrate that it had obtained the requisite water rights for purposes of the County use permit. The District's recent action is the ninth lawsuit brought against the Desal Project, and the fifth brought by the District.

While Cal Am has been successful in fending off legal and administrative challenges to date, recent complications and delays arising out of the District's lawsuit and the California Coastal Commission's consideration of a necessary project permit have seriously

limited Cal Am's ability to move forward, at least in the short term. On October 28, 2019, Coastal Commission staff recommended that the approval of the Desal Project permit be denied due to the viability of an expanded Pure Water Monterey recycled water treatment program as an alternative to the Desal Project. Shortly thereafter, the Coastal Commission decided to postpone a vote on the Desal Project until March, pending further review of the viability of alternatives to the project. Subsequently, on November 19, Judge Lydia Villarreal, presiding over the District's lawsuit, issued an order extending a stay on construction until March 2020, corresponding to the expected timing of the decision of the California Coastal Commission regarding a permit for the Desal Project.

Conclusion and Implications

The Desal Project is an ambitious undertaking borne largely out of necessity for Cal Am. Challenges to the project have had limited success, but the November 19 order in the District's lawsuit extending the stay on construction of the project represents a notable victory. Such delays, along with recent delays involving the expansion of Pure Water Monterey, mean that Cal Am may be unable to obtain the supplemental water supply in time needed to offset the full imposition of restrictions on production in Carmel River. Though the recent setbacks and present circumstances do not suggest that the eventual completion of the Desal Project will be compromised, Cal Am still needs to secure certain approvals relating to the project and opponents appear likely to continue pursuing all avenues undermine it. (Wesley A. Miliband, Andrew D. Foley)

IMPERIAL COUNTY DECLARES SALTON SEA STATE OF EMERGENCY, DEMANDS GOVERNOR NEWSOM TAKE IMMEDIATE ACTION

The Imperial County Board of Supervisors (Board) recently voted unanimously to declare a local emergency arising from air pollution at the Salton Sea. The Board subsequently declared a local emergency at the New River (River) based on findings of raw sewage discharge and other pollutants that risk causing extreme peril to the health, safety, and welfare

of people and properties near and around the River. The Board urges the State of California to recognize the emergency in a manner that would entitle use of federal and state disaster relief funds and allow mitigation work to begin immediately without traditional, lengthy environmental review.

Background

The Salton Sea is California's largest lake, extending approximately 35 miles long and 15 miles wide between the Coachella and Imperial valleys. The Salton Sea was formed around 1904, when the Colorado River swelled, broke through extensive irrigation structures and flowed into the Salton Basin for many months. The Salton Sea, which is saltier than the ocean provides fish habitat and a food supply food for millions of migratory birds on the Pacific Flyway. The Salton Sea Test Base has also been historically used by the U.S. Navy and other military agencies to test weaponry.

Over the last several decades, water levels at the Salton Sea have declined and salinity concentrations have increased, posing threats to the ecosystem and wildlife. The State of California committed to pursue dust suppression and habitat restoration projects for thousands of acres at the Salton Sea, and state lawmakers and voters have already approved over \$365 million in funding for those projects. However, those projects have yet to materialize.

The New River originates in the Mexicali Valley in Mexico and traverses north, across the United States-Mexico border and through Imperial County, where it discharges into the Salton Sea. Some have asserted that Mexico has treated the New River as a "drain" rather than a "river" by allowing unmitigated, perpetual discharge of raw, untreated sewage from Mexicali homes and businesses directly into the river. The problem has increased as Mexicali has grown to a city with a population over one million in recent decades.

California law recognizes extreme air pollution as a potential basis for an emergency declaration. A local emergency must be declared to the state within ten days of a disaster in order for funds to be disbursed. Thereafter, the Governor and the State Director of Emergency Services must review the request and respond to the declaration. The Governor has 30 days following the disaster to request a federal emergency declaration.

Current Conditions at the Salton Sea and the New River

Since 2003, the Salton Sea has receded rapidly, exposing approximately 40 acres of new shoreline.

As it shrinks, contaminants and caustic impurities from decades of past military testing and agricultural runoff create dangerous toxic dust pollution and other health hazards for local communities. This dust, in turn, contributes to already poor air quality and high rates of respiratory illness in the region. The Salton Sea is also a critical stopping point along the Pacific Flyway for nearly 400 bird species. The shrinking shoreline and increase in salinity is contributing factor to massive bird die-offs and poses other grave threats to the ecosystem and wildlife.

Additionally, the New River reportedly poses extreme and growing dangers to the health, safety, and welfare of Imperial County residents. The New River carries urban runoff, treated municipal wastes, untreated and partially treated industrial wastes, and agricultural runoff, originating from Mexico. Residents, workers, and visitors are potentially exposed to toxic substances and pathogens, including salmonella, e. coli, streptococcus, hepatitis, and other health risks. There is currently no plan of action by the International Boundary and Water Commission to address the threats posed by the New River.

Imperial County Declares Local Emergency

In late October the Board voted unanimously to declare a local air pollution emergency at the Salton Sea and urged the state government to take immediate action. The Board recently approved a second emergency declaration arising from conditions at the New River, once more asking the state to intervene.

Copies of the proclamations were sent to Governor Newsom requesting a State and ultimately federal emergency proclamations.

The County's request also included that the state provide equipment and resources including a swamp dozer, bull plow, lift pumps, and funding for scientific research and related purposes including to pay personnel such as an epidemiologist, data analyst, environmental toxicologist, research scientist and as many as six community health workers familiar with the region.

The County is also requesting an in-depth epidemiological study in local schools on extremely high rates of asthma, soil testing along the lake's exposed shoreline, and a toxic air data analysis, to be conducted by installing air monitors at schools and other sites where large numbers of people congregate.

The State's Response

In response, Governor Newsom's office stated that:

... [the Salton Sea] is an important issue, and we are currently reviewing the Board of Supervisors action. We want to ensure people that several actions are already underway to address air quality issues at the Salton Sea that include dust suppression and mitigation, and collaboration with local, state and federal agencies.

Governor Newsom's office further described some of these actions:

- Expediting a dust mitigation project at the southern end of the Sea expected to break ground by the end 2019.
- Accelerating planning and approvals for another 9,000 acres of dust suppression projects to address some of the most emissive areas related to the receding sea.
- Actively discussing additional funding for projects in a potential climate resilience bond measure in 2020.
- Accelerating progress and improving coordination on projects with the Governor's recent ap-

pointment of a new assistance secretary for Salton Sea policy.

- Working with federal and local partners to identify and address barriers to progress.

The state has also indicated that it will create a new Salton Sea website and email newsletter to update residents and even hire a community organizer to hold meetings in Spanish and English as projects are implemented.

Conclusion and Implications

Without sufficient mitigation, projected negative impacts to human health, wildlife, and the ecosystem arising from the Salton Sea and New River is undeniably concerning to the Board, the State and, of course, local residents. Analysts expect the shoreline of the Salton Sea to recede an additional four miles over the next 25 years if appropriate action is not taken. Approximately \$653 million in federal, state, and local funds have been authorized since 2003 to control dust and restore wildlife to the Salton Sea. Yet, for a variety of reasons, only \$184 million has been spent.

Imperial County's emergency proclamations represent a concerted effort to instill within federal and state agencies a greater sense of urgency to address these longstanding issues.

(Paula Hernandez, Michael Duane Davis)

WESTLANDS WATER DISTRICT SIGNS AGREEMENT BARRING ITS PARTICIPATION IN THE SHASTA DAM EXPANSION

The Westlands Water District (Westlands), one of the largest water districts in California, recently executed a settlement agreement with the California Attorney General that prohibits Westlands from participating in Shasta Dam expansion efforts that could adversely impact the McCloud River, a state-designated Wild and Scenic River.

Background

The prospect of raising Shasta Dam to increase surface water storage capacity for the state's largest reservoir has been a long-standing controversy. The

Shasta Lake Reservoir, which comprises an approximately 400-mile shoreline, supplies farms and cities across the Central Valley. The U.S. Bureau of Reclamation (Bureau), which operates the Shasta Dam, has proposed raising the dam by 18 feet, which would expand Shasta Lake's storage capacity by 14 percent and approximately 634,000 acre-feet.

Environmental groups opposing this proposal assert that it would inundate the McCloud River and flood sites considered sacred to the Winnemem Wintu Tribe. A 2015 feasibility study prepared by the U.S. Department of Interior determined that while unin-

dition would occur to a point 3,500 additional feet up river, such inundation would not materially impact lower McCloud River flows into Shasta Lake.

While the federal government has expressed a strong interest in increasing the Shasta Lake's storage capacity, the Bureau cannot raise Shasta Dam unless local water agencies contribute approximately half of the \$1.3 billion project costs. Westlands has demonstrated its interest in raising Shasta Dam, including indicating its willingness to contribute to the project costs. In 2007, Westlands spent \$35 million to buy a seven-mile stretch of land along the McCloud River in support of the project.

The Lawsuit and Subsequent Settlement Agreement

The California Attorney General (AG) filed a lawsuit against Westlands earlier this year. The AG alleged, among other claims, violations of the California Public Resources Code § 5093.542, which states that:

...no agency of the state shall assist or cooperate with...any agency of the federal, state, or local government in the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.

Westlands conducted environmental review for the Shasta Dam Raise Project pursuant to the California Environmental Quality Act (CEQA), which triggered the filing of the lawsuit. After the AG secured a preliminary injunction in July 2019 preventing Westlands from "taking any action that constitutes planning for or the construction of the Shasta Dam Raise

Project, pending trial of this matter" and enjoining Westlands' CEQA process, Westlands formally withdrew its CEQA Notice of Preparation on September 30, 2019 and entered into a settlement agreement with the AG.

The terms of the settlement agreement include:

- Westlands shall not initiate preparation of an environmental impact report or other environmental review document pursuant to CEQA for a project to raise Shasta Dam;
- Westlands shall not enter into any agreement to fund, directly or indirectly, the raising of Shasta Dam;
- Westlands shall not enter into any other agreement that would assist any agency of the federal, state, or local government in the planning or construction of the raising of Shasta Dam; and
- Westlands shall not acquire additional real property to facilitate the raising of Shasta Dam.

Conclusion and Implications

The Bureau of Reclamation continues to explore options with other non-federal cost-share partners to implement the Project, which is considered a high priority project for the Trump administration. Westlands is permitted to study whether raising the Dam would impact the McCloud River. Depending on the results of such additional studies, Westlands may decide to reengage in formal planning processes, though such a move may risk subsequent litigation. For now, Westlands has formally withdrawn its Project efforts to advance a major California water resources priority—increasing surface water storage capacity. (Chris Carrillo, Michael Duane Davis)

CALIFORNIA OPERATIONS AGENCY FORMS WORKING GROUP TO EXPLORE ROLE OF BLOCKCHAIN TECHNOLOGY IN SUSTAINABLE GROUNDWATER MANAGEMENT

September 20, 2019 marked the inaugural meeting of the Blockchain Working Group, recently created by the California Government Operations Agency, in accordance with AB 2658. Blockchain, the technol-

ogy behind cryptocurrency Bitcoin, is a secure ledger or database that has typically been used in the financial world. The group discussed, among other things, the content of their eventual report to the legislature.

The current Draft Table of Contents of the report includes two sections on utilities: one section on energy, electricity, and carbon, and a separate section on groundwater. Though not discussed at the meeting, private companies have already begun to research blockchain applications in groundwater management. The technology may be instrumental in the administration of the Sustainable Groundwater Management Act (SGMA), but it is too early to know whether and to what extent the State will embrace such innovation.

Background

Assembly Bill 2658, was enacted by the California Legislature in September of 2018 as a first step in understanding the use and potential regulation of blockchain technology in California. The act required the Secretary of the Government Operations Agency to appoint a chairperson and a 20-person working group by July 1, 2019. The resulting Blockchain Working Group has three main purposes: 1) to evaluate blockchain uses, risks, benefits, legal implications, and best practices; 2) to define the term “blockchain”; and 3) to recommend amendments to other statutes that may be impacted by the deployment of blockchain.

The Blockchain Working Group’s 20 members and chair are required to represent a variety of disciplines, which may be touched by blockchain technology. Some members were selected for their legal and governmental expertise, some for their technical expertise, and some for business expertise. Specifically, the group consists of: three appointees from the technology industry; three appointees from non-technology related industry; three appointees with a background in law, who were chosen in consultation with the Judicial Council; two appointees from privacy organizations; two appointees from consumer organizations; the State Chief Information Officer, Amy Tong; the Director of the Department of Finance, Keely Martin Bosler; the chief information officers from the California Environmental Protection Agency, the Franchise Tax Board, and the Department of Industrial Relations; State Senator Robert M. Hetzberg, Senate District 18; and State Assemblyperson Ian Calderon, Assembly District 57. The Chairperson is Camille Crittenden, the Executive Director of the Center for Information Technology Research in the Interest of Society (CITRIS) and the Banatao Institute.

An Assessment Interviews Summary released November 11, 2019 explains that the members are:

...committed to a dialogue that expands the collective understanding of blockchain and its potential application at the state, local, and private domains. . . . Working group members highlighted the importance of setting ethical guidelines for blockchain application to ensure that blockchain is leveraged to improve people’s lives. (Assessment Interviews Summary, p. 1.)

What is Blockchain?

Blockchain is most widely known as the underlying technology of Bitcoin, a cryptocurrency invented in 2008. Accordingly, blockchain’s history and much of the excitement about blockchain is intertwined with the financial world. But as applications for blockchain are being discovered and implemented in other fields—food supply chains, health records management, real estate transactions, and voting security, to name a few—the need for a broader understanding of blockchain is clear. California, as a leader in the technology world, may have a considerable influence over national policy in this regard.

In essence, a blockchain is a ledger. But it is a ledger that cannot be hacked, altered, or lost. As noted, the Blockchain Working Group will propose a definition with their report in 2020. But in the meantime, AB 2658 provides the following temporary definition, which embraces those three characteristics: “‘blockchain’ means a mathematically secured, chronological, and decentralized ledger or database.” (Cal. Gov. Code § 11546.)

Blockchain and the Sustainable Groundwater Management Act

California enacted the Sustainable Groundwater Management Act in 2014. At the core of SGMA are two principles: first, that sustainable management of the state’s groundwater resources is necessary for continued wellbeing; and second, that such management is best done at the local and regional level. To this end, SGMA mandates the creation of Groundwater Sustainability Agencies (GSAs) to monitor groundwater pumping and create and enforce groundwater sustainability plans in their respective basins. For every high- and medium-priority basin, the GSA must

develop and implement a Groundwater Sustainability Plan (GSP) or Alternatives to GSPs. A GSP serves as a roadmap for how a groundwater basin will achieve long term sustainability by the 2040 and 2042 deadlines specified in SGMA.

In the interest of local control, SGMA grants GSAs broad authority over the sustainable management of groundwater basins throughout the state: “A groundwater sustainability agency may perform any act necessary or proper to carry out the purposes of this part.” (§ 10725.2, subd. (a); *accord* § 10725, subd. (b).) There are several mechanisms for enforcement at the disposal of the GSAs: monitoring and investigation, civil penalties, suspension of extractions, exercise of any other powers belonging to the local agency serving as the GSA, and referral to the State Water Resources Control Board.

Blockchain, combined with another technology called IoT (which stands for Internet of Things), may facilitate a GSA’s monitoring and investigative activities. This option is already being explored in northern California by IBM Research in partnership with the nonprofit The Freshwater Trust, SweetSense Inc., which produces satellite-connected IoT sensors, and the University of Colorado, Boulder. (State of California Tackles Drought with IoT & Blockchain, Feb. 8, 2019.)

IBM’s pilot program is essentially a cap-and-trade framework: IoT sensors are attached to all of the groundwater pumps within a basin. The sensors track the activity of the pumps and report, in real time, the activity to a satellite, where the data is compiled into a blockchain. Through a web-based dashboard, farmers and other water users within the basin, may buy and sell allocations of water among themselves. Each transaction is recorded in the blockchain, and it may be verified against the activity of the pumps. IBM explains:

... [i]ndividual users who require groundwater amounts beyond their share cap will be able to ‘purchase’ groundwater shares from users who do not require all of their supply at a market-regulated rate.

Thus, water markets established to implement SGMA may be based on blockchain, and incorporated into GSPs in coming years.

Smart Contracts

There is a fourth characteristic of blockchain, which is not reflected in California’s working definition: blockchain is programmable. Accordingly, it can enable the execution and performance of complex “if/then” instructions. These types of instructions are known in the technology world as “smart contracts,” though they are not necessarily contracts in the legal sense. But such protocols, used in conjunction with IoT sensors, may allow water users execute transactions conditional on rainfall or temperature, or even non-weather events.

Smart contracts could also theoretically allow a GSA to automatically suspend extractions when a water user over pumps, in accordance with its powers under SGMA. Thorny issues of due process could arise if or when the technology is used in this way.

Conclusion and Implications

The Blockchain Working Group will give its report and policy recommendations to the Legislature on July 1, 2020. Until then the Blockchain Working Group has invited comments and questions, to be submitted to the Group Manager, Gabriela Montano, whose contact information is available here: <https://www.govops.ca.gov/blockchain/>. All meetings of the group may be streamed online from the Government Operations Agency’s YouTube channel. (Chelsie Liberty, Meredith Nikkel)

DEL PUERTO CANYON RESERVOIR PROJECT SEEKS TO IMPROVE WATER SUPPLY MANAGEMENT FOR CENTRAL VALLEY PROJECT, STATE WATER PROJECT

Within the next decade, Californians traveling along I-5 may have another piece of scenery to glance at as they drive on by. Set to develop in its namesake canyon in Stanislaus County, the Del Puerto Canyon

Reservoir’s (DPCR or Project) proposed construction primarily includes a 200-foot high earthen dam at the opening of the canyon which will be visible from the interstate, just west of the City of Patterson.

The Project has taken up the goal of improving water supply reliability for water users south of the Sacramento-San Joaquin Delta in dry years by taking better advantage of excess water in wet years. Although it is early on in the environmental review stages, proponents of the DPCR are optimistic construction can begin as early as 2022.

Background

Just a ten-minute drive from the main Plaza in downtown Patterson is the future site of the \$500-million Project. Creating a reservoir with a surface area of more than 800 acres, the Project's 200-foot high dam would serve to hold up to 85,000 acre-feet of excess water from the Delta-Mendota Canal (Canal). This stored water would then be pumped back into the Canal as needed for use by agricultural users in both Del Puerto Water District (DPWD) and the San Joaquin River Exchange Contractors Water Authority (SJRECWA) member entities service areas, and potentially other south-of-delta water suppliers or environmental purposes such as wildlife refuges.

As the Project stands, several modifications to local infrastructure would be required to make way for the DPCR. Del Puerto Canyon Road, which connects Patterson to the San Jose area, would need to be moved as it currently sits in land that is planned for inundation. Connecting the DPCR to the Canal would require running the pipeline under I-5. Furthermore, a Shell Oil pipeline, which runs almost directly along the proposed location of the dam, must be rerouted prior to the Project's implementation.

Having completed the Initial Study and Notice of Preparation of an Environmental Impact Report (EIR) as of June, 2019, the DPWD—acting as lead agency under the California Environmental Quality Act (CEQA)—is currently in the process of finishing up the draft EIR for the project. As of now, the draft EIR appears to be set for release sometime in December.

Contributions to the Central Valley Project and State Water Project

The primary concern that sparked interest in the development of the DPCR was the relative lack of local control over water storage with regard to operation of the federal Central Valley Project (CVP) and the State Water Project (SWP). The San Luis Reservoir (SLR), serving both the CVP and the SWP, and the U.S. Bureau of Reclamation manages the federal share of storage within the SLR. On the other hand, DPWD has only limited access to storage capacity in the SLR and SJRECWA has no direct ability to utilize storage capacity.

To circumvent this problem, the Project will allow for local control over water distribution at the point of the DPCR, enabling DPWD to respond to water demands as needed by users dependent on the CVP.

As of now, the Project's implementation does not include a connection with the SWP's California Aqueduct, however, the Notice of Preparation for the Project's EIR does include alternatives which allow for the expansion of the Project to connect with the aqueduct.

Conclusion and Implications

The Del Puerto Canyon Reservoir Project stands as a win on most accounts in terms of water supply and reliability. By inundating off-stream lands, the Project might present relatively minimal impact to wildlife (and fish in particular) while affording the area with an opportunity to better utilize excess water from the Delta-Mendota Canal. In addition to the benefits the Project may have on surface water management, the DPCR further promotes sustainable groundwater management by allowing for groundwater recharge through Del Puerto Creek's permeable creek bed via downstream releases.

(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF LAND MANAGEMENT FINDS NEGLIGIBLE RISK TO WATER RESOURCES POSED BY HYDRAULIC FRACTURING IN PORTIONS OF CALIFORNIA

On November 1, the U.S. Bureau of Land Management (BLM) issued a final Supplemental Environmental Impact Statement (EIS) relating to environmental impacts of hydraulic fracturing (fracking) in areas within western Kern, Kings, and nearby counties. In its supplemental impact statement, the BLM concluded that hydraulic fracturing posed negligible risks to surface and groundwater resources in the planning area subject to BLM jurisdiction.

Background

The Bureau of Land Management manages 400,000 acres of public lands, and 750,000 acres of federal mineral estate, within 17 million acres of public land in Kings, San Luis Obispo, Santa Barbara, Tulare, Ventura, Madera, Fresno, and Kern counties.

The surface and subsurface acreage managed by the BLM encompasses sensitive ecological resources and biodiversity. For instance, nearly one third of the threatened or endangered animal species in California may be found within the BLM's management area, and subsurface acreage includes a variety of groundwater systems that form part of the water supplies used by agricultural and municipal users in the area.

In September 2011, the BLM made available a draft Resource Management Plan (RMP) for the management area, which replaced an existing plan. The BLM also made available its draft Environmental Impact Statement under the National Environmental Policy Act (NEPA), which provided five alternatives to managing the public lands and mineral estate under BLM's jurisdiction.

In 2013, the BLM issued its final EIS, and subsequently commissioned an independent assessment of hydraulic fracturing (fracking) in California by the California Council of Science and Technology (CCST). CCST's study was designed to assess the available published scientific and engineering information associated with fracking in California, and

was released in 2014. However, the BLM concluded that CCST's report did not provide significant new information to warrant supplementing its EIS. In 2015, the BLM selected Alternative B as the operative RMP, which would open slightly more than 1 million acres to oil and gas exploration while closing nearly 150,000 acres.

Shortly after the BLM adopted Alternative B as its Resource Management Plan, several environmental groups filed a lawsuit in federal court challenging the sufficiency of the BLM's EIS, contending that the BLM failed to adequately consider the environmental impacts of fracking under NEPA on the roughly 1.2 million surface and subsurface acreage managed by BLM. In September 2016, the court granted most of the environmental parties' claimed relief, catalyzing a settlement agreement between the parties.

The settlement agreement conditioned dismissal of the case on the BLM preparing a supplemental EIS assessing the environmental impacts of fracking on the managed area. The settlement agreement also provided that the court would no longer have jurisdiction over the case within 14 days of the BLM issuing its supplemental EIS, provided any motions for attorneys' fees and costs on the part of the environmental groups had been resolved. The BLM issued its supplemental EIS (SEIS) on November 1, 2019.

The National Environmental Policy Act and Litigation

As interpreted by the Ninth Circuit in prior cases, NEPA obligates a federal agency to consider every significant aspect of the environmental impact of a proposed action, and ensures the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. In reviewing the adequacy of an EIS, courts apply a "rule of reason" standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of probable environmental

consequences. Accordingly, judicial review of an EIS consists only of ensuring that the agency took a “hard look.”

The U.S. District Court faulted BLM for failing to meaningfully discuss fracking in its EIS, instead only mentioning fracking three times throughout the report. The court concluded that the agency failed to take the requisite hard look required by NEPA, particularly where, under the RMP, a quarter of new wells in BLM’s managed area were expected to use fracking. The court also focused on the CCST study that identified several potential concerns and calls for additional information and analysis, such as potential impacts to surface and groundwater posed by fracking.

The SEIS recognizes that fracking may have an impact on surface and groundwater resources. In the SEIS, BLM assumed that between zero and four wells under any new lease would be drilled per year over the ten-year planning period (totaling 40 wells per lease). BLM estimates that approximately 400 wells per year would be fracked in California, resulting the consumption of roughly 246 acre-feet per year, based on an annual average use of 200,000 gallons per fracked well. According to BLM, that consumption would be negligible for zero to four wells drilled per year over the planning period, compared to the more than 2 million acre-feet of water used per year in Kern County, mostly for agriculture. Additionally, BLM concluded that, while spilled fracking fluids and materials could pose a risk to groundwater, the relatively small number of wells likely to use fracking meant the risk was negligible, as was the risk from flowback fluids used during the well drilling and fracking process.

In the SEIS, BLM generally recognized that injecting fracking fluids into wells poses contamination

risks to groundwater. According to BLM, there are two major pathways through which fracking fluids may impact groundwater. These are: 1) a breakdown in barriers designed to prevent leakage of fluids from the well, and 2) migration of fractures outside of the target producing formation. Addressing the former, the SEIS relies on the concept of well integrity, and state regulations designed to ensure it, in support of its conclusion that the impact of drilling zero to four new wells per year would cause negligible risks to groundwater. Similarly, BLM concluded that the risk of migrating fractures for zero to four wells per year posed a negligible risk of groundwater contamination. However, BLM noted that an interagency partnership called the California Oil, Gas, and Groundwater Program has been formed to study the problem posed by oil and gas activities to groundwater.

Conclusion and Implications

With respect to the impact posed by fracking on water resources, the SEIS generally concludes that the risks of fracking in the planning area managed by BLM are negligible. The SEIS includes reference to a variety of studies and reports, and thus appears to consider more information about fracking than the original EIS. However, it is unclear whether environmental groups will bring suit over the SEIS, and whether the information and analyses relied by BLM will stand up to the “hard look” standard required by NEPA. The BLM Supplemental Environmental Impact Statement, is available online at: https://eplanning.blm.gov/epl-front-office/projects/nepa/100601/20006500/250007620/FINAL_Bakersfield_Hydraulic_Fracturing_SEIS_10-25-19.pdf (Miles Krieger, Steve Anderson)

STATE WATER RESOURCES CONTROL BOARD APPROVES LONG-AWAITED PLAN TO ADDRESS SALTS AND NITRATES IN THE CENTRAL VALLEY

On October 16, 2019, the California State Water Resources Control Board (SWRCB) approved a long-awaited plan to address salinity and nitrate build-up in groundwater basins and surface waters in the Central Valley. Over ten years in the making, the new Central Valley-wide Basin Plan Amendments (BPAs)

implementing a Salt and Nitrate Management Plan (SNMP) is intended to improve drinking water supplies contaminated with nitrates from decades of agriculture practices, and further reduce nitrate discharges to prevent groundwater contamination. The SNMP also requires agricultural and wastewater

dischargers to address the build-up of salts in groundwater and surface waters.

Developed by the Central Valley Regional Water Quality Control Board (Central Valley RWQCB) and a diverse group of stakeholders, the SNMP is expected to help protect and preserve vital agricultural and drinking water sources in the Central Valley well into the future. However, specific initiatives under the SNMP will certainly lead to some growing pains, especially within the agriculture and wastewater communities.

Background

In 2006, after large enforcement actions were taken to enforce stringent salinity requirements on discharges, the Central Valley RWQCB initiated a collaborative effort to address elevated levels of salinity in groundwater basins and surface waters known as the Central Valley Salinity Alternatives for Long-Term Sustainability (CV-SALTS). The CV-SALTS initiative recognized that groundwater and surface water supplies were becoming limited, years of certain agriculture practices such as fertilizer use were leading to the build-up of salt in water supplies, and this in turn was leading to more concentrated levels of salt in wastewater streams. As a result, the CV-SALTS initiative spurred the development of a regulatory and programmatic approach for the management of salts in groundwater and surface waters, including through Basin Plan amendments and a Central Valley-wide SNMP. Part way through the process, the environmental justice community urged the process to also include nitrate, which was more of a human health concern related to groundwater. As a result, the focus was broadened to add nitrate to the program.

Pursuant to California Water Code § 13240 *et seq.*, a Water Quality Control Plan or “Basin Plan” is the RWQCB’s master water quality control planning document. A Basin Plan contains the regulations adopted by the RWQCB to control the discharge of waste and other controllable factors impacting water quality, and designates beneficial uses and water quality objectives for surface water, groundwater, as well as “saline waters,” which are included in the definition of “waters of the State.” See, Cal. Water Code § 13050(e).

After several years of development, in January 2017, CV-SALTS submitted the SNMP to the Central Valley RWQCB. In March 2017, the Central Val-

ley RWQCB adopted Resolution No. R5-2017-0031, which approved the SNMP and directed staff to start developing Basin Plan amendments to incorporate the SNMP’s policies and strategies to address nitrates and salt build-up into the Central Valley RWQCB’s Basin Plans.

A little over one year later, in May 2018, the Central Valley RWQCB adopted Resolution No. R5-2018-0034, which amended the board’s Basin Plans for the Sacramento and San Joaquin River Basins and Tulare Lake Basin—the three main basins under the Central Valley Water Board’s jurisdiction. These Basin Plan amendments also specifically incorporated the SNMP.

The Central Valley-Wide Salt and Nitrate Management Plan

On October 16, 2019, the SWRCB officially approved the BPAs implementing the SNMP. The Plan’s specific goals are: 1) to ensure a safe drinking water supply, 2) to achieve balanced and salt nitrate loads, and 3) to implement long-term and managed aquifer restoration programs where reasonable, feasible, and practicable.

The Central Valley RWQCB will accomplish these goals through mandatory and voluntary actions, including by requiring dischargers to form nitrate Management Zones, prepare and implement nutrient management plans, improve irrigation practices, as well as through pilot studies, monitoring, and additional research. The Central Valley RWQCB also intends to issue or amend individual permits to dischargers to track and meet these goals. Furthermore, dischargers will be required to develop strategies to reduce their contribution of salts to surface waters and groundwater sources.

In addition to the above changes, the SWRCB directed the Central Valley Water Board to revise and strengthen the SNMP in one year with respect to certain requirements, including the following:

- Revising requirements to accelerate the reduction of nitrate discharges to groundwater basins for dischargers or categories of dischargers participating in a Management Zone as soon as practicable, but not more than in 35 years. This was revised down from the Central Valley Water Board’s timeline of 50 years.

- Revising waste discharge requirements for nitrate to have enforceable interim deadlines or time schedules, as well as final compliance deadlines, to meet water quality objectives.
- Revising Management Zone implementation plan requirements to include a voluntary residential sampling program for residents whose water supplies may be contaminated.

The SWRCB's approval of the Basin Plan amendments incorporating the SNMP will now be submitted to the Office of Administrative Law (OAL). Basin Plan amendments do not become effective until OAL approves the provisions. The regulations and provisions of the BPAs related to federal surface waters or to National Pollutant Discharge Elimination System (NPDES) permits for surface waters must also receive approval from the U.S. Environmental Protection Agency.

Conclusion and Implications

Although the SWRCB formally adopted the BPAs implementing the SNMP, many of the SNMP's initiatives are still under development and will be implemented over time. For example, the related BPAs establish a prioritized nitrate control program for discharges to selected groundwater basins and sub-basins, as well as a phased salt control program for discharges to surface water and groundwater.

The Central Valley Regional Water Quality Control Board intended the phased and prioritized nature of these nitrate and salt control initiatives to be implemented over the next several years in part to first address drinking water sources impacted by nitrate contamination. The nitrate program requires Early Action Plans for priority areas to ensure that residents with nitrate-impacted drinking water sources are provided with drinking water from another source until a long-term solution can be implemented. The salinity program will begin collecting fees to pay for a large Priority and Optimization (P&O) Study to determine potential salinity treatment removal projects that could be located and to determine sources of funding for implementation. The costs of the P&O Study, anticipated to be \$1.5 million per year over ten years, will be imposed based on permit type or industry.

In summary, although the operational impact of the SNMP remains to be seen and will likely lead to some growing pains, especially within the regulated community, the SNMP represents a significant milestone to address nitrate and salt contamination in surface waters and groundwater basins within the Central Valley well into the future. It also remains to be seen whether this program will coordinate well with the Groundwater Sustainability Agency work being done under the Sustainable Groundwater Management Act.

(Melissa A. Thorme, Patrick F. Veasy, Meredith Nikkel)

U.S. BUREAU OF RECLAMATION PUBLISHES NOTICE OF PROPOSED WATER SUPPLY CONTRACT WITH WESTLANDS WATER DISTRICT

In November 2019, the U.S. Bureau of Reclamation (Bureau) made public a proposed water contract with Westlands Water District for 1.15 million acre-feet of water from the federally operated Central Valley Project in California. The proposed contract, which would convert Westlands' existing water service contract into a repayment contract, would provide Westlands a perpetual supply of water, depending on water availability and continued satisfaction of repayment obligations by Westlands provided for in the contract.

Background

The U.S. Bureau of Reclamation constructed and operates the Central Valley Project (CVP) that diverts from the Sacramento River, the American River, the Trinity River, and the San Joaquin River and their tributaries. The CVP provides for a variety of beneficial uses, including diversion and storage, flood control, irrigation, municipal, domestic, industrial, fish and wildlife mitigation, and electricity generation and distribution. Annually, the CVP delivers an average of 5 million acre-feet of water for farms,

600,000 for municipal and industrial uses, 410,000 acre-feet for wildlife refuges, and 800,000 acre-feet for other fish and wildlife needs.

The Bureau acquired water rights to operate the CVP under California law, and has entered into long-term water service agreements with more than 250 contractors, including Westlands. Generally, CVP contracts are water service contracts, which are authorized under the federal Reclamation Project Act of 1939 (1939 Act). Water service contracts are used where the CVP includes multiple facilities benefiting different CVP functions, and where construction and final cost allocations have not yet been completed. For those types of facilities, costs are recovered from contractors, via water service contracts, according to the annual number of acre-feet of water the contractor diverted. Rates are set by the Bureau. The 1939 Act also authorizes repayment contracts, which are used when specific cost obligations can be assigned to contractors when specific facilities are constructed for the sole benefit of a single contractor. Repayments are generally made in 40 annual installments to repay a fixed amount.

In 1960, Westlands assigned its state water rights to the Bureau in exchange for a long-term water service contract with the Bureau. Accordingly, CVP water is delivered to Westlands pursuant to a contract from 1963 and a stipulated judgment in federal court. Westlands and the Bureau subsequently entered into binding agreements relating to the terms and conditions for renewing Westlands' contract.

The Water Infrastructure Improvement Act

In 2016, Congress passed the Water Infrastructure Improvement Act (WIIN Act), which allows for the conversion of current water service contracts into repayment contracts under the 1939 Act. In particular, § 4011(a)(1) provides that:

. . . upon request of the contractor, the Secretary of the Interior shall convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' association to allow for prepayment of the repayment contract pursuant to paragraph (2) under mutually agreeable terms and conditions.

For purposes of this section, Westlands is deemed a

“water users' association” and thus is deemed eligible by the Bureau for conversion of its water service contract.

Section 4011(a)(1) further prescribes the manner in which water service contracts are converted into repayment contracts. For instance, water service contracts under § (e) of the 1939 Act become repayment contracts under § 9(d) of the 1939 Act, and water service contracts under subsection (c)(2) of the 1939 Act become repayment contracts under § 9(c)(2). Accordingly, the Bureau deemed Westlands' water service contract subject to conversion into a repayment contract. Moreover, the WIIN Act provides that newly converted repayment contracts are eligible for prepayment of construction cost obligations, discounted at half the Treasury rate. If Westlands' existing contract is converted into a repayment contract, its repayment obligation, if prepaid, may be discounted.

Proposed Terms

Under the proposed terms, the effective date of the contract would be March 1, 2020, and would continue “so long as the Contractor [Westlands] pays applicable Rates and Charges” under the contract, consistent with §§ 9(d) or 9(c)(1) of the 1939 Act. During each year, the Bureau would attempt to make available for delivery to Westlands 1,150,000 acre-feet of CVP water for irrigation, municipal, and industrial purposes. However, the proposed contract recognizes that the amount of contract water “is uncertain” due to hydrological conditions and the operation of state and federal law.

Although the contract contemplates Westlands' use of water for irrigation, municipal, and industrial purposes, the contract provides that Westlands may transfer, assign, reschedule, or convey CVP and other water to minimize the impacts of shortage conditions and to maximize the beneficial use of water. The contract would thus provide Westlands, and other contractors receiving similar provisions in their contracts, with greater flexibility to address hydrological and operation conditions within the CVP. It may also provide a general degree of flexibility for water planning and storage purposes, depending on the unique circumstances the contractor may be experience or anticipate experiencing. For instance, under the terms of the contract, “reasonable and beneficial use” broadly includes storage activities, including

groundwater recharge programs, groundwater banking programs, surface water storage programs, and other similar programs using CVP or other water Westlands receives within its service area, provided those uses are consistent with State law and the use is consistent with federal Reclamation laws. Notably, “rescheduled water” contemplates “pre-use” of water, where Westlands may request permission to use during the current year a quantity of CVP water which may be made available by the Bureau to Westlands during the subsequent year. Whether these uses are “reasonable and beneficial” uses as a matter of state law is not clear.

Conclusion and Implications

While the proposed contract between the Bureau and Westlands has already generated controversy, the mechanism for negotiating and converting water service contracts for the CVP was put in place by the WIIN Act of 2016. It remains to be seen whether any amendments to the contract will be made, as the comment period closes in January 2020, or whether the contract will be fully executed before the March 1, 2020 effective date. Bureau of Reclamation’s Negotiated Conversion Contracts are available online at: <https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html>
(Steve Anderson, Miles Krieger)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT AFFIRMS PRISON SENTENCE FOR KNOWING AND INTENTIONAL VIOLATIONS OF THE CLEAN WATER ACT

United States v. Blankenship, Unpub., Case No. 19-4072 (4th Cir. Oct. 1, 2019).

The U.S. Court of Appeals for the Fourth Circuit, in an *unpublished decision*, recently upheld a U.S. District Court's sentencing of Michael Blankenship (Blankenship) for violation of the federal Clean Water Act. The Court of Appeals held that several evidentiary determinations by the District Court did not amount to substantial prejudice against Blankenship.

Factual and Procedural Background

A jury sitting in the U.S. District Court convicted Blankenship of two counts of violating the Clean Water Act for knowingly discharging untreated sewage and portable waste into Little Huff Creek near Hanover, West Virginia. The District Court sentenced Blankenship to 15 months in prison and ordered him to pay a \$10,000 fine. Blankenship appealed and challenged four of the District Court's rulings.

The Fourth Circuit's Decision

Exclusion of Evidence at Trial

Blankenship argued that the District Court abused its discretion in excluding a chart demonstrating that there were other sources of fecal pollution in Little Huff Creek. The District Court excluded the evidence for lack of relevancy and the chart's potential to confuse the jury. Blankenship contended that the chart was relevant because it could explain the source of the foul odors described by the witnesses as emanating from the creek. The Fourth Circuit held that a District Court may exclude relevant evidence if its ability to prove something as true is substantially outweighed by the ability to mislead the jury. Here, the chart of fecal bacteria testing contained no testing date or location of testing that matched the date and location of Blankenship's alleged dumping.

Additionally, the Fourth Circuit ruled that the fecal content of the stream had no bearing on whether Blankenship dumped sewage into the creek. Therefore, the chart lacked the ability to validate Blankenship's point, while having the potential to confuse the jury of the source of foul odors emanating from the creek.

Testimony as to Undated Instances of Dumping

Blankenship also asserted that the District Court abused its discretion in permitting U.S. Government witnesses to testify to undated instances of dumping. The District Court admitted the evidence as essential to the charged dates and to support allegations of Blankenship's knowledge and intent. Evidence is essential if it is necessary to provide context relevant to the criminal charges. Here, the Government was required to establish that Blankenship knowingly dumped sewage. Accordingly, evidence that Blankenship dumped sewage repeatedly was essential to proving the act was not an accident. While evidence of the acts was undated, it was relevant to the issue at hand, necessary to prove the claim, and reliable. Therefore, the court affirmed the District Court's judgment as not unduly prejudicial.

Jury Instructions

Finally, Blankenship contended that the District Court abused its discretion in refusing to give jury instruction on the lesser-included offense of negligent dumping. Blankenship argued that the evidence supported the instruction because the element of knowledge was in dispute. Failure to give a requested instruction is not a reversible error unless the record as a whole demonstrates prejudice. The Fourth Circuit deemed testimonies of Blankenship's truck discharging sewage, Blankenship's pattern of dumping, and Blankenship's own admission of twice dumping into the creek as sufficient to dismiss Blankenship's argu-

ment for lack of merit. Therefore, the Fourth Circuit held that Blankenship failed to demonstrate that the ruling was prejudicial.

The Court of Appeals upheld the District Court's sentence of 15 months in prison and a \$10,000 fine:

Negligent dumping is a lesser-included offense of knowingly dumping. 33 U.S.C. § 1319(c)(1) (A) (West 2016 & Supp. 2019). Blankenship's argument, however, has no merit. West Virginia Department of Environmental Protection inspectors testified that Blankenship's truck was discharging sewage into the creek on the day in question, and neighbors' testimony established that Blankenship had a pattern of dumping sewage into the creek. Furthermore, Blankenship twice admitted to investigators that he dumped sewage into the creek on the date charged.

Blankenship's argument that he admitted to dumping sewage but not doing so knowingly makes little logical sense, and we conclude that the district court did not abuse its discretion in refusing to give the negligent dumping instruction.

Conclusion and Implications

This *unpublished decision* illustrates the deference given to District Courts by the Courts of Appeal in determining the admission of evidence for criminal violations of the federal Clean Water Act. When sufficient evidence is offered to support an essential element, the prejudicial effect on a party must be substantial. The court's decision is available online at: <http://www.ca4.uscourts.gov/Opinions/194072.U.pdf> (Marco Antonio Ornelas, Rebecca Andrews)

U.S. ARMY CORPS OF ENGINEERS' 2017 NATIONWIDE PERMIT FOR COMMERCIAL SHELLFISH AQUACULTURE SET ASIDE BY THE DISTRICT COURT

Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers, ___F.Supp.3d___, Case No. 17-1209RSL (W.D. Wash. Oct. 10, 2019).

The U.S. District Court for the Western District of Washington recently found that the U.S. Army Corps of Engineers (Corps) violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) in issuing the 2017 Nationwide Permit for commercial shellfish aquaculture activities (NWP 48). The District Court held NWP 48 unlawful with respect to activities in the waters of the State of Washington. The court heavily considered vacating NWP 48 outright, but agreed to accept additional briefing from the Swinomish Indian Tribal Community before issuing a final remedy.

Background

The CWA authorizes the Corps to issue permits for discharges of dredge or fill material into navigable waters of the United States. If the Corps determines activities involving discharges of dredged or fill material are similar in nature and will cause only minimal

adverse environmental effects both separately and cumulatively, the CWA allows the Corps to issue general permits on a nationwide basis for that set of activities. Nationwide permits last five years before the Corps must renew them.

In 2017, the Corps reissued NWP 48, authorizing: 1) the cultivation of nonindigenous shellfish species as long as the species had previously been cultivated in the body of water at issue, 2) all shellfish operations affecting half an acre or less of submerged aquatic vegetation, and 3) all operations affecting more than half an acre of submerged aquatic vegetation if the area had been used for commercial shellfish aquaculture activities any time in the last 100 years.

In addition to the CWA requirement that the Corps find minimal adverse environmental effects before issuing a general permit, NEPA requires that the Corps analyze the environmental impact of its actions through an Environmental Assessment (EA). If the Corps is unable to state that the proposed action

“will not have a significant effect on the human environment” after conducting the EA, the Corps must complete a comprehensive Environmental Impact Statement (EIS).

Ultimately, the Corps determined that issuing NWP 48 would not result in significant impacts on the human environment for the purposes of NEPA, and would result in no more than minimal individual and cumulative adverse effects on the aquatic environment for purposes of the CWA. Plaintiffs, on motion for summary judgment, asked the District Court to vacate NWP 48 under the APA because the Corps’ conclusions regarding environmental impacts were arbitrary and capricious and unsupported by evidence from the record. Plaintiffs also argued the Corps failed to comply with the CWA, NEPA, and the Endangered Species Act (ESA) in reissuing NWP 48.

The District Court’s Decision

Corps’ Evidence and Analysis Regarding Environmental Impacts

The court began by analyzing the Corps’ scientific evidence and findings regarding environmental impacts. Under the APA, a reviewing court must set aside agency actions that are arbitrary and capricious. Agency action is arbitrary and capricious if the agency has entirely failed to consider important aspects of the problem, offered an explanation that runs counter to the evidence before the agency, or offered an explanation that is completely implausible. The court noted that agency predictions *must* have a substantial basis in fact.

Here, the District Court found there was insufficient evidence in the record to support the Corps’ conclusion that reissuance of NWP 48 would have minimal environmental impacts. The Corps acknowledged multiple times that commercial shellfish aquaculture activities could have adverse environmental effects, but it did not provide sufficient evidence that the effects were minimal.

First, the court found the Corps improperly shifted the scale of impact evaluation to a landscape-scale analysis, rather than using the site-specific analysis that the CWA required. Second, the court found that the Corps broadly concluded that impacts would be minimal because the relevant ecosystems were resilient, relying on one scientific paper that lacked

evidence to support the Corps’ broad conclusion. The paper only studied effects of shellfish aquaculture on seagrass; it lacked any discussion of impacts on other types of vegetation, the benthic community, fish, birds, water quality/chemistry/structure, substrate characteristics, the tidal zone, or impacts of plastic use. The court found that the paper’s limited findings did not support the Corps’ broad conclusion that entire ecosystems are resilient to the disturbances caused by shellfish aquaculture, or that the impacts of those operations were minimal.

Third, the court found that the Corps’ minimal impact determination was inadequate under the CWA and NEPA because the Corps should have analyzed the impacts of the proposed activity against the environmental baseline, not as a percentage of the decades of degrading activities that came before. The Corps improperly compared the impacts of shellfish aquaculture to the impacts of the rest of human activity, noting that a particular environmental resource was degraded as a justification for further degradation.

Corps’ Reliance on General Conditions Imposed under Nationwide Permits

The court then analyzed the Corps’ use of the general terms and conditions imposed on all nationwide permits to make its environmental impact findings. Because the Corps relied on the general conditions imposed on all nationwide permits to find minimal impacts, without more evidence, the court found that the Corps did not satisfy the requirements of the CWA and NEPA. The general terms and conditions imposed on a nationwide permit can be relevant to minimal impact findings, but they are “simply too general to be the primary ‘data’ on which the agency relies when evaluating impacts.”

Corps’ Delegation of Impacts Analysis to Regional Corps Districts

Lastly, the court analyzed the Corps’ finding that regional district engineers would review projects and bring their impacts to a minimal level. Generally, district engineers have the ability to modify a nationwide permit within particular classes of waters, add regional conditions to the nationwide permit, and impose special conditions on particular projects to safeguard against risks of greater than minimal impacts. Here, the Corps relied on these abilities of the district

engineers in finding there would only be a minimal impact. The court found the Corps “effectively threw up its hands and turned the impact analysis over to the district engineers.” It held the Corps’ impact determinations were entirely conclusory, and the Corps abdicated its responsibility in violation of the CWA and NEPA.

The Remedy

The court held the U.S. Army Corps of Engineer’s issuance of NWP 48 was arbitrary and capricious and not in accord with the CWA or NEPA. As a result, the court held unlawful and set aside NWP 48 insofar

as it authorized activities in Washington. The court considered vacating NWP 48 outright but decided to accept briefing from the Swinomish Indian Tribal Community regarding the scope of the remedy before making a decision.

Conclusion and Implications

This case exemplifies the rule that agency actions must be supported by substantial evidence to be upheld under the APA. Practically, this case sets aside NWP 48 in the State of Washington.

<https://ecf.wawd.uscourts.gov/doc1/19718788103>
(William Shepherd IV, Rebecca Andrews)

DISTRICT COURT GRANTS MOTION FOR SUMMARY JUDGEMENT ON ADMINISTRATIVE VIOLATION OF THE CLEAN WATER ACT

The Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc.,
___F.Supp.3d___, Case No. 4:16-cv-40053 (D. Mass. Sep. 30, 2019).

The U.S. District Court for Massachusetts recently determined that citizen suits are not available for administrative violations of the federal Clean Water Act for failure to properly transfer a permit to a new owner in certain circumstances.

Background

Plaintiff, Blackstone Headwaters Coalition (Blackstone) brought this action under the citizen suit provision of the federal Clean Water Act (CWA). The Clean Water Act requires “operators” of construction activities that “will disturb one or more acres of land, or will disturb less than one acre but are part of a common plan of development ... that will disturb more than one acres of land,” to obtain a Construction General Permit (Permit) from the U.S. Environmental Protection Agency (EPA) authorized by the National Pollutant Discharge Elimination System (NPDES).

The Permit allows operators to discharge pollutants in accordance with set limitations and conditions. An “operator” is defined as either: 1) a party with “operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications,” or 2) a party

with “day-to-day operational control of those activities at a project that are necessary to ensure compliance with the [Permit] conditions.”

The site at issue was acquired by father and son Robert H. Gallo and Steven A. Gallo (Gallos) through several transactions conducted between 1995 and 2005. In 2005, the Gallos consolidated ownership of the site under their company—Fox Hill Builders, Inc. In 2007, the site was conveyed to Arboretum Village, LLC where the Gallos serve as members. In February 2006, Gallo Builders, Inc. (GBI) owned by the Gallos, obtained a Permit for the site and listed GBI as the operator of the site. In May 2012, the EPA revamped the Permit process to require permit holders to re-apply. GBI elected to allow its Permit to lapse and reapplied for it to be held by Arboretum. A Permit was issued to Arboretum in May of 2012.

The Massachusetts Department of Environmental Protection (DEP) has authority over the site under the Massachusetts Clean Water Act, Massachusetts Surface Water Quality Standards and the Massachusetts Wetlands Protection Act. These statutes and their corresponding regulations invest the DEP with enforcement powers. On June 21, 2013, the DEP issued a Unilateral Administrative Order (UAO) alleging storm water violations on the site that forced

Arboretum to comply with state and regulatory authority. The matter was ultimately settled by a jointly executed Administrative Consent Order (ACOP).

The District Court's Decision

The only remaining claim in this action was whether GBI and its owners, the Gallos (collectively referred to as: defendants), violated the CWA by failing to obtain a Permit for construction on the site. Defendants relied on similar case from the First Circuit Court of Appeals, which held that a business' failure to properly transfer an analogous state permit to a new business was *not* a substantive violation of the CWA that could be the basis for a civil enforcement suit. The First Circuit Court of Appeals reasoned that because: 1) the transferor and recipient businesses were controlled by the same person; 2) the identity of the current owner of the property was known to the state permitting authority; 3) and the current owner was complying with relevant regulations, the name on the permit amounted to no more than an administrative issue.

In reviewing applicability of the First Circuit Court's case, the U.S. District Court applied the three-step analysis to the present case. First, both

the prior operator listed on the Permit and the current operator that was not listed, were owned and controlled by the same person—the Gallos. Second, there was “voluminous evidence” demonstrating the identity of the site's owners was known to the state agencies. Third, GBI and the Gallos complied with the relevant regulations by continuing to comply with the ACOP.

In sum, the District Court held that the underlying purpose of the NPDES and the Permit provisions was met when a valid permit was issued to Arboretum. As seen in the First Circuit Court case, listing Arboretum as the permit holder did not rise to the level of a substantive violation of the CWA and could not form the basis of a civil enforcement suit. The court granted defendant's motion for summary judgement.

Conclusion and Implications

This case holds that where the three-step analysis is met, the name on a Construction General Permit for purposes of complying with the Federal Clean Water Act may amount to no more than administrative issue. When such an issue arises, it is not sufficient basis of a civil enforcement suit under the CWA. (Nathalie Camarena, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

**FIRST DISTRICT COURT UPHOLDS MITIGATED
NEGATIVE DECLARATION FOR WINERY EXPANSION
DESPITE CONTRARY EXPERT OPINION**

Maacama Watershed Alliance v. County of Sonoma, 40 Cal.App.5th 1007 (1st Dist. 2019).

On September 9, 2019 the First District Court of Appeal rejected a petition challenging a Mitigated Negative Declaration (MND) adopted by Sonoma County (County) for a winery expansion and wine cave project. The decision was certified for publication on October 7. Although petitioners in the action submitted multiple expert opinions challenging the MND, such opinions did not point to evidence sufficient to rise above speculation and meet the “fair argument” standard.

Factual and Procedural Background

Knights Bridge Vineyards sought to construct a two-story, approximately 5,500 square foot winery building, with an adjacent 17,500 square foot wine cave, and related improvements on a 2.4-acre area (Project). The Project was located in a rural part of Sonoma County on property zoned Land Extensive Agriculture, which allows for wineries and tasting rooms with a conditional use permit. Two residences and 46 acres of vineyards already existed on the Project site. Bidwell Creek, which is nearby, is possibly home to steelhead populations listed by the federal government as threatened species.

In 2015, the County’s board of zoning adjustments (Board) considered various reports analyzing the Project’s effect on geological, groundwater, wastewater, and biological resources. After considering these reports, the Board adopted a Mitigated Negative Declaration and approved a conditional use permit for the Project along with a mitigation monitoring program.

In 2016, the Maacama Watershed Alliance (MWA) appealed the Board’s project approval to the Board of Supervisors. County staff reviewed the issues raised in the appeal and prepared a revised MND. The County then received further comments on the revised MND related to groundwater and water qual-

ity.

In response, the County prepared a second revised MND. In 2017, the county approved the project subject to updated conditions and adopted the latest version of the MND for the Project.

MWA filed a petition for writ of mandate, which was rejected by the trial court, and then appealed to the First District Court of Appeal.

The Court of Appeal’s Decision

Fair Argument Standard

The Court of Appeal began by outlining the “fair argument” standard applicable to challenges of Mitigated Negative Declarations when it is argued that a full Environmental Impact Report (EIR) should be prepared pursuant to the California Environmental Quality Act (CEQA). The question in such cases is:

...whether there is substantial evidence in light of the record as a whole that it cannot be fairly argued that the project may cause a significant environmental impact.

In this context, the court noted that the word “may” means a reasonable possibility. The court went on to describe that the “fair argument” standard:

...creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review. . . .[however]. . . if a project may have significant effects, but mitigation measures will make the effects insignificant, the agency may adopt a Mitigated Negative Declaration.

While determining whether a MND is appropriate, the court noted that it was required to give the

county the benefit of the doubt on any “legitimate, disputed issues of credibility.” Accordingly, the burden of proof lies with the petitioner to demonstrate:

. . .by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact.

While personal observations of local residents can qualify as substantial evidence supporting a fair argument:

. . .mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument. (Citing *Pocket Protectors v. City of Sacramento*, 124 Cal. App.4th 903, 928 (2004).) As the court articulated:

. . .the question is not whether any argument can be made that a project might have a significant environmental impact, but. . .whether such an argument can fairly be made.

Guided by these principles, the court went on to analyze and reject each of the arguments raised by MWA.

Significant Geological and Erosion Impacts, Impacts to Fish Habitat, and Stormwater

MWA alleged that evidence supported a fair argument that construction of the Project’s wine cave would result in slope instability. MWA further alleged that a fair argument existed that the Project’s earth-moving and resulting erosion would have a significant impact on fish habitat in Bidwell Creek.

The court rejected these contentions. At the outset, the court highlighted that the MND’s conclusions regarding geology and erosion were supported by a geotechnical investigation that was peer reviewed twice. The court noted that the county’s consultants had some minor disagreements regarding the nature of soil and mineral deposits on the Project site. However, these consultants reached a consensus that the Project was geotechnically feasible, and that with adopted mitigation measures, the Project would not impact slope stability.

Regarding erosion impacts, the court examined a Biological Assessment prepared by a county con-

sultant. This assessment concluded that the Project would not affect special status species on or offsite if the applicant implemented best management practices to control erosion and silting.

MWA’s experts submitted multiple letters criticizing the county’s expert reports, claiming that they were based on insufficient data, and lacked a plan for placement of spoils created from excavation of the Project’s cave. The county’s experts responded to this criticism by submitting a detailed Stormwater Management Plan and creating plans for the placement of spoils extracted during cave construction. With these revisions to the Project approval, the county concluded that the risk of a landslide stemming from construction of the wine cave was very low. Through further peer review, the county also concluded that with the implementation erosion control measures, the Project would not cause significant erosion of cave spoils that would degrade water quality in Bidwell Creek.

Ultimately, the court was not persuaded that MWA’s experts’ “criticism of the data, findings, and conclusions of the county’s consultants” was sufficient to support a fair argument.” Although critical of the MND, MWA’s experts did not point to “evidence that the project is reasonably likely to cause landslides or otherwise generate environmentally harmful release of debris” that would impact Bidwell Creek.

Significant Impacts to Groundwater Supply

MWA contended that substantial evidence supported a fair argument that the Project’s groundwater use would significantly affect salmonids in Bidwell Creek, groundwater supply in neighboring wells, and fire suppression.

Again the appeals court rejected these contentions. The court first noted that Project modifications were incorporated to reduce water usage so that the Project would not result in any net increase in groundwater use over current conditions. The court then noted that although disagreement existed among experts about the interconnectedness of aquifers that would supply water to the Project and Bidwell Creek, even if such connection did exist, any impacts to groundwater supply would be “imperceptible.” The court went on to conclude that the Project’s conditions of approval, together with the county’s expert reports, supported the conclusion that no fair

argument existed that significant groundwater supply impacts might occur.

Significant Aesthetic Impacts

MWA next contended that a fair argument existed that the Project would result in significant aesthetic impacts. As evidence for this claim, MWA contended that an existing residence on a ridgetop on the property was “unsightly” and visible from a nearby highway.

The court rejected these claims. First, the court noted that the project site was not designated as a scenic resource, that the Project would be centrally located on an 86-acre parcel, and that unlike the existing residence, the new winery would be set into a hillside. The court also considered the Project’s enforceable conditions of approval that required the new winery to “have a dark-colored exterior, a non-reflective rooftop, and landscaping.”

With this information in mind, the court again upheld the County’s conclusion that evidence in the record did not give rise to a fair argument that the Project would result in significant aesthetic impacts.

Significant Fire Hazards

Last, MWA contended that a fair argument existed that the Project would result in significant fire hazards.

Again the court rejected this contention. The court noted that the Project was “consistent with the Public Safety Element of the General Plan” and would “include fire protection features, including a fire engine turnaround, access road. . .and water storage.” To the extent MWA argued that area fire protection services were already stretched thin:

. . .the need for additional fire protection services is not an environmental impact that CEQA requires a project proponent to mitigate.

Conclusion and Implications

The First District Court of Appeal’s decision highlights the fact that although the fair argument standard of review is a low bar, a petitioner challenging an MND must point to specific evidence in the record that a project may result in significant environmental impacts. Even when expert opinions are presented to challenge an MND, such opinions must be based on more than unsubstantiated speculation.

The decision also highlights that a MND can be strengthened during the administrative approval process through incorporation of concessions and mitigation measures that address criticism of the MND. These measures can reduce a MND’s vulnerability to challenge down the road. The court’s decision is available online at: <https://www.courts.ca.gov/opinions/documents/A155606.PDF> (Travis Brooks)

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