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CALIFORNIA WATER™ LAW & POLICY Reporter

FEATURE ARTICLE

HIGHLY-ANTICIPATED GROUNDWATER SUSTAINABILITY PLANS EMERGE FOR CALIFORNIA'S 'CRITICALLY OVERDRAFTED' GROUNDWATER BASINS

By Derek Hoffman and Chris Carrillo

For well over 150 years, the State of California did not comprehensively regulate its groundwater basin aquifers. That changed at the height of the historic multiyear drought, when California's Sustainable Groundwater Management Act (SGMA) took effect on January 1, 2015. SGMA requires local Groundwater Sustainability Agencies (GSAs) to develop and implement Groundwater Sustainability Plans (GSPs) to achieve long-term basin sustainability. On January 31, 2020, GSPs for approximately 20 "critically overdrafted" basins were due for submission to the California Department of Water Resources (DWR). These highly anticipated GSPs are now available for review and public comment on DWR's website. The shape of groundwater management in California is *rapidly* evolving, and will continue to evolve as these and other GSPs are evaluated, updated, implemented—and in some basins—litigated.

SGMA Background

GSPs must be adopted by local GSAs and submitted to DWR by January 31, 2022 for high- and medium-priority basins that are neither adjudicated nor subject to an approved GSP Alternative. For high- and medium-priority basins that are designated "critically overdrafted," the deadline to submit adopted GSPs was two years earlier, January 31, 2020. DWR is required to post each submitted GSP on its website and evaluate it within two years for compliance with SGMA and DWR's GSP Emergency Regulations (California Code of Regulations, Title 23, Division 2, Subchapter 2, § 350 *et seq.*) (GSP Regulations). In the event that a GSA fails to submit a timely GSP, or submits a GSP that fails to satisfy SGMA and the GSP Regulations, that basin may be placed in DWR probationary status and subjected to intervention and regulation directly by the California State Water Resources Control Board.

Basin Sustainability

SGMA requires achieving basin sustainability within 20 years of GSP adoption. While SGMA provides the legal framework and minimum standards for sustainability, it authorizes GSAs to specifically define sustainability for their local basins. That determination must be based upon technical and policy considerations. GSAs are required, for example, to consider the best available science and information in developing their GSPs and projects and management actions, and are required to consider the interests of all beneficial users and uses of groundwater within the basin. (California Water Code § 10723.2.)

GSPs must identify a "sustainability goal," which is defined under SGMA as:

> . . .the existence and implementation of one or more groundwater sustainability plans that achieve sustainable groundwater management by identifying and causing the implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield. (*Id.* § 10721(u).)

"Sustainable yield" is defined as the maximum quantity of water, calculated over a *base period* representative of *long-term conditions* in the basin and *including any temporary surplus*, that can be withdrawn

annually from a groundwater supply *without causing an undesirable result*. (*Id.*, § 10721(w).)

In other words, determining a basin's "sustainable yield" is complex and is intrinsically linked to avoiding specific, undesirable results. In its Draft Best Management Practice publication for Sustainable Management Criteria (SMC BMP), DWR explains the "Role of Sustainable Yield Estimates in SGMA," stating that "that SGMA does not incorporate sustainable yield estimates directly into sustainable management criteria." It continues:

> . . .basin-wide pumping within the sustainable yield estimate is neither a measure of, nor proof of, sustainability. Sustainability under SGMA is only demonstrated by avoiding undesirable results for the six sustainability indicators. (SMC BMP, p. 32.)

Thus, the careful study, definition, establishment and management of sustainable management criteria for each sustainability indicator are integral to achieving complaint and effective GSP. SGMA defines undesirable results as one or more of the following effects caused by groundwater conditions occurring throughout the basin:

> (1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon. Overdraft during a period of drought is not sufficient to establish a chronic lowering of groundwater levels if extractions and groundwater recharge are managed as necessary to ensure that reductions in groundwater levels or storage during a period of drought are offset by increases in groundwater levels or storage during other periods.
>
> (2) Significant and unreasonable reduction of groundwater storage.
>
> (3) Significant and unreasonable seawater intrusion.
>
> (4) Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies.
>
> (5) Significant and unreasonable land subsidence that substantially interferes with surface land uses.
>
> (6) Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water. (Wat. Code § 10721(x).)

SGMA does not define the threshold at which a specific sustainability indicator becomes *significant* and *unreasonable*. Rather, local GSAs are tasked with this weighty responsibility. Given the vast and varied users of groundwater in each basin and the potentially significant operational and financial impacts of GSP projects and management actions, the importance of establishing sustainable management criteria based upon the best available science and information and carefully informed policy considerations cannot be overstated.

GSPs must identify minimum thresholds, five-year interim milestones, and ultimate measurable objectives for each sustainability indicator. GSAs are afforded SGMA-enumerated powers, in addition to existing legal authority held by individual GSA member agencies, to implement GSPs within their jurisdictional areas. (*Id.* § 10725.) However, these powers are not unlimited. Municipalities retain, for example, their land use and well-permitting authorities, though coordination with GSAs may be required. (*Id.* §§ 10726.4, 10726.8, 10727.4). And, perhaps the most widely recognized SGMA limitation is its declared intent to "preserve the security of water rights in the state to the greatest extent possible consistent with sustainable groundwater management." (*Id.* § 10720.1(b).) SGMA expressly does not authorize a GSA to determine or alter California common law water rights or priorities. (*Id.* § 10720.5). Rather, water rights determinations remain within the role of the courts, primarily through the SGMA companion "comprehensive adjudication" legislation (California Code of Civil Procedure, Part 2, Title 10, Chapter 7, Article 1, § 830, *et seq.*) Through comprehensive adjudications, and other forms of litigation, pumpers are empowered to increase GSA accountability throughout the GSP development process, and ultimately seek a judgment as an alternative to a GSP.

'Critically Overdrafted' Basins

With the exception of a handful of GSP Alternatives (*i.e.*, specific types of basin managements plans that must satisfy specific SGMA and regulatory requirements), California's "critically overdrafted ba-

sins" represent the first group required to be managed under GSPs. Through its Bulletin 118 publication, DWR designated 21 basins that are "subject to critical conditions of overdraft" based upon certain criteria in the Water Code. SGMA incorporates those Bulletin 118 designations. (Wat. Code § 10720.7(a).)

California's 21 critically overdrafted basins are geographically concentrated primarily in the Central Valley, in central- and southern California coastal areas and, to a lesser extent, in desert inland southern California. They include DWR Basins:

> 3-001 Santa Cruz Mid-County; 3-002.01 Corralitos—Pajaro Valley; 3-004.01 Salinas Valley—180/400 Foot Aquifer; 3-004.06 Salinas Valley—Paso Robles Area; 3-008.01 Los Osos Valley—Los Osos Area; 3-013 Cuyama Valley; 4-004.02 Santa Clara River Valley—Oxnard; 4-006 Pleasant Valley; 5-022.01 San Joaquin Valley—Eastern San Joaquin; 5-022.04; San Joaquin Valley—Merced; 5-022.05 San Joaquin Valley—Chowchilla; 5-022.06 San Joaquin Valley—Madera; 5-022.07 San Joaquin Valley—Delta-Mendota; 5-022.08 San Joaquin Valley—Kings; 5-022.09 San Joaquin Valley—Westside; 5-022.11 San Joaquin Valley—Kaweah; 5-022.12 San Joaquin Valley—Tulare Lake; 5-022.13 San Joaquin Valley—Tule 5-022.14 San Joaquin Valley—Kern County; 6-054 Indian Wells Valley; 7-024.01 Borrego Valley—Borrego Springs.

With the exception of Pajaro Valley (for which a GSP Alternative was approved) and Los Osos Area (which is deemed adjudicated), each of the 19 remaining basins were required to submit their adopted GSPs to DWR by the January 31, 2020 deadline. DWR's GSP Portal indicates that GSPs were timely submitted (though, at the time of this writing, some had not been accepted for review as DWR awaited receipt of certain related documents).

Any practitioner that was meaningfully involved in developing those GSPs will undoubtedly acknowledge the intense effort that was required to meet the January 31, 2020 deadline. However, the submission of GSPs marks the *beginning* of the path to sustainability as GSAs continue to monitor basin conditions, implement projects and management actions, and amend and update their GSPs. Implementing the GSPs will require a greater, sustained intensity of effort and engagement, and will likely trigger litigation in some areas.

In certain basins where GSPs would impose particularly aggressive groundwater pumping restrictions and/or fees, litigation has already begun. In Borrego Springs Sub-basin (DWR Basin No. 7-024.01) located in the inland desert area of San Diego County, the local GSA developed one of the first GSPs in the State which included imposing approximately 75 percent pumping reductions. In lieu of adopting and submitting the GSP, a proposed stipulated judgment and physical solution has been negotiated among the vast majority of the basin groundwater producers and submitted to DWR as a comprehensive adjudication GSP Alternative.

In the Indian Wells Valley (DWR Basin No. 6-054) located in eastern Kern County and portions of San Bernardino and Inyo counties, the Indian Wells Valley Groundwater Authority has adopted a GSP that includes, as a primary management action, allocating a static estimated annual basin recharge of 7,650 AFY among selected groundwater users, and assigning virtually all agricultural producers a temporary, non-transferable pumping allocation comprising a fraction of groundwater in storage. Once the temporary allocations are used (which for some could be less than one year), those agricultural producers would be required to cease pumping entirely or pay yet-to-be-defined pumping fees on every acre foot of production to fund imported water infrastructure and imported water supplies. A group of agricultural interests recently filed a verified complaint in Kern County Superior Court including claims to quiet title and for declaratory relief and seeking a physical solution among a group of large groundwater producers in the basin. The complaint declares that it does *not* seek a comprehensive adjudication, citing provisions of the comprehensive adjudication law that exempt certain types of actions among limited groundwater producers that do not involve a comprehensive allocation of the basin's groundwater supply or a comprehensive determination of water rights. (Code Civ. Proc. § 833(b)(1)-(3).). The complaint does not name the GSA and does not directly challenge the GSP.

Basin Conditions of Concern, Projects and Management Actions

By and large, the GSPs adopted for California's critically overdrafted basins recognize and identify

the basin conditions that must be addressed in order to achieve sustainability, and they identify projects and management actions that may be considered for implementation as warranted. Most GSPs seek to achieve sustainability over the SGMA-authorized twenty-year timeline, recognizing that the adjustments, costs and impacts of their GSPs will require time and careful implementation. Many GSPs appropriately prioritize monitoring, evaluating and honing their sustainable management criteria during the first five-year implementation period, prior to implementing significant projects or management actions. Nearly all GSPs have yet to clearly determine how they will fund their sustainability programs.

The following provides a survey-level view of a few selected GSPs in different regions of the state.

The Cuyama Basin (DWR Basin No. 3-013)

The Cuyama Basin is located within California's Central Coast Hydrologic Region, primarily in Santa Barbara County. The Cuyama Basin Groundwater Sustainability Agency is the exclusive GSA for the basin. It is a joint powers authority comprising: Kern, Santa Barbara, San Luis Obispo and Ventura Counties, Cuyama Community Services District and the Cuyama Basin Water District.

Primary Sustainability Indicators of Concern

The GSP identifies declining groundwater levels and degraded water quality as the primary sustainability indicators of concern. It indicates that some areas of the basin have experienced no significant change in water levels while areas with the greatest concentration of irrigated agriculture occurs have shown declines. Groundwater quality varies but includes high levels of total dissolved solids (TDS) that exceed California's recommended secondary maximum contaminant level in some areas, and areas with high concentrations of nitrate and arsenic. The GSP finds that the lowering of groundwater levels has resulted in increased water quality degradation and elevated TDS levels. The GSP indicates that annual basin overdraft is approximately 26,000 acre-feet per year (AFY), and estimates that reducing pumping to 40,000 AFY is necessary to achieve long-term sustainability.

Projects and Management Actions

The GSP identifies primary projects and management actions including: 1) expanding monitoring programs; 2) a pumping allocation program to be implemented over a 15-year period beginning in 2023; 3) a cloud seeding project, described as a type of weather modification with the objective to increase the amount of precipitation that would fall in the Basin watershed and is estimated to yield up to 4,000 AFY of additional supply; and 4) diversion of high stormwater flows from the Cuyama River into basin recharge, which is estimated to support up to 4,000 AFY in groundwater production. Estimated implementation costs range up to approximately $5 million per year.

The Salinas Valley—180-400 Ft. Aquifer (DWR Basin No. 3-004.01)

The Salinas Valley—180-400 Ft. Aquifer is located within the Central Coastal region in Monterey County. It is one of multiple Salinas Valley sub-basins. The sub-basin is named for its two-primary water-bearing units: the 180-Foot Aquifer and the 400-Foot Aquifer, and it encompasses an approximately 140 square-miles. The basin is managed by three GSAs: 1) the Salinas Valley Basin Groundwater Sustainability Agency (a joint powers authority comprising multiple counties, cities and other agencies); 2) the County of Monterey GSA; and 3) the Marina Coast Water District GSA.

Primary Sustainability Indicators of Concern

The GSP identifies declining groundwater levels and sea water intrusion as the primary sustainability indicators of concern. According to the GSP, agricultural irrigation comprises approximately 85 percent of total groundwater use within the sub-basin, and urban/domestic use primarily the remainder. According to the GSP, concentrated groundwater pumping near the coastal area has resulted in declining groundwater levels and seawater intrusion. During the drought years 2013 to 2017, increased pumping expanded the sea water impacted areas from 12,500 acres to 18,000 acres. The GSP reports that in 2005, nitrate levels exceeding the primary maximum contaminant level (MCL) were found in 32 percent of public water supply samples in the greater Salinas Valley Basin. The GSP estimates historical average sub-basin overdraft to be 10,900 AFY, and projects overdraft in the amount of 8,100 AFY in 2030, and 8,600 AFY in

2070. The GSP aims to mitigate the projected long-term projected 8,600 AFY overdraft, and to mitigate existing short-term overdraft estimated at over 40,000 AFY.

Projects and Management Actions

The GSP identifies primary projects and management actions including: 1) a three-tiered pump fee designed to incentivize reduced pumping; 2) in-lieu projects designed to provide direct delivery of surface water to offset pumping; 3) direct recharge projects through recharge basins or injection; 4) indirect recharge projects designed to decrease evapotranspiration and increased infiltration, such as removing invasive species from riparian corridors, and capturing storm water flows; and 5) hydraulic barrier development to control seawater intrusion, such as injection wells aligned parallel to coastline areas. The GSP anticipates developing the fee structure and refining and prioritizing selected projects within the first three years of GSP implementation. The GSP estimates that planned activities will cost over $11 million over the first five years of implementation.

The Merced Basin (DWR Basin No. 5-022.04)

The Merced Sub-basin is located within the northern portion of the larger San Joaquin Valley Groundwater Basin, and encompasses an area of about 801 square miles. The basin is managed by three GSAs pursuant to a memorandum of understanding: Merced Irrigation-Urban Groundwater Sustainability Agency, Merced Sub-basin Groundwater Sustainability Agency, and Turner Island Water District Groundwater Sustainability Agency #1.

Primary Sustainability Indicators of Concern

The GSP identifies multiple sustainability indicators of primary concern, including declining groundwater levels, degraded water quality, land subsidence, and depletions of interconnected surface waters. Notably, the GSP indicates that loss of groundwater in storage is not a concern because historical reductions have been insignificant relative to the total volume of freshwater water storage. The historical water budget finds an annual average rate of overdraft (change of storage) of 192,000 AFY from 2006 through 2015. According to the GSP, sustainable yield was estimated by modifying conditions in the groundwater model to balance out the change in stored water over time. In order to achieve a net-zero change in groundwater storage over a long-term average condition, the GSP states that current agricultural and urban groundwater demand in the basin would need to be reduced by approximately 10 percent, absent implementation of any new supply-side or recharge projects.

Projects and Management Actions

The GSP aims to achieve its sustainability goal by allocating a portion of the estimated basin sustainable yield to each of the three GSAs and coordinating the implementation of programs and projects to increase both direct and in-lieu groundwater recharge. The GSAs have not yet reached agreement on allocations or how they will be implemented. The GSP identifies twelve potential projects, which categorically include basin recharge, monitoring wells, water system interties and additional conveyance canals, water use efficiency programs, and streamlining certain replacement wells, and other project categories. The GSP anticipates completing all projects by 2026. GSP implementation costs are estimated to range between $1.2 million and $1.6 million per year, with additional costs for projects and management actions ranging up to $22.9 million.

The San Joaquin Valley—Kern Sub-Basin (DWR Basin No. 5-022.14).

The Kern Sub-basin is the southernmost area of the San Joaquin Valley Groundwater Basin. It is managed by 11 organized GSAs and five coordinated GSPs. Six GSAs are included in the GSP developed by the Kern Groundwater Authority GSA (KGA). Two GSAs are included in the Kern River Groundwater Sustainability Agency GSP. Three additional district-specific GSPs have been prepared in the sub-basin by Buena Vista Water Storage District, Henry Miller Water District, and Olcese Groundwater Sustainability Agency.

The KGA's GSP covers the largest GSA area within the sub-basin, comprising 1.2 million acres of the sub-basin's approximate 1.8 million-acre area. The KGA is a joint power authority including 16 member entities made up of water districts/agencies, groundwater banking projects, and organized non-districted lands. Each KGA member is assigned the sole right and responsibility to implement SGMA within

its respective boundaries and/or management areas, in a manner determined by the member, so long as the implementation actions do not interfere with the surrounding KGA members or other GSAs.

Primary Sustainability Indicators of Concern

The KGA's GSP includes basin-wise coordinated sustainable management criteria and water modeling budgets (historical, baseline and projected). Those budgets indicate that the basin, as a whole, averages overdraft in the amount of 324,326 AFY over the baseline conditions of which the KGA area comprises more than two-thirds of the deficit. Each KGA member agency addresses its own individual water supply sources, projects and management actions in greater detail in its individual management area plans comprising its dedicated GSP chapter.

Projects and Management Actions

The GSP indicates that KGA members have collectively identified more than 150 projects and management actions. They include expanding local and regional conveyance and recharge facilities, better utilizing surplus surface water supplies, developing new conveyance and recharge projects, and participating in the California WaterFix or other thru-Delta improvement projects. Management actions include implementing district level fee structures to incentivize reduced groundwater pumping, participating in local, regional, and state-wide water markets, and establishing individual landowner groundwater allocations. According to the GSP, the coordinated modeling effort shows that the implementation of the identified projects and management actions throughout the basin would result in an average *surplus* of 85,578 AFY over the projected future baseline condition.

Conclusion and Implications

All GSPs that were submitted to DWR and accepted for review are posted on DWR's website at https://sgma.water.ca.gov/portal/gsp/all. The deadline to submit public comments on each individual GSP is also provided. Virtually every GSP spans well over 1,000 pages (and some, over several thousand pages) including technical and other supporting attachments. The GSPs submitted for California's critically overdrafted basins collectively represent a truly "Herculean" effort to meet this crucial SGMA milestone. DWR is required to review the GSPs, consider all public comments, and render an evaluation of each GSP within two years. If the last five years have taught us anything, it is that January 2022 will be here before we know it. And at that point, DWR will have received an even larger wave of high- and medium-priority basin GSPs to review. In the meantime, GSPs for critically overdrafted basins will begin implementation, though the actual path forward for any particular GSP very much remains to be seen.

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CALIFORNIA WATER NEWS

PRESIDENT TRUMP'S VISIT TO BAKERSFIELD RESULTS IN EXECUTIVE MEMORANDUM FOR ADOPTION OF CVP AND STATE WATER PROJECT BIOLOGICAL OPINIONS—CALIFORNIA FILES SUIT

On Wednesday, February 19, 2020, thousands of Californians gathered in Bakersfield to hear President Donald Trump address the Central Valley's water concerns. The President spoke about myriad of issues that California has faced in recent times, ranging from homelessness, the high-speed rail project, and of course water and related environmental issues.

The Official Adoption of Biological Opinions

As to California's water supplies, the President stated: "You need water. It's real. It's really simple. And you have the water. You just need a signature. You're going to have one today."

Closing out his Bakersfield address, President Trump signed into effect an Executive Memorandum indicating the federal government's intention to move forward with a Record of Decision (ROD) adopting Biological Opinions (BiOps) issued by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) in October of 2019 for the coordinated operation of the federal Central Valley Project (CVP) and California State Water Project (SWP).

Three years in the making, these BiOps were initiated in late 2016 to update the existing operating agreements to account for new information with respect to impacts on endangered and threatened Delta species and mitigation measures available to protect those species—namely, the Delta smelt, Central Valley steelhead, the Sacramento River's winter-run chinook salmon, and the Central Valley's spring-run chinook salmon. With the BiOps' completion, the Coordinated Operations Agreement (COA) for the CVP and SWP could potentially move forward with more accurate considerations in protecting Delta species and ensuring protection of all beneficial uses of water.

Complicating matters, however, California has filed a lawsuit against the U.S. Bureau of Reclamation (Bureau), claiming that the BiOps currently stand in violation of the federal Endangered Species Act (ESA) and the Administrative Procedure Act (APA), essentially alleging the BiOps have apparently *loosened* protections for the endangered and threatened Delta residents.

California's Lawsuit Against the U.S. Bureau of Reclamation

As of its February 20, 2020 filing, California's Complaint for Declaratory and Injunctive Relief (Complaint) against the Bureau points out several alleged deficiencies in the BiOps adopted by the Bureau in its Record of Decision.

First, the Complaint alleges that the BiOps fail to evaluate whether the proposed COA will jeopardize the continued existence of the Delta species or adversely affect their critical habitat. Rather than conform to these requirements of the ESA, the Complaint claims that the BiOps instead take a "base-line model" approach, comparing the relative impacts of the currently existing COA with the proposed COA.

While this approach purportedly limits impacts to these Delta species to minimally more impactful actions, the Complaint cites the original purpose behind the 2016 re-initiation of these BiOps to refute the effectiveness of this methodology: that a new COA was necessary to properly protect the Delta species in light of new information regarding the existing COA's ineffectiveness.

Second, expanding on the BiOps use of a "base-line model," the Complaint continues by reiterating that the BiOps "entirely fail to consider … important aspect[s] of the problem." Citing a 2008 case expounding upon the implementation of the APA's requirements, the Complaint reads that:

> Even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm. (*National Wildlife Fed'n v. National Marine Fisheries Service*, 524 F.3d 917, 930 (9th Cir. 2008).

For both the FWS' and NMFS' BiOps, the Complaint takes issue with the comparative rationale in use. In the NMFS BiOp, for example, NMFS acknowledges that winter-run chinook salmon already face a high extinction risk, though the BiOps articulate that because the proposed COA only presents risks comparable to the current COA, such risks are permissible.

Third, the Complaint alleges that the BiOps rely on operational criteria and conservation measures which not reasonably certain to occur or:

> . . .are heavily caveated and include many unbounded off-ramps making it impossible to know how, if at all, project operations will avoid further harm to the species.

Pointing out the unacceptable inefficiencies of the COA's operations, the Complaint uses a proposed Delta smelt population supplementation program offered as a mitigation measure by the FWS BiOps. Under such program, Delta smelt populations would be supplemented via operation of a "Delta Fish Conservation Hatchery."

Lastly, "caveats" and "off-ramps" are laid out in the BiOps to provide for expanded pumping operations under certain circumstances. In doing so, the BiOps "no jeopardy" findings—the Complaint asserts—fail to consider the possibility for unfettered pumping to the contravention of the ESA's protections.

Conclusion and Implications

While this article provides only a snapshot of the battle to come, the timing of this push for Central Valley water is certainly noteworthy. With the general election mere months away, it comes as no surprise to see this kind of tooth-and-nail conflict between President Trump and Governor Gavin Newsom.

Regardless of the political dynamics, the lawsuit at hand between California and the U.S. Bureau of Reclamation is one of particular noteworthiness given its potential impacts on the Sacramento-San Joaquin Delta and its inhabitants as well as its impacts on the CVP and SWP.

(Wesley A. Miliband, Kristopher T. Strouse)

SALTON SEA SPECIES MANAGEMENT PROGRAM REPORT OUTLINES PROGRESS AND THE PATH FORWARD

In February 2020 the Salton Sea group of various state agencies issued an annual report on the state of the management program.

Background

The Salton Sea Management Program (SSMP) is a comprehensive plan developed in response to the state's obligations under the Salton Sea Restoration Act of 2003 aimed at the protection of wildlife habitats in the Salton Sea ecosystem and public health in surrounding communities, which have been imperiled as a result of progressively declining water levels over the past several decades. The SSMP is a joint effort of government agencies at the local, state and federal levels, spearheaded by a "State Team" consisting of the California Natural Resources Agency (CRNA), Department of Water Resources (DWR) and California Department of Fish and Wildlife (CDFW). In February 2020, the State Team released its 2020 Annual Report on the Salton Sea Management Program (Report), describing the status of the implementation of the SSMP and outlining the program's goals and expectations for future progress.

The Salton Sea and the SSMP

The Salton Sea is a shallow terminal lake situated primarily in the Imperial and Coachella Valleys. Overflows of Colorado River water caused by a breach of an irrigation canal in 1905 created the sea, filling the lakebed over a period of almost two years. Lacking any connection to the ocean, water in the sea lost by evaporation is primarily replenished by agricultural runoff. Salt leftover from evaporated water, along with the generally high salinity of the agricultural inflows, have resulted in a sea over 50 percent more saline than the Pacific Ocean.

Steadily declining water levels in the sea over the past several decades are largely attributed to shifts in agricultural water use practices, which, over time, have significantly reduced the agricultural runoff into the sea that historically replenished water lost through evaporation. Resulting increases in salin-

ity concentration in the Salton Sea and particulate air pollution from wind erosion of newly exposed lakebed, or "playa," create conditions that threaten the wildlife inhabiting the sea ecosystem as well as the public health of surrounding communities. For wildlife, reduced water levels degrade and destroy habitats relied upon by fish and birds as critical sources of food, shelter and nesting grounds. For human populations, breathing the fine dust introduced into the air from the erosion of exposed lakebed, some of which contains toxic elements like arsenic and selenium from past inflows, can give rise to a variety of respiratory illnesses over time.

The SSMP represents perhaps the most comprehensive state effort to revitalize the Salton Sea in the wake of the Salton Sea Restoration Act. Developed primarily by the CRNA in accordance with a 2015 directive of former Governor Brown, the SSMP features a comprehensive, two-pronged approach focused on habitat restoration and dust suppression projects covering tens of thousands of acres in and around the sea to be implemented in multiple phases. Currently, the State Team is working with local, state and federal stakeholders to carry out the Phase 1: 10 Year Plan (Phase 1 Plan). Overseeing the effort is the State Water Resources Control Board (SWRCB), as described in SWRCB Order WR 2017-134 (Order) detailing the board's role and setting forth parameters for the accomplishment of key SSMP initiatives. Additionally, the Order includes a requirement that the State Team submit an annual report that outlines major SSMP activities over the previous year, sets forth plans for moving forward with SSMP and provides an update on the program's funding status.

The 2020 Annual Report

The February 2020 Annual Report prepared by the State Team pursuant to the Order describes activities for the past year under four primary categories including project delivery, planning, partnership development and community outreach efforts. Project delivery achievements include the completion of the first SSMP project in January 2020, the small 112-acre Bruchard Road Dust Suppression Project involving surface roughening techniques to control erosion of playa and limit the resulting spread of dust. The first major habitat project of the SSMP and centerpiece of the Phase 1 Plan, the Species Conservation Habitat Program (SCHP) is set to begin construction in the fall of 2020. The SCHP encompasses approximately 3,770 acres of exposed playa at the southwest end of the Salton Sea near the mouth of the New River, a tributary to the Salton Sea. The SCHP will cultivate sustainable fish and avian habitats through the construction of a variety of components, which include water management ponds, berms, islands, pump stations, river crossings and intake, access corridors, pipelines and dust suppression elements. A design-build contract is expected to be awarded in summer 2020, with construction is scheduled to be completed by the end of 2023.

The two remaining elements of the four-part Phase 1 Plan include the Dust Suppression Action Plan (DSAP) and completion of a detailed environmental document prepared in accordance with the National Environmental Policy Act (NEPA). The DSAP involves the identification and prioritization of approximately 8,200 acres of dust suppression projects on emissive lakebed around the sea. Identification of projects for the DSAP will be determined in part by the State Team's ability to secure required land access agreements, as well as soil conditions and requirements of federal and state environmental law applicable to proposed project locations and completion of identified projects is to occur by end of 2022. The final component of the Phase 1 plan, the environmental document required by NEPA, is being undertaken in collaboration with the U.S. Army Corps of Engineers (Corps) and is expected to be finalized in spring 2021. The joint effort will focus on the facilitation of ongoing permitting needs for the large number of Phase 1 Plan projects to be constructed on areas within the jurisdiction of the Corps.

As described in the Annual Report, the State Team has cultivated numerous working relationships with key agencies and stakeholders in the Salton Sea region, including the Imperial Irrigation District (IID), Audubon California, the Salton Sea Authority, and the Counties of Imperial and Riverside. In particular, the state has extensively worked with IID as a partner in SSMP mitigation efforts, including the formation of critical land use agreements such as the easement agreement reached in May 2019 that gave the State Team the access necessary to move forward with the SCHP. Such agreements are intended to serve as templates for future land and water access needs of the SSMP. Federal partners include the Corps, the Bureau of Reclamation and the U.S. Fish

and Wildlife Service, with whom the State Team is coordinating regarding NEPA requirements as well as the implementation and funding of additional mitigation projects. In addition to coordination with other government agencies, the Annual Report describes a concerted community outreach effort by the State Team to increase transparency and establish a permanent physical presence at the sea by opening a local office.

The Annual Report indicates that the SSMP is receiving significant funding from the state, including appropriations of $298 million, over $200 million of which is allocated to the SCHP. The state budget for 2021 proposes an additional $220 million allocation of potential bond proceeds, subject to the passage a measure to be included on the November 2020 ballot. Notwithstanding the state's commitment to support the SSMP, the Annual Report claims that additional funding will be necessary to implement acreage requirements set forth in the Order, and the State Team is pursuing federal funding opportunities and other arrangements with its partners to make up this shortfall.

According to the State Team, the Annual Report will serve as a guide with respect to the development of SSMP stages following the implementation of the Phase 1 Plan. This effort is slated to begin in the first quarter of 2021 and be completed by the end of 2022.

Conclusion and Implications

The 2020 Report describes a SSMP moving full steam ahead as of February 2020, and specifically credits efforts to remedy institutional capacity issues that had previously limited progress as a primary reason. Under Governor Newsom, the state continues to support the program financially, though it remains to be seen whether and to what extent the ripple effects of the massive economic disruption caused by the Covid-19 outbreak in California that began shortly after the release of the Annual Report will impact SSMP funding and overall progress in the future. Nonetheless, the State Team appears committed to aggressively moving forward with the SSMP and according to the Annual Report, has laid much of the groundwork necessary to meet the program's lofty goals.
(Wesley A. Miliband, Andrew D. Foley)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES REFUSES TO ACCEPT COORDINATION AGREEMENT FOR GSPS IN MADERA SUBBASIN

In February 2020, the California Department of Water Resources (DWR) declined to accept a partially signed coordination agreement for multiple Groundwater Sustainability Plans (GSPs) covering the Madera Groundwater Subbasin in the Central Valley. DWR determined that the failure to submit a fully executed agreement did not comply with the Sustainable Groundwater Management Act. DWR also declined to post the plans for public review or initiate a public comment period. In a letter dated March 10, 2020, DWR informed the Madera Subbasin management agencies that, upon consultation with the California State Water Resources Control Board (SWRCB), it has determined the plans submitted for the Madera Subbasin as inadequate based on the deficiency in the execution of the coordination agreement, and that it will not be evaluating the individual plans at this time. Such determination triggers a "probationary" designation of the Subbasin under SGMA and potential State Water Resources Control Board intervention.

Background

On September 16, 2014, then Governor Jerry Brown signed into law the Sustainable Groundwater Management Act (SGMA), comprised of three bills—AB 1739, SB 1168, and SB 1319. The purpose of SGMA is to achieve sustainability in designated California groundwater basins within 20 years of adopting a GSP. To this end, SGMA requires for each basin determined by DWR to be a high- or medium-priority basin, a local agency be formed by June 30, 2017, known as Groundwater Sustainability Agencies (GSAs) , to oversee the development and implementation of a GSP, or an alternative (if applicable) for that basin. GSAs must develop, prepare, and begin implementation of GSPs by 2022 (2020 in critically overdrafted basins). If multiple GSAs overlie the same basin, the GSAs may each adopt one GSP or individual GSPs covering the entire basin. Where multiple GSPs are prepared for the same basin, SGMA requires the GSAs to enter into a coordination agreement that provides for the adoption and implementation of respective GSPs in a manner that achieves sustainability for the entire basin.

Under SGMA, the SWRCB acts as a backstop in probationary basins where no local GSA is formed or when a GSA (or multiple GSAs, as the case may be) fails to adopt or effectively implement GSPs that comply with SGMA's requirements. After the expiration of the probationary period, if the deficiency is not remedied, the SWRCB may develop and impose its own interim GSP to regulate extractions in the basin.

The Madera Groundwater Subbasin

The Madera Groundwater Subbasin (Madera Subbasin) is a critically overdrafted groundwater basin located in Madera County and forms part of the larger San Joaquin Valley Groundwater Basin in California's Central Valley, a globally significant agricultural area. Multiple GSAs overlie the Madera Subbasin, including the Madera County GSA, City of Madera GSA, Madera Irrigation District, Root Creek Water District, Madera Water District, Gravelly Ford Water District, and New Stone Water District. These GSAs, either individually or jointly, prepared and submitted to DWR four GSPs covering the Madera Subbasin. On January 31, 2020, a coordination agreement was submitted for these GSPs purporting to demonstrate how the implementation of the GSPs would be coordinated to ensure the objectives of SGMA were achieved. In a February 21, 2020 letter, DWR informed the Madera Subbasin GSAs that the coordination agreement did not comply with SGMA, because it had not been signed by New Stone Water District, which is responsible for implementing one of the submitted GSPs within its jurisdictional boundaries.

DWR Requires a Coordination Agreement to Be Fully Executed by All GSAs

Under SGMA, when GSAs develop multiple GSPs for a single designated basin or subbasin, the GSAs must jointly submit to DWR: 1) the GSPs, 2) an explanation of how the groundwater sustainability plans implemented together satisfy the mandates of SGMA for the entire basin, and 3) a copy of the coordination agreement between the GSAs "to ensure the coordinated implementation of the groundwater sustainability plans for the entire basin." (Water Code § 10733.4(b)(1)-(3).) Because the Madera Subbasin would be covered by four different GSPs, DWR determined that the coordination agreement provision of SGMA applied to the submitted GSPs. Moreover, DWR determined that the coordination agreement needed to be fully executed by all GSAs in the Subbasin, and an agreement that was not fully executed did not comply with SGMA or its implementing regulations. In making this determination, DWR suggested that, based on its discussions with GSAs in the Madera Subbasin, the omission of New Stone Water District's signature was intentional, and that, in effect, the GSAs had not reached an agreement to coordinate the GSPs covering the Madera Subbasin. Thus, DWR rejected the possibility that the omitted signature was an oversight.

Inadequacy of the GSPs

Importantly, SGMA requires that DWR disapprove a GSP if, after consultation with the SWRCB, DWR finds that the GSP is inadequate and does not achieve the sustainability goals of SGMA. A GSP may be inadequate if it has any deficiency identified in SGMA. For instance, a GSP may be inadequate if it does not include a coordination agreement, if one is required; if a GSP either individually or in coordination with other GSPs does not cover an entire basin; or if a coordination agreement, if required, has not been adopted by "all relevant parties." (23 C.C.R. § 355.4(a)(3),(b)(8).) Upon DWR's determination that the coordination agreement did not include the signatures of all GSAs in the Madera Subbasin, it sent a letter to the SWRCB initiating consultation. Subsequently, in a letter dated March 10, 2020 to the GSAs, DWR determined that the partially signed coordination agreement constitutes a deficiency under SGMA and determined the GSPs inadequate. Pursuant to SGMA, this determination places the Subbasin in a probationary period during which the GSAs must remedy the deficiency or risk SWRCB intervention. DWR has not posted the GSPs for public review and is not initiating a public comment period. However, in its letter, DWR clarified that, in the interim, the GSAs are not without authority to begin implementing the respectively-adopted GSPs.

Conclusion and Implications

As suggested by its letter to the Madera Subbasin GSAs, DWR is requiring strict compliance with the GSP adoption under SGMA, including fully executed coordination agreements, if required. It is unclear if DWR's view of GSP requirements is influenced by the priority of the groundwater basin, but it is reasonable to assume that DWR will look critically at all submitted GSPs to ensure strict compliance with SGMA. For more information on the Letter from DWR re: Madera Subbasin, *see:* https://sjvwater.org/wp-content/uploads/2020/02/2020-02-21_Letter_DWR-to-Madera-GSAs.pdf.
(Miles Krieger)

CALIFORNIA FISH AND GAME COMMISSION ADOPTS NEW STRIPED BASS POLICY FOR THE DELTA

In late February 2020, the California Fish and Game Commission (Commission) voted unanimously to adopt an amended striped bass policy for the Sacramento-San Joaquin Delta. Striped bass are non-native species that have established a presence in the Delta beginning in the late 1800s. The new policy eliminates a specific population objective for striped bass, but also states a commitment to sustaining the striped bass fishery within the Delta.

Background

Striped bass were introduced into the Sacramento-San Joaquin Delta (Delta) in the late 1800s. Commercial fishing of striped bass was outlawed in 1935. Between the mid- 1970s and 1990s, populations of the non-native striped bass in the Delta plummeted from over 2 million fish (estimated) to less than 700,000. To improve the population, in 1981 the California Legislature established the Striped Bass Management Program. However, the program was eliminated in the early 2000s. According to a Senate Floor Analysis for a pertinent bill from 2003:

> Striped bass populations have been steadily increasing. In fact, they have reached a point where predatory striped bass, an introduced species, are becoming a problem in recovering certain native species of fish. (Senate Floor Analysis, SB 692 (2003), p. 2.)

Indeed, trawl survey data indicate that striped bass populations have substantially increased in the last ten years, though they are still not near the abundance levels seen in the 1970s and prior years. Some estimates put the number of striped bass in the Delta at or below 300,000.

In 1996, the Commission adopted a striped bass policy that set a long-term population restoration goal of 3 million adult striped bass within the Delta. The Commission set a five to ten year goal of 1.1 million adults, reflective of the striped bass population in 1980. The Commission identified several means of achieving its population targets, including helping to maintain, restore, and improve habitat, pen-rearing fish salvaged from water project fish screens, and artificial propagation. Additionally, Commission regulations continued to provide for a take limit of two striped bass, with a general 18-inch length limit, unless an exception applies. (CCR, tit. 14, § 5.75.)

In 2016, the Commission received a regulation change petition from a local interest group called the Coalition for a Sustainable Delta, among others, requesting an increase in the bag limit and a reduction of the minimum size limit from striped bass in the Delta. According to the petition, the purpose of the regulatory change would be to reduce predation by striped bass, as well as black bass, on fish native to the Delta and listed as threatened or endangered under the federal or California Endangered Species Acts. These threatened or endangered species include winter-run and spring-run chinook salmon, Central Valley steelhead, and Delta smelt. Negative impacts on threatened or endangered species can, according to the petition, affect water deliveries from the Delta to local water users as well as water users elsewhere in the state.

Despite the petition later being withdrawn, the Commission requested that the Wildlife Resource Committee (WRC), operating within the Commission, begin reviewing the existing striped bass policy adopted in 1996. More broadly, an effort to review existing policy and to potentially adopt a new policy concerning fisheries management in the Delta has been in progress since 2017. Following public stakeholder meetings and discussions, including with representatives from the Coalition for a Sustainable Delta, an initial draft fisheries policy emerged that became the subject of stakeholder and Commission discussion leading up to the Commission adopting its newest striped bass policy.

Policy Options

In early 2020, the Commission held a meeting with the California Department of Fish and Wildlife and stakeholder groups representing fishing and water interests to discuss three striped bass policy options that were presented to the Commission in December 2019. The three options were comprised of two stakeholder options and one Commission staff option. According to the Commission, discussion focused primarily on whether a specific numeric population

target for striped bass was appropriately included in a revised striped bass policy. Ultimately, the Commission voted unanimously to adopt an amended policy that did not include a specific numeric target, and instead aimed to "monitor and manage" the striped bass fishery in the Delta.

Points of Agreement

Prior to the Commission's adoption of the revised striped bass policy, the Commission and sport fishing industry stakeholders reached several points of agreement related to the importance of a striped bass fishery in the Delta. In particular, stakeholders and the Commission agreed that a new policy should include ensuring a robust recreational fishery or maintaining/increasing striped bass recreational angling opportunities. However, stakeholders and the Commission also agreed that the 1996 policy's objective of achieving a striped bass population of 3 million was likely unrealistic given the current state of the Delta, and that pen-rearing and artificial propagation would likely be unsuccessful in light of past efforts using those methods, which were not successful in reversing fish declines. Moreover, pen-rearing is not a practice employed by the Department of Fish and Wildlife in inland waters. Nonetheless, stakeholders and the Commission agreed that activities designed to support striped bass, such as habitat improvement, controlling invasive aquatic vegetation, improving water quality, reducing striped bass loss, and monitoring populations of striped bass should be included in the policy.

Point of Disagreement—Numeric Targets

The primary point of disagreement between the Commission and stakeholders was setting a numeric target for the striped bass population in the Delta. From the Commission's perspective, identifying a specific numeric target would not lead to a different result compared to striped bass population numbers over the past few decades, when a specific numeric target was in place. Instead, according to the Commission, the striped bass population in the Delta would depend on management actions aligned with policy-based guidelines, as well as third party and stakeholder relationships. Generally, the Commission adopted the view that many Department of Fish and Wildlife projects that help restore the Delta ecosystem also benefit striped bass, including by focusing on benefits to native species. Accordingly, given limited resources available to the Department of Fish and Wildlife, the Commission contended that resources should be devoted to native species, as opposed to restoring numerically defined striped bass populations in the Delta.

Fishing industry stakeholders advocated for specific numeric targets, typically around 1 million striped bass in the Delta. Many stakeholders contended that a specific numeric population figure would help make the Commission's policy concrete and measurable. Additionally, academic support was offered for maintaining striped bass populations in the Delta due to the bass' long-term presence in the Delta, despite its introduction as a non-native species. In particular, striped bass populations can be used to evaluate the health of the estuarine ecosystem of the Delta, because the bass spend each of their life stages within the Delta and typically parallel salmon and smelt population increases or declines. Nonetheless, the Commission adopted a policy that does not provide a specific population target, but does commit to maintaining the striped bass fishery in the Delta.

Conclusion and Implications

Without a specific numeric population figure for striped bass in the Delta, some stakeholders may believe the Commission's policy could lead to a decline in striped bass populations. At the same time, however, if the Commission is correct that general improvements to Delta ecosystems and habitat that benefit other species may also benefit the striped bass, the species could experience some level of stability or even increase. Only time will tell how the Commission's new striped bass policy will affect population numbers in the Delta. The Striped Bass Policy is available online at: https://fgc.ca.gov/About/Policies/Fisheries#StripedBass.

(Miles B. H. Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

STATE CLASS ACTION FILED CHALLENGING PUBLIC AGENCIES' RETAIL WATER RATES UNDER CALIFORNIA'S PROPOSITION 218

On February 19, 2020, a class action lawsuit challenging the retail water rates of more than 80 public agencies was filed in California Superior Court. The case, *Kessner et al v. City of Santa Clara et al.*, Case No. 20CV364054 (Santa Clara County Super. Ct.), alleges that the rates charged by each of the named entities exceed their cost of service, in violation of Proposition 218.

Background

Proposition 218 (an amendment to the California Constitution adopted by voters in 1996) imposes substantive and procedural limits on the fees that a local agency may charge for property-related services, including water service. Those constitutional limits include a directive that revenues derived from the fee must not exceed the funds required to provide the property-related service; that these revenues shall not be used for any purpose other than that for which the fee or charge was imposed; that they shall not exceed the proportional cost of the service attributable to the parcel; and that no fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. (Cal. Const. Art. XII D, Sec. 6.)

Fees for water service to a parcel are traditionally considered property-related fee subject to Proposition 218. *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 217 (2006). While public agencies have some flexibility in setting those rates, they must adhere to the basic proportionality principles outlined by the Constitution. The precise scope of what constitutes an appropriate property-related fee for water service has, however, been the source of regular litigation.

The Lawsuit Challenges Retail Water Rates Statewide

The complaint filed by Kessner *et al.* in February 2020 attacks the water rates of more than 80 public agencies from across the state of California, each of whom are named as defendants and respondents in a single "Respondent Class." It identifies specific retail customers of each agency as a plaintiff, each of whom is listed both individually as a ratepayer of the defendant agency, on behalf of "all others similarly situated" in a class of plaintiffs and petitioners unique to that respondent (the class of "Retail Customers of City of Santa Clara", for example).

Plaintiffs allege that, as a class, defendants have charged rates to their customers that exceed their cost of service, and that each defendant's water rate structure subsidizes water service provided to the government and for general governmental services, including public fire hydrant services. Plaintiffs further allege that some of the named defendants' rates as to the plaintiff's class agricultural and irrigation water rates by the same provider, effectively allowing the defendant to charge a below-cost rate to those customers at the expense of plaintiffs. In addition, certain of the defendants (referred to as the San Diego County SAWR defendants in the complaint) are members the San Diego County Water Authority, and represented on that entity's 36-member board of directors. As to those defendants, plaintiffs additionally allege that they have caused the San Diego County Water Authority, to maintain a subsidized wholesale water rate which it passes on to certain unlawfully subsidized retail accounts.

The defendant and respondent agencies named in the suit are diverse in both geography and composition: they are situated in more than twenty counties, and include cities, counties, special act districts, California water districts, irrigation districts, and public utility districts. Notwithstanding those differences, plaintiffs assert that common issues may be found among these defendants and classes, specifically "whether the California Constitution prohibits reallocation to Retail Water Customers of Subsidized Government Water Service." (Complaint, ¶ 185.) As to each class of retail customers, the complaint indicates that it will ask the court to address "whether the defendant Retail Water Provider unlawfully real-

located costs of service to its Retail Water Customers, and the amount of unlawfully reallocated costs."

Conclusion and Implications

While water rates have been the subject of Proposition 218 class actions in other contexts, the statewide, multi-agency scope of this action is unusual, and presents unique class-certification issues in this action. Plaintiffs have asked the court for declaratory and injunctive relief, as well as damages. None of the defendants has filed a formal response: responsive pleadings and discovery in the case were temporarily stayed; and a case management conference has been scheduled for June 23, 2020. The full text of the complaint, and an order deeming the case complex, are available on the Santa Clara County Superior Court's website: http://scscourt.org.
(Rebecca Smith, Meredith Nikkel)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT FINDS CERCLA COST RECOVERY CLAIM AGAINST THE FEDERAL GOVERNMENT FAILS DUE TO PREVIOUS CLEAN WATER ACT CONSENT DECREE

Government of Guam v. United States of America, ___F.3d___, Case No. 19-5131 (D.C. Cir. Feb. 14, 2020).

On February 14, 2020, the D.C. Circuit Court of Appeals determined that the government of Guam was unable to recover money from the U.S. Navy under the cost recovery sections in the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court determined that CERCLA § 107(a) was inapplicable because a previous Consent Decree (Consent Decree) resulting from a federal Clean Water Act (CWA) claim resolved some of the liability. Since the liability had been resolved, only § 113(f)(3)(B) was a viable means of recovery; however, recovery was impermissible because the statute of limitations for this section had run.

Factual and Procedural Background

Between 1903 and 1950, the United States treated Guam as a US Naval ship—the "USS Guam"—and maintained military rule over the island. In the 1940s, the Navy constructed and began operating a landfill, called the Ordot Dump, where municipal and military waste was disposed. In the 1950s the United States began forming a civilian government, but even after relinquishing sovereignty, the Navy used the Ordot Dump for the disposal of munitions and chemicals, allegedly including Dichlorodiphenyltrichloroethane—DDT—and Agent Orange, throughout the Korean and Vietnam wars. Despite the dump's extensive use for both military and civilian needs, there were few environmental safeguards implemented. It was unlined at the bottom and uncapped on top which allowed the rain to mix with the chemicals and contaminate the soil and ground water.

Starting in 1986, the U.S. Environmental Protection Agency (EPA) repeatedly ordered Guam to contain the environmental impacts at Ordot Dump. In 2002, the EPA sued Guam under the CWA asserting that Guam violated the Act when water flowed from the Ordot Dump into the Lonfit River without a permit. To avoid litigation, Guam and the EPA entered into a Consent Decree in 2004, which required Guam to pay a civil penalty, close the dump, and install a cover over the dump.

In 2017, Guam initiated an action under CERCLA, asserting that the Navy was responsible for the Ordot Dump's contamination, and seeking to recover costs caused by closing the land fill and cleaning the area. Guam brought two causes of action: a CERCLA § 107(a) "cost recovery" claim seeking "removal and remediation costs" related to the landfill, and, alternatively, a § 113(f) "contribution" action.

The U.S. moved to dismiss the claims, arguing, first, that the 2004 Consent Decree resolved the United States' liability for a response action, and therefore Guam had to proceed under § 113 rather than § 107. Second, the United States argued that because CERCLA § 113 "imposes a three-year statute of limitations on contribution claims" that runs from a consent decree's entry, Guam was time-barred by the three-year statute of limitations from pursuing a § 113 contribution claim.

The U.S. District Court found that the § 107(a) claim was not barred by the Decree because it did not sufficiently resolve the liability of the Ordot Dump and denied the motion to dismiss. The United States sought interlocutory appeal of the district court's order.

The D.C. Circuit's Decision

Two CERCLA sections are at issue in this case: § 107(a) and § 113(f)(3)(B). Section 107(a) provides a cost recovery action with a six-year statute of limitations that is permissible if liability has not been resolved. Section 113(f)(3)(B) provides a contribution action available to recover paid funds from a nonparty as a result of a § 107(a) action, settlement, or other contribution action with a three-year statute of limitations.

Cost Recovery and Contribution Claims Are Mutually Exclusive

The court first considered whether CERCLA §§ 107(a) and 113(f)(3)(B) were mutually exclusive. That is, if a party incurs costs pursuant to a settlement and therefore has a cause of action under § 113, is it precluded from seeking cost-recovery under § 107? The court reasoned that the purpose of § 113(f)(3)(B) is to allow private parties to seek contribution after they have settled their liability with the government. Allowing recoupment of costs through a § 107 cost-recovery claim would render § 113(f)(3)(B) superfluous.

Triggering Section 113(f)(3)(B) Through a Non-CERCLA Claim

The court next considered whether the 2004 Consent Decree resolved Guam's liability for a response action within the meaning of § 113(f)(3)(B), thus triggering Guam's right to seek contribution and precluding it from seeking cost-recovery under § 107. In order to trigger CERCLA § 113(f)(3)(B), a party must resolve its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in a judicially approved settlement. Guam argued the 2004 Consent Decree could not qualify as a settlement under CERCLA because it settled an action brought by EPA under the CWA, not CERCLA.

The court determined that § 113(f)(3)(B) did not require a CERCLA specific settlement. Because other subsections in § 113 specifically required a CERCLA claim and 113(f)(3)(B) does not, this implied that Congress did not intend to place this restriction on the subsection when drafting CERCLA.

Consent Decree Resolves Liability

After determining that a settlement agreement under the CWA could trigger 113(f)(3)(B), the court examined the terms of the 2004 Consent Decree. The court determined that the ordinary meaning of the phrase "resolved its liability" meant that the liability must be decided in part by the agreement with the EPA. The Consent Decree required Guam to take actions against further contamination, which constituted a response action.

Guam unsuccessfully argued that the Consent Decree did not resolve liability in this context for multiple reasons. First, Guam argued that the Consent Decree did not resolve liability because it explicitly reserved the right to pursue other claims against Guam that arose from the circumstances. The court determined that complete resolution was not necessary as 113(f)(3)(B) only required some response action, which was present when Guam agreed to work to cover the Ordot Dump in the Consent Decree.

Second, Guam argued that the Consent Decree did not trigger § 113(f)(3)(B) because liability under the decree due to ongoing performance requirements. The court rejected this argument, reasoning that such a position would produce the absurd result that Guam's cause of action under § 113 would not accrue until after the statute of limitations ran. Because this created a timing inconsistency that was impossible to resolve, the court found that Congress could not have intended for the liability to accrue only after performance had been completed.

Third, Guam argued that the disclaimer in the Consent Decree, which asserted there was no "finding or admission of liability," prevented the liability from being resolved as required by § 113(f)(3)(B). Here, the court determined that disclaimer did not overcome the substantive portions of the Consent Decree. Because the Consent Decree caused Guam to assume obligations consistent with finding liability, this was sufficient action to trigger § 113(f)(3)(B).

Fourth, Guam argued that the Consent Decree was outside of CERCLA because the document was only about violations to the CWA and "non-CERCLA pollutant discharges only." The court determined this to be irrelevant because the instructions regarding the cover asserted that the system was designed to "eliminate discharges of untreated leachate" which was an action specifically identified in CERCLA as a remedial action.

Finally, Guam argued that denying § 107(a) recovery violated the due process clause by not providing notice that the Consent Decree also triggered CERCLA. Since this argument was not raised originally in the District Court, the Circuit Court found that it was forfeited.

Conclusion and Implications

This case brought the D.C. Circuit in line with the Third, Seventh, and Ninth Circuit Courts who have ruled that § 107(a) and 113(f)(3)(B) are mutually exclusive. This case also shows that CERCLA § 113(f)

(3)(B) can be triggered by actions taken by the EPA under other statutes and is triggered as soon as the settlement, not the performance, occurs. Lastly, any disclaimers or rights to take other actions reserved in a Consent Decree do not necessarily prevent § 113(f)(3)(B) from being triggered. See, https://www.cadc.uscourts.gov/internet/opinions.nsf/36DBD6063D08111F8525850E00580F44/$file/19-5131-1828593.pdf (Anya Kwan, Rebecca Andrews)

DISTRICT COURT HOLDS CLEAN WATER ACT CITIZEN SUIT ALLEGING STORMWATER DISCHARGES INTO SAN FRANCISCO BAY SURVIVES MOTION TO DISMISS

Eden Environmental Citizen's Group, LLC v. American Custom Marble, Inc., ___F.Supp.3d___, Case No. 19-CV-03424-EMC (N.D. Cal. Feb. 13, 2020).

The U.S. District Court for the Northern District of California denied defendants' motion to dismiss Eden Environmental Citizens Group's (Eden) federal Clean Water Act (CWA) complaint on the grounds of standing and personal jurisdiction. However, the court granted defendants' motion to dismiss Eden's fifth, sixth, and seventh causes for failure to implement Best Available and Best Conventional Treatment Technologies, discharges of contaminated stormwater, and failure to properly train employees, respectively. The court allowed Eden to amend its complaint to cure pleading deficiencies within 30 days because the court dismissed these causes of action without prejudice.

Background

Eden is an environmental membership group organized to protect and preserve California's waterways. Eden's mission is implemented by enforcing provisions of the CWA by seeking redress from environmental harms caused by industrial dischargers. Eden brought suit against American Custom Marble (ACM) and Patricia A. Sharp, ACM's corporate secretary and the facility's legally responsible person (collectively Defendants) for violations of the CWA. In its complaint, Eden alleged that ACM stores industrial materials in an outdoor location where the materials are vulnerable to storms and wind. As a result of this storage, Eden alleged that stormwater containing ACM's industrial materials discharged from ACM's facility into waters of the United States that drain to San Francisco Bay.

Eden filed a complaint against ACM and Ms. Sharp for violations of the CWA. Eden gave ACM proper notice, but Eden did not explicitly give notice to Ms. Sharp in her personal capacity. ACM moved to dismiss, arguing that: 1) Eden lacked standing, 2) the court lacked personal jurisdiction over Ms. Sharp because Eden failed to give her proper notice, and 3) Eden failed to state facts that support a cause of action.

The District Court's Decision

Standing

The court began by analyzing whether Eden had organizational standing. An organization may assert standing to sue on behalf of its members where: 1) its members would otherwise have standing to sue on their own, 2) the interests it seeks to protect are relevant to the organization's purposes, and 3) neither the claim nor the relief require the participation of the individual members. Here, the court found that Eden had sufficiently alleged organizational standing. Even though Eden had not included any facts about its members in its complaint, Eden cured this pleading deficiency by submitting a declaration from one of its members claiming the member used and enjoyed the watershed at issue and claiming the member had suffered harm as a result of the discharges.

The court next analyzed whether Eden had standing to bring claims predating Eden's existence, given that Eden was formed in 2018. The court determined that the key inquiry was whether Eden's harmed member would have standing to bring suit for the violations of the CWA in his own right, even if those violations predated Eden. The court found that Eden's member would in fact have standing in his

own right because he had lived in the area for the full amount of time allowed by the statute of limitations. Therefore, Eden had standing to sue on its member's behalf for violations before Eden's existence.

Personal Jurisdiction Over Ms. Sharp

The court next analyzed whether it had personal jurisdiction over Ms. Sharp even though Eden did not give her notice of the violations in her personal capacity. Responsible corporate officers can be held personally liable under the CWA. However, the CWA requires that a plaintiff give prior notice to alleged violators before filing a complaint.

Defendants argued Eden failed to give any CWA notice to Ms. Sharp in her personal capacity, therefore Eden could not sue Ms. Sharp. However, Eden addressed its notice to "Officers, Directors, Property Owners and/or Facility Managers of ACM," which gave Ms. Sharp notice she could be sued in her personal capacity because of her position. Eden also served notice to Ms. Sharp at her home, and noted that Ms. Sharp should be on notice of her personal liability because she is the ACM facility's "legally responsible person." The court took these facts into consideration and determined Ms. Sharp had fair notice. Ms. Sharp had not alleged that she was prejudiced by Eden's imperfect notice, therefore the court denied the motion to dismiss for lack of personal jurisdiction.

Failure to State a Cause of Action

Finally, the court analyzed whether Eden had adequately stated its causes of action to survive a Rule 12(b)(6) motion. To overcome a Rule 12(b)(6) motion, a plaintiff's factual allegations in the complaint must suggest the claim has a plausible chance of success. A plaintiff cannot simply recite elements of a cause of action; the complaint must contain sufficient allegations of underlying fact to give fair notice to the defendant.

The court found that Eden's fifth, sixth, and seventh causes of action were deficient under Rule 12(b)(6). Eden only alleged its fifth and seventh causes of action in general terms, and the court decided Eden merely recited the elements of a cause of action. The court stated that it needed more information from Eden to uphold the fifth and seventh causes of action. The court found Eden's sixth cause of action deficient because it alleged an unspecified number of discharges. The sixth cause of action stated that an unlawful discharge occurred in every rain event presumably from the beginning of the statute of limitations to the filing of the lawsuit. The court stated that ACM was entitled to know how many violations were being alleged and how Eden identified "rain events" that would count as discharges under the CWA. Accordingly, the court dismissed Eden's fifth, sixth, and seventh causes of action under Rule 12(b)(6) with leave to amend.

Conclusion and Implications

This case establishes that organizations have standing to sue on behalf of their members when their members have standing to sue in their own capacity, even if the members' injuries predate the existence of the organization. This case also establishes that a defendant must show they have suffered prejudice from a plaintiff's imperfect CWA notice in order to succeed in dismissing a lawsuit under the CWA. Practically, this case allows Eden's lawsuit against Defendants to continue forward. Eden may amend its complaint within 30 days to cure its deficient pleadings for the fifth, sixth, and seventh causes of action. For more information, *see*: https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_19-cv-03424/pdf/USCOURTS-cand-3_19-cv-03424-1.pdf.
(William Shepherd, Rebecca Andrews)

COURT OF FEDERAL CLAIMS REJECTS 'TAKINGS CLAIMS' RELATED TO HURRICANE HARVEY DOWNSTREAM FLOODING CASES

In re Downstream Addicks and Barker (Texas) Flood-Control Reservoir, ___F.Supp.3d___, Case No. 17-9002 (Fed. Cl. Feb. 18, 2020).

The U.S. Court of Federal Claims dismissed U.S. Constitutional Fifth Amendment takings claims related to "Hurricane Harvey" for failure to state a claim upon which relief could be granted. The ruling comes as a result of the court's determination that the Fifth Amendment only protects legally recognized property rights created by states or the federal government.

Factual and Procedural Background

This litigation was brought by residents of Harris County, Texas (plaintiffs). Plaintiffs suffered from flooding that damaged their property during Hurricane Harvey in 2017. Plaintiffs alleged that economic and emotional damages occurred as a result from imperfect flood control from two dams created by the U.S. Army Corps of Engineers (Corps or federal government) to mitigate against floods in their area.

The Corps created the Barker Dam and Addicks Dam between February of 1942 and December of 1948, respectively. The dams' reservoirs provided flood protection along the Buffalo Bayou. Plaintiffs acquired their respective properties between 1976 and 2015. All properties fell within the Buffalo Bayou watershed and all properties were built after the erection of the dams.

On August 25, 2017, Hurricane Harvey made landfall on the coast of Texas. To mitigate against downstream flooding, the Corps closed the flood gates on both the Addicks and Barker dams. By August 28, the volume of water in the reservoirs exceeded capacity and the Corps began releasing waters downstream. Despite the controlled releases, uncontrolled water was reported to be flowing around the north end of the Addicks Dam.

In September of 2017, property owners began to file claims with the court. Plaintiffs alleged that the flooding caused by Hurricane Harvey and the dams was an unconstitutional taking of their property. The claims were consolidated and then bifurcated into an Upstream Sub-Docket and a Downstream Sub-Docket. The federal government filed a motion to dismiss under Rule 12(b)(6) of the United States Court of Federal Claims for failure to state a claim upon which relief could be granted. The federal government alleged that the government cannot take a property interest that plaintiffs do not possess.

The Court of Federal Claims Decision

The Takings Clause of the Fifth Amendment protects against private property being taken for the public without just compensation. Accordingly, courts implement a two-step analysis of takings claims. First, a court determines whether plaintiffs possess a valid interest in the property affected by the government action. If the court determines that the plaintiffs do have a property right, then it must decide whether the governmental action at issue constituted a violation of the property right.

The Court of Federal Claims referenced that for a Fifth Amendment takings claim to succeed, plaintiffs must first establish a compensable property interest. For a property right to be recognized, it must have a legal backing, such as a state or federal law protecting the interest.

State Recognized Property Rights

The Court of Federal Claims reviewed over 150 years of Texas flood-related decisions and determined that the State of Texas has never recognized perfect flood control in the wake of an "act of God," such as a hurricane, as a protected property interest. In fact, the court determined that Texas had specifically excluded the right to perfect flood control when the occurrence was an act of God.

Under Texas law an act of God is the result of an event that was "so unusual that it could not have been reasonably expected or provided against." Here, the court determined that Hurricane Harvey was an event that occurred only every 200 years, and that the Houston area could not have reasonably expected or provided against its damages. Therefore, the federal government could not be held responsible for plaintiff's injury because Texas law specifically limits liability in takings and tort contexts when the

operator of a water control structure fails to perfectly mitigate against flooding caused by an act of God.

The court then looked to the Texas state Constitution, which specifically enumerates that police power is an exception to takings liability and that property is owned subject to the pre-existing limits of the state's police power. The court highlighted the fact that Texas courts have consistently recognized efforts by the state to mitigate against flooding as a legitimate use of police power.

The court also looked to the Texas Supreme Court's holding that governments cannot be expected to insure against every misfortune on the theory that they could have done more. The reasoning behind that conclusion was the fact that extending takings liability on such instance would encourage governments to do nothing to prevent flooding instead of trying to address the problem.

Finally, under Texas case law when an individual purchases real property, the individual acquires that property subject to the property's pre-existing conditions and limitations. The court noted that each of the plaintiffs in this case acquired their property after the construction of the Addicks and Barker dams. Therefore, plaintiffs acquired their property subject to the right of the Corps and federal government to engage in flood mitigation.

Federally Recognized Property Rights

Because the court did not find a property right recognized by the State of Texas, it examined whether federal law provides plaintiffs with protected property interest. Plaintiffs advanced two legal theories to allege that federal law recognized their property rights. First, plaintiffs alleged that because their property only experienced minimal flooding before Hurricane Harvey, they had a reasonable investment-backed expectation that they would always remain free from flooding. Second, plaintiffs alleged that because the water ran through the Corp's reservoir, it was the Corps' water and not flood water.

First, the Court of Federal Claims determined that plaintiffs did not have a reasonable expectation to be free from flooding simply because the federal government erected a dam to mitigate floods. The court determined that:

> . . .an unintended benefit could not create a vested property interest, and that '[i]n certain limited circumstances, the [federal government] can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment.'

The court highlighted the notion that government projects rarely provide an individual with a property interest because government projects are intended to benefit the community as a whole.

Second, the court determined that the Flood Control Act of 1928 (FCA) defines water impounded behind dams because of a natural disaster as flood waters. Additionally, the court determined that the FCA does not confer owners a vested right in perfect flood control simply for owning property that benefits from a flood control system. The court determined that when the federal government undertakes efforts to mitigate against flooding, it does not become liable for a taking because the efforts failed.

The court concluded that there exists no cognizable property interest in perfect flood control against waters resulting from an act of God. The court refused to extend liability to the federal government because it failed to protect against waters outside of its control. Therefore, the court granted the federal government's motion to dismiss for failure to state a claim upon which relief could be granted.

Conclusion and Implications

The court's decision closely tracked state law and federal law in an attempt to harmonize its decision. In the end, the Court of Federal Claims found that the failure of a federal flood control project to control flood waters may not constitute a Fifth Amendment taking without a state-created property right to be free from the type of flooding at issue. The implication of that analysis would suggest that a different result might be possible on the same or similar fact in another state. In February 2020 we reported on the court's decision in the "upstream" portion of the flooding event. *See*: 30 *Envtl Liab Enforcement & Penalties Rptr* 74. The court' decision is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv9002-203-0.
(Marco Ornelas, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT FINDS CERTIFIED LOCAL COASTAL PLAN, NOT THE COASTAL ACT REGULATION, GOVERNS CITY'S COASTAL DEVELOPMENT OF HOUSING FACILITY

Citizens for South Bay Coastal Access v. City of San Diego,
___Cal.App.5th___, Case No. D075387 (4th Dist. Feb. 18, 2020).

A local interest group brought suit challenging the City of San Diego's (City) issuance of a Conditional Use Permit (CUP) allowing the City to convert a motel that it had purchased into a transitional housing facility for homeless misdemeanor offenders. The group alleged that the City was required to obtain a Coastal Development Permit (CDP) for the project. After the Superior Court granted a writ of mandate, the City appealed. The Court of Appeal for the Fourth Judicial District reversed, finding that the City's certified local coastal plan governed the City's coastal development, under which the project was exempt.

Factual and Procedural Background

The City acquired a property, which was operated as a motel, for the purpose of converting the motel into a transitional housing facility for homeless misdemeanor offenders. The City planned to rehabilitate the existing building on the property with interior and exterior improvements. The City's plan also reduced the existing 53 parking spaces in the parking lot to a total of 25 parking spaces and added passive open green spaces.

The property is located within the Coastal Overlay Zone as defined by the City. Generally, the City's Municipal Code provides that a Coastal Development Permit is required for all coastal development of properties within the Coastal Overlay Zone unless an exemption applies. When the City passed a resolution approving a conditional use permit for the project in late 2017, the staff presentation stated that the facility was exempt under the City's municipal code.

Plaintiff Citizens for South Bay Coastal Access brought suit, claiming, among other things, that the project required issuance of a CDP. In particular, it asserted that the California Coastal Act and the regulations promulgated thereunder had the effect of preempting the City's municipal code and required the City to obtain a CDP. Plaintiff claimed two sections of the regulations triggered the CDP requirement: 1) a section requiring a CDP for any improvement to structures that change the intensity of use of the structure; and 2) a section requiring a CDP for any improvement made pursuant to a conversion of an existing structure from a visitor-serving commercial use to a use involving a fee ownership. (Cal. Code Regs., tit. 14, § 13253.)

Plaintiff did not dispute that the portion of the City's municipal code governing the requirement to obtain a CDP for development in the Coastal Overlay Zone contained an exemption for improvements to existing structures. It also did not dispute that none of the municipal code's exceptions to the existing-structure exemption for certain types of improvements were applicable. In particular, a section of the code set forth an exception for improvements that result in an intensification of use, which it defines as:

> . . .a change in the use of a lot or premises which, based upon the provisions of the applicable zone, requires more off-street parking than the most recent legal use on the property.

The City apparently had determined that this exception did not apply because its planned use of the property would require less parking, and the City planned to significantly reduce the number of parking spaces.

At the Superior Court

While the Superior Court rejected plaintiff's other arguments (*e.g.*, California Environmental Quality Act (CEQA) and Planning and Zoning Law claims), it agreed with the argument that state law preempted portions of the existing-structure exemption. Among

other things, the court found that the City municipal code exemption was applied in such a way that a CDP was not required because the project resulted in a lowered intensification of use (as evidenced by less required parking). This, the court found, was forbidden under state law, which requires a CDP for any change in intensity, not just a higher intensity. In addition, the Superior Court also found that the project would convert the motel from multiple unit commercial use to a use involving a fee ownership. This, the court found, also would be forbidden under state law without a CDP. After the Superior Court entered judgment in favor of plaintiff, the City appealed.

The Court of Appeal's Decision

The Court of Appeal began with a discussion of the legal principles applicable to a preemption analysis. Generally, a county of city may make and enforce within its limits local, police, sanitary, and other ordinance and regulations not in conflict with state law. Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law.

The California Coastal Act

The Court of Appeal next addressed the California Coastal Act, the intent of which is to provide a comprehensive scheme to govern land use planning for the coastal zone of California. Given this broad geographic scope, the Coastal Act recognizes the need to "rely heavily" on local governments. To that end, it requires local governments to develop local coastal programs, which are comprised of a land use plan and a set of implementing ordinances. Local coastal programs must be submitted to the California Coastal Commission (Commission) for a certification of consistency, and, once certified, the Commission delegates authority over CDPs to the local government.

Notably, once the Commission certifies a local government's local coastal program, the Commission no longer exercises original jurisdiction over the issuance of a CDP. However, because the Commission still retains jurisdiction over the issuance of CDPs in certain circumstances (*e.g.*, when no local coastal program has been certified), the Coastal Act contains provisions governing the Commission's exercise of its original jurisdiction to issue CDPs. Consistent with these provisions, the Commission has promulgated regulations that apply to instances in which it is operating under its original jurisdiction to issue CDPs. Those regulations include, among other things, the regulations referenced by plaintiff and relied on by the Superior Court to conclude that state law contradicted the City's municipal code provisions governing whether a CDP was required for development of the property.

Preemption Analysis

Applying the above principles, the Court of Appeal found that the Superior Court's reasoning contained a fundamental flaw. As a basic premise, the Superior Court assumed that the Commission's regulations pertaining to its original jurisdiction were intended to apply to the City's decision whether a CDP is required for a proposed coastal development. Finding a contradiction between the Commission's regulations and the City's LCP, both of which the Superior Court assumed were applicable, it concluded that the Commission's regulations should prevail. However, because the Commission had certified the City's LCP, the Commission's regulations did not apply to the City's CDP decision. As such, there was no contradiction with state law, and preemption was not applicable. On that basis, the court reversed the Superior Court's decision and remanded with direction to deny the petition.

Conclusion and Implications

The case is significant because it provides a substantive discussion of the relationship between the California Coastal Act and accompanying regulations, on the one hand, and local coastal programs, on the other. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D075387.PDF.
(James Purvis)

FIFTH DISTRICT COURT HOLDS KERN COUNTY OIL AND GAS ACTIVITY ORDINANCE INVALID

King and Gardiner Farms, LLC, et al. v. County of Kern, et al., ___Cal.App.5th___, Case No. F077656 (5th Dist. Feb. 25, 2020).

On February 25, 2020, the California Court of Appeal for the Fifth District invalidated Kern County's Oil and Gas Ordinance (Ordinance), including on the ground that the County's underlying programmatic Environmental Impact Report (EIR) inappropriately deferred the implementation of mitigation measures to address impacts to water supplies. Adopted by the Kern County Board of Supervisors in November 2015, the Ordinance was intended to streamline the permitting process for a variety of oil and gas activities within unincorporated portions of the County, including for oil and gas production wells, as well as related infrastructure such as well pads and pipelines.

Although the court's decision does not impact permits that the County already issued under the Ordinance, the court remanded the matter to the trial court to issue a writ of mandate vacating and setting aside the Ordinance. Accordingly, and at least for now, future project applicants will not be able to obtain streamlined review under the Ordinance.

Background

In 2013, Kern County started to evaluate amendments to the County's general zoning ordinance governing local permitting for oil and gas exploration, development, and production activities. The County's proposed amendments still required permits for all new oil and gas activities, but subjected permit applications to a ministerial "Oil and Gas Conformity Review," which was based on the County's programmatic EIR evaluating the amendments under the California Environmental Quality Act (CEQA). Assuming that the applicant and County correctly classified a permit as "ministerial," permits issued under the Ordinance could then proceed without any additional environmental review.

After the Kern County Board of Supervisors adopted the Ordinance in 2015, several groups challenged Kern County's EIR and Ordinance on several grounds, including CEQA. In 2018, the Superior Court issued its decision, holding in relevant part that the County's EIR violated CEQA on two issues related to the Ordinance's impacts on rangeland and road paving mitigation measures intended to reduce dust and the project's impact on air quality. Despite this conclusion, however, the trial court determined that the proper remedy did not require the County's EIR or Ordinance to be vacated. Instead, the trial court allowed project applicants to continue applying for coverage under the Ordinance while the County remedied the EIR's deficiencies. Several petitioners then appealed the trial court's decision.

The Court of Appeal's Decision

In a 150-page and *partially* published decision, the Fifth District Court of Appeal reversed and remanded the trial court's decision, including on the basis that the County's EIR inappropriately deferred, and failed to sufficiently address, the implementation of mitigation measures designed to address impacts to water supplies.

The Impacts to Water Use

More specifically, the court observed that certain mitigation measures that the County had selected required applicants to increase or maximize their use of produced water, and decrease or minimize their use of municipal and industrial (MAI) water to the extent feasible. The court held that these measures improperly deferred or delayed mitigation of impacts to water supplies, and lacked specific performance standards. Although there are exceptions under CEQA to the general rule that mitigation measures should not be delayed or deferred to some point in the future (*e.g.*, where an agency "commits" itself to the implementation of specific criteria), the court reasoned that the County's mitigation measures improperly deferred mitigation because the measures would not be determined or even implemented until project applicants requested a permit and received approval from the County. Moreover, the court reasoned that the County did not commit itself to the implementation of specific measures included in the plan.

In addition, the court concluded that the County's disclosure of these specific mitigation measures tied to water supplies were not adequate in the EIR. Accordingly, the County's adoption of a statement of overriding considerations did not render the County's failures to comply with CEQA harmless.

Conservation Easements

In another portion of the court's published decision, the court held that the County's EIR failed to sufficiently address or mitigate impacts from the project's conversion of agricultural lands because the County's use of conservation easements did not sufficiently offset the loss of agricultural lands. This portion of the court's decision is notable since these types of mitigation measures are frequently used to mitigate projects under CEQA.

Noise Impacts

In the final portion of the court's published decision, the court held that the County's EIR failed to sufficiently address noise impacts because the County determined the significance of those impacts based on a single threshold—whether the estimated ambient noise level with the project would exceed the 65 decibel threshold set forth in the County's general plan. The court also observed that the County failed to provide any analysis to support its use of a single quantitative method to accurately describe changes in noise levels.

The Unpublished Portions of the Opinion

In the unpublished parts of the decision, the court generally held that the County: 1) inadequately addressed air quality impacts in relation to fine particulate matter (PM2.5); and 2) failed to include a cumulative health risk assessment in the draft EIR that the County conducted, thus there was no meaningful public review and comment on the assessment.

Conclusion and Implications

The Fifth District Court of Appeal remanded the matter to the trial court to issue a writ of mandate vacating and setting aside the EIR and Ordinance. Although the court concluded that permits already issued under the Ordinance could remain in effect, the court held that any permits issued after the trial court's writ of mandate setting aside the Ordinance should be invalidated. Accordingly, pending the County's efforts to comply with CEQA and address the deficiencies in the EIR, applicants will not be able to rely on the County's Ordinance. Instead, project applicants will have to proceed under the prior county code (to the extent it covers such activities in the first place). Finally, although Kern County filed a petition for rehearing, which the court has since denied, the County may still seek review before the California Supreme Court. However, it is too early to tell whether any subsequent appeal will be successful. The court's *partially* published decision is available online at: https://www.courts.ca.gov/opinions/documents/F077656.PDF.

(Christian L. Marsh, Patrick F. Veasy, Meredith Nikkel)

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