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# CALIFORNIA WATER™

## LAW & POLICY Reporter

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FEATURE ARTICLE

# THE CALIFORNIA SUPREME COURT DECIDES *PROTECTING OUR WATER AND ENVIRONMENTAL RESOURCES V. COUNTY OF STANISLAUS*, FINDING GROUNDWATER WELL PERMITS ARE DISCRETIONARY, NOW AND THEN

*By Christian Marsh*

The last decade has witnessed dramatic shifts in the framework for governance of the state's groundwater resources, from the California Legislature's enactment of the Sustainable Groundwater Management Act (SGMA) to the Third District Court of Appeal's extension of the common law public trust doctrine to the pumping of groundwater that impairs hydrologically connected surface waters. During this time, the California Environmental Quality Act (CEQA) has also caught the attention of the California Supreme Court. Rather than clarify the law, however, the Court's decisions have more often created multi-part tests or new interpretations of old precedent, adding to the complexities already facing public agencies in their efforts to navigate the byzantine world of environmental review. The one area of law that seemed to provide lead agencies some clarity is the line of more recent cases clarifying the division between discretionary and ministerial review—the latter are not subject to CEQA.

Not content to leave the law undisturbed, the California Supreme Court on August 27, 2020 waded in again, issuing its decision in *Protecting Our Water and Environmental Resources v. County of Stanislaus*, ___Cal.5th___, Case No. S251709 (2020) (*Protecting Our Water or POWER*), and finding that groundwater well installation permits issued under a county ordinance could not be categorically classified as ministerial decisions exempt from environmental review. Instead, the Court narrowed the grounds on which the ministerial exemption might apply in a manner that will require more careful case-by-case determinations by lead agencies and the courts. And since county well ordinances across the state comprise similar provisions, this ruling upsets the common practice of treating many such permits as ministerial and not subject to CEQA. More importantly, however, the Court's ruling interrupts a growing trend in the case law to provide some relief from CEQA where agencies lack sufficient discretion to address environmental concerns associated with certain categories of projects.

## New Forces at Work in the Governance and Protection of Groundwater Resources

To address the seemingly disparate governance structures between surface and groundwater in California, the Legislature in 2014 enacted SGMA to support the "protection, management, and reasonable beneficial use of the water resources of the state." To achieve this purpose, SGMA preserves for local agencies (including counties) the opportunity to manage groundwater by acting as a Groundwater Sustainability Agency (GSA) and to develop a Groundwater Sustainability Plan (GSP) to manage groundwater resources within a given basin. Such GSPs must protect against "undesirable results," including chronic lowering of groundwater levels, unreasonable degradation in water quality, and significant and unreasonable adverse impacts on beneficial uses of interconnected surface waters. However, GSPs are only required for basins assigned specific priorities—*e.g.*, "medium," "high," or "critically overdrafted" basins. If a GSA fails to meet these deadlines or if it is determined that the basin is not being sustainably managed, the state may intervene.

On the heels of SGMA and shortly before the *POWER* decision, the California Court of Appeal for the Third Appellate District published its opinion in *Environmental Law Foundation v. State Water Resources Control Board* (*ELF*), 26 Cal.App.5th 844 (2018), a case brought to challenge Siskiyou County's issuance of well permits in the vicinity of the Scott River, a navigable waterway. For the first time, the Court of Appeal applied the common law public trust doctrine to the administration of groundwater in holding that counties, as subdivisions of the state, have a fiduciary duty to consider the public trust before authorizing the drilling of groundwater wells whose extractions might have an adverse impact on trust uses or resources (*e.g.*, recreation or preservation of trust lands in their natural state). Thirty-five years earlier, the California Supreme Court in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), applied the public trust doctrine to limit the appropriation of water from navigable streams and non-navigable tributaries, holding that the state may allocate water resources within its discretion and "despite foreseeable harm to public trust uses" *only so long as* it "considers" public trust resources and "preserves" those resources to the extent "feasible." The *ELF* decision extended this reasoning to groundwater "hydrologically connected" to the Scott River based on the premise that pumping might adversely (albeit indirectly) affect navigable waters subject to the trust. In its opinion, and despite the fact that SGMA is expressly designed to address interconnected surface waters and bring imperiled groundwater basins back to sustainable levels, the court rejected the notion that SGMA preempts or fulfills a county's duty to consider the trust. Of particular importance in the context of the *POWER* decision, the Third District Court had the opportunity but failed to address the issue of whether a county must still consider the trust when it lacks the discretion to address the alleged harm to trust uses and resources—*e.g.*, because a county well ordinance only governs construction standards for wells, *and not* allocation of water resources among users.

### The Evolution of Ministerial Review under CEQA

Under CEQA, the distinction between discretionary and ministerial actions is a critical one, as it fixes a public agency's responsibility to analyze and minimize potential environmental impacts before it approves a project. As the overarching environmental protection law in California, CEQA broadly requires review of all "discretionary projects proposed to be carried out or approved by public agencies." (Pub. Resources Code, § 21080(a).) Environmental review of projects under CEQA can, in some cases, entail years of analysis, document preparation, public participation, and litigation.

The CEQA Guidelines define a discretionary project as any action that requires the exercise of judgment or deliberation when an agency decides to approve or disapprove a particular activity. (Guidelines, § 15357.) Ministerial actions, on the other hand, are statutorily carved out as exempt from CEQA review. (Pub. Resources Code, § 21080(b)(1).) A ministerial decision involves "little or no personal judgment. . .as to the wisdom or manner of carrying out" a project. (Guidelines, § 15369.) An agency "merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision." (*Id.*) The amount of judgment or deliberation an agency can exercise in a given scenario "depends on the authority granted by the law providing the controls over the activity." (*Id.*, § 15002(i)(2).) Even where a ministerial approval could result in environmental impacts, CEQA review is not required where the approving agency lacks the authority or the ability to "shape the project" in a way to sufficiently respond to the identified environmental concerns. (*Mountain Lion Foundation v. Fish & Game Com.*, 16 Cal.4th 105, 107 (1997) (*Mountain Lion Foundation*); *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App.4th 286, 302 (2010) (despite authorizing demolition of historical resource, upheld demolition permit ordinance as ministerial because it applied fixed, objective standards and did not allow the agency to shape the project to avoid harm).) The trend in cases over the last decade has tended to characterize projects as ministerial even where there exists some discretion. Indeed, the cases have emphasized that the discretion has to be of a certain kind. (*See, e.g.*, *Sierra Club v. County of Sonoma*, 11 Cal.App.5th 11 (2017) (issuance of permit allowing the establishment of a vineyard was ministerial because the applicable ordinance provisions did not allow any meaningful mitigation for environmental impacts); *McCorkle Eastside Neighborhood Group v. City of St. Helena*, 31 Cal.App.5th 80, 92-94 (2018) (city council discretion limited to design review, and did not empower

city council to consider and mitigate traffic, noise, air, or water quality impacts).)

Public agencies are encouraged to identify which of their projects and actions can be categorically deemed ministerial, based on the applicable laws and ordinances governing them. (Guidelines, § 15268.) The oft-cited example provided in the CEQA Guidelines illustrates what makes a decision ministerial:

> A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee. (*Id.*, § 15369.)

Like building permits, many counties have issued well construction permits as ministerial decisions, governed by the local ordinances that limit decision-making to the application of adopted technical construction standards.

### Opponents Challenge Well Permits and Ordinances in San Luis Obispo and Stanislaus Counties

Applying the above legal standards and case law, the Second District Court of Appeal in early 2018 published its opinion in *California Water Impact Network v. County of San Luis Obispo* (*CWIN*), 25 Cal.App.5th 666 (2018), which found that San Luis Obispo County's issuance of permits under its well-construction ordinance was ministerial and thus not subject to CEQA. Unlike the court in the Stanislaus County cases discussed below, the Second District Court in *CWIN* found that the ordinance and the state standards it incorporated (Bulletin No. 74) imposed only fixed technical requirements and did not grant discretion to mitigate potential environmental impacts, particularly related to the amount of water that could be extracted (which was not regulated by the ordinance). However, plaintiff sought review in the California Supreme Court and it is still awaiting resolution.

Just months after the *CWIN* ruling and in two *unpublished* decisions decided by the same panel and authored by acting Presiding Justice Poochigian, *Protecting Our Water & Environmental Resources v. Stanislaus County*, Case No. F073634 (*Protecting Our Water*) and *Coston v. Stanislaus County*, Case No. F074209 (*Coston*), the Fifth District Court of Appeal came to the opposite conclusion, finding that well permitting under the Stanislaus County ordinance was discretionary, and subject to CEQA.

Much like San Luis Obispo and many other counties, Stanislaus County (County) issues its groundwater well permits pursuant to chapters 9.36 and 9.37 of the County Code. As directed by California Water Code § 13801, Chapter 9.36 incorporates the technical construction criteria set forth in the California Department of Water Resources' Bulletin No. 74, concerning the "location, construction, maintenance, abandonment, and destruction" of groundwater wells for the purpose of protecting groundwater quality. Chapter 9.37 prohibits the issuance of permits that would result in the unsustainable extraction or export of groundwater supplies. Following the recommendation in CEQA Guidelines § 15268, the County adopted CEQA procedures in 1983 that classified all well construction permits that do not require a variance as ministerial decisions on the basis that the County is limited to assessing whether a proposed well meets the adopted Bulletin No. 74 standards.

In 2014, plaintiffs challenged the County's ministerial classification of its permits, arguing the criteria contained in the state standards require the County to exercise discretion, thus prompting CEQA review. The plaintiffs identified four Bulletin No. 74 standards they believed necessitated the exercise of independent judgment: Standard 8.A (requiring wells to be an "adequate" distance from contamination sources); Standard 8.B (concerning "possible" placement of wells relative to the groundwater gradient); Standard 8.C (concerning "possible" placement of wells relative to flooding areas); and Standard 9 (requiring wells be "effectively" sealed). The trial court was not persuaded, finding the County only determined whether applications met certain technical standards, which was ministerial in nature.

The Fifth District Court of Appeal overturned the trial court's ruling, holding that unlike the more objective findings under Standards 8.B, 8.C, and 9, the determination of well-spacing under Standard 8.A was inherently discretionary because it requires the County to employ subjective judgment. That same day, the Fifth District Court issued a nearly identical decision in *Coston v. Stanislaus County*, holding that the County's authority to decide the location

and spacing of individual wells under Standard 8.A renders the permit approval process discretionary, even where the individual permit in question does not require a spacing determination. Because the ordinance granted some level of discretion, the court reasoned, well permitting decisions are subject to CEQA. The County thereafter sought review in the Supreme Court.

### The Supreme Court's Decision in *Protecting Our Water*

In recognition of the conflict in the lower courts, the Supreme Court granted review of *Protecting Our Water* and deferred further action on the *Coston* and *CWIN* decisions pending its resolution. The core issue presented to the Court was whether the County's issuance of well construction permits is ministerial or discretionary under CEQA.

The County argued that its administration of the permits must be ministerial because its options to mitigate any potential environmental damage are limited to location adjustments, which on their own are not enough to meaningfully address CEQA concerns. Plaintiffs, on the other hand, argued that CEQA should apply to every well permit approval, since the County must exercise discretion any time it decides if a permit meets the governing standards. Writing on behalf of the Court, Justice Carol Corrigan rejected both parties' positions, holding instead that a blanket designation of "ministerial" or "discretionary" is simply inconsistent with the reality that some permit decisions may require discretion, while others may not.

The Supreme Court's holding in *Protecting Our Water* poses significant practical implications for public agencies that have made categorical designations of ministerial decisions pursuant to CEQA Guidelines. It was well-established that requiring CEQA review only for discretionary projects:

> . . .implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an [Environmental Impact Report] EIR, or its functional equivalent, environmental review would be a meaningless exercise. (*Mountain Lion Foundation*, 16 Cal.4th at 117.)

*Mountain Lion Foundation* established a functional standard to be used as a touchstone for determining whether CEQA review is required, focusing on the agency's ability to meaningfully address the environmental concerns that might be identified.

As courts have consistently held:

> CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to 'mitigate . . . environmental damage' to some degree. (*San Diego Navy Broadway Complex Coalition v. City of San Diego*, 185 Cal.App.4th 924, 934 (2010); *see also Sierra Club v. Napa County Bd. of Supervisors*, 205 Cal.App.4th 162, 179 (2012) (the discretionary component of an action must give the agency authority to consider a project's environmental consequences to trigger CEQA); *McCorkle Eastside Neighborhood Group v. City of St. Helena*, 31 Cal.App.5th 80, 89 (2018) (a public agency does not have authority to mitigate environmental harms flowing from a ministerial approval in a "meaningful way").)

While it cited approvingly to the *McCorkle* and *Sierra Club* cases, the Supreme Court ultimately found them inapplicable here. Without a particular permit approval to evaluate, the Court eschewed the functional test described in *Mountain Lion Foundation* and *Sierra Club* in favor of generally holding "Standard 8.A gives County sufficient authority, at least in some cases," to make the issuance of well permits discretionary. Limitations on an agency's ability to mitigate environmental impacts do not render environmental review meaningless where at least *some* hypothetical authority—in this instance, well relocation or permit denial—exists. In doing so, the Opinion seemingly lowered the threshold for the type and degree of discretion that triggers CEQA review, emphasizing that: "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything."

Countenancing its rejection of the County's ministerial categorization, the Court also denied the plaintiffs' overbroad request that all permit approvals be declared discretionary. The Court preserved the

existing law that: "[p]ermits issued under an ordinance are not necessarily discretionary simply because the ordinance contains some discretionary provisions." And although the Court denied granting any deference to the County's legal interpretation of its governing authority under Chapter 9.36 for purposes of its categorical designation, any factual determination that a particular issuance decision is ministerial would be "entitled to great weight." Thus, the County's permit approvals under Chapter 9.36 may still be ministerial "[i]f the circumstances of a particular project do not *require* the exercise of independent judgment," such as when there is no contamination source identified near a proposed well.

Despite imposing responsibility on the County to determine whether CEQA review is needed for each well permit, the Court declined to comment on the scope of the County's authority once an environmental review process was commenced, emphasizing that:

> . . .[w]e are not called upon here to determine the scope of County's authority once an environmental review process begins. We express no view on that issue.

Of course, to comply with CEQA is no small task. Lead agencies are required to make a host of findings and incorporate mitigation and alternatives where necessary to lessen environmental impacts. (Pub. Resources Code, § 21081.) The CEQA process also involves comprehensive notice and hearing procedures, investigations, and covers issues far beyond the groundwater quality concerns addressed in Chapter 9.36 of the County Code, SGMA, or the common law public trust doctrine. But where the governing statute does not allow the issuing authority to condition or deny well permits to mitigate environmental impacts that exist outside of the adopted well standards, CEQA review seems to serve no purpose. Query whether a county well ordinance focused solely on protecting water quality provides sufficient discretion—and indeed the obligation or duty—to administer groundwater rights or limit the volume of groundwater extractions where impacts are limited to water supply.

### Conclusion and Implications

Because many counties administer their well programs utilizing similar ministerial classifications, the Supreme Court's *Protecting Our Water* opinion has significant practical considerations statewide. Counties (and other lead agencies) will now need to tread more carefully in classifying a whole permitting scheme as ministerial and not subject to CEQA. Applying a case-by-case approach imposes significant uncertainty and new analytic burdens on counties that have historically relied on the categorical ministerial exemption for the hundreds of permitting decisions made each year. In addition, counties in basins that are "medium" or "high" priority, "critically overdrafted," or otherwise connected to navigable surface waters, will need to contend with CEQA as well as SGMA and the public trust. Together, this decade may mark the most significant shift in the administration of groundwater in California's history. The Supreme Court's opinion in *Protecting Our Water* is available online at: https://www.courts.ca.gov/opinions/documents/S251709.PDF

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## CALIFORNIA WATER NEWS

# SAN DIEGO COUNTY WATER AUTHORITY, AGAIN CONSIDERS A COLORADO RIVER PIPELINE PROJECT

The San Diego County Water Authority (Authority) is again exploring the possibility of an ambitious pipeline project to grant the Authority direct access to its primary water supplies in the Colorado River. In August 2020, the Authority released a report evaluating strategies for regional water needs finding that a new conveyance system would be cost competitive as compared to the Authority other main long-term options, chiefly increased supplier diversification or further reliance on water obtained from the Metropolitan Water District of Southern California (MWD). Despite the report and apparent enthusiasm for the initiative among some Authority officials, the viability of the project remains dubious at this preliminary stage, given the serious questions that exist as to the conclusions in the August report, the financial burden that would be incurred by members before cost-effectiveness could be realized, and the Authority's history of studying and abandoning similar proposals.

### Background

The Authority is a county water authority created in 1944 by the California Legislature under the Water Authority Act to administer the rapidly-growing San Diego region's rights to water in the Colorado River. Initially consisting of 11 member agencies, the Authority now acts as wholesale supplier to 24 retail member agencies. The Authority's members account for many of the primary retail distributors in the region and with several municipalities, the City of San Diego among them, as well as water districts, irrigation districts a public utility district and military base.

Reliance on water from the Colorado River has necessitated a historical reliance on purchases from MWD, the operator of the existing conveyance system since the Authority's inception. Until 2003, all of the Authority's imported water came from MWD. While in recent years the Authority has significantly reduced that reliance and diversified its Colorado River suppliers, the Authority remains largely reliant on MWD purchases.

The Authority has long coveted its own infrastructure for direct access to the Colorado River in order to secure necessary water supply for the San Diego region on a long-term basis independent of MWD's influence, whom the Authority has an ongoing history of conflict. Without the proposed conveyance infrastructure, the Authority is likely to remain subject to increases in MWD's rates with no viable alternative but to bear the costs to a large degree regardless of supply diversification efforts. The Authority contends that their 2021 rates are mostly attributable to the impact of MWD increases and currently objects to MWD's alleged failure to pursue cost-cutting measures during the pandemic.

### Current Project and Reaction

Preliminary plans for the pipeline essentially call for a modern version of MWD's existing pipeline, extending through the desert and Cleveland National Forest to reach the Colorado River. As envisioned, the project would carry an estimated construction cost of approximately $5 billion, with expected annual maintenance costs of almost $150 million. Almost $100 million of that amount would be attributable to energy needs associated with the system.

Some observers are skeptical, noting that the project is not critical to ensuring regional water supply because MWD's system is projected to have ample capacity to accommodate the Authority's expected needs over the coming years. In addition, the costs of the project are such that even if the project were cost-effective to the Authority in the long-term, the near-term costs are so substantial that actual savings could not be realized for decades.

Even member agencies of the Authority appear uneasy with the plan. Notably, a majority of the Authority's member agencies separately undertook an independent review of the Authority report's findings. In direct contradiction with the Authority report, the member agencies' report determined that

the pipeline project would not be cost-competitive with the Authority's other long-term supply options and was likely to be "substantially more costly" than those other options, such that the Authority report's conclusion otherwise was "not reasonable."

Adding to the skepticism of the plan's viability is the lack of results produced by several prior studies conducted by the Authority examining possibilities for its own pipeline. Apart from the disputed Authority report conclusions, there is little to suggest that this push for a pipeline is significantly different than prior efforts abandoned following initial study. In August, the Authority Board discussed the merits of the plan but ultimately balked at funding a second round of studies regarding the project prior to further consideration scheduled for November.

### Conclusion and Implications

The San Diego County Water Authority report's finding that the proposed Colorado River pipeline project could be cost competitive as compared to other long-term supply strategies suggests that the project may have some momentum, but at this preliminary stage the likelihood of the project proceeding much further appears questionable at best, given the size and cost involved, as well as the Authority's history of repeated and ultimately abandoned flirtations with similar incarnations of the pipeline project dating to the 1990s.

One question that might be considered is the extent to which the Authority's strained relationship with MWD and desire to be out from under MWD's authority and control, has led to an over-eagerness to pursue the project or to accept the cost-competitiveness conclusion in a report that appears curious, having been apparently contradicted by an independent review undertaken by Authority member agencies. Even if those findings are well-founded, the Authority still faces an uphill climb to generate necessary support for an enormously expensive project with up-front costs making financial benefits to Authority members unlikely to be realized for many years, to say nothing of legal or other procedural hurdles that the Authority would face in realistically moving forward. (Wesley A. Miliband, Andrew D. Foley)

## LEGISLATIVE DEVELOPMENTS

# REGULATING PFAS—CALIFORNIA LAWMAKERS VOTE TO PHASE OUT THE SALE AND USE OF FIREFIGHTING FOAM

California has experienced unprecedented wildfires during the summer of 2020. The financial impact of the fires to the state is immense and direct impact to homeowners have been dire. With evidence of one particular fire-fighting chemical making its way into drinking water sources, use of the chemical has caught the attention of California lawmakers.

California lawmakers recently voted to approve Senate Bill 1044 and ban the manufacture, sale, and use of firefighting foam containing perfluoroalkyl and polyfluoroalkyl substances (commonly referred to as PFAS) by January 1, 2022. PFAS have been linked to cancer and other significant health concerns and have been increasingly found in drinking water supplies throughout the State. As of the date of this writing, the bill awaited Governor Newsom's signature by October 1, 2020. The bill was submitted to Governor Newsom on September 10, 2020.

### Background

PFAS can be found in many household products that have been used for decades. It has also been increasingly discovered in drinking water throughout California and the United States. Firefighting foam widely employed on military bases, airports and at industrial sites has been found to be one prevalent source of PFAS in groundwater basins supplying drinking water. Last year, California regulators found PFAS in hundreds of drinking water supply wells. Recent reports indicate groundwater aquifers underlying at least 21 military bases in the state have been found to contain PFAS due to the military's reliance on firefighting foam.

Recent reports have also found traces of PFAS in firefighters' blood who have used the foam to fight fires. In 2019, the International Pollutants Elimination Network (EPIN) issued a white paper that found "unequivocal evidence" that firefighters using foam made with PFAS had "unacceptably high levels" of PFAS in their blood supply.

Scientists refer to PFAS as "forever chemicals" because they accumulate in the human body and do not dissipate over time. Human exposure to PFAS chemicals have been linked to kidney and testicular cancer, high levels of cholesterol, thyroid disease and other health issues.

### New Legislation

The California legislation bans municipal fire departments from using PFAS-containing foam by January 1, 2022, and further bans its use by chemical plants and airport hangars by 2024. Oil refineries will be banned from use of the foam by 2028, unless they qualify for a waiver. The legislation requires those entities to replace the foam with alternatives that do not contain PFAS. According to the legislative reporting, viable non-PFAS alternatives exist today on the market. As of 2019, there were reportedly over 100 flourine-free foams available from 24 manufacturers that met internationally accepted certifications and approvals.

The legislation also regulates the safe transport and storage of PFAS that will be disposed. It also requires any person selling firefighting protective equipment to any person to provide a written notice to the purchaser at the time of sale that the equipment contains intentionally added PFAS chemicals, and the reason that PFAS chemicals have been added to the equipment. Violations would be subject to civil penalties in the amount of up to $5,000 for the first violation and $10,000 for each subsequent violation.

As of the date of this writing, the legislation—which comprises the most stringent of its kind of any state in the country—awaited Governor Newsom's signature to sign the bill into law. The States of Colorado and Washington have banned the sale of the foam, but California's bill goes further to prohibit not only its sale but also its continued use. At the federal level, In 2018 Congress directed the Federal Aviation Administration to change its rules so that airports could move to PFAS-free foam. In December 2019, Congress banned the use of all firefighting foam containing PFAS in the military by 2024.

### Conclusion and Implications

The legislation is intended to create a safer working environment for firefighters and others exposed to the foam while also reducing the exposure of PFAS in drinking water supplies statewide. Though the foam is effective in fighting fires—another of California's major and increasing challenges—legislators have clearly determined that its risks to the health and safety of firefighters on the front lines and the public as a whole demand the use of alternative substances. Additionally, by taking a phased approach to implementation, the bill anticipates and provides time for industry to make an effective and thoughtful transition to viable non-PFAS alternatives that are already available. The full text and history of SB 1044 is available online at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1044.
(Chris Carrillo, Derek R. Hoffman)

## LAWSUITS FILED OR PENDING

# STATE ATTORNEYS GENERAL CHALLENGE TRUMP ADMINISTRATION'S REVAMP OF THE NATIONAL ENVIRONMENTAL POLICY ACT

In July 2020, the Council on Environmental Quality adopted sweeping revisions to its longstanding 1978 regulations detailing implementation of the National Environmental Policy Act (NEPA). In late August 2020, several states and local government entities brought an action against the council alleging that the agency's newly adopted regulations violated *NEPA* and the Administrative Procedure Act. As this article went to press, a motion seeking to enjoin implementation of the Final Rule on NEPA was made before the court. [*States of California, et al. v. Council on Environmental Quality, et al.*, Case No. 3:20-cv-06057 (N.D. Cal. 2020).]

### Background

Enacted on January 1, 1970, the National Environmental Policy Act is a federal law that promotes the protection of the environment and established the President's Council on Environmental Quality (CEQ or Council). NEPA was developed at a time of heighted awareness and growing concern about the environment in response to a series of high-profile environmental crises in the late 1960s, such as the Cuyahoga River fire. As a result, NEPA has been described as the foundation for many state-level environmental protections across the country and is often referred to as the "Magna Carta" of United States environmental law. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir. 1991).

To ensure that the policies outlined by NEPA are "integrated into the very process of decision-making," NEPA outlines "action-forcing" procedures. *Andrus v. Sierra Club*, 442 U.S. 347, 349-50. These procedures require federal agencies to prepare a detailed environmental review or Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the environment, including those impacting regulated waters. *Id.* In short, NEPA requires federal agencies to make well-informed and transparent decisions based on a thorough review of environmental and public health impacts, and input from states, local governments, and the public.

In 1978, CEQ promulgated regulations that have guided the implementation of NEPA for more than 40 years. These longstanding regulations have directed federal agencies, and in some situations, state agencies and local governments involved in major Federal actions significantly affecting the environment, on how to comply with NEPA's procedural requirements and its environmental protection policies. *See,* 40 C.F.R. pt. 1500 (1978) (1978 regulations). These regulations have remained largely unchanged with the exception of two minor amendments enacted in 1986 and 2005.

In 2017, President Donald Trump issued Executive Order 13,807, which called for revisions to the NEPA regulations, to expedite infrastructure projects and boost the economy. In response to this Executive Order, CEQ announced a plan to overhaul the 1978 regulations, including a list of topics that might be addressed by the rulemaking process, and taking public comments. *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 Fed. Reg. 28,591 (June 20, 2018) (Advance Notice). On January 10, 2020, CEQ released its proposal (Proposed Rule) to revise the 1978 regulations, which included revisions that would significantly alter the current implementation of NEPA.

After the publication of the Proposed Rule, CEQ provided 60 days for the public to review, analyze, and submit comments. During this timeframe, interested parties submitted over 1.1 million comments, a significant portion of which opposed the Proposed Rule. Four months after the close of the comment period, the Final Rule was published in the *Federal Register* on July 16, 2020. The Final Rule adopted a majority of the changes outlined by the Proposed Rule's revisions to the 1978 Regulations.

In response to the publication of the Final Rule, several states and local government entities filed a lawsuit against CEQ in the U.S. District Court for

the Northern District of California, alleging that CEQ's adoption of the Final Rule violated NEPA and the Administrative Procedure Act (APA).

### The NEPA Claims

An agency does not have authority to promulgate a regulation that is "plainly contrary to the statute." *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or.*, 515 U.S. 687, 703 (1995). Plaintiffs allege that the Final Rule violates NEPA by adopting provisions that, both individually and collectively, conflict with NEPA's overriding purposes of environmental protection, public participation, and informed decision-making. Specifically, the Final Rule may potentially restrict the number of projects subject to detailed environmental review, while also limiting the scope of environmental effects to be considered by federal agencies when conducting NEPA review. For example, if a project could potentially impact a local water source, the conducting agency may be required to consider only direct impacts of the imposed action on the water source, rather than future/cumulative actions. According to plaintiffs, these two changes directly conflict with NEPA's goal of applying the statute to the "fullest extent possible" and addressing the "long-range character of environmental problems." *See*, 42 U.S.C. §§ 4311, 4322. As a result, according to plaintiffs, the Final Rule should be set aside because it is plainly contrary to NEPA.

Additionally, NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). CEQ is a federal agency subject to NEPA. An EIS must discuss:

> . . .the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any irreversible and irretrievable committed of resources involved in the proposed action. *Id.*

Under CEQ's 1978 regulations, a "major Federal action" included "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a) (1978). As a result, plaintiffs allege that CEQ was required, but failed to address the Final Rule's significant environmental impacts and reasonable alternatives to the Final Rule in an EIS or, at a minimum, an Environmental Assessment (EA). Given CEQ's failure to prepare an EA or EIS, the states argue that the Final Rule should be declared unlawful and set aside.

### The APA Claims

The Administrative Procedure Act provides that a court shall "hold unlawful and set aside" agency action that is arbitrary and capricious without the observance of procedure required by law or in excess of statutory authority. 5 U.S.C. § 706(2). Pursuant to the APA, in promulgating a regulation an:

> . . .agency, must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

Plaintiffs allege that in promulgating the Final Rule, CEQ failed to provide a rational explanation for its changes to its longstanding NEPA interpretations and policies, relied on factors Congress did not intend for CEQ to consider, and offered explanations that ran counter to the evidence before the agency. Similarly, plaintiffs allege that CEQ lacked the statutory authority to implement certain provisions of the Final Rule, such as defining "major Federal action" to exclude an agency's failure to act, directly contradicting the 5 U.S.C. § 551(13). Plaintiffs also allege that CEQ failed to properly follow the APA's notice and comment requirements by failing to respond significant comments. As a result, plaintiffs argue that the Final Rule should be ruled unlawful and set aside on these grounds, in addition to the NEPA ground discussed above.

### Conclusion and Implications

The Final Rule marks a significant alteration of the current NEPA scheme that will likely alter the environmental analysis undertaken for future federal and federalized projects, including those related to water. This suit led by a variety of state and local governments is the latest in a line of legal challenges of the Final Rule. In early August, a coalition of environmental groups led by the Natural Resources Defense Council, filed suit against the administration, challenging the rollback of environmental protections as

outlined by the Final Rule. Ultimately, it remains to be seen if these legal proceedings will result in a roll-back of the changes outlined in the Final Rule. The lawsuit can be found online here: https://oag.ca.gov/system/files/attachments/press-docs/%5B1%5D%20Complaint%20for%20Declaratory%20and%20Injunctive%20Relief.pdf.

*Editor's Note:*

On September 22, 2020, the California Attorney General issued a 60-day notice of intention to sue the CEQ, along with several other states, on a new cause of action in relation to the NEPA Final Rule—violation of the federal Endangered Species Act. For the notice of intention, *see:* https://oag.ca.gov/sites/default/files/Notice%20Letter%20to%20CEQ.pdf.pdf (Geremy Holm, Miles Krieger, Steve Anderson)

## HOOPA VALLEY TRIBE ENTERS LEGAL BATTLE OVER PERMANENT CENTRAL VALLEY PROJECT CONTRACTS

In August, the Hoopa Valley Tribe (Tribe) filed a complaint for declaratory and injunctive relief against the U.S. Bureau of Reclamation (Bureau), challenging the Bureau's conversion of certain "renewal" water supply contracts into "permanent" contracts for water from the Trinity River. The Tribe alleges violations of the Central Valley Project Improvement Act (CVPIA), the Water Infrastructure Improvement for the Nation Act (WIIN Act), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). The case is currently pending in the U.S. District Court for the Northern District of California, Eureka Division.

### Background

The Central Valley Project (CVP), which was constructed and is operated by the Bureau, provides nearly 7 million acre-feet of water annually to, among others, agricultural contractors in the Central Valley. The CVP begins in northern California, near the Cascade Range, and extends nearly 400 miles from Shasta Dam south to the Kern River in southern California. On average, the CVP delivers approximately 5 million acre-feet of water to farms and farmland, 600,000 acre-feet to municipal and industrial users, 410,000 acre-feet to wildlife refuges, and 800,000 acre-feet for environmental needs. The CVP is comprised of 20 dams and reservoirs, 11 power plants, and 500 miles of canals, in addition to conduits, tunnels, and other storage and distribution facilities. The Bureau diverts water from the Trinity River at the Trinity River Diversion before the Trinity River reaches the Tribe's reservation within the Trinity River Basin. Water diverted from the Trinity River Diversion is sent out-of-basin to contractors in the Central Valley.

Each winter and spring, the Bureau determines its estimated deliveries of water to its CVP contractors in the water year. CVP contractors are entitled to receive water from the CVP, depending on availability within the system, based on the terms of their individual water supply contracts with the Bureau. With certain exceptions, most contracts within the CVP are "water service contracts" as defined in the Central Valley Project Improvement Act. Under the CVPIA, water service contracts may be renewed for 25-year periods. Upon renewal of any water service contract, the Secretary of the Interior (on behalf of the Bureau) is required to incorporate all requirements imposed by then-existing law, including provisions of the CVPIA, within the renewed contracts, and is required to administer all existing, new, and renewed contracts in conformance with the requirements and goals of the CVPIA.

Under the Water Infrastructure Improvement for the Nation Act, water service contracts may be converted into repayment contracts. The purpose of a repayment contract is to allow a contractor to "prepay" its portion of allocable construction costs associated with the CVP that otherwise would have been repaid to the Bureau over an extended period of time. Once a contractor prepays its allocable costs to the Bureau, it is thereafter entitled to a permanent supply of water—again, depending on availability—from the CVP without acreage limitations or full-cost pricing. Accordingly, many CVP contractors have sought to

convert their water service contracts into repayment contracts.

Prior to this lawsuit, two similar lawsuits were filed by environmental interest groups challenging the conversion of renewal contracts into permanent contracts. (*Center for Biological Diversity v. Bureau of Reclamation, et al.*, E.D. Cal. Case No. 1:20—at—00362; and *North Coast Rivers Alliance, et al. v. Dep't of Interior, et al*, E.D. Cal. Case No. 1:16-cv-00307-DAD-SKO.) Those lawsuits also allege violations of the CVPIA, the WIIN Act, the National Environmental Policy Act, and the Administrative Procedure Act.

## The Complaint

According to the complaint, the Tribe filed suit to protect its interests in salmon fisheries in the Trinity River basin. While the Tribe's complaint asserts two claims for relief—one for violations of the CVPIA and the APA, and one for violations of NEPA and the APA—the Tribe requests a variety of types of relief. The thrust of the Tribe's action is to invalidate the Bureau's contract conversions, and to enjoin the Bureau from taking any action pursuant to the converted contracts as well as from converting any other contracts into permanent contracts without fully complying with the CVPIA and NEPA.

### The CVPIA Claim

For instance, with respect to its CVPIA claim, the Tribe seeks a declaration from the District Court that the Bureau failed to comply with the CVPIA by executing (or otherwise approving) the conversion of CVP renewal contracts into "permanent water service contracts"—presumably, permanent renewal contracts—without expressly incorporating legal requirements that impose specific fishery restoration measures and payment obligations. According to the Tribe, these measures and obligations confirm that in-basin Trinity River flow releases have higher priority than out-of-basin diversions to the Central Valley. In particular, the Tribe alleges that the converted contracts fail to secure recognition of fishery restoration as a purpose of the CVP; fail to memorialize in the contracts certain operation and maintenance cost obligations under the CVPIA; fail to specify existing legal acknowledgements made by CVP contractors with respect to fishery restoration measures and cost obligations; fail to memorialize legally confirmed in-basin priority for Trinity River water release flows; fail to address Trinity River Hatchery failures and mismanagement, despite the Tribe's reliance on hatchery operations as a source of salmon; and fail to declare that hatchery modernization and improved effectiveness is an operation and maintenance expense under the CVPIA. For these reasons, the Tribe alleges that the implementation of the converted contracts should be enjoined, and any future contracts should not be converted into permanent contracts without full compliance with the CVPIA.

### The NEPA Claim

The Tribe also seeks a declaration from the court that the Bureau failed to prepare an Environmental Impact Statement or Environmental Assessment assessing, disclosing, and considering the environmental effects of the contract conversions, and considering alternatives to the contract conversions, in violation of NEPA. The Tribe, similar to other complaints challenging the permanent contract conversions, argues that the conversion of water service contracts into permanent repayment contracts constitute a "major federal action" that will significantly affect the quality of the human environment, and therefore requires compliance with NEPA, either in the form of preparing and environmental impact statement or environmental assessment. Because the Bureau prepared neither of those documents, the Tribe alleges that the Bureau violated NEPA. Moreover, because the Bureau allegedly did not comply with NEPA, the Tribe argues that its decision to approve the conversion of water service contracts into permanent contracts is arbitrary, capricious, an abuse of discretion, and contrary to law under the APA.

## Conclusion and Implications

The Tribe's complaint was only recently filed, and it is unclear how the Bureau of Reclamation will respond, or if federal contractors may move to intervene to defend their interests in the newly converted contracts, or those that may be converted in the future. It is also not clear to what extent a Tribal victory might impact the viability of converting water service contracts into permanent contracts, or whether a Bureau victory would have a significant impact on the Tribe given the existing legal framework gov-

erning both the CVP and the Trinity River. However, the importance of the contracts and the litigation likely mean that, absent settlement, a lengthy court process is foreseeable, particularly because other CVP contractors around the state have also converted to permanent water service contracts in the last several years. The Complaint for Declaratory and Injunctive Relief is available online at: http://www.schlosserlaw-files.com/~hoopa/Complaint_Final_01.pdf
(Miles Krieger, Steve Anderson)

## RECENT FEDERAL DECISIONS

# DISTRICT COURT REVERSES ARMY CORPS' CLEAN WATER ACT JURISDICTIONAL DETERMINATION—APPLIES BOTH JUSTICE KENNEDY AND JUSTICE SCALIA'S ANALYSES IN *RAPANOS*

*Lewis v. United States*, ___F.Supp.3d___, Case No. CV 18-1838 (E.D. La. Aug. 18, 2020).

The U.S. District Court for the Eastern District of Louisiana recently reversed and remanded a U.S. Army Corps of Engineers (Corps) federal Clean Water Act (CWA) jurisdictional determination regarding two grass-covered, majority dry fields. The court noted a lack of appropriate evidence supporting the Corps' determination under two different Supreme Court tests.

### Factual and Procedural Background

Plaintiff Gary Lewis owns two tracts of land, both of which are grassy, predominantly dry, and were previously used for timber farming. When water is present on the property, it flows from the tracts' roadside drainage ditches to an unnamed tributary, then to Colyell Creek (an "impaired" water), and then to Colyell Bay (a traditional navigable water). Water from Lewis' property travels some 10-15 miles before reaching Colyell Bay.

Lewis made plans to develop his land in July 2015 and therefore sought a jurisdictional determination from the Corps to determine whether the property was considered a wetland subject to the CWA. The following summer, the Corps issued its Approved Jurisdictional Determination, concluding that some portions of each of Lewis' tracts were jurisdictional wetlands, and both tracts in their entireties were therefore subject to the CWA. Lewis challenged the Corps' decision, arguing in particular that the Corps incorrectly determined the size and location of the property's adjacent wetlands and improperly concluded that a significant nexus between Lewis' property and the adjacent wetlands existed. The Corps thereafter reviewed its decision and in November 2017 reached the same conclusion.

Lewis then appealed to the judiciary and filed a motion for summary judgment, explaining the Supreme Court's *Rapanos* decision required a different outcome. The Corps filed a cross-motion for summary judgment, contending that the district court owes the Corps' decision great deference and that the record establishes a significant nexus between Lewis' wetlands and the waterway.

In light of the parties' cross motions, the threshold issue before the District Court became whether factual evidence in the record supported the Corps' conclusion that portions of Lewis' property were wetlands subject to the CWA.

### The District Court's Decision

Under the Administrative Procedure Act, agency actions, findings, and conclusions can be set aside only if the court finds the decision is arbitrary, capricious, or otherwise not in accordance with the law.

### The *Rapanos* Decision and the Scalia and Kennedy Analyses for Corp Jurisdiction of Wetlands

In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court delivered a plurality opinion explaining when a wetland is subject to the CWA. In it, Justice Scalia's plurality adopted the "adjacency test," under which only wetlands with a "continuous surface connection" to other navigable water bodies are subject to the CWA. Justice Kennedy filed a concurring opinion advancing the "significant nexus test," which subjects wetlands to the CWA when there is a "significant nexus between the wetlands in question and [traditional] navigable waters." Justice Kennedy's test relies on hydrologic and ecologic factors to determine if a wetland's connection with other water bodies is significant.

Circuit Courts have split on which approach is correct, and the Fifth Circuit has not endorsed any approach. The District Court is within the Fifth Judicial District.

### District Court Hedges Its Bet: Uses Both Approaches to Jurisdictional Determination

The court here declined to adopt either approach to wetlands and Corps jurisdiction, and, instead, evaluated the facts under both tests.

First, the court noted that the Corps acknowledged Lewis' land did not meet Justice Scalia's adjacency test. There was, therefore, no basis for CWA jurisdiction under this approach.

Second, the court considered Justice Kennedy's significant nexus test and concluded the nexus between Lewis' property and other water bodies was not significant. Regarding hydrologic factors, the court emphasized that the Corps observed only evidence of water flow from which it made inferences regarding the property's actual water flow and its impacts. But evidence of flow, the court explained, is not actual flow. Furthermore, the Corps relied on "field indicators" which likewise can only predict surface flow at some points during any given year. Since the Corps' analysis regarding the property's actual water flow relied only on inferences and predictions rather than actual observations, the court concluded the property's hydrologic factors weighed against CWA jurisdiction.

Considering the property's ecologic factors, the court again emphasized that the Corps' report was lacking. Because Lewis' land lies within a 500-year flood plain, the court explained, a portion of the property's pollutants will no doubt at some point flow downstream. Even still, the Corps' report failed to determine whether significant rain or flooding events occur often enough to have a substantial impact on the downstream water bodies. Therefore, since the Corps' report did not indicate the amount of pollutants actually traveling downstream and whether their collective effects were significant, the court concluded the ecologic factors, too, weighed against CWA jurisdiction.

### Summary Judgment

After determining that both the hydrologic and ecologic factors weigh against the Corps' decision, the court concluded Lewis was entitled to summary judgment as a matter of law and granted Lewis' motion. In doing so, the court dismissed the Corps' argument that its budgetary constraints limited its ability to determine with perfection whether a significant nexus existed. The court made clear that, regardless of budgetary or other constraints, Justice Kennedy's significant nexus cannot be established without demonstrating through the record a wetland's substantial effects on a traditional navigable waterway.

The court remanded the decision to the Corps for further consideration.

### Conclusion and Implications

This case recognizes but does not specifically endorse any approach to Clean Water Act jurisdictional determinations for wetlands within the Fifth Circuit. It does, however, suggest that parties seeking to challenge a Clean Water Act jurisdictional determination in the Fifth Circuit should be prepared, when possible, to argue under each of the plurality's approaches. This case also evaluates the type of evidence needed to support a jurisdictional determination. The court's opinion is available here:
https://www.govinfo.gov/content/pkg/USCOURTS-laed-2_18-cv-01838/pdf/USCOURTS-laed-2_18-cv-01838-0.pdf
(Melissa Jo Townsend, Rebecca Andrews)

# DISTRICT COURT BARS CITIZEN SUIT AGAINST COUNTY IN GEORGIA DUE TO THE DILIGENT PROSECUTION PROVISION OF THE CLEAN WATER ACT

*South River Watershed Alliance, Inc. v. DeKalb County*, ___F.Supp.3d___, Case No. 1:19-cv-04299-SDG (N.D. Ga. Aug. 31, 2020).

The U.S. District Court for the Northern District of Georgia recently dismissed a citizen suit seeking to enforce the federal Clean Water Act against a defendant that had previously executed a consent decree with the U.S. Environmental Protection Agency and state Environmental Protection Department. The court found that the plaintiffs' citizen suit sought to enforce the same "standard, order, or limitation" as the consent decree and that the plaintiff did not plausibly allege a lack of "diligent prosecution" by the government agencies. The court therefore held that the Clean Water Act's diligent prosecution provision barred the plaintiffs' action.

## Factual and Procedural Background

The Clean Water Act (CWA) governs the discharge of pollutants into the navigable waters of the United States and prohibits the "discharge of any pollutant" from any point source without a permit authorizing such discharge. The CWA grants the U.S. Environmental Protection Agency (EPA) authority to issue such permits, known as National Pollutant Discharge Elimination System (NPDES) permits. The CWA also authorizes private citizens to file a civil action (citizen suit) against an alleged polluter in violation of an effluent standard or limitation under the CWA or an order issued by the EPA or a state with respect to such standard or limitation. However, this right is limited by the CWA's diligent prosecution provision, which prohibits the commencement of a citizen suit when the EPA or state has commenced and is diligently prosecuting a civil or criminal action to require compliance with a "standard, limitation, or order."

DeKalb County, Georgia (DeKalb), owns and operates a Water Collection and Transmission System (WCTS) designed to collect and transport wastewater to three locations. DeKalb is required to treat wastewater at these locations before discharging the water into surface water pursuant to NPDES permits issued by the Georgia Environmental Protection Department (EPD). In December 2010, the United States and the state of Georgia filed a complaint against DeKalb on behalf of the EPA and the EPD, respectively, alleging that, since 2006, DeKalb's WCTS experienced hundreds of untreated wastewater overflows that contained pollutants in violation of the CWA and the Georgia Water Quality Control Act (GWQCA). In 2011, the District Court approved a consent decree executed by DeKalb, the EPA, and the EPD. Pursuant to the consent decree, DeKalb was to undertake several actions to achieve the stated goal of full compliance with the CWA and the GWQCA.

In 2019, plaintiffs initiated a citizen suit, alleging DeKalb violated the consent decree, the CWA, and its NPDES permits. DeKalb thereafter filed a motion to dismiss, arguing the plaintiffs' claims were barred by the CWA's diligent prosecution provision. Plaintiffs argued the 2011 consent decree was insufficient to ensure DeKalb's compliance and, alternatively, the government was not diligently prosecuting DeKalb for its violations.

## The District Court's Decision

Prior to reviewing the motion to dismiss, the District Court determined whether the motion to dismiss was governed by Federal Rules of Civil Procedure (FRCP) Rule 12(b)(1), lack of subject-matter jurisdiction, or 12(b)(6), failure to state a claim. If the diligent prosecution provision is jurisdictional, the court stated, then Rule 12(b)(1) controls. Otherwise, FRCP Rule 12(b)(6) applies. The District Court determined that, because Congress did not provide a clear statement in the CWA that the diligent prosecution provision is a jurisdictional requirement, the provision was non-jurisdictional. Therefore, FRCP Rule 12(b)(6) applied.

### Diligent Prosecution Provision

The District Court next determined whether the CWA's diligent prosecution provision barred the

plaintiffs' citizen suit. The court applied the following two-part inquiry: first, the court must determine whether a prosecution by the state (or the EPA Administrator) to enforce the same "standard, order, or limitation" was pending on the date that the citizen suit commenced. If so, the court must then determine whether the prior pending action was being "diligently prosecuted" by the state or EPA at the time that the citizen suit was filed.

### 'Same Standard, Limitation or Order'

Under the first prong, the court may rely primarily on a comparison of the pleadings in the two actions to make its determination. The claims need not be identical for the action to cover the same standards and limitations. Comparing the plaintiffs' amended complaint with the 2010 complaint and the 2011 consent decree, the court concluded that there was substantial overlap in the standards and limitations on which the government and plaintiffs based their claims such that the two actions concerned the same "standard, limitation, or order." The court therefore addressed the second prong of the analysis: whether the EPA and the EPD were diligently prosecuting the claims raised in their 2010 complaint and addressed by the 2011 consent decree.

### 'Diligent Prosecution'

In analyzing the second prong, a court ordinarily considers a CWA enforcement prosecution "diligent" if the judicial action is capable of requiring compliance with the CWA and is in good faith calculated to do so. Diligence is presumed, and the burden for proving non-diligence is heavy. A plaintiff must do more than show that the agency's prosecution strategy is less aggressive than the plaintiff would like or that it did not produce a completely satisfactory result. That is, a plaintiff must show that the government's actions are incapable of requiring compliance with the applicable standards.

The District Court quickly dismissed DeKalb's first argument–that the 2011 consent decree alone was sufficient to establish diligent prosecution–noting that the consent decree's language did not limit the rights of third parties, not a party to the consent decree, against DeKalb. Moreover, such a conclusion would diverge from clearly established law, the court stated.

The District Court, however, agreed with DeKalb's second argument that the government agencies' ongoing efforts to require compliance with the 2011 consent decree established diligent prosecution. Specifically, plaintiffs had alleged that sewage discharges from the WCTS into watersheds had not decreased in either priority or non-priority areas since the entry of the 2011 consent decree, the fines were too low to force compliance, DeKalb failed to meet a June 20, 2020 deadline to rehabilitate priority areas, the consent decree did not establish a timeline to rehabilitate nonpriority areas, and DeKalb implemented a different type of hydraulic model, with permission, than that required by the consent decree.

With regard to DeKalb's continued sewage discharges, the court focused on the government's repeated fining of DeKalb for noncompliance, reasoning that an "unsatisfactory result does not necessarily imply lack of diligence." The court was also unpersuaded by the plaintiffs' criticisms of the fine amounts, concluding that the appropriate fine amount is the type of discretionary matter to which the court should defer to the government agencies' expertise. Further, the court noted the plaintiffs did not allege the bad faith needed to overcome the heavy presumption of diligence. As to DeKalb's failure to meet the June 20 deadline, the court reasoned that DeKalb's breach did not translate into a factual allegation of non-diligent prosecution by the government. Finally, as with the determination of the fine amount, the court reasoned that the government agencies' decision to not include a timeline for nonpriority areas and to permit DeKalb to implement a different hydraulic model than required by the consent decree were discretionary decisions best left to the agencies' expertise. Thus, the court held that the plaintiffs failed to allege any facts that could plausibly overcome the heavy presumption of diligence afforded to the government agencies.

## Conclusion and Implications

This case demonstrates that an alleged polluter is not immunized from citizen suits under the CWA simply by entering into a consent decree with the government. However, for such an action to survive a motion to dismiss, a plaintiff must allege facts that state a plausible lack of diligence by the government agencies beyond mere disagreement with the agencies' approach. Instead, the plaintiff must allege facts

that plausibly state the government's actions are incapable of requiring compliance with the applicable standards. The court's opinion is available online at: https://www.courtlistener.com/recap/gov.uscourts.gand.268968/gov.uscourts.gand.268968.57.0.pdf (Heraclio Pimentel, Rebecca Andrews)

## RECENT CALIFORNIA DECISIONS

# CALIFORNIA SUPREME COURT HOLDS COUNTY'S BLANKET CLASSIFICATION OF ALL WELL CONSTRUCTION PERMIT ISSUANCES AS MINISTERIAL VIOLATES CEQA

*Protecting Our Water and Environmental Resources v. County of Stanislaus*, ___Cal.5th___, Case No. S. 251709 (Aug. 27, 2020).

The California Supreme Court in *Protecting Our Water and Environmental Resources v. County of Stanislaus* found that the County of Stanislaus (County) had violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*) by making a "blanket classification" that all permits issued under Chapter 9.36 of its groundwater well permitting ordinance, other than those requiring a variance, were "ministerial." The Court found the practice unlawful under CEQA because, ". . . while many of its decisions are ministerial. . . some of County's decisions may be discretionary."

### Factual and Procedural Background

In 1968, the California Department of Water Resources (DWR) issued Water Resources Bulletin No. 74, Water Well Standards: State of California. As revised and supplemented, Bulletin No. 74 has been described as a "90-page document filled with technical specifications for water wells."

Under Water Code § 13801, subdivision (c), counties are required to adopt well construction ordinances that meet or exceed the standards in Bulletin No. 74. Many counties have incorporated the bulletin's standards into their well permitting ordinances.

In 1973, the County of Stanislaus enacted Chapter 9.36 of its County Code regulating the location, construction, maintenance, abandonment, and destruction of wells that might affect the quality and potability of groundwater. Many of the permit standards in Chapter 9.36 incorporate by references standard set forth in Bulletin No. 74, including Standards 8.A, 8.B, and 8.C.

Standard 8.A addresses the distance between proposed wells and potential sources of contamination such as storm sewers, septic tanks, feedlots, *etc.* It requires that all wells "be located an adequate horizontal distance" from those sources and provides specific separation distances that are "generally" considered to be adequate—but allows an agency to increase or decrease suggested distances, depending on circumstances.

Standard 8.B provides that "[w]here possible, a well shall be located up the ground water gradient from potential sources of pollution or contamination." Under Standard 8.C, "[i]f possible, a well should be located outside areas of flooding."

Chapter 9.36 of the County Code also allows for variance permits to be issued by the County Health Officer authorizing an exception to any provision of Chapter 9.36 "when, in his/her opinion, the application of such provision is unnecessary." When authorizing a variance, the health officer may prescribe "such conditions as, in his or her judgment, are necessary to protect the waters of the state."

In 1983, the County adopted its CEQA regulations generally classifying *all* well construction permits as ministerial projects absent a variance permit. In 2014, the County amended Chapter 9.37 of the County Code to prohibit the unsustainable extraction and export of groundwater. Chapter 9.37 requires that permit applications also satisfy Chapter 9.36.

Since 2014, the County has had a practice of treating all non-variance permit approvals as ministerial. Plaintiffs sued the County, alleging "a pattern and practice" of approving well permits without CEQA review. Plaintiffs asserted that all permit issuance decisions under Chapter 9.36 are discretionary because the County can:

> . . .deny [a] permit or require changes in the project as a condition of permit approval to address concerns relating to environmental impacts.

The trial court ruled that the County's approval of

all non-variance permits was ministerial. The Court of Appeal reversed, concluding that issuance of well construction permits is a discretionary decision, but acknowledged that many of the decisions the County may make under Chapter 9.36 would be ministerial. Nevertheless, the appellate court found that the County's compliance determination under Standard 8.A involved sufficient discretionary authority to make the issuance of all permits under Chapter 9.36 discretionary—which would trigger CEQA compliance.

The Supreme Court granted the County's petition for review.

## The Supreme Court's Decision

The Supreme Court began its inquiry by distinguishing discretionary projects from ministerial projects. A project is discretionary if the government can shape the project in any way which could respond to any of the concerns which might be identified" during an environmental review. The Court noted that when a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary.

### *De Novo* Review

In setting forth the standard of review, the Supreme Court articulated that because the County's position that the permits were regardless of the circumstances is based on the County's legal interpretation of Chapter 9.36, the Court reviews that interpretation *de novo*.

### Standard 8.A Confers County Discretion to Deviate from General Standards

The Court concluded that the plain language of Standard 8.A authorizes the County to exercise judgment or deliberation when it decides to approve or disapprove a permit. Although the standard sets out distances generally considered adequate, individualized judgments may be required. For example, Standard 8.A notes that an:

> . . .adequate horizontal distance may depend on '[m]any variables' and '[n]o set separation distance is adequate and reasonable for all conditions.

The Court acknowledged that the standard does provide a list of minimum suggested distances, but notes that Standard 8.A expressly provides that "[l]ocal conditions may require greater separation distances." Moreover, if, in the opinion of the enforcing agency adverse conditions exist, Standard 8.A requires that the suggested distance be increased, or special means of protection be provided. Finally, approval of lesser distances may be allowable by the enforcing agency on a "case-by-case basis." The Supreme Court concluded that the language in Standard 8.A confers significant discretion on the County to deviate from these general standards depending on the circumstances. Such permit issuance cannot therefore be classified as ministerial.

### Limited Discretion is Not the Same Thing as Lacking Discretion

The Supreme Court rejected the County's argument that permit issuance is ministerial because under Standard 8.A the County may only adjust the location of a well to prevent groundwater contamination. Chapter 9.36 does not allow the County to address other environmental concerns or impose other measures that might prevent groundwater contamination, such as regulating pesticides or fertilizers. In response, the Court stated that "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything." That the County has the authority to require a different well location, or deny the permit, is sufficient to make the issuance of the permit discretionary.

### The Appropriate Remedy

The Supreme Court, however, disagreed with the appellate court that permits issued under Chapter 9.36 are always a discretionary project. The fact that an ordinance contains provisions that allow an agency to exercise independent judgment in some instances does not mean that all permits are discretionary. The Court observed that sometimes the discretionary provisions are not relevant to a particular permit. For example, Standard 8.A only applies when there is contamination source near a proposed well.

The Supreme Court concluded by reversing the Court of Appeal holding that all permit issuances under Chapter 9.36 are discretionary but finding that plaintiffs were not entitled to a declaration to that

effect nor an injunction requiring the County to treat all permit issuances as discretionary. Rather, the Court held that plaintiffs were entitled to a declaration that the County's blanket ministerial categorization is unlawful:

> Accordingly, classifying all issuances as ministerial violates CEQA. Plaintiffs are entitled to a declaration to that effect. But they are not entitled to injunctive relief at this stage, because they have not demonstrated that *all* permit decisions covered by the classification practice are discretionary.

### Conclusion and Implications

In light of this decision, a local agency that categorically classifies the issuance of a particular permit as ministerial may want to review its permitting ordinance to ensure that it complies with the Supreme Court's holdings. When an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not categorically classify the issuance of permits as ministerial. But the agency may classify a particular permit as ministerial and develop a record in support of that classification.
https://www.courts.ca.gov/opinions/documents/S251709.PDF
(Christina Berglund)

## FOURTH DISTRICT COURT FINDS IMPERIAL IRRIGATION DISTRICT WATER ALLOCATION PROGRAM INVALID BUT NOT A 'TAKING' OF WATER RIGHTS

*Abatti v. Imperial Irrigation District*, 52 Cal.App.5th 236 (4th Dist. 2020), as modified on denial of reh'g (Aug. 5, 2020), review filed (Aug. 24, 2020).

In a years-long dispute over water allocations among irrigation district water users in the Imperial Valley, the Fourth District Court of Appeal recently issued an opinion in *Abatti v. Imperial Irrigation District* addressing the limited nature of Imperial Irrigation District (IID) landowner rights to receive water service and the parameters within which IID may adopt programs allocating limited water supplies while recognizing statutory priorities and conservation mandates.

### Background

As summarized in the Opinion, IID is the sole source of fresh water for the Imperial Valley in southern California, all of which comes from the Colorado River. Approximately 97 percent water distributed by IID is used for agricultural purposes. IID is a party to various judgments, settlement agreements and related agreements—some dating back many decades—governing allocation of Colorado River water supplies. Under one such agreement—the 2003 Quantification Settlement Agreement (QSA)—IID's entitlement to Colorado River supplies was capped at 3.1 million acre-feet, subject to an overrun policy requiring conservation and net returns to the water system in event of overuse.

As part of implementing the QSA, IID imposed land fallowing and water use efficiency conservation measures and developed programs to allocate its water resources during shortage conditions. In 2013, the IID board of directors (IID Board) adopted an "equitable distribution plan" (EDP), which unlike previous plans, provided for an annual apportionment that would not require the presence of a water shortage as a precondition and was intended to be permanent. Under the EDP and related IID Board actions, water would be allocated first to non-agricultural users, with remaining amounts allocated among farmers. Agricultural allocations would be made according to a combination of farmers' historical use and a distributed allocation of total water on a per-acre basis. Farmers would also be able to share, buy and sell water through a clearinghouse.

Plaintiff and appellant Abatti and his family have been farming in the Imperial Valley for more than a century. As a recipient and user of IID water, Abatti

filed a petition for writ of mandate and related claims in the Imperial County Superior Court challenging the EDP and related IID actions. Abatti objected to EDP allocation prioritization and asserted claims for declaratory relief, an uncompensated taking of Abatti's claimed water rights, and a breach of fiduciary duty. Abatti asserted that the farmers possess water rights entitling them to receive water from IID sufficient to meet their reasonable irrigation needs and that such water rights derive from amounts historically used to irrigate their crops. IID contended that while agricultural users possess a right to water *service*, that right is not quantified and is also not a water right in the traditional common law sense. IID further asserted that the EDP was consistent with IID's obligation to distribute water equitably to all of its while fulfilling its other obligations such as conservation and operating within its Colorado River entitlement.

### Trial Court Proceedings

The trial court struck Abatti's breach of fiduciary duty and taking claims, and allowed the remaining claims to proceed. In 2017, the trial court issued a writ of mandate directing IID to repeal the EDP. In its statement of decision, the trial court determined the parties' water rights, including finding that, based on historical use, farmers own the equitable and beneficial interest in the district's water rights, which are appurtenant to their lands and is a constitutionally protected property right. It found that IID abused its discretion by prioritizing non-agricultural water users ahead of agricultural users, by violating both "no injury" rules applicable to water transfers and appurtenancy rules, and by the methodology IID selected to apportion agricultural water among farmers.

The trial court also determined ruled that Abatti's claims were not time barred or estopped by a prior validation action. Finally, the judgment entering declaratory relief also expressly prohibited IID from prioritizing any non-domestic water users over farmers, from apportioning agricultural water without consideration for historical use, and from entering into contracts that guarantee water to any non-domestic or non-agricultural water users during shortage conditions.

IID appealed from the judgment and writ of mandate, and Abatti appealed from the dismissal of his breach of fiduciary duty and taking claims. Many *amicus* briefs were filed in support of both parties.

### The Court of Appeal's Decision

In the lengthy opinion, the court first explained in significant detail the complex geographical, historical and legal context pertaining to the management and regulation of the Colorado River water system, often referred to as the Law of River. The court explained that, as an irrigation district, IID holds its various water rights in trust for the benefit of its users, and is responsible for managing its water supply not only for irrigation but also for other beneficial uses.

The court observed that IID obligations included managing water resources in accordance with many complex and in some ways competing principles, including requirements that water be used reasonably and beneficially, that it must be conserved and that IID must comply with obligations imposed under the Law of the River including historic drought and water shortage conditions.

The Court of Appeal rejected Abatti's contentions and the trial court's findings regarding the nature of the farmers' water rights. The court held that farmers within the district:

> . . .possess an equitable and beneficial interest in [IID's] water rights, which is appurtenant to their lands, and that this interest consists of a right to water *service*. (emphasis added).

The court found that IID allocation programs did not comprise water "transfers" and did not therefore implicate no injury rules.

The court observed that in accordance with statutory law and applicable case law, IID retains discretion to modify water service consistent with its duties to manage and distribute water equitably for all categories of IID water users. The court concluded that the trial court correctly found that IID abused its discretion in the way it prioritized water users in the EDP, but that the trail court erred to the extent that it found any other abuse of discretion by IID in its adoption of the EDP. The Court of Appeal found that the trial court erred and overreached in granting declaratory relief by prescribing specific methodologies to prioritize allocations, which the court deemed a usurpation IID's authority and discretion.

### Breach of Duty and 'Taking' Claims

Finally, the Court of Appeal found that the trial court properly dismissed Abatti's breach of fiduciary duty and taking claims, largely on the basis that Abatti failed to demonstrate elements of damages and the existence of a water right being taken without compensation. Specifically, as to the breach of fiduciary duty, the Court of Appeal stated:

> The superior court determined that Abatti failed to allege facts establishing damages that would support his claims. We construe this as a finding that Abatti did not sufficiently plead damages for purposes of his breach of fiduciary duty claim. Even assuming that the District had a fiduciary duty to Abatti and that the EDP somehow breached that duty, we conclude that Abatti's failure to adequately plead damages is a sufficient basis to sustain the demurrer.

As to the takings claim specifically, the Court of Appeal stated:

> As we have determined, *ante*, Abatti possesses a right to service, and changes to service do not necessarily impede or diminish that right. Assuming that injuries from such changes could support a claim for damages, one would still have to sufficiently allege them. Abatti simply speculates that the 2013 EDP could harm farmers. . . .Even in alleging that the 2013 EDP has the effect of taking water from him, Abatti does not assert that he has *actually* been denied any water. Neither potential harms, nor counsel's hypothetical arguments, suffice to establish compensable damages.

### A 'Limited' Opinion

The court emphasized the limited scope of its conclusions and their applicability to the parties, facts and issues before the court. The court affirmed the judgment as to the ruling that IID abused its discretion in how it apportioned water in the EDP, and as to the dismissal of Abatti's breach of fiduciary duty and taking claims.

The court otherwise reversed the trial court judgment and directed the Superior Court to enter a new and different judgment granting Abatti's petition on the *sole* ground that IID's failure to provide for equitable apportionment among categories of water users constituted an abuse of discretion and denying the petition on all other grounds, including as to declaratory relief.

### Conclusion and Implications

The *Abatti* case demonstrates the complex and multi-layered regulatory regime within which IID operates in managing and allocating its water resources. Water providers throughout California face similar challenges and complexities, particularly in times of drought and in response to new and ever-increasing regulations and mandates. Though the Fourth District Court of Appeal emphasized the narrow scope of its findings, the published Opinion addresses many interesting issues that have broader relevance for California water law and policy. The court's original and modified opinions are available online at: https://www.courts.ca.gov/opinions/documents/D072850M.PDF

(Derek R. Hoffman)

# SECOND DISTRICT COURT FINDS DEVELOPER OBTAINED STATUTORY VESTED RIGHTS PRIOR TO PASSAGE OF INITIATIVE THAT WOULD HAVE SUBSTANTIALLY CURTAILED PROJECT

*Redondo Beach Waterfront, LLC v. City of Redondo Beach*, 51 Cal.App.5th 982 (2nd Dist. 2020).

A developer filed a lawsuit against the City of Redondo Beach (City), claiming that it had obtained statutory vested rights for a waterfront development project prior to passage of an initiative by the voters that would have substantially curtailed the project. A group of local residents intervened. The trial court agreed with the developer, and the residents appealed. The Court of Appeal for the Second Judicial District then affirmed the judgment in favor of the developer.

## Factual and Procedural Background

This case involves the proposed redevelopment of the Redondo Beach King Harbor Pier area. In 2010, a majority of the City's residents approved "Measure C" via the initiative process, which, among other things, authorized 400,000 square feet of new development. In order to facilitate these improvements, the City acquired leaseholds and other property interests within the waterfront area and sought out a private developer to assist with the project. In 2013, Redondo Beach Waterfront, LLC (Developer) and the City entered into an exclusive negotiating agreement for the project.

In June 2016, the Developer submitted a development application that included a vesting tentative tract map. The City notified the Developer in writing on June 23, 2016, that its application for approval of this vesting tentative tract map was "deemed complete." In August 2016, the Harbor Commission then certified an Environmental Impact Report (EIR) and approved a Coastal Development Permit, Conditional Use Permit, Harbor Commission design review, and a map for the project. That decision was in turn appealed to the city council, which approved the entitlements by way of resolution. Among other things, that resolution explicitly noted that the City's approval of the Map:

> . . .shall confer a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards described in Section 66474.2 of the Government Code of the State.

Also, in June 2016, five days after the City deemed the vesting tentative tract map application to be complete, a group of residents submitted a "Notice of Intent to Circulate Petition" to the City, seeking to place an initiative on the ballot for the next general election. After sufficient signatures were gathered, Measure C was placed on the ballot for a March 2017 election. A majority of voters casting ballots in that election voted in favor of the initiative, and the Coastal Commission later approved the amendments to the City's local coastal program. If applied to the proposed waterfront project, the provisions of Measure C would substantially curtail the project.

The Developer filed a lawsuit, contending that Measure C was invalid, unconstitutional, and, in any event, inapplicable to the project. A group of residents who supported the initiative intervened. The Developer then filed a motion claiming that, as a matter of law, its rights had vested and therefore Measure C could not apply to the project. The City and residents opposed the motion, arguing that the project did not have vested rights and that, even if the City could not apply Measure C to the project, the Coastal Commission could. Following oral argument, the trial court found that the Developer had obtained statutory vested rights to proceed in accordance with the vesting tentative tract map. The court entered in judgment in favor of the Developer, and the residents then appealed.

## The Court of Appeal's Decision

### Statutory Vested Rights Claim

In a *partially published* opinion, the Court of Appeal addressed the issue of whether the Developer had obtained vested rights to proceed in accordance with the vesting tentative tract map and, if so, whether those rights vested before or after the passage of Mea-

sure C. The Developer's claim was based in Government Code § 66498.1, which provides that a local agency's approval of a vesting tentative map confers a right to proceed with development in substantial conformance with the ordinances, policies, and standards in effect at the time that a map is deemed complete.

Applying this statutory provision, the Court of Appeal found it undisputed that the Developer's application for a vesting tentative tract map had been deemed complete in June 2016. Thus, the Court of Appeal concluded, the Developer had a vested right to develop in conformance with the ordinances, policies, and standards in effect as of that time, well before Measure C was passed in March 2017. It also considered the intent of the Legislature to provide stability for the private sector, finding that it was reasonable for the Developer to be able to rely upon an approved vesting tentative tract map and to expend resources and incur additional liabilities without the risk of having the project frustrated by subsequent actions by the approving local agency.

The Court of Appeal also rejected the residents' claims that these vesting provisions would not apply within the coastal zone because: 1) a local agency's action is subject to review by the Coastal Commission; and 2) under Government Code § 66498.6, a developer that obtains statutory vested rights is not exempt from federal and state law. Essentially, the residents contended, that, where a development project implicates the Coastal Act, the Coastal Act in turn regulates the local agency's actions exclusively, rendering § 66498.1 inapplicable.

The foundation of the residents' argument, the Court of Appeal found, rested on an "untenable interpretation" of § 66498.1 and assumed that vested rights would exempt a developer from compliance with any and all conceivably applicable land use laws and regulations, regardless of the source. But the Developer did not contend as much; it only asserted that a local agency cannot change its own ordinances and policies after it approves a vesting tentative map and then apply those new ordinances and policies to the previously approved project. The Developer conceded that it was subject to the Coastal Act and the jurisdiction of the Coastal Commission. This, the Court of Appeal found, is what § 66498.1 and related statutory provisions contemplate.

Accordingly, the City was prohibited from applying subsequently amended local ordinances, standards, and policies—such as the amended ordinances contained in Measure C—to the project. This does not mean, however, that either the applicability of the Coastal Act or the oversight provided by the Coastal Commission is curtailed by the Developer's vested rights. It only means that the City's approval of the vesting tentative tract maps binds the City, which was the precise question presented in the appeal.

### Ripeness

The Court of Appeal also addressed the residents' claim that the lawsuit was not ripe. It again disagreed with the residents, finding that an actual controversy existed regarding the Developer's statutory vested rights. Following the passage of Measure C, for example, the City took the position that some of its obligations might be impacted by the initiative. The City also suggested that it believed that the project would be impacted by the amendments to the local coastal program contained in Measure C, which would necessarily conflict with the Developer's claim of a statutory vested right. That position, the Court of Appeal concluded, virtually guaranteed a future controversy relating to the legal rights and duties of the parties in light of Measure C. Accordingly, it agreed with the trial court that the matter was ripe for adjudication.

### Conclusion and Implications

The case is significant because it contains a substantive analysis of statutory vested rights under Government Code § 66498.1 and a discussion such rights as they relate to issues of state and federal law, specifically within California's coastal zone. The decision from the Second District Court of Appeal, ordered *partially published*, is available online at: https://www.courts.ca.gov/opinions/documents/B291111.PDF
(James Purvis)

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