

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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FEATURE ARTICLE

COASTAL ‘MANAGED RETREAT’—A SENSIBLE AND TEMPERED MITIGATION STRATEGY OR A SACRIFICIAL ABANDONMENT?

By David C. Smith, Esq.

It is your California dream home—beach-front access and 180-degree ocean views. However, due to being included in a “hazards” overlay zone, you are unable to secure homeowners’ insurance at any reasonable cost and no title company will extend full coverage title insurance. And the “hazard” at issue is universally recognized to be decades away, and some question if it will ever materialize. Nonetheless, enactments of local elected officials and regulators are tanking the value and insurability of your single greatest asset. And when you propose to build structures that engineers certify will protect your home decades into the future, regulators refuse to allow it.

This hypothetical scenario is proving not quite so “hypothetical” as “managed retreat” becomes an increasing focus of attention for both the public at large and regulatory officials. Climate change modeling and hazard projections increasingly fuel debates over appropriate mitigation and adaptation measures to combat the future threat of rising seas. And the threat is not just for the wealthy in exclusive enclaves like Malibu or distant third-world countries. The threat may be most dire for the already vulnerable among us, such as disadvantaged communities living in mobile home units in the very shadow of Silicon Valley tech giants. Advocates fear redlining practices from banks and others due to projected vulnerabilities will destine such communities to the fate of New Orleans’ Ninth Ward in the wake of Hurricane Katrina.

Background

So, what is “managed retreat”? A reporter for *National Public Radio* (NPR) covered a conference on managed retreat in New York in June 2019. He described it this way:

So it’s a technical term, a political term. And it is essentially like a formal acknowledgement that there are places in the U.S. and around the world—not just the East Coast, I should say - that are going to be, if they aren’t already, at such huge levels of risk from climate change that it just won’t make sense for those places to remain.

And that can be, you know, communities at risk of increased wildfire heat. But primarily, what we’re talking about at this conference—it’s focused on the impacts on coastal zones—cities by the sea, oceanside towns that are going to be inundated or see more flooding as sea levels rise. It just won’t make sense for those places to remain.

What does that mean? And who gets to decide that an existing home or community should no longer “remain”? And what are the consequences for those potentially displaced? All of these critical considerations remain open and unresolved as the promotion of, opposition to, and debate over managed retreat escalates.

Managed Retreat Is Not a New Concept

Managed retreat is not a new concept. In 2011, the Bay Conservation and Development Commission (BCDC), the San Francisco Bay equivalent of and state predecessor to the California Coastal Commission, adopted climate-change-related amendments to its governing document, the Bay Plan. The approval came only after months of highly contentious debate, including whether lowlying areas, communities, infrastructure, and even tech campus were potentially subject to abandonment to rising seas. For many, this was their first exposure to the term “managed retreat”

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and the potential for government-sanctioned abandonment of private property as an actual regulatory concept.

In March 2017, the scientific journal *Nature Climate Change* (NCC) published an analysis and proposed model evaluating approaches to and consequences of managed retreat. It noted that the United Nation's International Panel on Climate Change (IPCC) included managed retreat "as an alternative to coastal protection" in its First Assessment Report in 1990. According to the NCC piece:

Retreat' is used to capture the philosophy of moving away from the coast rather than fortifying it in place. 'Managed retreat,' on the other hand, derives from coastal engineering and has been defined as 'the application of coastal zone management and mitigation tools designed to move existing and planned development out of the path of eroding coastlines and coastal hazards. . . .' We identify two defining features of managed retreat in coastal and other settings. First, it is a deliberate intervention intended to manage natural hazard risk, requiring an implementing or enabling party. Second, it involves the abandonment of land or relocation of assets. We use those characteristics to define managed retreat as the strategic relocation of structures or abandonment of land to manage natural hazard risk.

As managed retreat becomes more broadly recognized and understood, as well as advocated for inclusion in broad regulatory policies addressing the future of California's precious coastline, the owners of potentially vulnerable properties are beginning to realize that others, not themselves, have already begun debating "strategic relocation of structures or abandonment" of that individual's privately owned property (including, frequently, their home) "to manage natural hazard risk." And many of them are not at all happy about it.

Del Mar, California Rejects Managed Retreat

At the present time in California, there is no greater battleground debate over managed retreat than in San Diego County's smallest city, Del Mar, and its ongoing conflict with the Coastal Commission. At issue is the Coastal Commission's refusal to

certify Del Mar's Local Coastal Program (LCP) for the City's own regulation of development and other activities in the Coastal Zone. Under the California Coastal Act (Pub. Resources Code §. 30000 *et seq.*), the Coastal Commission has ultimate authority over regulation of the Coastal Zone. However, cities within the Coastal Zone may adopt programs for local implementation of the Coastal Act's requirements through an LCP, though the LCP must be periodically certified by the Coastal Commission itself. Specified approvals by a city pursuant to an LCP may be appealed up to the Coastal Commission itself.

According to the *San Diego Union Tribune*, the consistent approach of the Coastal Commission in reviewing LCP certifications throughout the state includes:

. . . [a] slow and calculated retreat The strategy includes warning property owners and prospective buyers of the possibility they could be flooded, prohibiting new or additional development in threatened areas and in some cases providing financial assistance to people who need to relocate out of harm's way.

Del Mar has long opposed the concept of managed retreat. With beach-front properties regularly valued at over \$10 million each, Del Mar has argued that codifying managed retreat today could have a devastating impact on property values and insurability of these properties. Further, the City points out that residential neighborhoods behind the beach-front properties are even more low-lying than the beach properties themselves, so allowing the front line of homes along the beach to be abandoned ensures loss of the next neighborhoods as well. Instead, the City has adopted a long-term adaptation strategy whereby regular replenishment of sand on the beach and seawalls are the primary defense mechanisms against rising seas.

Del Mar is in the midst of seeking certification of its LCP and has resisted what it characterizes as the Coastal Commission's insistence that the LCP include managed retreat as a mitigation measure for future Coastal Development Permits (CDP) issued under the LCP. And the dispute has been pending for nearly four and a half years.

Most recently, as outlined in a Staff Report dated September 27, 2019, the Coastal Commission staff

recommended denial of certification of Del Mar’s proposed LCP unless the City agreed to 25 proposed changes. These included provisions relating to bluff setbacks, waiver of any future right to build structure protections against sea level rise, and addressing potential implications of regulations posing the risk of liability for an unconstitutional “taking” of property. Coastal Commission staff stated that it viewed the proposed amendments as standard for LCPs in an era addressing future sea level rise; fully consistent with the City’s proposed adaptation plan that accompanied, though does not have the regulatory authority of, the LCP itself; and never expressly required managed retreat.

At its City Council meeting on October 7, 2019, Del Mar unanimously rejected in summary fashion all proposed 25 amendments by the Coastal Commission. The City stated that the proposed amendments were the Coastal Commission’s attempt to “back door” managed retreat into the LCP.

The Coastal Commission hearing on the LCP and staff’s recommendation regarding the 25 proposed amendments was just over a week later on October 16, 2019. While staff expressed great surprise and frustration with the City’s summary dismissal of the proposed amendments after four years of discussion and negotiation, Coastal Commission staff ultimately agreed to postpone the hearing so that additional negotiation could take place.

The Lindstroms, Encinitas, California, and the Coastal Commission

Unfortunately for Del Mar, Coastal Commission staff was likely bolstered in their confidence in the negotiations in light of a sweeping victory they received from the California Court of Appeal’s Fourth District Court on September 19, 2019, just over a week before Coastal Commission staff issued their staff report recommending denial of Del Mar’s proposed LCP without the 25 amendments. In *Lindstrom v. Coastal Commission*, 40 Cal.App.5th 73 (Sept. 19, 2019), four conditions imposed by the Coastal Commission on an individual CDP for a single-family residence on an ocean-front bluff in the City of Encinitas were nearly universally upheld. And these four permit conditions strikingly mirror the types of policies the Coastal Commission is looking to integrate into LCPs statewide in order to confront sea level rise.

The Lindstrom’s saga is a testament not only to

the substantive requirements individual permit applicants and jurisdictions seeking LCP certification should expect, but the complex, time-consuming, and expensive process entailed in challenging such requirements. The Lindstrom’s first applied for their CDP in 2012, and the court of appeal ruling was not issued until seven years later.

Background

The Lindstroms owned a 6,776 square foot lot on bluffs 70 feet above the ocean in the city of Encinitas, California. In 2012, they applied to Encinitas for entitlements, including a CDP under Encinitas’ LCP, to construct a two-story 3,553 square foot home. “The seaward side of the structure would be set back 40 feet from the edge of the bluff.”

One of the common requirements for CDP applications, whether under a certified LCP or from the Coastal Commission itself, is for thorough geotechnical analysis demonstrating that the approved structure will remain secure from erosion or other hazards for at least, typically, 75 years and that the new structure will not require additional structural protection such as a sea wall in the future. Encinitas’ code was no exception:

The City’s LCP requires that permit applications for development in the Coastal Bluff Overlay Zone, where the Lot is located, be accompanied by a geotechnical report prepared by “a certified engineering geologist.” (Encinitas Mun. Code, Ch. 30.34, § 30.34.020D.)

The review/report shall certify that the development proposed will have no adverse [e]ffect on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future. (Encinitas Mun. Code, § 30.34.020D.)

The City’s LCP lists certain aspects of bluff stability that the geotechnical report shall consider.[] It further states that:

... [t]he report shall also express a professional opinion as to whether the project can be designed or located so that it will neither be

subject to nor contribute to significant geologic instability throughout the life span of the project. (Encinitas Mun. Code, § 30.34.020D.11, 1st par.)

The geotechnical analysis under this requirement became a major point of contention between the Lindstroms and the Coastal Commission as to a condition relating to the required setback of the new structure from the bluff's ocean-ward edge.

Encinitas, through its Planning Commission, certified the project as consistent with its LCP and approved the new residence.

As one of the conditions for the permit, the City required the Lindstroms to provide a letter stating that 'the building as designed could be removed in the event of endangerment, and the property owner agreed to participate in any comprehensive plan adopted by the City to address coastal bluff recessions and shoreline erosion problems in the City.'

The Court of Appeal further explained:

This condition was required pursuant to the portion of the City's LCP concerning the Coastal Bluff Overlay Zone, which states, 'Any new construction shall be specifically designed and constructed such that it could be removed in the event of endangerment and the property owner shall agree to participate in any comprehensive plan adopted by the City to address coastal bluff recession and shoreline erosion problems in the City. (Encinitas Mun. Code, § 30.34.020B.1.a.)

Two sitting members of the Coastal Commission appealed Encinitas' approval of the Lindstrom's new home. (The Coastal Act makes express provision for two Coastal Commission members to appeal decisions under local LCPs to the full Coastal Commission for review.)

As relevant here, one ground of the commissioners' appeals was that the City's approval 'appears inconsistent with the policies of the LCP relating to the requirement that new development be sited in a safe location that will not require shoreline protection in the future.'

The appeal came before the Coastal Commission on July 13, 2016. The Coastal Commission approved the construction of the Lindstrom's home, but added four additional conditions to Encinitas' approval, "including that the structure be set back 60 to 62 feet from the edge of the bluff," as opposed to the 40 feet required by Encinitas. The four exact conditions required by the Coastal Commission were:

- A setback from the bluff 20 feet further than that required by Encinitas:

[1.a] The foundation of the proposed home and the proposed basement and shoring beams shall be located no less than 60 to 62 ft. feet [sic] landward of the existing upper bluff edge on the northern and southern portions of the site, respectively.

- Waiver of any right to construct protective structures in the future:

[3.a] By acceptance of this Permit, the applicants agree, on behalf of themselves and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the development approved pursuant to Coastal Development Permit No. A-6-ENC-13-0210 including, but not limited to, the residence and foundation in the event that the development is threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other natural hazards in the future. By acceptance of this Permit, the applicants hereby waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code § 30235.

- Confirmation they will remove the residence and foundation if ordered to do so:

[3.b] By acceptance of this Permit, the applicants further agree, on behalf of themselves and all successors and assigns, that the landowner shall remove the development authorized by this Permit, including the residence and foundation, if any government agency has ordered that the structures are not to be occupied due to any of the hazards identified above. In the event that portions of the development fall to the beach before they are removed, the landowner shall

remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.

- Obtain and comply with a new geotechnical study under specified conditions:
[3.c] In the event the edge of the bluff recedes to within 10 feet of the principal residence but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed coastal engineer and geologist retained by the applicants, that addresses whether any portions of the residence are threatened by wave, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the principal residence without shore or bluff protection, including but not limited to removal or relocation of portions of the residence. The report shall be submitted to the Executive Director and the appropriate local government official. If the geotechnical report concludes that the residence or any portion of the residence is unsafe for occupancy, the permittee shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard, which shall include removal of the threatened portion of the structure.

There are at least two immediately noteworthy aspects of the additional conditions imposed by the Coastal Commission. First, as to the length of the setback from the bluff, a veritable battle-of-the-experts broke out before the Coastal Commission. Over the course of processing the entitlements, the Lindstroms retained two different geotechnical firms that had different methodologies but both placed the setback at less than the City's codified mandatory minimum of 40 feet. When the question came before the Coastal Commission, the staff geologist—not an engineer—took the two methodologies and, rather than embracing the merits of one over the other, he added the two distances together for a single sum distance. There was expert testimony that this approach was baseless and nonsensical. The two methodologies were distinct approaches to coming up with a single

distance, not a single compound analysis. There was no professional justification for adding one on top of the other for, effectively, a double distance. But that is exactly how the Coastal Commission got to 60 to 62 feet of setback.

The other notable attribute is the Coastal Commission's reference to and forced waiver of Public Resources Code § 30235 in condition 3.a. That statute provides an express right in the Coastal Act to defend imperiled properties with structural protections. However, it is now the position of the Coastal Commission that the section's protections apply, if at all, only to existing structures and that proposed new structures may be conditioned on waiver of that statutory right. The Lindstroms argued both that this violated the Coastal Act and that it was an unconstitutional taking of property without compensation.

At the Trial Court

The Lindstroms filed suit challenging all four conditions.

The trial court ruled that the Coastal Commission abused its discretion as to conditions 1.a (60- to 62-foot setback) and 3.a (waiver of any future right to build structural protection) as contrary to the language of Encinitas' LCP and the Coastal Act. The trial court upheld conditions 3.b (removal of residence upon order of a government agency) and 3.c (obtain and adhere to a new geotechnical report).

Both the Lindstroms and the Coastal Commission appealed their respective losses.

The Court of Appeal's Decision

As to condition 1.a—quite incredibly, frankly, given the record—the Fourth District Court of Appeal found the Coastal Commission's methodology of requiring both distances summed together to a total of 60 to 62 feet as reasonable.

As to condition 3.a, the court held that the Coastal Commission has full authority to require waiver of future structure protections to new construction.

As to condition 3.b, the court disallowed it, but only on a minor and easily fixable drafting error to clarify that the only hazards that could implicate vacating and removing the structures had to be hazards within the purview of Coastal Commission authority.

And finally, as to condition 3.c, the court held that the Coastal Commission with within its authority to

require preparation of and adherence to a new geotechnical study upon specified future circumstances.

The most important point as to this sweeping victory for the Coastal Commission, of which the court may or may not have been aware, was that the precedential implications of this ruling go far beyond the conditions to this or any other future permit. Indeed, the four substantive provisions at the heart of the respective conditions actually track some of their foundational strategies the Coastal Commission is seeking to integrate system wide through the LCP programs. Namely, those four strategies are:

Mandatory minimum setbacks; Waiver of any right to future structural shoreline protections;

Future removal and disposal of the structures and foundations under specified circumstances; and Automatic mandates under specified circumstances for the preparation of technical studies that could themselves require removal of structures.

Conclusion and Implications

Harkening back to NPR's coverage of the managed retreat conference in New York in 2019, the reporter

was asked if there was any semblance of good news emerging from the apparent chaos surrounding the politics of managed retreat. As with many dynamics in the world today, one thing seemed clear—things are changing:

I mean, there's a lot of excitement that the conversation is happening. I've heard more than one person say that it's about time we start tackling this. But I also wanted to steal a quote that one of the presenters stole from Oliver Smith, a Marine Corps general who served in World War II and the Korean War, where, in a battle, he said—he famously said, *you know, we're not retreating; we're just advancing in a different direction.*

And, look; climate change is going to make us have to change direction. And there's a lot of hope at this conference that as we rebuild communities, as we rethink them, there's an opportunity to do that in a way that doesn't have some of the inequalities and segregation that our current systems have. (*Emphasis added.*)

I don't think the residents of Del Mar would agree.

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CALIFORNIA WATER NEWS

**U.S. GEOLOGICAL SURVEY RELEASES STUDY
SUGGESTING COLORADO RIVER STREAMFLOW REDUCTIONS
ARE ASSOCIATED WITH ATMOSPHERIC WARMING**

In March 2020, the U.S. Geological Survey (USGS) released a study seeking to explain the physical mechanism behind the correlation between temperature increase and reduced streamflow in the Upper Colorado River Basin. Using a new model and satellite-based observations, the study found that melting snowfall caused by atmospheric warming was the driving force behind streamflow reduction in the Colorado River. The study was able to project a streamflow reduction rate of about 5 percent for every degree of temperature increase. Such information may be useful in developing management programs that account for potential reductions in Colorado River streamflow in the future.

Background

Approximately 1,450-miles-long, the Colorado River is one of the principal water sources in the Western United States. The Colorado River drains an expansive watershed that encompasses parts of seven U.S. states and two Mexican states. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. The Upper Colorado River Basin (Upper Basin) accounts for approximately 90 percent of the water flowing in the river. Water from the Upper Basin is currently used for services provided to approximately 40 million people and supports economic activity in the United States Southwest, estimated at \$1.4 trillion each year.

Water in the Upper Basin originates as precipitation and snowmelt in the Rocky and Wasatch mountains. Due to year-to-year differences in precipitation and snowmelt, the natural water supply of the Upper Basin is highly variable. Since the early 1900s, water demand in the Upper Basin has increased while water supply has, on average, decreased. The Upper Basin is susceptible to long-term drought, demonstrated by the impacts of the ongoing drought that began in 2000. While previous studies have generally estab-

lished a link between global temperature increase and streamflow reduction in the Upper Basin, with varying estimates of its impact, the USGS's recent study incorporates more than two-decades worth of satellite imagery and information that other studies have not significantly incorporated.

The USGS Study

The recent study conducted by the U.S. Geological Survey used a new model and updated satellite-based observations to explain the mechanism behind flow reduction and shortages in the Upper Basin. The primary focus of this study was to measure surface net radiation rather than focusing only on temperature measurements to explain flow reduction. Surface albedo, also known as reflectivity, determines the amount of solar radiation that is absorbed by land surface, which can drive the process of evapotranspiration. Evapotranspiration is the sum of evaporation and plant transpiration from the Earth's land and ocean surface to the atmosphere. This process accounts for the movement of water to the air from sources such as the soil, canopy interception, and waterbodies. As a result, an increase in evapotranspiration increases the movement of water to the air and reduces the amount of water remaining in waterbodies.

The USGS study revealed that the reduction of snow cover largely accounted for the decrease of streamflow in the Upper Basin. Surface albedo is highly sensitive to snow cover, which is an efficient reflector of solar radiation. As temperatures rise, more precipitation falls as rain instead of snow, and what snow does fall melts earlier in the year. The loss of snow exposes the land to increased solar radiation. The absorbed radiative energy is dissipated by further heating of the lower atmosphere and increased evaporative cooling. The increased evaporation consumes water that would otherwise run off into the river, reducing the amount of streamflow. This results in a chain reaction, where the increase in temperature

starts a process which ultimately leads to a further increase in temperature.

Due to the reduced snow cover, streamflow in the Upper Basin is decreasing by about 5 percent per degree Fahrenheit as a consequence of atmospheric warming, causing a 20 percent reduction over the past century. There is the possibility that precipitation levels may change as a result of climate change, but this remains highly uncertain. While increased precipitation may partially offset the impacts of atmospheric warming, precipitation decreases would likely exacerbate warming impacts. Until now, the inability to identify a physical mechanism that accounts for the sensitivity of streamflow to atmospheric warming has made the translation of climate-change temperature projections into flow projections highly uncertain. The identification of these physical mechanisms may enable more robust projections of future streamflow, which in turn may allow for more precise planning and management of Upper Basin water resources.

Conclusion and Implications

Because Colorado River water supplies millions of people, businesses, and farms with water, the projected future reduction of Colorado River streamflow due to atmospheric warming poses a significant concern. The Upper Basin continues to experience streamflow reductions that may increase over time. However, the identification of the physical mechanisms behind streamflow reduction, as well as the corresponding reduction rate of 5 percent per degree Fahrenheit, may help future planning by water agencies, industry, and agricultural interests in the future. The U.S. Geological Survey study is available online at: *Colorado River Flow Dwindles as Warming-Driven Loss of Reflective Snow Energizes Evaporation*, https://www.usgs.gov/center-news/colorado-river-flow-dwindles-warming-driven-loss-reflective-snow-energizes-evaporation?qt-news_science_products=1#qt-news_science_products (Jeremy Holm, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES KLAMATH RIVER PROJECT INTERIM PLAN, WHICH PROVIDES ADDITIONAL WATER FOR ENDANGERED SPECIES

In late March 2020, the U.S. Bureau of Reclamation (Bureau) released a proposed Interim Plan to operate the Klamath River Project for a three-year period, with up to an additional 40,000 acre-feet per year made available for the benefit of endangered species and their critical habitats. The Interim Plan would govern the project's operations while the Bureau, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) complete consultation on the Bureau's proposed longer-term operations plan. The Bureau's long-term operations plan is the subject of a federal Endangered Species Act lawsuit filed by the Yurok Tribe and environmental groups.

Background

The Klamath River Project (Project) is located in Klamath County, Oregon, and Siskiyou and Modoc counties in California. The Project, which is operated by the Bureau of Reclamation, supplies irrigation water for approximately 230,000 acres of farmed land. Project water is stored and released from three reservoirs: Upper Klamath Lake, Clear Lake, and Gerber Reservoir. Additional water is available to the Project from the Klamath and Lost rivers, which is delivered through a network of diversion structures, canals, and pumps. Approximately 200,000 acres are served from Upper Klamath Lake and the Klamath River, and 30,000 acres are served from the Lost River, Clear Lake, and Gerber Reservoir. Several federally endangered species, such as coho salmon, and their critical habitats are dependent on the waters of the Klamath River.

The federal Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce, acting through the National Marine Fisheries Service, may list any species, subspecies, or geographically isolated populations of species

as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary of the Interior must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary, acting through Fish and Wildlife Service (FWS) may list and otherwise regulate the take of such species.

The Biological Opinions

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

On March 29, 2019, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (collectively: the Services) submitted to the Bureau their coordinated Biological Opinions evaluating the Bureau's 2018 Biological Assessment for proposed operations of the project, as modified (2018 Operations Plan). In evaluating the Bureau's 2018 Operations Plan, the Services each prepared Biological Opinions in 2019, concluding that the 2018 Operations Plan would not jeopardize the continued existence of Southern Oregon/Northern California Coast (SONCC) coho salmon, Southern Resident killer whale (SRKW), and Lost River sucker (LRS)

and shortnose suckers (SNS), nor would it destroy or adversely modify their designated critical habitat.

Subsequently, the Bureau analyzed the 2018 Operations Plan under the National Environmental Policy Act (NEPA), resulting in an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), which was finalized on April 1, 2019. Thereafter, the Bureau began operating the Project pursuant to both Services BiOps and the EA. However, in late summer 2019, Earth Justice on behalf of the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit, Case No. 3:19-cv-04405-WHO, in the U.S. District Court for the Northern District of California, challenging, among other things, the "no jeopardy" and "no adverse modification" conclusions in NMFS' BiOp, as well as the Bureau's associated EA.

In August 2019, it was discovered that "computer modeling input files" used to evaluate the amount of available habitat for SONCC coho fry in the Bureau's 2018 Operations Plan and NMFS' 2019 BiOp, contained erroneous information related to the BiOp's "Weighted Usable Area habitat curves" for SONCC coho salmon. Accordingly, the files revealed effects of the 2018 Operations Plan on listed species or their critical habitats that were not previously considered in the BiOp or EA. In particular, the Bureau has expressed concerns related to the amount of habitat available for juvenile coho salmon, in addition to disease mitigation as had previously been the focal point of the Bureau's consultation with NMFS. The Bureau requested re-initiation of formal consultation with both Services on November 13, 2019.

Prior to the Bureau's request to reinitiate consultation with the Services, plaintiffs in the federal lawsuit filed a motion seeking a preliminary injunction to force the Project to operate under a 2012 operations plan in compliance with a corresponding BiOp from 2013, and which would require the Bureau to increase Klamath River flows to address coho salmon disease and habitat concerns. In late January, plaintiffs modified their motion for preliminary injunction, requesting an additional 50,000 acre-feet (AF) of water allocated for Klamath River flows for the benefit of endangered species and their critical habitats.

The New Environmental Assessment, the Interim Plan and the Proposed Action Alternative

On February 7, 2020, as part of the reinitiated consultation process, the Bureau transmitted a new Environmental Assessment to both Services for Project operations from April 1, 2020, through March 31, 2024. However, the Bureau and the Services subsequently agreed that additional time would be required to complete the consultations. Accordingly, the Bureau proposes to operate the Project pursuant to the Interim Plan for the period of April 2020 to March 2023 while the Bureau and the Services continue the formal consultation process. Litigation over the 2018 Operations Plan and NMFS' 2019 BiOp will be stayed pending the consultation process, provided the Project is operated in accordance with the Interim Plan.

The Interim Plan constitutes the Bureau's Environmental Assessment for Project operations during the three-year period to which it applies, and analyzes two water management approaches: A No-Action Alternative, and a Proposed Action Alternative. The EA adopts the "Proposed Action Alternative."

The Proposed Action Alternative consists of water supply and water management approaches for Upper Klamath Lake, and the Klamath and Lost rivers. These approaches attempt to replicate natural hydrologic conditions observed in the Upper Klamath Basin. The EA reflects the Bureau's effort to comply with the ESA, while also maintaining reliable water deliveries to agricultural water users during the agricultural season. The Proposed Action Alternative generally includes: 1) storing waters of the Klamath and Lost rivers; 2) operating the Project to deliver water for irrigation purposes subject to water availability; and 3) maintaining conditions in Upper Klamath Lake and the Klamath River that comply with ESA requirements.

Under the Proposed Action Alternative, Project operations conducted after the agricultural season would be oriented toward filling Upper Klamath Lake during the fall/winter in order to bolster the ecologic benefit of the volumes available for the Environmental Water Account, which includes habitat

and disease mitigation flows. The Proposed Action Alternative provides an additional 40,000 acre-feet of water for the Environmental Water Account, which is 20,000 acre-feet more than a proposed but rejected alternative in the 2018 Operations Plan and 10,000 acre-feet less than the amount plaintiffs requested in their motion for preliminary injunction.

Notably, 17,000 acre-feet of the additional water for the Environmental Water Account would come from Upper Klamath Lake, while the rest would be supplied by other Project facilities. As analyzed in the EA, Upper Klamath Lake levels are not anticipated to decline significantly due to the additional water releases. In particular, the Proposed Action Alternative would maintain Upper Klamath Lake levels deemed to be protective of ESA-listed suckers, because it includes spring and annual Upper Klamath Lake minimums deemed important to sucker spawning and survival. The remaining 23,000 acre-feet from the Project's other supplies would be largely consistent with what the Bureau proposed in its 2018 Operations Plan. Following the winter months, when Upper Klamath Lake increases would be stored for the benefit of species and habitat, the Project would be operated to provide the Project's irrigation supply during the following spring/summer operational period.

Conclusion and Implications

While parties on both sides of the litigation involving the 2018 Operations Plans and NMFS' 2019 Biological Opinion generally perceive the Interim Plan as an acceptable compromise during the Bureau of Reclamation and the Services' continuing consultation process, it is unclear what longer-term operations plan will be developed. Potentially, the three-year Interim Plan may influence longer-term project operations by providing a test case weighing additional Environmental Water Account supplies with irrigation supplies and needs. It also remains to be seen whether there will be any deviation from the Interim Plan operations and whether plaintiffs will challenge any such deviations for purposes of lifting the stay on litigation. Finally, whether increased flows from the Environmental Water Account will provide the hoped-for ecological benefits remains to be seen, and could play an important role in future negotiations. For more information, see:

U.S. Bureau of Reclamation, *Environmental Assessment—Klamath Project Operating Procedures 2020-2023*, available at: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42944 (Miles B.H. Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE ISSUES INCIDENTAL TAKE PERMIT FOR LONG-TERM OPERATIONS OF THE STATE WATER PROJECT

On March 31, 2020, the California Department of Fish and Wildlife (CDFW) issued an Incidental Take Permit (ITP) to the California Department of Water Resources (DWR) under the California Endangered Species Act (CESA) for the long-term operations of the State Water Project (SWP). The permit, which is intended to minimize impacts to Delta smelt, longfin smelt, and winter and spring-run chinook salmon (Covered Species) from SWP operations, has attracted controversy from both the environmental community and water agencies with an interest in SWP operations.

Background

The CESA prohibits any person or public agency from taking species listed as threatened or endangered

by the California Fish and Game Commission. Fish & Game Code § 2080. CDFW, however, can authorize take of listed species by issuing an ITP if the take is "incidental to an otherwise lawful activity," the impacts of the take are minimized and fully mitigated, the necessary mitigation measures are fully funded by the applicant, and the taking will not jeopardize the continued existence of the species at issue. *Id.* at § 2081.

The SWP is operated by DWR conveys an average of 2.9 million acre-feet of water per year to communities and farms throughout California. TP at p. 2. Like the federal Central Valley Project (CVP), the SWP operates a large pumping plant in the Sacramento-San Joaquin River Delta. *Id.* at p. 3. The operations of both projects have caused take of the Covered Spe-

cies in the past and likely will do so in the future.

Historically, the SWP and CVP have coordinated their operations, and DWR obtained incidental take coverage for SWP operations under CESA by securing a consistency determination from CDFW based on federal Biological Opinions. In 2019, however, DWR announced that it would seek an ITP for SWP operations that did not rely on the federal process for analyzing the effects of coordinated CVP and SWP operations under § 7 of the federal Endangered Species Act.

DWR Receives ITP from CDFW

DWR thus prepared a draft Environmental Impact Report (DEIR) analyzing the effects of its proposed operations under the California Environmental Quality Act (CEQA) and submitted its ITP application to CDFW. The operations described in the ITP application, however, differed from the proposed project analyzed in the DEIR. (DWR, Final Environmental Impact Report for Long-Term Operation of the California State Water Project (FEIR) at I-1 (Mar. 27, 2019).

After submitting the application, DWR worked with CDFW staff to refine Alternative 2b in the DEIR, which CDFW had indicated was more likely to be acceptable under the CESA than the proposed project analyzed in the DEIR. *See id.* On March 27, 2020, DWR certified the FEIR, selected refined Alternative 2b as the environmentally superior alternative, and issued a notice of determination stating that DWR would implement refined Alternative 2b. CDFW issued the ITP four days later.

Overview of the ITP

The ITP authorizes incidental take of Delta smelt, longfin smelt, and winter and spring-run chinook salmon from SWP operations subject to a host of conditions of approval. For example, the ITP requires DWR to “reduce the maximum seven-day average diversion rate” at the Barker Slough Pumping Plant to less than 60 cubic feet per second (cfs) between January and June of dry and critical water years when larval longfin and Delta smelt are present, with the

possibility of further reductions based on recommendations provided by the Smelt Monitoring Team. ITP at 98. The ITP also requires DWR to spend more than \$300 million on habitat mitigation projects to benefit the Covered Species. *Id.* at 127. All told, the ITP contains 86 pages of conditions DWR must meet to maintain incidental take coverage for the operations of the ITP. *See id.* at 50-136.

Among the conditions are requirements for additional outflow from the Delta. For example, Condition of Approval 8.17 requires DWR to curtail SWP exports to protect Delta outflows from April 1 to May 31. *Id.* at 102-104. Although DWR may increase exports by up to 150,000 acre-feet beyond what would otherwise be allowed under Condition of Approval 8.17 with written permission from CDFW, the excess exports must be accounted for and redeployed for CDFW’s use in the next year, unless the next year is critical. *Id.* at 105. Thus, DWR’s compliance with the ITP is expected to decrease the availability of SWP supplies while passing the increased costs associated with operating to the ITP to SWP Contractors. *Id.* at 134 (All costs of the Project, including the costs of mitigation and monitoring activities required by this ITP shall be. . . charged to SWP Contractors.)

Conclusion and Implications

The issuance of the ITP has been met with controversy from many corners of California’s water community. Many environmental interest groups have suggested that the ITP is insufficiently protective of the covered species, while agricultural and water agency stakeholders have expressed concerns about the interaction between the operations of the SWP under the ITP and CVP operations under new Biological Opinions issued by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service, as well as the potential that the ITP will interfere with potential voluntary agreements to implement Bay-Delta Water Quality Control Plan Update. The Metropolitan Water District of Southern California’s board of directors has already voted to sue the state over the ITP, and other stakeholders are likely to challenge the ITP as well. (Sam Bivins, Meredith Nikkel)

CALIFORNIA DEPARTMENT OF WATER RESOURCES REPORTS GROUNDWATER LEVELS REBOUNDED, BUT NOT YET AT PRE-DROUGHT CONDITIONS

The California Department of Water Resources (DWR) recently issued a report indicating the State has seen a modest rebound in precipitation and groundwater levels since 2016 when historic drought conditions prevailed. Three of the past four water years have been above average, with 2017 and 2019 being among the wettest years on record in California.

Background

California experienced one of its most severe droughts on record in the past decade. The resulting impact on the health of the state's underground aquifers was significant. On average, California derives approximately 30 percent of its water supply from groundwater in normal years and up to 60 percent in drought years. Restoring and maintaining healthy groundwater basins has become a top statewide and local priority.

Each year, DWR monitors the state's groundwater levels, primarily based upon data obtained in the spring prior to crop irrigation season. Reporting includes water level data from wells for at least five years reporting to DWR by the California Statewide Groundwater Level Monitoring Entities, local agencies, and well owners. DWR recently completed its annual assessment and issued its report showing 2019 as one of the wettest years on record.

The Statewide Annual Precipitation chart (NOAA National Centers for Environmental Information, Climate at Glance: U.S. Time Series, Precipitation) monitors precipitation dating back to 1970. It indicates that since 2009, there have been five below-average water years, three average water years, and three above-average water years. Following the 2012 to 2016 drought period, 2017 and 2019 were reported as above average water years.

The groundwater level change maps referenced in the DWR report provide one-year changes from Spring 2018 to Spring 2019 and three-year changes from Spring 2016 to Spring 2019.

One-Year Change Map, Spring 2018 to Spring 2019

According to DWR, the one-year change map

shows that approximately 50 percent of recorded well measurements statewide indicate net water level changes of less than five feet and that 25 percent of the remaining statewide well measurements show an increase in water levels.

For the San Francisco Bay Hydrologic Region (281 wells), 23 percent of wells showed an increase of five to 25 feet in groundwater levels from Spring 2018 to Spring 2019, while approximately six percent (6 percent) of wells saw a decrease of that same amount. In the San Joaquin River Hydrologic Region (734 wells), approximately 17 percent of wells showed an increase of five to 25 feet during the past year and approximately 8 percent of wells saw a decrease of that amount. The South Coast Hydrologic Region (southern California coastal and inland populated areas, with 995 wells) reported approximately 26 percent of its wells increasing by five to 25 feet, while less than 10 percent showed decreases in that range. Geographically, groundwater level declines in amount greater than 25 feet occurred primarily in the Tulare Lake Hydrologic Region, and more specifically in the San Joaquin Valley.

Three-Year Change Map, Spring 2016 to 2019

Turning to the three-year change map, approximately 65 percent of well measurements reported net water level changes of less than five feet. The Sacramento Hydrologic Region noted considerable groundwater level increases, indicating 49 percent of the reporting wells increased more than five feet, and even higher increases specifically in Yolo and Sutter counties. In particular, the San Francisco Bay Hydrologic Region reported approximately 24 percent of its wells experienced five to 25-foot groundwater level increases and less than 5 percent seeing a comparable decrease over the three-year period from Spring 2016 to Spring 2019. The San Joaquin River Hydrologic Region reported nearly 40 percent of its wells experiencing five to 25-foot increases in water levels and approximately 11 percent experiencing decreases in that range. Finally, the South Coast Hydrologic Region reported nearly 31 percent of its wells experiencing five to 25-foot increases in water levels and approximately, and less than 12 percent experiencing

decreases in that range during the same three-year timeframe.

Five-Year and Ten-Year Change Maps Show Only Partial Recovery to Pre-Drought Conditions

Despite the generally positive recent data, the five- and ten-year maps paint a different picture. These figures illustrate that many groundwater basins have not recovered to pre-drought conditions. In the San Joaquin, Tulare Lake, and South Coast Hydrologic Regions, 30 - 70 percent of well measurements report water level decreases over the last five- and ten-year periods. The five-year change map does show groundwater level increases in the Sacramento Hydrologic Region in Tehama, Yolo, and Sutter counties and

throughout the San Francisco Bay Hydrologic Region.

Conclusion and Implications

Although California's Spring 2019 groundwater levels have widely improved over the past one to three years with 2017 and 2019 as some of the wettest years on record, groundwater levels have not fully recovered to pre-drought conditions, as shown by the five- and ten-year data. The results demonstrate not only California's wild and unpredictable swings in precipitation levels since the onset of the recent drought, but also the severity of the drought's impact and the efforts and conditions that will be needed to return to pre-drought levels.

(Chris Carrillo, Derek R. Hoffman)

CALIFORNIA DEPARTMENT OF WATER RESOURCES AWARDS \$47 MILLION IN GRANTS FOR GROUNDWATER SUSTAINABILITY PROJECTS

The California Department of Water Resources (DWR) recently awarded \$47 million in grant funding to more than fifty local agencies for sustainable groundwater planning projects. This funding will assist local agencies in their ongoing efforts to implement the Sustainable Groundwater Management Act (SGMA). Funding will be used for actions such as facilitating community outreach efforts, preparing feasibility studies for proposed Groundwater Sustainability Plan (GSP) projects and management actions to and installing monitoring wells to oversee and manage groundwater levels.

Background

SGMA provides a framework for long-term sustainable groundwater management across California. It requires local Groundwater Sustainability Agencies (GSA) to prepare and implement GSPs to sustainably manage their local groundwater basins within approximately twenty years, and beyond. GSPs must identify basin characteristics and supplies and must identify and implement projects and management actions to achieve their local sustainability goals.

DWR offers a number of grant and loan programs that support integrated water management activities.

The Sustainable Groundwater Management Planning Grant Program (SGM Program) provides financial assistance for sustainable groundwater planning and projects. Acceptable projects may include the development and implementation of GSPs and more specifically, projects that provide investments to establish or improve groundwater recharge from surface water, storm water capture and diversions to basin recharge, recycled water projects, projects designed to prevent or mitigate groundwater contamination.

SGM Grant Program's Planning Grant— Round 3

DWR administered the SGM Grant Program's Planning Grant—Round 3 using funds authorized by Proposition 68 and Proposition 1. Of the total amount awarded, \$46.25 million was funded by Proposition 68, while an additional \$1.2 million came from Proposition 1 funds. An additional \$1.6 million in Proposition 1 funds is being recommended conditioned upon future appropriation of grant funds available in Fiscal Year 2021/2022. The grants were awarded to more than fifty local agencies to support projects for managing groundwater basins for long-term sustainability.

Projects supported by this round of funding include, for example:

- Installation of groundwater monitoring wells;
- Aerial electromagnetic surveys to map aquifer conditions to better assess groundwater quality and storage conditions and to identify opportunities for recharge;
- Preparation of basin and sub-basin GSPs, and implementation of those GSPs;
- Implementation of advanced metering infrastructure networks; and
- Evaluation of groundwater dependent ecosystems and surface water depletion.

The final list containing all award recipients and project proposals is posted on DWR’s website (https://water.ca.gov/-/media/DWR-Website/Web-Pages/Work-With-Us/Grants-And-Loans/Sustainable-Groundwater/Files/Prop68_Planning-Final-Award-List_ay_20.pdf).

DWR will begin working with recipients immediately to develop and execute grant agreements.

Tentative Schedule for Additional Funding Opportunities

DWR anticipates launching a further competitive grant solicitation process to provide at least \$88 million in additional grant funding in 2022 for GSP implementation and projects that address drought and investments in groundwater supplies. Additional

details will be available at a later time, but the tentative schedule is as follows:

- Early 2021—Release Draft Proposal Solicitation Package;
- Mid- to Late 2021—Release Final Implementation Grant PSP and Open Grant Solicitation;
- Late 2021—Implementation Grant Solicitation Closes;
- Early 2022—Implementation Grant Award List, Award Letters Released.

Conclusion and Implications

One of the most challenging and often controversial aspects of GSPs is how the selected projects and management actions will be funded. Many of these projects and management actions range in the tens—or even hundreds—of millions of dollars. In many basins, local funding for projects of such scale is likely not feasible. At the same time, groundwater is a critical natural resource that requires careful management and long-term investment as part of California’s water resilience portfolio, including at the local level. As noted in recent comments by DWR Director Karla Nemeth, “sustainable management of our groundwater basins is a critical aspect of making our communities more resilient.” The availability of grant funds for GSAs and implementation of their GSPs is not just important, but vital to successfully achieving those objectives and to the overall success of SGMA implementation.

(Paula Hernandez, Derek R. Hoffman)

STATE WATER RESOURCES CONTROL BOARD TO CONSIDER REGULATORY COMPLIANCE EXTENSIONS DUE TO COVID-19

Social distancing restrictions implemented by the State of California and local government to slow the spread of the novel coronavirus COVID-19 have dramatically impacted all aspects of public and private life, most prominently through a shelter-in-place order requiring the general suspension of public activities not deemed “essential.” In an effort to

address the impact of such restrictions with respect to timely compliance with orders and regulations promulgated by the State Water Resources Control Board (SWRCB) and the nine California Regional Water Control Boards (RWQCBs) (collectively: the Water Boards) issued an initial statement in March 2020 to clarify their position for responsible entities.

The statement, as subsequently revised, indicates that the Water Boards consider timely compliance to be an essential function of the responsible entity or community, exempt from state and local restrictions on activity, but also provides for a review process by which an entity may claim that compliance is inconsistent with an applicable restriction relating to COVID-19, suggesting that the Water Boards may grant extensions on a case-by-case basis.

The COVID-19 Pandemic

The proliferation of COVID-19 throughout the United States has prompted drastic measures from all levels of government aimed at reducing the spread of the virus and an overburdening of the health care system. In California, Executive Order N-33-20 (Executive Order) issued by Governor Newsom on March 19, 2020 imposed a mandate requiring all residents to shelter in place, and requiring business activities that cannot be performed remotely to be suspended, generally excepting only essential operations within one of the federal “critical infrastructure sectors” identified by the Cybersecurity and Infrastructure Security Agency (CISA) or additional sectors that may be designated by the Governor. While CISA has provided some guidance regarding these sectors and the essential workers needed to serve them, the guidance does not begin to address the myriad legal and practical issues facing individuals, businesses and public entities as a result of the restrictions. Consequently, many if not most individuals and organizations, including the Water Boards, must grapple with questions unique to their specific circumstances as they attempt to operate as normally as possible while complying with the Executive Order and other local restrictions relating to COVID-19.

Compliance with Water Board Regulations

While water and wastewater and certain governmental operations are identified by the CISA guidance as work that should continue during the pandemic response, the extent to which activities necessary for compliance with orders and regulations promulgated by agencies like the Water Boards remains unclear. Absent specific guidance, the Water Boards cannot be certain whether orders and regulations may be enforced in light of restrictions imposed by the Executive Order and local authorities. The

SWRCB posted an update on its website following the issuance of the Executive Order to clarify their own position on the matter, which explicitly states that:

. . . timely compliance by the regulated community with all Water Board orders and requirements. . . is generally considered to be an essential function during the COVID-19 response.

The SWRCB’s statement further explains that such orders and requirements include “regulations, permits, contractual obligations, primacy delegations, and funding conditions.” According to the statement, the Water Boards regard the activities or governmental functions necessary for ensuring compliance with Water Board orders and regulations to be essential by extension.

SWRCB to Consider Extensions Due to COVID-19

Despite taking the position that compliance with Water Board requirements and related activities are exempt from the scope of COVID-19 restrictions, the statement issued by the SWRCB describes a process implying that extensions may be granted with respect to compliance deadlines upon review by the applicable Water Board. Specifically, the statement provides that a party subject to a Water Board requirement with which it cannot timely comply due to an inconsistency with COVID-19 restrictions must immediately notify the applicable Water Board by email, and the Water Board would endeavor to respond to the notice within 48 hours. While not expressly referencing extensions, the process specified by the Water Boards involves a review of and response to each particular notice regarding noncompliance due to COVID-19, suggesting that individual circumstances will be evaluated such that an extension may be granted as the applicable Water Board may deem appropriate.

The SWRCB’s statement also outlines certain substantive requirements for notices submitted thereunder. Such notices must include: 1) the specific requirement that cannot be met by the responsible entity, 2) the COVID-19 guideline or directive that is inconsistent with timely compliance, 3) an explanation of why the responsible entity cannot comply and 4) any action that the entity intends to take in lieu of

compliance. The statement provides that these notice requirements are subject to change, and more specific directions or procedures applicable to particular types of Water Board orders and requirements may be forthcoming. Material revisions to the Water Boards' statement have already been incorporated with respect to the substantive notice requirements, which initially applied only to notices relating to compliance with certain annual report filing requirements, but have since been extended to apply to notices relating to compliance with any Water Board requirement.

Conclusion and Implications

The State Water Resources Control Board and the Regional Water Quality Control Boards have attempted to provide clarity to responsible entities with its COVID-19 update, but creates some questions needing clarification. In particular, the Water Boards' statement is not explicit as to whether extensions

would in fact be granted and what the length of such extensions may be. As such, the Water Boards have taken a position on extensions that is somewhat at odds with other prominent public agencies in the state that provided for automatic extensions on deadlines with respect to their own regulations and requirements in the wake of the Executive Order. Moreover, the SWRCB's statement does not address potential consequences that may be imposed for lack of timely compliance with a given requirement if a notice is submitted pursuant to the statement and the responsible party is not granted an extension. Ultimately, the statement clearly seeks to strike the balance of dealing with these unprecedented times while also obtaining important information from water right holders. Interested parties should monitor the Water Boards webpage for changes to the statement as the COVID-19 situation continues to unfold. (Wesley A. Miliband, Andrew D. Foley)

LAWSUITS FILED OR PENDING

JAMES IRRIGATION DISTRICT SUES WESTLANDS WATER DISTRICT OVER MENDOTA POOL GROUP 20-YEAR EXCHANGE PROGRAM

On February 20, 2020, James Irrigation District filed a petition for writ of mandate and complaint for declaratory and injunctive relief (Petition) challenging Westlands Water District's approval of the Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the Mendota Pool Group 20-Year Groundwater Exchange Program (Exchange Program). The Exchange Program contemplates the diversion of up to 400,000 acre-feet of federal Central Valley Project (CVP) water over the course of 20 years to the Mendota Pool Group, which is comprised of landowners within Westlands Water District. In exchange, the Mendota Pool Group would pump non-CVP groundwater that the Bureau of Reclamation (Bureau) could then use to meet other CVP contractual demands at the Mendota Pool.

Among other things, the Petition alleges the groundwater supplied by the Mendota Pool Group is significantly more saline than CVP surface water supplies and that Westlands violated the California Environmental Quality Act (CEQA) by failing to analyze the adverse impacts on water users situated downstream of the Mendota Pool when it approved the Exchange Program EIR/EIS. [*James Irrigation District v. Westlands Water District*, Fresno County Superior Ct, Case No. 20CECG00688.]

Factual Background

The Mendota Pool is a reservoir formed by the Mendota Dam in Fresno County at the terminus of the Delta-Mendota Canal, near the confluence of the San Joaquin River and the Fresno Slough. In operating the CVP, the U.S. Bureau of Reclamation conveys water from the Sacramento-San Joaquin River Delta through the Delta-Mendota Canal to the Mendota Pool for deliveries to the San Joaquin Valley agricultural region.

The Mendota Pool Group is an unincorporated association consisting of farmers that own or operate farmland within Westlands Water District, who rely predominantly on CVP water deliveries due to lack of other available surface water supplies and constraints

on overlying groundwater use. Since its formation in 1989, the Mendota Pool Group has coordinated with the Bureau and others to implement groundwater exchange programs which have been subject to settlement agreement terms for monitoring, adaptive management, and other mitigation measures since 2001. As with the preceding exchange programs, the 20-Year program would divert CVP water to Westlands in exchange for groundwater pumped to the Mendota Pool from the Mendota Pool Group's wells.

The Exchange Agreements

Under the Exchange Program contemplated in the EIR/EIS, the Bureau would execute a series of exchange agreements with the Mendota Pool Group to allow up to 25,000 acre-feet of water per year to be exchanged and/or conveyed and stored within federal facilities over the next 20 years. In turn, the Mendota Pool Group farmers would introduce an equivalent amount of groundwater to the Mendota Pool, plus a 5-percent "leave-in" buffer amount. The purpose of the program is to ensure continued availability of reliable, good quality irrigation water in Westlands as a supplement to existing CVP contracts, and to facilitate the cultivation of over 42,000 acres of farmland. As described in the EIR/EIS, the exchange of water under the Exchange Program would be subject to annual agreements, management mechanisms, design constraints, a monitoring and reporting program, new groundwater recharge components.

The Petition

James Irrigation District alleges in its Petition that Westlands failed to analyze the downstream adverse impacts that groundwater discharges under the Mendota Pool Group exchange programs have had and will continue to have on the environment, including reduced crop yields, alterations of the soil, and adverse effects on surface water and groundwater quality. Petition, at ¶¶ 40-41. Citing technical analysis of water sampled from its intake at the Fresno Slough,

James Irrigation District claims previous exchange programs have resulted in salinity levels “high enough to cause 10 [percent] or greater yield loss to sensitive crops such as onions, lettuce, and almonds, which together make up over 42 [percent] of the cropped acreage” in the district. *Id.* at ¶¶ 42-43. As a result, James Irrigation District alleges that the Exchange Program threatens to interfere with the Bureau’s contractual obligations to deliver high-quality water to contractors like the District, and contrary to Westlands’ project description in the EIR/EIS. *Id.* at ¶ 45.

California Environmental Quality Act Analyses

CEQA requires that an EIR must include a description of the environmental baseline against which potential impacts are compared to determine whether they are significant. CEQA Guidelines, § 15125(a). The Petition alleges that Westlands failed to incorporate in its evaluation of baseline conditions James Irrigation District’s operational needs and the pending regulatory changes to the Bay-Delta Water Quality Control Plan, the CV-SALTS initiative, and implementation of the Sustainable Groundwater Management Act (SGMA). Petition, at ¶¶ 49-53. According to James Irrigation District, the EIR/EIS avoids considering the impacts of the Exchange Program by comparing its potential surface water quality impacts against a baseline that includes exchanges and groundwater pumping that has occurred for the past 30 years under earlier iterations of the project. *Id.* at ¶ 51.

Under the No Action Alternative analyzed in the EIR/EIS, the 25,000 acre-feet of water each year would instead be delivered to the Mendota Pool to

satisfy existing CVP obligations. The Mendota Pool Group would disband without implementing the groundwater management and reporting contemplated for the project, and instead rely more heavily on groundwater pumping of up to 33,000 acre-feet per year. The Petition criticizes the no action alternative as unreasonable and inaccurate, given the constraints likely to be imposed under SGMA. *Id.* at 54.

Despite assurances that modeling shows salinity impacts of the Exchange Program will not exceed the allowable threshold of significance for water quality, James Irrigation District also contends that the EIR/EIS fails to account for cumulative impacts resulting from Mendota Pool Group groundwater pumping, in conjunction with other pump-in and exchange programs in the Mendota Pool. *Id.* at ¶¶ 70-77. As a result, the Petition alleges these omissions amount to a prejudicial abuse of discretion, failure to proceed in a manner required by law, and unsupported by adequate findings or substantial evidence. *Id.* at ¶ 77.

Conclusion and Implications

The James Irrigation District’s Petition challenges the proposed Exchange Program, and other exchange programs carried out by the Bureau of Reclamation and the Mendota Pool Group for the past three decades. In light of existing concerns with the COVID-19 pandemic, the parties have stipulated to extend the deadline to lodge the administrative record for 90 days, until July 27, 2020, after which Westlands and the Mendota Pool Group will have an opportunity to file their responsive pleadings.

A copy of the Petition is available at: <https://mavensnotebook.com/wp-content/uploads/2020/03/James-ID-Petition-for-Writ-of-Mandate-2-20-20.pdf>. (Austin Cho, Meredith Nikkel)

DELTA MENDOTA SUB-BASIN GROUNDWATER SUSTAINABILITY PLANS CHALLENGED IN REVERSE VALIDATION ACTION

With the January 31, 2020 deadline for submission of Groundwater Sustainability Plans (GSPs) having come and passed, the Department of Water Resources (DWR) has had its hands full in keeping the online Sustainable Groundwater Management Act (SGMA) portal up-to-date following the influx of GSPs from across the state. Following the posting of GSPs to this

online portal, DWR has indicated that there will be a 75-day public comment period, but some GSPs have seen more than just comments in response to their posting.

Most recently, the California Sportfishing Protection Alliance (CSPA) has filed suit to invalidate Delta Mendota region GSPs which were part of an

agreement to create six separate groups in the area. [*California Sportfishing Protection Alliance v. All Persons Interested in the Matter of the Validity...*, Case No. 12345678 (Stanislaus Super Ct.).]

The GSPs at Issue

On March 16, 2020, the California Sportfishing Protection Alliance (CSPA) filed a complaint in Stanislaus County Superior Court seeking to invalidate several Delta Mendota region GSPs. In its current state the complaint takes aim at six GSPs in particular: 1) GSP for the Northern and Central Delta-Mendota Regions; 2) the San Joaquin River Exchange Contractors GSP; 3) the GSP for Fresno County Management Areas A and B within the Delta-Mendota Groundwater Sub-basin; 4) the Grassland GSP; 5) the Farmers Water District GSP; and 6) the Aliso Water District GSP.

The GSPs above were all drafted and submitted in accordance to a Delta-Mendota Sub-basin Coordination Agreement (Agreement). In breaking the many Groundwater Sustainability Agencies (GSAs) in the Delta-Mendota Groundwater Sub-basin into six separate GSP Groups, the Agreement uses a representative GSA from each GSP Group to submit the GSP for their respective group. In doing so, the Agreement handles the entire sub-basin by divvying up the coverage across multiple GSPs.

The Issues Addressed in the Complaint

The complaint splits its attack into two parts. First, generalized allegations are made about the adequacy of the GSPs', with respect to both procedural elements and substantive elements. Second, specific issues are addressed by referencing several comment letters submitted in response to the GSP.

The generalized allegations naturally take a more "kitchen sink" approach, starting off by stating that the GSPs do "not achieve sustainable groundwater management" according to the term's meaning under SGMA. The other issues noted in the complaint include a level of uncertainty in the GSPs that is incompatible with an adequate understanding of the basin setting, a lack of support for the findings of the

GSPs, and a lack of sufficient responses to comments resulting in inadequate public engagement in planning and adopting the GSPs.

In tackling specific issues with the GSPs, the complaint cites to several comment letters rather than address the issues directly, but leaves open the possibility of other comment letters serving this purpose as well. All of the currently cited comment letters are available in Appendix C of the GSP for the Northern and Central Delta-Mendota regions.

The complaint does add more to these citations aside from the references themselves, however, by including several examples within the comments in support of the general allegations above. Using the comment letters of such agencies as Audubon California and the Department of Fish and Wildlife, one contention within the complaint is that the GSPs:

...exclusion of seasonally managed habitats and wetlands that rely on pumped groundwater from designation as Groundwater Dependent Ecosystems is arbitrary and unsupported.

The complaint further attacks the GSPs by asserting that the "GSP improperly uses Water Year 2013 data to represent 'current conditions' and fails to present data from 2016, 2017, or 2018."

Conclusion and Implications

While the complaint in its current state remains quite broad in its attack on the GSPs, more information regarding the specific areas of concern within the GSPs will surely arise as the litigation continues.

The several attacks appear to rely on the disagreements of the CSPA and the GSP Groups in the validity of the support used in establishing the GSP—disagreements which tend to defer in favor of the agencies' conclusions. If the disparity between the data used in support of the GSPs and the conclusions drawn therein is such that the court invalidates the GSPs, however, the Delta-Mendota GSP Groups could find themselves needing to reevaluate their GSPs in the future in order to satisfy the requirements of SGMA.

(Wesley A. Miliband, Kristopher T. Strouse)

RECENT FEDERAL DECISIONS

DISTRICT COURT GRANTS SUMMARY JUDGMENT ON PUBLIC NUISANCE CLAIMS RELATING TO PCB CONTAMINATION OF SAN DIEGO BAY

San Diego Unified Port District v. Monsanto Co.,
___F.Supp.3d___, Case No. 3:15-CV-00578 (S.D. Cal. Mar. 26, 2020).

The U.S. District Court for the Southern District of California recently considered a series of motions for summary judgment challenging claims that a PCB manufacturer is liable under a public nuisance theory for costs to clean up PCB contamination the San Diego Bay (Bay). In *three separate decisions*, the U.S. District Court granted summary judgment against the City of San Diego, but upheld the San Diego Unified Port District claims for public nuisance and abatement remedies Trial is scheduled for fall 2020.

Factual and Procedural Background

Starting in the 1980s, the San Diego Regional Water Quality Control Board (RWQCB) issued several cleanup and abatement orders after finding elevated levels of Polychlorinated Biphenyls (PCBs) in sediments and fish living in the San Diego Bay (Bay). PCBs are a non-biodegradable, stable compounds originally manufactured to cool and insulate heavy-duty electrical equipment. Monsanto was the sole manufacturer of PCBs from the 1930s to 1979. PCBs are virtually indestructible, and once released into the environment, PCBs bind to soil and sediment, travel long distances, and remain pervasive in the environment for long periods of time. The RWQCB found PCBs bioaccumulated in Bay fish and may pose a serious risk to human health. Fish consumption advisories also warned women over 45 and children under the age of 18 should avoid consuming fish from the Bay due the risks of PCB contamination. Under the Port Act, the San Diego Unified Port District (Port District) has authority and powers to “protect, preserve, and enhance” the water quality and natural resources of the Bay. As a title holder and trustee to the Bay, the Port District incurred costs overseeing and funding sediment caps to remediate PCB-contaminated sites.

In one cleanup and abatement order for the Shipyard Sediment Site, the RWQCB named the City of San Diego (City) as one of the discharging parties responsible for remediation. The RWQCB found the City’s municipal separate storm sewer system (MS4) discharged urban sediment and storm water contaminated with toxic substances, including PCBs, into the Bay. The City ultimately incurred approximately \$17 million to investigate and cleanup PCBs in the Shipyard Sediment Site pursuant to a settlement of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state law claims.

In 2015, the Port District and the City jointly initiated an action against Monsanto Company, Solutia Inc., and Pharmacia Corporation (collectively: Monsanto) alleging the PCBs in the Bay constituted a public nuisance. A nuisance, as applied here, is:

... anything which is injurious to health... or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use, in the customary manner, of any navigable lake, or river, bay stream, canal, or basin. . . .

The City’s amended complaint alleged a single cause of action that the continual presence of PCBs in the City’s MS4 constituted a public nuisance and allowed the City to recover its remediation costs. The Port District also brought public nuisance, purperture, and abatement claims against Monsanto for public nuisance related to PCB contamination in the Bay. The Port District alleged Monsanto knowingly promoted the use, sale, and improper disposal of PCBs, despite knowing PCBs posed an environmental and health risk.

On August 2, 2019, Monsanto filed motions for

summary judgment against all claims brought by the Port District and the City. The Port District also filed a motion for summary judgment against Monsanto's affirmative defenses.

The District Court's Decision

As the moving party, Monsanto had the burden to show there was no genuine dispute of material fact and it was entitled to judgment as a matter of law. Monsanto could discharge its burden by showing an absence of evidence to support the Plaintiff's case. If so, the court then considered whether Plaintiffs' presented sufficient evidence to show a genuine issue for trial.

Public Nuisance and Evidence of Physical Harm

The court first considered whether Monsanto was entitled to judgment on the City's claim for public nuisance by considering whether there was sufficient evidence showing the presence of PCBs injuriously affected the MS4. The court's order emphasized that to be a nuisance, the interference must be both substantial and unreasonable. Substantiality is the "real and appreciable invasion of the Plaintiff's interests" that is "definitely offensive, seriously annoying, or intolerable." Monsanto argued the City's claim for public nuisance failed because the City lacked evidence of the City's property, the MS4, incurring injury.

Though the court found evidence of PCBs in the MS4, evidence of physical harm to the MS4 was lacking. Nothing in the record indicated the MS4 was physical damaged or structurally altered due to the presence of PCBs. Further, the City did not claim PCBs caused physical damage to the MS4 or that retrofitting or repairs were necessary as a result. The court found the evidence did not show PCBs prevented the City from operating the MS4 as designed. The court then turned to the City for admissible evidence of substantial and unreasonable harm, but found no evidence that the presence of PCBs in the MS4 necessitated physical repairs, upgrades, or maintenance. As a result, the court concluded the City failed to establish the presence of PCBs caused "substantial and unreasonable" harm to the MS4.

Investigative and Remedial Costs as Damages

In addition, the court considered whether the City

could claim its costs investigating and cleaning up the Bay as public nuisance damages. The City contended all investigation and cleanup costs were a direct result of PCB contamination in the MS4 owned by the City, but the court found the clean-up costs related to a list of pollutants from the MS4, not just PCBs. Without evidence to show costs incurred directly from PCBs, the Court concluded the City failed to establish a substantial connection between the investigation and cleanup costs incurred and the presence of PCBs in the Bay.

Port District Injury

Using the same standards applied to the City, the court reached a different conclusion about whether the PCBs caused "substantial and unreasonable" injury to the Port District. Under California law, pollution of water is a public nuisance, and the record was replete with specific facts from the RWQCB orders to support the conclusion that PCBs polluted the Bay. Monsanto argued the Port District could not claim injury for sediment caps they expressly approved. The court acknowledged that, while logically accurate, pollution of the Bay was the alleged nuisance, not the sediment caps.

The court was also persuaded by the Port District's evidence showing the PCB pollution interferes with the public health and the public's right to use the Bay. Under California law, pollution in a body of water may be deemed a nuisance where it interferes with the public right to "wild game." Monsanto argued the PCB interference could not be substantial if fish populations in the Bay were thriving, but the court disagreed. Fish consumption advisories warning against PCBs directly supported the conclusion that PCBs caused substantial harm to human health and the use and enjoyment of the Bay. Thus, the court upheld the Port District's public nuisance claim and denied Monsanto's motion for summary judgment.

Purpesture Claim

The court then turned to the Port District's purpesture claim. Purpesture occurs where a party makes an unlawful physical encroachment, intrusion, or obstruction of a public land to "enclose or make several that which is common to many" on public land for personal gain. Monsanto moved for summary judgment because the PCBs did not prevent physi-

cal access to the Bay's resources. The court agreed. The court could not find any evidence that the PCBs provided Monsanto "exclusive use and dominion to the exclusion of the public" in the Bay. Thus, the court granted summary judgment to Monsanto as to the purpseture claim.

Equitable Cause of Action for an Abatement Fund

Finally, the court dismissed Monsanto's challenge that the Port District's equitable cause of action for an abatement fund was unripe. The court reasoned the injury—PCBs in the Bay—had already occurred, and trial could adjudicate whether abatement was a proper remedy without necessitating a final amount to be set.

Conclusion and Implications

This case represents one of many novel cases alleging a PCB manufacturer may be liable under a public nuisance theory for environmental cleanup costs decades after customers used its product. The U.S. District Court's analysis of the City of San Diego's public nuisance claim suggests monetary liability for site remediation under environmental hazardous waste statutes is alone insufficient to show a public nuisance has caused "substantial and unreasonable" harm. Instead, evidence of physical harm directly incurred to an MS4 from the public nuisance may be required.

(Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

CALIFORNIA COURT OF APPEAL UPHOLDS COASTAL COMMISSION'S CERTIFICATION OF A LOCAL COASTAL PROGRAM FOR THE SANTA MONICA MOUNTAINS

Mountainlands Conservancy, LLC v. California Coastal Commission,
___Cal.App.5th___, Case No. B287079 (2nd Dist. Apr. 1, 2020).

A group of landowners brought suit challenging the California Coastal Commission's certification of a local coastal program for the Santa Monica Mountains, which, among other things, prohibited new vineyards in the Santa Monica Mountains coastal zone. The Superior Court denied the petition, and the landowners appealed. The Court of Appeal affirmed, finding that the Coastal Commission had followed proper procedures and that its actions were supported by substantial evidence in the record.

Factual and Procedural Background

In 2014, Los Angeles County (County) initiated a process to amend the land use plan for the Santa Monica Mountains coastal zone. Compared to the previous plan (which was certified by the Coastal Commission in 1986), the County explained that agricultural uses would be restricted: while vineyards and crop areas already in existence would be allowed to continue, further establishment of such uses would be prohibited and the updated land use plan would designate considerably more habitat as critical.

Following action by the County board of supervisors, the program was submitted to the Coastal Commission. In advance of a public hearing, the Coastal Commission released a staff report recommending denial of the land use plan amendment as submitted, but approval subject to certain modifications. These included, clarifications to the provisions regarding agricultural uses, adding that existing uses may not be expanded. They also included a new policy stating that existing crop-based agricultural uses on lands suitable for agricultural use shall not be converted to non-agricultural use unless certain requirements are met. The report also addressed Coastal Act, §§ 30241 and 30242, which pertain to agricultural uses, and found that they generally did not apply and that, overall, areas suitable for agricultural uses within the plan area were limited.

In response, the plaintiffs submitted comments challenging staff's findings in connection with §§ 30241 and 30242, in particular the conclusion that the vast majority of land in the Santa Monica Mountains was unsuitable for agricultural use. The Coastal Commission then issued an addendum to its staff report, recommending a modification to allow new agricultural uses meeting certain criteria: 1) the uses are limited to specific areas on natural slopes of 3:1 or less steep, or areas currently in agricultural use; 2) new vineyards are prohibited; and 3) organic or biodynamic farming practices are followed. Staff also removed the prohibition on expanding agricultural uses and recommended that existing uses may be expanded with the same three criteria. The staff report justified the prohibition on new vineyards due to a number of identified adverse impacts.

Plaintiffs responded, stating that: they had not been given them enough time to respond; even as revised, the proposed plan raised substantial issues with the Coastal Act; and the plan would still exclude new agricultural uses from the vast majority of the plan area, particularly because new agriculture would be allowed only within certain habitat areas, which were limited in designation. They also challenged the justification to prohibit new vineyards, in connection with which they submitted a UCLA study.

At its public hearing, the Coastal Commission adopted the land use plan with the modifications suggested by staff. A few months later, it also approved the County's proposed local implementation plan, with modifications. It then issued a resolution adopting the local coastal program, consisting of the land use plan and the implementation plan. Final certification by the Commission took place in October 2014

At the Superior Court

Plaintiffs then filed a petition for writ of mandate and the Superior Court denied the petition, issuing

two rulings. In its first ruling, the court: rejected them claim that the addendum to the staff report was required to be distributed at least seven days before the public hearing; found the Coastal Commission was not required to hold a separate hearing on matters deemed by plaintiffs to raise “substantial issues”; and determined that the Commission’s findings in connection with Coastal Act §§ 30241 and 30242 were supported by substantial evidence.

In a second ruling, the court found that there was substantial evidence that vineyards are harmful to the Santa Monica Mountains ecology because they require clearing and scarification, increase erosion and sedimentation, require pesticide use, and constitute an invasive monoculture.

The Court of Appeal’s Decision

Holding of a Separate Hearing

The Court of Appeal first addressed the claim that the Coastal Commission was required to hold a separate hearing pursuant to Coastal Act § 30512, which generally requires the Coastal Commission to determine, after a public hearing, whether the land use plan of a proposed local coastal program “raises no substantial issue as to conformity with” Coastal Act policies. If the plan does raise a substantial issue, the Commission must identify the issues and hold at least one public hearing on the matters identified. The Coastal Commission, on the other hand, contended that it properly proceeded under § 30514, which pertains to amendments to certified local coastal programs and does not have the same requirement. The Court of Appeal agreed with the Coastal Commission, finding that the commission properly proceeded under § 30514 and therefore was not required to make the “substantial issue” determination otherwise required by § 30512.

Coastal Act Sections 30241 and 30242

The Court of Appeal next addressed the claim that the Coastal Commission failed to proceed in the manner required by law because it supposedly made a blanket determination that the Santa Monica Mountains are not suitable for agriculture. In particular, plaintiffs argued that Coastal Act §§ 30241 and 30242 contemplate a determination of the feasibility of agriculture in relation to a specific parcel of property, on a case-by-case basis.

In rejecting these claims, the Court of Appeal first

found that plaintiffs did not cite any authority for their “case-by-case” claim. Instead, it agreed with the Coastal Commission that the point of a local coastal program is to allow local governments to do area-wide planning in conformity with the policies of the Coastal Act. Specifically in regards to §§ 30241 and 30242, the Court of Appeal found that these sections likewise do not “contemplate” a case-by-case or parcel-by-parcel determination of the feasibility of agriculture, and that the Commission’s finding that the majority of land in the Santa Monica Mountains was unsuitable for agricultural use was supported by substantial evidence.

Fair Trial Issues

The Court of Appeal next addressed the claim that the public hearing denied them due process because the Coastal Commission gave them less than 24-hours’ notice of a “new” land use plan (in an addendum to a staff report) that would completely ban vineyards. The Court of Appeal first found that the addendum, which was issued the day before the public hearing, complied with the pertinent regulations, as did the earlier staff report. The Court further observed that nothing about the proposed modifications included in the addendum altered the land use plan’s original objective, that is, to restrict agricultural uses. The modification merely eased the categorical restriction on new agriculture. While plaintiffs claimed they had no time to refute the prohibition of new vineyards, that item never changed from the original staff report.

Substantial Evidence Issues

Finally, the Court of Appeal addressed the claim that the decision to specifically prohibit new vineyards was not supported by substantial evidence. The court disagreed, finding that there was evidence that vineyards cause particular environmental harm, including testimony from the Coastal Commission’s staff ecologist.

Conclusion and Implications

The case is significant because it involves a substantive discussion of local coastal programs and related Chapter 3 policies under the Coastal Act. The decision is available online at: <https://www.courts.ca.gov/opinions/documents/B287079.PDF> (James Purvis)

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