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CALIFORNIA WATER™
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RECENT CALIFORNIA DECISIONS

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CALIFORNIA WATER NEWS

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA OFFERS TO SETTLE PROTRACTED LITIGATION WITH THE SAN DIEGO COUNTY WATER AUTHORITY OVER WATER DELIVERY RATE

For the past decade, the San Diego County Water Authority (SDCWA) has been engaged in litigation against the Metropolitan Water District of Southern California (Metropolitan) over water rates for Metropolitan water deliveries to SDCWA. SDCWA extended a substantial settlement offer over a year ago. Recently, Metropolitan countered with an offer to compromise that reimburses SDCWA for overcharges during the years 2011-2014 and sets a fixed price of $450 per acre-foot for Metropolitan water deliveries to SDCWA from 2019 through the end of 2122.

Background

SDCWA has filed several lawsuits against Metropolitan challenging its water rates. At the heart of SDCWA's claims is an argument that it should not have to pay Metropolitan for its Water Stewardship Rate (WSR), which Metropolitan has built into its overall rate structure. The WSR recovers costs for Metropolitan's demand management programs, through which the agency provides conservation and local resources development incentive funding to its member agencies.

SDCWA challenges certain rates that apply to all 26 Metropolitan member agencies. To date, no other member agency has challenged the rates or supported SDCWA's efforts. Nine member agencies have joined the litigation in defense of Metropolitan's rates.

SDCWA prevailed at trial in one of its legal challenges. The court found that the WSR should not have been included in the parties' exchange agreement price for the years 2011-2014, because it found insufficient evidence in the administrative record for those years to justify including the WSR in Metropolitan's overall rate structure. Metropolitan has already paid SDCWA more than $44 million to reimburse SDCWA for those payments.

Metropolitan's justification for its rates for the 2014, 2016 and 2018 rate setting cycles is based on additional information that it believes supports the allocation of the WSR to its overall established rates for those three cycles.

The Proposed Settlement Offer

Metropolitan has offered to pay SDCWA more than $72 million which consists of the following: 1) SDCWA's WSR payments on exchange agreement deliveries for 2011-2014, and 2) SDCWA's WSR payments on exchange agreement deliveries for 2015-2017, though the legitimacy of those payments has not been litigated.

In addition, Metropolitan has offered to include a fixed price term in its exchange agreement with SDCWA for the years 2019-2112. Metropolitan has offered to charge SDCWA a discounted fixed price of $450 per acre-foot of water. The price would increase according to a defined construction cost index rather than the formula the agency typically uses for establishing water costs. According to Metropolitan, when applied over the length of the exchange agreement, the change in price is estimated to provide SDCWA with a savings of between $5.5 billion and $8.4 billion (in 2019 dollars).

San Diego County Water Authority's Response

Though as of the date of this writing the SDCWA has not formally responded, its representatives have indicated an unwillingness to accept the offer. SDCWA's Chairman recently stated:

> The Water Authority is fully committed to a mutually beneficial settlement, which is why we initially offered a proactive settlement to [Metropolitan] more than a year ago. [Metropolitan's] recent counter offer makes additional progress, but to truly reach an enduring agreement, fur-

ther discussions must be conducted in an open and transparent manner that moves away from costly legal debates.

Metropolitan's offer is a California Code of Civil Procedure § 998 statutory offer, which means it is a "take it or leave it offer" according to the Metropolitan General Manager, who also indicated that the Metropolitan Board would have to decide quickly if Metropolitan will continue discussions or go back to court.

Conclusion and Implications

Though the timeframe for responding to the § 998 offer was still pending as of the date of this writing, Metropolitan's recent offer marks a major development. Both sides are engaged in serious settlement discussions and appear interested in halting the continuance of costly of litigation. If they are successful, future litigation funds could be redirected to water projects and priorities that proactively serve the agencies respective constituents.
(Chris Carrillo, Michael Duane Davis)

PACIFIC GAS AND ELECTRIC ANNOUNCES SETTLEMENT AGREEMENT WITH WILDFIRE VICTIMS, BUT HAS MORE WORK TO DO

On December 6, 2019, wildfire victims reached a $13.5 billion settlement with Pacific Gas & Electric, Company (PG&E) to resolve the nearly 700,000 legal claims stemming from the 2018 Camp Fire, the 2017 Northern California fires, the 2017 Tubbs Fire, the 2016 Ghost Ship warehouse fire in Oakland and the 2015 Butte Fire. The settlement proposal was approximately $23 billion less than the initial $36 billion estimate from counsel for wildfire victims, and the announcement of the settlement proposal sent PG&E's stock price up in the markets.

Background—The Settlement

As part of the settlement, PG&E would pay wildfire victims $5.4 billion in cash and $6.75 billion in PG&E stock. The settlement also includes a $1 billion payout to cities and counties that were affected by the fires.

Federal bankruptcy judge Dennis Montali approved the settlement agreement on December 17, 2019.

Simultaneously, PG&E announced a $1.68 billion settlement with the Safety and Enforcement Division of the California Public Utilities Commission, settling an investigation launched by the Division regarding safety violations made by PG&E in managing and operating its utility infrastructure, which led to some of the 2017 and 2018 wildfires. This settlement agreement, if approved and adopted by CPUC Commissioners, would be the largest fine in CPUC history, and would require PG&E to set aside $50 million to invest in measures that would strengthen its utility infrastructure and to engage with local communities, including by holding Town Hall meetings and providing quarterly reports on maintenance work.

Governor Newsom Disagrees with the Settlement

Notwithstanding the approvals from the federal bankruptcy judge, Governor Gavin Newsom issued a statement and a letter to PG&E CEO Bill Johnson noting that the bankruptcy reorganization plan "falls woefully short." Newsom stated that:

> In my judgment, the amended plan and the restructuring transactions do not result in a reogranized company positioned to provide safe, reliable and affordable service to its customers. The state remains focused on meeting the needs of Californians including fair treatment of victims—not on which Wall Street financial interests fund an exit from bankruptcy.

Newsom's office issued a statement further elaborating:

> The governor has been clear about the state's requirements—a new and totally transformed entity that is accountable and prioritizes safety. Critically important to that is ensuring that the new entity has the flexibility to fund this transformation. These points are not negotiable.

Newsom's letter was widely supported by state legislators and advocacy groups such as The Utility Reform Network (TURN), who would like and expect to see further term negotiation to ensure customer safety and reliability, rather than a quick exit that favors shareholders and the aim of qualifying for the state wildfire fund, before PG&E emerges from the bankruptcy dispute.

PG&E's stock fell 14 percent after the letter from Newsom, trading at $9.67. PG&E is operating under a June 2020 deadline to exit bankruptcy proceedings in order to qualify for California's recently enacted wildfire insurance fund under Assembly Bill 1054.

Allegedly Diversion of Undergrounding Funds

Meanwhile, a recent audit commissioned by the CPUC and conducted by the firm AzP Consulting found that from the period 2007 through 2016, PG&E diverted $123 million from funds allocated to the Commission's Rule 20 program, which is intended to increase the undergrounding of overhead electric lines.

The audit report concluded that its findings showed that:

> PG&E ratepayers not only paid more in rates than PG&E spent on the Rule 20A program, [but that] the project activity that was performed was done so in a manner that was inefficient and costlier than necessary.

The Rule 20A program was launched to facilitate undergrounding and to soften the high cost barrier associated with such work. For example, PG&E has estimated that it costs an average $2.3 million per mile to bury overhead power lines, whereas running the same lines above ground costs approximately $800,000 per mile.

The CPUC also recently rejected a request by both PG&E and SDG&E to increase its profit margins in a filing before the Commission.

Conclusion and Implications

Overall, PG&E still has a long road ahead in wrapping up its bankruptcy proceeding and numerous related investigations at the CPUC—and in planning for its future in supplying electricity, often above ground, in a California that increasingly burns. (Lilly McKenna)

ONE NEVADA COUNTY PROPOSES NOVEL IDEA FOR EXPORTING EXCESS FLOODWATERS

It's hard to believe that in Nevada—the most arid state in the nation—there might be *too much* water. But that is the case in one hydrologic basin on the northern edge of the Reno metropolitan area, where impervious desert playa soils, banner water years in 2017 and 2019, and development in the floodplain have combined to cause ongoing flooding that has not abated. To address the problem, the county responsible for flood management, Washoe County, has filed an application with the Nevada State Engineer to export excess floodwaters out of the basin. That application underscores the difficulties that can arise when a governing body's responsibility to manage public health and safety concerns intersects with the doctrine of prior appropriation.

Historic Flooding

Reno sits on the eastern edge of the Sierra Nevada. Lemmon Valley is one of several basins in the Reno area that receives run off from the mountains but has no natural outlet for water. Stormwater collects at the valley floor and fills Swan Lake, a shallow playa depression, where little infiltration occurs. Over the years, the City of Reno and Washoe County approved residential, industrial and commercial development along the shores of Swan Lake.

In normal years, sufficient water evaporates from the surface of Swan Lake to keep it confined to the natural lake bed and, sometimes, to dry completely. In 2017, however, precipitation and mountain snowpack were about 200 percent of normal. In response, Swan Lake rose above its historical elevation and flooded surrounding homes. To make matters worse, a wastewater treatment plant also discharges treated municipal effluent into Swan Lake, accounting for 5-6 percent of the lake's water.

Due to the sheer amount of moisture and saturated soils, the floodwaters did not sufficiently recede, not-

withstanding a warm summer. Flooding or the threat of flooding continued into 2018. Compounding the situation, 2019 proved to be another very wet year. Three years into the flooding, it has become obvious that the problem will not resolve itself through natural processes within any reasonable time frame.

Initially, Washoe County implemented short-term measures to contain the lake water, which included temporary barriers and pumps. When those measures did not alleviate the problem, a number of neighboring homeowners sued the City of Reno, claiming a taking of private property without just compensation. The plaintiffs contended that the flooding resulted from city and county planning decisions, which transformed Swan Lake into a water storage facility for run off. The city responded that extreme weather events, not development, created an unprecedented flooding situation beyond the city's control. In June 2019, however, a jury found for the neighbors.

The County's Application to Export Floodwater

On October 18, 2019, the county filed an application to appropriate 1,500 acre-feet per year of water from Swan Lake as part of a project to mitigate the flooding in Lemmon Valley. Through a pump, pipeline and other infrastructure, the county proposes to transport the floodwaters to two neighboring basins for discharge to ephemeral streams. The county identifies its proposed manner of use as wildlife purposes and suggests that ancillary benefits could include instream flow and groundwater recharge in the receiving basins. In other words, the purpose of the application is to get rid of water in Lemmon Valley, not address any needs in the basins to which the water would be moved.

The county's application acknowledges that, before implementing any such project, it will need to perform feasibility studies and acquire rights of way from property owners. There is no specified deadline within which the State Engineer must act on an application.

Private Appropriation of Floodwaters

One interesting twist in the county's flood mitigation effort is that a more senior application to appropriate the floodwaters of Swan Lake is already pending before the State Engineer. That application was filed by three individuals, who proposed:

> . . .to use 2,500 acre-feet of Swan Lake water for storage in reservoirs and underground aquifers. . .to alleviate an actual and potential hazard from flooding in Lemmon Valley.

The application also identifies potential secondary beneficial uses, which could include "quasi-municipal, municipal, evaporation, irrigation, mining, recreation, wildlife, dust control and domestic." According to the application:

> The water pumped from the lake. . .will be. . .only for the purpose of pro-actively reducing if not entirely eliminating the existing and threatened flood situation. The goal is for mitigating flood situations in Lemmon Valley Lake [aka Swan Lake] that are due to increased runoff associated with climate change, development or extreme events. Public agencies, utilities and associations will implement.

The applicant does not own the land on which the flood storage structures would be built. The county protested this application, but in its own application, only requested the right to divert lake water above and beyond the 2,500 acre-feet sought in the more senior application.

Notably, the same private appropriators also filed applications for the floodwaters of two nearby playa lakes in the Reno area, one of which the State Engineer approved in 2012. In issuing that permit, the State Engineer indicated that:

> . . .[t]he amount of water recoverable under [the permit] will be determined on an annual basis. . .[with]. . .[n]o carry over credit. . .allowed. . .unless approved by the State Engineer under a separate recharge, storage, and recovery permit.

Without any carry over credit, it remains to be seen what beneficial uses could actually be proved up.

The City of Reno also recently proposed a change to its development standards for stormwater control in the Federal Emergency Management Agency's designated "flood hazard areas" in closed drainage basins. Going forward, the city will require:

> . . .onsite detention/retention basins that are adequately sized to mitigate the increase of storm water runoff as the result of the development to a minimum mitigation ratio of 1:1.3 during the 100-year, 10-day storm.

This means a development must capture more stormwater than would naturally flow offsite, raising the question of whether a developer must file an application to appropriate the surplus stormwater that the oversized detention/retention basins will collect.

Nevada's water statutes provide that "all water may be appropriated for beneficial use as provided in this chapter and not otherwise." Nev. Rev. Stat. 533.030(1). One exception to this mandate is, in any county with a population of 700,000 or more, "[w]ater stored in an artificially created reservoir for use in flood control." Currently, this provision applies only to Clark County, which encompasses the Las Vegas metropolitan area, and nowhere else in Nevada. The limited scope of the statute suggests that the stormwaters of Lemmon Valley are subject to private appropriation.

Conclusion and Implications

The assertion of private rights to appropriate runoff may not be compatible with a municipality's obligation to manage stormwater flows and protect the community from flooding. Will the holder of a permit to appropriate stormwater be able to restrain the governing jurisdiction's planning authority or dictate how floodwaters are managed? Must the governing jurisdiction pay the private appropriator for the right to manage those floodwaters? This may be at odds with the general police power to protect public health and safety. A legislative fix is probably the best means to address these vexing questions. In the meantime, though, the issue may soon come to a head in flood-prone Lemmon Valley.
(Debbie Leonard)

GREAT LAKES BEACHES ARE DISAPPEARING DUE TO RISING WATER LEVELS

The waters of Lake Michigan are rising, removing beaches, encroaching on lakefront property, and exacerbating the weather for those living near the waterfront. Record-high water levels in the Great Lakes, as well as the bays and rivers connected to them, have caused beaches and shorelines to disappear all over the state of Michigan during the summer. The effects of rising water levels have reduced beach access in 37 state parks, not to mention the effects on residents and tourists.

Background

A combination of steady rain and Lake Michigan's rising tides with high winds recently resulted in floods in Manistee, Michigan and closure of portions of Lake Shore Drive in Chicago. Lake Erie's high levels have caused flooding that has endangered roads on Peelee Island, a Canadian island south of Windsor. Although water levels have receded in recent weeks, projected fall and winter storms are likely to mean more coastal flooding, erosion, ice floes and ice jams that could create havoc for those living or working near the lakes.

Year-Round Issues

While the summer season is impacted when rising water levels remove access to popular beaches, the effects of rising levels in the Great Lakes are truly year round. When the lakes freeze over in winter, ice jams can clog channels and impede water flows, creating significant flooding. The receding beaches make lakefront living far riskier, and can result in ice buildup against sea walls and harmful storms which can damage those homes.

Officials from the U.S. Army Corps of Engineers, which tracks lake levels and forecasts them at least six months in advance, predict a high probability stemming from more rain and high winds. The Great Lakes Basin experienced its wettest 60-month period (ending August 31, 2019) in 120 years of record-keeping. Even as waters recede, they are projected to remain well above average over the next six months. And fall and winter storms tend to create further coastal erosion and coastal flooding, exacerbating issues.

The record lake levels have caused $550,000 in emergency repairs in Michigan's Porcupine Mountains in the state's Upper Peninsula along the Lake Superior shoreline. In October, a combination of high lake levels and wind-driven waves swept away up to 20 feet of dunes alone the Lake Michigan shoreline. Lakes Erie and Superior have set or tied all-time monthly records for the past four months, and the level for lakes Michigan and Huron is a foot higher

than last year without touching records. Lake St. Clair has set all-time monthly highs for four consecutive months.

Last spring, elevated waters lifted cement docks off their pilings at Luna Pier Harbor Club in Monroe County off Lake Erie, causing $20,000 in damage. Increased ice floes also threaten flooding along the shorelines.

State Parks are not just losing beaches, either. McLain State Park off Lake Superior had to be rebuilt for $4.1 million after five years of constant erosion. Others are facing reductions in land area or even complete disappearance if present trends continue.

Conclusion and Implications

Rising water-levels are a problem for coastal communities world-wide. Much attention is focused on beachfront properties along the coast in California, New Orleans, or Florida. But the same basic risks face populations living along the Great Lakes, and can impact large swaths of the Midwest in years to come. These issues are not simply a problem for residents with coastal property, but can create massive damage to infrastructure and natural resources, cause flooding, exacerbate winter storms, and result in colder winters near lake fronts. The year-round effects of climate change are worsening, and projections for further record-breaking lake levels indicate these issues are not likely to recede in years to come.
(Jordan Ferguson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES TAKES ITS FIRST LOOK AT SNOWPACK FOR 2020

On January 2, 2020 the California Department of Water Resources performed it first manual snow survey of 2020. The results were promising.

Background

In 1929 the California Legislature established the California Cooperative Snow Surveys program (Program), which is a partnership of more than 50 state, federal and private agencies. (*See*, https://water.ca.gov/Programs/Flood-Management/Flood-Data/Snow-Surveys). The group share a pool of staff and funding of the Program, which collects and analyzes snow data from more than 265 locations with 130 sensors located throughout the Sierra and Shasta ranges.

California is the only western state to perform snow level testing on its own. (*Ibid*), whereas in other states in the West, the testing surveys are done by the federally funded Natural Resources Conservation Service.

In California, the Department of Water Resources is the lead agency in coordination of the Program.

Survey Results

Manual Testing

On January 2, 2020, the California Department of Water Resources (DWR) performed its first survey for 2020 of snowpack levels. The testing was undertaken at Phillips Station. (*See*, https://water.ca.gov/News/News-Releases/2020/January-2020-Snow-Survey) The manual survey recorded 33.5 inches of snow depth and a water equivalent of 11 inches. This represents 97 percent of average for the Phillips Station location.

As a result of this manual survey, DWR Director Karla Nemeth stated:

> While the series of cold weather storms in November and December has provided a good start to the 2020 snowpack, precipitation in Northern California is still below average for this time of year. . . We must remember how variable California's climate is and what a profound impact climate change has on our snowpack.

Electronic Testing

In addition to the manual testing, DWR also monitors electronic readings from 130 stations located throughout the state. These electronic measurements indicate that, *statewide*, the snowpack water equivalent is 9.3 inches, which represents 90 percent of the average for January 2.

Sean du Guzman, chief of DWR's Snow Surveys and Water Supply Forecasting Section indicated that:

> It's still too early to predict what the remainder of the year will bring in terms of snowpack. . . .Climate change is altering the balance of rain and snow in California. That is why it is important to maintain our measurements of the snowpack to document the change in addition to having critical information to forecast spring runoff.

Most Precipitation in a Short Time Period

Typically, California receives an average of 75 percent of its annual precipitation in approximate a 90-day period: During the months of December, January and February. This time period often brings periods of hard rain, currently referred to as "atmospheric rivers." DWR reports that climate change has had a strong influence in this pattern, above:

> Climate change is expected to lead to continued warming and fewer but more intense storms impacting the snowpack of the Sierra Nevada. These changes continue to impact the distribution of snow across elevations, its pattern of accumulation, and rate of melt.

Additional Snowpack Manual Surveys

At Phillips Station, in addition to the January manual survey, DWR conducts surveys in the months of February, March and April (and occasionally in the month of May, "if necessary.") (*Ibid*)

Conclusion and Implications

For California, the January manual survey at Phillips Station, and the electronic surveys done throughout the state, look about normal. The state is currently at over 90 percent of average as of January 2. Climate change factors into the Department of Water Resources predictions for how and when precipitation will fall in the forms of snow and rain. From January through March, DWR anticipates atmospheric rivers to enter the state adding to the currently snowpack at higher elevations and adding to reservoirs in the form of intense rain. California is on track to repeat last year's water supply which was, by California standards, relatively plentiful statewide.
(Robert Schuster)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ISSUES DRAFT ENVIRONMENTAL IMPACT REPORT FOR STATE WATER PROJECT OPERATIONS

The California Department of Water Resources (DWR) recently released a draft Environmental Impact Report (DEIR) for the long-term operation of the California State Water Project, including in the Sacramento-San Joaquin Delta (Delta). According to DWR, the DEIR would strengthen safeguards for threatened and endangered fish species and expand science-based decision making for State Water Project operations in the Delta and upstream. The DEIR differs in several ways from the recently released Biological Opinions issued by two federal wildlife agencies for the operation of the federal Central Valley Project. Those Biological Opinions are now subject to litigation filed by environmental organizations alleging that they violate federal environmental and administrative laws.

Background

The California State Water Project (SWP) is the country's largest state-built water storage and delivery project. The SWP is operated in close coordination with the federal Central Valley Project (CVP) operated by the U.S. Bureau of Reclamation (Bureau) under the Coordinated Operation Agreement between the federal government and California. For both projects, the State Water Resources Control Board issues water rights permit and licenses, which allow for the appropriation of water by directly using or diverting water to storage for later use. Those water rights permits are conditioned on the bypass or withdrawal of water from storage to help satisfy specific water quality, quantity, and operations criteria affecting the Delta.

The federal Endangered Species Act (ESA) and California Endangered Species Act (CESA) impose requirements for the protection of endangered and threatened species and their ecosystems. In 2008 and 2009, the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) determined, in documents called Biological Opinions, that the continued long-term operation of the CVP and SWP would jeopardize certain endangered or threatened species. The FWS and NMFS' Biological Opinions included alternative project operations (aka "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. DWR has historically relied on federal biological opinions to provide "take" coverage under the ESA, with the California Department of Fish & Wildlife (CDFW) issuing a consistency determination for compliance with CESA.

On October 22, 2019, the FWS and NMFS each issued Biological Opinions concluding that newly proposed operation plans for the CVP and SWP would not jeopardize endangered and threatened species. The proposed operations plan contemplated significant investments in research and restoration actions for smelt and salmonid species, revised manage-

ment plans for operations of river systems tributary to the Delta, and changes cold pool management at Lake Shasta (CVP) for the benefit of salmon. Earlier this year, DWR indicated that it would pursue its own environmental review and permit process under CESA out of a concern for a perceived lower level of scientific rigor employed in the federal process of developing the Biological Opinions.

The Draft Environmental Impact Report

The DEIR is intended to support DWR's decision regarding ongoing SWP operations and CDFW's issuance of a CESA incidental take permit for a variety of aquatic species, including CESA-listed Delta smelt, Longfin smelt, Winter-run Chinook salmon, and Spring-run Chinook salmon. DWR's current incidental take permit, which provides legal protection for incidentally taking listed species during operation of the SWP, is limited to Longfin smelt and expires December 31, 2019. "Take" of the other CESA-listed species is accomplished through "consistency determinations" issued by CDFW. DWR is seeking a new incidental take permit from CDFW related to SWP operations, and CDFW will rely on the DEIR in assessing whether to issue the new permit.

From an operational standpoint, SWP exports would not increase under DWR's proposed operation of the SWP under the DEIR, and under some alternatives would decrease due to flow dedication for fish purposes at certain times of year. Moreover, the proposed operational changes in the DEIR would, according to the document, not result in any significant impacts, and thus no mitigation would be required. While DWR would continue to operate the SWP in accordance with state and federal permits and requirements to protect water quality for public, agricultural, environmental and other uses, the DEIR differs from the federal Biological Opinions in important ways.

First, the DEIR grants authority to CDFW to cease DWR operational changes if CDFW determines the changes will violate CESA. For instance, if CDFW does not agree with ongoing operational actions for Old and Middle River flows affecting Delta smelt entrainment or Longfin smelt spawning off-ramps, DWR will implement an operational action that is agreeable to CDFW, provided the agencies have attempted to timely resolve the disagreement and CDFW provides an explanation and supporting documentation.

Second, the DEIR includes alternatives that provide a quantity of water that can be used to offset pumping impacts in the Delta. For instance, Alternative 2B would provide for a 100,000 acre-foot "block" of water for summer or fall Delta outflow in wet or above-normal years. The additional water would be available for use from June through November, and could be procured by water purchases or SWP project water. Similarly, Alternative 2A would provide increased spring flows from the Delta for the benefit of Longfin smelt, which would reduce the amount of water available for export through the SWP, although it is unclear what impact increased spring outflows would have on CVP operations, if any.

Third, the DEIR provides direction on when Delta pumping can be increased during storm events and caps export amounts during those events. For instance, under the DEIR, DWR may capture excess flows in the Delta for export as a result of storm-related events by operating to a more negative Old and Middle River flow, but not greater than -6,250 cfs. Water may only be captured if it exceeds that required to meet water quality control flow and salinity requirements set by law. DWR would not be able to capture excess flows if any fish protective restrictions have been triggered, certain species are present or exhibit behavioral changes, or additional flow restrictions are forecast.

Fourth, the DEIR includes updated modeling and quantitative analyses to support habitat actions in summer and fall to benefit Delta smelt. Environmental and biological goals for modeling and analysis include maintaining low-salinity habitat in Suisun Marsh and Grizzly Bay, managing the low salinity zone to overlap turbid water and available food supplies, and establishing a contiguous low-salinity habitat from Cache Slough Complex to Suisun Marsh.

Conclusion and Implications

DWR's Draft EIR appears to provide greater flows through the Delta as a means to protect listed fish species than the federal Biological Opinions, and the document at least partially developed in reaction to them. Public comments on the DEIR may be submit-

ted to DWR by January 6, 2020. It is unclear whether DWR will modify the DEIR following the public comment period, but if the final EIR adopted largely mirrors the DEIR, it is likely that the SWP may be operated more restrictively with respect to water exports moving forward. The Draft Environmental Impact Report is available at: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Files/Deliv-42DEIRv1-120519-Volume-I508.pdf
(Miles B. H. Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES COMPLETES GROUNDWATER BASIN PRIORITIZATION PROCESS

The California State Department of Water Resources (DWR) recently completed its multiphased prioritization of the state's 515 groundwater basins and sub-basins. As a result, many basins are now required to comply with the mandates of California's landmark Sustainable Groundwater Management Act (SGMA). By contrast, some basins are now left to decide whether they will voluntarily comply with SGMA.

Background

In 2009, California enacted legislation requiring DWR to evaluate the effectiveness of local groundwater basin monitoring systems and data across the State. In response to that legislation, DWR created the California Statewide Groundwater Elevation Monitoring (CASGEM) program, which included prioritizing all California basins and sub-basins and establishing monitoring and reporting requirements.

SGMA requires local agencies in all non-adjudicated, high- and medium-priority basins to establish local groundwater sustainability agencies (GSAs) and to develop and implement groundwater sustainability plans (GSPs). DWR utilized the 2014 CASGEM basin prioritization for the initial SGMA prioritization requirements, which resulted in the designation of 127 high-and medium-priority basins.

2019 Basin Prioritization Phases

The 2009 groundwater monitoring law, as amended by SGMA, requires DWR to consider multiple components in establish basin priorities, including:

- The population overlying the basin or sub-basin.
- The rate of current and projected growth of the population overlying the basin or sub-basin.
- The number of public supply wells that draw from the basin or sub-basin.
- The total number of wells that draw from the basin or sub-basin.
- The irrigated acreage overlying the basin or sub-basin.
- The degree to which persons overlying the basin or sub-basin rely on groundwater as their primary source of water.
- Any documented impacts on the groundwater within the basin or sub-basin, including overdraft, subsidence, saline intrusion, and other water quality degradation.
- Any other information determined to be relevant by DWR, including adverse impacts on local habitat and local streamflows.

SGMA further requires DWR to reassess groundwater basin prioritization any time it updates Bulletin 118 basin boundaries. In December 2016, DWR published Bulletin 118 – Interim Update 2016, which defined 517 groundwater basins and sub-basins in California. In May 2018, DWR released a draft prioritization for those basins and initiated a lengthy public comment period, during which time some local agencies requested a further review of basin boundary modifications. In response, DWR's prioritization process occurred in two phases (referred to as SGMA 2019 Basin Prioritization Phase 1 and Phase 2).

SGMA 2019 Basin Prioritization Phase 1

The SGMA 2019 Basin Prioritization Phase 1 focused on the basins that were defined according to

Bulletin 118 – Interim Update 2016 and not affected by the 2018 basin boundary modifications. In January 2019, DWR finalized the SGMA 2019 Basin Prioritization Phase 1 priorities for 458 basins.

SGMA 2019 Basin Prioritization Phase 2

SGMA 2019 Basin Prioritization Phase 2 (Phase 2) was completed in December 2019. Phase 2 prioritized the remaining 57 basins that included the 53 basins for which boundaries were modified and approved through the 2018 boundary modification process, two basins for which boundary changes were not approved, and two basins for which boundaries were established pursuant to statutory amendments to SGMA. In total, Phase 2 completed prioritization for all 515 California basins and sub-basins.

DWR reports that the SGMA 2019 Basin Prioritization followed the same technical process used in prior basin prioritization efforts, with certain updates to reflect statutory changes to SGMA. In conducting the SGMA 2019 Basin Prioritization, the following items were particularly drawn into focus: 1) Adverse impacts on local habitat and local streamflows; 2) Adjudicated areas; 3) Critically overdrafted basins; and 4) Groundwater-related transfers.

As with previous prioritization processes, DWR assigned points to each component of the analysis.

Point totals were determined and scaled, resulting in high-, medium-, low- or very-low priority designations. Phase 2 resulted in the following prioritizations: 1) High priority – 46 basins; 2) Medium priority – 48 basins; 3) Low priority – 11 basins; and 4) Very Low priority – 410 basins

According to DWR, the 94 basins and sub-basins now designated high- and medium-priority, in combination with adjudicated areas which have existing local groundwater management in place, collectively account for 98 percent of the pumping (20 million acre-feet), 83 percent of the population (25 million Californians), and 88 percent of all irrigated acres (6.7 million acres) within the California's groundwater basins. SGMA implementation is already well underway, and in some cases nearly complete, for many of those basins that were already identified as high- and medium-priority.

Basins previously ranked low- or very-low priority that are now are prioritized as high- or medium-priority are required to form GSAs within two years and develop their GSPs within five years (or submit a qualifying GSP alternative as provided in SGMA).

Basins previously prioritized as high- or medium-priority that are now low- or very low-priority are not required to form a GSA or prepare a GSP. These basins are, however, still encouraged by DWR to form GSAs and develop GSPs and to develop and or update existing local groundwater management plans.

Reports and Tools

DWR issued a report detailing the SGMA 2019 Basin Prioritization, entitled *Sustainable Groundwater Management Act 2019 Basin Prioritization*. The report explains DWR's process, criteria and results. The report, along with other SGMA 2019 Basin Prioritization information, including maps and tools, is available on DWR's website at: https://water.ca.gov/Programs/Groundwater-Management/Basin-Prioritization.

Conclusion and Implications

SGMA implementation continues to develop and evolve throughout California. At nearly the same moment some basins became subject to SGMA's mandates through the SGMA 2019 Basin Prioritization, GSPs are coming due in January 2020 for the approximately twenty basins that have been designated as "critically overdrafted." By contrast, some basins previously required to establish GSAs and develop GSPs are now left to decide whether to do so voluntarily and how to address previously awarded grant funding. One thing is certain: groundwater management in California will look and function much differently over the next 20 years.
(Derek Hoffman, Michael Duane Davis)

HYDROELECTRIC PROJECT SEEKS WATER FROM HEAVILY LITIGATED WALKER RIVER BASIN—PART OF PROJECT WILL USE RENEWABLE ENERGY SOURCES

Recently, a private energy development company based in California applied to the Federal Energy Regulatory Commission (FERC) for permits to explore the feasibility of constructing two reservoirs above Walker Lake and Pyramid Lake in Nevada to generate electricity for sale in the Los Angeles energy market. The Walker River Working Group and Walker River Paiute Tribe recently intervened and provided commentary, respectively, opposing issuance of the permits for the Walker Lake project. Both entities are concerned that the proposed project would cause environmental, recreational, and aesthetic harm by decreasing lake levels.

Background

On July 10, 2019, Premium Energy Holdings, LLC (Premium Energy) filed an application for a preliminary permit to study the feasibility of what it calls the Walker Lake Pumped Storage Project (Project). The Project would be located on Walker Lake and Walker River, in Mineral County, Nevada. The Walker River originates in the eastern Sierra Nevada Mountains in California before emptying into Walker Lake. According to FERC, the sole purpose of a preliminary permit is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not, however, entitle the permit holder to construct the proposed project, and instead limits the authority conferred on the permit holder to study the feasibility of a proposed project. Moreover, a preliminary permit does not authorize the permit holder to enter privately owned lands or waters without permission.

The Project, as currently formulated, would be a closed-loop pumped storage hydropower facility consisting of an upper and lower reservoir. Water would be pumped from the lower reservoir using excess renewable energy, such as from solar and wind, into the upper reservoir. Water would be released from the upper reservoir to generate hydroelectricity when other renewable energy sources were unavailable. Premium Energy's application proposes three alternative upper reservoirs: Bald Mountain Reservoir, Copper Canyon Reservoir, or Dry Creek Reservoir. Walker Lake, which holds approximately 1.4 million acre-feet of water, would be the lower reservoir for either of the alternative upper reservoirs. The estimated annual generation of the Project under each of the alternatives would be about 6,900 gigawatt-hours.

The Bald Mountain Reservoir alternative consists of a proposed 101-acre upper reservoir at an elevation of 6,500 feet above sea level. The upper reservoir would have a total storage capacity of 23,419 acre-feet, and would be impounded by a 615-foot-high concrete dam. Water conveyance facilities would include a series of tunnels and shafts, as well as a 500-foot-long, 85-foot-wide, 160-foot-high powerhouse located in an underground cavern. The powerhouse would contain five pump-turbine generator-motor units capable of generating 400 megawatts each. A 0.45-mile-long, 32-foot-diameter tunnel would discharge into Walker Lake. Similarly, the Copper Canyon Reservoir alternative would consist of a 235-acre upper reservoir, with a 505-foot concrete dam impounding as much as 36,266 acre-feet, and would include a powerhouse identical to the Bald Mountain Reservoir alternative. The Dry Creek Reservoir alternative would consist of a 105-acre upper reservoir with a total storage capacity of 21,953 acre-feet impounded by a 775-foot-high concrete dam and utilize slightly shorter water conveyance facilities. An identical powerhouse to the Bald Mountain and Copper Canyon Reservoirs is included in the Dry Creek alternative. Under either alternative, the powerhouse would be connected to the electrical grid via a ten-mile-long, 500 kilovolt transmission line extending to a proposed converter station.

Legal Issues Raised

Premium Energy's permit application has raised several legal concerns by parties to ongoing litigation involving Walker Lake and the Walker River Basin, primarily with respect to the availability of water for the Project. Mineral County, the Walker River Working Group, and the Walker River Paiute Tribe have all expressed concerns that any water contemplated for use by the Project would diminish the amount of water flowing into or stored in Walker Lake, thus

negatively impacting environmental, recreational, and aesthetic values, as well as precipitating lakebed ownership questions that have not been judicially resolved.

Water rights to the Walker River are governed by the Walker River Decree, which was issued by the United States District Court for Nevada in 1936 and modified in 1940. Currently, the United States and Walker River Paiute Tribe are seeking additional water rights for the tribe than were originally adjudicated in the Walker River Decree, including storage rights of Walker River water in Weber Reservoir north of Walker Lake. Additionally, Mineral County and the Walker River Working Group filed a lawsuit currently pending before the Nevada Supreme Court alleging that the State of Nevada and the Walker River Decree fail to satisfy or recognize the state's public trust duties to maintain Walker Lake for the benefit of the public, which could require imposing inflow requirements for Walker Lake. Accordingly, the parties opposing Premium Energy's permit application argue that either no water is available for the Project, or any water rights obtained by Premium Energy will be encompassed by ongoing litigation.

In response to some of these concerns, Premium Energy has recently stated that it will seek to acquire water rights to the Walker River, potentially via litigation. According to Premium Energy, it is interested in acquiring water rights from users upstream of Walker Lake. Instead of consumptively exercising those water rights, Premium Energy suggests that it would direct the water to Walker Lake, which would then be cycled between Walker Lake and an upper reservoir, resulting in less than one-foot fluctuations in Walker Lake levels. Premium Energy has not identified whether it will seek Nevada or California water rights to the Walker River, nor has it articulated its legal basis for how acquiring those rights would allow Premium Energy to store—as opposed to consumptively use—water in Walker Lake and an upper reservoir.

Conclusion and Implications

Premium Energy's application is only for studying the feasibility of the Walker Lake Pumped Storage Project. It is unclear what water rights may be available for Premium Energy to acquire to meet the needs of the Project without interfering with existing water rights. Moreover, it is unclear if water rights may be available to Premium Energy that would allow the company to non-consumptively store water in Walker Lake for cycling between an upper reservoir. Answering these questions could significantly impact the viability of the Project, and could potentially involve litigation to settle those or related questions.

The Premium Energy Preliminary Permit Application, available at: https://www.federalregister.gov/documents/2019/10/04/2019-21638/premium-energy-holdings-llc-notice-of-preliminary-permit-application-accepted-for-filing-and

(Miles B. H. Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT ORDERS EPA TO REGULATE WATER TEMPERATURE IN COLUMBIA AND SNAKE RIVERS TO PROTECT SALMON AND TROUT

Columbia Riverkeeper v. Wheeler, ___F.3d___, Case No. 18-35982 (9th Cir. Dec. 20, 2019).

Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Inc., Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources (Plaintiffs) sued the U.S. Environmental Protection Agency (EPA) under the federal Clean Water Act's (CWA) citizen-suit provision, asserting that because the States of Oregon and Washington had failed to develop temperature Total Maximum Daily Loads (TMDLs) for the Columbia and Snake rivers, the CWA required EPA to do it instead. They won.

The Statutory Framework

The CWA, passed in 1972, required states to identify "impaired waters" (also called "water quality limited segments") that are contaminated by a specific pollutant, like aluminum or arsenic, or a condition such as temperature or turbidity. States then had to rank their impaired waters by priority on so-called "§ 303(d) lists." For each pollutant in each impaired water segment, a state must develop and submit to EPA a TMDL that sets the maximum amount of the pollutant that the segment can receive without exceeding the applicable water quality standard. Within 30 days of a state's submission, EPA must approve the TMDL or disapprove the state's TMDL and issue a new one in its place.

Procedural History

The original deadline for states to submit their § 303(d) lists and TMDLs to EPA was in 1979. Like many states, Oregon and Washington missed the deadline by over a decade and did not even submit their § 303(d) lists to EPA until the 1990s, at which point they still did not have functioning TMDL programs. Oregon and Washington's § 303(d) lists identified segments of the Columbia and Snake Rivers as water quality limited for temperature.

In 2000, Oregon and Washington entered into an agreement with EPA whereby EPA would produce the Columbia and Snake River TMDL for them. After a bit more administrative wrangling, EPA published a draft TMDL in July 2003, which stated that a final TMDL would be issued after the 90-day public comment period. Since publication of the draft TMDL, neither state nor the EPA has made any progress on finalizing the TMDL, although both states have developed TMDL programs and issued over 1,000 *other* TMDLs. Both states maintain § 303(d) lists with target dates for completing their remaining TMDLs, but neither list includes the Columbia and Snake River temperature TMDL.

The Litigation

In early 2017, Plaintiffs sued to compel EPA to issue a final TMDL to protect salmon and trout, which can be harmed or killed when river water gets too warm. The summer of 2015 illustrated the problem: that year, an estimated 250,000 Snake River sockeye salmon died before they could spawn. The U.S. District Court granted Plaintiffs' motion for summary judgment and ordered EPA to issue a final TMDL. EPA appealed and sought a stay, which the court granted.

The Ninth Circuit's Decision

The CWA does not specify what happens if a state fails to develop a TMDL as required. However, the Ninth Circuit in the *BayKeeper* case held "that where a state has 'clearly and unambiguously' decided that it will not submit TMDLs for the entire state, that decision will be 'construed as a constructive submission of no TMDLs, which in turn triggers the EPA's nondiscretionary duty to'" issue a TMDL. *Columbia Riverkeeper v. Wheeler*, ___F.3d___, Case No. 18-35982, 2019 WL 6974376, at *4 (9th Cir. Dec. 20, 2019)

(quoting *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 883, 880 (9th Cir. 2002)). Several other circuits have reached the same conclusion.

Here, EPA argued that *BayKeeper* only requires EPA to issue TMDLs if a state completely refuses to issue any TMDLs for the whole state. The Ninth Circuit rejected that argument, stating that "our holding in *BayKeeper* does not limit the application of the constructive submission doctrine to a wholesale failure by a state to submit any TMDLs. Such a limitation is not supported by either the language and purpose of the CWA or the logic of our case law." The court observed that the CWA's purpose—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—"would be dramatically undermined if we were to read into § 1313(d)(2) a loophole by which a state, and by extension the EPA, could avoid its statutory obligations by a mere refusal to act." The Ninth Circuit's conclusion is consistent with other circuit courts' decisions.

The Ninth Circuit agreed with the District Court's finding that "Washington and Oregon have clearly and unambiguously indicated that they will not produce a TMDL for these waterways." Therefore, the court ordered EPA to issue a final TMDL within 30 days of its December 20, 2019 decision:

> Because Washington and Oregon have conclusively refused to develop and issue a temperature TMDL for the Columbia and Snake Rivers, the EPA is obligated to act under § 1313(d)(2). This constructive submission of no TMDL triggers the EPA's duty to develop and issue its own TMDL within 30 days, and it has failed to do so. The time has come—the EPA must do so now.

Conclusion and Implications

The Ninth Circuit's decision in this case represents a major victory for environmental advocacy groups in their multi-pronged legal and political effort to rehabilitate the Pacific Northwest's imperiled anadromous fish populations and the endangered southern resident orcas that depend on them. Coincidentally, the Ninth Circuit's ruling came out on the same day as a draft report from Washington Governor Jay Inslee's office analyzing arguments for and against breaching the four lower Snake River dams, which contribute to warm temperatures in the river (the report, however, does not actually make a recommendation one way or the other). Dam removal or changes in flow regimes could have significant impacts on the region's economy; dams provide irrigation water and access to barge shipping as well as hydroelectric power. By the time this article is published, the final TMDL should be issued (absent further appeal and stay), which will begin to delineate the implications of the court's ruling. The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/12/20/18-35982.pdf
(Alexa Shasteen)

FEDERAL CIRCUIT DETERMINES CVP RESTORATION FUND PAYMENTS MUST BE PROPORTIONATELY ASSESSED TO WATER AND POWER CUSTOMERS

Northern California Power Agency et al. v. U.S., ___F.3d___, Case No. 19-1010 (Fed. Cir. Nov. 6, 2019).

On November 6, 2019, the U.S. Court of Appeals for the Federal Circuit in *Northern California Power Agency et al. v. United States* determined that mitigation and restoration charges imposed on buyers of water and power from the federal government's Central Valley Project (CVP) must be assessed proportionately to their relative CVP repayment obligations. CVP water customers are responsible for approximately 75 percent of CVP repayment obligations, while power customers typically shoulder the remaining 25 percent. The U.S. Court of Federal Claims previously held the opposite, ruling that while the result—which saw power customers' obligations for mitigation and restoration charges increase dramatically in excess of 25 percent during the recent drought—was "curious in the extreme," based on principles of statutory construction there was no applicable proportionality requirement.

Background

The CVP is the nation's largest federal water management project and is operated by the U.S. Bureau of Reclamation (Bureau). In addition to distributing water, the CVP generates hydroelectric power through dams and power plants built as part of the project. The CVP sells that power to cities and other purchasers through its agent, the Department of Energy's Western Area Power Administration. The rates charged to CVP water and power customers reimburse the Bureau for the proportionally allocated costs of building, operating, and maintaining the CVP. Water customers are responsible for roughly 75 percent of those costs. Power customers are responsible for the remaining 25 percent. Those allocations:

> . . .are intended to reflect the relative benefits that water and power customers derive from the CVP. . .[as]. . .water customers are responsible for a larger proportion of project costs because the CVP is primarily a water-focused project.

In 1992, Congress enacted the Central Valley Improvement Act (CVPIA), which mandated changes in management of the CVP, particularly regarding the protection, restoration, and enhancement of fish and wildlife. The CVPIA created a "Restoration Fund," which was to be used to help pay for CVPIA activities, including the restoration of habitat. To raise money for the Restoration Fund, Congress directed the Secretary of the Interior to assess several types of charges, one of which is Mitigation and Restoration payments (M&R payments). M&R payments are assessed to both CVP water and CVP power customers.

At the U.S. Court of Federal Claims

A complaint was filed by in the United States Court of Federal Claims by the Northern California Power Agency and three California cities—the City of Redding, the City of Roseville, and the City of Santa Clara. The plaintiffs all purchase hydroelectric power that is generated by CVP facilities, and sought to recover M&R payments that they claim were unlawfully assessed and collected by the Bureau in violation of the CVPIA.

As the trial court explained, in years when California has experienced severe drought and sales to CVP water customers declined dramatically, "the payment structure under the CVPIA has resulted in power customers"—including Plaintiffs—"bearing a disproportionately high assessment of payments, because the water customers' share of payments is much lower."

Under certain circumstances, the Bureau has a collection cap for M&R payments of $30 million. CVPIA § 3407 subdivision (c)(2) provides that collections of these payments are "subject to the limitations in subsection (d)." CVPIA § 3407 subdivision (d), in turn, provides that M&R payments "shall, to the greatest degree practicable, be assessed in the same proportion…as water and power users' respective allocations for repayment of the [CVP]." The question for the court was whether "the proportionally requirement under [§] 3407 subdivision (d) constituted a 'limitation' under 3407 subdivision (c)(2) relative to M&R payments."

The trial court found the proportionality requirement for assessment of M&R payments was not a limitation. The court concluded that the statutory language was clear, and that the true limitations under § 3407 subdivision (c)(2) were expressly referenced in the statute by words such as either "provided" or "further provided." The proportionality requirement of § 3407 subdivision (d) was not included in that list and was not preceded by such "provided" language. The trial court thus concluded the proportionality requirement did not apply to the M&R payments, noting in a comment, however, that "if the system is to be fixed, it should be addressed by Congress."

The Federal Circuit's Decision

In reaching the opposite conclusion from the trial court, the circuit court relied on the plain meaning of "limitation." Quoting *Black's Law Dictionary*, the court noted that:

> . . .[a] limitation is commonly understood to be a restriction. . .[and]. . .both parties and the Court of Federal Claims agree that the proportionality requirement [of section 3407 subdivision (d)] is a restriction that has a limiting effect. . . .

The court reasoned that "[a]bsent a clear indication that Congress intended otherwise, we must conclude that the proportionality requirement is a true 'limitation'" and that as a result, the court held the proportionality requirement must be applied to M&R payments.

In support of its conclusion, the court noted that under an alternative funding mechanism—whereby

Congress appropriates exactly $50 million to the Restoration Fund—the Bureau is clearly required by the CVPIA to collect M&R payments from water and power customers in proportion to their respective repayment obligations. The court reasoned that:

> . . .[i]t is difficult to imagine why Congress would have wanted the applicability of the proportionality requirement to turn on whether the amount appropriated from the Restoration Fund is exactly $50 million, rather than one dollar less.

Consequently, the Circuit Court remanded the case for further proceedings.

Conclusion and Implications

The CVP Restoration Fund and its M&R payments has been a longstanding feature of Bureau rate setting since 1992. With the Federal Circuit Court of Appeal's determination that M&R payments must be allocated proportionately between water and power customers however, it is unknown how or if the Restoration Fund's allocation targets will be met going forward. This is because in addition to the now-recognized proportionality requirement, § 3407 subdivision (d) contains other express limitations including that M&R payments are limited to $6 and $12 per acre-foot (October 1992 price levels) for delivered CVP irrigation and M&I water respectively. While these payments are indexed annually as required by CVPIA (*e.g.* to $10.91 for irrigation and $21.82 for M&I for 2020), it is unclear whether these per acre-foot caps will conflict with water users' total M&R payment obligations under the proportionality requirement. The most likely scenario for this conflict will be the next multi-year drought, when CVP deliveries on a per acre-foot basis are likely low, but Restoration Fund assessments and water users' requirement to proportionately incur assessments relative to their repayment obligations, remain.
(David E. Cameron, Meredith Nikkel)

DISTRICT COURT HOLDS U.S. ARMY CORPS IS NOT OBLIGATED UNDER THE CLEAN WATER ACT OR OTHER LAWS TO DREDGE CHANNELS ON ANNUAL BASIS

San Francisco Bay Conservation and Development Commission v. U.S. Army Corps of Engineers, et al., ___F.Supp.3d___, Case No. 16-cv-05420-RS (N.D. Cal. Nov. 4, 2019).

On November 4, 2019, the U.S. District Court for the Northern District of California granted summary judgment in favor of the United States Army Corps (Corps) and its defense of plans to dredge two shipping channels in the San Francisco Bay. The ruling by Judge Seeborg in *San Francisco Bay Conservation and Development Comm'n v. U.S. Army Corps of Engineers* (the Judgment) reinforces the final agency action requirement under the Administrative Procedure Act (APA) and identifies potential complications that may occur at the interstice of federal and state laws.

Background

The San Francisco Bay is host to a number of federal and state endangered species, salmon fisheries, Dungeness crab, and millions of migrating waterfowl that stop along the Pacific Flyway. As such, the Bay is frequently implicated with regard to dredge and contaminant concerns under multiple regulatory schemes.

The Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* (CZMA) is a federal statute that prompts coastal states to develop Coastal Zone Management Plans (CZMPs), which are then submitted to the National Ocean and Atmospheric Administration (NOAA) for review and approval. Once approved, the states hold federal authority to regulate the actions of federal agencies that might "affect[] any land or water use or natural resource of the coastal zone." *Id.*, citing 16 U.S.C. §1456(c)(1)(A). The resulting "federal-state partnership[s]" help "ensure water quality and coastal management" by incorporating the various state standards into the broader federal standards and requiring preparation of a "consistency determination" certifying the proposed action is

consistent with the CZMP. *Id.*, citing 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36(b)(1).

Upon submittal of a consistency determination, the state with regulatory oversight "may then concur, conditionally concur, or object." *Id.* at 5, citing 15 C.F.R. § 930.41(a). The federal agency is then required to comply with any conditional concurrence terms, unless it finds that the action is "fully consistent with the state CZMP notwithstanding the state's CZMP, or consistency "with the enforceable policies of the state's CZMP is legally prohibited." *Id.*, citing 15 C.F.R. § 930.43(d).

Similar to the CZMA, the California Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA) requires each state to develop water quality standards which are subsequently approved and incorporated by the U.S. Environmental Protection Agency (EPA) to" become federally-enforceable standards under the CWA." Judgment, at 5, citing 33 U.S.C. § 1313(c)(3). Authority over the navigable waters under federally-approved state standards is provided by § 401 of the CWA. *Id.*, citing 33 U.S.C. § 1341. Any entity seeking to engage in activity that "may result in any discharge into navigable waters," a water quality certification is required. *Id.*

The District Court's Decision

The central dispute in the litigation was whether the Corps' maintenance dredging activities, which are subject to the CWA and CZMA, were required to comply with the Bay Conservation and Development Commission's (BCDC) conditional concurrence that specified additional requirements pertaining to dredging both channels in a given year.

The District Court found that Corps regulations for its dredging operations incorporate "CZMA, CWA, and other environmental laws." *Id.* at 6. Separately, the Corps historically followed a 20 percent maximum sediment deposit goal in line with the Long-Term Management Strategy (LTMS) for the San Francisco Bay which did not impose hard requirements. *Id.* at 7. In 2015, the Corps contemplated new alternatives that reduced dredging in the shipping channels due to concerns over the federally-listed endangered Delta smelt and state-listed threatened Longfin smelt. The Corps issued a consistency determination in the spring of 2015 to pursue the reduced dredging alternative, under which it would deposit up to 48 percent of dredged sediment in the Bay.

The BCDC issued a conditional concurrence on the certification of determination under CZMA, stating the Corps could only move forward with its proposed dredging activity if it limited dredged sediment deposits to meet the LTMS goals. At the same time, the Regional Water Quality Control Board (RWQCB) issued a water quality certification of the Corps' proposed actions with the condition to implement the reduced dredging alternative in the environmental document. *Id.* at 9. The Corps' November 10, 2015 response to the BCDC objected to the imposed conditions and argued that it was obligated to pursue the "least costly," legally required alternative, opting instead to dredge in accordance with the Regional Board's water quality certification condition. *Id.* The Corps ultimately adopted a reduced dredging alternative, implementing the RWQCB's condition. *Id.*

Issue of the Final Agency Action

As a threshold matter, the court first determined whether the Corps' November 10, 2015 letter to BCDC stating it would not comply with the conditional concurrence constituted a "final action" under the APA. *Id.* at 11. Because the letters merely set out what the agencies' views of the law were, the court held they did "not impose legal obligations, deny a right, or fix a legal relationship." *Id.* The actual adoption of the reduced dredging alternative in January 2017, on the other hand, was clearly a final action. *Id.*

Assessing Whether the Corps Was Obligated to Comply with BCDC Requirements

Second, the court analyzed whether the conditions set forth in BCDC's concurrence required compliance by the Corps. *Id.* at 12. Despite the lack of statutory requirements to perform additional dredging, BCDC argued the Corps should be bound to its previous prioritization of dredging both channels within a year, not just one. *Id.* at 13. The court held BCDC's reliance on *Ohio v. United States Army Corps of Engineers*, 259 F.Supp.3d 732 (N.D. Ohio 2017) was misplaced because unlike in the instant case, there the Corps was governed by statute dictating how available funds were spent. *Id.* at 14. Here, the Corps was not obligated by statute to comply with the BCDC's requirements. Rather, the Corps' plan did not violate the maximum limits on dredging set forth under the

CZMA and CWA regimes—therefore the Corps was not required to comply with BCDC's conditions.

Conclusion and Implications

The District Court's ruling emphasized that a challenged agency decision must be a final action, notwithstanding stated intent in a letter. Additionally, while the Corps altered its prioritization of dredging activity, its plan did not violate the maximum limits on dredging imposed by the state agencies and incorporated into the CZMA and CWA. Absent a statutory violation, BCDC could not enforce its preferred regulatory scheme on the Corps. The U.S. District Court's ruling is subject to possible appeal to the Ninth Circuit.
(Austin C. Cho, Meredith Nikkel)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT AFFIRMS JUDGMENT FINDING THAT EVIDENCE WAS INSUFFICIENT TO ESTABLISH IMPLIED DEDICATION AT MARTIN'S BEACH

Friends of Martin's Beach v. Martins Beach 1, LLC, *Unpub.*, Case No. A154022 (1st Dist. Dec. 2019).

Following a bench trial, judgment was entered against plaintiff Friends of Martin's Beach finding that evidence did not to show that road, parking area, and inland sand of Martin's Beach had been dedicated to public use. Plaintiffs appealed, and the Court of Appeal for the First District, in an *unpublished* decision, affirmed, finding, among other things, that the trial court did not err by considering the acts of the lessee in determining whether the public use was permissive, and that substantial evidence supported the trial court's findings.

Factual and Procedural Background

Martin's Beach is a crescent-shaped beach located just south of Half Moon Bay that is bounded to the north and south by high cliffs that extend into the water. Other than by water, the only means of access is via Martin's Beach Road, which runs across the property from Highway 1 to the beach. In 2012, plaintiff filed a lawsuit on behalf of the public to use the road, parking area, and inland dry sand of Martin's Beach. Defendants in turn filed a cross-complaint seeking to quiet title to the property.

While plaintiff initially asserted several theories, it ultimately narrowed down to two. The first was that a provision of the California Constitution (Art. X, § 4) prohibits owners of property fronting navigable waters from excluding the right of way to the beach and confers on the public a right of access over private property to all tidelands. The second was that under common law dedication the defendants' predecessors, the Deeney family, who owned the property from early in the 20th century until the defendants purchased it in 2008, through their words and acts offered to dedicate portions of the beach property to public use over a period of decades, and the public accepted that offer by using those parts of the property.

The trial court initially granted summary judgment on behalf of defendants on all causes of action raised in plaintiff's complaint. The Court of Appeal affirmed in part and reversed in part. On remand, the parties conducted discovery and proceeded to trial on the common law dedication issues. Following a bench trial, the trial court rejected plaintiff's common law dedication claim and entered judgment in favor of defendants.

Among other things, the court found that the "Deeney family licensed daily use and access to the property on payment of a fee," and that the Deeneys' intent was "to allow licensed use and access only upon payment of a fee." It also concluded that plaintiff "failed to prove that defendants intended to dedicate their property to the public and that the public accepted the dedication" and did not meet its burden to prove:

> . . .defendants intended to dedicate the property to the public or that the public had continuous and unfettered public use for the prescriptive period without asking or receiving permission.

Following entry of judgment, plaintiff timely appealed.

The Court of Appeal's Decision

Common Law Dedication

Generally, a common law dedication may be established in three ways: 1) express dedication, where an owner's intent to dedicate is manifested in the overt acts of the owner (*e.g.*, by execution of a deed); 2) implied in fact, where the acts or omissions of the owner afford an implication of actual consent or acquiescence to dedication; and 3) implied by law, where the public has openly and continuously made adverse use of the property for more than the prescriptive period. Plaintiff challenged the trial court decision on three grounds, the first two of which related to implied in law dedication.

First, plaintiff argued that the trial court erred by relying on the acts of the Deeneys' lessee, Watt, to find the use by the public permissive rather than adverse, and that there was no evidence that the Deeneys themselves took steps to prevent public use prior to 1990. Citing *Gion v. City of Santa Cruz* (the seminal case on implied in law dedication), the Court of Appeal found that:

> . . the question is whether the public's use was free from interference or objection by the fee owner or persons acting under his direction and authority.

Thus, the question for purposes of the case was whether the Deeneys' lessee, Watt, acted under the Deeneys' direction and authority. Reviewing the record, the Court of Appeal found that there was substantial evidence to support a finding that Watt had the Deeneys' authority to do what he did.

Second, plaintiff contended that, even if Watt's actions could be considered, the evidence was insufficient to show the public use was pursuant to a license so as to defeat plaintiff's showing of an implied in law dedication. The court found it undisputed, however, that even early in time, Watt had consistently charged people a fee, and that those who visited the beach understood they needed to pay the fee to access the property. Paying a fee to gain admission to the beach, the court reasoned, was tantamount to obtaining permission or a license. Implicit in charging a fee is that the right to use the beach is conditional on payment. "We do not believe," the court concluded, "that this is the kind of unfettered use the court referred to in *Gion-Dietz*."

Third, plaintiff claimed that, pursuant to the Court of Appeal's prior direction on remand, it had established an express dedication as a matter of law. In particular, plaintiff relied on statements in the prior opinion, reversing the grant of summary judgment, that the facts plaintiff had alleged were "sufficient to establish the elements of common law dedication, if they can be proven at trial," and that the complaint alleged:

> . . .acts on the part of the owners that could manifest an intent to dedicate to the public, coupled with public use over many years that could establish acceptance.

Claim of Error as a Matter of Law

Plaintiff contended that it provided evidence at trial to support every allegation in its complaint, and that the prior ruling thus means that as a matter of law plaintiff met its burden of proof at trial.

The Court of Appeal found that this argument misconstrued the prior ruling, which was simply a determination that plaintiff had alleged enough to get beyond what was in effect a motion for judgment on the pleadings. This was not tantamount, the Court of Appeal noted, to finding that if plaintiff provided some evidence supporting its allegations it would be entitled to judgment as a matter of law, even if there had been no contrary evidence. Rather, whether the elements of a common law dedication ultimately could be established would "depend on all of the circumstances, as shown by the evidence the parties offer at trial." Consistent with this rule, the Court of Appeal found that the trial court had properly considered the evidence presented at trial, and that substantial evidence supported the trial court's conclusion that the owners' acts did not reflect an intent to dedicate to public use and instead reflected only an intent to allow paid use.

Conclusion and Implications

The *unpublished* case remains significant, not only given the considerable attention that issues related to Martin's Beach have received, but also because it contains a thorough discussion of the law regarding implied in law dedication. The decision is available online at: https://www.courts.ca.gov/opinions/nonpub/A154022.PDF
(James Purvis)

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