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FEATURE ARTICLE

U.S. SUPREME COURT'S NEW DISCHARGE TO GROUNDWATER DECISION IN *COUNTY OF MAUI* RAISES MORE QUESTIONS THAN IT ANSWERS

By Brenda Bass, Esq.

On April 23, 2020, the United States Supreme Court issued a 6-3 decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. ___ (Apr. 23, 2020) setting forth a new test for determining when a point source discharge to groundwater, that ultimately reaches a navigable surface water, is subject to the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting requirement. The U.S. Supreme Court held that an NPDES permit is required "if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters." The Supreme Court lists several factors that may be used in determining whether a discharge through groundwater represents the "functional equivalent," but notes that the list is not exhaustive. Additionally, the Supreme Court did not apply this new rule to the facts in *County of Maui*, leaving the practical application of this rule unanswered.

In the majority opinion, delivered by Justice Breyer, the Supreme Court states that this rule narrows the "fairly traceable" rule articulated by the Ninth Circuit Court of Appeals in 2018, but yet is not so narrow as the interpretation advanced by the County of Maui (Maui) and the U.S. Environmental Protection Agency (EPA). Notably, the Ninth Circuit's "fairly traceable" test also included the phrase "functional equivalent of a discharge into navigable waters." However, no bright line distinction was made to differentiate between the "functional equivalent" test and the "fairly traceable" test. Thus, the *County of Maui* decision raises as many questions as it tried to answer.

Background

County of Maui arose out of a dispute over whether Maui needed an NPDES permit for discharges from its Lahaina Wastewater Reclamation Facility (Facility). The Facility treats domestic wastewater generated in West Maui, serving a population of approximately 40,000 people, and disposes of this treated wastewater effluent into groundwater through four wells. The Clean Water Act's permitting requirement applies only to discharges of pollutants from point sources to navigable waters, *i.e.*, "waters of the United States" (WOTUS). Because the Facility discharges to groundwater, which is not a navigable water, Maui had state-level and EPA Underground Injection Control (UIC) well permits. However, Maui had not sought an NPDES permit for these discharges.

Hawaii Wildlife Fund and several other environmental interest groups alleged that pollutants contained in the Facility's effluent reach the Pacific Ocean—a navigable water—and due to this hydrologic connection between groundwater and the Ocean, an NPDES permit is required. A tracer dye study indicated that the discharges from the injection wells appeared offshore, southwest from the Facility. *No one disputed* that the injection wells at issue constituted "point sources" under the Clean Water Act or that the Pacific Ocean is a navigable water regulated under the Clean Water Act. The main question was whether the discharge's indirect passage through groundwater obviated the need for an NPDES permit.

The 'Functional Equivalent' Test

The question before the Supreme Court was whether "pollution that reaches navigable waters

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only through groundwater [is] pollution that is 'from' a point source" requiring an NPDES permit. This case did not consider whether groundwater should be considered WOTUS. Instead, the Supreme Court viewed groundwater merely as a conduit through which a discharge from a point source is conveyed to jurisdictional waters. The court's concluded as follows:

> We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.

The majority articulated a standard that an NPDES permit is required "when there is a direct discharge from a point source into a navigable water or when there is the *functional equivalent of a direct discharge*" from a point source. Recognizing that the term "functional equivalent" is not defined, the Supreme Court further restated that a discharge requires a permit "when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means."

To further assist with determining what might be "roughly similar" to a direct discharge, the majority opinion also provided several potentially relevant factors. These factors include: 1) the pollutant's travel time between the discharge point and the navigable water; 2) the distance traveled; 3) the material through which the discharge travels; 4) dilution or chemical changes during travel; 5) the amount of pollutant entering the navigable water as compared to the amount that leaves the point source; 6) the way or location the pollutant enters the navigable water; 7) and the degree to which the pollution has retained its identity upon reaching the navigable water. The majority opinion makes clear that the list is not all-inclusive, but notes that time and distance may be the most important factors.

The Supreme Court also clarified that its new rule is not the same as proximate cause, and rejected importation of this tort concept into the Clean Water Act. The Supreme Court also rejected reliance on tracing alone to establish Clean Water Act liability or permitting requirements. However, the concept of tracing likely cannot be wholly ignored when applying the "functional equivalent" rule, particularly given the factors articulated by the Supreme Court.

The Supreme Court did note its concern with developing a rule that created perceived loopholes in the Clean Water Act, as well as its concern about expanding federal regulation to groundwater generally. The Supreme Court specifically recognized that the Clean Water Act leaves groundwater quality regulation to the states, and did not intend to upset this authority. And while the Supreme Court sought to avoid a rule that would apply the Clean Water Act to a discharge that reaches navigable waters only after traveling for many miles or many years, the Supreme Court wanted to avoid a rule where a discharger could avoid NPDES permitting requirements simply by moving a discharge pipe a few feet away from a navigable water.

The Ninth Circuit's 'Fairly Traceable' Test

In the underlying Circuit Court of Appeals decision, the Ninth Circuit determined that Maui was liable under the Clean Water Act based on the satisfaction of three elements:

> (1) [Maui] discharged pollutants from a point source,
>
> (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and
>
> (3) the pollutant levels reaching navigable water are more than *de minimis*.

The Ninth Circuit rejected the lower court's determination that when pollutants reach navigable waters, regardless of how, the discharger is subject to Clean Water Act liability. The Ninth Circuit focused on how the tracer dye study and Maui's admissions removed any question that the disposal wells were connected to the Pacific Ocean. The Ninth Circuit also rejected Maui's argument that discharges to navigable waters had to be directly from the point source to the navigable water.

A Multitude of Factors Means Little Guidance for Dischargers, Regulators, and Courts

The Supreme Court's non-exhaustive list of seven factors were provided to help determine whether a

discharge through groundwater is a "functional equivalent" to a direct discharge, and thus, would require an NPDES permit. Unfortunately, this list does not provide bright line guidance to those implementing the new rule. Indeed, the functional equivalent test, and its many factors, were not actually considered or applied by the Supreme Court in *County of Maui*. Rather, the Supreme Court remanded the case to the Ninth Circuit to apply its rule. Another pending Clean Water Act case involving discharges to groundwater, *Kinder Morgan Energy, et al. v. Upstate Forever, et al.*, (4th Cir. 2018), [*see*: https://www.upstateforever.org/files/files/4th%20Circuit%20Decision.pdf] (*Kinder Morgan*), saw a similar result and was remanded to the Fourth Circuit Court of Appeals, on May 4, 2020 for reconsideration based on the "functional equivalent" rule.

The primary guidance in the *County of Maui* opinion bookends what the Supreme Court believes would qualify for Clean Water Act permitting, and what most likely would not be considered a "functional equivalent." Specifically, the Supreme Court states that when a point source is "a few feet" from a navigable water, such that the discharge travels through groundwater for that short distance, this is functionally equivalent to a direct discharge and would require an NPDES permit. A similar discharge that flows for a few feet over the beach would also require a permit. On the other end, if a point source is located miles away from the navigable water and the discharged pollutants travel within the groundwater, mixing with other materials and only reaching navigable waters years later, then the discharge likely does not need an NPDES permit. For discharges somewhere in between these two ends, the "middle instances" in the Supreme Court's parlance, the opinion provides little guidance.

The Supreme Court also provided some assurance, in *dicta*, that EPA and judges would not extend the functional equivalent rule so far that NPDES permits would be required for all disposal wells or all domestic septic systems. But this, too, could present "sliding scale" challenges in areas where beach houses have septic systems or where disposal wells have suspected, but difficult to discern, hydrologic connections to navigable waters. The exceptions in some instances may prove to swallow the rule.

The numerous factors and lack of guidance in terms of applying the rule to a set of specific facts resembles the Supreme Court's "significant nexus" test for determining whether a water is subject to Clean Water Act jurisdiction in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). This test required dischargers, regulators, and judges to consider a range of factors in order to determine whether the Clean Water Act applied in cases where "wetlands, either alone or in combination with similarly situated lands in the region, *significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" In that case, the Supreme Court opined that, when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term 'navigable waters.'" In the dozen years since the *Rapanos* decision's release, the EPA has struggled to articulate regulations governing which waters are subject to Clean Water Act jurisdiction, with the two most recent versions of such rules—the 2015 WOTUS rule and the 2020 WOTUS rule—being the subject of multiple legal challenges.

Based on the fact-specific nature of the functional equivalent rule, regulators and courts will face challenges similar to those following *Rapanos*. Indeed, connectivity and chemical and physical attributes are at issue in both *Rapanos* and *County of Maui*. The lack of clear guidance presents challenges for dischargers and regulators in determining whether a specific discharge to groundwater requires an NPDES permit.

The lack of clarity also may subject dischargers and regulators to lawsuits for failing to obtain or issue NPDES permits for specific discharges. These issues were raised in Justice Alito's dissent in *County of Maui*. Justice Alito criticized the majority opinion for failing to provide additional guidance while admitting that the functional equivalent rule "'does not, on its own, clearly explain how to deal with the middle instances.'" Justice Alito also expressed concern that in any case, other than an extreme instance, "[r]egulators will be able to justify whatever result they prefer in a particular case."

Until courts begin applying the functional equivalent test to actual factual scenarios, the test itself, and its non-exhaustive list of potentially relevant factors, remain conceptual. Clarity on the operation of this rule—and on whether certain discharges to groundwater require an NPDES permit—is yet to come.

The 'Functional Equivalent' Test Might Not Be So Different from a 'Fairly Traceable' Test

The lack of clarity and application of the functional equivalent test also calls into question whether, and to what degree, the test is different than the "fairly traceable" test proposed by the Ninth Circuit. Despite the Supreme Court's insistence that the functional equivalent rule is narrower than the Ninth Circuit's rule, substantial similarities remain.

For example, the Supreme Court's test requires a permit where "there is a direct discharge from a point source into a navigable water or when there is the *functional equivalent of a direct discharge*." The Ninth Circuit proposed that a permit is required where "pollutants are fairly traceable from the point source to a navigable water such that the discharge is the *functional equivalent of a discharge into the navigable water*." Most of the substantive words mirror one another.

When joined with the factors listed by the Supreme Court, the "functional equivalent" test considers how far and how long pollutants have traveled, as well as how much the pollutants have changed or diluted between the point source discharge into groundwater and their emergence in a navigable water. This seems to reflect the analysis the Ninth Circuit conducted when applying the "fairly traceable" test to the facts in *County of Maui*. The Ninth Circuit determined that the discharge was subject to the Clean Water Act because the tracer dye studies showed the connection between the point source and the emergence of the pollutants in the Pacific Ocean. The study showed the time and distance traveled, as well as the relative amount of the discharge that reached navigable waters. In spite of the Supreme Court's insistence that the "functional equivalent" rule is narrower than the Ninth Circuit's "fairly traceable" standard, the difference between the two does not appear to be great.

Despite the use of the phrase "fairly traceable," the lack of the word "direct" by the Ninth Circuit may be the largest difference between the words used in the two approaches. The use of the term "direct" may be the key to the "functional equivalent" rule being understood and applied in a narrower fashion than the "fairly traceable" test. Depending on how closely the groundwater discharge resembles a "direct" discharge, this could influence the balance of the factors and the relative showing needed for each factor in order to come to the conclusion that a discharge to groundwater requires an NPDES permit.

The Ninth Circuit declined to determine at the time when the connection between a point source discharge to groundwater is "too tenuous" to be considered "fairly traceable." In doing so, the Ninth Circuit expressed skepticism that any pollutants reaching navigable waters traceable back to a point source discharge would be too attenuated for Clean Water Act liability to apply. The Supreme Court, in contrast, did provide an example of a discharge too tenuous to be considered a "functional equivalent" of a direct discharge to navigable waters. In this sense, the "functional equivalent" is narrower than the "fairly traceable" test, by virtue of there being at least some enunciated scenario where a discharge to groundwater that reached navigable waters is too far removed to be considered roughly similar to a direct discharge.

Conclusion and Implications—The 'Functional Equivalent' Standard Begins a New Chapter of Uncertainty

The Supreme Court confirmed that some point source discharges to groundwater that reach navigable waters require NPDES permits, but did not alleviate much of the confusion about just which discharges need NPDES permits. Until the "functional equivalent" test is applied to specific sets of facts, it will be difficult to fully understand what the rule, or any of its terms, means in any practical sense. Because the Supreme Court declined to apply the test to the facts at issue in both *County of Maui* and *Kinder Morgan*, practitioners, dischargers, regulators, and courts are left with little guidance on application and meaning beyond relatively extreme examples provided. This uncertainty as to exactly which discharges require an NPDES permit will likely continue even after the Ninth Circuit and Fourth Circuit reconsider these cases due to the fact-specific nature of the "functional equivalent" test. The Supreme Court's Slip Opinion in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, Case No. 18-260, 590 U.S. ___ (2020) is available online at: https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf.

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CALIFORNIA WATER NEWS

GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER THAT SUSPENDS CERTAIN NOTICING DEADLINES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Recently, California Governor Gavin Newsom issued an Executive Order suspending various timeline aspects of the California Environmental Quality Act (CEQA). This will be relevant to all CEQA practitioners in the areas of land use and water law.

Background

The COVID-19 global pandemic has resulted in extensive federal, state and local legislation touching various topics, from government relief to eviction moratoriums. In California, these mandates have also impacted some of the rules that would typically apply to matters governed by the California Environmental Quality Act. On April 22, 2020, Governor Gavin Newsom issued Executive Order N-54-20, which includes provisions that *suspend* the filing, posting, notice, and public access requirements related to certain notices under CEQA for a period of 60 days. This suspension does not apply to provisions governing the time for public review.

CEQA Provisions Suspended

The specific CEQA provisions that are subject to Executive Order N-54-20's 60-day suspension are below.

- Public Resources Code § 21092.3—requiring that notices relating to the preparation and availability of an Environmental Impact Report (EIR) to be posted by the county clerk for 30 days, and requiring a notice of intent to adopt a negative declaration to be posted for 20 days.

- Public Resources Code § 21152—governing local agency requirements for filing notices of determination and notices of exemption.

- CEQA Guidelines § 15062, subds. (c)(2) and (c)(4)—governing a public agency's filing of a notice of exemption for projects that are exempt from CEQA.

- CEQA Guidelines § 15072, subd. (d)—requiring notice of intent to adopt a negative declaration or mitigated negative declaration to be posted at the office of the county clerk for at least 20 days.

- CEQA Guidelines § 15075, subds. (a),(d), and (e)—requiring the lead agency to file a notice of determination within five days of deciding to approve a project for which there has been a negative declaration or mitigated negative declaration prepared. This section also requires the notice of determination to be posted by the county clerk for at least 30 days.

- CEQA Guidelines § 15087, subd. (d)—requiring that a notice of availability of a draft environmental impact report for public review be posted at the office of the county clerk for at least 30 days.

- CEQA Guidelines § 15094, subds. (a), (d), and (e)—requiring the lead agency to file a notice of determination within five days of deciding to approve a project for which an environmental impact report was approved. This section also requires the notice of determination to be posted by the county clerk for at least 30 days.

Use of Electronic Means

Section 8 of Executive Order N-54-20 will also allow certain notice requirements under CEQA to be satisfied through electronic means in order to allow public access and involvement consistent with COVID-19 public health concerns. The order's electronic noticing provisions are as follows:

> In the event that any lead agency, responsible agency, or project applicant is operating under any of these suspensions, and the lead agency, responsible agency, or project applicant would otherwise have been required to publicly post or file materials concerning the project with any

county clerk, or otherwise make such materials available to the public, the lead agency, responsible agency, or project applicant (as applicable) shall do all of the following:

a) Post such materials on the relevant agency's or applicant's public-facing website for the same period of time that physical posting would otherwise be required;

b) Submit all materials electronically to the State Clearinghouse CEQAnet Web Portal; and

c) Engage in outreach to any individuals and entities known by the lead agency, responsible agency, or project applicant to be parties interested in the project in the manner contemplated by the Public Resources Code § 21100 *et seq*. and California Code of Regulations, Title 14, § 15000 *et seq*.

Tribal Consultations

Executive Order N-54-20 also has a provision regarding CEQA's tribal consultation process. Under the § 9 of the order, the timeframes set forth in Public Resources Code §s 21080.3.1 and 21082.3, within which a California Native American tribe must request consultation and the lead agency must begin the consultation process relating to an Environmental Impact Report, Negative Declaration, or Mitigated Negative Declaration under CEQA, are suspended for 60 days.

Conclusion and Implications

In addition, Executive Order N-54-20 encourages lead agencies, responsible agencies, and project applicants to pursue additional methods of public notice and outreach as appropriate for particular projects and communities.

Governor Newsom's Executive Order of April 22, 2020 predominantly suspends certain important deadlines. This 60-day suspension periods imposed by Executive Order N-54-20 are set to expire on June 22, 2020. It will be important for CEQA practitioners to review all the temporary changes made as deadlines and notice requirements play a crucial role in compliance. Executive Order N-54-20 may be accessed online at the following link: https://www.gov.ca.gov/wp-content/uploads/2020/04/N-54-20-COVID-19-4.22.20.pdf.
(Nedda Mahrou)

REGULATORY DEVELOPMENTS

SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN TAKES FORM FOLLOWING DRAFT'S PUBLIC COMMENT PERIOD

After a two-week public comment period ending May 11, 2020, the U.S. Bureau of Reclamation's (Bureau) Temperature Management Plan for the Sacramento River took another step towards its final form. In setting conditions for Bureau permits for the operation of Keswick Dam, Shasta Dam, Spring Creek Power Plant, and the Trinity River Division, the State Water Resources Control Board (SWRCB) issued Order WR 90-5 establishing requirements for maintaining appropriate water temperatures in the Upper Sacramento River at specified locations. Following the ideology of this order, the 2009 Biological Opinions for the federal Central Valley Project and the State Water Project—issued by the National Marine Fisheries Service (NMFS)—likewise contained water temperature requirements. Ten years later, NMFS released a revised Biological Opinion (BiOp) strengthening these restrictions, resulting in the Bureau's preparation of the Temperature Management Plan.

Background

Issued 30 years ago, Order WR 90-5 was adopted by the SWRCB in an effort to protect fish life—particularly temperature sensitive Chinook salmon—in the Upper Sacramento River. This order added temperature control restrictions on Bureau permits for operating several upstream facilities. Specifically, the Bureau was thereafter required to maintain the temperature in the reach of the Sacramento River between the Keswick Dam and Red Bluff Diversion Dam at 56°F when reasonably within the Bureau's control.

The 2009 NMFS BiOps provided for similar requirements in the operation of the federal Central Valley Project and State Water Project. In the 2019 revised BiOp, NMFS included more specific provisions for managing the Sacramento River's water temperature. Here, NMFS created a four-tier system for managing daily average water temperatures between May 15 and October 31.

Under this system "Tier 1" years would require the Bureau to target average daily temperatures of 53.5°F at a location just above Clear Creek (12 miles downstream from Keswick Dam).

Tier 2 and 3 years would lessen the requirements, allowing the Bureau to shift its target in both temperature maintained and the duration in which it must be maintained, fluctuating between 53.5 and 56°F depending on cold water storage and spawn timing of the Chinook salmon.

Finally, Tier 4 takes an "as good as possible" approach, allowing Reclamation to maintain temperatures higher than 56°F based on available cold-water resources.

The Draft Temperature Management Plan

Leading up to the release of the draft Temperature Management Plan and its accompanying public comment period, the Bureau and the SWRCB naturally went back and forth on the extent to which the evaluation included in the draft was required to be. Noting that 2020 is likely to be a critical water year for Lake Shasta—citing poor hydrology in the early half of this year—the Bureau ultimately asserted that the evaluation in the draft Temperature Management Plan will anticipate operation of Shasta Dam's Cold Water Pool Management at Tier 3.

Conclusion and Implications

Currently, the Bureau of Reclamation is planning to have the Temperature Management Plan finalized as early as the end of May. The State Water Resources Control Board is likewise expecting a quick turnaround following the public comment period as indicated by the displeasure expressed in the SWRCB's April 3, 2020 letter to the Bureau regarding the proposed release dates for the draft in April and the final in May.

While the Bureau's indication that the Temperature Management Plan will evaluate a Tier 3 operating year, colder water Tiers were not foreclosed entirely as it was also stated that a change in forecast

could make operation under such Tiers feasible. In any case, the process will likely need to proceed in a rather quick fashion given the start dates of the management season addressed in each Tier as May 15 that could impact not only the Sacramento River but also its tributaries, and in turn, other fisheries or water users.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS PERMANENT MONTHLY WATER USE REPORTING REQUIREMENTS

Building upon its emergency regulations imposed during the incredible drought years of 2014 and 2017, the California State Water Resources Control Board (SWRCB) recently made permanent regulations mandating urban water suppliers to track and report monthly water usage.

Background

During California's recent historic drought, the SWRCB adopted emergency regulations that required California's largest water suppliers—those with more than 3,000 connections or supplying more than 3,000 acre-feet of water annually—to track and report monthly water usage. These urban water suppliers collectively represent the state's 400 largest water suppliers and serve approximately 90 percent of the state's population. The regulations were put into effect generally from July 2014 through November 2017, in an effort to maximize water conservation throughout the state. Many considered those efforts largely successful. Between June 2015 and March 2017 California's urban water suppliers collectively conserved 22.5 percent water use compared to prior years, enough to supply approximately one-third state's population for one year.

In late 2017, the SWRCB modified the reporting mandates and generally transitioned toward voluntary reporting. Notwithstanding that transition, more than 75 percent of water suppliers have continued to report their monthly water usage voluntarily. In May 2018, the Governor signed into law water efficiency legislation that authorized the SWRCB to issue permanent mandatory monthly water use requirements on a non-emergency basis.

Monthly Reporting Requirements

The new SWRCB regulation requires water suppliers to report residential water use, total potable water production, measures implemented to encourage water conservation and local enforcement actions. Specifically, the regulation requires reporting of the following:

- The urban water supplier's public water system identification number(s);
- The urban water supplier's volume of total potable water production, including water provided by a wholesaler, in the preceding calendar month;
- The population served by the urban water supplier during the reporting period;
- The percent residential use that occurred during the reporting period;
- The water shortage response action levels.

The SWRCB considers these measures as part of the state's long-term plan to prepare California for future droughts. The regulation increases transparency and access to important and timely water data, and in a format consistent with reporting provided since 2014.

In adopting the regulation, the Chairman of the SWRCB stated:

> As we continue to see, the quality, timeliness, and gathering of data are critical to managing California's water in the 21st century. Urban monthly water use data have driven enduring, widespread, public awareness and understanding of water use, conservation and efficiency in our state.

The regulation now moves to the Office of Administrative Law for review and is expected to take effect October 1, 2020.

Conclusion and Implications

The recently adopted regulation will likely assist policy makers in making important and better-informed water resources management decisions moving forward. It will also help water managers and Californians working together to monitor statewide and local water usage conditions and improve effectiveness in responding to future water shortage challenges. Though reporting is once again mandatory, with more than 75 percent of water suppliers already voluntarily reporting water usage during the past three years, many are observing what appears to be a post-drought culture change among stakeholders who have taken greater ownership and responsibility in achieving water conservation. This recent move could potentially strengthen that dynamic and continue to yield increased conservation results. For more information, *see:* https://www.waterboards.ca.gov/press_room/press_releases/2020/pr04212020_swrcb_adopts_water_conserv_rpt_req.pdf.
(Chris Carrillo, Derek R. Hoffman)

LAWSUITS FILED OR PENDING

CALIFORNIA OBTAINS TEMPORARY HALT TO CURRENT CENTRAL VALLEY PROJECT OPERATIONS TO PROTECT STEELHEAD

On April 21, the State of California filed a preliminary injunction in the U.S. District Court for the Eastern District of California requesting that the District Court enjoin the U.S. Bureau of Reclamation's current operation of the federal Central Valley Project (CVP). The court granted the preliminary injunction in part on May 12 to protect steelhead populations through May 31, 2020. Current CVP operations were evaluated by recently adopted Biological Opinions that determined the Bureau's proposed CVP operations would not jeopardize the existence of legally protected species. California legally challenged those Biological Opinions as violating state and federal law. Therefore, California requested in its preliminary injunction that the CVP be operated pursuant to Biological Opinions adopted in 2009 until the merits of its underlying challenge to the recently adopted Biological Opinions was resolved. The 2009 Biological Opinions concluded that CVP operations, as then proposed, would jeopardize the existence of protected species, and provided reasonable and prudent alternatives for CVP operations that would not jeopardize protected species. [*California Natural Resources Agency v. Ross*, Case No. 1:20-cv-00426 (E.D. Cal.).]

Background

The federally operated Central Valley Project, which is operated by the U.S. Bureau of Reclamation (Bureau) in conjunction with the California State Water Project (SWP), is the nation's largest water conveyance network. The CVP and SWP move water from Northern California through the Sacramento-San Joaquin Delta (Delta) south through the Central Valley and into southern California.

The CVP is operated pursuant to federally adopted Biological Opinions which are issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). A Biological Opinion indicates whether a proposed federal action, such as the operation of the CVP, will likely jeopardize the continued existence of flora and fauna protected by the federal Endangered Species Act (ESA) or adversely modify designated critical habitat. The ESA establishes liability for the "taking" of listed species, unless a permit or authorization for incidentally taking species is obtained. If a Biological Opinion determines that a proposed action would jeopardize the existence of a protected species, the Biological Opinion is deemed to be a "jeopardy" opinion. If not, a Biological Opinion is deemed a "no jeopardy" opinion. For jeopardy opinions, the federal agency responsible for the project must comply with reasonable and prudent alternatives identified in a Biological Opinion to avoid liability under the ESA. Even for "no jeopardy" opinions, a federal agency may operate a project pursuant to a reasonable and prudent measures. Separate from the ESA, California has also enacted environmental protections for species of *flora* and *fauna* through the California Endangered Species Act (CESA).

In late 2019, FWS and NMFS each issued no jeopardy Biological Opinions for proposed CVP operations, determining that the long-term operation of the CVP was not likely to threaten the continued existence of endangered species listed under the ESA. In reaching these conclusions, FWS and NMFS considered funding, habitat restoration, and rearing measures for endangered species proposed as part of CVP operations. These Biological Opinions replaced those issued in 2009 for CVP and State Water Project operations, which were "jeopardy" opinions and imposed reasonable and prudent alternatives for operating the CVP. Additionally, while FWS and NFMS were preparing the new biological opinions, the Bureau adopted an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for the long-term operation of the CVP, as identified in a Biological Assessment that the Bureau prepared under NEPA.

Concerned about the potential impacts CVP operations may have on endangered species, California filed suit in February 2020, alleging that the Biological Opinions violated the federal ESA, CESA, and

the federal Administrative Procedure Act (APA). California's lawsuit also included alleged violations of NEPA, namely, that the Bureau's EIS failed to take a "hard look" at the environmental consequences of its proposed action, as required by NEPA.

The District Court's Ruling

The purpose of a preliminary injunction is to preserve the relative position of the parties until the merits of a lawsuit can be resolved. California's preliminary injunction sought to halt CVP operations pursuant to the recently adopted biological opinions—which California legally challenged under state and federal law—and asked the court to order that the Bureau operate the CVP in accordance with the 2009 Biological Opinions until the court resolved the merits of California's claims. To obtain a preliminary injunction, California was required to show that it: (1.) was likely to succeed on the merits; (2.) would likely suffer irreparable harm if the preliminary injunction was not granted; (3.) prevailed in a balancing of the equities; and (4.) showed that the injunction is in the public interest.

Likelihood of Success on the Merits

First, California contended that it was likely to prevail on the merits of its claims, because the Bureau's operation of the CVP violated the ESA and CESA. In particular, California argued that the 2019 Biological Opinions failed to include sufficiently detailed "guardrails" for federal operations or definite measures to enhance a species' health. Accordingly, California argued that the "no jeopardy" conclusion in both Biological Opinions was unsupported, and therefore was arbitrary and capricious under the APA.

Similarly, California argued that CESA, which is state law, applied to the Bureau because federal statutes require that the Bureau comply with state water laws. In particular, California contended that CESA applied to the use of water in California as it affects species, including pursuant to permits issued by the California State Water Resources Control Board for the operation of the CVP. Because CVP operations under the Biological Opinions impact species protected by CESA, California argued that the Bureau was "taking" protected species without authorization and was therefore violating CESA.

Finally, California argued that the Bureau was violating NEPA because its EIS failed to take a "hard look" at the environmental consequences of its proposed action. Specifically, California alleged that the Bureau's EIS was "tainted" by the inclusion of protective measures that are disallowed by NEPA, such as conservation hatchery programs assessed by the EIS. California also contended that the Bureau did not adequately analyze the impact on salmonid species during high flow events that would correspond with higher pumping rates by the CVP, because it did not model the impact of maximum pumping rates during such events and assumed that such pumping would only occur for limited periods of time during certain years. Finally, California argued that the Bureau's EIS did not provide for mitigation measures on species impacts from CVP operations, as required by NEPA. For instance, California asserted that the Bureau only proposed to monitor longfin smelt populations during certain operational stages, which did not itself qualify as a mitigation measure. For these and related reasons, California argued that the Bureau's EIS violated NEPA, and that California would prevail on this claim for purposes of obtaining a preliminary injunction.

Irreparable Harm

To satisfy the second prong of the preliminary injunction requirements, California argued that it would suffer irreparable harm, primarily in the form of increased mortality of endangered species and the loss of their habitat. In particular, California cautioned that Delta smelt, longfin smelt, and Central Valley steelhead would suffer population and habitat declines as a result of CVP operations, particularly during dry years. For instance, under critically dry conditions in the Delta, California warned that Delta smelt habitat would be reduced, including rearing habitat, and that the already reduced Delta smelt population would be further imperiled. Similarly, longfin smelt and Central Valley steelhead could be increasingly entrained by CVP operations given greater water exports from the Delta under current CVP operations, thus leading to greater population declines that, according to California, might not be remedied. Accordingly, California contended that it had satisfied the irreparable harm standard required to obtain a preliminary injunction.

Balancing the Equities and the Public Interest

California also argued that the balance of the equities and the public interest support issuing a preliminary injunction. California argued that current CVP operations will result in permanent environmental harms, and thus tipped the balance of the equities as well as the public interest in favor of its position. Because environmental impacts could be permanent—such as the extinction of the Delta smelt—and would otherwise be significant, California contended that any economic harm incurred by defendants in the lawsuit could not outweigh the equities and public interest favoring California's position.

Conclusion and Implications

On May 12, the court granted California's preliminary injunction in part, and denied the remainder as moot. Specifically, the court enjoined current CVP export operations in the South Delta and reinstated a specific action with the reasonable and prudent alternative from the 2009 NMFS Biological Opinion from May 12 through May 31, 2020, on the ground that operations carried out pursuant to current CVP operations would irreparably harm threatened Central Valley steelhead. Because the remainder of California's motion was denied as moot, the impact of the court's order was limited to the month of May, and the limited injunction would not apply to the duration of California's underlying lawsuit. Whether the State of California or other parties will file further applications for preliminary injunction during the pendency of the action is not yet known. Plaintiffs motion for preliminary injunction is available online *at*: https://oag.ca.gov/system/files/attachments/press-docs/Memorandum%20in%20support%20of%20Preliminary%20Injunction.pdf.
(Miles Krieger, Steve Anderson)

ENVIRONMENTAL GROUPS FILE SUIT OVER LONG-TERM STATE WATER PROJECT OPERATIONS

In late April 2020, several environmental groups filed suit against the California Department of Water Resources (DWR) seeking to vacate DWR's approval of a long-term operations plan for the State Water Project. The lawsuit alleges violations of the Delta Reform Act, the California Environmental Quality Act (CEQA), and the public trust doctrine. The lawsuit appears to be aimed at reducing water exports from the Sacramento-San Joaquin Delta that petitioners allege cause environmental harm. [Sierra Club et al. v. California DWR (SF.Supp.Ct.).]

Background

The State Water Project is one of the country's largest water conveyance facilities, transporting water from Northern California through the Sacramento-San Joaquin Delta (Delta) south to the Central Valley and southern California. The California Department of Water Resources owns and operates the State Water Project. Twenty-nine public agencies contract with DWR to receive water allocations from the State Water Project, which is capable of delivering approximately 3 million acre-feet of water per year. In most years, however, water deliveries are significantly less than to what contractors are entitled under their contracts with DWR.

In 2009, California enacted the Delta Reform Act, which set forth coequal goals related to managing Delta resources. In particular, the Delta Reform Act establishes a state policy that the Delta be managed to provide a reliable water supply throughout California and to restore, protect, and enhance the Delta ecosystem. Over time, several alternative conveyance facilities for the State Water Project have been proposed relating to the Delta. Most recently, a twin-tunnel conveyance project known as Cal WaterFix would convey Sacramento River water flowing into the Delta from the north under the Delta to pumping facilities on the southern portion of the Delta. Cal WaterFix has evolved into a single conveyance-tunnel project (One Tunnel Project). On January 15, 2020, DWR issued a notice of preparation of an Environmental Impact Report (EIR) for the One Tunnel Project under the California Environmental Quality Act, which requires that a lead agency of a project—in this case, DWR—analyze the impacts a proposed project may have on the human environment.

In April 2019, DWR prepared and issued a notice of preparation and scoping for an EIR for the

long-term operation of the State Water Project. On March 27, 2020, following public comment on a draft EIR, DWR approved the long-term operations plan (Project) and certified a final EIR. The instant lawsuit followed shortly thereafter.

The Lawsuit

Petitioners assert three causes of action based on alleged violations of the Delta Reform Act of 2009, CEQA, and the public trust doctrine.

Alleged Delta Reform Act Violations

Petitioners allege that DWR's approval of the Project violates the Delta Reform Act for a variety of reasons. For instance, petitioners contend that DWR's approval conflicts with the state's declared policy in the Delta Reform Act because: 1) the Project as approved does not reduce reliance on the Delta in meeting California's future water supply needs, and 2) the Project replaces foundational principles of reasonable use and the public trust doctrine with maximization of water exports from the Delta. Accordingly, petitioners allege that the Project's approval is inconsistent with the declared policy of the state expressed in the Delta Reform Act.

Petitioners also allege that the Project largely ignores the Delta Reform Act and conflicts with the "coequal goals" articulated in it to: 1) provide a more reliable water supply for the state and 2) protect, restore, and enhance the Delta ecosystem. In particular, petitioners contend that the Project does not provide a more reliable water supply for California, because it allegedly does not determine "actual water rights" as opposed to "paper water rights" for purposes of identifying the availability of water supplied by the Delta. At the same time, petitioners argue that the Project does not identify operational requirements and flows that are necessary to recover the Delta ecosystem, and therefore does not identify a remaining amount of water available for export that does not impact the Delta Reform Act's ecosystem goals.

Finally, petitioners allege that the single conveyance tunnel project cannot be included in the Delta Plan unless it complies with CEQA and includes a comprehensive review and analysis of operational requirements and flows for recovering the Delta ecosystem, a reasonable range of Delta conveyance facilities, and potential effects of those conveyance facilities on water quality in the Delta. According to petitioners, DWR has not made these determinations or performed these analyses.

Alleged CEQA Violations

Petitioners allege multiple CEQA-related violations against DWR. Petitioners accuse DWR of omitting facts or including inaccurate evidence pertaining to DWR's EIR for the Project. Petitioners ultimately argue that DWR did not use its best efforts to identify, analyze, and disclose the Project's environmental impacts, and thus that the Project's approval and certification of the EIR are not supported by substantial evidence. In particular, petitioners allege that the EIR fails to analyze significant environmental impacts, including impacts created by water exports from the Delta on the Delta ecosystem and fishing or recreational activities. Petitioners allege that DWR characterizes many potential impacts as "uncertain" in an effort to avoid disclosing significant environmental impacts that would logically result from reduced freshwater inflow to the Delta due to water exports. Such impacts allegedly include declining fish populations, such as the Delta smelt and salmonid species for which the Delta provides critical habitat.

Petitioners also focus on the alleged absence of the One Tunnel Project from the EIR. For instance, Petitioners allege that the EIR fails to define, disclose, and even conceals, the One Tunnel project by omitting it from the identified list of water supply and management projects in the EIR. Petitioners juxtapose the perceived absence of the One Tunnel Project from the EIR with allegations that DWR has been developing One-Tunnel Project design and related processes with water purveyors that may result in $300 million in expenditures over the next several years. Accordingly, petitioners assert that DWR fails to adequately analyze the Project's cumulative and future impacts—including from the related One Tunnel Project that Petitioners contend is absent from the EIR and thus renders inadequate any analysis regarding cumulative impacts from the Project.

Petitioners also contend that the EIR insufficiently analyzes a "no Project" alternative, environmental baselines, and climate change, and fails to recognize advancements in technology to curtail exports. An additional failure in the EIR, according to petitioners, is the absence of any analysis regarding recently proposed federal commitments to maximize exports

from the federally operated Central Valley Project (CVP) that also takes water from the Delta. Taken together, petitioners allege that these shortcomings violate CEQA, and thus the EIR is not supported by substantial evidence.

Alleged Public Trust Violations

Petitioners' third cause of action is based on the public trust doctrine. The public trust doctrine generally provides that the state has a duty to manage natural resources held in trust, including water, in the public interest. Petitioners specifically contend that, in approving the Project, DWR failed to properly consider public trust interests and uses; did not balance public trust interests against non-trust interests benefited by the Project; ignored the Delta Reform Act's principle that the public trust doctrine (and reasonable use doctrine) provide the foundation for state water management policy by approving the Project that maximizes exports from the Delta; and did not consider a "public-trust focused" alternative to the Project, *i.e.* a no-single conveyance facility alternative or alternatives that would reduce Project exports. Petitioners also generally allege that the Project approval violates a public trust duty created by California Fish and Game Code § 5937, which provides that fish be kept in good condition downstream of a dam. Presumably, Petitioners view Project operations as qualifying as the type of "dam" structure to which the restrictions imposed by § 5937 might apply.

Conclusion and Implications

Petitioners' lawsuit is one of several involving DWR's long-term operations plan for the State Water Project. These lawsuits have similar characteristics, in that they allege CEQA, Delta Reform Act, and public trust doctrine theories of liability. While it remains to be seen whether petitioners will prevail in their claims, the outcome of this and other lawsuits will likely have significant implications for the One Tunnel Project and future Delta exports. For more information on the petition for writ of mandate and complaint for declaratory and injunctive relief, *see:* https://www.courthousenews.com/wp-content/uploads/2020/04/CalifStateWaterProject-COMPLAINT.pdf.
(Miles Krieger, Steve Anderson)

LAWSUITS EMERGE CHALLENGING NEW GROUNDWATER SUSTAINABILITY PLANS AND GROUNDWATER SUSTAINABILITY AGENCY ACTIONS

As Groundwater Sustainability Agencies (GSAs) throughout California work to implement the Sustainable Groundwater Management Act (SGMA), legal challenges to recently adopted Groundwater Sustainability Plans (GSPs) and related GSA actions are beginning to emerge.

Background

SGMA requires GSAs for all high- and medium-priority basins to achieve groundwater basin sustainability within 20 years of GSP adoption. GSPs for basins that are designated "critically overdrafted" were due January 2020. The deadline is January 2022 for all other high- and medium-priority basins that are neither adjudicated nor subject to management under a qualified GSP alternative plan.

GSA Powers and GSP Requirements

GSAs are afforded statutory powers under SGMA, in additional to the powers held by individual GSA member agencies, including but not limited to:

- Adopt rules, regulations, ordinances and resolutions implementing the sustainability program;
- Impose well registration, metering, spacing and reporting requirements;
- Regulate, limit or suspend groundwater production in accordance with applicable sustainable management criteria and appropriate projects and management actions;
- Impose certain administrative fees and assessments; and

•Take enforcement actions

GSAs are required to consider the best available science and information in developing their GSPs and the projects and management actions to achieve sustainability. (California Water Code § 10723.2.) GSPs are subject to DWR review for compliance with SGMA and the Department of Water Resources' (DWR) GSP Regulations (California Code of Regulations, Title 23, Division 2, Subchapter 2, § 350 *et seq.*).

The GSP Regulations require DWR to consider the following criteria when evaluating GSPs:

•Whether the assumptions, criteria, findings, and objectives, including the sustainability goal, undesirable results, minimum thresholds, measurable objectives, and interim milestones are reasonable and supported by the best available information and best available science.

•Whether the Plan identifies reasonable measures and schedules to eliminate data gaps.

•Whether sustainable management criteria and projects and management actions are commensurate with the level of understanding of the basin setting, based on the level of uncertainty, as reflected in the Plan.

•Whether the interests of the beneficial uses and users of groundwater in the basin, and the land uses and property interests potentially affected by the use of groundwater in the basin, have been considered.

•Whether the projects and management actions are feasible and likely to prevent undesirable results and ensure that the basin is operated within its sustainable yield.

•Whether the Plan includes a reasonable assessment of overdraft conditions and includes reasonable means to mitigate overdraft, if present.

•Whether the Plan will adversely affect the ability of an adjacent basin to implement its Plan or impede achievement of its sustainability goal.

•Whether coordination agreements, if required, have been adopted by all relevant parties, and satisfy the requirements of the Act and this Subchapter.

•Whether the Agency has the legal authority and financial resources necessary to implement the Plan.

•Whether the Agency has adequately responded to comments that raise credible technical or policy issues with the Plan.
GSP Regulations § 355.4(b).

SGMA Related Litigation

SGMA expressly does not authorize a GSA to determine or alter California common law water rights or priorities. (Wat. Code § 10720.5). Rather, water rights determinations remain within the purview of the courts, primarily through the SGMA companion "comprehensive adjudication" legislation (*California Code of Civil Procedure*, Part 2, Title 10, Chapter 7, Article 1, § 830, *et seq.*)

SGMA does, however, establish requirements regarding various types of litigation-related matters pertaining to GSPs and GSA actions, as follows.

A GSA may file an action to validate its GSP under *Code of Civil Procedure* § 860 *et seq.* after 180 days of adopting the GSP. (Wat. Code § 10726.6, subd. (a).) SGMA does not expressly address reverse validation actions, which are set forth separately under the Procedure Code of Civil.

Any judicial action or proceeding to attack, review, set aside, void or annul a GSA ordinance or resolution imposing a new or increased fee under SGMA's fee provisions (namely, Wat. Code §§ 10730, 10730.2, 10730.4) must be commenced within 180 days following the adoption of the ordinance or resolution. (Wat. Code § 10726.6, subd. (c).)

Any person subject to those fees may pay under protest and seek reimbursement through the procedures set forth in the *Revenue and Taxation Code*. (Wat. Code § 10726.6, subd. (d).)

Except for the actions listed above, all other actions of a GSA are subject to judicial review by writ proceedings under § 1085 of the California Code of Civil Procedure.

Recent Lawsuits Challenging GSPs and GSA Actions

Several lawsuits have recently emerged challenging GSPs and other GSA actions, including two nearly identical GSP reverse validation complaints filed by California Sportfishing Protection Alliance (CSPA), and a verified petition for writ of mandate filed by the McMullin Area Groundwater Sustainability Agency (McMullin GSA) against the James Irrigation District and James Groundwater Sustainability Agency (collectively: James GSA) to comply with requirements of the California Public Records Act.

The CSPA Lawsuit—Eastern San Joaquin Groundwater Sub-Basin GSP

In *California Sportfishing Protection Alliance v. Eastern San Joaquin Groundwater Authority, et al.*, Case No. CV-20-001720 (Stanislaus Super. Ct.), CSPA filed a complaint for reverse validation challenging the validity of the GSP adopted in January 2020 for the San Joaquin Valley Groundwater Basin, Eastern San Joaquin Subbasin (DWR Basin No. 5-22.01.). CSPA's complaint is brought pursuant to the SGMA GSP validation action provision (Wat. Code § 10726.6, subd. (a).) and the Code of Civil Procedure validation provision § 863.

CSPA is a:

> California non-profit public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality, wildlife and fishery resources and their aquatic ecosystems and associated riparian habitats.

The named defendants include the Eastern San Joaquin Groundwater Authority, a joint powers authority, and the multitude of the authority's multi-layered GSA member agencies collectively having jurisdiction or responsibility for groundwater or land use management within the area managed under the GSP.

CSPA and its members allege standing to bring the action on the grounds that they "are beneficially interested in defendants' full compliance with SGMA." They further allege that "Defendants owed a mandatory duty to comply with SGMA before approving the GSP" and that they have "the right to enforce the mandatory duties that SGMA imposes upon Defendants." CSPA further invokes the private attorney general doctrine, asserting that the relief sought will confer a significant benefit on a large class of persons by ensuring compliance with lawful environmental review and compliance with local and state zoning law.

The complaint alleges defendants failed to comply with SGMA's procedural and substantive requirements. It asserts that the GSP will not achieve sustainability within 20 years as required by SGMA, and asserts failures to comply with each of the GSP criteria set forth in GSP Regulation § 355.4 (see above). The compliant further alleges that the GSA defendants failed to "adequately engage the public in planning and adopting the GSP," citing "violations of SGMA" described in various comment letters submitted by CSPA and other entities.

CSPA's alleged SGMA violations primarily center on issues regarding environmental beneficial uses and users, surface water-groundwater connectivity, groundwater dependent ecosystems, climate change considerations, public outreach. CSPA seeks an order declaring the GSP and its adoption are invalid, together with attorney's fees, costs and other relief.

The CSPA Lawsuit—Delta-Mendota Sub-Basin

In *California Sportfishing Protection Alliance v. San Luis & Delta-Mendota Water Authority, et al.*, Case No. CV-20-0017480 (Stanislaus Super. Ct.) CSPA simultaneously filed a similar complaint on the same day for reverse validation challenging the validity of six coordinated GSPs collectively adopted in January 2020 for the Delta-Mendota Sub-basin Basin (DWR Basin No. 5-22.01). Defendants in that case include multiple GSAs and member agencies (observed by some commentators as one of the most complex GSA organizations in California).

The claims, allegations and relief sought virtually mirror CSPA's companion lawsuit, but also center on issues regarding GSP components pertaining to groundwater storage and other aspects, citing various comment letters previously submitted to the GSAs.

Case Management Conferences for each CSPA case are currently scheduled to be heard in July.

The McMullin GSA Lawsuit—Kings Sub-Basin

In *McMullin Area Groundwater Sustainability Agency v. James Irrigation District et al.*, Case No. 20CECG00507 (Fresno Super. Ct.), McMullin GSA seeks a writ of mandate to compel James GSA to disclose requested records in accordance with the California Public Records Act. The complaint describes the requested records to include information related to James GSA's "extraction and use of groundwater from within Petitioner's groundwater management area in the Kings Sub-basin." The complaint alleges that James GSA "operates groundwater extraction facilities within [McMullin GSA's] groundwater management boundaries" and that McMullin GSA "has a direct interest" in James GSA's:

> (1) groundwater extraction from the McMullin GSA's area;
>
> (2) export of groundwater from the McMullin GSA's area;
>
> (3) use of groundwater extracted from within and exported out of McMullin GSA's boundaries; and
>
> (4) compliance with McMullin GSA's sustainable groundwater management activities over its portion of the Kings Subbasin pursuant to SGMA.

The complaint alleges that responsive documents were not produced or wrongfully withheld under the public records law over more than a seven-month period. It asserts that the requested documents contain information necessary for implementation of SGMA. James GA recently filed a detailed verified answer to the complaint, including additional allegations that McMullin GSA was provided but declined to pursue opportunities to review requested records, also citing applicable provisions of the complex GSA coordination agreement regarding records inspections. At the time of this writing, a motion to transfer venue to Kern County Superior Court was scheduled to be heard in early June.

Conclusion and Implications

The requirements imposed by SGMA and the Department of Water Resources regulations are both significant and complex. Managing groundwater basins to achieve long-term sustainability requires careful analysis of local basin conditions and thoughtful technical and policy consideration in developing effective projects and management actions. Early, meaningful and frequent stakeholder engagement is critical to GSA success. Though GSAs have been formed and many GSPs have been adopted, the vast majority of the SGMA process lies ahead. All GSPs submitted to date remain subject to DWR review, which may take up to two years—right about when the many dozen remaining GSPs are due for submission to DWR. In the meantime, these and other lawsuits are testing local SGMA implementation and could potentially have broader SGMA implications. (Derek R. Hoffman)

RECENT FEDERAL DECISIONS

DISTRICT COURT HOLDS CAFO CITIZEN SUIT FAILS TO ESTABLISH 'IMMINENT AND ONGOING THREAT' UNDER RCRA AND THE CLEAN WATER ACT

Garrison v. New Fashion Pork, LLP, ___F.Supp.3d___,
Case No. 18-CV-3073-CJW-MAR (N.D. Iowa Mar. 27, 2020).

Recently the U.S. District Court for the Northern District of Iowa was faced with claims of water and soil contamination from runoff and manure spreading from a nearby confined animal feeding operation (CAFO). In the end, plaintiff was unable to establish any ongoing actions, thus failing in it's case under RCRA or the federal Clean Water Act.

Factual and Procedural Background

Defendants, New Fashion Pork, LLP, own and operate a confined animal feeding operation in Emmet County, Iowa on a piece of land known as the "Sanderson property." Plaintiff, Gordon Garrison, is an adjacent landowner. Plaintiff alleged that defendants' misapplication of hog manure to defendants' fields caused manure to runoff into water on the plaintiff's property constituting a violation of the federal Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and Iowa statutes, regulations and common law.

The hog manure pit on the Sanderson property is customarily emptied by defendants every fall after the crop harvest is complete. To empty the pit, defendants fill a tanker truck with manure and then apply the manure directly into the soil and cover the manure with another layer of soil. Excess manure that is not applied to defendants' fields is sold as fertilizer to other farms.

Plaintiff alleged that, on two separate occasions, defendants improperly applied the manure to fields on the Sanderson property, causing the manure to run off the Sanderson property and into water on plaintiff's property. First in 2016, plaintiff observed defendants apply manure to the Sanderson property when the soil was saturated. Second, in the fall of 2018, defendants applied manure on top of frozen ground and snow. Because the ground at the Sanderson property was too frozen and snow-covered to inject the manure into the soil, the defendants got permission from the Iowa Department of Natural Resources (DNR) to spray manure onto the frozen ground rather than inject it. However, in December 2018, the weather became unreasonably warm, which caused the manure to unfreeze and run off the Sanderson property.

Defendants moved for summary judgment on plaintiff's RCRA and CWA claims and requested the court to decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. The parties also filed separate motions to strike portions of and exclude certain expert testimony reports.

The District Court's Decision

Defendants' Motion for Summary Judgement of Plaintiff's Federal Claims

RCRA's citizen suit provision permits a private party to bring suit only upon a showing that the solid waste or hazardous waste at issue may present an imminent and substantial endangerment to health or the environment. The CWA similarly requires a Plaintiff to demonstrate an "imminent an ongoing threat." Thus, in order to prevail on its motion for summary judgement, Defendants were required to demonstrate that the hog manure spreading activity did not present an imminent and ongoing threat under the RCRA or CWA.

Defendant made two arguments in support of their motion. First, defendant argued that plaintiff could not show an ongoing violation because defendants did not apply the manure on the Sanderson property following the 2019 harvest, electing instead to dispose of the manure from the Sanderson property onto another property owned by the defendants. Second, defendants argued that plaintiff did not have sufficient evidence to meet the threshold "imminent and

ongoing" requirement under the RCRA or CWA.

In response, plaintiff argued that defendants' decision to apply the manure to other fields and a statement from defendants' environmental manager that the lawsuit was "definitely a consideration" in defendant's decision to begin spreading manure elsewhere effectively served as an admission that defendants were creating an imminent and substantial endangerment. Second, that water test results show that defendants' repeated application of manure to the Sanderson field polluted plaintiff's property. Finally, plaintiff argued, that the manure was disposed of in violation of the RCRA's anti-dumping provision.

Defendants' Change in Manure Spreading Practice

In regards to defendants' first argument, the court reasoned that in order for the court to find that defendants' changed spreading practice showed there was no threat of future or imminent harm, there must be clear evidence demonstrating that the original spreading practice could not reasonably be expected to recur. Defendants had done nothing to show that they would not start applying manure to the Sanderson property after the lawsuit is resolved.

The court was also unpersuaded by plaintiff's argument that defendants' change in spreading practice demonstrated an imminent and ongoing threat, and constituted an admission of such a finding. First, the court held that the change in practice alone did not show an imminent and ongoing threat. Second, defendants' environmental manager's statement was not sufficient evidence.

Plaintiff's Physical Observations and Water Test Results

Turning to plaintiff's second argument, the court held that plaintiff's physical observations and water test results failed to establish a substantial endangerment to plaintiff's property. On the issue of physical observations, the plaintiff provided deposition testimony that plaintiff once observed manure applied to saturated soil. The court determined that a single observation was insufficient to establish an imminent and ongoing threat. On the issue of water test results, the court determined that the results would need to show a pattern of periodic spikes of nitrate levels in the water correlating to defendants' emptying of the manure pit. Plaintiff's water samples, however did not indicate such a pattern. The court also found plaintiff's argument that it takes time for over applied manure to work its way through the soil, into the plaintiff's drainage system and into plaintiff's stream was unpersuasive. It held that plaintiff's second argument failed because the water tests did not establish a discernable pattern of violations, and further that, plaintiff failed to provide sufficient evidence showing that the nitrate levels were caused by defendants' misapplication.

Open-Dumping in Violation of the RCRA

Plaintiff also argued that Defendants' over application of manure constituted "open dumping" in violation of RCRA. The court held that this argument also failed because the plaintiff failed to cite to any authority supporting its assertion that the open dumping prohibition was exempted from the threshold requirement under the citizen suit provision of the RCRA that the violation must be ongoing. Thus, the court determined the plaintiff waived this claim by failing to cite any supporting legal authority.

Remaining Claims

The court declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims and dismissed them without prejudice. The court was also presented with the parties' motion to strike and exclude certain expert witness reports. The court determined the grant of defendants' summary judgement rendered this issue moot.

Conclusion and Implications

This case demonstrates that a single occurrence of a past violation is not sufficient to meet the "imminent and ongoing" threshold requirement under the RCRA or the CWA.

(Nathalie Camarena, Rebecca Andrews)

DISTRICT COURT FINDS NATIONWIDE PERMIT FOR KEYSTONE XL PIPELINE PROJECT VIOLATES THE ENDANGERED SPECIES ACT

Northern Plains Resource Council v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. CV-19-44-GF-BMM (D. Mt. Apr. 15, 2020, *amended* order May 11, 2020).

The U.S. District Court for the District of Montana recently declared that the U.S. Army Corps of Engineers (Corps) violated the federal Endangered Species Act (ESA) when it reissued Nationwide Permit 12 (NWP 12), a streamlined general permit used to approve the Keystone XL pipeline and other pipelines and utility projects pursuant to § 404(e) of the federal Clean Water Act. On April 15, 2020, the court determined the Corps did not properly evaluate NWP 12 under the ESA when it determined that reissuance of the permit would have no effect on listed species or critical habitat. Further, the Corps' decision not to initiate formal programmatic consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) in reissuing NWP 12 was also "arbitrary and capricious in violation of the Corps' obligations under the ESA." The court's order completely vacated the NWP 12 permit. In a subsequent order dated May 11, 2020, the court narrowed the *vacatur* to apply only to projects for the construction of new oil and gas pipelines, but not routine maintenance, inspection, and repair activities on existing projects. Thus, the court's order "prohibit[s] the Corps from relying on NWP 12 for those projects that likely pose the greatest threat to listed species."

Factual and Procedural Background

Plaintiffs include six environmental organizations that sued the Corps alleging violations of the Endangered Species Act, the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) following its reissuance of NWP 12 in 2017. The Corps issued NWP 12 for the first time in 1977.

Section 404 of the CWA requires any party seeking to construct a project that will discharge dredged or fill material into jurisdictional waters to obtain a permit. The Corps oversees the permitting process and issues both individual permits and general nationwide permits to streamline the process. The discharge may not result in the loss of greater than one-half acre of jurisdictional waters for each single and complete project. For linear projects like pipelines that cross waterbodies several times, each crossing represents a single and complete project. Projects that meet NWP 12's conditions may proceed without further interaction with the Corps.

Under § 7(a)(2) of the ESA, the Corps is required to ensure any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. The Corps must determine "at the earliest possible time" whether its action "may affect" listed species and critical habitat. If the action "may affect" listed species or critical habitat, the Corps must initiate formal consultation with the Services. No consultation is required if the Corps determines that a proposed action is not likely to adversely affect any listed species or critical habitat. Formal consultation begins with the Corps' written request for consultation under ESA § 7(a)(2) and concludes with the Services' issuance of a Biological Opinion whether the Corps' action likely would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

On January 6, 2017 the Corps published its final decision reissuing NWP 12 and other nationwide permits. The Corps determined that NWP 12 would result in "no more than minimal individual and cumulative adverse effects on the aquatic environment" under the CWA, and that NWP 12 complied with both the ESA and NEPA. The Corps did not consult with the Services based on its "no effect" determination, as the ESA does not require consultation if the proposed action is determined to not likely adversely affect any listed species or critical habitat.

Following the Corps' final decision, Plaintiffs challenged the Corps' determination not to initiate programmatic consultation with the Services under ESA § 7(a)(2) to obtain a Biological Opinion.

The District Court's Decision

The court considered plaintiffs' claim that the Corps acted arbitrarily and capriciously in reaching its "no effect" determination, and that the Corps should have initiated programmatic consultation with the Services when it reissued NWP 12. The court analyzed whether the Corps "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

Reissuance of the Nationwide Permit Impacted Listed Species and Habitat

First, the court determined "resounding evidence" existed that the Corps' reissuance of NWP "may effect" listed species and their habitat. The court quoted statements by the Corps itself in its final determination documents acknowledging the many risks of authorized discharges by NWP 12. The Corps noted that activities authorized by past versions of NWP 12 "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources" including "permanent losses of aquatic resource functions and services." Further, the Corps acknowledged that utility line construction "*will* fragment terrestrial and aquatic ecosystems" and that fill and excavation activities cause wetland degradation and losses. The court concluded that "[t]he types of discharges that NWP 12 authorizes 'may affect' listed species and critical habitat, as evidenced in the Corps' own Decision Document." Thus, under the ESA's low threshold for § 7(a)(2) consultation, "[t]he Corps should have initiated Section 7(a)(2) consultation before it reissued NWP 12 in 2017." The court also cited plaintiffs' expert declarations which demonstrated that reissuance of NWP 12 may affect endangered species, including pallid sturgeon populations in Nebraska and Montana, and the endangered American burying beetle. The declarations added to the "resounding evidence" in support of the conclusion that the Corps' actions "may affect" listed species or critical habitat.

Circumvention of the Consultation Process

Next, the court addressed the Corps' argument that it was authorized to circumvent § 7(a)(2) consultation requirements for programmatic consultation with the Services by relying on project-level review or General Condition 18, which provides that a nationwide permit does not authorize an activity that is "likely to directly or indirectly jeopardize the continued existence of a" listed species or that "will directly or indirectly destroy or adversely modify the critical habitat of such species." The court noted that a federal court previously concluded that the Corps should have consulted with the Services when it reissued NWP 12 in 2002. Further, the Corps had a history of consultation when it reissued NWP 12 in 2007 and 2012.

The court concluded that the Corps could not circumvent the consultation requirements of the ESA by relying on project-level review because "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." By contrast, project-level review, "by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat." Similarly, General Condition 18, "fails to ensure that the Corps fulfills *its* obligations under ESA § 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees." Thus, the Corps could not delegate its duty to determine whether NWP authorized activities will affect listed species or critical habitat.

Conclusion and Implications

In the end, the District Court concluded that the Corps' "no effect" determination and resulting decision to forego programmatic consultation "proves arbitrary and capricious in violation of the Corps' obligations under the ESA." The court vacated NWP 12 and enjoined the Corps from authorizing activities thereunder. In its amended order, the court limited the scope of its order to the construction of new oil and gas pipelines.

This case emphasizes the low threshold for § 7(a)(2) consultation for any activity that "may affect" listed species and critical habitat, and the need to comply with the ESA's procedural consultation requirements. The District Court's decision is available online at: https://ecf.mtd.uscourts.gov/doc1/11112687968.

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