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FEATURE ARTICLE

ARE 'WETLANDS' REALLY 'WATERS OF THE STATE'?

By David Ivester, Esq.

California regulates "discharges of waste" into "waters of the state" under the Porter-Cologne Act. Contrary to popular supposition, "waters of the state" properly do not include "wetlands." The California Legislature had no intention of reaching wetlands when it enacted the statute in 1969. What!? But the State Water Resources Control Board (SWRCB) and the Regional Water Quality Control Boards (RWQCBs) have long treated "wetlands" as "waters of the state" and asserted they have jurisdiction to regulate discharges of waste into them. Indeed, after a decade or so of consideration, the SWRCB recently adopted an extensive regulation prescribing detailed procedures by which it intends to do exactly that. That the SWRCB and RWQCBs have claimed this authority and have so far gotten away with it does not though establish the validity of their claim nor shield it from challenge.

The Porter-Cologne Act

Whether "wetlands" are "waters of the state" regulated under the Porter-Cologne Act is a question of how to read and understand the statute, and that calls for recognizing and following well established, fundamental principles of statutory interpretation. Even though the SWRCB and RWQCBs have long been in the habit of treating wetlands as waters of the state, their claim has never been examined or sanctioned by any court. It remains, in that sense, an open legal question.

The Porter-Cologne Act provides that anyone discharging or proposing to discharge "waste" within any region in the state that could affect the quality of "waters of the state" must first file a report of waste discharge with the pertinent RWQCB and then comply with the conditions of any "waste discharge requirements" (*i.e.*, a permit by another name) issued by the SWRCB. (Wat. Code §§ 13260, 13264.) (Whether discharging "waste" extends beyond discarding or disposing of "sewage and any and all other waste substances," as "waste" is defined in the Porter-Cologne Act, to also encompass placing and using materials such as sand, gravel, soil, concrete, and lumber for some intended, useful purpose, e.g., building houses and roads, repairing levees, or contouring agricultural fields, is a different question for another day.)

When enacting the Porter-Cologne Act in 1969, the Legislature defined "waters of the state" to mean "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code § 13050(e).)

Legislative Intent

The touchstone of understanding a statute is legislative intent, and in construing a statute, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court*, 39 Cal.4th 77, 83 (2006).) Toward this end, "we begin with the language of the statute, giving the words their usual and ordinary meaning." (*Id.*)

In 1969, the Legislature undoubtedly understood "surface water" in keeping with its ordinary meaning and then existing law to refer not just to any H_2O on the ground surface, but rather to an actual body of water, either flowing or still, that:

> Encompasses both natural lakes, rivers and creeks and other bodies of water, as well as artificially created bodies such as reservoirs, canals, and dams. (*People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 301-302 (1996).)

> But by surface waters are not meant any waters which may be on or moving across the surface of the land without being collected into a natural watercourse. (*Horton v. Goodenough,* 184 Cal. 451, 453 (1920).)

Integral to identifying a surface waterbody and delineating its extent is ascertaining and recognizing its boundary, the ordinary high-water mark at common law, which distinguishes the surface waterbody from surrounding land. In *Churchill Co. v. Kingsbury,* 178 Cal. 554 (1918), for instance, the California Supreme Court considered whether certain lands:

> . . .were swamp and overflowed lands, passing to the state by grant from the United States, or were lands lying under the waters of a navigable lake, belonging to the state by virtue of her sovereignty. (*Id.* at 557).

Noting that a survey had been made of the ordinary high-water mark of the lake, the Court affirmed that "[t]he lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water." (*Id.* at 559.) It distinguished that from other "land [that] was not a part of the bed of the lake, but was marsh or swamp land adjoining the border of the lake." (*Id.*)

"Wetlands" was a word not yet appearing in any California court decision by the time the Porter-Cologne Act was enacted. The term has come into currency more recently to generally refer to areas that do not contain enough water often enough or long enough to develop an ordinary high water mark identifying them as waterbodies and delimiting their boundaries, but instead experience inundation or saturation by water often enough and long enough (perhaps as little as a couple weeks per year) to develop soil characteristics typical of anaerobic conditions and support a prevalence of vegetation typically adapted for saturated soil conditions.

Not only did the Legislature define "waters of the state" to mean "surface waters" as commonly understood, it also said nothing in the Porter-Cologne Act or its legislative history to suggest it intended these terms to include "wetlands" (or swamps, marshes, bogs, or the like). When passing the act, the Legislature said nothing of "wetlands" in its definition of "waters of the state." Indeed, the Legislature never mentioned wetlands *anywhere* in the Porter-Cologne Act. Nor did it refer to wetlands *anywhere* in the legislative history of the Porter-Cologne Act. If the Legislature had intended to depart from the common understanding of surface waters and start treating wetlands as waters of the state, one would reasonably expect the Legislature to have left at least some hint of that innovation in the Act and its legislative history. It did nothing of the sort. The Legislature's omission of any reference to wetlands is compelling; it plainly did not have wetlands in mind when it enacted the statute and defined the "waters of the state" regulated under the act.

That rightly marks the end of the inquiry:

> Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Burden v. Snowden,* 2 Cal.4th 556, 562 (1992).)

The Legislature's intent is manifest. "Waters of the state" as defined by the Legislature in the Porter-Cologne Act do not include wetlands.

State Water Resources Control Board Claims over Wetlands

The SWRCB and RWQCBs nonetheless have long claimed authority to regulate wetlands as "waters of the state." On April 2, 2019, the SWRCB formalized their regulatory practices in this regard by adopting a state wetland definition and procedures for discharges of dredged or fill material to waters of the state. (State Water Resources Control Board, Res. No. 2019-0015; 23 Cal. Code Reg. § 3013.) In doing so, it asserted that wetlands of various types are "waters of the state." (State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State, p. 2 (Apr. 2, 2019) (Procedures); Staff Report, pp. 3-4 (Apr. 2, 2019).)

This claim does not withstand scrutiny. Disregarding the first principle of statutory interpretation, the SWRCB failed even to attempt the fundamental task necessary to understanding the Porter-Cologne Act, *i.e.*, read it with the aim of ascertaining the Legislature's intent. In the Procedures and accompanying materials, the SWRCB spoke much about why it regarded including wetlands within its regulatory purview to be a good idea, but said almost nothing

about what the Legislature intended. The act's meaning though is not a question of policy for the SWRCB to decide as if writing on a clean slate, but rather a question of statutory interpretation. The SWRCB's responsibility is to faithfully ascertain and implement the Legislature's intent, and not to arrogate to itself the authority to decide what it thinks should be the scope of its own regulatory jurisdiction.

As explained above, both the text and legislative history of the Porter-Cologne Act reveal no intent of the Legislature to treat wetlands as "waters of the state." The SWRCB has not offered any sound reason to imagine otherwise. It said nothing of the omission of any reference to "wetlands" in the statute and its legislative history. It said nothing of the ordinary meaning and common law understanding of "surface waters." The most the SWRCB offered was its own characterization that the act defines waters of the state "broadly" to include "any surface water or groundwater, including saline waters, within the boundaries of the state." (Procedures, p. 2; Staff Report, p. 57.) Simply labeling the act's definition as "broad," though, hardly serves as evidence of the Legislature's intent. Even less does such a facile assertion explain or justify supposing the Legislature intended to include wetlands within "waters of the state."

Seemingly dropping all pretense of seeking the Legislature's intent, the SWRCB instead offered a novel theory for injecting "wetlands" into "waters of the state." It observed that Congress enacted the federal Clean Water Act to regulate discharges of dredged or fill material into "waters of the United States." Since the Clean Water Act is subject to constitutional limitations, *e.g.*, the limited reach of the federal commerce power, inapplicable to the Porter-Cologne Act predicated on the state's general police powers, the SWRCB observed that "waters of the state" thus could extend beyond "waters of the United States" that Congress might regulate under the commerce power. (Staff Report, pp. 16-17.) On that premise, the SWRCB asserted without further explanation that "'[w]aters of the state' includes all 'waters of the U.S.'" (Procedures, p. 2; Staff Report, p. 57.) Extending its assertion even further, the SWRCB reasoned that since the term "waters of the United States" has been defined by the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) in their regulations to include "wetlands," "waters of the state" necessarily includes wetlands as well. (Staff Report, pp. 13-21, 55.)

This makes no sense. It is but wordplay, toying with an impossibility and a *non sequitur*—and failing to offer any real basis for the SWRCB's claim over wetlands. First, the impossibility: When the Legislature enacted the Porter-Cologne Act in 1969, it could not have intended "waters of the state" to include "waters of the United States" because the latter term had not yet been invented. Congress did not coin it until three years later when passing the Clean Water Act in 1972. Similarly, the Legislature could not have had in mind then nonexistent Corps and EPA wetland regulations when it defined "waters of the state" in the Porter-Cologne Act. The SWRCB cannot subsequently infuse "waters of the state" with meaning the Legislature could not possibly have intended when it defined the term. (*See*, *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1388-1389 (1987); 78 Ops.Cal.Atty.Gen. 137, 140 (1995), observing that a California statute "could not possibly have been intended or designed to conform with the federal counterpart" enacted years later.)

The SWRCB nonetheless tried bootstrapping its claim, saying that its own regulation adopted in 2000 stating that, for certain limited purposes, "[a]ll waters of the United States are also 'waters of the state'" (23 Code Cal. Reg. § 3831(w)).

> [This]. . .reflects an intention by the Water Boards to include a broad interpretation of waters of the United States into the definition of waters of the state. (Staff Report, p. 57.)

The SWRCB's regulation, though, equates waters of the state with waters of the United States *only* for purposes of "certifications" provided by the SWRCB and RWQCBs pursuant to certain federal laws, such as § 401 of the federal Clean Water Act, and not for any other purposes. If anything, the regulation's limitation to circumstances governed by federal law suggests that, contrary to the SWRCB's supposition, in other contexts all waters of the United States are *not* necessarily waters of the state. More to the point, though, it is the Legislature's intention, not the SWRCB's, that establishes the meaning of "waters of the state." An agency cannot simply will a statute to mean what *it* wishes. Indeed, to the extent the SWRCB strayed beyond the Legislature's intention, its regulation is invalid.

Second, the *non sequitur*: In defining "waters of the state," the Legislature, of course, was not bound by constitutional limitations on Congress in defining "waters of the United States," and that may explain how "waters of the state" could extend to surface waters beyond the reach of the federal commerce power. How that observation might have any bearing though on the SWRCB's further assertion that "waters of the state" must also be read to encompass features other than the "surface waters" specified by the Legislature, the SWRCB does not explain. It simply does not follow that because the Legislature had the power to regulate surface waters beyond Congress' reach, it necessarily intended to regulate features other than surface waters, such as wetlands—and, moreover, did so without saying so.

Conclusion and Implications

The Porter-Cologne Act and its legislative history demonstrate the lack of any intent by the California Legislature to treat "wetlands" as "waters of the state." In nonetheless claiming authority to regulate "wetlands," the State Water Resources Control Board shrugs off the California Legislature's intent and instead resorts to alternative theories serving only to reveal the absence of any sound basis for its claim. "Waters of the state" within the meaning of the Porter-Cologne Act properly do not extend beyond "surface waters" to encompass "wetlands" elsewhere on the landscape.

That said, as a matter of practicality, there is little reason to expect major changes in the scope of wetland regulation in California any time soon. The vast majority of wetlands are regulated under the federal Clean Water Act by the Corps and EPA—and by the State Water Resources Control Board and Regional Water Quality Control Boards exercising their authority under § 401 of that federal CWA to "certify" whether permits to fill such wetlands comply with pertinent federal and state requirements. That regulatory program will continue unaffected by whether the Boards regard wetlands to be "waters of the state" under state law. Moreover, wetlands outside federal jurisdiction commonly are regulated in some manner under local ordinances or other state or regional programs; those regulatory programs will continue as well.

The SWRCB's newly adopted wetland regulatory Procedures may well remain in place too. Having accustomed itself for many years to enjoy regulatory jurisdiction under the Porter-Cologne Act at least coextensive with that exercised by the Corps and EPA under the Clean Water Act and having worked for a decade to develop the Procedures to extend and refine its regulatory program, the SWRCB appears sufficiently invested in the effort to not readily relinquish it. Few landowners have much incentive to challenge that claim. Owners of the vast majority of wetlands regulated under the federal or some other program would gain little or no regulatory relief by removal of the SWRCB's largely duplicative regulation of wetlands under the Porter-Cologne Act. Whatever projects or activities they undertake affecting those wetlands would remain subject to regulation under those other programs even if the SWRCB or a court set aside the Procedures. Landowners with wetlands outside the jurisdiction of the federal agencies, who thus might gain some regulatory relief by removal of the SWRCB and RWQCB regulatory program, typically tend to prefer trying to reach acceptable resolutions of their land use issues through permitting rather than litigation. Generally, only those with their backs against the wall, such as those facing enforcement actions and penalties or onerous permit requirements, prohibitively expensive avoidance and mitigation measures, and the like, may feel sufficiently motivated to contest the legality of the Boards' claim that they can regulate "wetlands" as "waters of the state." In the meantime, the Boards' house of cards likely will remain undisturbed.

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CALIFORNIA WATER NEWS

SONOMA COUNTY GROUNDWATER SUSTAINABILITY AGENCIES COMMENCE RURAL COMMUNITY ENGAGEMENT PLAN

Earlier this month, the three main Sonoma County Groundwater Sustainability Agencies—(GSAs) Santa Rosa Plain, Sonoma Valley, and Petaluma Valley—proceeded with the first step of their Rural Community Engagement Plan. Under the engagement plan, nearly 9,500 rural well owners throughout the county were mailed a groundwater survey eliciting their input on groundwater conditions and management in the basin.

Rural Community Engagement Plan

In Sonoma County, rural well owners constitute a large portion of total groundwater extractions in the basin, due in large part to the fact that the county has one of the highest concentrations of rural well owners in California. In developing their Groundwater Sustainability Plans (GSPs) for the 2022 deadline set by the Sustainable Groundwater Management Act of 2014 (SGMA), the three GSAs have teamed up to gather the thoughts and opinions of this population of well owners in the county.

With funding from the California Drought, Water, Parks, Climate, Coastal Protection and Outdoor Access for All Act of 2018 (Prop 68), the goal of the engagement plan is to educate and engage rural residents and well owners on issues related to the SGMA, the three GSAs, and funding ideas for future groundwater management. This engagement plan is broken down into three phases: 1) a mail-in survey and focus group study; 2) the development of a community outreach campaign; and 3) a feasibility study of future revenue sources. The first phase, now well under way, has already initiated the mail-in survey portion with rural well owners having until January 15, 2021 to submit their replies.

Focus Group Studies to Come Soon

Following this part of the engagement plan, the GSAs anticipate the focus group studies to begin sometime in February or March, although the exact methodology has yet to be completely ironed out. Initially, these focus groups were slated to be made up of one ten-person focus group for each subbasin and one more for the entire basin which would last up to two hours, but the GSAs have brainstormed several alternatives to this original plan including splitting the focus groups into two five-person virtual groups for one-hour periods or conducting individual interviews with representative rural residents throughout the county.

Using the data collected from this first phase of the engagement plan, the Sonoma County GSAs plan on developing a community outreach campaign to further educate and engage rural residents about the GSP and other local groundwater issues.

Conclusion and Implications

Although Covid-19 has slowed many agency processes in transitioning to a virtual world, the three GSAs anticipate this engagement plan to continue forward, with its outreach campaign set to begin sometime in the early summer of 2021.

Having such a large rural well owner population is not an attribute exclusive to Sonoma County. On the contrary, its Rural Community Engagement Plan and accompanying community outreach campaign are tools that GSAs across the state should seek to implement in developing their Groundwater Sustainability Plans by SGMA's 2022 deadline. Extensive and productive community involvement and outreach can help these GSAs and others across California, in educating their constituents on the complexities of groundwater management, and help the community take positive action with respect to the management of this vital resource. While the 2022 deadline of SGMA is fast approaching, the Sonoma County GSAs and others following suit will likely see significant benefit—even if only from a public relations perspective—from seeking the input of these rural residents. For more information, *see*: http://sonomacountygroundwater.org

(Wesley Miliband, Kristopher Strouse)

THE FUTURE OF LAKE PILLSBURY—POTTER VALLEY PROJECT SEEKS TO RESTORE EEL RIVER HABITAT FOR NORTH COAST SALMON AND STEELHEAD

In the beautiful Mendocino National Forest, just about an hour's drive northwest of the City of Ukiah, lies the camper's paradise of Lake Pillsbury. This 2,300-acre reservoir has served as a hotspot for summer vacationers with its lakeside camp sites and serene stretch of the Eel River below Scott Dam, but all of this may see a big change in the coming years.

The Potter Valley Project

The Potter Valley Project (Project) lies on the Eel River just north of the small farming community of the same name. Comprising the Project are the Scott and Cape Horn dams, an intake tunnel diverting water from the Eel into the Russian River watershed, and the Potter Valley Powerhouse. For many years now, this project has been operated by PG&E. With the Project's license set to expire in April of 2022—requiring costly updates to its infrastructure including a $100 million fish passage system—PG&E has deemed the 100-year-old Project as no longer economically viable.

Although it initially began the relicensing process in 2017, PG&E officially withdrew its application to relicense the Potter Valley Project in early 2019. Six months later, several agencies and organizations banded together and filed a new Notice of Intent to file an application for a new license for the Project.

Progress in Relicensing

Led by Mendocino County IWPC, Sonoma County Water Agency, Cal Trout, Humboldt County and later Round Valley Tribes (together: NOI Parties), the troupe has set out to relicense the project with an ultimate plan to have Scott Dam removed entirely, freeing up roughly 300 miles of high elevation steelhead and salmon habitat in the Mendocino National Forest. In addition to its plans to improve fish habitat conditions, the NOI Parties' plan seeks to increase winter diversions to maintain adequate water supply for the Russian River watershed which currently receives an average of 60,000 AFY from the Eel through the Potter Valley Powerhouse.

In advancing these goals, the NOI Parties submitted its initial Scoping Document for the Project with a proposed pre-filing process plan and schedule in July of 2019. This schedule—which was echoed by the NOI Parties' Ad Hoc Committee in September of 2020—was broken into three phases.

First up would be the initiation of the licensing process. This phase 1 involved the filing of the NOI, submission of a feasibility study, and submission of an updated scoping document. Scheduled through most of 2020, this Phase 1 is nearing completion as the NOI Parties have already submitted both a Feasibility Study and Scoping Document 3.

Phase 2 consists of conducting further study on the Project's potential impacts in preparation for the submission of the Final License Application. With the deadline to submit a final application for relicensing pushed back to April of 2022, the NOI Parties appear set to enter into Phase 2 as early as January, 2021.

Lastly, Phase 3 involves the final step in the relicensing process—preparation and submission of the Final License Application. Anticipated in its scheduling for sometime late 2021, this final phase will commence once the NOI Parties file its Updated Study Report and have a Study Plan Determination issued.

Conclusion and Implications

The NOI Parties have a lot of work ahead of them if they are to keep with their plan of submitting a Final License Application by April of 2022. In addition to the phasing set out above, the NOI Parties are acting as a proxy for a proposed Regional Entity that would ultimately be the license applicant for the Potter Valley Project. The Regional Entity has not yet been formed under California law, but once formed, the Regional Entity would supplant the NOI Parties in the licensing process. While no official timeline for the establishment of this Regional Entity has been released, it is expected that the Regional Entity will be discussed before the California Legislature sometime next year if the NOI Parties plan to have this Entity submit the Final License Application.

Dam removal is by no means an easy or quick process, and obviously is very controversial. This Project will continue to face much opposition as it moves along and it certainly has a long way to go before

anything can be definitively said about the future of the Eel River. This process has, however, been a move towards habitat restoration in the Eel, and the Two Basin Solution touted by the NOI Parties hopes to balance that with the water supply needs that Lake Pillsbury has historically fulfilled in the Russian River watershed.

In the coming months, interested parties can keep an eye out for updates on the Phase 2 studies and on the formation of the Regional Entity. For more information on the Potter Valley Project and its progress, both the Potter Valley Project's and California Trout's website offer resources for staying up to date. (Wesley A. Miliband & Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

FEDERAL LEGISLATION REINTRODUCED TO TACKLE PFAS WATER CONTAMINATION ISSUES

A growing concern over the effects of water contaminants perfluoroalkyl and polyfluoroalkyl substances (commonly referred to as PFAS) in recent years has resulted in several states passing legislation to impose regulations on these "forever chemicals." Congress also made attempts at federal regulation. With a new federal administration on the horizon, congressional proponents of such regulation are preparing to reintroduce previously stalled PFAS legislation.

Background

PFAS can be found in many household products that have been used for decades. It has also been increasingly discovered in drinking water throughout California and the United States. For example, firefighting foam widely employed on military bases, airports and at industrial sites has been found to be one prevalent source of PFAS in groundwater basins supplying drinking water.

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

PFAS Legislation Reintroduced in 2020

Early in 2020, the United States House of Representatives passed House Resolution (HR) 535; however, the bill did not go on to pass in the Senate. Recent reports indicate that the House intends to reintroduce PFAS legislation in early 2021, to signal to the incoming Biden administration the importance of regulating PFAS. This bill, unless further modified, would propose to enact a variety of PFAS related controls, including the following:

- The Environmental Protection Agency (EPA) would be required to designate certain PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund). The EPA would then have five years to determine whether the remaining PFAS should be designated as hazardous substances, individually or in groups. However, the bill would exempt public agencies or private owners of public airports that receive federal funding from Superfund liability for remediation of certain releases of PFAS into the environment resulting from the use of aqueous film forming foam in certain circumstances:

- The EPA would be required to create regulations for the disposal of materials containing PFAS or aqueous film forming foam. Within one year, the EPA would be required to issue guidance on minimizing the use of, or contact with, firefighting foam and other related equipment containing any PFAS by fire fighters and other first responders, without jeopardizing firefighting efforts. Additionally, materials containing PFAS would be considered hazardous waste for criminal penalty purposes.

- The bill would also require the EPA to promulgate a national primary drinking water regulation for certain PFAS within two years, and would require it to consider regulating additional PFAS or classes of PFAS in drinking water within a set time frame. The EPA would publish a health advisory for PFAS not subject to a national primary drinking water regulation.

- The EPA would be prohibited from imposing financial penalties for a violation of a PFAS national primary drinking water regulation within the first five years after the bill's enactment into law.

- The bill would require the EPA to establish a grant program to financially assist community water systems with treating PFAS contaminated water.

- The EPA would be directed to investigate methods and means to prevent contamination of surface waters, including those used for drinking water, by certain PFAS.

- An owner or operator of an industrial source would be prohibited from introducing PFAS into treatment works (systems that treat municipal sewage or industrial wastes) unless such owner or operator first provides certain notices to such treatment works, including notice of the identity and quantity of the introduced PFAS.

- The EPA would biennially review the discharge of PFAS from certain point sources and make a determination whether or not to add certain measureable PFAS to the list of toxic pollutants, or to establish effluent limitations and pretreatment standards for such PFAS.

The Biden Administration's Stance on PFAS

Even if the reintroduction of HR 535 again fails in the Senate, the Biden administration would likely consider pursuing actions via the executive action to limit PFAS exposure. Such actions could include Superfund designation of PFAS as hazardous substances. The Biden administration's online environmental justice platform (https://joebiden.com/environmental-justice-plan/) has already signaled that it intends to prioritize PFAS regulation by:

> . . .designating PFAS as a hazardous substance, setting enforceable limits for PFAS in the Safe Drinking Water Act, prioritizing substitutes through procurement, and accelerating toxicity studies and research on PFAS.

Conclusion and Implications

HR 535 is intended to create a safer working environment for those exposed to PFAS while also reducing the exposure of PFAS in drinking water supplies. However, whether this bill becomes law depends largely on the balance of power in Congress, which as of the data of this writing remains undetermined. Nevertheless, this bill is intended to signal the importance of PFAS regulation in order to encourage action from the executive branch with respect to setting new PFAS controls during the next presidential administration. For more information on HR 535 *see*: https://www.congress.gov/bill/116th-congress/house-bill/535

(Gabriel J. Pitassi, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE ISSUES FINAL EIS FOR CHANGES TO MIGRATORY BIRD TREATY ACT

On November 27, 2020, the U.S. Fish and Wildlife Service (FWS or Service) published a final Environmental Impact Statement (EIS) analyzing a proposed rule change to the Migratory Bird Treaty Act (MBTA) that would significantly reduce potential liability under the statute, including for water agencies. Specifically, the proposed rule would adopt a regulation exempting activities that incidentally result in "take" of protected bird species from the scope of the MBTA's prohibitions, meaning that the MBTA would only reach, and create potential civil or criminal liability for, actions designed to intentionally kill or harm migratory birds, their nests, or their eggs. [U.S. Department of the Interior Fish & Wildlife Serv., *Regulations Governing Take of Migratory Birds: Final Environmental Impact Statement* (November 2020).]

Background

The FWS is the federal agency delegated the primary responsibility for managing migratory birds consistent with four international migratory bird treaties (between the United States and Canada, Mexico, Japan, and Russia) and implementing the MBTA. The MBTA was enacted in 1918 to help fulfill the United States' obligations under the 1916 "Convention between the United States and Great Britain for the protection of Migratory Birds." The goal of the MBTA was to stop the unregulated killing of migratory birds at the federal level.

On December 22, 2017, the principal deputy solicitor of the Department of the Interior (Solicitor), exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-Opinion 37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." M-Opinion 37050 concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions intentionally or purposefully "taking" migratory birds, their nests or their eggs. In response to this opinion, several environmental groups took legal action in federal court, alleging that the proposed interpretation would severely rollback the ability of the federal government to prosecute industries for violations of the MBTA.

The FWS sought to adopt the Solicitor's opinion, publishing a proposed rule codifying M-Opinion 37050 on February 3, 2020. Following the administrative process required by the National Environmental Policy Act (NEPA), the Service released a draft Environmental Impact Statement on June 5, 2020. After the issuance of the proposed rule and draft EIS, a U.S. District Court vacated M-Opinion 37050. (*See, Natural Resources Defense Council v. U.S. Department of the Interior*, ___F.Supp.3d___, Case 18-cv-4596(S.D. N.Y. Aug. 11, 2020); *see:* https://www.biologicaldiversity.org/species/birds/pdfs/Migratory-Bird-Treaty-Act-Ruling.pdf)

In response to the court's *vacatur* of the M-Opinion, the FWS continued to proceed through the NEPA process. On November 27, 2020, the Service published the final EIS, providing responses to comments received throughout the process. The final EIS is available for public review for 30 days, after which the Service will issue a Record of Decision (ROD). *See*: https://www.fws.gov/regulations/mbta/.

After the ROD is issued, the final step of the rulemaking process will be the publication of a final rule.

The Migratory Bird Treaty Act and 'Takings'

The MBTA makes it unlawful to, among other things, take individuals of many bird species found in the United States, unless that taking is authorized by a regulation promulgated under 16 U.S.C.§ 704. 16 U.S.C. § 703. "Take" is defined in the Service's general wildlife regulations as "to pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R § 10.12. Prior to M-Opinion 37050, § 703 of the MBTA was interpreted as a strict liability provision, meaning that no criminal intent is required for a violation to have taken place, any act that takes or kills a bird must be covered as long as the act results in the death of a bird. M-Opinion 37041 at 2 (January 10, 2017). Instead, the FWS relied on enforce-

ment discretion to determine when to pursue alleged incidental take violations. *Id.* at 12.

However, federal courts have adopted different views on whether the MBTA prohibits the "incidental take" of migratory birds. Some Courts of Appeal and District Courts have held that the MBTA criminalizes certain activities that incidentally take migratory birds, generally with some form of limiting construction, while others have indicated that it does not. For instance, the FWS did not enforce incidental take of migratory birds within the jurisdiction of the Fifth Circuit Court of Appeals because that court held the MBTA does not prohibit incidental take. *See: United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

The Fish and Wildlife Service's Proposed Rule

By its most recent action, the Service proposes to develop a regulation in 50 C.F.R part 10 that defines the scope of the MBTA to exclude incidental take, claiming that the adoption of the regulation is necessary to provide legal certainty for the public regarding what actions are prohibited under the MBTA.

In the proposed rule, the FWS seeks to interpret the MBTA to prohibit only actions directed at migratory birds, their nests, or their eggs, clarifying that incidental take is not prohibited. With the proposed rule, the Service proposes to adopt a regulation defining the scope of the MBTA's prohibitions to reach only activities expressly directed at killing migratory birds, their nests, or their eggs. In other words, take of a migratory bird, its nest, or eggs that is incidental to another lawful activity does not violate the MBTA, and the MBTA's criminal provisions do not apply to those activities. Only deliberate acts intended to take a migratory bird are prohibited under the MBTA. As a result, this interpretation would significantly reduce the activities that would result in liability under the MBTA, including activities undertaken by water agencies that may inadvertently lead to take of migratory birds.

Conclusion and Implications

The Record of Decision for the proposed rule is due to be issued at the end of December, after which the final rule will be published. Given the controversy surrounding this issue and previous litigation attempts, it remains to be seen if there will be any last-minute legal challenges. Ultimately, the proposed rule will significantly change current enforcement of the MBTA. However, with a Biden administration coming to office in January 2021, it is possible that these changes to the MBTA may be reversed. (Geremy Holm, Steve Anderson)

NOAA REPORTS HALF OF THE UNITED STATES IS MIRED IN DROUGHT CONDITIONS

The National Oceanic and Atmospheric Administration (NOAA) recently reported 47 percent of the contiguous United States to be experiencing drought conditions due to lack of precipitation and higher than average temperatures. Looking ahead, federal climatologists are reportedly not optimistic that conditions will improve during the winter season.

U.S. Drought Conditions

NOAA reports that in 2020, drought conditions broadened and intensified throughout the western United States, particularly in California, the Four Corners region and western Texas, due to a lack of seasonal monsoons over the past two years.

According to the NOAA, many climatologists project that La Niña conditions, which are characterized by below-average sea surface temperatures resulting in below-average precipitation, are likely to continue throughout the winter and early spring seasons, providing little relief to the western United States. At the same time, unprecedented wildfires in the region have been exacerbated as a result of the emerging drought conditions. Colorado, Oregon, and California each experienced their largest wildfires on record in 2020. California, in particular, now seeks to mitigate risks of subsequent landslides and pronounced flooding in burn areas.

California Drought Conditions

According to the United States Drought Monitor (USDM), more than three-quarters of California is experiencing at least some level of drought condi-

tions. The USDM categorizes drought levels at moderate, severe, extreme, or exceptional. The USDM estimates that more than 30 million or, approximately 77 percent of the state's population, live in areas in drought conditions.

Additional relevant data regarding California drought and water supply conditions includes:

The California Department of Water Resources (DWR) eight precipitation stations in northern California recorded a record low 0 percent of average historic rainfall in October 2020 and 53 percent of average in November.

Most of the state's major reservoirs are lower than historical average to date compared to last year. The federal Central Valley Project's (CVP) largest reservoir was recently reported to hold 75 percent of its historical average for this time of year compared to 119 percent of its historical average at the same time in 2019. Lake Oroville, the State Water Project's largest reservoir, recently reported holding just 61 percent compared to 90 percent of its historical average to date in 2019. San Luis Reservoir, a joint-use facility for the State Water Project and CVP, reported holding 76 percent compared to 72 percent of its historical average to date in 2019.

Looking to the watershed areas, recent statewide mountain area soil water equivalent (SWE) was reported at just 47 percent of normal. The current regional breakdown (percentage of normal SWE) is as follows: Northern Sierra/Trinity–46 percent, Central Sierra–53 percent, and Southern Sierra–29 percent.

Finally, areas of severe drought and extreme drought expanded in southern California where precipitation during a recent 90-day reporting period was generally less than 25 percent of normal.

California Department of Water Resources Initial State Water Project Allocations

Due to the drying conditions statewide, DWR announced in December its initial State Water Project allocation of just 10 percent of requested supplies for 2021. The allocation amounts to 422,848 acre-feet of water, enough to serve approximately 27 million Californians and 750,000 acres of farmland. The 2021 percentage allocation matches DWR's initial allocation for 2020.

Allocations are based on conservative assumptions of hydrological conditions statewide, the state's snowpack levels, and reservoir storage, among other factors. DWR allocations are reviewed monthly and are subject to change, as they did last year when DWR eventually revised its allocation to 20 percent in May of 2020.

Conclusion and Implications

While drought conditions may improve, the early signs are troubling. Both the broadening of the drought, now affecting nearly half the United States, and the increased severity of the drought in places like California are of particular concern. In California, the drought has prompted a statewide governmental response addressing water policy, project funding, and broad stakeholder involvement. Will a multi-regional drought demand further actions? Stay tuned. As this article went to "print" northern California received several storms.
(Chris Carrillo, Derek R. Hoffman)

DEPARTMENT OF WATER RESOURCES REPORT TO THE CALIFORNIA WATER COMMISSION HIGHLIGHTS IMPACTS OF SUBSIDENCE ON THE CALIFORNIA AQUEDUCT

In November 2020, the California Department of Water Resources (DWR) provided an update to the California Water Commission (Commission) on several issues affecting the State Water Project (SWP). The update included information related to the impact of subsidence on the California Aqueduct, modernizing SWP fire and safety features, lining and repairing aqueducts and embankments, and other maintenance, improvements, and repairs being made to the SWP.

Background

The State Water Project is a water storage and delivery system comprised of reservoirs, aqueducts, power plants, and pumping plants spanning more

than 700 miles from northern to southern California. Water from rain and snowmelt is stored in SWP conservation facilities before flowing through the Sacramento-San Joaquin Delta and being delivered by way of SWP transportation facilities, including the 444-mile California Aqueduct through the Central Valley. According to DWR, the SWP supplies water to more than 27 million people across California, and irrigates roughly 750,000 acres of farmland. The SWP is capable of delivering roughly 4.2 million acre-feet of water per year. However, the amount of water available to water contractors varies each year because supply is impacted by variability in precipitation and snowpack, operational conditions, as well as environmental and other legal constraints.

The Commission is comprised of nine members who are appointed by the Governor and confirmed by the State Senate. The Commission provides a variety of functions, including advising the Director of DWR on matters within DWR's jurisdiction, approving rules and regulations, and monitoring and reporting on the construction and operation of the SWP. The Commission is also responsible for the distribution of public funds set aside for the public benefits of water storage projects, and developing regulations for the quantification and management of those benefits.

The DWR Update on Subsidence

At the Commission's November 2020 meeting, DWR updated the Commission on subsidence affecting the California Aqueduct. According to DWR, subsidence, or the sinking of land, has occurred throughout California for almost a century. Before the California aqueduct was built in the 1960s, land near the aqueduct sank as much as 20 to 30 feet as a result of nearby groundwater pumping. While subsidence initially stabilized after the aqueduct was constructed and water delivered to adjacent areas, the aqueduct has sustained a significant increase in subsidence rates in more recent times. For instance, during the drought between 2013 to 2016, some areas along the aqueduct sunk nearly three feet.

DWR prepared a subsidence report in 2017, and a supplemental report in 2019, addressing the impacts of subsidence. According to DWR, deep groundwater pumping is the primary cause of significant subsidence, and is exacerbated by extended periods of drought. Moreover, DWR reports that the effects of climate change will also likely exacerbate increasing subsidence rates, and the conversion of row crops, which are often fallowed in dry years, to orchards and vineyards that cannot be fallowed in dry years, resulting in more subsidence when surface water is unavailable.

The impacts of subsidence, according to DWR's reports, include increased water delivery costs, reduced flow capacity of the California Aqueduct in areas affected by subsidence, and higher operating and electricity costs to move higher volumes of water during on-peak hours. Moreover, subsidence decreases the reliability of the California Aqueduct. Specifically, as the aqueduct sinks, the risk increases that water will spill over the aqueduct's liner. Such spillages can result in erosion or damage to other delivery structures, delivery losses, flooding, and require emergency outages of the aqueduct. These impacts require DWR to continue physically raising the aqueduct lining and embankments, as well as repairing or modifying appurtenant structures.

At the November Commission meeting, DWR reported that over two feet of subsidence along the aqueduct from groundwater pumping during the recent drought cannot be recovered, and that the capacity of the California Aqueduct has been reduced by up to 33 percent in some locations. Ultimately, reduced capacity in the aqueduct reduces its operational flexibility and efficiency, while at the same time increasing maintenance and operation costs. However, DWR suggested that the Sustainable Groundwater Management Act (SGMA) could help protect the aqueduct from further damage by imposing sustainability requirements for groundwater basins along the path of the facility. Additionally, there are two ongoing projects within DWR's California Aqueduct Subsidence Program that are focused on rehabilitation and recovery efforts. Such efforts include raising 35 miles of the aqueduct, reconstructing or repairing parts of the aqueduct, raising bridges, relocating utility crossings, and raising turnout structures. According to DWR, key considerations moving forward include restoring capacity of the aqueduct for reliable water delivery, restoring operational flexibility, ensuring infrastructure resiliency, improving operational efficiency, and pursuing supplemental funding.

DWR also apprised the Commission of recent upgrades, repairs, and maintenance efforts for the benefit of the SWP. Such efforts include modernizing the SWP's fire and safety infrastructure in light

of the 2012 Thermalito Powerhouse fire, lining the California Aqueduct and repairing cracked embankments based on the level of risk posed to operations, assessing the integrity of SWP pipelines to ensure continued water deliveries, and various gate, dam, and spillway repairs or improvement projects required by regulation or aging infrastructure. In particular, maintenance on the East Branch of the SWP in the San Bernardino area of southern California was successfully completed, while seismic retrofitting is being made to Anderson Reservoir near the South Bay Aqueduct and the Castaic Dam Tower Bridge in Los Angeles County. Radial gate maintenance and repair along the California Aqueduct is also ongoing, and spillway improvements are being made to Cedar Dam in San Bernardino County and Pyramid Dam in Los Angeles County.

Conclusion and Implications

The State Water Projet is a critical water supply and delivery system to almost 27 million Californians. DWR's report to the Commission presents some concerning aspects related to subsidence and its impact on the California Aqueduct. There is a hope that a combination of efforts focused on the physical facilities and implementation of SGMA may help to alleviate some of the subsidence issues. DWR Subsidence PowerPoint available at: https://cwc.ca.gov/-/media/CWC-Website/Files/Documents/2020/11_November/November2020_Item_10_Attach_1_PowerPoint.pdf?la=en&hash=1FBB9F361DBE0A21DDCD0F431000BC00D9062808
(Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS CHALLENGE THE DEPARTMENT OF WATER RESOURCES' ADOPTION OF BOND RESOLUTIONS FOR DELTA CONVEYANCE PROJECT UNDER CEQA

On October 28, 2020, the Sierra Club, Center for Biological Diversity, Planning and Conservation League, Restore the Delta, and Friends of Stone Lakes National Wildlife Refuge (Petitioners) filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (Petition) against the California Department of Water Resources (DWR).

The Petition challenges DWR's adoption of its Delta Program Revenue Bond General Bond Resolution and two supplemental resolutions (collectively: Bond Resolutions) under the California Environmental Quality Act (CEQA), and alleges that DWR should have prepared an Environmental Impact Report (EIR) analyzing the effects of a new water conveyance project in the Sacramento-San Joaquin River Delta (Delta) before it adopted the Bond Resolutions. [*Sierra Club v. California Dept. of Water Resources*, Sacramento County Superior Court, Case No. 34-2020-80003517.]

Background

On July 21, 2017, DWR gave final approval to and certified the Final EIR for the California WaterFix project. Complaint at ¶ 26. The WaterFix project proposed to construct two tunnels just north of the Sacramento-San Joaquin Bay Delta that would convey large quantities of water from the Sacramento River to the Banks Pumping Plant for export south. *Id.* at ¶¶ 2, 26. DWR adopted bond resolutions to pay for the WaterFix Project and filed a validation action in Sacramento County Superior Court to validate the bond resolutions and bonds. *Id.* at ¶ 27. One month later, Petitioners joined in an action challenging DWR's EIR for the WaterFix Project under CEQA. *Id.* Ultimately, after a total of seventeen lawsuits challenging the WaterFix project had been filed, DWR rescinded its approval of the project, set aside its certification of the Final EIR, and rescinded the bond authorizations for WaterFix in May 2019. *Id.* at ¶¶ 31-32.

On January 15, 2020, DWR issued a Notice of Preparation of EIR (NOP) for a new project that would "construct and operate new conveyance facilities in the Delta" that would add to existing State Water Project infrastructure. *Id.* at ¶ 37. Whereas the WaterFix Project proposed the construction and operation of two tunnels to facilitate the export of water from the Delta, the new Delta Conveyance Project would convey water through a single tunnel underneath the Delta to the Banks Pumping Plant for export south. *Id.* at ¶ 2. In April 2020, Petitioners submitted comments on the NOP arguing that: 1) the Draft EIR was required to set forth a range of reasonable alternatives to the Delta Tunnels Project; 2) that the Delta Conveyance Project would violate the Delta Reform Act and California's public trust doctrine; and 3) that DWR must disclose and assess the future reduction in claimed needs for the Delta Conveyance Project as a result of new technologies and curtailed exports. *Id.* at ¶¶ 40-41.

DWR adopted the Bond Resolutions on August 6, 2020. On the same day, DWR filed a validation action pursuant to Code of Civil Procedure sections 860 *et seq.* seeking to confirm the validity of the proposed revenue bonds authorized by the Bond Resolutions. *Id.* at ¶ 43-45; *see also, California Dept. of Water Resources v. All Persons Interested in the Matter of the Authorization of Delta Program Revenue Bonds*, Sacramento County Superior Court, Case No. 34-2020-00283112.

CEQA and the Bond Resolutions

CEQA generally requires that state and local agencies analyze the environmental effects of projects they approve and mitigate any significant environmental effects to the extent it is feasible to do so. Cal. Pub. Res. Code § 21000 *et seq.* Petitioners contend that DWR's adoption of the Bond Resolutions violates CEQA on multiple grounds.

First, Petitioners allege that DWR's adoption of

the Bond Resolutions violates Public Resources Code § 21102. Complaint at ¶ 60. Public Resources Code § 21102 provides that "[f]easibility and planning studies for possible future actions" that have not been adopted by a public agency do not require the preparation of an EIR before they authorized by the agency. Petitioners contend that the Bond Resolutions are not limited to funding feasibility or planning studies for possible future actions because they authorize revenue bonds to fund the "acquisition, construction, operation, and maintenance" of the Delta Conveyance Project. *Id.* at ¶ 58.

Second, Petitioners allege that DWR's adoption of the Bond Resolutions constituted a discretionary approval of the Delta Conveyance Project that is likely to cause significant environmental effects without adequate environmental review under CEQA. *See id.* at ¶ 64. Although CEQA Guidelines § 15378(b)(4) exempts "government funding mechanisms" and other "government fiscal activities" from environmental review under CEQA, Petitioners charge that the Bond Resolutions fall outside this exemption because they effectively commit DWR to the Delta Conveyance Project. *Id.* at ¶ 67. Relatedly, Petitioners contend that DWR's adoption of the Bond Resolutions unlawfully limits alternatives to the Delta Conveyance Project that DWR must consider when it prepares an EIR for the Delta Conveyance Project. *Id.* at ¶ 63.

Finally, Petitioners allege that DWR's decision to adopt the Bond Resolutions before preparing and certifying an EIR for the Delta Conveyance Project improperly deferred CEQA review of the Project. Petitioners contend that by adopting the Bond Resolutions, DWR has effectively "piecemealed" the Delta Conveyance Project by breaking the project into smaller pieces to evade its obligation to analyze the environmental effects of the entire project. *Id.* at ¶¶ 68-69.

Conclusion and Implications

As of December 19, 2020, DWR has not filed its responsive pleading to the Petition. However, DWR has taken the position that the Bond Resolutions are for the purpose of confirming DWR's legal authority to authorize and issue bonds, and do not commit DWR to any particular course of action.

The Petition has been assigned to Judge Laurie Earl of the Sacramento County Superior Court for all purposes. If Petitioners prevail in their challenge to the Bond Resolutions, the court could direct DWR to rescind and set aside its adoption of the Bond Resolutions and enjoin DWR from taking further action in connection with the Delta Conveyance Project until DWR has complied with CEQA.

A copy of the Petition is available here: https://www.courthousenews.com/wp-content/uploads/2020/10/DeltaTunnels-COMPLAINT.pdf. (Sam Bivins, Meredith Nikkel)

SIERRA CLUB FILES CEQA CHALLENGE TO PROPOSED NEW OFF-STREAM STORAGE FOR THE CENTRAL VALLEY PROJECT

On November 20, 2020, a coalition of environmental groups filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief and attorney's fees (Petition) challenging the Del Puerto Water District's (District) approval of the Del Puerto Canyon Reservoir Project (Project) and the certification of the Project's Final Environmental Impact Report (Final EIR). Specifically, the Petition alleges that that the District's approval of the Project and certification of the Project's Final EIR: 1) violated the California Environmental Quality Act (CEQA) by failing to adequately describe, analyze, and mitigate the Project's potential environmental impacts, and 2) violated Code of Civil Procedure §§ 1085 and 1094.5 by failing to proceed in the manner required by law. [*Sierra Club, et al. v. Del Puerto Water District, et al.*, Stanislaus County Superior Court, No. CV-20-005193.]

Factual Background

The District, in partnership with the San Joaquin River Exchange Contractors Water Authority, has proposed the Del Puerto Canyon Reservoir Project in an effort to increase water storage capacity in California's Central Valley. Del Puerto Canyon Reservoir Final EIR, Executive Summary (Oct. 2020) at ES-1.

The proposed Project is located in Stanislaus County just west of the City of Patterson and south of the Sacramento-San Joaquin Delta. *See id.* at ES-1-ES-3. The proposed Project involves construction and operation of a reservoir on Del Puerto Creek to provide approximately 82,000 acre-feet of new off-stream storage to the Central Valley Project (CVP). *Id.* Project components are the reservoir (including the main dam and three saddle dams), conveyance facilities to transport water to and from the Delta-Mendota Canal (including a pipeline and pumping plant), electrical facilities, relocation of Del Puerto Canyon Road, and relocation of existing and proposed utilities that are within the project area. *Id.*

The District issued a Notice of Preparation of an Environmental Impact Report and Scoping Meeting for the Project on June 26, 2019, and then a Draft EIR on December 12, 2019. Petition at ¶ 26-28. The Final EIR was issued on October 9, 2020—consisting of three volumes and over 1,500 pages—and the District approved the Project on October 21, 2020. *Id.* at ¶¶ 29, 33.

The Lawsuit

Filed in the Superior Court for the County of Stanislaus by Sierra Club, California Native Plant Society, Center for Biological Diversity, and Friends of the River, the Petition challenges the District's certification of the Final EIR and approval of the Project under CEQA.

CEQA Analyses

The petitioners' First Cause of Action for Approval of the Project as Contrary to Requirements of CEQA alleges that the District violated CEQA by failing to adequately describe, analyze, and mitigate the Project's potential environmental impacts. *Id.* at ¶ 37. Among other arguments, Petitioners contend that that the "FEIR segments the Project both temporally and geographically, and thereby fails to fully disclose the Project's environmental impacts" by, for example, failing to discuss Project impacts to downstream terrestrial biological resources and amphibians, and by failing to discuss how the Project's intended increase in available water supplies will affect pumping in the Delta. *Id.* at ¶¶ 52, 52c. Petitioners also argue the Final EIR unlawfully defers mitigation measures by, for example, deferring to the future "development of a plan to mitigate the Project's impacts on cultural resources." *Id.* at ¶¶ 68, 68c. Petitioners argue the Final EIR's alternatives analysis is inadequate because it states the Project objective as constructing "a dam with a capacity of at least 80.000 acre-feet" rather than the "actual goal of increasing the reliability of the District's water supplies." *Id.* at ¶ 74. They also argue the Final EIR fails to meaningfully respond to public comments, such as one comment from the Department of Fish and Wildlife requesting a buffer zone around active hawk nests. *Id.* at ¶ 89. Further arguments include failure to consult with and obtain comments from the City of Patterson and County of Stanislaus, and failure to recirculate the draft EIR after significant new information arose. (*Id.* at ¶¶ 81, 94.

Additional Allegations and Relief Sought

Petitioners' Second Cause of Action for Project Approvals as Contrary to Code of Civil Procedure §§ 1085 and 1094.5 contends the District violated Code of Civil Procedure by failing to proceed in a manner required by law by approving the Project and certifying the EIR notwithstanding CEQA violations. *Id.* at ¶¶ 102-104. Accordingly, petitioners' Prayer for Relief includes: 1) alternative and peremptory writs of mandate, declaratory judgment, and permanent injunction, setting aside and enjoining DPWR's actions in certifying the Project's EIR and approving the Project, 2) a temporary restraining order, stay order, preliminary injunction, and alternative and peremptory writs of mandate, enjoining and restraining DPWR and its partners from taking any action to implement the Project that could result in any change or alteration to the physical environment pending CEQA compliance, 3) attorney's fees, 4) costs of suit, and 5) any other relief the court deems just and proper. Petition, Prayer for Relief at ¶¶ 1-5.

Conclusion and Implications

If the Petitioners are successful, the District may be required to prepare a new or amended document in compliance with CEQA or take other remedial actions in order to move forward with the Project. As of December 14, 2020, neither the DPWD nor any real parties in interest have responded to the Petition. A copy of the Petition is available at: https://www.courthousenews.com/wp-content/uploads/2020/11/DelPuertoDam-COMPLAINT.pdf.
(Holly Tokar, Meredith Nikkel)

RECENT FEDERAL DECISIONS

DISTRICT COURT ADDRESSES LESSOR LIABILITY UNDER THE CLEAN WATER ACT FOR VIOLATIONS OF FORMER TENANTS UNDER A TERMINATED GENERAL PERMIT

Puget Soundkeeper Alliance v. APM Terminals Tacoma, LLC, ___F.Supp.3d___, Case No. C17-5016 BHS (W.D. Wash. Nov. 17, 2020).

The U.S. District Court for the Western District of Washington recently granted in part and denied in part motions for summary judgment following a lengthy docket on a federal Clean Water Act (CWA) case regarding liability for successor permittees. The court ruled that once a permit holder has terminated its lease, and terminates its permit, violations of the CWA are not considered ongoing as to the lessor. Therefore, the Port was not held liable for violations of its former lessee.

Factual and Procedural Background

APM Terminals Tacoma, LLC (APM) secured a lease with the Port of Tacoma (Port), and obtained an Industrial Stormwater General Permit (ISGP) to discharge pollutants near the Tacoma Port. In a 2013 annual report, APM admitted to exceeding established benchmarks for pollutants for all four quarters, resulting in Level 1, 2, and 3 corrective action requirements under the ISGP.

In 2017, following discussions with the Washington Department of Ecology (Ecology) to consider corrective actions, including the construction of a new stormwater treatment system, APM terminated its lease, and the Port assumed the design and construction of the stormwater treatment system. Thereafter, the Port applied for a new ISGP through Ecology. Following public comment, Puget Soundkeeper Alliance (Soundkeeper) opposed the new ISGP, indicating in their opposition that the ISGP needed to either include an administrative order for the Port to implement Level 3 corrective actions or to transfer APM's ISGP to the Port.

In October 2017, Ecology issued the new ISGP and signed an Agreed Order with the Port agreeing to implement best management practices, create a new Stormwater Pollution Prevention Plan (SWPPP), and construct the stormwater treatment system by September 30, 2018.

Plaintiff Soundkeeper filed its complaint in January 2017 against APM for the violation of the National Pollutant Discharge Elimination System (NPDES), listing the Port as a defendant in an amended complaint in November 2017. After a series of amended complaints, Soundkeeper and the Port filed cross motions for summary judgment.

Soundkeeper moved for partial summary judgment that it had standing to bring the action, that the Port is jointly liable for alleged violations that occurred during APM's tenancy, that the Port is liable for failing to monitor discharges from the wharf and to identify the wharf in its Stormwater Pollution Prevention Plan. The Port moved for summary judgment on Soundkeeper's entire claim against the Port.

The District Court's Decision

A moving party is entitled to judgment when the nonmoving party fails to make a sufficient showing on an essential element of a claim on which the nonmoving party has the burden of proof.

Soundkeeper's Motion for Summary Judgment and Standing

The court first considered Soundkeeper's motion for summary judgment. The court considered and rejected four arguments raised by the Port and determined that Soundkeeper had standing to sue under the CWA citizens suit provision. The Port first argued that standing and subject matter jurisdiction should be determined after the completion of discovery. The court rejected this argument, reasoning that standing was a threshold question to be considered before the merits. Additionally, subject matter jurisdiction can be raised at any time, including before discovery.

Second, the Port argued that Soundkeeper failed to bring sufficient evidence to establish an injury in fact,

as the Port's discharges only had minimal impact on Commencement Bay. The court found that the Port failed to provide adequate authority on its proposition and found for Soundkeeper's authority, which expanded injuries due to CWA violations. Thus, the court found that Soundkeeper provided sufficient evidence to establish an injury in fact.

Third, the Port argued that Soundkeeper had failed to establish the element of causation. The court found this argument without merit as causation is not an element of standing. Rather, courts must consider whether the injuries are "fairly traceable" to the Port's alleged CWA violations.

Fourth, the Port argued that Soundkeeper failed to bring forth redressable claims because the Port was not violating the CWA. However, the court determined that this argument goes to the merits and cannot be used to determine whether Soundkeeper may bring a claim under the citizens' suit provision. Therefore, redressability was not at issue in determining standing for Soundkeeper.

Soundkeeper's Motion for Summary Judgment and Level 3 Violations Liability

The court next considered two arguments related to the Port's liability for the Level 3 corrective actions. First, Soundkeeper argued the Port was liable because the Port managed and oversaw its lessee, APM. The court recognized that the CWA holds those who violate CWA provisions and permits accountable regardless of whether they are a permit holder, however, this determination is a fact-based analysis.

Second, the Port argued that even if the Port was responsible for permit violations, the violations ceased when APM terminated its lease and were not ongoing. Soundkeeper filed the complaint after APM terminated its lease and after APM's permit was terminated. Rather than transfer APM's permit to the Port, Ecology entered into an Agreed Order with the Port to correct the actions of APM. Because Soundkeeper failed to oppose the transfer during public comment and provided no authority to support the proposition that a lessor's alleged violations are continuous after a permit has been terminated, the court denied Soundkeeper's summary judgement and granted the Port's.

Soundkeeper's Motion for Summary Judgment and the Wharf

The court next considered Soundkeeper's argument that the Port was liable for failing to monitor discharges from the wharf and failing to identify the wharf in its SWPPP. The court quickly found for the Port because the wharf was not covered by the ISGP. Thus, Soundkeeper's argument that the Port was liable for its failure in monitoring discharges from the wharf as well as identifying the wharf in the stormwater pollution prevention plan was moot.

The Port's Motion for Summary Judgment

Finally, the court considered the Port's motion for summary judgment on Soundkeeper's claim of liability for the Level 3 corrective actions required for the violation of the ISGP. The court determined that the Port could not be held liable for the violations of APM, as APM had terminated its ISGP when it terminated its lease with the Port. So, while the Port had applied for a new permit and entered into an Agreed Order with Ecology to establish a new stormwater treatment system and commence corrective actions for the former violations, the Port's permit allowed this to be completed by September 30, 2019 at the earliest. Thus, Soundkeeper's decision to file complaint for violations of the Port's ISGP was premature. The court found that the Port was in violation of its Agreed Order with Ecology, however, it was not determined whether a violation of an Agreed Order was grounds for a citizen suit. Thus, the court granted the Port's motion for summary judgement on Soundkeeper's claim of liability for the Level 3 corrective actions.

Conclusion and Implications

A current permit holder cannot be liable for violations that occurred prior to the transition of permit holders, unless the violation is continuous and ongoing. Here, APM's violations ceased when it terminated its permit. Therefore, the Port, as owner and lessor, could not be held liable. The court's ruling is available online at:
https://casetext.com/case/puget-soundkeeper-alliance-v-apm-terminals-tacoma-llc-4
(Kara Coronado, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT FINDS GROUP LACKED STANDING TO SEEK FINES AGAINST COASTAL COMMISSIONERS

Spotlight on Coastal Corruption v. Kinsey, 57 Cal.App.5th 874 (4th Dist. 2020).

A nonprofit "watchdog" group brought an action against California Coastal Commissioners for allegedly violating provisions of the California Coastal Act that prohibit nondisclosure of certain *ex parte* communications and participation in matters without disclosing related *ex parte* communications. The trial court entered judgment for the nonprofit entity and the Coastal Commissioners appealed. The Court of Appeal for the Fourth Judicial District reversed, finding that the nonprofit lacked standing and that another section of the Coastal Act providing for fines does not apply to *ex parte* disclosure violations.

Factual and Procedural Background

This case pertains to "*ex parte* communications" under the California Coastal Act, which is defined to include:

> . . .any oral or written communication between a member of the [C]ommission and an interested person, about a matter within the [C]ommission's jurisdiction, which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.

To ensure open decision-making within this system, the Coastal Act provides in § 30324 that a Commissioner must fully disclose and make public the *ex parte* communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the Commission on the record of the proceeding at that hearing.

Under Coastal Action § 30824, a violation of these provisions is subject to a civil fine, not to exceed $7,500. A Commissioner also is prohibited from participating in a matter about which he or she has knowingly had an unreported *ex parte* communication. Under § 30327, a Commissioner who knowingly violates this section may be fined up to $7,500, in addition to any other applicable penalty, including a civil fine imposed under § 30824. A court also may award attorneys' fees to a prevailing party in litigation.

The plaintiff in this case, Spotlight on Coastal Corruption (Spotlight), filed an action against five Coastal Commissioners. The complaint alleged a cause of action for "Violation of Laws Governing Ex Parte Communications," which the plaintiff divided into three counts. Count 1 alleged violations of the *ex parte* disclosure procedures; Count 2 alleged that each defendant knowingly attempted "to use his or her official position as a member of the Coastal Commission to influence a Commission decision about which each Defendant knowingly had an ex parte communication that was not reported;" and Count 3 alleged that each violation was separately punishable under Coastal Act § 30820(a)(2).

Following trial, the Superior Court determined that certain *ex parte* disclosure violations had occurred and imposed various fines against each of the five defendants. On cross-motions for attorneys' fees, the trial court then determined that Spotlight was the prevailing party. Although defendants defeated approximately 99 percent of Spotlight's monetary claims, the trial court found that Spotlight's "main litigation objective" was to shed light on "lax *ex parte* disclosure practices" and "create changes in those practices," and that this objective had been met.

The Court of Appeal's Decision

Standing

The Court of Appeal first addressed defendants' argument that Spotlight lacked standing to bring counts 1 and 2. Typically, to have standing, a plaintiff must have a "special interest" to be served or some particular right to be preserved or protected over and

above the interest held in common with the public at large. However, in cases seeking a writ of mandate, the California Supreme Court has held that, where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, a petitioner need not show that she has any legal or special interest in the result.

Here, defendants contended that, as a matter of law, such "public interest" standing applies only in mandamus actions, not actions like this case to impose civil fines. The Court of Appeal agreed and found that, contrary to Spotlight's contentions, the complaint lacked essential allegations for a writ of mandate. It also disagreed with the trial court's alternative ruling that public interest standing could be conferred by exercise of discretion, finding this to be erroneous as a matter of law.

Coastal Act Section 30820

The Court of Appeal next addressed Coastal Act § 30820(a)(2). Count 3 of the complaint alleged that each disclosure violation was separately punishable under § 30820(a)(2), which specifies fines of up to an additional $30,000 for "any violation" of the Coastal Act aside from certain development activity addressed in § 30820(a)(1). Unlike Counts 1 and 2, it was not disputed that Spotlight had standing to bring Count 3. Defendants, however, maintained that notwithstanding the general reference in the statute to "any violation" of the Coastal Act, § 30820(a)(2) does not apply to violations of the Act's specific *ex parte* disclosure statutes.

In particular, defendants contended that the phrase "any violation" could not be read in isolation because elsewhere in the Coastal Act (*i.e.*, §§ 30324 and 30327) the California Legislature addressed a unique type of Coastal Act violation—one that only a Commissioner can commit, and that involves the decision-making process. Defendants claimed that to interpret "any violation" in § 30820(a)(2) literally would ignore the legislative intent to essentially create two separate fine regimes: one for development-related violations, and the other for *ex parte* communication disclosure violations.

After analyzing the statutory language and conducting an in-depth review of the legislative history, the Court of Appeal agreed with the defendants, finding that § 30820(a)(2) does not apply to *ex parte* communication disclosure violations punishable under §§ 30324, 30327, and 30824. Thus, to the extent that the trial court judgment had been based on violations of these statutes under Count 3, the judgment was reversed. Further, because the judgment was reversed, the Court of Appeal also reversed the prevailing party attorneys' fee and cost award.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the Coastal Act's *ex parte* disclosure requirements, including potential civil fines for violations. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D074673M.PDF
(James Purvis)

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