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CALIFORNIA WATER™

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CALIFORNIA WATER™ LAW & POLICY Reporter

FEATURE ARTICLE

GOVERNOR NEWSOM RELEASES FINAL WATER RESILIENCE PORTFOLIO FOR CALIFORNIA'S WATER FUTURE

By Wesley A. Miliband and Andrew D. Foley

On July 28, 2020, Governor Gavin Newsom released a final version of the Water Resilience Portfolio (Portfolio). The Portfolio represents the state's comprehensive effort to develop a coordinated strategy for the management of California's water resources over the coming years and decades, by focusing on approaches that can mitigate the increasing uncertainties and challenges associated with hydrological shifts in climate change. The resulting Portfolio outlines strategic actions and tactical directives for mitigation of the impacts of these conditions on wildlife preservation (including fisheries) and water supply reliability, while also seeking to balance complex and often competing regional, environmental and economic interests. Ultimately, development of the Portfolio is no easy undertaking nor is its anticipated implementation; however, necessity breeds innovation and the time is now to improve upon water resources management in this great state.

Origins of Initiative

Under Governor Brown and now Governor Newsom, the state has demonstrated a sense of urgency with respect to the critical but highly complex water management challenges posed by climate change, and frankly also implicated are political, policy, regulatory and technical issues that come into play when trying to preserve California's water rights regime while also establishing good public policy to ensure water supply reliability and health of fisheries and habitat. Hydrological shifts and temperature changes (both air and water) have exacerbated ongoing water management concerns such as flood and drought conditions, groundwater sustainability and water quality maintenance. Moreover, climate change has given rise to new concerns that complicate an already complex water management equation, particularly the threat of sea level rise to coastal communities and water infrastructure and headwater regions—namely, the state's mountain areas—having less predictability as to how much snow will fall and how much water content will actually be in the snow. Any attempt by the state to strategically address these threats must also balance that effort against the multi-faceted consideration associated with economic interests, increasing supply demands associated with population growth, limitations of current infrastructure and environmental conservation.

In response to these challenges, the Governor issued Executive Order No. N-20-19 (Order), calling for the creation of the Portfolio. The Order directs the California Natural Resources Agency, the California Department of Food and Agriculture and the California Environmental Protection Agency (collectively: Agencies) to collectively develop the portfolio by assessing the current state of affairs in California and recommending approaches that respond to projected future needs in the era of climate change. While reflecting overall goals generally consistent with existing state water policies developed under former Governor Brown's 2014 Water Action Plan, the Order called for broad reconsideration of the means by which the State would undertake to achieve those aims. After all, stating a general public policy is one thing, but developing a detailed plan with direction, or at minimum guidelines or criteria, for regional and local water agencies and water users to evaluate presents a whole different challenge.

Governing Principles

The Order specifically outlines principles to govern the preparation of the Portfolio, which emphasize the importance of seeking multiple-benefit solutions, utilizing natural infrastructure, embracing novel solutions pursued outside California, promoting innovation and facilitating cooperation and coordination among federal, state and local agencies, as well as developing solutions that operate at the regional level.

In accordance with the Order, the Agencies conducted an extensive outreach effort in connection with the assessment and development of solutions that would be encompassed by the Portfolio. The Agencies not only sought input from the numerous government entities and agencies at all levels relevant to the state's water management, but also from a broader array of interested parties, such as sovereign tribes, environmental organizations, agricultural groups, business leaders and academic experts. The final Portfolio includes 14 new actions not contained in the draft plan released for public comment in January, reflecting input on the draft provided by more than 200 separate individuals and organizations. Generally, the revisions to the draft arising out of the outreach and comment process led to a final Portfolio with an increased emphasis on tribal interests and leadership, upper watershed health and cross-border water issues.

The Final Portfolio

As mandated by the Order, the Portfolio consists of assessment and action components. The assessment conducted under the direction of the Agencies gives a broad and comprehensive overview of current conditions and in the state, while further examining conditions and risk factors specific to ten distinct commonly-recognized hydrologic regions within the state. The solutions in the Portfolio reflect a continued focus on regional approaches supported by the state, and also provide specific direction to many of the key public agencies in order to clarify their role in carrying out the actions prescribed.

Assessment

Outlining Primary Needs and Threats

The Portfolio includes an overview of California's water system and uses, and defines particular threats to sustainable water management in the state. As noted, the effects of climate change are of particular long-term concern, presenting threats such as a potential for increasingly extreme and prolonged drought, flood and other weather conditions, as well as the potential impact of a rise in sea level on coastal communities and infrastructure. In some ways, the particular threats posed by climate change do not alter the ever-present challenges inherent developing effective water policy in California, but rather exacerbate the scale of those existing problems and the urgency of developing a plan to address areas of inefficiencies.

Such existing challenges include groundwater sustainability, vulnerable infrastructure, mitigation against drought and flood, population growth and environmental protection. The Portfolio stresses the state's reliance on water supply stored in groundwater basins (as compared to reservoir water), and depletion of those resources as a result of decades of over-pumping from the basins in many, but not all, areas. The sufficiency of major water conveyance infrastructure has long been of concern, particularly with the expectancy of a major earthquake in northern California that could imperil the levees supporting conveyance infrastructure in the Bay-Delta that is essential to the water supply to over half of the state, and more recently reported to be concerns by some scientists that southern California is due for a large earthquake which also poses a significant threat to water infrastructure and supplies. Closely linked to these threats are significant risks to habitat, both wildlife and fisheries. Accordingly, the often-existing perception of human water resources needs being exclusive, or at least competing, with habitat needs are inextricably linked and bear a common interest for sustainability.

Comparison of Regional Vulnerabilities

Consistent with the terms of the Order, the assessment of current conditions and future needs examine the situation within the state broadly and more narrowly at the regional level. The Portfolio describes the particular circumstances present within ten distinct commonly-recognized hydrologic regions within the state. Specifically, the vulnerability of each region to specific was rated with respect to 12 separate risk categories outlined in the assessment, which included drinking water threats, water scarcity, beach conditions, water quality, flood, drought preparation, threats to local ecosystems, groundwater management

challenges, sea level rise, affordability issues, agricultural sustainability and significant reliance on aging state infrastructure.

Regions were given a rating between one to four in each category, with a higher number representing greater risk. The ratings reveal noteworthy stresses within key regions, including acute threats to drinking water sources, with five of the ten regions analyzed assigned the highest risk rating in that category, including the San Joaquin, South Lahontan, Central Coast, Tulare Lake and Colorado River regions. General water scarcity issues are considered most immediate in the San Joaquin, Central Coast and Tulare Lake regions. Risk of flooding was determined to be greatest in the Sacramento River, San Francisco, San Joaquin and Tulare Lake regions, with drought preparation deemed most severely limited in the North Coast, North Lahontan, South Lahontan and San Joaquin regions. According to the assessment, groundwater management challenges are greatest in the San Joaquin, Central Coast and Tulare Lake regions. Relatedly, agricultural sustainability risks were rated highest in the San Joaquin and Tulare Lake regions. These two regions, in addition to the Sacramento River region, also had the highest risk rating assigned to them with respect to their reliance on aging state infrastructure.

Low-risk grades assigned to regions are also worthy of note. For instance, drinking water supplies do not appear to be at risk in the North Coast and San Francisco regions, each of which were assigned the lowest vulnerability rating of 1 in that category. The San Francisco and South Coast regions also received the lowest vulnerability rating with respect to drought readiness. The Portfolio rated the risk from reliance on aging state infrastructure lowest in the North Coast, North Lahontan and Colorado River regions, and other than the three high-risk regions for this category noted above, no other region was assigned a risk rating higher than 2 in this category.

Notably, ratings assigned in certain categories reflect more of a shared vulnerability among regions. All regions were deemed to have significant vulnerability with respect to affordability challenges, excepting only the San Francisco region. All regions in which sea level rise was an applicable risk category received a rating of 3 or 4, reflecting high vulnerability. All regions were given a moderate or relatively high vulnerability rating for ecosystem vulnerability, with no single region assigned the lowest risk rating, and only one (Central Coast), assigned the highest. Lastly, water scarcity and impaired water quality appears to be at least a moderate threat in every region, with three regions given the highest vulnerability rating in the water scarcity category as noted above and one region (San Francisco) assigned the highest vulnerability rating to impaired water quality vulnerability.

In a general sense, the breadth of risk categories illustrates the range and complexity of issues the Portfolio confronts, while the variety among ratings assigned to different regions within those risk categories underscores the difficulty of developing a broad strategy at the state level that can adequately respond to the unique circumstances present in each region. Moreover, the results of the regional assessment detailed by the Portfolio appear to support the Order's emphasis on developing a plan involving coordinated regional solutions wherever possible. Indeed, a major theme of the strategic approach outlined by the Portfolio is programs administered regionally and supported at the state level, as further described below.

The assessment of broad and regional risks led to certain key insights described in the Portfolio, which guided the ultimate solutions presented in the document and described above.

Solutions

Informed by the assessment, the Portfolio describes over 100 distinct actions intended to address the challenges of sustainable, responsive water management and policy within the state. These solutions are primarily aimed at protecting the long-term viability of the State's water supply while promoting environmental sustainability.

Emphasis on Coordinated Regional Efforts with State Support

The Order and Portfolio make clear, both expressly and through the assessment data presented, that an effective state-wide policy cannot be a "one size fits all" approach. Accordingly, a core element of solutions outlined in the document involves coordinated efforts at the regional level bolstered by commitments and support at the state level.

A primary recommendation of the Portfolio is the diversification of regional supply, citing the danger of relying too greatly on individual sources of supply due

to the projected reduction of snowpack and potential for extreme drought conditions in the coming years. The Portfolio notes that diversification will vary by region, but provides several general examples of how water supply might be diversified within a region, including the promotion of higher use efficiency and waste elimination as well as recycled water programs. Additionally, the Portfolio suggests desalination as a potentially beneficial option where feasible.

The Portfolio further identifies a number of specific proposals for how state agencies can support the regional supply diversification effort. The Portfolio recommends that agencies work with local water districts to promote conservation. This aspect could become challenging from a practical and legal set of perspectives, as conservation mostly is a necessity a "new way" of managing the resource the long-term sustainability, but local agencies often become confronted with realities that strong conservation reduces water demand but not to the same extent for operational and maintenance needs, thus requiring in some instances water rate increases despite customers doing the "right thing" by trying to conserve their water use. Hence, a local challenge throughout the state to conserve the stream of water while still needing to preserve the stream of revenue.

Building on Progress, Policies and Programs

Another common theme among the solutions offered by the Portfolio is an effort to build on previous efforts and otherwise maximize the implementation of certain existing laws, regulations and water programs in the state, in order to realize their usefulness in addressing various needs.

For example, the state is now pursuing the Delta Conveyance Project, which is to a large extent an iteration, albeit a separate project, from California WaterFix, more commonly known as the "twin tunnels" project during Governor Brown's tenure. Also ongoing are the Salton Sea Management Plan, Integrated Regional Water Management Program, efficiency programs ("Make Conservation a Way of Life" laws, State Water Efficiency and Enhancement Programs), among various others identified in the Proftfolio.

In addition to the above-referenced programs, the Portfolio evidences an overall goal of streamlining processes and coordination of interests relating to California water management. Many such actions involve the reduction of permitting and other legal hurdles that hinder the development of projects and other initiatives that the Portfolio contemplates as part of California's water resilience strategy.

Technological and Analytical Efforts

Ongoing monitoring and modeling of relevant conditions represents another clear priority of the Portfolio generally, particularly with respect to environmental protection efforts. If effectively implemented, such efforts would generally facilitate the collection of precise and reliable information, which information will be critical to developing and enhancing a level of responsiveness to the complex challenges addressed by the Portfolio.

Many recommended actions involve the development of technologies and analytical tools beyond what is currently available. For instance, the Portfolio calls for the development of new programs to detect and manage invasive species disrupting ecosystems, as well as programs to protect and manage threatened wildlife habitats and species. Other key innovations and improvements recommended in the Portfolio include tools for monitoring infrastructure and technologies for promoting efficient water use.

Responsible Agencies

The Portfolio also provides some detail on the means of implementation for the proposals and solutions described. Such detail includes clarification of the roles envisioned for a number of the agencies that will be central to the implementation of the Portfolio's strategies. In addition to the Agencies charged with developing the Portfolio, relevant agencies include the State Water Resources Control Board (SWRCB), Department of Water Resources (DWR), California Department of Fish and Wildlife (CDFW), Delta Stewardship Council and the Regional Water Quality Control Boards (RWQCBs).

Many of the Portfolio actions require participation by multiple agencies. For example, both DWR and the SWRCB are described as key agencies with respect to the implementation of the "Make Conservation a Way of Life" laws and the Sustainable Groundwater Management Act (SGMA), funding of multiple-benefit groundwater recharge programs, support for aquifer enhancement initiatives and development of desalination technologies, among others. The Agencies continue to be jointly tasked with outreach efforts to various stakeholders for the development

of voluntary solutions promoting resilience, which appears to be an extension of the outreach conducted by the Agencies during the Portfolio's development. CDFW is to work with partner agencies on a number of initiatives, such as expanding the use of the Regional Conservation Investment Strategies developed in 2017 guiding water project mitigation needs, eradicating a South American rodent species threatening important Central Valley wetlands and levees, as well as developing analytical tools related to the identification of functional ecosystem flows and modeling for assessing streamflow depletion caused by groundwater pumping. In other contexts, a single agency will be charged with taking the lead.

State Programs

The Portfolio also summarizes some of the state water programs and which will play a role in the execution of the Portfolio's strategies, generally and as part of the support to be provided by the state in connection with regional efforts. The programs are classified under broad categories including monitoring and modeling, management, climate change, flood, planning, environment, State Water Project and funding.

In the end, by whatever measure one chooses to utilize, the Portfolio is bold, innovative and detailed to state clear policy from this state administration on how to ensure the state, and all of its water users, continue to have a clean and reliable water supplies available for use over the long term.

Conclusion and Implications

Because the Portfolio calls for broad strategies and solutions, clarification regarding the implementation of those actions is essential given the number of public entities and other stakeholders involved. Accordingly, the Portfolio identifies the agency or agencies associated with the implementation of many of the recommended actions. In addition, the Portfolio describes some of the key state programs that will play a role, thus creating expectations and even accountability for performance and ultimately success of the Portfolio and California's future for water resource management. The Portfolio is an extensive look to the future of California resources.

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REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY PUBLISHES FINAL RULE UPDATING NEPA'S IMPLEMENTING REGULATIONS

The Council on Environmental Quality (CEQ) recently published a final rule updating the National Environmental Policy Act's (NEPA) implementing regulations. Among other things, the updated regulations are intended to promote a more timely and efficient NEPA review process, streamline the development of federal infrastructure projects, and promote better federal decision-making. The new regulations, however, have also prompted concerns voiced by some in the environmental community.

Background

NEPA was signed into law by President Nixon on January 1, 1970. The purpose of NEPA is to:

> . . .foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (42 U.S.C. § 4331(a).)

To that end, NEPA requires that federal agencies undertaking a "major" federal action that significantly affect the quality of the human environment to prepare detailed statements on their actions' environmental effects, any such adverse effects that cannot be avoided if the proposed action is implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (*Id.* at § 4332(C).)

NEPA does not, however, mandate specific outcomes, rather it requires "Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes." (85 Fed. Reg. 43304-01, 43306.) Thus, in very general terms, federal agencies comply with NEPA by: 1) preparing an Environmental Assessment of their proposed actions; and 2) preparing an Environmental Impact Statement if the Environmental Assessment concludes that the action may have significant effects on the environment. (*See generally*, 40 C.F.R. § 1501.4(c).)

NEPA also established the CEQ and empowered it to administer the implementation of the statute. (42 U.S.C. §§ 4332(B), 4342, 4344.) In 1977, President Carter directed the CEQ to issue implementing regulations for NEPA, and the CEQ did so in 1978. (85 Fed. Reg. 43304-01, 43307. Since then, the CEQ has only once issued substantive amendments to those regulations. (*Id.*)

President Trump Directs the CEQ to Make Changes

In 2017, President Trump directed the CEQ to issue such regulations as it deemed necessary to, among other things, enhance interagency coordination of environmental review and authorization decisions, ensure that interagency environmental reviews under NEPA are conducted efficiently, and require that agencies reduce unnecessary burdens and delays in applying NEPA. (*Id.* at 43312.) In accordance with this directive, CEQ issued an advance notice of proposed rulemaking on June 20, 2018. (*Id.*) The CEQ's notice of proposed rulemaking was published in the *Federal Register* on January 10, 2020.

Discussion and Summary of Key Elements of the Final Rule

The Final Rule published on July 16, 2020, contains numerous changes to NEPA's implementing regulations. (*See generally* 85 Fed. Reg. 43304-01.)

Definitions

Among the most significant are changes to the regulatory definitions of "Effects," "Cumulative Impacts," and "Major Federal Action." Under the new definition of "Effects," effects must be "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives[.]"

(*Id.* at 43343.) Thus, under the definition, a but-for causal relationship will be insufficient to make an agency responsible for the environmental effects of a major federal action under NEPA. (*Id.*) CEQ's explanation of this definition indicates that it is similar to the test of proximate causation applied in tort law. (*Id.*) The Final Rule also completely eliminates the definitions of, and references to, "cumulative impacts" from NEPA's implementing regulations. CEQ has explained that it has eliminated this definition to:

> . . .focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. . .[and because]. . .cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives. (*Id.* at 43343-43344.)

Finally, the new regulations clarify that "Major Federal Actions" do not include projects where, due to "minimal Federal funding or minimal Federal involvement" the agency lacks control over the outcome of a project. (*Id.* at 43347.)

Deadlines and Page Limits

The new regulations also set deadlines and page limits that govern the development of environmental documents. Under the Final Rule, federal agencies must issue Environmental Assessments within one year of deciding to prepare such a document, and Environmental Impact Statements must be issued within two years. (*Id.* at 43327.) Similarly, the Final Rule now sets a 75-page limit for Environmental Assessments, a 150-page limit for typical Environmental Impact Statements, and a 300-page limit for Environmental Impact Statements of "unusual" scope or complexity. (*Id.* at 43352.) However, all of these deadlines and page limits may be extended if approved by a senior agency official. (*Id.*)

Prohibition on 'Irreversible and Irretrievable' Commitments of Resources

Finally, while NEPA prohibits the "irreversible and irretrievable" commitment of resources which would be involved in a proposed action before the environmental review process is complete (42 U.S.C. § 4332(C)(v), the Final Rule clarifies that non-federal entities may take actions necessary to support an application for federal, state, tribal, or local permits or assistance. (85 Fed. Reg. 43304-01, 43336.) Such actions may include, but are not limited to, the acquisition of interests in land and the purchase of long lead-time equipment. (*Id.* at 43370.)

Conclusion and Implications

The CEQ's Final Rule is more than 70-pages along and contains many more changes in addition to those described above. Although interests such as the U.S. Chamber of Commerce support the new regulations, numerous environmental groups have already challenged the CEQ's adoption of the Final Rule on both substantive and procedural grounds. These lawsuits filed in the U.S. District Courts for the Western District of Virginia (*Wild Virginia, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-00045) and the Northern District of California (*Alaska Comty. Action on Toxics, et al. v. Council on Envtl. Quality, et al.*, Case No. 20-cv-05199) are in the earliest stages of litigation, and it is unclear if they will succeed. For more information on the changes to NEPA, *see:* https://www.whitehouse.gov/ceq/nepa-modernization/ (Sam Bivins, Meredith Nikkel)

FERC ORDER REQUIRES PACIFICORP TO REMAIN ON FOR KLAMATH DAM REMOVALS

A recent ruling by the Federal Energy Regulatory Commission (FERC) has inserted a new condition on a longstanding plan to demolish four hydroelectric dams on the Klamath River in northern California and southern Oregon. Despite the terms of a settlement agreement that called for PacifiCorp, the dams' current owner and operator, to sever ties—and liability—by transferring its operating license to the group that would oversee the demolition, FERC's approval of the transfer includes a condition that PacifiCorp remain a co-licensee.

Background

For decades, the Klamath River Basin (Basin) has been an epicenter for disputes over water and other natural resources among farmers, tribes, fishermen, environmentalists, and state and federal authorities. The Basin spans over 16,000 square miles in Oregon and California, consisting of agricultural, forest, and refuge lands. The four hydroelectric dams proposed for demolition were built between 1908 and 1962, along the Lower Klamath River. The placement of the dams interrupts access to hundreds of miles of historical spawning and rearing habitats in the Upper Klamath for migratory Chinook and coho salmon.

In 2004, PacifiCorp sought FERC approval to re-license its operation of the dams for another 30 to 50 years. In response, a 2004 economic study by the California Energy Commission and the U.S. Department of the Interior found that decommissioning the dams instead could actually saving PacifiCorp ratepayers up to $285 million over a 30-year period. A settlement group comprised of representatives from PacifiCorp, Klamath Basin tribes, state and federal agencies, counties, farmers, fishermen and conservation groups, was formed in 2005 to potentially resolve the years of disputes and litigation over habitat, fishery, and water quality concerns surrounding the four contested dams.

The 2010 Klamath Hydroelectric Settlement Agreement, amended in 2016 to incorporate delayed state legislative approvals, finally brought the parties to terms on the decommission and demolition of the four Lower Klamath dams. Under a key provision of the Settlement Agreement, PacifiCorp would request to transfer its ownership of the dam facilities and FERC operator's license and contribute $200 million collected through utility bill surcharges towards the $450 million removal effort. In exchange, PacifiCorp would be protected from all liability for potential damages caused by the ensuing dam removal process.

FERC Grants Partial Transfer of PacifiCorp's License

On July 16, 2020, four years after the transfer application was submitted, FERC's 31-page Order Approving Partial Transfer of License, Lifting Stay of Order Amending License, and Denying Motion for Clarification and Motion to Dismiss, 172 FERC ¶ 61,062 (FERC Order) granted only a partial transfer of PacifiCorp's license to the Klamath River Renewal Corporation (KRRC), a nonprofit organization formed to carry out the decommission and removal of the dams.

In requiring that PacifiCorp and KRRC accept their status as co-licensees, FERC pointed to the discrepancy between KRRC's limited finances and lack of experience with hydropower dam operation and removal, and PacifiCorp's additional financial resources and 32 years of experience in operating the Lower Klamath facilities. (FERC Order, pp. 17-18.) While the Settlement Agreement contemplated a budget of $450 million that would fully fund the removal project, FERC cautioned that "[c]osts could escalate beyond the level anticipated and unexpected technical issues could arise." (*Id.* at p. 17.)

Out of concern for the "uncertainties attendant on final design and project execution, and the potential impacts of dam removal on public safety and the environment," FERC determined it would not be in the public interest for KRRC to bear all responsibility and liability on its own, despite the express intent of the settling parties. (*Id.* at 17-18.) Thus, FERC's approval of the transfer is conditioned on PacifiCorp remaining on the license.

Despite the significant change to the parties' proposal, FERC suggests PacifiCorp's status as co-licensee may not ultimately affect the final results. In the event KRRC has access to sufficient funding and no unforeseen issues arise in the removal process, Paci-

fiCorp would not bear additional burdens. (*Id.* at p. 18.) FERC also suggested that the parties may further amend the Settlement Agreement so that KRRC agrees to indemnify PacifiCorp for any expenses or damages that may result from the shared licensing obligation. (*Id.*)

Conclusion and Implications

While the Federal Energy Regulatory Commission Order provides a pathway forward to the next milestone, it may take more time before the plan to demolish the four Lower Klamath dams can be realized. Consistent with FERC's recommendation, it can be expected that PacifiCorp, KRRC, and the other stakeholders to the Settlement Agreement will coordinate to develop satisfactory terms to account for this latest snag in an already drawn-out process.

The July 16, 2020 FERC Order is available at: http://www.klamathrenewal.org/wp-content/uploads/2020/07/FERC-Order-20_0716.pdf
(Austin C. Cho, Meredith Nikkel)

CALIFORNIA FISH AND GAME COMMISSION TO CONSIDER LISTING WESTERN JOSHUA TREE AMID POTENTIAL IMPACTS ON WATER INFRASTRUCTURE PROJECTS

In August, the California Fish and Game Commission (Commission) continued its vote on whether to accept for consideration a petition submitted by the Center for Biological Diversity to list the western Joshua tree as "threatened" under the California Endangered Species Act (CESA) following significant public commentary on both sides of the issue. If the Commission accepts the petition for consideration at a later public meeting, the western Joshua tree would temporarily receive the prohibitions against "take" and other protections available under CESA for about a year while the California Department of Fish and Wildlife (CDFW or Department) evaluates whether the species should be permanently listed as a threatened species. Public opposition to the petition has focused on potential economic, development-related and infrastructure impacts, if the western Joshua tree is ultimately listed as threatened.

Background

Joshua trees occur in desert grasslands and shrub lands in hot, dry sites on flats, mesas, bajadas, and gentle slopes in the Mojave Desert. Soils in Joshua tree habitats are silts, loams, and/or sands and variously described as fine, loose, well drained, and/or gravelly, while the plants can reportedly tolerate alkaline and saline soils. Populations are discontinuous and reach their highest densities on well-drained sandy to gravelly alluvial fans adjacent to desert mountain ranges.

On October 21, 2019, the Center for Biological Diversity submitted a petition to the California Fish and Game Commission to list the western Joshua tree as "threatened" under the California Endangered Species Act. The petition describes severe and immediate threats to the Joshua tree primarily attributable to climate change. For instance, the petition warns of increasing mortality among adult Joshua trees at the hotter and lower-elevation edges of their geographic range; increased risk from invasive native grass-fueled fires that pose, and recently resulted in, significant Joshua tree mortality; and the continued emissions of greenhouse gases that are largely attributed to the negative effects of climate change.

CESA prohibits any person from taking or attempting to take a species listed as endangered or threatened. (Cal. Fish & Game Code, § 2080.) The term "take" is defined as attempting to or actually hunting, pursuing, catching, capturing, or killing any listed species. (Cal. Fish & Game Code, § 86.) Unlike the ESA, CESA does not include harming or harassing in its definition of take. Also, unlike FESA, CESA does not include habitat modification in its prohibitions.

Modeled after the federal Endangered Species Act (FESA), the CESA is intended to provide additional protection to California endangered and threatened species. FESA and CESA operate in conjunction and a species may be listed under just one act or under both. However, in spring 2019, the federal government declined to add the western Joshua tree to the federal list.

The Commission is responsible for adding, removing, and changing the status of species on the state endangered and threatened species list. The Department of Fish and Wildlife enforces CESA in all other respects. Unlike under FESA, CESA provides the protections of state law, on a temporary basis, to those species officially designated by the Fish and Game Commission as candidate species.

The Listing Process

Several procedural steps are undertaken to determine if a species is added to the CESA endangered or threatened species list. Any person may submit a petition to list a species to the Commission on the approved form. The petition must provide sufficient scientific information to show that a listing is warranted. The Commission has ten days to review the petition for completeness. To be complete, the petition must be on the proper form, incorporate information required by each category in California Fish and Game Code, § 2073.3, and contain a detailed species distribution map. If the petition is complete, the Commission will refer it to the Department for review. The Department has 90 days to provide a report to the Commission recommending that the Commission either reject or consider the petition. If the Commission rejects the Department's recommendation, it must publish a "notice of findings" explaining the reasons it found the petition insufficient. If the Commission accepts the recommendation, it must also publish and indicate the species is considered a "candidate species" for listing.

Once the Commission formally accepts a petition for consideration and the species is given candidate status, the Department must conduct a one year status review of the species and provide the Commission with a report that includes the following information: 1) whether the listing is warranted; 2) a preliminary identification of habitat that may be essential to the species' continued existence; and 3) a recommendation to assist the species' recovery. During this one-year review, the Department must make reasonable efforts to notify interested parties and solicit comments from independent and competent peer reviewers.

If the Commission determines the listing not warranted, it must remove the species from the list of candidate species. If it determines the listing warranted, the Commission must publish a proposed rule to add the species to the endangered or threatened list in the California Regulatory Notice Register. Once the Commission decides to list a species it must adopt a final rule and obtain approval from the Office of Administrative Law within one year of the published proposed rule. At least once every five years, the Department reviews the status of species as endangered or threatened under CESA. The Department's findings are then reported to the Commission and treated as recommendations to add or remove species from the list of endangered and threatened species.

The Center for Biological Diversity's petition is awaiting the Commission's vote on whether to accept the petition for consideration. The Department, in February of this year, recommended that the Commission consider the petition. In June and then in August, the Commission decided to delay its vote on whether to give the western Joshua tree candidate status until September 2020. The Commission was originally scheduled to vote on the petition in June, but in light of substantial public commentary, staff recommended the vote be continued until August.

Opposition to the Listing

Under CESA, a person may not "take" a threatened or endangered species unless authorized by the California Department of Fish and Wildlife through a permitting process, subject to any special terms and conditions it prescribes. Accordingly, listing the Joshua tree as "threatened" under CESA, or even designating the species as a candidate species, could have a variety of resulting implications for public and private development projects, including wind, solar, and water development projects.

Opposition to the Joshua tree petition has focused on the impacts the listing could have on local economic growth and associated infrastructure projects, including wind, solar, and water projects. A number of local, state and federal officials oppose listing on the basis that the species is not at imminent risk of extinction and is adequately protected by existing law—for instance, by ordinances requiring permits to remove Joshua trees from private property and the presence of Joshua trees in state and national parks. Additionally, local officials have raised concerns that listing would have negative impacts on housing, energy diversification, civil infrastructure, and local governments. In particular, local municipalities and public agencies have also voiced strong opposition

to the listing. For instance, the Town of Yucca Valley, Hi-Desert Water District, Victor Valley Transit Authority, High Desert Joint Powers Authority, San Bernardino County, Mohave Desert Air Quality Management District, and QuadState Local Governments Authority submitted a comment letter to the Commission opposing the petition on the grounds that the Joshua tree is not currently imperiled, that existing protections are adequate, and that listing would hamper construction of infrastructure, affordable housing, and alternative energy projects.

Additionally, local agencies in the Yucca Valley area also expressed concerned that listing could halt progress on a wastewater collection and treatment infrastructure currently being constructed under requirements issued by the Regional Water Quality Control Board, Colorado River Basin Region. According to the Town of Yucca Valley, property owners in Phase I of the project agreed to tax themselves approximately $19,000 per single family residential unit to deliver this critical infrastructure to the community. Phase I was completed in approximately December 2019. Preliminary estimates for Phase II of the wastewater project place single family residential units' costs at approximately $28,000. The town expressed concern that numerous property owners will be unable to connect to the state-mandated wastewater collection system without removal of Joshua trees due to increased costs listing the species would impose on the project.

Conclusion and Implications

While it is unclear whether the Commission will vote to accept the petition for consideration, thus potentially leading to listing the western Joshua tree as threated under CESA, opposition from public officials and local government and public agencies emphasizes that increased costs associated with listing the species could compromise future and in-development infrastructure projects that may hamper development in already infrastructure-deficient areas of the state. Whether industry and economic interests can be aligned with preservation and protection of the western Joshua tree in the future, particularly if the species is listed under CESA, remains to be seen. The Petition is available online at: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=175218&inline (Miles Krieger, Steve Anderson)

SANTA ANA REGIONAL WATER BOARD DELAYS VOTE ON HUNTINGTON BEACH DESALINATION PLANT PROPOSAL

Two decades after its inception, Poseidon Water's Huntington Beach Desalination Plant proposal (Project) recently came again before the Santa Ana Regional Water Quality Control Board (RWQCB) for permit approval. After two days of public hearings, the RWQCB elected to delay its vote to mid-September 2020 on whether to issue a permit to discharge Project water brine byproduct to the ocean along the Orange County coast. The RWQCB also requested Poseidon Water incorporate additional environmental mitigation measures into the Project's design.

Background

As described in Project documents, Poseidon Water's Huntington Beach Desalination Plant is a $1 billion, 50 million-gallon-per-day seawater desalination facility that, if built, would become one of the country's largest seawater desalination plants. The Project would draw 106 million gallons per day of seawater off the Huntington Beach coast through an offshore intake pipe. It would create 50 million gallons of potable water per day, which is enough to support 450,000 people. The Project would also produce 56 million gallons per day of brine concentrate, twice as salty as the ocean, which would be released back to the ocean via a 1,500 foot discharge pipe. The Project has a proposed 50-year lifespan. The Project proposes to mitigate environmental impacts by restoring 5.7 acres of the Bolsa Chica wetlands, enhancing water circulation and paying for the inlet dredging.

Regional Water Quality Control Board Permit

California's Regional Water Boards administer the U.S. Environmental Protection Agency's Clean Water Act, National Pollutant Discharge Elimination System (NPDES) program. Through the NPDES program five-year operating permits are issued regulating discharges to protected water sources. The RWQCB

first issued the Project's NPDES permit in 2006 and again in 2012. With those permits expired, Poseidon Water is before the RWQCB seeking a reissuance of the Project's NPDES permit.

Issues Raised During Public Hearings

The Project has been a long-standing controversial proposal since its inception in 1998. Issues that have been historically raised, and which were echoed during the recent public hearings, include: 1) the cost of the water, 2) the need for the water, and 3) the environmental impacts and mitigation measures associated with the facility.

Water produced from the Project will be among the most expensive in the state at $2,250 an acre-foot. This cost is twice as high as treated imported supplies from the Metropolitan Water District of Southern California, which is currently $1,100 an acre-foot and significantly higher than current groundwater costs of approximately $600 an acre-foot. The Orange County Water District, which has signed a nonbinding term sheet to buy the Project's annual deliveries of 56,000 acre-feet, estimates household water bills will rise $3 to $6 a month.

Orange County Water District's service area receives 77 percent of its water from local groundwater supplies and 23 percent from imported supplies derived from northern California and the Colorado River. If approved, the Project would supplant approximately half of the imported water demand transported to north and central Orange County.

At the public hearings, dozens of stakeholders supported the Project, including trade union representatives and county business groups. Dozens also spoke against the proposal, including a coalition of more than 20 environmental groups and neighbors of the Project.

RWQCB members asked whether Orange County needs the costly supply. They questioned the use of the relied upon data gauging the Project's potential harm to marine life and they expressed doubts about whether the Project's wetland restoration plans meet state environmental requirements to offset that harm. At the hearing's conclusion, the RWQCB elected to postpone their decision. The delay came as a result of RWQCB staff, in response to RWQCB members concerns, agreeing to revise the permit agreement with Poseidon Water to include requirements that the company perform more environmental restoration to mitigate for the Project's environmental impacts. The RWQCB anticipates returning to the issue at its September 17, 2020 meeting.

If the RWQCB issues the NPDES permit, the Project will seek permitting from the California Coastal Commission.

Conclusion and Implications

It is unclear if the Regional Water Quality Control Board's recent postponement will delay the Project significantly. What is clear is that the Project highlights the complexities of developing a desalination facility, with concerns surrounding the high cost of water and environmental impacts balanced against the benefits of creating a local supply of water at a time when California water policy encourages localities to reduce their dependency on imported water sources.

(Chris Carrillo, Derek R. Hoffman)

RECENT FEDERAL DECISIONS

DISTRICT COURT DISMISSES CLEAN WATER ACT FOR PRE-SUIT NOTICE DEFICIENCY AND CONCLUSORY STATEMENTS IN COMPLAINT

Stevens v. St. Tammany Parish Government, et al, ___F.Supp.3d___, Case No. 20-928 (E.D. La. Jul. 23, 2020).

The U.S. District Court for the Eastern District of Louisiana recently dismissed a federal Clean Water Act citizen suit due to an insufficient pre-suit notice and insufficient allegations to support plaintiffs' right to relief.

Factual and Procedural Background

On March 17, 2020, Terri Lewis Stevens, Craig Rivera and Jennifer Rivera (plaintiffs) brought suit against St. Tammany Parish Government (STPG) and the Louisiana Department of Environmental Quality (LDEQ) for violations of the Clean Water Act (CWA) and a Louisiana Pollutant Discharge Elimination System (LPDES) permit. In the initial complaint, plaintiffs alleged that sanitary sewer overflows, along with other pollutants, spilled from STPG's drainage ditches and onto their property before being discharged into various waters of the United States. Plaintiffs alleged LDEQ failed to enforce the applicable Louisiana state laws and LPDES permit.

On April 27, 2020, prior to receiving an answer from LDEQ and STPG, plaintiffs filed the First Amended Complaint (FAC). In the FAC, plaintiffs sought additional remedies specific to LDEQ's lack of enforcement of the CWA. Plaintiffs also added more claims against LDEQ, including Fifth and Fourteenth Amendment violations and unconstitutional takings of their property.

On May 12, 2020, STPG filed a motion to dismiss plaintiffs' complaint and the FAC, pursuant to Federal Rules of Civil Procedure Rule 12(b)(6). LDEQ filed a motion to dismiss for lack of jurisdiction. On June 3, 2020, plaintiffs filed for permission to file a Second Amended Complaint (SAC), prior to STPG and LDEQ's response to the initial complaint of March 17.

On June 20, 2020, plaintiffs dismissed LDEQ without prejudice. On June 23, 2020, the court heard oral arguments for the remaining STPG motion to dismiss.

The District Court's Decision

STPG argued that plaintiffs' complaint and FAC should be dismissed on the doctrine of *res judicata* and that plaintiffs failed to provide adequate pre-suite notice. Plaintiffs did not oppose STPG's motion to dismiss. Instead, plaintiffs moved to dismiss STPG's motion on the grounds that the SAC rendered STPG's motion moot.

Determining the Mootness of STPG's Motion to Dismiss

The court first considered plaintiff's mootness arguments. To determine whether the SAC rendered STPG's pending motion to dismiss moot, the court considered whether the SAC would cure the alleged defects. Here, the court found that the SAC did not cure the alleged defects because it added very little new information. The court noted that the lawsuit centered around the events already litigated in the state court. Even in the SAC, plaintiffs did not add materially different facts or assist the court in determining whether there was a claim upon which relief may be granted. Accordingly, the court determined that STPG's motion to dismiss was not moot.

STPG's *Res Judicata* Claim

The court next considered STPG's motion to dismiss on the doctrine of *res judicata*. *Res judicata* is a doctrine that bars parties from litigating a matter that has already been finalized by a court. The court began by noting that STPG had not yet answered the initial complaint filed on March 17, 2020. Typically, *res judicata* is plead in answer to a complaint and not in a motion before an answer. However, when *res judicata* is apparent in the pleadings, a dismissal may be appropriate. Here, the court found that *res judicata*

was apparent in plaintiffs' complaints and supplemental documents because plaintiffs repeatedly referenced the state court litigation. The court determined that since the *res judicata* was apparent in the pleadings, it was appropriate for STPG to assert the defense before answering plaintiffs' complaint.

The court then turned to applicable law regarding *res judicata* in Louisiana. The court found that if a valid final judgment was in favor of the defendant, and the same parties are involved in subsequent litigation, all causes of action existing at the time of the judgment are barred from future causes of action if they arise out of the same transaction. In Louisiana, a judgement is made final whenever it is rendered by a court with jurisdiction over both the subject matter and the parties after proper notice was given.

Plaintiffs previously filed suit in the 22nd Judicial District Court for the state of Louisiana against STPG for the same conduct. After five years of litigation, the state court issued a final judgment in favor of STPG. While the judgment was on appeal, plaintiffs brought suit in the U.S. District Court for the Eastern District of Louisiana. Here, the court determined that the state court judgment was finalized and in favor of STPG. Additionally, the parties in both the state court litigation and the present litigation were identical. Finally, the court noted that plaintiffs' allegations arose out of the original complaint in the state court litigation and that no new allegations had been made since the state court's final judgment. The court concluded by holding that all but the CWA claims were barred from proceeding before the court.

The court then proceeded to address whether the Louisiana state court could have exercised jurisdiction over plaintiff's CWA claims to determine whether *res judicata* applied to the claim. The court noted a circuit split as to whether CWA claims could be brought in state courts. The court mentioned that the Third and Ninth circuits issued decisions holding that federal courts had exclusive jurisdiction over CWA suits. Instead of ruling on the matter, the court considered whether the CWA claim asserted in the present lawsuit met the pleading standards under Rule 12(b)(6).

Pre-Suit Notice

The court next considered whether plaintiffs pre-suit notice was adequate. STPG argued that under Rule 12(b)(6), plaintiffs did not state a claim because they did not provide the required pre-suit notice under the CWA and they failed to specify evidence of a CWA violation. The CWA requires notice to be given to a defendant before filing suit. The notice must be specific and contain the type of violation, the person(s) responsible for the violation, the location and date(s) of the violation, along with the full name, address and telephone number of the person giving notice.

Here, STPG argued that plaintiffs' pre-suit notice was vague and overly broad. Plaintiffs argued that the parties' litigation history overcomes any notice deficiencies. The court determined that the notice was inadequate because it lacked the specific effluent standard or limitation being violated, the person or persons responsible for the alleged violation, and the date(s) of the violation. The court determined that plaintiffs failed to plead a facially plausible claim.

Alternatively, the court reasoned that even if plaintiffs satisfied the pre-suit notice requirement, they still failed to state a CWA claim in their subsequent pleadings. The court based this on the SAC's lack of explicit connection between STPG's actions and the pollution of waters of the United States. The court noted plaintiffs' inference that the runoff from STPG's discharge would end up in waters of the United States, along with the assumption that permit noncompliance was an automatic violation of the CWA, was insufficient. With those statements and nothing more, the court concluded that Plaintiffs did not state a claim upon which relief may be granted.

Conclusions and Implications

This case highlights the importance of an adequate pre-suit notice and adequate pleading under the federal Clean Water Act. Parties wishing to bring suit under the Clean Water Act must provide a detailed pre-suit notice to violating parties and avoid inferences in their complaints. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-laed-2_20-cv-00928/pdf/USCOURTS-laed-2_20-cv-00928-0.pdf
(Marco Antonio Ornelas, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT ADOPTS BROAD DEFINITION OF PROPOSITION 218: FINDS WATER UTILITY CHARGES FALL WITHIN REFERENDUM EXEMPTION FOR 'TAX LEVIES'

Wilde v. City of Dunsmuir, et al., ___Cal.5th___, Case No. S252915 (Cal. Aug. 3, 2020).

The California Supreme Court has ruled that water rates fell within the constitutional referendum exemption for "tax levies," resolving conflicting lower court decisions and expressly affirming the Court of Appeal's decision in *Howard Jarvis Taxpayers' Association v. Amador Water Agency*. The Supreme Court reasoned that the definition of "tax" has no fixed meaning, often resulting in different meanings applied to the term depending on the context. Given the wide range of uses of "tax," the Court adopted a broad definition based on previous case law and the overall purpose of the referendum exception to Proposition 218. Given that the purpose of the City of Dunsmuir's (City) water rate increase was to fund upgrades to the City's water infrastructure, allowing a referendum on a tax would hamstring the ability of local governments to budget and manage their fiscal affairs. As a result, the City's water rates fell within the exemption for "tax levies" and are not subject to referendum.

Background

The Dunsmuir city council approved a resolution establishing a five-year plan for a $15 million upgrade to the City's water storage and delivery infrastructure and adopted new water rates necessary to pay for this project. The resolution was adopted in accordance with Proposition 218 after holding a noticed public hearing. The plaintiff was a Dunsmuir water rate payer who opposed the water rates, and attempted to block the rate increase by many different means.

The plaintiff initially organized an unsuccessful protest effort, which yielded far fewer protests than necessary to block adoption of the rates. After the new rates were adopted, the plaintiff next tried to undo the resolution in two ways. First, she circulated a petition for a referendum seeking to overturn the resolution. Second, the plaintiff gathered a sufficient number of signatures to place an initiative on the ballot to implement a different water rate schedule. The initiative was placed on the November 2016 ballot and rejected by the voters. However, the City refused to place the plaintiff's referendum on the ballot, on the grounds that setting water rates is an administrative act not subject to referendum, and that Article XIII C, § 3 of the California Constitution allows for initiatives, but not referenda, related to water rate increases.

The plaintiff filed a writ petition to compel the City to place the referendum on the ballot. The trial court denied the petition on the grounds that Proposition 218 allows voters to challenge property-related fees by initiative but not referendum. The Court of Appeal reversed, finding that, while Article II, § 9 exempts tax measures from referendum, the "tax exemption" did not apply because the water charges are a "property-related fee" and not a "tax" under Proposition 218.

The California Constitution

Under the California Constitution "[t]he legislative power of this State is vested in the California Legislature…but the people reserve to themselves the powers of initiative and referendum." Cal. Const., Art. IV, § 1.

The referendum powers allow voters to weigh in on laws that have already been adopted by their elected representatives, suspending the operation of the law until it is approved by a majority of voters. Cal. Const., Art. II, §9, subd. (a); *see*, *City of Morgan Hill v. Bushey*, 5 Cal.5th 1068, 1078 (2018). However, the referendum power is subject to certain exceptions:

> The referendum is the power of the electors to approve or reject statutes…except urgency statutes, statutes calling elections and statutes

providing for *tax levies* or appropriations for usual current expenses of the State. Cal. Const., Art. II, § 9, subd. (a) (emphasis added).

That is, the California Constitution exempts from the referendum power acts of the Legislature providing for tax levies or appropriation for the usual current expenses of the state to prevent disruption of its operations by interference with the administration of its fiscal powers and policies.

The Supreme Court's Decision

In order to determine if local utility charges fell into the referendum exception, the California Supreme Court turned to the question of whether the local utility charges were "taxes." Article II, § 9 of the California Constitution does not define the term "tax." Here, the Court concluded that the term "tax" had no fixed meaning, and that the distinction between taxes and fees was frequently blurred, taking on different meanings in different contexts. The Court applied a broad interpretation of "tax" to determine that water rates could be both a property-related "fee" under Articles XIII C and XIII D and a "tax" within the referendum provisions in Article II. Judicial decisions from the time of Article II, § 9's passage indicate that the term "tax" was understood to be broad enough to cover charges for municipal utility services. For instance, in *City of Madera v. Black*, rates charged to fund the construction of a municipal sewer system qualified as a "tax" because the charge was imposed by the legislative authority of a city for public purposes. 181 Cal. 306, 310 (1919).

The Supreme Court held that the Article II, § 9 referendum exemptions reflected a recognition that in certain areas, legislators must be permitted to act expediently, without delays and uncertainty that accompany the referendum process. For this reason, if essential governmental functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended. For instance, if a tax measure were subject to referendum, the local government's ability to adopt a balanced budget and raise funds for current operating expenses through taxation would be delayed and might be rendered impossible.

Alleviating the Risk of Interfering with City's Management of Fiscal Affairs

The Court applied these principles to the City's water utility rates, reasoning that even the temporary suspension of a rate-setting resolution would run the risk of undermining the City's ability to finance its water utility and manage its fiscal affairs. If this were to occur, the City would inevitably need to raise the funds required for the operation, repair, and upkeep of its utilities. A delay caused by a wait for a successful referendum runs the risk of preventing the City from managing its fiscal affairs for a significant period of time. The purpose of the taxation exception in Article II, § 9 is to alleviate that risk. As a result, the Court held that charges used to fund a city's provision of water, like other utility fees used to fund essential government services, are exempt from referendum.

Conclusion and Implications

The California Constitution grants voters the power of referendum, which allows them to approve or reject laws enacted by their elected representatives before the laws take effect. In order to prevent the referendum process from disrupting essential governmental operations, the Constitution exempts certain categories of legislation, including "statutes providing for tax levies or appropriations for usual current expenses" of the government. Municipal water rates and other local utility charges may be challenged by other means, including pre-adoption protests or post-adoption initiatives, but the California Supreme Court has now held that they are not subject to referendum. The Supreme Court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/S252915.PDF

(Miles Krieger, Geremy Holm, Steve Anderson)

FOURTH DISTRICT COURT HOLDS AGENCIES MUST RETAIN DOCUMENTS MANDATED FOR INCLUSION IN THE ADMINISTRATIVE RECORD UNDER CEQA

Golden Door Properties, LLC v. Superior Court of San Diego County, ___Cal.App.5th___, Case Nos. D076605, D076924, D076993 (4th Dist. July 30, 2020).

The Fourth District Court of Appeal in *Golden Door Properties, LLC v. Super. Ct. of San Diego County* largely overturned a discovery referee's recommendations, which were later adopted by the trial court, holding that a lead agency must retain writings subject to inclusion in the administrative record under Public Resources Code § 21167.6, and permitting discovery to identify documents that had been deleted from the county's files.

Factual and Procedural Background

The county has a policy whereby emails are permanently deleted after 60 days unless the email user determines that the email needs to be saved, in which case it is retained for at least two years.

In 2015, the project applicant proposed a mixed-use development in close proximity to petitioner's property. In June 2017, the county released a California Environmental Quality Act (CEQA), draft Environmental Impact Report (EIR) for the project. Shortly thereafter in July 2017, petitioner submitted a Public Records Act (PRA) (Gov. Code, § 6250 *et seq.*) request seeking the draft EIR's technical analyses. The county refused production claiming its consultants had possessory rights to the documents.

Petitioner submitted another PRA request in October 2017 requesting copies of the county's consultant contracts along with all documents and communications in the county's possession pertaining to the project. Despite that environmental review had been ongoing for nearly three years, the county produced only 42 emails covering only the 60-day period from September through October 2017. When questioned, San Diego County explained its 60-day auto-deletion program for emails. The county subsequently refused to produce copies of emails that may have been deleted held by its consultants.

In June 2018, the county released a second draft EIR for the project. Prior to certification of the EIR, petitioner filed a PRA lawsuit alleging, among other claims, that the county improperly destroyed official records and improperly withheld records under the PRA. In July 2018, the trial court issued a temporary restraining order directing the county to stop deleting project-related emails.

The county certified the EIR on September 26, 2018. petitioner, and others, filed lawsuits. The court consolidated all actions, including petitioner's PRA lawsuit for a single trial.

In January 2019, petitioner served discovery requests under the Civil Discovery Act for the documents it had already requested under the PRA in order to prepare the administrative record. Between January and May 2019, the county produced nearly 6,000 documents, but refused, in part, requests seeking documents pertaining to the county's compliance with petitioner's PRA requests. Attempting a different avenue, petitioners unsuccessfully attempted to obtain copies of deleted emails from the project applicant the county's environmental consultants. Petitioner also attempted to subpoena the county's environmental consultants for project-related emails, notes, studies and agreements between them and other parties. The consultants objected. Petitioner also filed motions to compel discovery and require a privilege log for withheld documents.

The parties stipulated to the appointment of a discovery referee and the county agreed to prepare a privilege log. The discovery referee denied petitioner's series of discovery motions on a number of grounds: 1) that the discovery requests improperly sought extra-record evidence; 2) failure to exhaust administrative remedies; 3) failure to prove documents were destroyed; 4) the county's 60-day email deletion policy was lawful; 5) discovery was not available under the PRA; 6) the county was not in constructive possession of consultant documents and therefore production was not required; and 7) the common interest doctrine applied. The trial court adopted the discovery referee's recommendations.

Petitioner filed a writ petition (the first of three) with the Court of Appeal seeking a writ of mandate

directing the trial court to grant the motions to compel or otherwise rule that the county had violated Public Resources Code § 21167.6 by destroying documents subject to inclusion in the administrative record. The appellate court summarily denied the petition and petitioner filed a petition for review in the Supreme Court. Shortly thereafter, the county produced a privilege log, which petitioner alleged was inadequate.

When petitioner subpoenaed several of the county's environmental consultants for business records, the consultants refused production. Petitioner filed a motion to compel. Petitioner also noticed depositions for the county individual most knowledgeable about the document retention policies. In response, the county filed a motion to quash the deposition notice. The discovery referee denied the motion to compel and granted the county's motion to quash, awarding $7,425 in sanctions. The trial court adopted the discovery referee's ruling but struck the sanctions.

Petitioner filed a second writ petition with the appellate court challenging denial of its motions to compel and the order granting the motion to quash. Subsequently, the Supreme Court granted the petitioner's petition filed earlier related to its initial discovery motions transferring the matter back to the appellate court with direction to issue an order to show cause regarding why the first writ petition should not be issued. The Fourth District Court of Appeal issued an order addressing the first writ petition and another showing cause regarding the second writ petition, consolidating the two writ proceedings.

In October 2019, petitioner filed a motion to augment the administrative record to add documents omitted by the county. The trial court denied the petition and petitioner filed a third writ petition with the appellate court. The court issued an order to show cause and consolidated the three petitions.

The Court of Appeal's Decision

County's Email Destruction Policy

As a threshold matter, the Fourth District first considered whether the writ petitions were moot because the county had rescinded and vacated its certification of the EIR and approval of some (but not all) associated land use entitlements. The court held that the petitions were not moot because the county did not rescind all project approvals and the applicant indicated its intent to proceed with the project.

Even if the issue was moot, the court stated that it had the discretion to retain a moot case on three bases: 1) the case presents an issue of broad public interest that is likely to recur; 2) the parties' controversy may recur; and 3) a material issue remains for the court's determination. The court stated that the Supreme Court's actions in this matter implicitly determined that the county's 60-day email deletion policy was an issue of statewide significance. Thus, the court concluded that the writ petitions were not moot, but even if they were it exercised discretion to decide them.

In considering the issue of whether Public Resources Code § 21167.6 requires documents subject to inclusion in the administrative record to not be destroyed before the record is prepared, the court provided a recitation of § 21167.6, which has been interpreted to encompass any document that "ever came near a proposed development or to the agency's compliance with CEQA in responding to that development."

Using the plain and commonsense meaning of the language in the statute, the court found that to the extent county policies allow for the destruction of emails that § 21167.6 mandates be retained, § 21167.6 controls. The court next turned to the mandatory and broadly inclusive words in the statute, *e.g.*, § 21167.6 subdivisions (e)(7) and (e)(10), which call for:

> . . .all written evidence or correspondence. . .[and]. . .any other written materials relevant to the respondent public agency's compliance with this [CEQA] or its decision on the merits of the project.

The court specified that these sections cannot be reasonably interpreted to mean:

> . . .all written materials, internal agency communications, and staff notes except those emails the lead agency has destroyed.

The court further found that interpreting § 21167.6 to require documents within its scope be retained is consistent with core CEQA policies, *i.e.*, information and disclosure. The court rejected the county's argument that § 21167.6 only lists docu-

ments to be included in the administrative record, but does not mandate retention of those documents. The court questioned the inherent futility in enumerating mandatory record components, only to allow a lead agency to delete writings not to its liking to keep them out of the record. Based on the plain language of the statute, the court held "that a lead agency may not destroy, but rather must retain writings § 21167.6 mandates for inclusion in the record of proceedings.

The county also argued that a lead agency should only be required to retain those writings that the CEQA Guidelines or a statute designates. For example, certain provisions of the CEQA Guidelines identify retention periods for particular documents, *e.g.*, EIRs, notices of determination, or notices of exemption. The court disagreed. The court held that CEQA Guidelines regarding document retention are not exclusive adding that the provisions addressing document retention timelines generally serve to inform the public of which documents trigger limitation periods, further underscoring the importance that these documents be made publicly available. The court held that it was "inconceivable" that in adopting § 21167.6 the California Legislature intended only the handful of documents identified in the CEQA Guidelines be retained to serve the dual purpose of providing the public with information and ensuring meaningful judicial review of a lead agency's decision.

Next the court held that the trial court erred in applying the rules for extra-record evidence. The documents sought by petitioner were already mandated for inclusion in the record under the statute. The court held that the discovery referee failed to first determine if the documents qualified for inclusion in the record pursuant to § 21167.6, subdivision (e). Only if the item does not fall within the scope of the statute is its admissibility determined under the rules applicable to extra-record evidence.

The court next discussed the inapplicability of a string of authorities relied on by the discovery referee as the basis for his ruling that the county's email destruction policy was lawful finding that none of them supported the discovery referee's ruling.

The court further found that the referee had inappropriately equated non-official emails with preliminary drafts in determining that "[n]on-official emails and other preliminary drafts" are not included under § 21167.6. The court noted that to describe a communication as a non-official record email does not speak to whether it is final or instead a preliminary draft.

The county's argument that its policy is consistent with other agencies' practices and recommendations failed to persuade the court. The court noted that whether the county's policy complied with CEQA was not "based on a popularity poll" but must be determined based on the statutory language interpreted in light of CEQA policies and goals.

The court also rejected several alternative grounds relied on by the referee in denying petitioner's discovery motions. Regarding exhaustion, the court pointed out that the record establishes that petitioner preserved the document destruction issue in a letter delivered to the county board three days before the notice of determination was issue. The referee, however, refused to consider this argument because petitioner submitted it for the first time in their reply papers. The court, however, highlighted the exception to prohibiting new evidence presented with reply papers for evidence that is strictly responsive to arguments made for the first time on opposition—concluding that the referee's ruling constituted an abuse of discretion because he applied the incorrect legal standard.

With respect to the referee's recommendation to deny petitioner's motions to compel because petitioner failed to:

> . . .make a timely request of the [c]ounty to retain non-essential emails, the court pointed out that such requirement is antithetical to the underlying purpose of CEQA, which is government accountability.

The court also rejected the county's contention that discovery is generally not permitted in CEQA matters as incorrect relying on cases where courts have allowed discovery in CEQA proceedings. In response to the county's argument that allowing discovery conflicts with CEQA's legislative goals that such actions be decided expeditiously, the court noted that the delay was caused by the county's failure to abide by § 21167.6 and that discovery would not be necessary had the county complied with the mandatory and broad inclusive language found therein.

In response to the county's argument that it would cost $76,000 per month for email storage, the court clarified nothing in § 21167.6 or the opinion requires retention of emails having no relevance to the

project or the agency's compliance with CEQA with respect to the project. For example, email equivalents to "sticky notes, calendaring faxes, and social hallway conversations" are not within the scope of § 21167.6, subdivision (e) and do not need to be retained. Similarly, the court emphasized that relevant emails do not need to be retained indefinitely stating that CEQA's famously short statutes of limitation is a relevant consideration in determining whether a document retention policy is consistent with CEQA.

Discovery Requests Propounded on Project Applicant and Consultants

The court found the referee's ruling to deny petitioner's motion to compel discovery on the project applicant and consultants erroneous. The discovery referee recommended denying the motion to compel because it was too late to enlarge the administrative record. The court reiterated that petitioner was not attempting to enlarge the record, but instead attempting to compile the record as provided in § 21167.6.

The court also found the discovery referee's recommendations denying petitioner's motions to compel production of documents on the county's consultants were also erroneous.

Common Interest Doctrine

In May 2019, petitioner filed a motion to compel the county to produce a privilege log after the county objected to production of documents on several grounds, including the common interest doctrine. The county produced a privilege log identifying 3,864 withheld documents, and later produced an amended privilege log identifying 1,952 documents.

Taking Claim

Petitioner asserted that the common interest doctrine did not apply to the documents shared between the project applicant and the county prior to October 10, 2018, the date the county board adopted the last project approval. The court disagreed holding that the referee correctly determined the common interest doctrine applied pre-project approval. The court distinguished *Ceres for Citizens v. Super. Ct.*, 217 Cal. App.4th 889 (2013), by pointing out that petitioner had already sued the county twice prior to project approval, each time seeking orders to kill the project and creating the common interest between the lead agency and the applicant to defend the project pre-approval.

PRA Exemptions

The county relied on both the preliminary draft exception and the deliberative process privilege to withhold approximately 1,900 documents from discovery. The referee upheld all 1,900 claims without analyzing any of the underlying documents or even referring to generic categories of documents. In contrast, the court held that the county had made an insufficient showing to support its claims that these documents were privileged or exempt.

The court discussed the difficult balance the county must trike between not giving away the information it seeks to protect while also providing enough information to give a requester "a meaningful opportunity to contest" the basis upon which an agency withholds documents and for the court to determine whether the exemption applies. The court found that the declaration offered by the county to support its privilege claims offered only "broad conclusory claims" that "merely echo public policies underlying claims of privilege generally." The court held that the county had failed to carry its burden to establish that the public interest in withholding the documents clearly outweighed the public interest in disclosure.

Remedy

The court found that the trial court's order denying petitioner's motion to augment must be vacated because the county's long-standing email retention policy is unlawful. It held that petitioner should be afforded a reasonable period of time to bring a new motion to augment after discovery is completed.

Conclusion and Implications

Going forward, CEQA practitioners may see more and more petitioners relying on this case to request discovery to prepare the administrative record. Moreover, as the county argued that their 60-day automatic deletion policy "comports with other agencies' practices and recommendations," this decision may have far reaching implications on lead agencies' document retention policies. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D076605.PDF
(Christina Berglund, Mina Arasteh)

THIRD DISTRICT COURT AFFIRMS STATE WATER BOARD'S AUTHORITY TO REGULATE UNREASONABLE WATER USE THROUGH TEMPORARY EMERGENCY REGULATIONS AND CURTAILMENT ORDERS WITHOUT PRIOR EVIDENTIARY HEARING

Stanford Vina Ranch Irrigation Company v. State of California, 50 Cal.App.5th 976 (3rd Dist. 2020).

The California Third District Court of Appeal recently upheld a determination that the State Water Resources Control Board's (SWRCB or Board) possesses broad authority to issue temporary emergency regulations and curtailment orders which establish minimum flow requirements, regulate unreasonable use of water, and protect threatened fish species during drought conditions.

Background

Plaintiff/appellant Stanford Vina Ranch Irrigation Company (Stanford Vina) diverts water for agricultural uses from Deer Creek, a tributary to the Sacramento River. Stanford Vina is entitled to use 66% of the flow of Deer Creek and holds both riparian and pre1914 appropriative water rights.

Two species of anadromous fish, Chinook salmon (fall run and spring run) and steelhead trout migrate from the Pacific Ocean to Deer Creek each year to spawn. The spring Chinook salmon and steelhead trout are listed as a threatened species under the California Endangered Species Act and the federal Endangered Species Act. Federal and state agencies have concluded that Deer Creek has "high potential" for supporting viable populations of both spring-run salmon and steelhead trout. The water diversion structures operated by Stanford Vina on Deer Creek were alleged to have the potential to dewater Deer Creek during low flow periods and to also negatively affect the outmigration of juvenile spring-rule salmon and steelhead trout.

In 2014, California was in the midst of one of the most severe droughts on record. Extreme drought conditions threatened to dewater high priority streams during critical migration periods for threatened and endangered fish species. In response, then-Governor Jerry Brown declared a drought state of emergency and signed urgency legislation that included authority for the SWRCB to adopt emergency regulations. Those emergency regulations included, among other provisions, Board authority to prevent waste and unreasonable use of water, to promote water conservation, and to require curtailment of certain surface water diversions. The SWRCB thereafter began promulgating regulations implementing in-stream flow requirements for Deer Creek and other surface water courses.

Specifically, the regulations declared that any diversion reducing flows beneath drought emergency minimums would be a per se waste and unreasonable use in violation of Article X, § 2 of the California Constitution. The emergency regulations barred water from being diverted from Deer Creek and other specific streams during the effective period of any SWRCB curtailment orders issued pursuant to the regulations.

On June 5, 2014, the Board issued the first curtailment order for Deer Creek, which directed all water rights holders to immediately cease or reduce their diversions in order to maintain the drought emergency minimum flows specified by the regulation. Between June 2014 and October 2015, the Board issued three more curtailment orders to Deer Creek water users.

Procedural History

Stanford Vina filed suit against the SWRCB in October 2014 asserting causes of action for inverse condemnation and declaratory relief over the temporary emergency regulations. Stanford Vina argued that the emergency regulations and curtailment orders were unreasonable, violated due process requirements, and amounted to a taking of vested water rights without just compensation.

The trial court concluded that the Board possessed quasi-legislative authority to adopt the challenged emergency regulations without first holding an evidentiary hearing. It found that under the extreme drought conditions, the Board rationally determined that allowing diversions to reduce flows below the minimum amounts necessary for fish migrations and

survivability would be an unreasonable use of water. The trial court also rejected Stanford Vina's taking argument and rule of priority argument and entered judgment against Stanford Vina on all causes of action.

The Court of Appeal's Decision

In its recent published opinion, the Third District Court of Appeal affirmed the trial court's decision and held that the Board has broad authority to regulate the unreasonable use of water. This authority, the court found, included the right to adopt regulations, establish minimum flow requirements to protect the migration of threatened fish species during drought conditions, and to declare unreasonable diversions of water would cause in-stream flows to fall below levels needed by those fish. Because different standards of review apply to the Board's quasi-legislative rule making power and its quasi-adjudicative enforcement actions, the court addressed the validity of the challenged regulations and challenged curtailment orders separately.

Validity of the Challenged Regulations

The Court of Appeal determined that the emergency regulations were within the Board's regulatory authority in furtherance of its constitutional and statutory mandate to prevent waste and unreasonable uses of water and consistent with Article X, § 2 of the California Constitution and Water Code §§ 100, 275, 1058, and 1058.5:

- Section 100: Provides in relevant part that 'the right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.'

- Section 275: The Board is authorized to 'take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.'

- Section 1058: The Board is authorized to 'make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties.'

- Section 1058.5: The Board is authorized to adopt emergency regulations to prevent 'unreasonable use, unreasonable method of use, or unreasonable method of diversions' during severe drought conditions.

The court further held that adoption of the regulations was not arbitrary, capricious, or lacking in evidentiary support.

The court then concluded that, contrary to Stanford Vina's arguments, the Board was not required to hold an evidentiary hearing before making a "reasonableness determination" as to plaintiff's use of water. According to the court, neither the due process clauses of the federal or California Constitutions, nor article X, § 2 of the California Constitution, require the Board to hold an evidentiary hearing prior to adoption of a regulation governing reasonable water use.

Citing heavily to and expanding upon *Light v. State Water Resources Control Bd.*, 226 Cal. App. 4th 1463 (2014) (*Light*) and the line of reasonable use cases before it, the Court of Appeal also concluded that the Board's authority included the direct regulation of riparian and pre-1914 appropriative water rights holders without first holding an evidentiary hearing, and the ability to adopt curtailment orders that notified the affected water rights holders the emergency regulations were put into effect.

Validity of the Challenged Curtailment Orders

The Court of Appeal next analyzed whether the SWRCB had properly implemented the emergency regulations by issuing the challenged curtailment orders. Contrary to Stanford Vina's assertion, the court found that Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations regardless of its status as a senior riparian and that it held pre-1914 water rights. Thus, the court applied the substantial evidence standard of review in assessing the validity of the curtailment orders.

Upon review of the record, the court found that substantial evidence supported the SWRCB's conclusion that curtailed diversions would have caused or threatened to cause the flow of water in Deer Creek to fall below the emergency minimum flow requirements. The court further held that the curtailment orders were not a taking of the company's water rights, because the mere regulation of the use and enjoyment of a property right for the public benefit is a permissible exercise of the state's police power and does not amount to a taking under eminent domain. Therefore, the Board had acted within its authority to determine that diversions from Deer Creek threatened to violate the emergency regulations minimum flow requirements constituted an unreasonable use of water.

The court further rejected the argument that the curtailment orders were a taking of private property without just compensation since it found that Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations. Along those lines, the court dismissed any claims that the regulations and curtailment orders impermissibly interfered with a prior judicial degree declaring its water rights, because rights declared by a judicial decree are subject to the rule.

Conclusion and Implications

The *Stanford Vina* decision is an interesting and consequential case among those pertaining to the applicability and use of the reasonable use doctrine. Whereas in *Light* the court acknowledged that the curtailment and regulation of riparian and pre-1914 water users would be pursuant to local programs and not by the State Water Resources Control Board itself, the Third District Court of Appeal in this case found that the Board may, under certain circumstances itself declare diversions unreasonable and issue curtailment orders to cease all diversions of water without first holding an evidentiary hearing. While the SWRCB authority during the unique circumstances of an extraordinary multi-year drought is made more-clear by the court's opinion, it leaves unanswered whether a similar approach would work during less extreme circumstances. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C085762.PDF
(Paula Hernandez, Derek R. Hoffman)

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