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CALIFORNIA WATER™

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CALIFORNIA WATER NEWS

LOOKOUT SLOUGH RESTORATION PROJECT MOVES AHEAD

On November 3, 2020, a final Environmental Impact Report (EIR) was certified by the California Department of Water Resources (DWR) for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Project). The Project seeks to create habitats suitable for native fish and wildlife in the Cache Slough region of the Sacramento-San Joaquin Delta (Delta) by restoring approximately 3,000 acres of tidal wetland. The Project will be implemented by DWR, Reclamation District No. 2098 (Reclamation District) and the private environmental firm Ecosystem Investment Partners (EIP).

Background

The Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is located in the Cache Slough region, one of the key areas in the Delta with elevations favorable for maintaining tidal habitats for the endangered Delta smelt. The proposed Project would restore approximately 3,000 acres of tidal wetland, creating habitat that is beneficial to native fish and wildlife.

Ecological threats to tidal habitat in the Delta are the result of multiple factors, ranging from naturally-changing conditions to regulatory decisions to human consumptive needs for municipal (*i.e.*, households and businesses) and irrigation (*i.e.*, farms) uses.

The Lookout Slough Project

The Project was conceived as a partial response to conservation requirements imposed by a 2008 U.S. Fish and Wildlife Service (FWS) Biological Opinion concerning the long-term operations of the State Water Project (SWP) and federal Central Valley Project (CVP) mandating 8,000 acres of tidal habitat restoration, which requirement was incorporated as part of the currently-effective biological opinions governing the long-term operation of the SWP and CVP. In addition, the restoration requirement was made a condition of the March 2020 incidental intake permit issued by the California Department of Fish and Wildlife granting Endangered Species Act authorization for SWP operations.

Planners chose the Cache Slough region for the Project largely due to the suitability of the varying elevations in the area for listed species such as the long-watched and protected wildlife like the Delta smelt. The Project focuses on promoting food productivity and biodiversity in the area. Additional habitat restoration efforts are being undertaken by DWR adjacent to the Project site, and along with the completed Project will produce a contiguous tidal habitat restoration area of over 16,000 acres.

A Public-Private Partnership

The public-private nature of the undertaking is worthy of note. EIP is a private equity firm formed in 2007 focused on managing large environmental projects for developers and public agencies subject to mitigation requirements of the federal Clean Water Act and other applicable environmental laws like the ESA. EIP has experience overseeing such projects from the planning stages through completion, and this experience is expected to assist DWR in seeing the Project through to completion in a timely manner. Similarly, the adjacent restoration efforts near Yolo Flyway Farms and Lower Yolo Ranch are public-private partnerships involving DWR.

Funding the Project

Funding for this Project is provided through two separate sources based on specific benefits. The habitat restoration objectives of the project will be funded by the State Water Project and State Water Contractors ($97,000,000), and the flood protection objectives will be funded by Proposition 1—for multi-benefit and systemwide flood improvements ($21,865,000). The estimated total cost of the project is approximately $118,865,000.

Conclusion and Implications

The Project represents another large endeavor aimed at mitigating the threats to wildlife habitat and flood risks. The certification of the EIR marks an im-

portant milestone for the realization of the effort. In addition to the involvement of a private equity firm in the Project's implementation, the Project stands out for its vision in combining the restoration efforts in the adjacent project area in order to maximize benefits to wildlife. Similarly, the construction of a new levee to manage flood risk demonstrates the foresight of planners in recognizing the additional benefit that replacing existing levees would have on the promotion of food sources for wildlife like the smelt and overall habitat viability. For more information, *see:* https://resources.ca.gov/CNRALegacyFiles/docs/ecorestore/projects/Lookout-Slough-Tidal-Habitat-Restoration-Flood-Improvement.pdf
(Wesley A. Miliband, Andrew D. Foley)

EL DORADO IRRIGATION DISTRICT APPROVES NEW CAPITAL IMPROVEMENT PLAN CONSIDERING $225 MILLION IN IMPROVEMENTS

The El Dorado Irrigation District (EID or District) Board of Directors reviews and adopts an update to its Capital Improvement Plan (CIP) on an annual basis. Covering several main project areas, the CIP is a five-year plan that details the projects and estimated expenditures for necessary improvements that ensure safety and reliability of the District's infrastructure. Included in the project are plans regarding water, wastewater, recycled water, hydroelectric projects, recreation, and general district projects. Recently the District adopted consideration of additional expenditures in the millions.

The 2021-2025 Capital Improvement Plan

During EID's October 26 meeting, an updated CIP was adopted considering expenditures up to $225 million from 2021 through 2025. With planned expenditures seeing an increase of nearly $17 million from EID's previous five-year CIP, the District's new plan brings several large projects to the forefront with nearly $50 million in construction expenditures in 2021 alone. Projects with the largest increase in projected spending include those in the areas of Water and General District projects, which saw increases of $23.5 million and $5.5 million, respectively, in plans for 2021.

Background

The El Dorado Irrigation District is an irrigation special district under the California Irrigation District Law (Water Code §20500, *et seq.*) and authorizing statutes (Water Code §22975, *et seq.*). The District serves more than 125,000 residents in northern California's El Dorado County. A scenic drive along Highway 50, heading east from the Sacramento County line to South Lake Tahoe, takes you through the heart of EID's service area and gives you an overview of the extraordinary geographic diversity of the region.

Large-Scale Plans in EID's Future

Of the large-scale projects planned, the Folsom Lake Intake project is proposed as the most-costly undertaking with expenditures reaching upwards to $28.7 million. Supplying EID with roughly a third of its total water supply, the Folsom Lake Intake operates to supply water from Lake Folsom to the El Dorado Hills Water Treatment Plant for customers in El Dorado Hills.

With its original intake system constructed in 1958, the Folsom Lake Intake had additional pumps installed in 1994 and a temporary Phase 3 expansion in 2010. The Phase 3 expansion now being inoperable, EID's planned project proposes a new intake system with stainless steel casings and a temperature control device to help maintain Lake Folsom's cold-water pool for downstream releases. On top of this, the project seeks to add new pumps to the outdated system as well as other electrical and site modifications.

The District's service reliability has seen an average of nearly 250 unplanned water outages a year since 2017, and seeking to improve, EID's new CIP plans to utilize $61.5 million in funds to maintain the benchmark median set by the American Water Works Association (AWWA) for comparable agencies. Comprising the $61.5 million figure, the 2021-2025 CIP includes $41.5 million for water service and pipeline replacements, and $20 million for wastewater pipeline replacements.

Another of these larger scale-projects included in the CIP is the $14 million Upper Main Ditch Piping project. Transporting water from the Forebay Reservoir outside Pollock Pines to the Reservoir 1 Water Treatment Plant, this 3-mile stretch of the Main Ditch is set to have its open conveyance system replaced by a 42-inch cylinder pipe with a capacity of 40 cubic feet per second.

The CIP also discussed a heap of other projects planned-for in the five-year period like the replacement of Flume 30 with a price tag of over $10 million and of Flumes 4, 45, 45A, 46A, 47A and B, and 52A at a cost of $9.5 million. The replacement of the Echo Conduit, bringing water from Echo Lake to South Fork drainage, is set to run EID another $1.8 million while penstock replacements tally up to the same figure.

Conclusion and Implications

The El Dorado Irrigation District's new Capital Improvement Plan seeks to overhaul much of its existing system to improve reliability for customers and increase the coldwater-pool supplies that enhance conditions for fishery. These efforts require a hefty price tag but at some point, become necessary to ensure reliability of supplies and to comply with applicable regulations, or better yet to avoid some type of regulatory action by a state or federal agency. The District is not the only agency undertaking these significant efforts but serves as a good example of current efforts around the state and certainly others in the future. For more information, *see:* https://www.eid.org/about-us/project-updates; *and see:* https://www.eid.org/home/showpublisheddocument?id=13051. (Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

GOVERNOR NEWSOM SIGNS BILL GRANTING CEQA EXEMPTION FOR DISADVANTAGED WATER SYSTEM PROJECTS

Governor Gavin Newsom has signed Senate Bill No. 974 (SB 974), simplifying the approval process for qualifying water infrastructure projects in low-income and disadvantaged communities by creating a new exemption under the California Environmental Quality Act (CEQA). With bipartisan support, SB 974 was enacted to reduce the financial and regulatory hurdles that may hinder small water systems endeavoring to improve their communities' access to clean and safe drinking water.

Background

It is the established policy of the state that all people have a right to "safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." (Wat. Code, § 106.3.) However, some rural and economically disadvantaged communities throughout California have struggled to maintain access to safe and reliable drinking water due to aging infrastructure or limited customer bases.

Drinking water systems in California are subject to federal and state Safe Drinking Water Acts, under which the State Water Resources Control Board (SWRCB) adopts and enforces drinking water standards for contaminants. (Health & Saf. Code, § 116365.) Small water systems can lack the capacity or resources to construct needed water treatment facilities or secure alternative water supplies. The costs of these projects are increased by the regulatory review processes prescribed by CEQA.

CEQA requires public agencies and local governments to evaluate the environmental impacts of proposed discretionary projects and to limit or avoid those impacts where possible. (Pub. Resources Code, § 21000, *et seq.*) Environmental review under CEQA generally entails the preparation of a negative declaration, mitigated negative declaration, or environmental impact report, depending on the significance of potential impacts and the degree to which those impacts can be mitigated. The purpose of CEQA review is to inform decisionmakers and the public about potential project impacts, identify feasible alternatives, and disclose the measures to be taken to minimize those impacts that are unavoidable. Nevertheless, such review can be quite costly, involving years of preparatory work and tens of thousands of dollars—even for relatively small projects—before a project may commence.

CEQA already includes a number of statutory and categorical exemptions for certain projects, including exemptions for emergency repairs, replacement of existing facilities, and minor pipeline maintenance and installation projects, but according to Senator Hurtado, the sponsor of SB 974, such exemptions are not necessarily available for many of the small water system projects that are inordinately hampered by the additional costs and delays associated with environmental review.

Senate Bill No. 974

SB 974 creates a new CEQA exemption for drinking water infrastructure projects that primarily benefit small, disadvantaged community water systems, in furtherance of the declared statewide policy of ensuring the right to safe, clean, affordable, and accessible water for all people in the state. The legislation specifically targets small water system projects serving communities with fewer than ten thousand people, and water projects for schools that serve disadvantaged communities with annual median household incomes below 80 percent of the statewide annual median household income. The SB 974 exemption applies to projects that improve a system's water quality, supply or reliability; encourage water conservation; or provide safe drinking water via groundwater wells, drinking water facilities or storage, service lines, and drinking water system appurtenances such as hydrants, meters, and monitoring stations. The exemption would allow lead agencies engaged in such projects to avoid the delays and costs of CEQA review and more readily address their water supply needs.

Qualifying for an Exemption

To qualify for the CEQA exemption, a project must first satisfy a number of substantive criteria, including complete mitigation of construction impacts, and avoidance of adverse effects to wetlands and other sensitive habitats. Projects may not involve unusual circumstances that would result in substantial adverse effects, be located on hazardous waste sites, or have reasonably anticipated cumulative impacts. SB 974 also imposes labor requirements for qualifying projects, including criteria for prevailing wages, skilled and trained workforce certifications, which must be documented throughout the duration of a project. Prior to claiming the exemption, the lead agency must also coordinate with the SWRCB and confirm that the exemption will not disqualify the serviced community from receiving federal financial assistance. Finally, if a lead agency approves or carries out a project under this exemption, it must file a notice of exemption with the Office of Planning and Research, pursuant to CEQA guidelines.

Conclusion and Implications

Senate Bill 974 carves out a narrow exemption for CEQA that is intended to save disadvantaged communities significant time and money in meeting drinking water standards. One of its sponsors, the Rural Community Assistance Corporation, hailed the bill's passage as a huge win for rural California. Opponents of the bill argue that the bill will actually increase costs to comply with the skilled and trained workforce mandate.

The CEQA exemption shall remain in effect until its sunset date of January 1, 2028. The full text and legislative history of Senate Bill No. 974 can be found at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB974
(Austin C. Cho, Meredith Nikkel)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION AND SACRAMENTO RIVER CONTRACTORS COORDINATE AND DELAY WATER DIVERSIONS TO BENEFIT CHINOOK SALMON

Sacramento River Chinook salmon are a species of fish that have been subject to numerous protections over the years in order to battle declining populations. In light of these circumstances, the U.S. Bureau of Reclamation (Bureau) has coordinated with several entities in order to delay water diversions and early flow reductions to benefit fall-run Chinook salmon, as well as provide other benefits to the ecosystem in the Sacramento Valley area.

Background

According to Reclamation, Chinook salmon are a significant part of California's natural heritage. Chinook salmon are a species of fish native to the North Pacific Ocean and the river systems of western North America, ranging from California to Alaska. Chinook are anadromous fish, meaning that they can survive and live portions of their lives in fresh and salt water. As a result, Chinook salmon have a complex life history. A Chinook salmon will spawn and rear juveniles in freshwater rivers, which then migrate downstream to the ocean to feed, grow and mature. After maturation, the Chinook return to freshwater to spawn and repeat the process.

Four distinct runs of Chinook salmon spawn in the Sacramento-San Joaquin River system. Each run is named after the season when the majority of the salmon enter freshwater as adults. According to the Bureau, endangered Sacramento River winter-run Chinook salmon are particularly important among California's salmon runs because they exhibit a life-history strategy found nowhere else on the West Coast. These Chinook salmon are unique in that they spawn during the summer months when air temperatures usually approach their warmest. In contrast, fall-run Chinook salmon migrate upstream as adults from July through December and spawn from early October through late December. The timing of runs varies from stream to stream. Late-fall-run Chinook salmon migrate into the rivers from mid-October through December and spawn from January through mid-April. The majority of young salmon of these species migrate to the ocean during the first few months following emergence, although some may remain in freshwater and migrate as yearlings.

Fall-run Chinook salmon are currently the most abundant of the Central Valley salmon species, contributing to large commercial and recreational fisheries in the ocean and popular sport fisheries in the freshwater streams. Fall-run Chinook salmon are raised at five major Central Valley hatcheries which release more than 32 million smolts each year. Due to concerns over population size and hatchery influence, Central Valley fall and late-fall-run Chinook salmon are a Species of Concern under the federal Endangered Species Act (CESA).

Under § 7 of the federal Endangered Species Act (ESA), federal agencies must consult with the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries or NMFS) relating to activities that may affect ESA-listed species. Formal consultations result in NOAA Fisheries developing a Biological Opinion. The intent of a Biological Opinion is to evaluate whether a proposed federal action will jeopardize the continued existence of an ESA-listed species, or adversely modify such species designated critical habitat. A non-jeopardy Biological Opinion usually also includes conservation recommendations that are designed to help further the recovery of ESA-listed species. A non-jeopardy Biological Opinion typically also includes reasonable and prudent measures as needed to minimize any harmful effects, and may require monitoring and reporting to ensure that the project or action is implemented as described.

In October 2019, NOAA Fisheries published its *Biological Opinion for the Reinitiation of Consultation on the Long-Term Operation of the Central Valley Project and State Water Project* (Biological Opinion). In this Biological Opinion, NOAA Fisheries evaluated the impact of Central Valley Project and State

Water Project water operations on ESA-listed species, including Sacramento River winter-run Chinook salmon. The Biological Opinion documented impacts from the proposed operations of the two water projects. NOAA Fisheries worked with the Bureau to modify the proposed action to minimize and offset those impacts.

Bureau Actions

Pursuant to the recommendations in the Biological Opinion, the Bureau has begun to work with a large variety of federal and state public agencies and contractors, to implement fall water operations to benefit salmon populations in the Sacramento River.

In order to balance temperature and wildlife needs, the Biological Opinion recommends that the Bureau reduce fall releases to save cold water and storage for next year's temperature management season in years with lower end-of-September storage. Maintaining releases to keep late spawning winter-run Chinook salmon redds underwater may drawdown storage necessary for temperature management in a subsequent year. In years with sufficient end of September storage, the Bureau will maintain higher releases in the fall to avoid dewatering the last winter-run salmon redds, indicating that there is flexibility depending on the amount of water storage available. It is also recommended that the Bureau adhere to ramping rate restrictions to reduce the risk of juvenile stranding during these operations. The Biological Opinion also contains recommendations for coordination with Sacramento River water diverters, specifically delaying diversions to avoid the risk of impacting Chinook salmon populations.

Voluntary Delay of Water Diversions

In October, the Bureau coordinated with the Sacramento River Settlement Contractors (SRS Contractors) to voluntarily delay a portion of their water diversions from October 16-31 until November 1-23, which would allow the Bureau to further reduce flows in the Sacramento River in mid-October. With lower late October and early November flows, fall-run Chinook salmon are less likely to spawn in shallow areas that would be subject to dewatering during winter base flows. As a result, according to the Bureau, early flow reductions balance the potential dewatering late spawning winter-run Chinook salmon redds and early fall-run Chinook salmon redds. These delayed water diversions and corresponding early flow reductions are anticipated to prevent the dewatering of 2.2 percent of fall-run Chinook salmon redds, which is approximately 1 million eggs, greatly benefiting fall-run Chinook salmon populations.

Conclusion and Implications

Ultimately, the Bureau of Reclamation's actions highlight ongoing partnerships in water resource management to allow entities to quickly respond to changing water conditions in a manner that ensures efficient water supply management while also addressing the needs of fish and wildlife habitat. This flexibility may prove to be a boon given that circumstances may differ greatly year-to-year. It remains to be seen if future interactions between the SRS Contractors, Bureau, and other agencies will remain on good footing, but the current interactions showcase a commitment to maintaining these relationships. For more information, *see:* https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=73005
(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD GRANTS PETITION FOR STATUTORY ADJUDICATION OF FRESNO RIVER WATERSHED

On October 20, 2020, the California State Water Resources Control Board (SWRCB) granted a petition by Madera Irrigation District (District) for a statutory adjudication of water rights to the Fresno River and its tributaries (Petition), marking the first such adjudication that has been requested in forty years. Once concluded, the adjudication could result in a comprehensive resolution to the conflicts over water rights, water use, and water allocations within the Fresno River watershed.

Background

Water right claims to the Fresno River below Hidden Dam and Hensley Lake have been a source of conflict over water allocation and use in the watershed since the dam was constructed in the 1970s. There are an estimated 300 water right claims (not including unexercised riparian claims) in the Fresno River stream system, and conflicts and uncertainty regarding Fresno River rights arise when supplies are exceeded. Previous board actions and efforts to mediate private agreements in the Fresno River watershed have been both less comprehensive and unsuccessful in resolving the conflicting priorities and rights of claimants to the use of water in the Fresno River stream system.

Negotiated Management Attempts

In the Fall of 2019, the SWRCB adopted Resolution No. 2019-0049 postponing action on the Petition until May 2020, in order to give the parties more time to negotiate a settlement and management framework that would resolve diversion and use of water conflicts in the Fresno River watershed. Resolution No. 2019-0049 also provided eight requirements to be met in the negotiations, along with seven milestones the SWRCB would use to assess progress toward a negotiated settlement. The SWRCB further postponed action on the Petition to October 2020.

Also, in the Fall of 2019, a third-party facilitator was brought in to mediate negotiations and assist the parties in making substantial progress toward achieving a negotiated settlement. The facilitator's report on the mediation (Final Report on Mediation) was submitted to the SWRCB in August 2020, noting incomplete results. The Final Report on Mediation indicated that while the parties made some progress, they had not met the required elements or reached an agreement on water right quantities, water accounting, or administration. The District did not believe that negotiations would be able to resolve any substantive issues and again requested statutory adjudication of the Fresno River watershed.

Statutory Adjudication

A statutory adjudication determines the rights to water in a stream system through a board proceeding and court decree (Water Code §§ 2500-2868). According to the resolution of the SWRCB granting the Petition:

> A comprehensive statutory adjudication of the Fresno River watershed would evaluate and determine all claims of right to water in the Fresno River and its tributaries, from the upper watershed to the confluence with the San Joaquin River, encompassing approximately 300 claims.

The SWRCB makes a determination on the pending Petition after evaluating whether a statutory adjudication would serve the public interest and necessity. The following are a number of the relevant facts and conditions the SWRCB considered in making its public interest and necessity determination:

- The degree to which the waters of the stream system are fully used: Several previous board actions determined that the Fresno River is fully appropriated from spring through fall.

- The existence of uncertainty as to the relative priority of rights to the use of waters of the stream system: The Petition and Final Report on Mediation are both clear that uncertainties exist regarding the relative priority of water rights in the Fresno River watershed.

- The unsuitability of less comprehensive measures, such as private litigation or agreements, to achieve certainty of rights to the use of waters of the stream system: The board's previous actions in the Fresno River were limited in scope. Additionally, after two years of negotiations, including the involvement of a facilitator, the Final Report on Mediation indicates that meaningful progress toward a negotiated settlement has not been made.

- The need for a system-wide decree or watermaster service, or both, to assure fair and efficient allocation of the waters of the stream system: The District alleged in the Petition that it has in effect become watermaster of the Fresno River watershed without the appropriate legal authority. The Petition and Final Report on Mediation show that a system-wide decree and designation of a watermaster would likely provide a fair and efficient allocation of the Fresno River watershed.

The public trust may also be a consideration in a statutory adjudication, and the SWRCB's resolution granting the Petition noted that a statutory adjudication would provide:

> . . an opportunity for the [SWRCB] to evaluate the public trust resources of the Fresno River stream system and the flows necessary to protect those resources and meet applicable water quality standards.

The statutory adjudication process is intended to result in an order of the SWRCB determining and establishing the rights to water in the Fresno River stream system, which order would then be filed with the clerk of the Superior Court of the county in which the stream system is located. Each party of interest may file exceptions with the court and request relief. The court may then conduct proceedings, including hearings, prior to entering the decree that would ultimately determine the rights of all parties involved in the proceeding.

Conclusion and Implications

The statutory adjudication process seeks to provide a comprehensive resolution to the conflicts over water rights and water use in the Fresno River stream system. Claimants, and potential claimants, should note that failing to appear and submit proof of claim prior to the entry of the court decree will likely bar any claimant from subsequent attempts to claim any right to water in the Fresno River stream system. Thus, participation in the statutory adjudication process is critical for parties seeking to protect a claim of right to the use of water in the Fresno River stream system.
(Gabriel J. Pitassi, Derek R. Hoffman)

CALIFORNIA WATER COMMISSION TO ASSESS STATE'S ROLE IN FUNDING WATER CONVEYANCE PROJECTS

The California Water Commission (Commission) has begun a four-phased approach to assess the state's role in developing and funding water conveyance projects. This assessment furthers its directives under the Governor's Water Resilience Portfolio released earlier this year.

Background

In April of 2019, Governor Newsom issued Executive Order N-10-19, which calls upon State agencies to take actions necessary to meet California's water needs through the 21st Century, including responding to challenges arising from climate change. In response to that order, the California Natural Resources Agency, California Environmental Protection Agency, and the California Department of Food and Agriculture issued a Water Resilience Portfolio (Portfolio) in the summer of 2020.

One significant directive within the Portfolio calls for the Commission to assess the state's role in financing water conveyance projects. One focus of the Portfolio provides for the state to build connections, including increasing physical infrastructure connections, in order to increase coordination greater centralization of California's generally decentralized water conveyance systems.

A Four-Phased Approach

The Commission has initiated a four-phased assessment process, which will culminate in a report describing key issues and providing recommendations to California policymakers. In particular, the report will describe critical characteristics of resilient water conveyance projects, including how they would support adaptation to climate change, the public benefits of these projects, and how they would be best funded.

The first phase was completed prior to the Commission's October 2020 meeting, at which Commission staff presented research results and a background policy brief. Staff interviewed industry leaders and stakeholders representing the following: disadvantaged communities, tribal nations, environmental NGO's, water associations, growers, state agencies, federal agencies, academia, legislative staff, economists, local utilities, water banks, and wholesalers.

The second phase is now underway, which will engage the public through a series of public workshops to solicit stakeholder input. During the second phase,

the Commission will also gather input from various experts to help shape the Commission's recommendations. Phase two is scheduled to conclude in the early spring of 2021.

The third and fourth phases will involve drafting and finalizing the Commission's recommendations.

Rethinking the Approach to Financing Conveyance Projects—Results from Stakeholder Interviews

The Commission's phase 1 background policy brief indicates that funding for California's annual water system spending from 2014-2016 derived primarily from local users. The Commission found that federal and state governments provided a fraction of the funding for water systems, at three and twelve percent, respectively, while local water users paid for the overwhelming majority at 85 percent. Within that funding structure, the Commission staff identified financing options traditionally used for water conveyance projects, including water user fees, contractual mechanisms, and federal and state grants and loans.

The Commission interviews with stakeholders revealed an interest in moving forward with a variety of financing options to fund conveyance projects such as public-private partnerships, low interest rate loans, flexible repayment plans, assessments on land, "green" bonds, enhanced infrastructure finance districts, federal stimulus funds and public goods charges. Other ideas that were shared involved streamlining the permitting process to reduce project costs, facilitating pooling of resources and low-cost borrowing.

What the Commission Learned—Emerging Themes

Several themes emerged from the Commission's interviews regarding water conveyance. First, stakeholders gravitated toward resilience and ensuring that projects are flexible and adaptive to a wide range of hydrologic conditions. Second, conveyance criteria for priority projects should include multi-benefit, multi-use, a watershed approach and a focus on local and regional infrastructure. Finally, responses highlighted the importance of a holistic approach moving forward with conveyance projects, including responding to the legislatively enacted human right to water, supporting implementation of the Sustainable Groundwater Management Act, and enhancing and preserving the ecosystem.

Conclusion and Implications

The state is taking important steps to develop water policy, plans and actions to navigate 21st Century challenges. Engaging experts, water policy leaders, community leaders and other stakeholders for information gathering, ideas, and creative approaches to financing conveyance projects is critically important to achieving long-term success. The California water community should continue to engage with the California Water Commission through its public workshops and will be keenly interested in the Commission's final recommendations to be released in 2021. (Chris Carrillo, Derek R. Hoffman)

LAWSUITS FILED OR PENDING

ANSWERS DUE IN DEPARTMENT OF WATER RESOURCE'S VALIDATION ACTION RELATED TO DELTA CONVEYANCE FACILITIES

In August 2020, the California Department of Water Resources (DWR) filed a complaint seeking to validate its authority to issue revenue bonds to finance the environmental review, planning, design, and engineering of a single conveyance facility to convey water around the Sacramento-San Joaquin Delta for export to water users south of the Delta. The bond revenue could, if and when appropriate, be used to fund the acquisition and construction of the conveyance facility. Answers to DWR's complaint were due October 30. DWR's decision to adopt resolutions authorizing the bonds has been challenged by certain environmental groups under the California Environmental Quality Act (CEQA). [*California Department of Water Resources v. All Persons Interest in the Matter*, Case No. 34-2020-00283112-CU-MC-GDS, *Filed* Aug. 6, 2020 (Sac Super. Ct.).]

Background

Located at the confluence of the Sacramento and San Joaquin rivers, the Sacramento-San Joaquin Delta (Delta) could be the state's most important water system. The Delta provides water to millions of Californians and hundreds of thousands of acres of agricultural land throughout the state. It also supports a complex and diverse ecosystem, including critical habitat for a variety of threatened and endangered species. Accordingly, effective management of the Delta to meet the needs of water users and the environment has been a critical issue for decades.

To increase flexibility in operating the State Water Project (SWP), which begins at Lake Oroville in northern California and conveys water south through the Delta, the Central Valley, and into southern California, the state proposed the California WaterFix, whose facilities would be operated by the California Department of Water Resources. Cal WaterFix was designed to move water from the Sacramento River north of the Delta via two 30-mile-long tunnels to the existing State Water Project and federal Central Valley Project water export facilities in the south Delta. After assuming office, Governor Gavin Newson announced plans to forgo the twin tunnel design, opting instead to explore the possibility of a single tunnel conveyance plan.

DWR is one of the state agencies tasked with exploring the viability of a single tunnel plan. Earlier this year, DWR issued a Notice of Preparation of an Environmental Impact Report under the California Environmental Quality Act for a single tunnel Delta conveyance facility. Thereafter, DWR adopted Resolution No. DWR-DPRB-1 authorizing the issuance of "Delta Program Revenue Bonds" to obtain funds to pay Delta program capital costs and to refund DWR obligations issued for such purpose. DWR also adopted a First Supplemental Resolution, No. DWR-DPRB-2, and Second Supplemental Resolution, No. DWR-DPRB-3, authorizing Delta Program Revenue Bonds, Series A and Series B, respectively. The Delta Program includes the following: environmental review, planning, engineering, design, and if and when determined to be appropriate, acquisition, construction, operation, and maintenance of water conveyance facilities, which may include water diversion intake structures and a tunnel to facilitate water conveyance.

On August 6, 2020, DWR brought a Complaint for Validation in the Superior Court of the County of Sacramento seeking confirmation from the court that DWR has the requisite authority to issue bonds necessary to finance costs associated with the environmental review, planning, design, and engineering of a single conveyance facility, as well as, if appropriate, the acquisition and construction of conveyance facilities.

The Validation Action

DWR brought the validation action under California Code of Civil Procedure § 860 and Government Code § 17700. The complaint seeks the court's judgment confirming the validity of the proposed revenue bond financing that DWR authorized as

the mechanism to finance the Delta Program. DWR collectively refers to the revenue bonds as "Delta Program Revenue Bonds." Defendants in the action are defined as all persons interested in the validity of the Delta Program Revenue Bonds and underlying resolutions authorizing their issuance, including the Delta Program Revenue Bonds, Series A, Series B, and subsequent series to be issued pursuant to and in accordance with DWR's authorizing resolutions.

In its complaint, DWR alleges that confirmation of its legal authority to issue revenue bonds to pay for the Delta Program is important at the outset of the bond issuance process due to the magnitude of the costs involved in the environmental review, planning, design, and engineering of a potential Delta conveyance facility. Thus, DWR's complaint has two objectives: 1) to confirm that DWR has the statutory authority to issue revenue bonds to provide funds to pay and/or reimburse the costs of Delta Program planning costs, and 2) to confirm that DWR has the statutory authority to issue revenue bonds to provide funds to pay and/or reimburse other Delta Program capital costs, including the costs of the acquisition and construction of such conveyance facilities if and when such facilities are approved. Together, the Delta Program planning costs and construction costs constitute the Delta Program capital costs that the revenue bonds seek to cover.

DWR further alleges that it is authorized by the Central Valley Project Act (Cal. Water Code § 11100, *et seq.*) and the Burns-Porter Act (Cal. Water Code § 12930, *et seq.*) to carry out its various duties and functions related to, in effect, the SWP and related facilities. According to DWR, its powers include reviewing, planning, engineering, designing, acquiring, and constructing units of a "project" as that term is defined by the Central Valley Project Act (CVP Act), and to issue revenue bonds to pay the capital costs of those units. At present, water is conveyed via the SWP (operated jointly with the Central Valley Project) across and through channels of the Delta, as those channels have been modified over 150 years by the construction of levees, ship and other canals, flood protection facilities, salinity gates, and other facilities. DWR alleges that it has authority under the CVP Act to conduct the various environmental review, planning, design, and possible construction of a Delta conveyance facility and to issue revenue bonds to cover capital costs related to it.

Parameters of the Validation Action

Importantly, DWR alleges that its validation action only seeks to confirm the validity of its proposed revenue bond financing mechanism. According to DWR, the action does not seek to adjudicate any legal challenges based on the adequacy or implementation of any of the activities sought to be funded by the issuance of revenue bonds. Moreover, the legal validity of the revenue bond financing mechanism does not, according to DWR, implicate the future compliance of any undefined, unapproved, and hypothetical Delta conveyance facility with any applicable regulatory or statutory requirements other than the requirements imposed by the CVP Act. However, on October 27, 2020, certain environmental groups filed suit against DWR alleging CEQA violations related to the revenue bonds at issue in DWR's validation action. That case, which plaintiffs argue is related to DWR's validation action, is currently pending.

Conclusion and Implications

DWR's validation action is currently pending in the Sacramento County Superior Court. Numerous parties have filed answers supportive of or in opposition to DWR's complaint. The outcome of the litigation could have a significant impact on the source of DWR's financing for the various stages of its exploration of the viability and potential construction of a Delta conveyance facility, if one is deemed appropriate.

Editor's Note: Best Best & Krieger LLP represents certain parties involved in this matter.

(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

DISTRICT COURT ORDERS EPA TO PROVIDE MORE FREQUENT STATUS REPORTS ON DEVELOPMENT OF ANACOSTIA RIVER CLEAN WATER ACT TMDL

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 16-1861(JDB) (D. D.C. Sept. 21, 2020).

The U.S. District Court for the District of Columbia recently denied a motion to reconsider its prior decision not to impose a specific deadline on the U.S. Environmental Protection Agency (EPA) to establish a new Total Maximum Daily Load (TMDL) under the federal Clean Water Act (CWA) for trash in the Anacostia River. The District Court held that no new information or extraordinary circumstances justified reconsideration of its prior decision. However, the court urged EPA to act diligently and ordered more frequent status reports going forward.

Factual and Procedural Background

The federal Clean Water Act requires states and the District of Columbia to set comprehensive water quality standards, including the establishment of a Total Maximum Daily Load of pollutants in certain waters. TMDLs are then submitted to the U.S. Environmental Protection Agency for approval. If the EPA disapproves of the TMDL, it must set its own federal TMDL within 30 days. The CWA does not set a deadline for establishing and sending TMDLs to the EPA, and courts have acknowledged that setting TMDLs takes time and resources. However, a court may construe a state's prolonged failure to submit TMDLs as a "constructive submission" that it will not submit TMDLs. The constructive submission doctrine generally only applies when a state clearly and unambiguously decides not to submit TMDLs. In such cases, the EPA must establish a federal TMDL within 30 days.

The State of Maryland and the District of Columbia (collectively: state agencies) developed a TMDL to limit the amount of trash in the Anacostia River and submitted the TMDL to the EPA. Rather than set a limit on the "maximum" amount of trash that may be added to the river, the TMDL set a "minimum" amount of trash that must be captured, prevented from entering, or removed from the river. The EPA approved the TMDL, and the Natural Resources Defense Council, Inc. (NRDC) challenged the EPA's approval.

In March 2018, the U.S. District Court vacated and remanded the EPA's approval of the TMDL, finding that the TMDL did not comply with the plain meaning of "maximum daily load." The court stayed the *vacatur* of EPA's approval of the deficient TMDL until the EPA's approval of a replacement TMDL. The court denied NRDC's request to set a specific deadline on the EPA for the establishment of the new TMDL. The court also gave the EPA the option to cooperate with the state agencies to develop the new TMDL or to disapprove of the existing TMDL and establish a federal TMDL. The EPA elected to cooperate with the state agencies, and had been providing status reports to the court every six months. In January 2020, NRDC moved the court to reconsider imposing a one-year deadline on the EPA to establish a TMDL, arguing that the process was proceeding too slowly.

The District Court's Decision

The singular issue before the court was whether "new information" presented by NRDC was sufficient to invoke the court's discretion to reconsider its prior decision not to impose a deadline on the EPA for development of a replacement TMDL. A court has discretion under Federal Rules of Civil Procedure Rule 54(b) to determine whether reconsideration of a nonfinal order or decision is necessary under the relevant circumstances. To make this determination, the court considers whether it patently misunderstood a party, made an error of apprehension, or if a controlling or significant change of law or fact has occurred since submission of the issue to the court. A Rule 54(b) motion may be appropriately granted

when "new information" justifies reconsideration of the court's previous decision. However, the court's discretion is limited by the law-of-the-case doctrine, which provides that presentation of the same issues to the court for a second time in the same case should lead to the same result absent extraordinary circumstances.

NRDC argued that the slow pace of development and an inaccurate declaration submitted by an EPA official about the previously estimated time for completion of the TMDL constituted "new evidence" such that the court should reconsider its prior decision not to impose a deadline on the EPA. The EPA contended that these facts did not amount to a controlling or significant change in law or fact and did not justify overriding the law of the case on the issue.

The court agreed with the EPA, noting that it had already resolved the issue in the EPA's favor when it determined not to impose a deadline in its 2018 decision. The prior decision thus became the law of the case, the court stated, and should not be reconsidered absent extraordinary circumstances. The court concluded that the two and a half years that had elapsed in the case was simply not a sufficient justification to reconsider the court's prior decision. The court also found NRDC's criticism of the EPA official's declaration unpersuasive, reasoning that the EPA was not the entity developing the replacement TMDL. As to NRDC's implied constructive submission doctrine argument, the court found that the state agencies had in fact submitted a TMDL which remained in effect per the court's stay of vacatur. As such, the constructive submission doctrine was inapplicable because they did not fail to submit any TMDL. Moreover, the EPA submitted substantial documentation showing that the state agencies had been working to settle on a final approach for the replacement TMDL. They had therefore not clearly and unambiguously decided not to submit a TMDL.

Based on the foregoing, the court denied NRDC's motion, concluding that NRDC failed to meet the standard for reconsideration under Rule 54(b) or to override the law-of-the-case doctrine. However, the court ordered more frequent reporting of the state agencies' progress and cautioned the EPA that it would not permit the process to continue interminably, indicating that it may be more receptive to a similar motion "in the not-too-distant future."

Conclusion and Implications

This case illustrates the high bar plaintiffs face when moving a District Court to reconsider a prior decision not to set a deadline on final agency action. The opinion makes clear that the court is unwilling to impose a deadline not present in the CWA when the responsible agencies are making efforts to comply with the court's order. However, the court's warning to the agencies also provides a window into the circumstances under which a District Court may be willing to impose a timetable on the EPA to achieve final agency. The court's opinion is available online at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2016cv1861-56
(Heraclio Pimentel, Rebecca Andrews)

DISTRICT COURT DENIES MOTION TO DISMISS CLEAN WATER ACT CITIZEN SUIT—FINDS SUFFICIENT PLEADING OF CONTINUING OR INTERMITTENT VIOLATIONS

Okanogan Highlands Alliance, et al. v. *Crown Resources Corporation, et al.*, ___F.Supp.3d___, Case No. 2:20-CV-147-RMP (E.D. Wash. Oct. 5, 2020).

The U.S. District Court for the Eastern District of Washington recently denied a motion to dismiss, ruling that plaintiffs sufficiently plead continuing or intermittent violations of effluent standards or limitations to state a claim under the federal Clean Water Act (CWA) and avoid dismissal.

Factual and Procedural Background

Defendants, Kinross Gold USA, Inc., and its subsidiary, Crown Resource Corporation, own and operate Buckhorn Mountain Mine (Mine) in Okanogan County, Washington. In 2014, defendants obtained a federal Clean Water Act, National Pollutant Dis-

charge Elimination System (NPDES) permit from the Washington State Department of Ecology, allowing it to discharge pollutants into waters of the state, provided that it complied with various terms and conditions. Defendants' NPDES permit was modified twice after it was issued. The Second Modified NPDES permit is alleged to require defendants to capture and treat all water at the mine, meet certain numeric effluent limitations at water quality monitoring points, maintain a capture zone for mine-generated pollutants, and adhere to monitoring and reporting requirements.

Plaintiffs Okanogan Highlands Alliance and the State of Washington brought a citizen suit action under the Clean Water Act alleging that defendants violated several terms of their NPDES permit and polluted local waters continuously since 2014. Active mining ceased in 2017; however, plaintiffs alleged that defendants continue reclamation efforts and are still discharging pollutants to ground and surface waters surrounding the Mine. Specifically, plaintiffs allege that defendants are discharging pollutants in excess of average monthly effluent limitations, failing to maintain capture zones for mine-impacted water, and failing to follow reporting requirements. In response to these claims, defendants brought a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

The District Court's Decision

Defendants' raised two arguments in support of the motion to dismiss. First, defendants argued the court did not have proper jurisdiction, because the plaintiffs alleged only "wholly past" violations of the CWA. Second, defendants argued the plaintiffs' claims should be dismissed for failing to state a cognizable claim under the CWA.

Issue of 'Wholly Past Violations'

The court first considered whether plaintiffs alleged wholly past violations. Under the CWA, a citizen plaintiff must allege "a state of either continuous or intermittent violation. . .that is, a reasonable likelihood that a past polluter will continue to pollute in the future." The court noted that citizen plaintiffs need not prove the allegations of ongoing noncompliance before jurisdiction attaches. To withstand a motion to dismiss, the plaintiffs were required to meet a minimal pleading standard, with allegations based on "good-faith beliefs, formed after reasonable injury and are well-grounded in fact.

The court determined that the plaintiffs alleged past violations by the defendants and also alleged *continuing* violations. These allegations included the defendants' failure to maintain the capture zone, which was purported to have occurred every day for the last five years as well as an ongoing pattern of noncompliance with the NPDES permit's reporting requirements. Plaintiffs also alleged the defendants continue to own and operate the Mine and to discharge pollutants to the waters around the Mine.

Ultimately, the court found the plaintiffs' allegations appeared to be based on good-faith beliefs, formed after reasonable inquiry and were well grounded in fact, which satisfied the minimum threshold requirements for a properly plead complaint:

> Plaintiffs allege not only past violations by Defendants, but continuing violations as well. . . .These alleged violations include Defendants' failure to maintain the 'capture zone,' which has purportedly occurred every day for the last five years. . . .Plaintiffs further allege an ongoing pattern of frequent noncompliance with the permit's reporting requirements. . . .In support of these allegations, Plaintiffs contend that Defendants continue to own and operate the Mine; Defendants still hold an NPDES permit and are subject to its requirements; and Defendants continue to discharge pollutants to surrounding waters around the Mine. . . .Therefore, Plaintiffs' allegations of continuing violations committed by Defendants appear to be based on good-faith beliefs, 'formed after reasonably inquiry,' that are 'well-grounded in fact. . .'

As a result, the court had jurisdiction over the plaintiff's claims.

Issue of 'Failure to State a Cognizable Claim'

The court next considered whether plaintiffs' claims should be dismissed for failing to state a cognizable claim under the CWA. Dismissal of a complaint is proper where the plaintiff fails to state a claim upon which relief can be granted. In reviewing the sufficiency of a complaint, a court accepts all well-pleaded

allegations of material fact as true and construes those allegations in the light most favorable to the non-moving party. To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face."

Taking the factual allegations in the complaint as true for the purposes of the motion to dismiss, the court found that plaintiffs alleged sufficient facts to state a claim. Plaintiffs alleged various violations of "effluent standards or limitations," failure to maintain the "capture zone" as required by the NPDES permit, repeatedly ignoring reporting requirements outlined by the NPDES permit. As a result, defendants' motion to dismiss was denied.

Conclusion and Implications

This case provides a reminder that at the pleading stage, allegation of fact may be sufficient to defend against a motion to dismiss. The case is also an example of how liberal pleading standards may encourage Clean Water Act citizen suits to proceed to the discovery stage. The court's ruling is available online at: https://www.courthousenews.com/wp-content/up-

DISTRICT COURT REVERSES EPA'S NARROW JURISDICTIONAL DELINEATION BY APPLYING CONTEMPORARY JUDICIAL SCOPE OF THE CLEAN WATER ACT JURISDICTION

San Francisco Baykeeper et al. v. U.S. Environmental Protection Agency, ___F.Supp.3d___, Case No. 3:19-cv-05941-WHA (N.D. Cal. 2020).

In October 2020, the U.S. District Court for the Northern District of California rejected a March 2019 jurisdictional delineation in which the U.S. Environmental Protection Agency (EPA) determined that a salt production complex adjacent to the San Francisco Bay was not jurisdictional and therefore not subject to federal Clean Water Act (CWA) § 404. Specifically, the court found that EPA failed to consider whether the salt ponds fell within the regulatory definition of "waters of the United States" (WOTUS), and instead erroneously applied case law to reach a determination that the salt ponds were "fast lands," which are categorically excluded from CWA jurisdiction. "Fast lands" are those areas formerly subject to inundation, which were converted to dry land prior to enactment of the CWA. The court's holding: 1) maintains the status quo with regard to CWA jurisdiction over properly identified fast lands, and 2) indicates that the true measure of the jurisdictional extent of a WOTUS is the natural extent of such waters, absent any artificial components that limit the reach of an adjacent jurisdictional water body. Moreover, the court's holding suggests that jurisdictional delineations of wet areas at facilities developed prior to adoption of the CWA should be re-evaluated to apply landmark rulings regarding the appropriate scope of WOTUS and establishment of the "significant nexus" analysis established in the U.S. Supreme Court's *Rapanos* decision. In reaching this decision, the court did not consider or apply the most recent WOTUS definition, which became effective in June 2020 and eliminated the significant nexus analysis.

Background

The Redwood City Salt Plant continuously operated as a commercial salt-producing facility since at least 1902. The facility's salt ponds were created by reclaiming tidal marshes in San Francisco Bay through dredging, and construction of a system of levees, dikes, and gated inlets, permitted by the U.S. Army Corps of Engineers (Corps) in the 1940s. In the early 1950s, the Corps authorized construction of a brine pipeline, which connects the Redwood City Salt Plant to another salt production facility in Hayward, California. The Redwood City facility's operations have remained largely unchanged since 1951, prior to the adoption of the federal Clean Water Act in 1972. In 2000 and 2001, Cargill, Incorporated (Cargill), the current facility owner, constructed new intake pipes to bring in seawater and improve brine flow at the facility. In the absence of the improvements made by Cargill and its predecessors, some of the salt ponds would be inundated with the San Francisco Bay's jurisdictional waters.

In 2012, Cargill requested that EPA determine the jurisdictional status of the salt ponds. In response, EPA Region IX developed a draft jurisdictional determination in 2016, which indicated that only 95 acres of the Redwood City facility had been converted to "fast land" prior to enactment of the CWA. According to Region IX, the remaining 1,270 acres of the facility were jurisdictional under the CWA because:

> (1) the tidal channels within the Redwood City Salt Ponds were part of the traditionally navigable waters of the San Francisco Bay, and were not converted to fast land prior to enactment of the CWA; (2) the salt ponds in their current condition have been shown to be navigable in fact, and are susceptible to use in interstate or foreign commerce with reasonable improvements; (3) the salt ponds are impoundments of waters otherwise defined as waters of the United States; and (4) the salt ponds have a significant nexus to the traditionally navigable waters of the adjacent San Francisco Bay.

Ultimately, EPA headquarters issued a significantly different determination in March 2019, which found that the entire Redwood City facility was *not* jurisdictional, spurring a challenge by four environmental organizations.

The District Court's Decision

According to the court, EPA was bound to apply its regulatory WOTUS definition, rather than Ninth Circuit case law on the scope of CWA jurisdiction. The court found that even if headquarters intended to apply judicial precedent on the issue of "fast lands," it did so improperly. In 1978, the Ninth Circuit had previously evaluated the jurisdiction of the Redwood City Salt Plant ponds, and concluded differently than the March 2019 jurisdictional determination. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). In that earlier case, the Ninth Circuit determined: 1) that CWA jurisdiction still extended at least to those waters no longer subject to tidal inundation merely by reason of artificial dikes; and 2) the fast lands jurisdictional exemption applies only where the reclaimed area was filled in as dry upland before adoption of the CWA.

The court went on to examine EPA's application of *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), a case that determined tribal rights on land that became submerged, and thus converted to tidelands. In that case, lessors of the previously upland areas and adjacent homeowners erected shoreline defense structures on dry land, which, once submerged, constituted a trespass on the tribe's tidelands, and a violation of the CWA and the Rivers and Harbors Act. While the Ninth Circuit found violation in this case, the Ninth Circuit also confirmed that fast lands, where properly identified, are not subject to the CWA's permitting requirements. According to the court:

> . . .[e]ven if land has been maintained as dry through artificial means, if the activity does not reach or otherwise have an effect on the waters, excavating, filling and other work does not present the kind of threat the CWA is meant to regulate.

Conclusion and Implications

In addition to providing a refined view of Clean Water Act jurisdiction over aquatic features separated from a jurisdictional water by artificial means, the court also suggested that although operations at the Redwood City Salt Plant had remained largely unchanged since 1951, any evaluation of the facility's jurisdictional status should be updated to account for the three major Supreme Court decisions regarding the appropriate scope of CWA jurisdiction: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* decision's significant nexus analysis seems to have largely influenced the court's decision here. According to the court, the salt ponds "enjoyed a water nexus to the Bay," and found that issue to be dispositive, triggering reversal of headquarters' jurisdictional determination even absent appropriate application of prior applicable Ninth Circuit case law. The court's opinion is available online at: https://oag.ca.gov/sites/default/files/Redwood%20City%20Salt%20Ponds%20MSJ%20Order.pdf?source=email.

(Nicole E. Granquist, Brenda C. Bass, Meghan A. Quinn, Meredith Nikkel)

RECENT CALIFORNIA DECISIONS

CALIFORNIA COURT OF APPEAL REVERSES DISMISSAL OF RATE STRUCTURE CHALLENGE UNDER PROPOSITION 218 FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Lucinda Malott v. Summerland Sanitary District,
___Cal.App.5th___, Case No. B298730. (2nd Dist. Oct. 19, 202020).

The Second District Court of Appeal in *Lucinda Malott v. Summerland Sanitary District* held that a Proposition 218 challenge to a wastewater disposal rate structure in connection with a rate increase does not require exhaustion of administrative remedies and permits the introduction of extra-record evidence.

Factual and Procedural Background

Malott owns a 30-unit apartment building within the Summerland Sanitary District (District). The District provides wastewater collection, treatment and disposal services for commercial and residential property in its service area and charges service rates to its customers.

In 2017, the District provided notice to Malott and other property owners of a service rate increase. The rate increase was considered at a public hearing in February 2018, and a 3.5 percent rate increase was adopted. Malott did not file a written protest and did not attend the hearing.

On April 17, 2018, Malott filed a petition for a writ of administrative *mandamus* against the District. Malott alleged that she was excused from exhausting the administrative remedy of the public hearing because it was an inadequate remedy.

Malott further alleged the District uses a classification for service rates "for all residential parcels" that are "based upon a "Schedule of Equivalent Dwelling Units" (EDUs). She claimed that the District schedule of EDUs arbitrarily assigns EDU values without regard to: 1) actual wastewater discharged from a parcel; 2) proportional cost of providing wastewater service to a parcel. She also claimed the District's calculation of rates "based solely on EDUs without regard to the proportional cost of the service attributable to a parcel" violates article XIIID, § 6, subdivision (b)(3) of the California Constitution.

In September 2018, Malott filed a notice of motion and motion for judgment on a writ of administrative *mandamus*. The motion included a declaration of Lynn Takaichi, an expert on utility and wastewater service rates. The Takaichi declaration contained facts and an assessment that: 1) the District's calculation of fees did not comply with current law; 2) the District improperly placed all residential users, whether single family homes or residents in muti-unit apartment buildings, within a single rate EDU category; 3) apartment buildings containing multiple units use 40 percent lower amounts of water than the actual water use of single family homes; and 4) the District was overcharging apartment buildings and undercharging single-family residences.

The District filed a motion to strike Tachaichi's declaration because it had not been filed at the public hearing. The trial court granted the motion to strike, finding the declaration was "improper extra-record evidence" under the administrative remedy exhaustion doctrine because it had not first been presented at a District public hearing on a rate increase. The trial court subsequently denied the petition, finding that the District's single "uniform per-EDU rate for residential customers" was valid.

The Court of Appeal's Decision

The Court of Appeal reversed the trial court's judgment. The Court of Appeal held that Malott's pleading was, in essence, a complaint for declaratory relief, and not a writ of administrative mandate, because it was not challenging the rate increase percentage, but instead was challenged the basic underlying rate structure. Thus, the doctrine of exhaustion of administrative remedy did not apply. The Court of Appeal remanded the case to the trial court so that Malott may present evidence to support her contentions.

Proposition 218

Nearly two decades ago, Proposition 13 sharply constrained local governments' ability to raise property taxes, the mainstay of local government finance. Proposition 13 also specified that any local tax imposed to pay for specific governmental programs—a "special tax"—must be approved by two-thirds of the voters.

Since that time, many local governments have relied increasingly upon *other* revenue tools to finance local services, most notably: assessments, property-related fees, and a variety of small general-purpose taxes (such as hotel, business license, and utility user taxes). It is the use of *these* local revenue tools that is the focus of Proposition 218.

In general, the intent of Proposition 218 is to ensure that all taxes and most charges on property owners are subject to voter approval. In addition, Proposition 218 seeks to curb some perceived abuses in the use of assessments and property-related fees, specifically the use of these revenue-raising tools to pay for general governmental services rather than property-related services.

Under Proposition 218, before a local government agency may impose or increase certain property related fees and charges, it must notify affected property owners and hold a public hearing. (Cal. Const., Art. 13D, §. 6(a)(2); *Plantier v. Ramona Municipal Water Dist.* (*Plantier*), 7 Cal.5th 372, 376 (2019).) Among other Proposition 218 requirements, a governmental imposed fee "shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., Art. 13D, §. 6(b)(3); *Plantier*, at p. 382.)

When challenging an increase in fees on the basis that the fee structure itself "does not property allocate costs among the parcels served," there is no need to exhaust administrative remedies because the hearing does not provide an adequate remedy to challenge the method used to allocate the fee burden. (*Plantier*, at p. 387.) In *Plantier*, the plaintiffs, who did not participate in the Proposition 218 rate increase hearing either by submitting a written protest or speaking at the hearing, brought their challenge by way of an action for declaratory relief.

Administrative *Mandamus*

The Court of Appeal's focus was on whether the reasoning in *Plantier* applied also to a similar factual situation when the relief sought is by way of writ of administrative mandate, rather than by way of declaratory relief, as in *Plantier*. In determining that the type of action filed did not make a difference, the Court of Appeal noted that Proposition 218 specifically states that its provisions "shall be liberally construed to effectuate" its purposes of limiting local government revenue and enhancing taxpayer consent. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal.4th 431, 448 (2008).)

The Court of Appeal held that Malott's styling the complaint as one for administrative *mandamus* was permitted by Proposition 218, which does not specify the type of action. The Court of Appeal also held that common law does not deny declaratory relief when allegations of an administrative writ of mandate cause of action are sufficient to support declaratory relief. (*Woods v. Superior Court*, 28 Cal.3d 668, 672-674 (1981).) Thus, the Court of Appeal held that, as in *Plantier*, there is no requirement to exhaust administrative remedies in a Proposition 218 challenge to the underlying rate structure, regardless of the type of action filed.

Relevant and Admissible Evidence

Similar to its holding that the exhaustion of administrative remedies rule did not apply, the Court of Appeal also held that the extra-record exclusion doctrine did not apply, because the administrative hearing did not create a record relevant to the challenge to the underlying structure of the fee. Applying the exclusion doctrine when there is an inadequate administrative record would create an injustice by improperly elevating an exclusionary rule over the right to have a forum to litigate claims in a *mandamus* action. (*Ogo Associates v. City of Torrance*, 37 Cal. App.3d 830, 834-835 (1974).) Relevant admissible evidence in support of a petition for writ of mandate can be produced by affidavit. (*Hand v. Board of Examiners*, 66 Cal.App.3d 605, 615 (1977).) The Takaichi declaration was clearly relevant to whether the District's method to calculate residential service rates was proper.

Conclusion and Implications

This opinion by the Second District Court of Appeal reaffirms the holding in *Plantier* allowing

challenges to rate structures of fees at the time of fee increases, without strict limitations that would be applied to administrative *mandamus* proceedings, because the Proposition 218 fee increase hearings do not focus on the underlying rate structure. Courts are following the constitutional mandate to broadly construe Proposition 218 limitations on fees. Although it is conceivable that a government agency at a Proposition 218 fee increase hearing could present all of the evidence regarding the underlying rate structure in order to avail itself of the exhaustion of administrative remedies and extra-record exclusion doctrines, it may be expensive to do so and could unnecessarily encourage challenges to the rate structure. For those seeking to challenge fee increases, it certainly would be prudent to hire a consultant who can advise whether the rate structure is appropriate, as an additional challenge under Proposition 218 to any fee increase. https://www.courts.ca.gov/opinions/documents/B298730.PDF
(Boyd Hill)

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