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CONTENTS

Continued on next page

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FEATURE ARTICLE

CALIFORNIA ENVIRONMENTAL QUALITY ACT CONSIDERATIONS WHEN EVALUATING IMPACTS TO BIOLOGICAL RESOURCES

By Robbie Hull, Scott Birkey, and Clark Morrison

One of the stated legislative policies underlying the California Environmental Quality Act (CEQA) is to:

> . . .[p]revent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities. (Pub. Res. Code § 21001(c).)

To meet this goal, CEQA requires local agencies to review, analyze, and mitigate a project's anticipated impacts on biological resources, including impacts to threatened and endangered species, habitats, and wetlands.

The CEQA statute and the CEQA Guidelines leave a lot of questions unanswered, however. Some of these questions are rooted in legal considerations, while others reflect the practical realities of trying to evaluate unpredictable and variable biological systems. For example: What issues should a local agency consider when a project has the potential to impact biological resources? To what extent do those impacts inform the need for either an Environmental Impact Report (EIR) or a Mitigated Negative Declaration (MND)? What is the appropriate scope of the CEQA document's analysis of impacts to biological resources? What are acceptable thresholds of significance, and what triggers a determination that an impact is significant? What constitutes adequate mitigation to offset a project's significant impacts to biological resources? In what circumstances can that mitigation be deferred until later?

This article attempts to address these and other issues that often arise when consultants and lawyers prepare and review the biological resources discussion and analysis in CEQA documents. Though not exhaustive, this article is intended to provide for your consideration some thoughts on these issues to help you navigate the nuances of the biological-resources evaluation in a CEQA document. We presume the reader has at least a good working knowledge of fundamental CEQA principles, but to help place some of these issues into context, we remind the reader of certain basic concepts that apply more generally to CEQA documents and evaluation of projects.

Biological Resources Impacts and the Level of CEQA Clearance Required

During its preliminary review process, a lead agency must determine the appropriate type of CEQA clearance required for a project. A key consideration at this stage in the process is whether an exemption can be used as the CEQA clearance for the project. The potential for impacts to biological resources is sometimes one of the main reasons a project may not be eligible for an exemption. For example, a commonly used exemption—the "Class 32 Infill Exemption"—specifically disallows the use of the exemption in the event the project site has "value as habitat for endangered, rare or threatened species." (14 CCR § 15332(c).)

Relatedly, practitioners should keep in mind that a project may not rely on a "mitigated categorical exemption" to avoid CEQA review. In the context of biological resources, this issue typically arises when a project is in proximity to a sensitive environment or may have significant impacts on species or habitat and the applicant or lead agency seeks to incorporate mitigation into the project in order to make the project fit within an exemption.

For example, in *Salmon Protection & Watershed Network v County of Marin,* 125 Cal.App.4th 1098, 1102 (2004), Marin County approved the construction of a single-family home pursuant to the Class 3 categorical exemption for "New Construction or Conversion of Small Structures." The home, however, was in a protected "stream conservation area," pursuant to the County's General Plan designation for areas adjacent to natural watercourses and riparian habitat. (*Id.* at 1102-03.) In approving the project, the county imposed various mitigation measures, including construction limitations, a riparian protection plan, and erosion and sediment control, aimed at minimizing adverse impacts. (*Id.* at 1102-04.)

According to the Court of Appeal, the county erred in relying upon mitigation measures to grant a categorical exemption:

> Reliance upon mitigation measures (whether included in the application or later adopted) involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIRs or negative declarations. (*Id.* at 1108; *see also Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster,* 52 Cal.App.4th 1165, 1198-1200 (1997) [operation and minor alteration of existing landfill not exempt, despite mitigation measures addressing leaking of pollutants].)

In a somewhat complicated twist to this principle, a project may include design or operational features that reduce or avoid environmental impacts while remaining eligible for a categorical exemption. In *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.*, 242 Cal.App.4th 555, 570 (2015), the Court of Appeal held that a rodeo could rely on the Class 23 exemption for normal operations of existing facilities for public gatherings, despite the implementation of a manure management plan to minimize pollution to a nearby creek and the resulting indirect impacts to aquatic species. The court found that the management plan was not proposed as a mitigation measure for the rodeo project and, therefore, did not preclude the use of the Class 23 exemption. (*Id.*) Rather, it preexisted the project and was directed at preexisting concerns. (*Id.* at 570-71; *see also Wollmer v. City of Berkeley,* 193 Cal.App.4th 1329, 1352-53 (2011) [dedication of left-hand turn lane as part of project design was not a mitigation measure].)

Another consideration to take into account are the CEQA Guidelines pertaining to "mandatory findings of significance." (14 CCR § 15065(a).) These Guidelines specifically refer to impacts to biological resources and specify that an EIR must be prepared in the event certain biological resources are impacted, subject to certain specific requirements. The Guidelines state:

> (a) A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur:
> (1) The project has the potential to: . . . substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species . . .
> (b)(2) Furthermore, where a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species, the lead agency need not prepare an EIR solely because of such an effect, if:
> (A) the project proponent is bound to implement mitigation requirements relating to such species and habitat pursuant to an approved habitat conservation plan or natural community conservation plan;
> (B) the state or federal agency approved the habitat conservation plan or natural community conservation plan in reliance on an environmental impact report or environmental impact statement; and
> (C)(1) such requirements avoid any net loss of habitat and net reduction in number of the affected species, or
> (2) such requirements preserve, restore, or enhance sufficient habitat to mitigate the reduction in habitat and number of the affected species to below a level of significance.

Practitioners should keep these "mandatory findings of significance" standards and requirements in mind for projects where the key consideration is biological resources impacts. These CEQA Guidelines can serve as the touchstone for whether an exemption can be used, and whether the lead agency is required to prepare an EIR rather than a negative declaration or MND.

A benefit of these mandatory findings is that they specifically allow the lead agency to rely on the provisions of an approved Habitat Conservation Plan (HCP) in determining that biological impacts have been addressed. Given that the Guidelines require the HCP to have been reviewed in an EIR or environmental impact statement (EIS), these benefits are probably limited to the regional HCPs and Natural Community Conservation Plans (NCCPs) that have been adopted in various counties in northern and southern California. Project-specific HCPs do not always generate the need for EIS- or EIR-level review. Moreover, they are rarely entered into prior to completion of CEQA review by the lead agency for the underlying project. Where such review has been conducted, however, a lead agency may rely on its provisions to obviate the need for EIR-level review at the local level. Moreover, projects within regional HCPs that have an aquatic focus may also benefit under the State of California's new wetlands policies, which provide streamlining for projects consistent with such HCPs where they serve as a "watershed plan."

The Substance of a Biological Resources Analysis

This section provides a discussion of how impacts to biological resources should be described, analyzed, and mitigated in a CEQA document.

Describing Biological Resources in the Project Description and Environmental Setting

An accurate, stable, and finite project description has been described as the "sine qua non" of a legally sufficient CEQA document. (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193 (1977).) It should inform the public about the project's likely effect on the environment and ways to mitigate any significant impacts. Importantly, the project description must include a list of the permits and other approvals required for the project and a list of the agencies that will use the CEQA document in issuing those permits. (14 CCR § 15124.) Accordingly, if a project will require, for example, an incidental take permit or a wetland fill permit, the CEQA document must provide sufficient information for other governmental agencies to complete their decision-making processes as "responsible agencies" pursuant to CEQA. (14 CCR § 15096.) This may include, for example, a detailed discussion of any special-status species and their habitat located on or in the vicinity of the site, as well as any wetlands or other protected waters that exist and may be impacted by the project. In our experience, state agencies such as the California Department of Fish and Wildlife (CDFW) can be quite exacting in what they expect to see in a CEQA document in order for the agency to use that document as its own CEQA clearance for the issue of its permits. (*See, e.g.*, *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918 (2017).)

Like the project description, the environmental setting should provide a complete and accurate description of the project setting, *i.e.*, the existing environmental conditions and surrounding uses, to establish the baseline for measuring environmental impacts resulting from the project. (14 CCR § 15125; *see also San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus*, 27 Cal.App.4th 713, 729 (1994) [finding EIR inadequate without "accurate and complete information pertaining to the setting of the project and surrounding uses"].) To satisfy this requirement, lead agencies generally should incorporate a detailed review of biological databases (most notably the California Natural Diversity Database, or CNDDB), on-site data gathering and, if necessary, project-specific studies to determine existing environmental conditions. (*See, e.g.*, *North Coast Rivers Alliance v Marin Mun. Water District*, 216 Cal.App.4th 614, 644-45 (2013) [upholding EIR environmental setting based on database review and specific study to assess aquatic species].) As a practical matter, the level of this effort should be commensurate with the extent to which biological resources are a concern on the project site.

Thresholds of Significance for Impacts to Biological Resources

Once the project and environmental setting have been adequately described, the CEQA document

must identify the environmental impacts likely to result from project development, followed by mitigation measures or project alternatives that will avoid or reduce these impacts. To determine whether mitigation is required, or if mitigation can reduce an impact to a level of insignificance, a lead agency must compare a project's impacts to thresholds of significance. (14 CCR § 15064.)

For biological resources, lead agencies often use the checklist from Appendix G of the CEQA Guidelines, which requires the lead agency to consider whether the project may:

- Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

- Have a substantial adverse effect on federally protected wetlands as defined by § 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

- Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

- Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

Other common examples of significance thresholds include the mandatory findings of significance discussed above or local regulations and plans created for species protection. Ultimately, lead agencies have significant discretion when devising significance thresholds, but their decisions must be supported by substantial evidence. (*See, Save Cuyama Valley v. County of Santa Barbara,* 213 Cal.App.4th 1059, 1068 (2013) [Appendix G's thresholds of significance "are only a suggestion" (alterations omitted)]; *Protect the Historic Amador Waterways v. Amador Water Agency,* 116 Cal.App.4th 1099, 1111-12 (2004) [setting aside EIR for failure to adequately discuss impacts of stream flow reduction]; *San Bernardino Valley Audubon Soc'y v County of San Bernardino,* 155 Cal.App.3d 738, 753 (1984) [setting aside project approval based on inconsistency with general plan policy protecting rare plants].)

Analysis of Biological Resources

When analyzing project-related impacts to determine if they exceed defined significance thresholds, lead agencies may use a variety of methods, provided that the chosen method is supported by substantial evidence. For example, an agency may employ protocol-level, species-specific surveys adopted or recommended by wildlife agencies to determine whether protected species or habitat exists on the project site. Or, a lead agency may use broader, reconnaissance-level studies to assess biological resources. (*See, Gray v County of Madera,* 167 Cal.App.4th 1099 (2008) [county not required to follow CDFW study protocols for California Tiger Salamander], 1124-25; *Association of Irritated Residents v County of* Madera, 107 Cal. App.4th 1383, 1396 (2003) ["CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required."])

Though CEQA does not require an agency to conduct all possible tests or surveys, additional tests or surveys may be necessary if previous studies are insufficient. In particular, lead agencies should beware of outdated studies and information. In *Save Agoura Cornell Knoll v. City of Agoura Hills,* 46 Cal.App.5th 665, 692-93 (2020), the Court of Appeal set aside a project approval based, in part, on a CDFW comment letter, which noted that botanical surveys older than two years may be outdated. CDFW also commented that surveys should be performed in conditions that

maximize detection of special-status resources, to the extent feasible. (*Id.*) Surveys performed in a drought, for example, "may overlook the presence or actual density of some special status plant species on the [p] roject site." (*Id.* at 692.)

One important fact to consider is that CEQA's scope of review related to biological resources is quite broad. For example, the CEQA Guidelines broadly define "endangered, rare or threatened species" that must be evaluated in a CEQA document. (14 CCR § 15380.) The definition states:

> (a) "Species" as used in this section means a species or subspecies of animal or plant or a variety of plant.
> (b) A species of animal or plant is:
> (1) "Endangered" when its survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors; or
> (2) "Rare" when either:
> (A) Although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or
> (B) The species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered "threatened" as that term is used in the Federal Endangered Species Act.
> (C) A species of animal or plant shall be presumed to be endangered, rare or threatened, as it is listed in:
> (1) Sections 670.2 or 670.5, Title 14, California Code of Regulations; or
> (2) Title 50, Code of Federal Regulations Section 17.11 or 17.12 pursuant to the Federal Endangered Species Act as rare, threatened, or endangered.
> (D) A species not included in any listing identified in subdivision (c) shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).
> (E) This definition shall not include any species of the Class Insecta which is a pest whose protection under the provisions of CEQA would present an overwhelming and overriding risk to man as determined by:
> (1) The Director of Food and Agriculture with regard to economic pests; or
> (2) The Director of Health Services with regard to health risks.

As such, the scope of a CEQA document's evaluation of a project's impacts to biological resources typically go far beyond impacts to species listed under the federal or California Endangered Species Act as threatened or endangered.

This result is particularly noticeable with respect to plant species. Largely because of this expansive review, CEQA documents include an analysis of plant species based on the well-known ranking system established by the California Native Plant Society (CNPS), which is a non-governmental organization that has made its own determinations as to threats to plant species. Although the use of the CNPS ranking system in CEQA documents is generally accepted in the industry, CEQA's definition of special-status plant species does not reference the ranking system and thus, arguably the use of this system is not predicated on any actual legal foundation. Notably, some plant species identified as "rare, threatened, or endangered" (Rare Plant Rank 1B) by the California Native Plant Society are not listed as threatened or endangered under the federal or California Endangered Species Act.

Mitigation Measures for Impacts Related to Biological Resources

To satisfy CEQA's requirements that significant environmental impacts must be mitigated, lead agencies must set forth and identify feasible mitigation measures. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3); 14 CCR § 15126.4.) Significant case law exists regarding the concept of mitigation in the context of biological resources. Based on that case law, several themes are apparent.

Deferral

Generally, deferring the formulation of a mitigation measure is not allowed. However, deferral can be appropriate if it is impractical or infeasible to fully formulate the mitigation measure during the CEQA review process, provided that the agency commits itself to specific performance criteria for future mitigation. (14 CCR § 15126.4.) For example, a lead

agency is not required to identify the exact location of off-site mitigation, provided that it adequately analyzes project-related impacts and imposes specific mitigation, i.e., preservation or creation of replacement habitat at a specific ratio. In such an event, the agency is entitled to rely on the results of future studies to fix the exact details of the implementation of the mitigation measures it identified in the EIR. (*California Native Plant Society v. City of Rancho Cordova,* 172 Cal.App.4th 603, 622 (2009); *see also Endangered Habitats League, Inc. v. County of Orange,* 131 Cal.App.4th 777, 793-96 (2005) [enumeration of possible future mitigation options, including on- and off-site habitat preservation at specific ratios was not improper].)

Deferral also may be allowed if future mitigation is dependent on permits required by other regulatory agencies. For biological resources, this typically involves incidental take permits, Clean Water Act § 404 permits, and other similar species and habitat-related permitting requirements. (*See, e.g., Clover Valley Foundation v. City of Rocklin,* 197 Cal.App.4th 200, 237 (2011) [requirement that project obtain all necessary federal and state permits from Army Corps of Engineers and CDFW for impacts to protected bird habitat was permissible].) But, even when it is expected that another agency will impose mitigation measures on a project, the project's CEQA document must still commit itself to mitigation, identify the methods the agency should consider and possibly incorporate, and indicate the expected outcome. (*See Rialto Citizens for Responsible Growth v. City of Rialto,* 208 Cal.App.4th 899, 944-46 (2012) [holding that formal consultation with USFWS was appropriate, and that proposed methods, including avoidance, minimization, and purchase of off-site habitat, ensured impacts would be mitigated].)

With respect to permits issued by other agencies, and specifically permits protecting special-status species, CEQA does not require that a lead agency reach a legal conclusion on whether a "take" is expected to occur as a result of the project. A finding that a project will not significantly impact biological resources does not "limit the federal government's jurisdiction under the Endangered Species Act or impair its ability to enforce the provisions of this statute." (*Association of Irritated Residents v County of Madera,* 107 Cal.App.4th 1383, 1397 (2003).) Accordingly, a lead agency may disagree with federal or state wildlife agencies regarding the possible take of a species. Such a disagreement will not invalidate an EIR if the agency's conclusion is supported by substantial evidence in the record.

Relatedly, CEQA does not require that a lead agency compel a project applicant to obtain a federal or state take permit to mitigate impacts to species. (*Id.*) However, if project impacts to protected species are expected to be significant, CEQA imposes upon the lead agency an independent obligation to incorporate feasible mitigation measures which reduce those impacts.

Treatment of Unlisted Species

Pursuant to CEQA Guidelines 15380(d):

> . . .[a] species not included in any [federal or state] listing … shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).

In *Sierra Club v. Gilroy City Council,* 222 Cal. App.3d 30, 47 (1990), the court considered whether CEQA Guideline 15380 requires a lead agency to make specific findings as to whether an unlisted species may be considered rare or endangered. The court held that there is no mandatory duty to do so, as CEQA Guideline 15380 was intended to be directory rather than mandatory, and the ultimate authority to designate a plant or animal species as rare or endangered is delegated to the state and federal governments. (*Id.*) However, in that case, the court also noted that the lead agency extensively considered the potentially rare species and incorporated significant mitigation measures to assure its continued viability. (*Id.*) Accordingly, lead agencies should carefully consider impacts to unlisted species, particularly when presented with significant evidence that they may be rare or otherwise in jeopardy.

Replacement Habitat and Conservation Easements

CEQA Guideline 15370(e) provides that mitigation may include:

> . . .[c]ompensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of

resources in the form of conservation easements. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 [conserving habitat at a 1:1 ratio]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [on- or off-site habitat preservation at 2:1 ratio].)

Conservation easements over lands set aside as mitigation for impacts to biological resources is often a key element of preserving these lands in perpetuity, thereby justifying their mitigating effect.

There is, however, a growing split of authority on the adequacy of conservation easements as mitigation, at least in the context of easements related to impacts to agricultural resources. Some local governments in California take the position that, because conservation easements merely protect existing land from future conversion, but do not truly replace or offset the loss of converted land, the easements do not reduce project impacts on land conversion. In *King and Gardiner Farms v. County of Kern*, 45 Cal. App.5th 814, 875-76 (2020), the court found that:

> . . .the implementation of agricultural conservation easements for the 289 acres of agricultural land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County.

By contrast, in *Masonite Corp. v. County of Mendocino*, 218 Cal.App.4th 230, 238 (2013), the court concluded that:

> ACEs [agricultural conservation easements] may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. . . .ACEs preserve land for agricultural use in perpetuity.

While this split of authority generally pertains to mitigation for the loss of agricultural land, it may be relevant to mitigation for the loss of habitat land. Notably, CDFW and other natural resource agencies in the state routinely rely on this form of mitigation to offset impacts to biological resources. On-site or off-site preservation of comparable habitat, coupled with a conservation easement or other form or development restriction, is a typical form of mitigation included in many permits issued by both the state and federal natural resource agencies.

In-Lieu Fees

Impacts to biological resources are sometimes mitigated using in-lieu fees, either in conjunction with or independent of habitat restoration. The court in *California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1055 (2009), however, cautions that an in-lieu fee system will only satisfy the duty to mitigate if the fee program itself has been evaluated under CEQA, or the in-lieu fees are evaluated on a project-specific basis. There, El Dorado County adopted by ordinance a rare plant impact fee program for use by developers to mitigate project impacts, which certain developers relied on in preparing an MND, rather than an EIR. (*Id.* at 1029.) After petitioners challenged the adequacy of the fee program, the court set aside the project MND, finding that:

> . . .[b]ecause the fee set by the ordinance have never passed a CEQA evaluation, payment of the fee does not presumptively establish full mitigation for a discretionary project. (*Id.* at 1030; *see also, Save Agoura Cornell Knoll v. City of Agoura Hills*, 46 Cal.App.5th 665, 701-02 (2020) [in-lieu fee payment for oak tree planting inadequate to mitigate project impacts; the MND did not provide any evidence that the off-site tree replacement program was feasible].)

Mitigation Cannot Violate Other Laws

Perhaps it goes without saying, but mitigation measures, even those with laudable species protection and conservation goals, may not violate other laws. In *Center for Biological Diversity v. Dept. of Fish & Wildlife*, 62 Cal.4th 204, 231-32 (2015), for example, the court held that while the CDFW generally may conduct or authorize the capture and relocation of a fully protected species as a conservation measure, it could not as the lead agency rely in a CEQA document on the prospect of capture and relocation as mitigation for a project's adverse impacts. There, the Fish and Game Code expressly permitted capture and relocation as part of an independent species recov-

ery effort. (*Id.* at 232.) However, outside of a species recovery program, those same actions were considered a take of the species: "[m]itigating the adverse effect of a land development project on a species is not the same as undertaking positive efforts for the species' recovery." (*Id.* at 235.)

Battle of the Experts

Litigation regarding the effectiveness of proposed mitigation measures often involves a battle of expert opinions. In these cases, the survival of the proposed mitigation, and the project's CEQA clearance, may depend on the type of CEQA document used for the project. An EIR is subject to the deferential "substantial evidence" standard of review, limiting the court's review to whether there is any substantial evidence in the record supporting the EIR. (*See National Parks & Conservation Assn. v. County of Riverside*, 71 Cal. App.4th 1341, 1364-65 ["Effectively, the trial court selected among conflicting expert opinion and substituted its own judgment for that of the County. This was incorrect."].) For MNDs, however, courts apply the "fair argument" standard, which only requires that the petitioner demonstrate there is substantial evidence in the record supporting a fair argument that the proposed project may have a significant effect even after mitigation measures are considered. (*See, California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1060 (2009) ["Where the views of agency biologists about the ineffectiveness of MND's plant mitigation measure conflicted with those of the expert who reviewed the project for the developer, the biologists' views were adequate to raise factual conflicts requiring resolution through an EIR."].)

How Biological Resources Might Inform Subsequent CEQA Analysis

Under Public Resources Code § 21166 and CEQA Guideline 15162, a project may require subsequent environmental review if new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. In the context of biological resources, new information is often an issue when a species is newly listed as threatened or endangered. In *Moss v County of Humboldt*, 162 Cal.App.4th 1041 (2008), for example, the court held that the new listing of the Northern California coastal coho salmon as a threatened species was not new information requiring additional review, as there was no evidence that the species' habitat was located on or near the project site. (*Id.* at 1064-65.) In contrast, the newly listed coastal cutthroat trout did constitute new information, as evidence suggested the species was linked to a creek on the project site. (*Id.* at 1065.) As such, the court required that the lead agency undertake supplemental review with respect to the project's environmental impacts on the newly listed coastal cutthroat trout.

Conclusion and Implications

This article addresses only the tip of the proverbial iceberg. Over CEQA's 50-year history, much has been said about how lead agencies should approach impacts to biological resources. We hope this article has been helpful in identifying some of the key themes that we've seen in our practice as consultants and lawyers alike struggle (at times) to capture the nuances associated with impacts to biological resources and mitigation to offset those impacts.

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CALIFORNIA WATER NEWS

ONGOING MEXICO/U.S. CROSS-BORDER SEWAGE CONTAMINATION FUELS PUBLIC OUTCRY

Longstanding frustrations regarding the intrusion of raw sewage from Mexico into the San Diego region have come to a head over the past year, sparking a public war of words between Imperial Beach Mayor, Serge Dedina, and Mexican Governor of Baja California, Jaime Bonilla. While recent efforts have largely alleviated a sharp increase in contamination seen since late 2019, more permanent solutions to the ongoing issue remain somewhat elusive, particularly due to the international cooperation and coordination required. Nonetheless, heightened public awareness and recent developments at the state and federal levels have generated some optimism that the long-term situation will be taken more seriously and managed more effectively.

Background

Wastewater pollution from Mexico has affected many communities in the San Diego region for decades, but the issue was notably exacerbated by the failure of Mexican pumps needed to contain the sewage in November 2019. It has been estimated that the volume of sewage intrusion in 2020 has averaged 50-60 million gallons per day in dry weather alone, with the pollution causing illness and lengthy beach closures in communities as far north as Coronado over the past year.

Human exposure to the water can bring people into contact with a number of harmful pathogens including *E. coli*, *Vibrio* and *salmonella*. According to Mayor Dedina, both he and his son have become physically ill from polluted waters, along with other Imperial Beach residents and others such as border patrol officers and Navy personnel. Dedina claims pollution levels this year have been in excess of anything he has seen before.

EPA Proposals to Address the Problem

In September 2020, the U.S. Environmental Protection Agency (EPA) announced measures aimed at improving the situation, particularly infrastructure repairs to leaking pipes, broken pumps and collectors. These measures have been characterized as short-term solutions to a larger problem, though by most accounts they have markedly reduced the dire levels of contamination seen earlier this year. Action by the EPA follows sharp criticisms of the Trump administration's lack of initiative with respect to the matter, and the administration has been hit with a number of Clean Water Act lawsuits filed by several cities in the San Diego area.

Regarding long-term solutions, regional representatives were able to help secure $300 million in funds for additional infrastructure as part of the renegotiated North America Free Trade Agreement, aimed at capturing the sewage before reaching American shorelines. Efforts to date, like those undertaken by the EPA in September, have largely been focused on assisting Mexico with the maintenance of Tijuana's wastewater infrastructure.

A Public War of Words

Governor Bonilla has been a central player in the matter on the Mexican side since assuming office in June 2019, and has openly bristled at the notion that his government bears the primary responsibility for the pollution. In September 2020, Bonilla held multiple news conferences in which he called for an apology from Dedina for his public remarks blaming Mexico. Governor Bonilla has said that the broken pumps have been fixed and trash has been cleared along the Valley, sufficiently addressing the problem on the Mexican side. Bonilla has also suggested that Dedina's attacks reflect an attempt to raise his political profile. Dedina has been outspoken regarding his desire to be selected by Governor Newsom as Kamala Harris' replacement in the U.S. Senate should be elected vice president.

For his part, Mayor Dedina has consistently rebuffed Bonilla's denials and attacks. Notwithstanding the progress that has been made by the recent repairs, Mayor Dedina cites continuing problems with an overburdened Punta Banderas pump station

six miles south of the border that continues to leave his city vulnerable to pollution drifting north. In late September, Mayor Dedina characterized recent progress as having addressed the "apocalyptic situation" that developed over the past year, but said Imperial Beach continues to grapple with "the normal horrific situation that still needs to be fixed." Accordingly, Mayor Dedina has scoffed at the notion of apologizing, noting that substantial progress would have to be made prior to any such statement. Supporting his claims, a recent report of the International Boundary and Water Commission confirmed excessive pollutant levels in the Tijuana River Basin based on samples that were taken prior to the major pump failures in late 2019.

Raised Public Awareness and a California Bill

Despite the unpleasantries between himself and Gov. Bonilla, Mayor Dedina believes the feud has helped his community by raising public awareness in the U.S. and Mexico and adding pressure on Bonilla to address the issues at the Punta Banderas pump station. Mexican news outlets report that Baja California officials are aware of the issues at the station, and have plans for repairs to be financed by federal funding expected sometime next year.

In addition to local and federal efforts to resolve the cross-border contamination threat, the California State Legislature enacted Senate Bill (SB) 1301 on September 30, which requires the development of a Tijuana River Valley Watershed Action Plan. The plan will examine strategies for addressing the sewage contamination in the region and for promoting coordination among the state, federal government and Mexican government, as well as other interested parties with respect to the implementation of solutions on both sides of the border. SB 1301 requires the plan to be developed jointly by the California Environmental Protection Agency and the Natural Resources Agency, and to be reviewed and updated every three years. In addition to facilitating cooperation among the parties involved, SB 1301 indicates the state's desire to take matters into its own hands to the extent that such cooperation cannot be effectively achieved.

Conclusion and Implications

The cross-border nature of the problem and currently fraught relationship between the U.S. and Mexican governments makes solutions more difficult to achieve. Moreover, the Trump Administration's lack of focus with respect to environmental issues has been viewed by many as an obstacle. Nonetheless, progress has been made mitigate the alarming conditions that developed in 2020 due to recent infrastructure failures in Mexico. It remains to be seen whether more permanent solutions will be implemented using the federal funding secured in connection with the NAFTA renegotiation, and whether the Punta Banderas station will be repaired as suggested by reports from Mexican media sources. Despite the uncertainty, the new state initiatives of SB 1301 should promote continuing progress. The outlook would be further improved by the reinvigoration of the federal commitment to environmental issues that could be expected from a possible Biden administration. (Wes Miliband)

CME GROUP, INC., NASDAQ ANNOUNCE NEW CALIFORNIA WATER FUTURES MARKET ON THE HORIZON

Approximately one year after Nasdaq's development of a first-ever water transaction spot pricing index, a new California water futures market may soon emerge to facilitate water transactions designed to hedge against pricing volatility.

A New Index on the Nasdaq®

In today's sophisticated global marketplace, thousands if not millions of commodities transactions occur daily. Data-driven financial indexes inform buyers and sellers regarding commodity prices. Tradable financial instruments enable transactions not only to meet today's commodity demands but also future demands, and can hedge against anticipated fluctuations in price and availability. Indexes have long existed to track value and provide investors with access to

companies and utilities that develop, produce, treat and supply water resources. Likewise, indexes for *commodities* like corn, wheat, soybeans, precious metals, and lumber are ubiquitous.

As reported in this publication in early 2019 (29 *Cal. Water L. & Pol'y Rptr.*147 (Mar. 2019)), a new index emerged in late 2018: the NASDAQ Veles California Water Index (ticker symbol: NQH20) (NQH20 or Index) to track what it describes as the "spot price" of *water* in California. The Index is based upon certain types of sale and lease transactions in specific active California water markets. Those markets include four adjudicated groundwater basins—the Central Basin, Chino Basin, Main San Gabriel Basin, and Mojave Basin Alto Subarea—and a generallydescribed surface water market. While many aspects of the Index are deemed proprietary, NASDAQ provided some information about the functionality of the Index in its "NQH20 Methodology Report" (Index Report) (*See*, https://indexes.nasdaqomx.com/docs/methodology_NQH2O.pdf, last visited October 20, 2020.) The Index is priced in terms of U.S. Dollars per acre-foot of water and uses a "modified volumeweighted average" of prevailing prices in the selected underlying water markets after adjusting for "idiosyncratic pricing factors" specific to those water markets. On opening day, the Index listed a California water "spot price" of approximately just over $300 per acre-foot based upon nearly 300 then-recent water transactions occurring over roughly a six-month period.

In a press release announcing the Index, Veles Water Limited's (Veles) Chief Executive Officer stated he expects the Index:

> . . .to facilitate tradeable cash-settled futures contracts within [a year] to allow farmers, utilities and industrial water users to hedge the financial risk of volatile water availability [and] provide investors with a means to speculate on the future price of water without taking on the underlying risk of owning assets. (*See*, https://www.globalwaterintel.com/news/2019/2/california-water-pricing-index-launches-on-nasdaq)

CME Group Futures Market

Fast forward to today. CME Group, Inc. (CME) and Nasdaq recently announced plans for a new water futures market on the Nasdaq Veles California Water Index (NQH2O) to be launched in late 2020, pending regulatory review. The futures market is designed to enable buyers and sellers to transact water transfers at a predetermined price at a specified time in the future, thereby hedging against anticipated fluctuations in pricing.

CME (comprising the Chicago Mercantile Exchange, Chicago Board of Trade, New York Mercantile Exchange, and The Commodity Exchange), operates as a global security and commodity exchange company across various asset classes based on interest rates, equity indexes, foreign exchange, energy, agricultural commodities, metals, weather and real estate. It facilitates buyer/seller transactions through its electronic trading platform across the globe and its open outcry trading facilities in Chicago and New York City. The firm also provides clearing and settlement services for exchange-traded contracts, and certain types of derivatives transactions. (*Forbes*, https://www.forbes.com/companies/cme-group/#445886241497).

The Future of Water Futures?

In a recent joint press release, CME and Nasdaq announced:

> Nasdaq Veles California Water Index futures will be an innovative, first-of-its-kind tool to provide agricultural, commercial, and municipal water users with greater transparency, price discovery, and risk transfer—all of which can help to more efficiently align supply and demand of this vital resource.

Quoting CME Group Global Head of Equity Index and Alternative Investment Products, the press release further states:

> With nearly two-thirds of the world's population expected to face water shortages by 2025, water scarcity presents a growing risk for businesses and communities around the world, and particularly for the $1.1 billion California water market. Developing risk management tools that address growing environmental concerns is increasingly important to CME Group. This innovative, new water contract builds on our strong partnership with Nasdaq, as well as our proven 175-year track record of helping end users and other market participants manage risk in

essential commodity markets including agriculture, energy, and metals.

Executive Vice President and Head of Nasdaq Global Information Services recently stated,

> The Nasdaq Veles California Water Index helps drive better outcomes for water market participants through verifiable price discovery. Our collaboration with CME Group has the power to deliver greater transparency around the management of an important natural resource.

The joint press release goes on:

> A liquid, transparent futures market will help to create a forward curve so water users can hedge future price risk. For example, 40 [percent] of water currently consumed in California is used to irrigate its nine million acres of crops. Nasdaq Veles California Water Index futures would allow an agricultural producer to plan ahead for changing costs of the water they need for large-scale irrigation. It would also allow a commercial end user, like a manufacturer, to better navigate business and financial risks when water prices fluctuate. J. . . .The new California water futures contract will be financially settled based on the Nasdaq Veles California Water Index launched in 2018, with each contract representing 10 acre-feet of water. The index sets a weekly benchmark spot price of water rights in California, based on the volume-weighted average of the transaction prices in California's five largest and most actively traded water markets. Nasdaq developed the NQH2O Index in partnership with Veles Water Limited, a firm specializing in the development of financial products for water markets.

Conclusion and Implications

The value of water and water rights in California is almost guaranteed to continue rising into the future. In response to relatively nascent regulations such as California's Sustainable Groundwater Management Act of 2014, new local and regional water markets are likely to emerge as water management agencies develop systems to allocate scarce resources. California's surface and developed water systems likewise face increased pressure for innovation in response to volatile climate and reliability conditions. The Index and CME futures market are surely innovative ideas and programs. Given California's extremely complex water regulatory regime and infrastructure, the engagement and success of a water futures market remains to be seen. One thing is certain: A new wave of potential buyers and sellers of water and water rights is already rolling throughout the state.

CME has a website providing information about the water futures market and the Index, including a portal to subscribe for information updates (www.cmegroup.com/waterfutures).
(Derek R. Hoffman)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS PUBLISHES PROPOSAL TO REISSUE AND MODIFY CLEAN WATER ACT NATIONWIDE PERMITS

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published a notice of proposed rulemaking (Proposed Rulemaking) in which it expresses the desire to reissue existing federal Clean Water Act (CWA) Nationwide Permits (NWPs), conditions, and definitions, with modifications, prior to their original March 2022 expiration. The Proposed Rulemaking includes the elimination of a 300 linear foot limit for streambed losses under certain NWPs, and includes new NWPs related to certain mariculture activities, utility line activities currently authorized under an existing NWP; and water reclamation and reuse facilities. The Corps is also considering reissuing unchanged NWPs so that all NWPs expire at the same time. Interested parties have until November 16, 2020, to submit comments. [85 Fed. Reg. 57298 (Sept. 15, 2020).]

Background

The Corps issues NWPs to authorize specific activities under § 404 of the federal Clean Water Act (Section 404) and § 10 of the Rivers and Harbors Act of 1899 (Section 10). The CWA authorizes the Secretary of the Army (Secretary) to issue NWPs for any category of activities involving discharges of dredged or fill material into "waters of the United States" (WOTUS).

The categories of activities covered by NWPs must be similar in nature, cause only minimal adverse effects when performed separately, and have only minimal cumulative adverse effect on the environment. Once issued, NWPs are valid for up to five years and may be reissued, revoked, or modified. At present, there are 52 NWPs, which were issued in 2017 and are set to expire on March 18, 2022. Compliance with the terms and conditions of an NWP generally streamlines the authorization process for covered activities, reducing the burden on permittees associated with obtaining individual permits under the CWA.

The Secretary has delegated authority to the Chief of Engineers (and his or her designated representatives) to issue NWPs. There are eight Corps division offices and 38 district offices. Division engineers may modify, suspend, or revoke NWP authorizations on a regional or statewide basis for a specific geographic area, class of activity, or class of waters within their respective divisions. Proposed regional conditions are issued by the district offices.

In order for an activity to be covered by an NWP, both the activity and the permittee must satisfy all of the NWP's terms and conditions, including any regional conditions. Authorization under an NWP may be subject to certain requirements and limits, including pre-construction notification (PCN) requirements. PCNs are reviewed by District Engineers and allow for evaluation of certain proposed activities on a case-by-case basis. Some existing NWPs are also subject to a 300 linear foot limit for losses of stream bed, which excludes NWP coverage for otherwise covered activities that cause a loss of more than 300 linear feet of stream bed, unless this requirement is waived pursuant to NWP general conditions. Additionally, NWPs may be subject to a half-acre limit on the loss of waters of the United States, which excludes from NWP coverage those activities that result in a loss of more than a half-acre of stream bed and other non-tidal waters. The half-acre limit cannot be waived.

The Corps' Proposed Rulemaking

Several important changes appear in the Corps' proposal, particularly with respect to NWP limits related to streambed loss, new NWPs associated with utility lines and water reclamation and reuse facilities, and certain mariculture activities.

Removal of Linear Foot Limit Rule in Favor of Other Tools to Minimize Streambed Loss

The Corps proposes removing the 300 linear foot limit for the loss of streambed in favor of other tools present in existing NWPs, including regional conditions and the half-acre limit for loss of non-tidal wa-

ters of the United States. In the view of the Proposed Rulemaking, eliminating the 300 feet limitation would effectuate the primary purpose of having pre-authorized activities.

The proposed modifications would affect ten existing NWPs, including the following: NWP 29 (residential developments), 39 (commercial and institutional developments), 40 (agricultural activities), 42 (recreational activities), 43 (stormwater management facilities), 51 (land-based renewable energy generation facilities), and 52 (water-based renewable energy generation pilot projects).

Currently, these NWPs are subject to the half-acre limit. According to the Corps, the half-acre limit most accurately represents the amount of stream bed lost as a result of filling or excavation and the subsequent functions expected to be lost. Except for NWP 51 (land-based renewal energy generation projects), the NWPs listed above are also subject to a PCN requirement for all activities. NWP 51, on the other hand, requires PCN for losses of greater than one tenth-acre of waters of the United States (tenth-acre threshold).

Modifying 'Mitigation' General Condition

Additionally, the Corps is proposing to modify the "Mitigation" general condition (GC) applicable to NWPs to require compensatory mitigation for losses greater than one-tenth of an acre of stream bed that require PCN. However, the Proposed Rulemaking gives District Engineers discretion to waive the requirement upon written determination that another form of mitigation is more environmentally appropriate. According to the Corps, this additional requirement will have a similar effect of encouraging minimization of stream bed impacts authorized by NWPs. The Corps is also considering an alternative hybrid approach that would continue to quantify the above NWPs in linear feet when the activities authorized would result only in the loss of stream bed, as opposed to losses of stream bed plus other non-tidal waters.

Modifying Nationwide Permit 12—Utility Line Activities

The Corps has also proposed modifying NWP 12 (utility line activities) to authorize only oil or natural gas pipeline activities, separating out other activities currently authorized under NWP 12 into two new proposed NWPs: one authorizing electric utility lines and telecommunication activities (NWP C) and another authorizing utility line activities for water and other substances that are not petrochemicals (NWP D). Proposed new NWPs C and D would be subject to the half-acre limit and require PCN when a Section 10 permit is required or the tenth-acre threshold is triggered.

New Nationwide Permit Authorizing Discharges of Dredge or Fill Material Associated with Water Reclamation

The Corps is also proposing to add a new NWP authorizing discharges of dredged or fill material associated with water reclamation and reuse facilities (NWP E). This would include authorization for ecological infrastructure such as vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality. The NWP would authorize temporary fills, including the use of temporary mats, necessary to construct a water reuse project and attendant features. The NWP would not authorize discharges into non-tidal wetlands adjacent to tidal wetlands. Proposed new NWP E would be subject to the half-acre limit and PCN would be required for all activities prior to commencing activity. According to the Corps, certain activities associated with water reclamation and reuse facilities can be authorized, subject to the half-acre limit, by existing NWPs, including NWPs 29 (residential developments), 39 (commercial and industrial developments), 40 (agricultural activities), and 42 (recreational facilities). However, the Corps notes that this may not be obvious to the public or may be confusing and is therefore seeking comments on whether to add new proposed NWP E or make it clear in existing NWPs that water reclamation and reuse facilities may be attendant features under the applicable existing NWPs.

Seaweed and Finfish Mariculture

The Corps' remaining proposals for new NWPs would authorize seaweed mariculture activities (NWP A) and finfish mariculture activities (NWP B) not currently authorized by existing NWPs. These NWPs would authorize such activities in the navigable waters of the United States and permit seaweed and finfish mariculture structures attached to the seabed

on the outer continental shelf. The proposals include provisions on "multi-trophic species mariculture" activities as an alternative to creating a separate NWP authorizing those activities. This would allow flexibility in proposed new NWPs A and B, the Corps contends, allowing operators to propagate additional species, such as mussels, on the permitted structures. These new NWPs would not, however, authorize "land-based" seaweed farming or finfish mariculture activities such as the construction of ponds to produce catfish or tilapia. Proposed new NWPs A and B would be subject to PCN requirements for all activities and certain geographically based restrictions.

Other Proposed Modifications

In addition to these and other modifications, the Corps proposes modifying several NWP GCs, including GCs 13 (removal of temporary fills), 17 (tribal rights), 18 (endangered species), 20 (historic properties), 25 (water quality), and 32 (pre-construction notification).

Conclusion and Implications

Nationwide Permits streamline the authorization for categories of activities that have minimal adverse effects on WOTUS and the environment, and reduce permitting hurdles for projects that would otherwise require individual permits for covered project activities. The Corps' Proposed Rulemaking to modify and reissue existing permits prior to their original expiration has the potential to clarify and further streamline authorized activities for projects currently in the works. The Corps' ultimate determinations and decisions with regard to these proposals may affect the overall planning and feasibility of projects, especially projects with activities for which NWP authorization was formerly unavailable. Interested parties may submit comments to the Corps by the November 16, 2020 comment deadline and check with district offices about proposed regional conditions and comment deadlines. For more information, *see:* https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits (Geremy Holm, Steve Anderson)

U.S. BUREAU OF RECLAMATION RELEASES DRAFT SUPPLEMENTAL EIS FOR PROPOSED RAISE OF B.F. SISK DAM AT SAN LUIS RESERVOIR

In connection with an ongoing dam safety project, the U.S. Bureau of Reclamation (Bureau) and San Luis and Delta Mendota Water Authority (SLDMWA) seek to evaluate an increase in the storage capacity of the San Luis Reservoir. The increased storage capacity would be achieved by a ten-foot raise of the B.F. Sisk Dam above the level proposed for dam safety purposes, adding approximately 130,000 acre-feet (AF) of storage to San Luis Reservoir south of the Sacramento-San Joaquin Delta.

Background

B.F. Sisk Dam is an earth-filled gravity embankment dam with a crest height of 382 feet and an overall length of about 3.5 miles, impounding San Luis Reservoir with a capacity of 2,041,000 acre-feet (AF). Although the dam was constructed and is owned by the Bureau, the California Department of Water Resources (DWR) operates the facilities, and the California Department of Parks and Recreation manages the recreational resources associated with San Luis Reservoir.

The Bureau's Safety of Dams Office (SOD) completed a risk analysis of B.F. Sisk Dam that evaluated dam stability in the event of seismic activity. The analysis proposed a structural solution, which included a 12-foot crest raise. The Bureau and DWR prepared an Environmental Impact Statement (EIS)/Environmental Impact Report (EIR) and noticed the availability of the Final EIS/EIR to the public via the Federal Register on August 23, 2019.

As a connected action to the B.F. Sisk SOD Modification Project, the Bureau and SLDMWA now seek to evaluate an increase in storage capacity of the San Luis Reservoir. The increased storage capacity would be achieved by an additional ten-foot raise of the B.F. Sisk Dam embankment across the entire dam crest above the 12-foot increase proposed for dam safety purposes.

SLDMWA, in coordination with the Bureau, is conducting a feasibility study to evaluate the Pro-

posed Action and a potential cost-share in accordance with the Reclamation Safety of Dams Act (43 U.S.C. 506 *et seq.*), as amended by P.L. 114-113, and the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322), § 4007.

The Supplemental Environmental Impact Statement

SLDMWA and the Bureau completed the joint Draft Supplemental Environmental Impact Report/ Supplemental Environmental Impact Statement (Draft SEIR/EIS) to evaluate the environmental impacts of various alternatives under the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA). SLDMWA is the lead agency pursuant to CEQA and the Bureau is the lead agency pursuant to NEPA. Operationally, increased capacity and storage supply within San Luis Reservoir would only be used to help meet existing demands and would not serve any new demands in the South-of-Delta Central Valley Project (CVP) and State Water Project (SWP) service areas.

The Draft SEIR/EIS identifies and analyzes three alternatives: 1) a no project/no action alternative; 2) a non-structural alternative; and 3) a dam raise alternative—the proposed action. Under the no project alternative, the reasonably foreseeable future condition without the project is analyzed. The document found the likelihood of overtopping under a no action alternative increases during a seismic event. Under the non-structural alternative, the Bureau analyzed changing its annual allocation process to reserve up to 310 thousand acre-feet (TAF) of stored CVP supply in San Luis Reservoir at the end of wetter years, defined as years when South-of-Delta CVP allocations are 55 percent or higher. Under this alternative, allocated water supply not used by CVP contractors would not be carried over for use in a subsequent year. The dam raise alternative is the proposed action, and as noted would place additional fill material on the dam embankment to raise the dam crest an additional ten feet above the 12-foot embankment raise under development by the B.F. Sisk Dam SOD Modification Project providing an increase in reservoir storage capacity of 130 TAF.

The Draft SEIR/EIS also analyzed three sub-alternatives for the proposed dam raise action, relating primarily to how increased storage at San Luis would be allocated. The three sub-alternatives are: 1) CVP only storage; 2) CVP/SWP split storage; and 3) investor-directed storage. With the CVP only storage sub-alternative, the additional storage in San Luis Reservoir would be Bureau of Reclamation-owned CVP storage and would be operated consistent with current CVP operations. Under the CVP/SWP split storage sub-alternative, the additional storage would be split between CVP and SWP consistent with the current 45 percent CVP and 55 percent SWP split of the overall reservoir storage. Under the investor-directed sub-alternative, the use of the expanded storage capacity would be primarily investor directed pursuant to various scenarios, with remaining capacity available to the Bureau to store CVP Project water.

Under the CVP only storage sub-alternative, average annual South-of-Delta CVP agricultural deliveries are expected to increase up to 63 TAF in certain water year types and M&I deliveries are expected to increase up to 3 TAF. Refuge deliveries would see an average annual increase of approximately 1 TAF. Under this sub-alternative there would be a slight reduction in Table A SWP deliveries, an average of 12 TAF or less than 1 percent of total annual deliveries. The Draft SEIR/EIS deems this impact less than significant.

Under the operation of CVP/SWP split storage sub-alternative, CVP agricultural deliveries are expected to increase up to 35 TAF and M&I deliveries are expected to increased up to 2 TAF. Refuges would expect a slight average annual increase of 1 TAF. Under this sub-alternative there would be an increase in Table A SWP deliveries of an average of 9 TAF annually or again less than 1 percent of total deliveries. The Draft SEIR/EIS deems this impact less than significant.

Under the Operation of Investor–Directed Storage sub-alternative, CVP agricultural deliveries are expected to increase between 27 and 74 TAF in wet water year types and between 19 TAF and 21 TAF in dry water year types. M&I deliveries are expected to increase slightly, and refuge deliveries are expected to increase between 5 and 14 TAF in wet water year types and by 4 TAF in dry water year types. There would be a slight reduction in Table A SWP deliveries, an average of 12 TAF or again less than 1 percent of total deliveries.

Public comment on the Draft SEIR/EIS closed on September 28, 2020, and response to comments

received have not yet been circulated. Following the Notice of Preparation, however, the State Water Resources Control Board provided numerous comments including regarding the Bureau's purported need to complete an extension of time to implement the project and that the project should specifically be designed to avoid increases in exports and reductions in Delta outflows.

Conclusion and Implications

The Bureau of Reclamation's SEIS is one important step in what the Regional Director has estimated will be a project that may take five-six years to complete. Comments received during the SEIS comment period, along with the Bureau's responses, will be posted here once made publically available: https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=44425.
(David Cameron, Meredith Nikkel)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS EMERGENCY REGULATIONS INCREASING FEES FOR IRRIGATED LANDS REGULATORY PROGRAM

The California State Water Resources Control Board (SWRCB) has increased fees on agricultural water users subject to the state's Irrigated Lands Regulatory Program (ILRP). The SWRCB finds the increase necessary to fund additional staff positions established under the program.

Program Background

The ILRP was established by the SWRCB in 2003 and falls within the SWRCB's Water Rights Program (Water Rights Program). The purpose of the ILRP is to regulate irrigation runoff from agricultural lands, in order to mitigate impairment to surface water and groundwater from pesticides, fertilizers, salts, pathogens and sediment. The SWRCB has found that at high concentrations, unmitigated pollutants can harm aquatic life and render water supplies unusable for drinking or agricultural purposes.

Fee Structure Background

For many years, funding for the ILRP was provided entirely by California tax revenues, until it recently shifted to a fee-based program funded directly by ILRP agricultural stakeholders. During that time, the Water Rights Program, inclusive of the ILRP, has expanded, requiring more staff both at the state level and at the nine regional water quality control boards that are tasked with monitoring and enforcing program compliance.

The SWRCB's authority in determining fees for the Water Rights Program is limited. Its fees, which are approved in September of each year, are a function of the Governor's annual budget, as approved by the California State Legislature, which determines the staffing and the budget for the Water Rights Program. Water Rights Program fees reflect costs that the SWRCB determines must be passed on stakeholders, including ILRP participants.

Fiscal Year 2020-21 Adopted Budget

The Governor's January 2020 budget proposal—presented prior to the COVID-19 pandemic—provided for additional Water Rights Program staff positions. In response to the pandemic, these positions were cut from the Governor's May Revised Budget as the state cut billions of dollars of funding for various programs. Somewhat surprisingly, the final budget adopted in June, re-incorporated these positions, which the SWRCB indicates prompted the required increase in fees.

California *Water Code* § 1525 requires the SWRCB to adopt, by emergency regulation, a schedule of fees to recover the costs incurred in connection with the Water Rights Program. It also requires the board to adjust the fees annually to conform to the amounts appropriated by the Legislature.

Total budgetary expenditures for FY 2020-2021 are $30.4 million. To cover expenditures and ensure a 5 percent reserve for FY 2020-2021, the SWRCB approved a 6 percent fee increase for all fee payers within the Water Rights Program, including those agricultural fee-paying stakeholders funding the ILRP.

A Collaborative Approach Moving Forward

Stakeholder momentum has been gathering in calling for a more collaborative approach that would streamline the ILRP, cut down on staffing costs and ease the burden for stakeholders. Agricultural ILRP participants have proposed processes and concepts that would provide for individual water rights holders, utilities, and districts to work directly with board staff in order to reduce program staff costs. Implementing these concepts would include stakeholders assuming a role in what are currently regulatory duties such as monitoring and reporting. Additional ideas include consolidating reporting requirements for programs with overlapping functions, and allowing agricultural water users with established track records for water quality program compliance to report less frequently. The SWRCB has expressed an interest in considering these innovative and collaborative approaches.

Conclusion and Implications

The fact that the extensively reduced state budget for fiscal year 2020-2021 included increases in State Water Resources Control Board staffing to administer California's Water Rights Programs reflects recognition of the importance the state and its policy makers place on protecting water quality and resource management. It is simultaneously encouraging to hear that the SWRCB is willing to consider ways to creatively and collaboratively reduce costs to fee-paying agricultural stakeholders who fund the ILRP, particularly during a time of continued economic uncertainty.
(Chris Carrillo, Derek R. Hoffman)

LEGISLATIVE DEVELOPMENTS

CONGRESS CONSIDERS AMENDMENT TO EXPAND REACH OF THE WATER INFRASTRUCTURE FINANCE AND INNOVATION ACT

On September 11, 2020, Congressman John Garamendi introduced a bill to amend the 2014 Water Infrastructure Finance and Innovation Act (WIFIA), WIFIA Improvement Act of 2020 (H.R. 8217, 116th Cong. (2020)). WIFIA provides low-interest loans for water infrastructure projects with a maximum 35 year payoff period. If enacted, the bipartisan bill would amend WIFIA to extend the payoff period for certain long-term water infrastructure projects to 55 years. The bill would also clarify that WIFIA applies to projects owned by the U.S. Bureau of Reclamation (Bureau) but operated and maintained by local agencies.

History of the Water Infrastructure Finance and Innovation Act

Enacted in 2014, WIFIA established a program to fund the construction of water infrastructure projects with low-interest, long-term loans. The U.S. Environmental Protection Agency (EPA) administers the WIFIA loan program in partnership with the Bureau. Eligible borrowers include local, state, and tribal governments, the federal government. Private entities may also benefit from WIFIA if the entity participates with a public sponsor. Eligible projects include a wide spectrum of water infrastructure projects, including projects eligible under the Clean Water State Revolving Fund and the Drinking Water State Revolving Fund; energy efficiency projects for drinking water and wastewater facilities; repair, rehabilitation, or replacement of treatment works, community water systems, or aging water distribution or waste collection systems; desalination, alternative water supply, and water recycling projects; drought prevention, reduction, or mitigation projects; purchase of property integral to an eligible project or to mitigate environmental impacts of a project; and certain pollution control projects.

A WIFIA loan features a fixed interest rate that is established at the time of the loan's closing. If a borrower receives multiple disbursements over a span of years, the borrower keeps the same fixed rate. The fixed interest rate is equal to the U.S. Treasury rate of a similar maturity on the date of the loan's closing, even if the borrower only has a AA or BBB rating. The date of maturity, thus the interest rate, is based on the weighted average life of the loan, not the loan's actual maturity date. This generally results in a lower interest rate because the weighted average life of the loan is usually shorter than the loan's maturity date. The loan repayment period is the earlier of either: 1) 35 years after substantial completion of the project or 2) the useful life of the project. The long repayment period allows the borrower to make smaller payment amounts throughout the life of the loan.

The loans only finance up to 49 percent of the cost of a proposed project. Congressional appropriations provide money to cover estimated losses for the projects; otherwise, the loans are funded by and repaid to the Treasury. The funds appropriated by Congress thus have a significant multiplier effect on the total amount of money invested in water infrastructure projects.

A number of California projects have already benefited from WIFIA, including a groundwater replenishment system for the Orange County Water District, along with a number of wastewater treatment and recycling facilities throughout the state.

A Bipartisan Bill Seeks to Amend the Water Infrastructure Finance and Innovation Act

On September 11, 2020, Representative John Garamendi introduced a bill titled the WIFIA Improvement Act of 2020 (H.R. 8217, 116th Cong. (2020)). The WIFIA Improvement Act has bipartisan cosponsors, including California Representatives T.J Cox, Jim Costa, Doug LaMalfa, and Josh Harder. To date, the WIFIA Improvement Act has been referred to the House Transportation and Infrastructure Subcommittee on Water Resources and Environment, but no further action has been taken by the House of Representatives.

The WIFIA Improvement Act would amend the

provision of WIFIA that provides that the maturity date of the loan is the earliest of either the useful life of the project or 35 years from substantial completion of the project. Instead, if a project has a useful life of *more* than 35 years, the loan's maturity date is 55 years from the date of substantial completion of the project. If a project has a useful life of less than 35 years, the loan's maturity date is 35 years. Extending the repayment period to 55 years will reduce annual debt service payments by as much as 40 percent. The WIFIA Improvement Act would also clarify that loans can be used to fund repairs and improvements to transferred works owned by the Bureau but repaired and maintained by local agencies.

Congressman Garamendi has pointed to the Sites Reservoir Project as an example of a project that would benefit from the extension of the loan repayment period to 55 years. Congressman Garamendi also claims that clarifying that WIFIA applies to federally owned but locally maintained and operated facilities would enable financing for the improvements to and modernization of the Central Valley Project, including the C.W. "Bill" Jones Pumping Plant. Cosponsor Representative Dan Newhouse asserts that the WIFIA Improvement Act would provide similar benefits to his constituents in central Washington.

Conclusion and Implications

The WIFIA Improvement Act would expand WIFIA to allow financing for projects with longer useful lifespans and would clarify that WIFIA applies to federally owned and locally operated projects. The stated purpose of the WIFIA Improvement Act is to unlock long-term, low-interest financing for two of California's most important water infrastructure projects:. construction of Sites Reservoir and modernization of pumps for the Central Valley Project. The WIFIA Improvement Act boasts bipartisan support, but its fate—including passage through Congress and signature by the President—remains to be seen. The full text and history of H.R. 8217 is available online at: https://www.congress.gov/bill/116th-congress/house-bill/8217?s=1&r=18
(Brian Hamilton, Merdith Nikkel)

HOUSE REPRESENTATIVE RUIZ INTRODUCES SALTON SEA PUBLIC HEALTH ACT—NOT MUCH TRACTION YET IN CONGRESS FOR THE BILL

In September, House Representative Raul Ruiz circulated proposed legislation seeking to bring federal funding and participation into the dust suppression and habitat restoration projects designed to address numerous environmental and public health concerns at the Salton Sea. This legislation would provide significant funding to the State of California's long-term projects and could potentially accelerate the completion of these projects. However, a recent congressional hearing indicates that the legislation faces significant opposition.

Background

Located in Riverside and Imperial counties, the Salton Sea is California's largest inland lake. A terminal lakebed, the present-day Salton Sea formed in 1905 when an irrigation canal carrying Colorado River water breached and water flowed into the lakebed over a two-year period. Today, the Salton Sea provides habitat for certain species of migratory birds, including some threatened and endangered species.

Historically, the Salton Sea filled and dried with the natural fluctuations of the Colorado River. More recently, however, the Salton Sea has received sufficient agricultural runoff from the Imperial Valley to keep the lake from drying up. However, according to a State of California Legislative Analyst's Office (LAO), changing farming practices and water transfers over the last several decades have slowly reduced the amount of runoff the Salton Sea receives each year. With high rates of evaporation and reduced agricultural runoff from Imperial Valley farms, the Salton Sea has slowly been shrinking. This, in turn, exacerbates the Salton Sea's high salinity levels. The Salton Sea's salinity levels are further impacted by the saline nature of agricultural runoff and the fact that the Salton Sea, as a terminal lake, has no outflow.

According to the LAO, the shrinking of the Salton Sea presents public health and environmental concerns. For instance, exposing dry lakebed can

harm air quality, as the lakebed contains fine sediment potentially contaminated with elements from agricultural runoff, such as arsenic and selenium. The high winds and arid climate of the area can cause this particulate matter to become airborne, presenting potential public health concerns in the Imperial and Coachella Valleys. Increasing salinity in the Salton Sea also makes it increasingly inhospitable to fish, which are a significant food source for the migratory birds.

The Salton Sea Management Plan

In response to these environmental concerns, the state established the Salton Sea Management Plan (SSMP) and is currently in the first phase of implementing the SSMP. For instance, the plan does not contain a detailed list and timeline for specific projects that will occur during the initial ten-year phase. The SSMP will start with a focus on the Species Conservation Habitat (SCH) project [https://water.ca.gov/Programs/Integrated-Regional-Water-Management/Salton-Sea-Unit/Species-Conservation-Habitat], but the implementation of new projects depends on a number of factors such as permits, land-use agreements, and funding availability. Because of these considerations, it is unclear when other projects will be approved. Given these funding concerns, federal and state lawmakers have called on the federal government to provide greater assistance in remedying environmental and public health crises at the Salton Sea.

The Salton Sea Public Health and Environmental Protection Act

In September 2020, Rep. Ruiz circulated the draft Salton Sea Public Health and Environmental Protection Act (SSPHEPA or Act), which would bring substantial federal funding to support and accelerate dust suppression and habitat projects at the Salton Sea and increase coordination between stakeholders at all levels of government. This legislation would require the creation of a Memorandum of Understanding between the State and the Department of the Interior to coordinate the management of the federal and state projects. Specifically, the legislation would establish a requirement for the Department of the Interior to construction dust control and habitation mitigation projects at the Salton Sea in partnership with the SSMP, effectively covering a similar acreage of the exposed lakebed as the State of California-funded projects. The SSPHEPA also provides for federal delegation of construction activities to the State of California provided that there is adequate federal funding.

In order to coordinate the Salton Sea projects, the Act would create a federal interagency council that would expedite permits, conduct environmental review and streamline funding. This council would consist of officials from the Department of the Interior, Department of Agriculture, the U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency. The SSPHEPA would also require the publishing of an annual report on the status of the Salton Sea, including an analysis regarding the change in lakebed exposure, the presence of certain chemicals, and the associated health risks of the exposed shoreline. Ultimately, the Act is designed to result in an infusion of resources, which could help address funding concerns related to the implementation of the SSMP.

September 24, 2020 Salton Sea Congressional Hearing

A recent congressional hearing regarding the environmental status of the Salton Sea may demonstrate an absence of support for the SSPHEPA. At the request of Rep. Raul Ruiz and Rep. Juan Vargas, a Congressional hearing was held on September 24, 2020, the first congressional hearing regarding the Salton Sea held since 1997. This hearing was hosted by a water-focused subcommittee of the House Committee on Natural Resources, but was not attended by a significant portion of the subcommittee. Similarly, members of the U.S. Bureau of Reclamation as well as the U.S. Fish and Wildlife Service were invited, but also did not attend. This lack of attendance may indicate a hesitation to further involve the federal government in the management of the Salton Sea. Additionally, the subcommittee's ranking member, Rep. Tom McClintock, also criticized the proposed Act at the hearing. Specifically, Rep. McClintock raised issues regarding the amount of funding and federal involvement needed to assist the State of California with the SSMP and that there were other matters that should take precedence to federal involvement. Rep. McClintock also suggested that the state was ultimately responsible for the lake when it signed a

2003 water transfer deal. An absence of Congressional support, and even opposition to the Act, may make it difficult for the Act to proceed.

Conclusion and Implications

It remains to be seen if the Salton Sea Public Health and Environmental Protection Act will gain enough traction to potentially lead to federal funding and involvement in the management of the Salton Sea. If federal involvement does not occur, the state may be forced to consider alternative sources of revenue to address the funding issues with the SSMP. However, in the event that federal funding is acquired, the state may be able to concretely move forward with the SSMP. The Salton Sea Public Health and Environmental Protection Act, (2020) is available online at: https://ruiz.house.gov/sites/ruiz.house.gov/files/2020-09_Release_Salton%20Sea%20Public%20Health%20Protection%20Act.pdf
(Miles Krieger, Steve Anderson)

CALIFORNIA BILL SEEKING PROTECTION OF THE STATE'S LAND AND WATER, AND OF THE NATION'S OCEANS WILL HAVE TO WAIT UNTIL THE NEXT LEGISLATIVE SESSION

California Assembly Bill (AB) 3030, introduced and authored by Assemblymember Ash Karla of San Jose, declares goals for the State of California relative to the protection of approximately 30 percent of the state's land areas and waters and approximately 30 percent of the nation's oceans. While AB 3030 was not passed during the 2019-2020 Legislative Session, it is likely that this bill will return in the upcoming 2020-2021 Legislative Session for additional discussion and analysis.

Background

While there are nuances to AB 3030, the bill's overall goal was to protect at least 30 percent of California's land areas and waters to help advance the protection of 30 percent of the nation's oceans by 2030, inclusive of existing protections afforded by state and federal laws and regulations. AB 3030 also set a goal for the state to provide fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins through additional access to the protected waters and land.

In the bill's preamble its purpose and goals are summarized as follows:

> Existing law declares it to be the policy of the state that the protection and management of natural and working lands, as defined, is an important strategy in meeting the state's greenhouse gas emissions reduction goals, and requires all state agencies, departments, boards, and commissions to consider this policy when revising, adopting, or establishing policies, regulations, expenditures, or grant criteria relating to the protection and management of natural and working lands.
>
> This bill would declare it to be the goals of the state by 2030 to protect at least 30 percent of the state's land areas and waters; to help advance the protection of 30 percent of the nation's oceans; and to support regional, national, and international efforts to protect at least 30 percent of the world's land areas and waters and 30 percent of the world's ocean.
>
> The bill would declare it a further goal of the state to improve access to nature for all people in the state and to provide for recreational and educational opportunities, including wildlife-dependent recreational activities, with a specific emphasis on increasing access for communities of color and economically disadvantaged communities.

The Assembly Bill—A Call to Action

AB 3030 was drafted in response to the worldwide scientific community's call to action to protect 50 percent of the earth's oceans, land, and water resources by 2050. In an international effort to stop or reverse the impacts on mass extinction and human survival, world leaders are scheduled to meet in 2021 at the Convention of Biological Diversity. World leaders anticipate adopting a 30 x 30 goal at the 2021 Convention of Biological Diversity that seeks to pro-

tect 30 percent of the earth's oceans, land, and water resources by certain timelines.

'Goals of the State'

This bill would declare it to be the goals of the state by 2030 to protect at least 30 percent of the state's land areas and waters; to help advance the protection of 30 percent of the nation's oceans; and to support regional, national, and international efforts to protect at least 30 percent of the world's land areas and waters and 30 percent of the world's ocean. The bill would declare it a further goal of the state to improve access to nature for all people in the state and to provide for recreational and educational opportunities, including wildlife-dependent recreational activities, with a specific emphasis on increasing access for communities of color and economically disadvantaged communities:

> *The bill would authorize the state to achieve these goals through specified activities. The bill would require the Natural Resources Agency to ensure that actions made in furtherance of these goals are conducted in a specified manner.* (Emphasis in the original text).

The '30 x 30' Goals

On a national level, the U.S. House Select Committee on the Climate Crisis recommended Congress establish and pass a 30 x 30 goal for all of the nation's lands and ocean areas, which appears to have similar goals and initiatives as AB 3030 for California lands and oceans.

With the international and national efforts putting forth an objective of adopting 30 x 30 goals, AB 3030 attempts to place California as an environmental leader as the first state to officially adopt a 30 x 30 goal. Currently, Hawaii and South Carolina state legislatures are also considering a 30 x 30 goal bill. The hope of AB 3030, if eventually adopted, is that California provides an example for the rest of the country and the world once world leaders meet at the 2021 Convention of Biological Diversity.

The Opinions Stream in

Supporters of AB 3030 argue that this bill would be a "critical and concrete step forward" but also recognize that additional legislation and guidance will be necessary to meet the 30 x 30 goals. Supporters also argue that passing AB 3030 would place California in a better position to obtain federal funding and various philanthropic funding.

AB 3030 faced a vocal opposition during the 2019-2020 Legislative Session. Primarily, associations for recreational hunting and fishing oppose the bill due to the potential impacts to the fishing industry. The opposition argues that AB 3030 is unnecessary since fisheries along the West Coast are largely hailed as a world-wide model for how fisheries should be managed for sustainability. Additionally, the opposition argues that the 30 x 30 goal does not take into account local Californian issues of biodiversity and the goals are based on international issues that may not be applicable in California.

The State Senate Committee on Natural Resources and Water (Committee) analyzed some of the weaknesses of AB 3030 and made several comments on the potential need for amendments in the future. Specifically, the Committee analyzed the ambiguity regarding use of the term "protection" or "protect." The Committee stated that providing an adequate definition for "protection" in the 30 x 30 goals would be difficult. Since different studies and organizations have different definitions of what counts as baseline protection, it would be difficult to identify which database to use for the 30 x 30 goals.

Conclusion and Implications

While opponents admire the intent of AB 3030, the bill lacks tangible procedures, oversight, and milestones. Such ambiguity, the opposition argues, would impact recreational fishing and hunting, and commercial fishing.

AB 3030 will likely be reintroduced again in the upcoming Legislative Session, as concerns for urgency legislation related to COVID-19 were placed on higher priority during the 2019-2020 Legislative Session. Without a doubt, first steps to combat the biodiversity and climate change crisis will have to be adopted, whether by individual states, countries, or the international community at large, to save our environment. With the Convention of Biological Diversity just around the corner in May 2021, the California Legislature will have to pass AB 3030 or a new iteration of the bill soon if it wants to be the first state in the nation to adopt ambitious environmental goals relating to the biodiversity crisis. The full text

of the bill, along with its history, is available online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB3030
(Wesley A. Miliband, Nicolle Falcis)

LAWSUITS FILED OR PENDING

VALLECITOS WATER DISTRICT SUES SAN DIEGO COUNTY WATER AUTHORITY OVER PAYMENT FOR PREMIUM TREATED WATER

On September 24, 2020, the Vallecitos Water District (Water District) initiated an action against the San Diego County Water Authority (SDCWA) for breach of contract, declaratory relief, and cancellation of contract.

The Water District's complaint alleges that SDCWA, without notice, stopped direct delivery of desalinated water from the Claude "Bud" Lewis Carlsbad Desalination Plant (Carlsbad Plant) for 16 months. During the 16-month period, the Water District contends to have paid approximately $6 million dollars more than it would have paid for treated water. [Vallecitos Water District v. San Diego County Water Authority, Case No. 37-2020-00034563-CU-BC-NC (San Diego County Super. Ct.).]

Background

In 2012, SDCWA sought to develop and construct the nation's largest seawater desalination plant, the Carlsbad Plant. SDCWA committed to purchasing approximately 48,000 acre-feet per year of desalinated water from the Carlsbad Plant. A portion of SDCWA's committed desalinated water was offered to its member agencies, including SDCWA, at the same price SDCWA agreed to purchase the desalinated water. For those member agencies who were interested in purchasing a portion of the 48,000 acre-feet per year desalinated water, SDCWA prepared a uniform contract for all interested member agencies to review and execute (Uniform Contract), which sets forth the parameters for which member agencies would receive treated water in the applicable designated amounts. Notably, the Uniform Contract also provided broad discretion to SDCWA as to what type of treated water each member agency would receive:

> The parties acknowledge that the water provided by SDCWA under the uniform contracts will be treated water from any source determined by SDCWA at its sole discretion, and may be blended of desalinated water and other treated water of SDCWA, other treated water of SDCWA without blending with desalinated water or, in some limited cases, direct delivery of desalinated water, and that such water will be deemed to be delivered in equal monthly amounts.

The crux of the Water District's complaint relies upon the "limited cases" of "direct delivery of desalinated water." The Uniform Contract discusses the scenario where a member agency and SDCWA enter into:

> . . .a separate agreement for the design, construction, and operation of new connection facilities to the pipeline … that will allow for the direct delivery of desalinated water to the [member agency].

The Water District argues that since it entered into two separate agreements with SDCWA, including a design and construction agreement for direct connection facilities, the Water District was expressly authorized to receive direct delivery of desalinated water from the Carlsbad Plant, as opposed to the blended treated water available to other member agencies.

Shut Down Lines

As the Water District developed plans and constructed its direct connection facilities, including a 16-inch diameter pipeline to allow for direct delivery from the Carlsbad Plant, SDCWA assisted in construction by reviewing and approving plans and specifications, and provided construction management and inspection services. The Water District facilities were substantially completed by December 2015.

During a warranty check performed by SDCWA in November 2017, SDCWA informed the Water District that the line would be out of service for a video inspection. After the video inspection, the Water District alleges that SDCWA found areas of concern in the facilities, which SDCWA would review for

possible solutions. The Water District argues that SDCWA never informed the Water District that the direct delivery facilities would be shutdown indefinitely.

A year after the warranty check, the Water District was informed that SDCWA never turned on the direct connection from the Carlsbad Plant and that the Water District was not receiving desalinated water from the Carlsbad Plant since November 2017. During this shut-off period, the Water District claims to have paid a premium for treated water that was not desalinated water delivered directly from the Carlsbad Plant.

The Water District and Water Authority met and conferred regarding the shut-off period and the amounts paid. The Water District alleges that SDCWA took the firm position that "the Uniform Contract allows SDCWA, at its discretion, to deliver water from any source" and that the Uniform Contract "does not address, nor does it require, a specific water quality to be provided, or a specific source."

The Lawsuit

Subsequently, and based off these facts, the Water District filed the instant action against SDCWA for breach of contract, declaratory relief, and cancellation.

Although little has been filed on the case docket for the Water District's lawsuit, SDCWA has issued statements on its website, including a video interview with the retired Water Authority water resources director relative to the Uniform Contract. SDCWA's position is that the Water District knew about the shutdown and the premium rate that the Water District paid during the shutdown was for treated water to serve as a "local supply." Meaning, during a drought, the Water District would have a "priority right to its contracted amount of water from the Water Authority." Additionally, SDCWA argues that the direct facilities constructed by the Water District benefits the Water District by avoiding transportation costs issued by SDCWA when the Water District does receive direct delivery of desalination, but does not, however, guarantee the Water District 100 percent desalinated water.

The Water District now seeks reimbursement of the charges during the 16-month shutdown from SDCWA and an amendment to the Uniform Contract to clarify that the Water District receives 100 percent desalinated water from the Carlsbad Plant.

Conclusion and Implications

This case will likely come down to issues of contract interpretation and potentially extrinsic evidence. However, with the San Diego Superior Court's efforts to limit the spread of COVID-19, it is likely that this case will be stretched out well into 2021 and beyond if not resolved by alternative dispute procedures or settlement negotiations. Both parties have expressed their willingness to collaborate and resolve the issues.

The initial case management conference is currently scheduled for March 12, 2021. For more information regarding the case between the Water District and Water Authority, the case docket can be reviewed at the San Diego Superior Court's website as Case No. 37-2020-00034563-CU-BC-NC.
(Wesley A. Miliband, Nicolle A. Falcis)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT AFFIRMS DISTRICT COURT ORDER VACATING THE DELISTING OF THE YELLOWSTONE GRIZZLY POPULATION AND REMANDING FOR FURTHER CONSIDERATION

Crow Indian Tribe v. United States, 965 F.3d 662 (9th Cir. 2020).

The U.S. Fish and Wildlife Service (FWS) issued a final rule removing the grizzly bear population in the Greater Yellowstone Ecosystem from the threatened species list under the federal Endangered Species Act (ESA). Following cross-motions, the U.S. District Court granted summary judgment on behalf of plaintiffs, vacating the final rule and remanding to the FWS for further consideration. The FWS and intervenor states appealed, and the Ninth Circuit Court of Appeals affirmed with one exception.

Factual and Procedural Background

This case arises from efforts by the FWS to delist the grizzly bear in the Greater Yellowstone Ecosystem of Idaho, Montana, and Wyoming. In 2007, following success brought about by the Grizzly Bear Recovery Plan, the FWS issued a rule declaring the Yellowstone grizzly population a "distinct population segment" under the ESA, declaring it no longer threatened, and removing it from protection. That action resulted in a lawsuit, with the Ninth Circuit ultimately finding that the FWS arbitrarily concluded that declines of whitebark pine (an important food source for grizzlies) were unlikely to threaten the Yellowstone grizzlies and remanding for further consideration.

Five years later, the FWS published a Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem, which outlined the manner in which the Yellowstone grizzly would be managed and monitored upon delisting. The FWS then accompanied that Conservation Strategy with a second delisting rule, which found that the decline of the whitebark pine would not pose a substantial threat to the Yellowstone grizzly. This second delisting decision again drew a lawsuit by environmental and tribal groups.

The D.C. Circuit's Decision in *Humane Society*

In the midst of this second lawsuit, the D.C. Circuit considered a case in which the FWS similarly had created a distinct population segment and delisted it. That case, *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), involved the Western Great Lakes gray wolf. After concluding that the FWS' position that the ESA allows it to simultaneously create and delist a distinct population segment was reasonable, the D.C. Circuit found that such action required the FWS to look at the effect of partial delisting on the portion of the species that would remain listed (remnant species).

District Court Grants Summary Judgment/ Vacates the Rule

Following cross motions for summary judgment in this case, the District Court granted summary judgment on behalf of plaintiffs, vacated the rule, and remanded to the FWS for further proceedings. The FWS appealed aspects of the remand requiring the study of the effect of the delisting on the remnant grizzly population and further consideration of the threat of delisting to long-term genetic diversity of the Yellowstone grizzly. Three states in the region, as well as a number of private hunting and farming organizations, intervened on the government's behalf and appealed other aspects of the District Court's order involving issues pertaining to recalibration.

The Ninth Circuit's Opinion

Appellate Jurisdiction

The Ninth Circuit first addressed appellees' claim

that the court lacked jurisdiction to consider any issue on appeal because the remand order was not appealable. In support of their argument, appellees principally relied on two cases, *Natural Resources Defense Council v. Gutierrez*, 457 F.3d 904 (9th Cir. 2006), and *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004). The *Gutierrez* case involved an agency's attempt to challenge only the reasoning supporting a District Court ruling and not the relief granted. Here, by contrast, the Ninth Circuit found that the FWS did challenge the scope of the remand order and thus did not seek an advisory opinion.

Under *Alsea Valley*, a District Court's remand order of an agency's rulemaking is a final order as to the government and therefore appealable, although it may not be final as to private parties whose positions on the merits would be considered during proceedings on remand. Thus, under *Alsea*, the District Court's order was final at least as to the FWS. The Ninth Circuit found, however, that it also had jurisdiction to consider the issues raised by intervenors because, unlike in *Alsea*, those issues had been resolved by the District Court and could not be taken into account in the proceedings upon remand.

Merits of the Appeal

On the merits, the Ninth Circuit first considered the issue of whether the FWS needed to make a fuller examination of the effect that delisting the Yellowstone grizzlies would have on the remnant grizzly population. While it agreed with the District Court that further examination of the remnant population was necessary to determine whether there was a sufficiently distinct and protectable remnant population such that the delisting of the distinct population segment would not further threaten existence of the remnant, it found that extensive review under § 4(a) of the ESA was not required. It thus vacated the portion of the order calling for a "comprehensive review" of the remnant population and vacated for the District Court to order further examination.

The Ninth Circuit next considered the District Court's order to ensure the long-term genetic diversity of the Yellowstone grizzly. Finding that there were no concrete, enforceable mechanisms in place to ensure long-term genetic health of the grizzly, the Ninth Circuit concluded that the District Court had correctly concluded that the rule was arbitrary and capricious in that regard. Remand to the FWS therefore was required.

Finally, the Ninth Circuit found that the FWS' decision to drop a commitment to recalibration in the conservation strategy violated the ESA because it was the result of political pressure by the states rather than having been based on the best scientific and commercial data. On this basis, the District Court properly ordered the FWS to include a commitment to recalibration. The Ninth Circuit also rejected the intervenor's argument that, because the states had committed to using the current population estimator for the foreseeable future, a commitment to recalibration would be unnecessary and speculative.

Conclusion and Implications

The case is significant because it includes a substantive discussion of relatively novel issues resulting from a decision by the FWS to simultaneously create and delist a distinct population segment under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/08/18-36030.pdf
(James Purvis)

DISTRICT COURT APPROVES CONSENT DECREE BETWEEN FEDERAL, STATE AND LOCAL GOVERNMENT TO REMEDY CLEAN WATER ACT VIOLATIONS

U.S. and State of Texas v. City of Corpus Christi, ___F.Supp.3d___, Case No. 2:20-cv-00235 (S.D. Tex. Sept. 25, 2020).

The U.S. Environmental Protection Agency (EPA) and the State of Texas, Commission on Environmental Quality completed negotiations on a Consent Decree with the City of Corpus Christi (City). The Consent Decree aims to remedy alleged violations of the federal Clean Water Act and relevant Texas state law from sewage overflows due to the City's unmaintained sewage system.

Factual and Procedural Background

The City of Corpus Christi owns and operates one of the largest sewer systems in Texas with approximately 1,250 miles of sewer lines, more than 100 lift stations, and six treatment plants. On September 25, 2020, the State of Texas and the United States (plaintiffs) filed a joint Consent Decree, along with a suit, against the City. Plaintiffs alleged that the City violated § 301 of the Clean Water Act by failing to comply with conditions established in a Texas Pollutant Discharge Elimination Systems permit. Specifically, plaintiffs alleged that the City was discharging pollutants, including sewage, into waters of Texas and the United States. Plaintiffs also alleged that the City's failure to operate and maintain their sewer collection system and wastewater treatment plants resulted in a number of substantial blockages in the pipes that comprise the City's wastewater system, and that system sewage overflows (SSOs) resulted from the City's failure to upgrade, operate, and maintain its wastewater system.

In the complaint, plaintiffs alleged that on numerous occasions since at least 2007, the City discharged untreated sewage and other harmful pollutants through waters around Corpus Christi. Consequently, plaintiffs sought an injunction against the illegal discharges and measures to prevent future discharge.

Terms of the Consent Decree

The Consent Decree requires to City to clean and assess its sewer system, to identify deficient system conditions and capacities, to undertake projects to remediate deficiencies, and to undertake specifically identified capital improvement projects.

During the first four-and-a-half years of the Consent Decree, the City is required to conduct a system-wide condition and capacity assessment. The condition assessment must include gravity and force mains, manholes, air relief valves, and lift stations. The results of the condition assessment must then be used to rank the condition of the system components and to create a priority project list, which includes projects to be implemented as soon as practicable, but no later than six-and-a-half years after the effective date of the Consent Decree. Within five-and-a-half years after the effective date of the Consent Decree, the City must also create a condition remedial measures plan that identifies specific measures to remediate deficient system conditions and implement those measures on a timeline approved by EPA.

The capacity assessment must identify the capacity constraints that contributed to SSOs and include wet weather SSO characterization, hydraulic modeling evaluation, and field investigations. No later than five-and-a-half-years after the effective date of the Consent Decree, the City must submit a capacity remedial measures plan to implement remedial measures in a prioritized manner and implement all capacity remedial measures within fifteen years after the effective date of the Consent Decree.

Two specifically identified capital improvement projects required by the Consent Decree include replacement of a force main and improvements to a lift station and second force main.

The City is also required to continue implementing and improving existing programs, such as its routine cleaning and maintenance programs, its fats, oils, and grease control program, and its SSO reduction program.

Applicability of the Consent Decree

The Consent Decree is binding on the federal, state, and municipal governments involved. The

Consent Decree is also binding on the City's wastewater collection and treatment system, meaning that if the City were to sell its operations, the buyer would assume responsibility of complying with the Consent Decree. The City is also obligated to provide all "officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any contractor or consultant retained to perform Work required under this Consent Decree" within 60 days of the effective date of the Consent Decree. The Consent Decree may be terminated upon the City's completion of all obligations in the Consent Decree.

Cost of Implementing the Consent Decree

EPA estimates the cost of implementing the system wide assessment and remedial measures to be approximately $600 million over 15 years. The costs of the capital improvement projects are estimated at $10.4 million over two years. Finally, the Consent Decree includes a civil penalty of $1,136,000 in penalties, split evenly between the United States and the State of Texas. Failure to meet deadlines and any additional sewage spills will be subject to stipulated penalties starting a $500 per day and escalating to $4,000 per day.

The Consent Decree was lodged in the United States District Court for the Southern District of Texas, Corpus Christi Division. The Consent Decree is subject to a 30-day public comment period, after which the court may approve and enter the consent decree as a final judgment.

Conclusion and Implications

Large public wastewater systems often face daunting and expensive delayed maintenance obligations. This case demonstrates how failure to undertake these obligations, however, can lead to significant costs and civil penalties under the Clean Water Act. For more information, see, https://www.epa.gov/sites/production/files/2020-09/documents/corpuschristi-cd.pdf and https://www.justice.gov/enrd/consent-decree/us-and-state-texas-v-city-corpus-christi
(Marco Antonio Ornelas, Rebecca Andrews)

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