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CALIFORNIA WATER™
LAW & POLICY Reporter

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CALIFORNIA WATER NEWS

NINE ORANGE COUNTY WATER AGENCIES CONSIDER LITIGATION OVER PFAS CONTAMINATION

Nine Orange County, California water agencies are considering filing a lawsuit against chemical manufacturers of per- and polyfluoroalkyl substances, commonly known as PFAS, including 3M and DuPont, in order to fund cleanup of the "forever chemical" in groundwater in Orange County. PFAS contamination is an increasing concern nationwide, and states including California are currently implementing their own standards for the chemical. Accordingly, cleanup and removal costs associated with PFAS are rising.

Background

Per- and polyfluoroalkyl substances, commonly known as PFAS, are a large group of chemical compounds that do not occur naturally in the environment. PFAS substances are oil, water, temperature, chemical, and fire resistant. This makes them difficult to break down in the environment or through treatment. PFAS were first commercially produced in the 1940s. Two of the most commonly found PFAS chemicals, perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), are no longer manufactured in or imported into the United States.

PFAS can be found in firefighting foam, food packaging, commercial household products such as nonstick cookware, drinking water, and living organisms, including fish, animals, and humans. There is some scientific evidence that levels of exposure of PFAS may lead to cancer, low infant birth weights, immune system problems, and thyroid hormone disruption.

Currently, there is no federal regulation of PFAS as a hazardous waste or pollutant. In 2016, the U.S. Environmental Protection Agency (EPA) issued a Lifetime Health Advisory (LHA) of 70 parts per trillion for PFOS and PFOA combined, and a recommendation that water systems notify their customers when the combined PFOS and PFOA levels exceed the LHA. In February 2020, EPA announced its preliminary determination to regulate PFOS and PFOA in drinking water. Once an interagency review is complete, EPA will submit a national maximum contaminant level (MCL) proposal that will set the drinking water limit nation-wide.

In February 2020, the California State Water Resources Control Board (SWRCB) announced it would set response levels (RLs) of 10 parts per trillion (ppt) for PFOA and 40 ppt for PFOS. If a water system tests above the response levels for PFOA or PFOS, the water system is required to take the affected water source offline, treat the source, and notify its customers in writing. This action followed on the SWRCB's August 2019, decision to reduce the drinking water notification level (NL) from 14 to 5.1 ppt for PFOA and from 13 to 6.5 ppt for PFOS.

As a result of California's new response levels for PFOA and PFOS, water agencies across the State have temporarily removed wells from service as they begin treatment. In preparation for potentially more stringent standards, water agencies across the state are strategizing how to treat and remove the chemical from their water supply. In Orange County, specifically, 71 of 200 drinking water wells could be shut down due to PFAS levels.

The Orange County Water District Considers Lawsuit

Orange County Water District (OCWD), is comprised of 19 member agencies and serves nearly 2.5 million residents. The agency is in the process of developing plans to construct new PFAS treatment plants that will remove PFAS from the groundwater it uses for its primary supply. These new systems will take two to three years to become fully operational. OCWD estimates that its total cost for PFAS cleanup, increased imported water supply, and construction and maintenance of new treatment facilities, could cost nearly $1 billion. In order to meet water supply demands in the short-term, OCWD's member agencies are relying on imported water supplies from northern California and the Colorado River.

While it is not publicly known exactly which

companies OCWD will file claims against, PFAS manufacturers that may be subject to OCWD's lawsuit include 3M, Dupont, and Chemours. These companies are also involved in lawsuits related to PFAS contamination nationwide. In May, more than 200 property owners in North Carolina filed a federal lawsuit against DuPont and Chemours in the U.S. Eastern District Court of North Carolina. There, property owners seek punitive damages to cover the cost of cleaning the PFAS contamination on their properties and installing water filters to remove PFAS from the drinking water supply. The state of New Hampshire filed a lawsuit claiming the polluted water is a result of the chemicals and requests that the chemical manufacturers be held financially responsible for the cost of treatment and cleanup.

In previous cases, these chemical companies have settled PFAS contamination lawsuits for hundreds of millions of dollars. In 2017, DuPont and Chemours agreed to pay $671 million to settle 3,550 personal injury claims from residents in Ohio and West Virginia for polluting an area around a manufacturing plant. In 2018, 3M settled a lawsuit with Minnesota, agreeing to pay $850 million for releasing PFAS in the ground and into the Mississippi River from 1950 to 2000. Thus, there may be some precedent for remedies that may be available to OCWD should it decide to initiate legal action.

Conclusion and Implications:

If OCWD pursues litigation, it is possible that other water agencies in southern California will join, expanding the size and scope of the litigation. Alternatively, water agencies may wait to see the results of the litigation if it moves forward, and then decided to take separate, subsequent legal action against the chemical manufacturers. Entities affected by PFAS are working on how to effectively and efficiently clean up the contamination using directives from the federal and state governments. However, with limited federal or state financial aid for cleanup, more individuals may turn to legal action against the chemical manufacturers that caused the pervasive contamination. The potential financial remedies that may be available could elevate litigation as a means of obtaining compensation to cover clean-up costs associated with PFAS.
(Sofia McGraw, Steve Anderson)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES ENVIRONMENTAL DOCUMENT FOR REPAIR OF FRIANT-KERN CANAL IN CALIFORNIA

The U.S. Department of the Interior, Bureau of Reclamation (Bureau) has released its environmental document for a project intended to repair the Friant-Kern Canal, entitled the Friant-Kern Canal Middle Reach Capacity Correction Project (Project). The Project aims to restore the capacity of a 33-mile reach of the Friant Kern Canal (FKC), located in California, to its original design and constructed capacity level, which has been reduced by over 50 percent as a result of subsidence and design deficiencies.

Bakground

In 1942, the Bureau completed construction of Friant Dam, located on the San Joaquin River (SJR) about 16 miles northeast of Fresno, California, as part of the federal Central Valley Project (CVP). Friant Dam serves CVP contractors through three separate river and canal outlets: the SJR, the Madera Canal, and the FKC. The FKC conveys water by gravity more than 152 miles in a southerly direction from Millerton Lake to the Kern River four miles west of Bakersfield.

Since completion of construction by the Bureau in 1951, the FKC lost its ability to fully convey its previously designed and constructed capacity, resulting in restrictions on water deliveries to CVP contractors. The reduction in capacity is considered to be a result of several factors, including regional land subsidence and original design limitations. For example, under existing conditions estimated maximum conveyance capacity in the middle reach of the FKC is 1,323 cubic feet per second (cfs). Under the preferred alternative for the Project, capacity would be restored to 4,000 cfs.

In 1988, a coalition of environmental groups led by the Natural Resources Defense Council (NRDC) filed a lawsuit entitled *NRDC et al. v. Kirk Rodgers et al.*, which challenged the renewal of long-term water service contracts between the United States and certain CVP Contractors. NRDC, Friant Water Authority (FWA), certain CVP contractors and the U.S. Departments of the Interior and Commerce agreed to terms and conditions of a Stipulation of Settlement (Settlement) of that action. The Settlement established a "Restoration Goal" related to, among other things, releases of water from Friant Dam to the confluence of the Merced River and a "Water Management Goal" that, among other things, is intended to reduce or avoid adverse water supply impacts to Friant Contractors resulting from the release of Restoration Flows.

As part of federal legislation implementing the Settlement relative to the Water Management Goal—as provided for in Public Law 111-11, § 10201 and the Water Infrastructure Improvements for the Nation Act— the Bureau's Project is to restore conveyance capacity of the FKC Middle Reach to such capacity as it was designed and constructed by the Bureau, and increase the storage capacity in Millerton Lake through improved operations at Friant Dam.

The Environmental Analysis

In its Public Draft Environmental Impact Statement / Environmental Impact Report (EIS/EIR) for the Project, the Bureau analyzed two Project Alternatives to address subsidence impacts: 1) a Canal Enlargement and Realignment Alternative (CER Alternative); and 2) a Canal Enlargement Alternative (CE Alternative). The designed flow rates of the Project Alternatives would restore the capacity of the Middle Reach of the FKC to the original design rates of between 3,500 cfs and 4,500 cfs for each of four separate FKC canal segments. For purposes of the California Environmental Quality Act (CEQA), FWA has identified the CER Alternative as the "Proposed Project." The Bureau of Reclamation has not yet identified a "Preferred Alternative" as per regulations under the National Environmental Policy Act (NEPA) regulations. The Bureau has stated the Preferred Alternative will be identified in the Final EIS/EIR. Major characteristics of preferred alternative,

the CER Alternative, include raising approximately 13 miles of the existing FKC, constructing a new 20-mile realigned canal, replacing check structures and siphons at Deer Creek and White River, and replacing road crossings, turnouts, and various associated utilities.

The No Action/No Project Alternative (No Action Alternative) includes projected conditions as they would exist in the year 2070 if the Project is not implemented. Under the No Action Alternative, the Bureau and FWA would not take additional actions towards restoring the capacity of the FKC Middle Reach. The Bureau identified four foreseeable actions that would affect future conditions in the Project area if no action was taken:

(1) annual Restoration Flow volume would increase through 2025 when SJR channel improvements allow for full and continued release of annual Restoration Flow volume;

(2) additional subsidence would further reduce the FKC Middle Reach capacity, which would further reduce CVP water supplies to some CVP Contractors;

(3) full compliance with the state's Sustainable Groundwater Management Act would restrict groundwater pumping and preclude the ability of CVP Contractors to offset reduced FKC water deliveries with additional groundwater supplies; and

(4) CVP Contractors would attempt to minimize water delivery impacts by rescheduling allocated CVP water supplies in available Millerton Lake conservation space (storing) for delivery at a later time.

Conclusion and Implications

Years after the San Joaquin Settlement, much effort has been made to achieve the Settlement's Restoration Goal. The Project represents a step toward achieving the Settlement's Water Management Goal. FWA initiated the CEQA process by issuing a Notice of Preparation on December 2, 2019, and during the initial scoping period, the Bureau of Reclamation and the Friant Water Authority received a total of 11 comments. A public presentation of the Project by the Bureau occurred on June 8, 2020, and the comment period on the environmental document extended through June 22, 2020.
(David Cameron, Meredith Nikkel)

CALIFORNIA DEPARTMENT OF WATER RESOURCES INCREASES STATE WATER PROJECT WATER DELIVERIES—BUREAU INCREASES WATER ALLOCATIONS FROM THE CVP

The California Department of Water Resources (DWR) recently announced it would increase the previously planned 2020 water deliveries from the State Water Project (SWP) from 15 percent to 20 percent. DWR was able to increase the water delivery allocations to 29 agencies (SWP Contractors) due to the Sierra snowpack conditions resulting from above-average precipitation in May. The U.S. Bureau of Reclamation (Bureau) also recently announced that water allocations from the Central Valley Project (CVP) are increasing at a rate of 5 percent.

Background

The SWP is the largest state-built water and power project in the nation, with over 700 miles of canals and pipelines, 20 pumping plants, four pumping/generating plants, five hydro-electric power plants, 33 storage facilities and 21 reservoirs and lakes. The SWP has a total reservoir storage capacity of 5.8 million acre-feet, in addition to the water already in the delivery system and delivers an average of 2.4 million acre-feet of water annually through its system.

Construction of the SWP started in the 1960s with the first water deliveries to the Bay Area in 1962 and into Southern California in 1972. The SWP has delivered over 70 million acre-feet of water since its first delivery in 1962. Today, the SWP delivers water to 29 SWP Contractors who in turn deliver water to over 23 million Californians and over 750,000 acres of irrigated farmland. The SWP also delivers water to

other public agencies and provides water for wildlife and recreational uses. Approximately 70 percent of SWP deliveries are for urban use and 30 percent are for agricultural use.

The SWP Contractors take deliveries of water from the SWP, pursuant to long-term contracts (Water Contracts) that were entered into when the SWP was created. These Water Contracts obligate the SWP Contractors for the costs of constructing, operating and maintaining the SWP facilities, and for the water that is delivered to them through the SWP facilities. Although SWP Contractors are entitled to 4.2 million acre-feet of water, the SWP is only capable of deliveries on average of between 2.5 million and 3.5 million acre-feet of water.

2020 Annual Water Deliveries

Each October, the 29 SWP Contractors apply to the SWP for the following year's water allocation deliveries, up to the maximum allocation authorized in their individual Water Contracts. Each December, DWR publishes the allocation amounts for the coming year. The annual water allocations are based on several factors, including: 1) historical water supply data, 2) current reservoir storage, and 3) amount of water requested by the SWP Contractors. After the annual allocation is made, DWR continues to monitor climatic conditions, reservoir levels and Sierra snowpack, and may adjust the allocations accordingly. An initial allocation of 10 percent was announced in December 2019 due to a very dry winter. This allocation was increased to 15 percent in January 2020. In May 2020, DWR announced an increase from 15 percent to 20 percent due to the above-average precipitation brought by the recent May storms.

2019 Dry Winter and 2020 May Storms

DWR reported that this year's snowpack was the eleventh driest on record since 1950, and precipitation was the seventh driest on record since 1977. Despite the dry winter, May storms delivered 181 percent of average precipitation for the northern Sierra for this time of year allowing for DWR to slightly revise upward its allocation.

The Central Valley Project

The federal CVP, which is operated by the Bureau, delivers 7 million acre-feet of water on average each year to irrigate approximately 3 million acres of California lands, and supplies drinking water for more than 1 million households. The CVP has long-term agreements to supply water to more than 250 contractors in half of California's 58 counties. Deliveries by the CVP include providing an annual average of 5 million acre-feet of water for farms; 600,000 acre-feet of water for municipal and industrial uses; and water for wildlife refuges and maintaining water quality in the Sacramento-San Joaquin Delta. The construction of the CVP helped propel California to becoming the largest agriculturally productive state in the country, providing 25 percent of the nation's table food. California has led the nation in agricultural and dairy production for the last 50 years.

The Bureau's recent adjustment in allocation results in water users on the west side of the San Joaquin Valley receiving a 5 percent increase in water allocation from 15 to 20 percent of their contracted amount. Municipal and industrial users saw a five percent jump to 70 percent of their contracted amount.

Conclusion and Implications

The recent announcements by the Department of Water Resources and U.S. Bureau of Reclamation are welcome news to water consumers throughout the state. While the recent spring storms helped to mitigate low snowpack conditions, total allocations remain disappointing for most State and CVP Contractors in response to remarkable dry conditions. The Contractors and the communities they serve continue to monitor SWP and CVP trends and to develop local projects and programs promoting resource conservation.
(Chris Carrillo, Derek R. Hoffman)

JUDICIAL COUNCIL AMENDS EMERGENCY RULE TOLLING STATUTES OF LIMITATIONS AS THEY RELATE TO CALIFORNIA ENVIRONMENTAL QUALITY ACT ACTIONS

Back in early April, the California Judicial Council (Council) first adopted Emergency Rule No. 9 to suspend statutes of limitation on all civil cases until 90 days after Governor Newsom lifts the state of emergency related to the COVID-19 pandemic. However, the Council has amended the emergency rule so that it is no longer tied to the state of emergency declaration. The new rule will restart statutes of limitations on set dates—either August 3 or October 1, 2020. Under the amended Emergency Rule 9, the tolling period for actions brought under the California Environmental Quality Act (CEQA) and planning and zoning law expires on August 3, 2020.

Emergency Rule No. 9

On April 6, 2020, the Judicial Council adopted 11 temporary emergency rules in response to the COVID-19 pandemic. The Judicial Council's Emergency Rule No. 9 tolled statutes of limitations for all civil causes of action "until 90 days after Governor [Newsom] declares that the state of emergency related to the COVID-19 pandemic is lifted." Although it was unclear at the time, many worried that the rule would also apply to toll the deadline for filing a writ petition under CEQA because writs of mandate are considered special proceedings of a civil nature and are governed by the same rules in Part II of the Code of Civil Procedure that apply to ordinary civil actions. (Code Civ. Proc., § 1109.)

Because Emergency Rule No. 9 was so broad in scope, developers and anti-NIMBY groups were up in arms because this extended tolling period goes against the legislative intent behind having short statutes of limitations for CEQA and other land use-related legal challenges. For example, the time for filing certain initial pleadings under CEQA is 30, 35, or 180 days (Pub. Resources Code, § 21167); 60 days for claims under the California Coastal Act (Pub. Resources Code, § 30802) and validation actions (Code Civ. Proc., § 860); and 90 days for cases challenging governmental actions for which a shorter statute of limitations has not been set.

COVID-19's Ongoing Impacts in California

Although the Governor proclaimed a state of emergency on March 4, 2020, the state of emergency has not yet ended, and there is no indication when the emergency proclamation will be lifted. The uncertainty surrounding when the Governor's state of emergency order will be lifted put the deadline to file a CEQA challenge in flux, giving would-be challengers significantly more time to file an action. Under Emergency Rule 9, as it was originally drafted, the time in which to bring such actions could be tripled beyond the statutory time even after the state of emergency is lifted. This was problematic because a long tolling is inconsistent with the short limitation periods in statute and the legislature's intent that such causes of action be brought expeditiously. Various interested groups requested the Judicial Council to clarify how Emergency Rule No. 9 would affect CEQA actions. Up until the recent clarification, this was an evolving situation, with no clear answer regarding whether the rule applied to CEQA actions.

Amendments to the Emergency Rule

On May 29, 2020, the Judicial Council adopted amendments to Emergency Rule No. 9 to provide fixed dates for the tolling of civil statutes of limitations. The amendment suspends from April 6 to October 1 the statutes of limitations for civil causes of action that exceed 180 days, and suspends from April 6 to August 3 the statutes of limitations for civil causes of action that are 180 days or less. Causes of action with short-term statutes of limitation, such as CEQA actions, have the more immediate deadline of August 3 because those deadlines are designed to ensure that any challenges are raised more quickly.

The Judicial Council proposed August 3, 2020, as the earlier end date to ensure that courts will be able to process the civil actions and provide certainty and reasonable notice to litigants of the end of the tolling period, without overly impacting the construction and homebuilding industry or other areas in which the legislature has mandated short statutes of limitation. All said, the amended tolling rule results in a

total tolling period of approximately four months for those actions that have a statute of limitations under 180 days.

Conclusion and Implications

As California begins a phased re-opening and courts restore services shuttered due to the COVID-19 pandemic, we are likely to see an end to certain emergency measures that were adopted to address the global health hazard. However, because the pandemic presents an unprecedented crisis, the Judicial Council may re-institute certain emergency measures if health conditions worsen or change. Therefore, it is important to check court websites frequently to keep up to date with changes to critical filing deadlines.

The Judicial Council's Circulating Order Memorandum relating to the Emergency Rule No. 9 amendment is accessible at the following link: https://jcc.legistar.com/View.ashx?M=A&ID=790621&GUID=A0ED0998-D827-4792-9BD1-A3A4FC-F939AA
(Nedda Mahrou)

LAWSUITS FILED OR PENDING

FEDERAL WATER CONTRACTS, APPROVED UNDER WATER INFRASTRUCTURE IMPROVEMENTS ACT, CHALLENGED BY ENVIRONMENTAL GROUPS IN RECENT LAWSUIT

The U.S. Bureau of Reclamation (Bureau) finds itself in a legal battle over California's water as three environmental groups—the Center for Biological Diversity, Restore the Delta, and the Planning and Conservation League—have filed suit to challenge the Bureau's awarding of permanent federal water contracts to Central Valley Project (CVP) water users. On May 20, 2020, environmental groups filed suit in the U.S. District Court for the Eastern District of California, for Declaratory and Injunctive Relief. [*Center for Biological Diversity; Restore The Delta; and Planning and Conservation League v. United States Bureau of Reclamation; David Bernhardt in his official capacity as Secretary of the Interior; and United States Department of the Interior*, Case 1:20-at-00362 (E.D. Cal 2020).

Advanced Repayment under the WIIN Act

Under § 4011 of the 2016 Water Infrastructure Improvements for the Nation Act (WIIN Act), water users contracted with the Bureau to receive water from the CVP may request that their water service contracts be converted to repayment contracts. This affords the Bureau's contractors the option of prepaying the remaining debts owed by the contractor for CVP construction costs. In doing so, water contractors gain the benefit of no longer being subjected to the limitations involved in such water service contracts—such as those imposed from the Reclamation Reform Act of 1982—in future water contracts with Reclamation and the federal government would receive funding to be used for water infrastructure improvements under the WIIN Act ahead of schedule.

The Federal Water Contracts at Issue

In filing suit against the Bureau, the Environmental Groups opposed the Trump administration's decision making 14 short-term renewable water contracts from the CVP permanent—with notable water world heavyweight Westlands Water District included among them. In addition to these 14 contracts which have already been approved on a permanent basis, the lawsuit also seeks to prevent Reclamation from approving the same for 26 other contracts currently in the process of conversion.

The principal claim of the lawsuit is that the Bureau's approval of these contracts without conducting an Environmental Impact Statement (EIS) or Environmental Assessment (EA) constitutes a violation of the National Environmental Policy Act (NEPA). In defense of the Bureau's actions, the assertion has been that the WIIN Act does not afford the Bureau discretion in converting water service contracts to repayment contracts.

The Environmental Groups, however, have claimed that while the WIIN Act may require the Bureau to convert contracts when requested, the Bureau still has discretion in establishing the terms and conditions of the converted contracts.

Citing potential impacts in approving these contracts without environmental review, the lawsuit continued that some of the effects could include: reducing freshwater flows and worsening already degraded Sacramento-San Joaquin Delta water quality; further endangering and destroying endangered and threatened fish species and critical habitat; reducing freshwater flows causing and worsening harmful algal blooms in the Delta; adverse impacts on public health and safety in the Delta region; and adverse impacts on agriculture in the Delta.

Conclusion and Implications

California's epic water disputes continue to rage on. If the Environmental Groups prove successful in the lawsuit, the Bureau of Reclamation could be in for a flood of NEPA review. With 40 contracts at issue in the lawsuit, a judgment in favor of the plaintiffs here could result in an order that Reclamation conduct the NEPA review for each contractor seeking conversion. Or perhaps a legislative solution of some sort arises. Time will tell.
(Wesley A. Miliband, Kristopher T. Strouse)

RECENT FEDERAL DECISIONS

DISTRICT COURT HOLDS EPA HAS AN ONGOING NONDISCRETIONARY DUTY UNDER THE CLEAN WATER ACT TO UPDATE THE NATIONAL CONTINGENCY PLAN

Earth Island Institute, et al., v. Andrew R. Wheeler, et al.,
___F.Supp.3d___, Case No. 20-CV-00670-WHO (N.D. Cal. June 2, 2020).

On June 2, 2020, the U.S. District Court for the Northern District of California denied defendants Andrew Wheeler and the U.S. Environmental Protection Agency's (collectively: EPA) motion to dismiss plaintiffs' cause of action for violation of the federal Clean Water Act (CWA). On an issue of first impression, the court considered whether the CWA imposes a nondiscretionary duty on EPA to update or amend the National Contingency Plan (NCP): a plan for responding to oil and hazardous substance contamination that was last updated over 25 years ago. District Court Judge William H. Orrick determined EPA's duty to update is nondiscretionary, such that the environmental plaintiffs could bring a cause of action pursuant to the CWA's citizen-suit provision. The court also denied the American Petroleum Institute's motion to intervene, ruling that the lawsuit concerned EPA's procedure, but not any substantive decision.

Factual and Procedural Background

Plaintiffs Earth Island et al., (plaintiffs) sued EPA on January 30, 2020, alleging causes of action under the CWA and the Administrative Procedure Act (APA), claiming that the current NCP is "obsolete and dangerous." Plaintiffs alleged that because the current plan permits the use of chemical dispersants proven harmful to humans and the environment, EPA is required under the CWA to amend or update the plan. Plaintiffs further alleged that EPA violated its duties under the APA to conclude a matter presented to it within a reasonable time. EPA filed a motion to dismiss, and the American Petroleum Institute filed a motion to intervene, which EPA did not oppose. Plaintiffs opposed both motions.

The District Court's Decision

The CWA requires the President to prepare and publish a National Contingency Plan for removal of oil and hazardous substances and to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances. The CWA also provides that the NCP "may, from time to time, as the President deems advisable" be revised or otherwise amended.

Under the CWA's citizen suit provision, a citizen may bring suit against the EPA where there is alleged a failure to perform any act or duty which is not discretionary. To state a claim for relief, the citizen suit must allege "a nondiscretionary duty that is 'readily-ascertainable' and not 'only [ ] the product of a set of inferences based on the overall statutory scheme.'"

Mandatory Duty

The court first considered EPA's argument that the plain language of the CWA is permissive, not mandatory. The court rejected this argument, noting that EPA's permissive plain language argument appeared valid on first review "without context," however courts routinely note that "may" does not always indicate discretionary or permissive action. As it related to the CWA, the court also observed the cases interpreting EPA's obligations have held that EPA must review relevant guidelines for possible revision, and that formal revisions must comply with detailed statutory criteria. Here, the court noted that EPA's duty to promulgate the NCP in the first instance is nondiscretionary.

An Ongoing Duty

The court also analyzed the statute's context and found that the CWA requires EPA to take various actions related to the NCP, including: (i) to "prepare and publish the NCP"; (ii) to ensure the NCP provides "efficient, coordinated, and effective action"; (iii) to establish a Coast Guard strike team and

national center to assist in carrying out the NCP, a system of surveillance and notice to safeguard against discharges of oil and hazardous substances and imminent threats of such discharges, and a schedule of dispersants that may be used to carry out the NCP; and (iv) to ensure that removal of oil and hazardous substances "shall, to the greatest extent possible, be in accordance with" the NCP. The court concluded that the NCP requirements in the CWA contemplate an ongoing duty that in turn strongly suggests that the duty to update and revise the NCP is not discretionary, but required.

The also court rejected EPA's interpretation of the statute, because it would allow EPA to "fail to review, update, or amend the NCP for decades, despite scientific advances," incidences of oil and hazardous substances discharges, and "an internal report concluding that the NCP was outdated and inadequate." EPA's interpretation would frustrate the purpose of the statute to achieve an efficient response to pollution.

The Motion to Intervene

Finally, the court denied the American Petroleum Institute's motion to intervene because plaintiffs' complaint attacked only EPA's procedures with respect to amending or revising the NCP, not the substance of the regulations, citing several supporting cases. EPA's rule-making process adequately protected the intervening party's interests.

Conclusion and Implications

The current NCP is more than 25 years old. This decision will obligate EPA to update the NCP with new information related to the use of chemical dispersants proven harmful to humans and the environment. The court's opinion is available online at: https://ecf.cand.uscourts.gov/doc1/035119332281 (Rebecca Andrews, Patrick Skahan)

DISTRICT COURT FINDS BASIC ALLEGATIONS OF FACT WITHIN A 'ZONE OF INTEREST' TO JUSTIFY STANDING UNDER THE CLEAN WATER ACT

Friends of the Capital Crescent Trail v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. JKB-19-106 (D. MD 2020).

The U.S. District Court for Maryland recently addressed standing by an NGO interest group in a small wetlands area and the group's claim to standing under the federal Clean Water Act via their "zone of interest argument."

Background

An avid group of hikers struck out on its third attempt to get a U.S. District Court to stop a light rail project that is planned for an east/west route through the Maryland suburbs near Washington, D.C. In *Friends of the Capital Crescent Trail v. United States Army Corps of Engineers*, the U.S. District Court for Maryland found that the planning process for the project, which took a number of years and considered multiple alternative routes and modes of transit, provided a well articulated rationale for the selection of the route ultimately chosen. The impact of the construction to which the Friends of the Trail objected was the federal Clean Water Act, § 404 dredge and fill permit issued by the U.S. Army Corps of Engineers (Corps) which impacted a half acre of wetlands that was in the vicinity of the project.

The District Court's Decision

The District Court articulated the standards by which the Corps was constrained to reach a decision:

> If a non-water dependent project involves discharging dredge and fill materials into a 'special aquatic site' like a wetland, then the [Clean Water Act] Guidelines establish a presumption that practicable alternatives not impacting special aquatic sites are available, 'unless clearly demonstrated otherwise.' 40 C.F.R. § 230.10(a)(3). Accordingly, the Corps may only issue a permit authorizing discharge in a special aquatic site if the Corps determines that the permit

> applicant has rebutted this presumption. Proof that the Corps made a reasonable determination on this score 'does not require a specific level of detail . . . but only record evidence the agency took a 'hard look' at the proposals and reached a meaningful conclusion based on the evidence. *Hillsdale Envt'l Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1168 (10th Cir. 2012).

Standing—'Zone of Interests' Argument

Before it engaged in the analysis of whether the Corps had done an adequate job of considering practicable alternatives to filling of the small wetland, however, the court examined whether the plaintiffs had adequately established standing to sue. The standing analysis the court went through is probably the most interesting aspect of this case, because, while the result is favorable to the plaintiff organization, the court's analysis shows that the standing question was a very close one to call.

Obviously, the members of the hiking organization enjoyed the ability to walk on and use the Capital Crescent Trail. They clearly had concern for the aesthetics, vistas and natural beauty they would encounter in doing so, and in the ability to exercise and enjoy the hike itself. However, the MTA, one of the defendants, argued to the court that the plaintiffs in an environmental challenge like this, are required to have a valid interest that is within the scope of interests protected by the specific law whose application is allegedly improper. In this case, the Clean Water Act, § 404 permit was alleged to have been improperly granted. The MTA argued that plaintiff members who stated their interests had failed to meet the test of being within the "zone of interests" the Clean Water Act protects.

The court took this CWA zone of interests question seriously. It noted:

> The primary purpose of the CWA, as declared by Congress and recognized by the Fourth Circuit, is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' *Gaston Copper*, 204 F.3d at 151 (quoting 33 U.S.C. § 1251(a)). This is a broad goal, and the CWA's zone of interests has accordingly been held to encompass aesthetic and recreational interests related to water. *See*, *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 263 (4th Cir. 2001) (standing to sue under CWA where changes to a stream on plaintiff's property "significantly interfered with her use and enjoyment" of the stream); *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1039 (9th Cir. 2009) (standing to sue under CWA where members of plaintiff organization used affected area for "hiking, horseback riding[,] and other activities."). However, MTA argues that Plaintiffs' injuries fall outside this broad zone, since Plaintiffs' injuries relate to deforestation and noise-related impacts of the Purple Line project, not 'harms associated with discharges to waters of the United States.'

In the end, the court found standing to sue because one of the plaintiff organizations' members stated in a filed declaration that he took particular interest in the waters affected by the Corps permit. The court noted:

> Fitzgerald identifies these waters with particularity and testifies that though he has recently moved, he concretely plans to return to the waters described in his declaration on at least an annual basis. . . .Though Fitzgerald's injuries within the CWA's zone of interests may be minor, his declarations establish more than the 'identifiable trifle' necessary for standing.

Conclusion and Implications

The court's analysis does not really identify a tangible impact of the project on the member whose "intense interest" was averred. Whether that member could even discern the impacted area of dredge and fill when he enjoyed the project itself was not articulated or demonstrated. In short then, a different court might well have reached a different conclusion about whether an individual's expression of intensity of interest and once a year visits merit the considerable expenditure of time and human effort involved in the judicial contest over a dredge and fill permit that was arguably incidental and of questionable visibility as to the light rail project, the real impact a group of plaintiffs opposes. Sometimes the facts are everything at the trial court level in ruling on motions. This case was no exception.
(Harvey M. Sheldon)

DISTRICT COURT REJECTS DISMISSAL ARGUMENTS, INCLUDING 'DILIGENT PROSECUTION' PROVISION BAR, TO PERMIT TIMELY-FILED, WELL-PLED CLEAN WATER ACT CITIZEN SUIT

Moss v. Sal Lapio, Inc., ___F.Supp.3d___, Case No. 19-3210 (E.D. Penn. June 16, 2020).

Careful allegations of ongoing violations and prompt action, while concurrent enforcement actions are unfolding, saved a Clean Water Act citizen suit from dismissal by the U.S. District Court for the Eastern District of Pennsylvania.

Background

On March 25, 2019, plaintiff Michael Moss sent a notice of intent to sue Sal Lapio, Inc., for violations of the federal Clean Water Act (33 U.S.C. § 1251 *et seq.*, CWA) and the Pennsylvania Clean Streams Law (35 P.S. § 691.1 *et seq.*, the CSL); four days later, Moss sent a notice of intent sue to Schlouch, Inc., the U.S. Environmental Protection Agency (EPA), and the Pennsylvania Department of Environmental Protection (DEP). Lapio and Schlouch are "co-developers" of a residential development denominated "Harrow Manor," which shares a border with Moss' property. Rapp Creek and its tributaries cross both Moss' property and Harrow Manor.

Lapio had obtained a Nation Pollutant Discharge Elimination System (NPDES) permit for Harrow Manor in 2008, which:

> . . .required the establishment of riparian buffers and the installation of erosion and sedimentation (E&S) controls before commencing earth disturbance activities, prohibited earth disturbance within designated riparian buffers, and required areas affected by earth disturbance activities to be promptly stabilized to minimize the potential for erosion.

Schlouch became co-permittee in 2018, and the Permit was renewed on March 19, 2018. Moss' July 23, 2019 complaint alleged that "on March 19, 2019 defendants commenced earth disturbance activities without first installing E&S controls as required by the Permit," and that Lapio and Schlouch "disturbed ground within designated riparian buffers in violation of the Permit." Moss further alleged that because:

> . . .not all of the disturbed areas within the riparian buffers have been stabilized or restored to prevent silt and sediment-laden stormwater runoff from continuing to enter Rapp Creek and its tributaries.

Specific discharges "of silt- and sediment-laden stormwater into two of Rapp Creek's tributaries … allegedly occurred on March 26, 27, and 28, and April 1, 10, 11, and 15 of 2019." Per Moss:

> . . .silt, sediment, stones, leaves and other forest debris washed into Rapp Creek and/or its tributaries due to the uncontrolled stormwater discharges from Harrow Manor have not been removed and continue to pollute, impair and occupy portion of the tributaries to Rapp Creek.

Lastly, Moss alleged "that a large piece of corrugated pipe from the Harrow Manor development washed into a tributary of Rapp Creek on plaintiff's property."

Lapio sought to dismiss Moss' complaint, arguing that the CWA only allows citizen suits for ongoing violations, and that the CWA's "diligent prosecution" provision bars a citizen suit for civil penalties "where the state has commenced an enforcement action." In a variation, Schlouch sought dismissal on the basis of CWA § 1319(g)(6) bars Moss' suit because DEP had commenced an enforcement action, Schlouch took the remedial action required by DEP, and the District Court should defer to the state's enforcement action.

The District Court's Decision

Alleged Failure to Allege Ongoing Violation

Lapio's argument that Moss failed to allege an ongoing violation was easily dispensed with by the District Court. Lapio cited a "Consent Assessment of Civil Penalty entered into between defendants and the DEP in May of 2019 and an Earth Disturbance Inspection Report issued by the DEP in August of

2019," arguing they established any CWA or CSL violations "have been remedied and are 'wholly past.'"

The District Court was not persuaded. While CWA citizen suit plaintiffs "must allege a 'continuous or intermittent violation'" (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.* (*Gwaltney I*), 484 U.S. 49, 64):

> . . .[i]n applying this rule, courts have considered evidence that 'the risk of defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit.' *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988).

The court found that at this stage of the proceeding, plaintiffs need only "make a good-faith allegation of continuous or intermittent violation." *Gwaltney*, 484 U.S. at 64. As Justice Scalia elaborated in his *Gwaltney* concurrence:

> . . .[w]hen a company has violated an effluent standard or limitation, it remains,. . .'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. *Gwaltney I*, 484 U.S. at 69.

The Consent Assessment here merely evidenced that the state regulator, DEP, observed violations and that Lapio (and Schlouch) agreed to pay a penalty, but did not address remediation or prior discharges. Further, the August 16, 2019 Inspection Report was dated after Moss filed his complaint on July 23, 2019.

In light of the CWA's broad definition of pollutant (33 U.S.C. § 1362(6)), Moss' allegations that, as of the date of his complaint, "[n]ot all of the disturbed areas within the riparian buffers have been stabilized or restored to prevent silt- and sediment-laden storm-water runoff from continuing to enter Rapp Creek and its tributaries," leading to continued discharges, and "that a large piece of corrugated pipe from the Harrow Manor site washed into a tributary of Rapp Creek," were sufficient to survive Lapio's motion to dismiss.

Diligent Prosecution Bar Claim

Turning to the dismissal arguments premised on CWA provisions balance regulatory enforcement actions with citizen suits, the District Court rejected Lapio's argument that CWA § 1365(b)(1)(B) bars Moss' suit on the basis that:

> . . .the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. § 1365 (b)(1)(B).

Lapio cited no civil or criminal action filed by either the EPA or DEP. Rather, Lapio cited the [May 2019 Consent Assessment] as evidence that "the state acted immediately after it received Plaintiff's 60 Day Notice." Lapio attempted to argue that, because the state assessed fines, plaintiff's citizen suit is barred. The court found Lapio's argument was without merit under the CWA's diligent prosecution bar absent a civil or criminal action filed by the Government "in a court." 33 U.S.C. § 1365(b)(1)(B). The court thus concluded that the CWA's diligent prosecution bar was inapplicable to the instant action.

Prior Enforcement Bar Claim

Schlouch fared no better with the argument that under CWA § 1319(g)(6) a citizen suit is barred "if there is enforcement by the [EPA] or [DEP]," and "the relevant agency 'requires corrective action or assesses an administrative penalty." Section 1319(g)(6)'s diligent prosecution bar, however, does not apply when notice of an alleged violation of § 1365(a)(1) of this title has been given in accordance with § 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under § 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

Noting that this carve-out from the bar is applied "strictly" (*Black Warrior Riverkeeper, Inc. v. Cherokee Mining*, 548 F.3d 986, 992 (11th Cir. 2008), the court stated:

> . . .if notice has been given prior to the commencement of an enforcement action and the citizen-plaintiff files suit within 120 days of the notice, the citizen suit is not preempted.

Here, Moss' notice was sent to Schlouch, the

EPA and DEP on March 29, 2019. Per the Consent Assessment, DEP "had previously conducted a single inspection of the site on March 27, 2019," while the Consent Assessment was not entered into until late May 2019. As "an enforcement action is not commenced at the initial inspection but instead when a specific penalty is issued pursuant to state laws or regulations that provide for due process protections" (citing *Pub. Interest Research Grp. of N.J., Inc. v. Elf Atochem N. America, Inc.*, 817 F.Supp. 1164, 1172-73 (D. N.J. 1993)), the Consent Assessment did not render Moss' July 2019 complaint barred.

Conclusion and Implications

A private landowner citizen suit, presumably by a less sophisticated and experienced Clean Water Act litigant than a citizen suit brought by an national environmental advocacy group, easily dodged dismissal through competent pleading and persistent, prompt prosecution in the face of concurrent state regulatory action. The court's memorandum opinion is available online at: http://www.paed.uscourts.gov/documents/opinions/20D0325P.pdf
(Deborah Quick)

DISTRICT COURT LEAVES KLAMATH RIVER PROJECT INTERIM PLAN IN PLACE—DENIES MOTION TO LIFT STAY ON LITIGATION OVER CHALLENGE TO BIOLOGICAL OPINION

Yurok Tribe, et al. v. U.S. Bureau of Reclamation, et al.,
___F.Supp.3d___, Case No. 3:19-cv-04405-WHO (N.D. Cal. May 29, 2020).

On May 29, the U.S. District Court for the Northern District of California declined to lift a stay on litigation between the Yurok Tribe and the U.S. Bureau of Reclamation (Bureau) that would have rekindled the tribe's lawsuit challenging a proposed operations plan for the Klamath River Project and related Biological Opinion (BiOp) that the tribe believes would, if implemented, jeopardize the continued existence of salmon and other aquatic species that utilize the Klamath River. Instead, the federal court's ruling leaves in place an interim plan that requires additional water for certain endangered fish species, provided certain hydrological and water supply conditions are met.

Background

The Yurok Tribe (Tribe) filed suit in 2019 challenging the U.S. Bureau of Reclamation's operating plan for the Klamath River Project (Project) for the years 2019-2024. The lawsuit also challenged a related Biological Opinion prepared by the National Marine Fisheries Service (NMFS), which concluded that the Bureau's proposed operation of the Project would not jeopardize the existence of certain fish species. The Project is located in Klamath County, Oregon, and Siskiyou and Modoc counties in northern California. The Project consists of several reservoirs, including Upper Klamath Lake, Clear Lake, and Gerber Reservoir, which serve more than 230,000 acres of farmland in addition to providing recreational water sport opportunities. The Project also regulates water flows on which various endangered aquatic species rely for habitat, reproduction, and rearing, including the Southern Oregon/Northern California Coast coho salmon, lost river sucker, and short nose sucker.

The federal Endangered Species Act (ESA) prohibits the "take" of any species that is listed as threatened or endangered under the ESA without a permit. Under the ESA, "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." For marine and anadromous species like salmon, the Secretary of Commerce is responsible for listing threatened or endangered species, typically following a petition process by interested persons. In addition to listing a species as endangered or threatened, the Secretary must also designate "critical habitat" for each species, to the maximum extent prudent and determinable.

A federal agency such as the Bureau is required under the ESA to consult with NMFS to ensure that any action proposed by the agency will not likely result in jeopardizing the continued existence of a marine or anadromous species, nor adversely affect designated critical habitat. If, it is determined that a

project is likely to adversely affect a listed species or designated critical habitat, the action agency initiates "formal consultation" by providing information related to the potential effects of the agency's action to NMFS, ordinarily via submission of a biological assessment. At the end of formal consultation, NMFS prepares a Biological Opinion. The Biological Opinion contains NMFS' analysis supporting its determination that the proposed action is or is not likely to jeopardize the continued existence of the species or adversely modify critical habitat. If a jeopardy or adverse modification determination is made, the Biological Opinion is referred to as a "jeopardy opinion" and must ordinarily identify reasonable and prudent alternatives according to which a project may move forward without exposing the agency to liability under the ESA. If a BiOp determines that the project is not likely to jeopardize the continued existence of the species, and is thus a "no jeopardy" opinion, the federal action agency is still subject to the terms and conditions of the incidental take statement and any reasonable and prudent measures.

NMFS' BiOp, issued in 2019, is a "no jeopardy" opinion, because it concluded that the Project would not likely jeopardize the continued existence of Southern Oregon/Northern California Coast coho salmon and southern resident killer whales, and would not adversely modify critical habitat for coho salmon. The Tribe filed its lawsuit on July 31, 2019 challenging the Project and the BiOp, and also filed a motion for preliminary injunction seeking up to 50,000 acre-feet of supplemental water to be released for the benefit of coho salmon. After it was discovered that certain computer modeling information was incorrect as it related to critical habitat for coho salmon and the Bureau's determination that the Project would not adversely modify such habitat, Reclamation re-initiated formal consultation with NMFS. The Tribe and the Bureau consequently agreed to stay the litigation until September 2022 in exchange for operating the Project in accordance with an "interim plan" from April 2020 to March 2023.

Under the interim plan, the Bureau would augment flows for coho salmon by as much as 40,000 acre-feet in the May-June period, provided that lake levels in Upper Klamath Lake did not drop below 4,142 feet and the supply in Upper Klamath Lake was forecast to be above 550,000 acre-feet during those months. In the event Upper Klamath Lake falls below that level or stored water is less than 550,000 acre-feet, the interim plan requires the Bureau to consult with NMFS to reallocate water to meet the needs of protected fish species, and obtain the input of the Tribe and other interested parties. Absent any such reallocation, the interim plan's 40,000 acre-foot allocation to coho salmon is comprised of 23,000 acre-feet from the Project's agricultural allocation and 17,000 acre-feet from Upper Klamath Lake. On April 1, The Bureau of Reclamation forecast that Upper Klamath Lake supply would be 577,000 acre-feet, above the 550,000 acre foot threshold required to release 40,000 acre-feet of augmented flows for coho salmon.

The District Court's Decision

In early May, despite its April 1 forecast, the Bureau reduced augmentation flows for coho salmon because lake levels at Upper Klamath Lake dropped below 4,142 feet. The Tribe, deeming the Bureau's determination not to release augmented flows for coho salmon a violation of the interim plan, filed an emergency motion asking the federal court to lift the litigation stay and to re-instate the Tribe's complaint and motion for preliminary injunction. However, instead of 50,000 acre-feet of water for coho salmon, the Tribe's motion only sought 30,000 acre-feet of water—23,000 acre-feet for coho salmon, and 7,000 acre-feet for ceremonial and cultural purposes related to the Tribe's Boat Dance. In its reply to the Bureau's opposition to the Tribe's emergency motion, the Tribe eliminated its ask for 7,000 acre-feet for the Boat Dance and reduced its ask for coho salmon flows to 16,000 acre-feet.

In support of its motion, the Tribe argued that the Bureau was deviating from the interim plan, because: 1) once the Bureau forecasted on April 1 that Upper Klamath Lake supply would be sufficient to release augmentation flows for coho salmon, it was required to make those releases, 2) the Bureau lacked flexibility in eliminating augmentation flows for coho salmon, and 3) the Bureau failed to properly coordinate with the parties as required by the interim plan. The Bureau opposed the Tribe's motion, arguing, among other things, that an exceptionally dry April failed to generate sufficient water needed to exceed 550,00 acre-feet in Upper Klamath Lake supply that was a prerequisite to release 40,000 acre-feet for coho salmon. The Bureau also argued that releases from

Upper Klamath Lake could impact ESA-listed Lost River and short nose suckers, and therefore it could not prioritize releasing flows for coho salmon over the needs of the suckers. Instead, the Bureau maintained that it had the needed flexibility to make reallocations to coho salmon flows after consulting with NMFS and receiving input from the Tribe and other parties under the interim plan.

District Court's Denies Motion to Lift Litigation Stay

Following a hearing on the motion, the court denied the Tribe's motion to lift the litigation stay and reinstate its motion for preliminary injunction, and therefore denied the Tribe's request for temporary restraining order as moot. The court interpreted several provisions in the interim plan to provide the Bureau with the flexibility to make adjustments to allocations for augmented flows for coho salmon, and found that the Bureau had properly consulted with NMFS and obtained the input of the Tribe and other parties before making the reallocation. The court paid particular attention to the interim plan's requirement that the Bureau obtain scientific input from its own and NMFS' biologists through a technical advisory process established by the interim plan related to the needs of ESA-listed species in the event Upper Klamath Lake levels would drop below 4,142 feet. Following this consultation, the Bureau determined that augmented releases for coho salmon would imperil endangered sucker species in Upper Klamath Lake given low lake levels and dry conditions, and thus declined to continue augmentation releases. Accordingly, the court found that the Bureau had not violated the interim plan that would justify lifting the litigation stay. Because the Bureau did not violate the interim plan, the court determined that the litigation stay should not be lifted.

Conclusion and Implications

The court's ruling leaves the interim plan in place, and the litigation initiated by the Tribe remains stayed pending development of a new Project operations plan and Biological Opinion. While it is unclear if climatic conditions will continue to require Reclamation to make adjustments to water flows, the interim plan apparently provides sufficient flexibility for the Bureau of Reclamation to make needed adjustments to water releases to provide, to the extent possible, for the demands of various listed fish species and other water users.
(Miles Krieger, Steve Anderson)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT FINDS DELTA PLAN VALID DESPITE LACK OF ENFORCEABLE NUMERIC COMPLIANCE TARGETS

Delta Stewardship Council Cases, 48 Cal.App.5th 1014 (3rd Dist. 2020).

On April 10, 2020, the California Court of Appeal for the Third Judicial District released a published opinion affirming certain aspects of the 2018 Delta Plan. Seven separate challenges to the Delta Plan were filed. Following coordination of the actions, the trial court vacated the Delta Plan and related regulations because the Delta Plan did not include legally enforceable regulations for numeric compliance targets. The Court of Appeal reversed the trial court's determination that the Delta Stewardship Council (Council) was required to set enforceable numeric targets. The Court of Appeal also rejected a separate appeal by federal and state water contractors challenging the authority of the Council to regulate water rights. The Court of Appeal remanded to the trial court other matters that were mooted by the adoption of amendments to the Delta Plan during the pendency of the appeal. The Court of Appeal affirmed the remaining portions of the judgment.

History of the Coordinated Actions Challenging the Delta Plan

In 2009, the California Legislature passed the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act). (Wat. Code, § 8500 *et seq.*) The Delta Reform Act created a new independent agency, the Delta Stewardship Council to promulgate a long-term plan for managing the Delta.

The California Legislature charged the Council with two coequal goals "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." In May 2013, the Council adopted the Delta Plan, a suite of recommendations and proposed regulations aimed toward accomplishing the Council's dual mandate. The Office of Administrative Law adopted the regulations set forth in the Delta Plan.

Seven different lawsuits were thereafter filed challenging the Delta Plan and its regulations. Those seven lawsuits were coordinated into a single proceeding in Sacramento Superior Court. The trial court concluded that the Delta Plan violated the Delta Reform Act because the Delta Plan did not include numeric targets in the form of legally enforceable regulations. The trial court also found other violations of the Delta Reform Act and Administrative Procedure Act. The trial court vacated the Delta Plan and related regulations and ordered the Council to correct the deficiencies. During the pendency of the appeal, in April 2018, the Council issued amendments to the Delta Plan.

The Court of Appeal's Decision

The Issue of Numeric Targets

On appeal, the Third District Court concluded the trial court erred. The Delta Reform Act provides that the Delta Plan must include "quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan." The trial court determined that the Delta Plan was invalid because it did not include specific numeric targets that would be evaluated on a specific date to determine compliance with the Delta Plan's dual goals. Instead, the Delta Plan included broad, nonnumeric goals, using terms such as "a significant reduction," "progress toward," and "a downward trend."

The trial court held that the Delta Reform Act's requirement of "quantified or otherwise measurable targets" required the Council to adopt an enforceable numeric target. The Court of Appeal disagreed, noting that the Delta Reform Act required a plan:

> . . .built on the principles of adaptive management—*i.e.*, 'a framework and flexible decisionmaking process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvement in management

planning and implementation . . . to achieve specified objectives.' (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 262 Cal. Rptr.3d 445, 473, citing Wat. Code, § 85052.)

Performance Metrics Were to Support Council's Supervision of the Plan

The Delta Reform Act did not include any requirement for the Council to adopt numeric targets that were legally enforceable as regulations. Instead, the stated purpose of any performance metrics was to support the Council's supervision of the Delta Plan. Such a purpose did not require legally enforceable numeric targets, and thus failure to include numeric targets as legally enforceable regulations did not render the Delta Plan invalid.

The Court of Appeal declined to review the other violations of the Delta Reform Act of Administrative Procedure Act found by the trial court because those issues became moot as a result of the Council's adoption of amendments to the Delta Plan in 2018 during the pendency of the appeal.

Water Resources Policy 1

The Court of Appeal also addressed a challenge by state and federal water contractors to a portion of the Delta Plan, Water Resources Policy 1 (WR P1). WR P1 mandates improved self-reliance from regions that depend on water from the Delta. The water contractors argued, among other reasons, that WR P1 was invalid because the Council lacked the authority to regulate water rights. Instead, according to the appellants, such regulation is the exclusive domain of the State Water Resources Control Board.

The Court of Appeal rejected this assertion. The Court of Appeal first noted that all water rights are limited by the doctrine of reasonable use, and the public trust doctrine confers the state with authority to ensure that water resources are put to beneficial use and to prevent waste or unreasonable use. The Court of Appeal then went on to examine the language of the Delta Reform Act and concluded that WR P1 fell within the authority conferred by the Delta Reform Act. The Court of Appeal thus held that the Council possessed regulatory authority over water rights, though the scope of such authority was limited to certain covered state and local land use actions. The Court of Appeal dismissed the argument that the Council's authority improperly overlaps with the authority of the State Water Resources Control Board. Such overlap was not unprecedented or improper.

Conclusion and Implications

The Court of Appeal's decision clarifies the manner in which the Council is required to set targets for achieving the objectives of the Delta Plan, but also refrains from addressing other aspects of the Delta Plan that were amended while the appeal was pending. The Delta Plan amendments are the subject of other currently pending lawsuits. In addition, state and federal water contractors filed a petition for the California Supreme Court to review the Court of Appeal's decision on the Delta Plan.
(Brian Hamilton, Meredith Nikkel)

THIRD DISTRICT COURT RULES PROPERTY NON-CONTIGUOUS TO MIDDLE RIVER RETAINED RIPARIAN RIGHTS

Modesto Irrigation District v. Tanaka, 48 Cal.App.5th 898 (3rd Dist. 2020), (*reh'g denied* June 3, 2020).

The Third District Court of Appeal recently held that a tract of subdivided land no longer contiguous to a river retained riparian rights to divert and use water from the river, despite no express language in the deed granting riparian rights.

Background

The Modesto Irrigation District (MID) brought an action in 2011 seeking declaratory and injunctive relief to enjoin Tanaka, a landowner, from diverting water from Middle River for a subdivided parcel of farmland that her great-grandfather had acquired by a deed 130 years earlier. The parcel conveyed by the deed had been part of a larger riparian tract but was no longer contiguous to the river. The Sacramento Superior Court entered judgment in favor of MID. Tanaka appealed.

Historical Setting

In its opinion, the Court of Appeal recounted in detail the historical setting giving rise to the litigation, which:

> . . .began in the middle of the California Delta in the latter half of the 19th century before the islands were transformed from marsh and swampland into some of the most productive agricultural land in the state.

The court described conditions in the San Joaquin Delta prior to the 1850s, when the islands in the Delta were regularly flooded and none of the land had been reclaimed. As described by the court, Roberts Island, the largest island in the state, consisted of 67,000 acres of marsh and swampland. Middle River, which breaks off from the San Joaquin River, flows along the western side of Roberts Island.

The court reviewed congressional acts encouraging reclamation and settlement of swamplands throughout the country, including an 1850 Act giving California 2 million acres of federal swampland contingent upon the state devising programs to drain the marshland and let settlers move onto it to make it productive. Reclamation and farming began on Roberts Island in 1856. In 1868 California lifted its initial the 320-acre limitation on swampland conveyances, opening the way for large scale corporate reclamation efforts. As described in the opinion, these reclamation efforts transformed Roberts Island into rich and productive farmland, giving simultaneous rise to the demand and use of water for irrigation.

The Transactional History

The court described Tanaka's historical chain of title in detail. In 1881, the owner of a vast land holding on Roberts Island began subdividing and selling large tracts. In 1888, that owner's holdings were foreclosed upon by his mortgage holders, who bought the property and marketed the land as "the best farming land in the State" and sold various tracts. In 1890, Tanaka's great-grandfather Isaac Robinson, Sr. (Robinson), purchased 108.02 acres of farmland on Roberts Island.

The Robinson property was not contiguous to Middle River. In 1925 Robinson and other landowners dug a canal from near a levee along Middle River to the Robinson farm and other adjacent parcels. In 2002, Tanaka purchased the farm and continued to pump water out of Middle River through the canal to irrigate her farm.

The Court of Appeal's Decision

Intent of the Contracting Parties

In its opening paragraphs, the court's opinion states:

> '[A] riparian right, rather than being merely incident to or appurtenant to the land, has been said to be a vested right inherent in and a part of the land [citations] and passes by a grant of land to the grantee even though the instrument is silent concerning the riparian right.' (Citation) However, riparian rights can continue when riparian land is subdivided, creating subdivided parcels that are no longer contiguous to the water that rendered the larger parcel riparian. In the present case, appellant Heather Robinson Tanaka's great-grandfather purchased a subdivided parcel that had been part of a larger riparian tract but was no longer contiguous to water. Clearly, riparian rights can persist in land sold under such circumstances, though the grantee cannot acquire riparian rights any greater than those held by the grantor. The question in the case of such a transfer is whether the parties intended the grantee to receive riparian rights. The clearest expression of intent is when a deed expressly conveys the riparian rights to the noncontiguous parcel, in which case the parcel retains its riparian status. However, where the deed is ambiguous, extrinsic evidence is admissible on the question.

The Superior Court considered the language of the deed and extrinsic evidence, and concluded the conveyance to Robinson did not convey riparian rights. The Court of Appeal re-examined the deed and extrinsic evidence, stating:

> . . .[w]e must, therefore, place ourselves in 1890 in the shoes of Robinson, and the mortgage holders when they executed the grant deed to the farm. . .Thus, it is solely a judicial function

> to construe the language in light of the surrounding circumstances to determine whether the parties to the sale intended that the farm would retain its riparian water rights.

The grant to Robinson did not refer to riparian rights. It contained the following language:

> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

'Hereditaments', 'Tenements' and 'Appurtenances'

The court's opinion focused on "what this language would have meant to our 19th century friends [, turning] to the cases interpreting the language at the time it was used." Specifically, the Court of Appeal examined the meaning of words "hereditaments," "tenements" and "appurtenances" used in the deed. Citing the 1886 seminal case on riparian rights, *Lux v. Haggin*, the court observed that "there are many references acknowledging that riparian rights were commonly considered hereditaments." The court similarly examined the meaning of the other terms, citing case law and *Black's Law Dictionary* of 1891.

The court concluded that:

> All three words are expansive in their meaning. Hereditaments alone was generally used as the 'widest expression for real property of all kinds' and, when coupled with appurtenances and tenements, as well as the word 'all' in front of all three terms, plus the additional language 'belonging, or in anywise appertaining' to Robinson's farm, we agree with Tanaka it is abundantly clear that, in light of the 'ordinary and popular sense' of those words and their 'primary and general acceptation,' the mortgage holders and Robinson, Sr., made it crystal clear that they intended to transfer 'everything of the nature of realty' 'belonging, or in anywise appertaining' to Robinson's farm, including riparian rights.

Extrinsic Evidence

The court observed that while the parties:

> . . .chose extraordinarily broad inclusive language of conveyance, it is true they did not explicitly state that Robinson would retain the riparian rights to the farm.

The court therefore reviewed extrinsic historical evidence admitted at trial to ascertain the parties' intentions regarding conveyance of riparian rights.

The court found that extrinsic evidence pertaining to the parties and the surrounding circumstances supported the conclusion that the grant did not intend to strip Robinson of riparian rights. The court pointed to the fact that Robinson was a farmer who bought the small farm on recently reclaimed land at the height of an agricultural boom, which required water:

> At that moment in history, it is hard, if not impossible to imagine, that someone purchasing land on Roberts Island would not be concerned with their access to water. That someone in our case is [Robinson] … the notion he intended to buy a landlocked parcel without access to water strains credulity.

The court described the grantors, on the other hand as "men anxious to rid themselves of the thousands of acres they held as security, not to farm" and that "they would not have benefitted financially by cutting off a small farmer's riparian rights…" The court further disregarded MID's evidence that the canal serving the Robinson property was not dug until many years after Robinson's purchase, finding instead that the lack of a canal at the time of conveyance did not negate the parties' intentions.

'Source of Title' Doctrine

MID cited cases establishing what is often referred to as the "source of title" doctrine in California:

> . . .where the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status.

The court noted "the somewhat precarious nature of riparian rights of land that is no longer contiguous to a watercourse." Nonetheless, the court found the

cited cases unpersuasive because they were decided long after the 1891 grant to Robinson, they were factually distinguishable, and they "universally echo the same basic principle that the intention of the parties govern."

Conclusion and Implications

The Third District Court of Appeal reversed the judgment of the trial court, the result of which is court's determination that Tanaka, the owner of property not contiguous to Middle River, may divert water as a riparian user based upon the facts and circumstances of the contracting parties more than 100 years ago. When viewed as a contract interpretation case, the court's opinion is, perhaps, somewhat unremarkable in its approach and findings. However, the subject matter of the dispute being riparian rights—a bedrock principle of California water rights law largely shaping the allocation and use of California's water resources—certainly renders this case remarkable and potentially encourages inland property owners pursuing riparian right claims for properties with complex transactional and historical titles. The Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C083430.PDF (Derek R. Hoffman)

SIXTH DISTRICT COURT HOLDS SEEKING STREAMBED ALTERATION AGREEMENT FROM DEPARTMENT OF FISH AND WILDLIFE IS NOT A 'FURTHER DISCRETIONARY APPROVAL'

Willow Glen Trestle Conservancy v. City of San Jose, ___Cal.App.5th___, Case No. H047068 (6th Dist. May 18, 2020).

In ruling on petitioners' second attempt to halt the demolition of the Willow Glen Trestle, the Sixth District Court of Appeal held that the act of seeking a new streambed alteration agreement (SAA) from the California Department of Fish and Wildlife (CDFW) for the previously reviewed project was not a "new discretionary approval," and therefore subsequent environmental review was not required.

Factual and Procedural Background

In 2014, the City of San Jose (City) approved a Mitigated Negative Declaration (MND) for the demolition and replacement of the Willow Glen Railroad Trestle, a wooden railroad bridge built in 1922. When the City approved the MND, the trestle was not listed in the California Register of Historical Resources. The Friends of the Willow Glen Trestle filed a lawsuit challenging the MND. The Superior Court concluded that substantial evidence supported a fair argument that the trestle was a historical resource, and the City was therefore required to prepare an Environmental Impact Report (EIR). The Court of Appeal remanded the matter to the trial court, holding that the substantial evidence standard of review, not the fair argument standard, applied to the City's determination of historical status. (*Friends of Willow Glen Trestle v. City of San Jose*, 2 Cal.App.5th 457 (2016).)

In May 2017, the California State Historical Resources Commission approved listing the trestle in the California Register of Historical Resources. Also, in 2017, the City's SAA with CDFW expired. The City submitted a new notification to CDFW, which subsequently issued a final SAA in August 2018. Petitioners filed a lawsuit alleging that entering into the SAA was a discretionary approval by the City that triggered supplemental review under Public Resources Code § 21166 of the California Environmental Quality Act (CEQA).

The trial court temporarily enjoined the City from proceeding with demolition of the bridge, but ultimately denied the petition. The trial court found that the City's actions in connection with the 2018 SAA were not a discretionary approval—reasoning that the City's approval of the 2014 MND included approval of the SAA.

Petitioners appealed the trial court's decision. Additionally, petitioners sought a writ of *supersedeas* from the Sixth District Court of Appeal, which was

granted, enjoining the destruction of the bridge pending resolution of appeal.

The Court of Appeal's Decision

Public Resources Code § 21166 and CEQA Guidelines § 15162 require supplemental environmental review, in limited circumstances, when an agency must make a "further discretionary approval" for a project for which the agency has already completed review. Petitioners argued that the City's submission of a notification to CDFW in order to obtain a new SAA amounted to an approval by the City, requiring supplemental environmental review. The Court of Appeal disagreed, holding that approval of the SAA was an action by CDFW, not the City.

Petitioners argued that the City's act of seeking and accepting the SAA was a discretionary approval. Quoting the California Supreme Court in *Friends of College of San Mateo Gardens v. San Mateo Community College District,* 1 Cal.5th 937, 945 (2016) (*San Mateo Gardens*), the Sixth District Court of Appeal emphasized that §§ 21166 and 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared, and promote the interests in finality and efficiency. If every action in connection with a project were considered an "approval," the court said, each and every step of a lead agency would reopen environmental review under CEQA.

Petitioners also argued that different rules should apply because this was the City's own project, rather than a private project. Petitioners asserted that because the City retained discretion to reconsider or alter the project, its failure to abandon the project was itself a new discretionary approval. The Court of Appeal rejected this argument, reiterating that the purpose of § 15162 is to limit subsequent environmental review. Additionally, the court stated that § 15162 makes no distinction between public and private projects.

The court concluded that the City was implementing the project when it submitted a new notification to CDFW and when it accepted the SAA. The only new approval was CDFW's, a decision which petitioners left unchallenged.

Conclusion and Implications

Applying the principles espoused by the California Supreme Court in *San Mateo Gardens*, the Court of Appeal offered further clarity on what triggers supplemental analysis under CEQA. It also serves as an important reminder to carefully track all further discretionary decisions made by responsible agencies—as failing to do so may forfeit any further challenge to a project.

https://www.courts.ca.gov/opinions/documents/H047068.PDF

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