

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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FEATURE ARTICLE

ENVIRONMENTAL JUSTICE IN GENERAL PLANS

By Michele A. Staples, Esq.

The California Governor’s Office of Planning and Research (OPR) updated its General Plan Environmental Justice Element Guidelines in June 2020 to address the Environmental Justice (EJ) requirements of Senate Bill 1000 of 2016, The Planning for Healthy Communities Act. ([General Plan Guidelines Chapter 4: Environmental Justice Element \(ca.gov\)](#).) The following is an overview of the EJ goals, requirements, procedures and tools, as well as insights into how they can inform diligence investigations for property acquisition and guide development project conceptualization. The land use law-water law practice overlap for attorneys can at times be substantial. OPR’s Guidelines include access to clean water supply.

The General Plan as the Planning and Land Use Framework

Every California city and county must have a General Plan, a long-term vision for their future growth and development. The California Supreme Court has characterized the General Plan as the “constitution” for a city’s or county’s growth and development. Like the state and federal constitutions, the General Plan sets the policy framework for the city or county which is then implemented through programs, ordinances and regulations. Virtually every land use decision in California is based on the city’s or county’s General Plan, including development project approvals. Development projects consistent with the General Plan can benefit from streamlined review while those inconsistent with the General Plan can be denied or their approvals overturned. In jurisdictions where the General Plan is found to be inadequate, courts have temporarily halted development project approvals until a legally valid General Plan is approved. As a

result, the General Plan is the jurisdiction’s critical community planning document as well as the starting point for planners and land use practitioners evaluating property acquisitions, conceptualizing development projects and crunching projects *pro forma*.

General Plans are required to include seven “Elements”: Land Use, Housing, Transportation, Conservation, Open Space, Safety and Noise. (Gov. Code § 65302(a)-(g).) Each element has certain requirements that have evolved over time. Increased study and awareness of societal effects of unjust planning practices lead to Senate Bill (SB) 1000. SB 1000 requires cities and counties with identified disadvantaged communities in their jurisdictions to include an EJ Element or incorporate EJ policies in other General Plan elements. (Gov. Code, § 65302(h).) SB 1000 aims to correct the inequity to minority and low-income communities resulting from California’s history of discriminatory land use policies by reducing the pollution experienced by these communities and ensuring their input is considered in planning decisions that affect them.

Environmental Justice and Disadvantaged Communities Defined

EJ is defined as:

...the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. (Gov. Code, section 65040.12(e).)

Cities and counties with an identified “disadvantaged community” that revise two or more General

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Plan Elements concurrently are required to incorporate EJ into their General Plans. OPR strongly encourages jurisdictions without formally-defined disadvantaged communities to consider creating an optional EJ Element in order to promote equity and protect health and wellness in their communities.

Local jurisdictions have discretion to identify a disadvantaged community based on three identification methods in SB 1000. The first method of defining a disadvantaged community is based on the score calculated by the California Communities Environmental Health Screening Tool (CalEnviroScreen) developed by CalEPA's Office of Environmental Health Hazard Assessment as a mapping tool to identify environmentally burdened and vulnerable communities for investment opportunity under the state's Greenhouse Gas Reduction Fund Cap-and-Trade program. 25 percent of the proceeds from the fund must be spent on projects located in disadvantaged communities. Known as California Climate Investments, these funds are aimed at improving public health, quality of life and economic opportunity in identified disadvantaged communities while reducing greenhouse gas emissions.

The CalEnviroScreen model scores each of California's 8,000 census tracts based on 12 types of pollution burden such as pesticide use, drinking water contaminants and proximity to hazardous waste generators and facilities, and eight socioeconomic and health-related characteristics indicators related to pollution including low-income, asthma and cardiovascular disease. The census tracts that score the highest are the most burdened and most vulnerable to pollution. Under the first method for identifying disadvantaged community, an area is a disadvantaged community if it scores 75 percent or higher on CalEnviroScreen. (Gov. Code, § 65302, subd. (h)(4) (A).)

The other two definitions of disadvantaged community in SB 1000 are based on low-income areas having a disproportionate pollution burden or other hazards that can lead to negative health effects, exposure or environmental degradation. SB 1000 defines a "low-income area" as: 1) an area with household incomes at or below 80 percent of the statewide median income, or 2) an area with household incomes at or below the threshold designated as low income by the Department of Housing and Community Development's list of state income limits. If the local

jurisdiction identifies low-income areas, it must then evaluate whether these areas are disproportionately affected by environmental pollution that can lead to negative health impacts, pollution exposures or environmental degradation. The CalEnviroScreen mapping tool displays its individual data layers that cities and counties can use as part of their examination of whether low-income areas may be disproportionately burdened by pollution. Tiffany Eng, the California Environmental Justice Alliance's Green Zones Program Manager, suggests that jurisdictions can identify disadvantaged communities within their boundaries by layering available data such as air quality data, local tribal areas, ethnicity, and other socio-economic demographic information to create a composite map.

OPR recommends that jurisdictions conduct early community engagement, particularly with low-income communities, communities of color, sensitive populations, tribal governments, and organizations focused on public health and EJ during the disadvantaged communities screening process. This can help to ensure that the location of disadvantaged communities is accurately identified and the nature of their environmental burdens, concerns and needs are specifically defined.

The OPR Guidelines encourage cities and counties to go beyond the SB 1000 statutory definition when identifying disadvantaged communities within their jurisdiction and also consider issues unique to areas within their jurisdiction which might not be reflected in the statewide data sets, such as a high pollution burden for one type of pollutant even when the overall CalEnviroScreen score is less than 75 percent, or the regional cost of living. For example, OPR suggests that, depending on the data and information available, local governments should consider whether there are disadvantaged communities in geographic units smaller than a census tract to ensure that all disadvantaged communities are recognized.

In addition to helping cities and counties define the presence, location and needs of disadvantaged communities within their jurisdiction for purposes of General Plan EJ policies, the CalEnviroScreen mapping tool provides a wealth of information that can help identify project opportunities and constraints such as identified pollutants, groundwater threats, noise and other environmental hazards in the project site vicinity, as well EJ policies that discourage or promote certain types of development projects within areas identified as disadvantaged communities.

The Environmental Justice Process

Upon completion of the screening process, the city or county is required to include detailed information in the General Plan identifying and clearly defining the disadvantaged communities within the area covered by the General Plan, including their location and the nature of their environmental burdens, health risks and needs. The General Plan's EJ topics include information such as pollution exposure including air quality, water quality and land use compatibility; public facilities; accessibility to public transit, employment and services; health risks such as high fire threat and seismic risk areas; civic or community engagement; and prioritization of improvements.

Once the needs are clearly defined, local agencies are to develop draft goals, objectives, policies and programs to reduce health risks and associated issues with the aim to ensure fair treatment and meaningful involvement of people of all races, cultures, incomes and national origins. Government Code § 65302(h) requires the General Plan to identify specific EJ objectives and policies that do at least the following:

- Reduce exposure to pollution including improving air quality in disadvantaged communities. The OPR Guidelines suggest this could include land use and project siting, transportation improvements, tobacco smoke, pesticide drift and water quality, accessibility and affordability.
- Promote public facilities in disadvantaged communities. Examples include equitable access and connections to public services and community amenities.
- Promote food access in disadvantaged communities. Examples include streamlining project approvals for grocery stores in underserved areas, promoting community gardens and improving connectivity and transportation to provide access to grocery stores and farmer's markets.
- Promote safe and sanitary homes in disadvantaged communities. Examples include siting new housing near transportation and amenities, enforcing code requirements and providing and preserving affordable housing.
- Promote physical activity in disadvantaged

communities. Examples include prioritizing park improvements in underserved areas; shared use agreements with schools, places of worship and other private properties; and planning connected bike and pedestrian routes and pathways.

- Reduce any unique or compounded health risks in disadvantaged communities not otherwise addressed above. The OPR Guidelines discuss in some depth the example of disadvantaged communities' heightened risk and increased sensitivity to climate change with less capacity and fewer resources to cope with, adapt to or recover from climate impacts.
- Promote civic engagement in the public decision-making process in disadvantaged communities. Examples given in the OPR Guidelines include partnering with community-based organizations, advocacy groups, and trusted leaders that work within the identified disadvantaged communities, and continuing to engage disadvantaged communities in General Plan implementation including review of new development projects, capital improvement plans, and other programs.

According to Ms. Eng, effective community outreach efforts have involved the participation of neighborhood schools, churches, housing justice organizations and environmental justice groups. One real measurement of EJ adequacy is whether community recommendations and feedback are incorporated into the final policies.

OPR's guidance on the EJ process puts a premium on community engagement in defining needs and developing and vetting policies. Likewise, the California Attorney General's comments on several cities' and counties' proposed EJ policies (posted at [SB 1000 - Environmental Justice in Local Land Use Planning | State of California - Department of Justice - Office of the Attorney General](#)) are particularly focused on robust community engagement to identify EJ needs within each city and county, and incorporating clear and actionable requirements responsive to community comments in General Plans to accomplish EJ goals.

It is critical that the affected communities support the policies and programs intended to address their specific issues and needs. Those living in disadvantaged communities often have not participated in

city and county decision-making processes, so staff and governing boards tasked with formulating objectives and policies to resolve environmental inequities might not have been made aware of specific community needs and the day-to-day barriers in the particular disadvantaged communities needing solutions. Ms. Eng points out that any investment in a disadvantaged community can lead to unintended consequences like rising housing prices and displacement. Proactive community engagement also provides opportunities for trust building, open communication and education between developers (who have knowledge and resources for housing and infrastructure) and residents (who have knowledge about the neighborhood that the developer may not otherwise have access to).

The City of Placentia Example

The City of Placentia's (City) Health, Wellness, & EJ Element is considered by OPR to be an example of a successful EJ process and garnered state and local awards for Opportunity and Empowerment from the American Planning Association California Chapter's Award of Merit and Orange County Section of the California Chapter of the American Planning Association's Award of Excellence. The City's EJ community outreach program included collaboration with a local nonprofit organization located in one of the disadvantaged communities, LOT 318, to engage with local residents in their neighborhoods through community meetings and surveys. The City provided outreach materials in Spanish and other appropriate languages, and provided a translator or translation headsets at public meetings to enable residents to engage firsthand with the meeting content. Because of the City's effective community outreach efforts, its EJ Element was able to detail residents' concerns and specifically address those concerns through the goals and policies.

Joe Lambert, director of development services for the City, purposely structured community meetings as talking with neighbors. The City learned through those discussions about physical barriers to health and wellness such as inadequate sidewalks and street lights making residents feel unsafe walking their children to school alongside traffic or walking 20 minutes from the nearest parking space to their apartment after dark. A lack of public transportation prevented residents from accessing healthy food choices located

too far away at the farmers market and grocery stores. Renters put up with subpar living conditions because they were afraid of the potential ramifications if they asked the landlord to make repairs. Obtaining such specific community input enabled Placentia to develop EJ policies that directly address the concerns raised by the community relating to improved pedestrian lighting and code enforcement, increased access to green spaces to encourage physical activity, and expanded hours and locations for food distribution programs.

Involve and Engage Disadvantaged Communities in General Plan Implementation

OPR suggests that local jurisdictions should continue to involve and engage disadvantaged communities in General Plan implementation activities on an ongoing basis after adoption of the General Plan update. For example, civic engagement should be included in reviewing proposed development projects and associated entitlements, proposals for amending zoning or other implementing codes or standards, local neighborhood-level Specific Plan or revitalization efforts, and capital improvement plans or facility master planning. Public outreach should address barriers to participation such as language and transportation to foster transparency and enable community input to influence the planning process. The OPR Guidelines further suggest that all cities and counties, not just those with disadvantaged communities, implement such a holistic planning approach in their General Plan or other local planning documents to promote equity and protect human health from environmental hazards.

For development projects within identified disadvantaged communities, the city's or county's EJ outreach program may provide a template for how public review and comment on project entitlements will be handled.

Examples of Environmental Justice Policies

OPR has developed Model EJ Policies for General Plans to accompany the OPR Guidelines ([Model EJ Policies for General Plans \(ca.gov\)](#)). The OPR Guidelines also provide links to EJ Elements and policies in city and county General Plans as examples.

Many EJ policies are familiar land use and planning topics, such as promoting transit-oriented development and encouraging water- and energy-

conserving features in new development projects. Some EJ policies such as the following city General Plan policies are tailored specifically to community barriers to health, wellness and engagement in order to address the unique and compounded health risks to EJ communities as required by SB 1000:

- Consider environmental justice issues as they are related to potential health impacts associated with land use decisions, including enforcement actions, to reduce the adverse health effects of hazardous materials, industrial activities, and other undesirable land uses, on residents regardless of age, culture, ethnicity, gender, race, socioeconomic status, or geographic location (National City HEJ-1.2)

- Consider any potential air quality impacts when making land use or mobility decisions for new development, even if not required by California Environmental Quality Act (Placentia HW/EJ 10.9)

- Conduct City Council visits to disadvantaged neighborhoods to encourage discussion on items that affect the residents and businesses. Have Council accompanied by representatives from Police, Code Enforcement, Development and Community Services, and other departments. Host an annual community walk with the Mayor and other Council members (Placentia HW/EJ 15.6)

- Promote capacity-building efforts to educate and involve traditionally underrepresented populations in the public decision-making process (Inglewood EJ-1.9)

- Encourage the development of healthy food establishments in areas with a high concentration of fast-food establishments, convenience stores, and liquor stores. For example, through updated Zoning regulations, tailor use requirements to encourage quality, sit down restaurants, in areas that lack them (Inglewood EJ-4.2)

- Prioritize projects that significantly address social and economic needs of the economically vulnerable populations. Address and reverse the underlying socioeconomic factors and residential social segregation in the community that contributes to crime and violence in the city (Richmond HL-33)

- Ensure that contaminated sites in the city are adequately remediated before allowing new development. Engage the community in overseeing remediation of toxic sites and the permitting and monitoring of potentially hazardous industrial uses. Develop a response plan to address existing contaminated sites in the city. Coordinate with regional, state, and federal agencies. Include guidelines for convening an oversight committee with community representation to advise and oversee toxic site cleanup and remediation on specific sites in the city. Address uses such as residential units, urban agriculture, and other sensitive uses (Richmond HL-40).

The information in an EJ Element can inform private planning and land use decisions, such as whether the local jurisdiction considers certain locations appropriate for new residential, commercial or industrial projects and whether there may be additional procedural steps in the entitlement review process. For development projects located within an area identified as a disadvantaged community, the EJ policies help identify on- and off-site infrastructure, amenities and services that may be required in connection with project development, and provide a ready source of information to help analyze the compatibility of a proposed project, the potential extent of California Environmental Quality Act review and mitigation measures, and community organizations that should be consulted in the project conceptualization process.

Environmental Justice Resources

Helpful EJ resources appear below:

- The Attorney General's SB 1000 webpage ([SB 1000 - Environmental Justice in Local Land Use Planning | State of California - Department of Justice - Office of the Attorney General](#)) includes helpful links to EJ resources including the Attorney General's EJ-related comments on several city and county draft General Plans, example EJ Elements and policies, a link to CalEnviroScreen and links to each of the 12 pollution indicator maps, CalEPA's Disadvantaged Communities Mapping Tool, and several other regional, state and federal environmental mapping tools.

- The OPR Guidelines (https://opr.ca.gov/docs/20200706-GPG_Chapter_4_EJ.pdf) include a list of several scientific based tools developed by other agencies and academia that provide information relevant to EJ considerations, as well as links to EJ Elements and policies in General Plans adopted by several jurisdictions throughout the state.

The following OPR email address is dedicated to SB 1000 questions: SB1000@OPR.CA.GOV.

- Background information detailing the root causes of California’s environmental inequities is included in the OPR Guidelines and in the 2017 book, *The Color of Law: A forgotten History of How Our Government Segregated America*, by Richard Rothstein.

- The California Environmental Justice Alliance (one of the SB 1000 co-sponsors) prepared the “CEJA SB 1000 Implementation Toolkit” to provide guidance on implementing SB 1000’s mandates: <https://www.caleja.org/sb1000-toolkit>

Conclusion and Implications

Environmental Justice-related tools will help guide more equitable planning policies while providing valuable resources to inform property acquisition and development project conceptualization. Perhaps EJ’s greatest value will be the beneficial results of fostering communication with residents who have not been involved in the decision-making processes affecting them and the societal and economic benefits resulting from reversing the negative effects of pollution and environmental degradation that have burdened the most vulnerable for too long.

Michele A. Staples, Esq., is a shareholder at the law firm of Jackson Tidus, A Law Corporation. Michele has over 30 years’ experience representing a broad spectrum of clients from publicly traded companies to individuals in land use, project entitlement, water resources and environmental matters. Michele’s experience includes conducting diligence investigations on behalf of developers for acquisition of property and projects, securing land use entitlements for commercial, residential and mixed-use projects, obtaining permits and approvals to revamp development projects to respond to changing market conditions, and resolving high-profile disputes involving development and use of land, natural resources and water resources. Ms. Staples is a long-serving member of the Advisory Board of the *California Water Law & Policy Reporter*.

CALIFORNIA WATER NEWS

**SETTLEMENT AGREEMENT AND FEDERAL FUNDING
MOVE FRIANT-KERN CANAL PROJECT OUT TO BID**

A recent settlement between the Friant Water Authority (FWA) and farmers in southern Tulare County, coupled with the passage of a federal stimulus bill, has opened the path for short-term funding sufficient to move the Friant-Kern Canal Middle Reach Capacity Correction Project (Project) out to bid. The Project is designed to remedy the Friant-Kern Canal's (Canal) significant subsidence issues, which have severely impacted water deliveries to farms and communities in both Tulare and Kern county.

Background

The Canal is a cornerstone facility of the federal Central Valley Project that serves farms and communities from Chowchilla in the north down to Arvin Edison near the Grapevine in the south. Water supplied from the Canal plays a significant role in supporting regional and local economies in the Counties of Tulare and Kern. During California's recent record-breaking drought, significant groundwater pumping adjacent to the Canal resulted in land subsidence damaging the Canal.

The most extensive damage to the Canal occurred along an approximately 30-mile stretch from Strathmore to Delano, a major citrus, nut and grape growing region, where land subsidence was reported to have exceeded 12 feet since the Canal was put into service in the 1950s. Analysts have projected that the land in this area could potentially subside an additional three feet before significant implementation of the local groundwater sustainability plan occurs in 2025. The Project is designed to restore this 33-mile stretch of the 153-mile-long Canal.

Project officials indicate that as a result of subsidence, Canal water deliveries have been reduced by around 60 percent and as much as 300,000 acre-feet of undelivered water in some years. The Friant Division of the Central Valley Project delivers water to over one million acres of irrigable farm land and more than 30 irrigation districts and cities. The extensive reduction in Canal capacity and deliveries has significantly impacted those water users.

The Project

Over the past year, the FWA, managers of the Canal, and the U.S. Bureau of Reclamation have worked to find and secure sufficient funding to proceed with the Project, which is estimated to cost around \$480 million. The Project, if approved, will construct a 33-mile parallel canal that would replace the existing Canal where subsidence is greatest. The Project was scheduled to go out to bid in January 2021 and to begin construction in the Spring of 2021. The Bureau of Reclamation anticipates a three-year project cycle with an expected Project completion date in 2024.

Settlement Agreement for Project Funding

A settlement agreement regarding Project funding was reached in January 2021 between FWA, Arvin Edison Water Storage District (Arvin Edison), and the Eastern Tule Groundwater Sustainability Agency (ETGSA) on behalf of local farmers. Under the terms of the settlement, ETGSA has agreed to contribute \$125 million to the Project. Meanwhile, FWA and Arvin Edison agreed to support implementation of the ETGSA's Groundwater Sustainability Plan (GSP) that will gradually reduce overdraft through 2035 and agreed to forego potential litigation against the ETGSA or its landowners in exchange for the \$125 million funding. Negotiations among the agencies began in early 2020 following ETGSA's adoption of its January 2020 GSP.

The settlement agreement provides that the farmers' payments for the Project funding could begin as early as the first quarter of 2021, and that construction for the Project is expected to begin at that time.

Federal Funding

A major gap in funding for the Project was also recently filled with the enactment of the Federal Consolidated Appropriations Act of 2021 (FCAA). The FCAA, which requires a local match, earmarked \$206 million in Federal funds dedicated to the repair

of the Canal which will be used to partially fund the Project.

Conclusion and Implications

The settlement agreement and a significant infusion of federal funding have made it possible for the

Project to move forward. These efforts required significant cooperation, leadership and a willingness to work toward shared objectives. The Project will help ensure critical water deliveries are provided to Central Valley communities and the farms that comprise a critical foundation for the region's economy. (Chris Carrillo, Derek R. Hoffman)

CITY OF ANTIOCH AWARDS \$87 MILLION CONTRACT FOR NEW DESALINATION PLANT

At its December 18, 2020 special meeting, the city council of the City of Antioch (City or Antioch) approved an approximately \$87 million contract for the construction of a new brackish water desalination plant (Plant or Project) that will treat water diverted from the San Joaquin River (River) under the City's pre-1914 senior water rights. The City devised the Project as a means of ensuring continued access to the River water for its approximately 112,000 residents despite the impact of steadily increasing salinity levels projected to worsen over time. By enabling year-round pumping from the River, the Plant is also expected to alleviate costs associated with the City's need to purchase more expensive water supplies during the highest salinity months, while allowing the City to preserve its pre-1914 water rights.

Delta Salinity

Rising salinity levels in the Delta are the largely the result of environmental impacts associated with drought conditions and climate change. In addition to these environmental concerns, water diversions have also resulted in flow reductions and increased salinity, a situation some fear will be significantly worsened if the state's massive tunnel project for siphoning additional water to southern California is realized.

With the outlook for long-term improvement of salinity levels appearing uncertain at best, the City has opted to pursue the Project as a bold effort to protect its long-term access to its primary source of water supply, and to address the more immediate problems caused by the City's inability to pump River water in the summer and fall months when salinity levels are too high for Antioch's existing water treatment plant to process the water. During those months, the City

has been forced to incur the higher costs of purchasing additional untreated water from Contra Costa Water District (CCWD), the City's primary source of supply apart from the River. Once online, the Plant is expected to allow the City access to River water year-round. The increased access will in turn enable Antioch to avoid the financial burden of purchasing more expensive water from CCWD and to ensure the preservation of its pre-1914 water rights in the Delta.

The Project

The Plant is expected to be located near the City's existing water treatment plant and operate at a capacity of up to 6 million gallons per day. As part of the Project, the City's current pump station on the River will be replaced by a new relocated station, which will feature sophisticated fish screening to protect wildlife and a new approximately 3,000-foot pipeline linking the new station with the City's treatment plant. Additionally, a 4.3-mile pipeline from the Plant to the City's wastewater treatment plant will be constructed for brine disposal. Construction of the Plant is expected to be completed by the end of 2023.

Contract Approval and Funding

The City council's unanimous approval of the construction contract comes seven years after the Project's initial conception. The winning bid by Shimmick Construction Company (Shimmick) edged out three other competitors for the \$87 million contract that includes a contingency of over \$4.3 million. The city council awarded the contract to Shimmick despite a protest bid submitted by a competitor regarding Shimmick's failure to meet qualifications, a claim the City determined to be without merit.

Funding for the Project will be derived from several sources, including \$10 million from the Department of Water Resources (DWR) under the Proposition 1 Integrated Regional Water Management Grant Program, administered by DWR pursuant to the Water Quality Supply and Infrastructure Improvement Act of 2014, which authorized \$510 million in state funding for long-term water management projects. The \$10 million Prop 1 grant awarded to the City is one of only three such awards to California cities for desalination projects to date. In addition, the City will apply \$27 million previously received through a water rights settlement agreement with DWR as well as \$56 million in loan proceeds obtained through the State Water Resources Control Board's Drinking Water Revolving Loan Fund. Remaining amounts are expected to come from City funds set aside for the Project.

Conclusion and Implications

The Plant has been touted by the City as a solution to major short-and-long-term threats posed by

rising salinity levels to Antioch's ability to access water supply from the River and preserve its legal right to the water while expanding operational flexibility. The City's ability to obtain suitable financing to cover the Plant's hefty \$87 million price tag, including significant grant and settlement funds, likely contributes to the general enthusiasm for the Project. As other water suppliers grapple with strains on water supply, Antioch's Project may serve as an important reference point for how they might viably proceed, particularly given the still relatively low number of major desalination plant projects undertaken to date throughout the state. That number is likely to increase gradually, as the need for action becomes more pressing, and as the state government offers more support for desalination initiatives, a trend suggested by the state's 2020 Water Resilience Portfolio highlighting desalination as a potentially strong solution and calling for the development of better and more broadly viable desalination technologies. (Wesley A. Miliband, Andrew D. Foley)

NEW PUMPED-STORAGE PROJECT PROPOSED AT KERN COUNTY'S LAKE ISABELLA

With California's boom in solar and wind energy sources, one question that remains for the future is how California can utilize its renewable energy sources when the sun is not shining brightly enough and the wind is not blowing strongly enough. Although technological advances in batteries have improved storage options for energy, water reservoirs remain a key component in the state's energy storage infrastructure moving forward. One such addition could come in the form of a new pumped-storage project above Lake Isabella, just 40 miles northeast of Bakersfield.

A New Reservoir Above Lake Isabella

Proposed by Premium Energy Holdings, the \$3 billion proposal envisions a pumped-storage power plant facility with a capacity of a staggering 2,000 megawatts, rivaling Castaic in size. The project's current proposal seeks to utilize the existing Lake Isabella as a lower pool for the project while a new upper reser-

voir would be created in the southern Sierra Nevada Mountains above the lake at one of three alternative sites. The Federal Energy Regulatory Commission is currently in the process of reviewing these plans.

While local interest holders have valid concerns regarding how this project will impact Kern River flows downstream from Lake Isabella, the proposed project would operate in a closed loop system. When energy demand is high, the pumped storage project would send water from its upper pool to power turbines at the lower pool. When energy demand is low—or energy production exceeds demand—the turbines would pump water from the lower pool back into the upper pool.

As for the initial filling of the upper pool, project proponents have noted that downstream impact should be minimal once the pool is settled around 30 to 40 thousand acre-feet. This initial filling would utilize seasonal high flows from the Kern River to further minimize the project's impacts on downstream flows in the river.

Additional measures the project plans to take in minimizing impact on water availability in the Kern River are the utilization of a membrane bedding to prevent percolation and a covering over the upper pool to limit the amount of water lost as evaporation. This covering could even implement solar panels to further increase the benefits provided by the project's operations.

According to Premium Energy Holdings, the project would be interconnected with the existing Southern California Edison or Pacific Gas and Electric transmission grid to provide energy storage to renewable resources. In addition to these major utilities, the project would likely draw the interest of other local utilities as a source of renewable energy storage.

The project is still in a very early stage now, with no designated owner or operator for its future, but it

could optimistically come to fruition within the next decade.

Conclusion and Implications

California's current energy infrastructure includes huge amounts of solar production, such that the state sees an excess in solar production from noon to 6 pm during the summer months. Without efficient energy storage solutions, however, California will be hard pressed to match its 100 percent renewable energy mandate coming in the near future. Reservoir operations have had their fair share of challenges for various reasons, but their role as the original "battery" remains of significant value, while also serving to provide most of California's water for water suppliers, farmers and environmental habitat.

(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

CONGRESS PASSES CONSOLIDATED APPROPRIATIONS ACT, HR 133, WHICH INCLUDES FUNDING FOR SEVERAL CALIFORNIA WATER PROJECTS

In December 2020, the Consolidated Appropriations Act of 2021, HR 133, 166th Congress (2020) was passed and signed into law. The bill provides for the implementation of the Water Resources Development Act of 2020, outlining significant support provisions and guidelines for water infrastructure projects nationwide. Additionally, the bill provides federal funding for several California water projects, with a majority of the projects located in the San Joaquin-Sacramento River Delta, potentially providing for increased water supplies.

Background

On December 21, 2020, Congress released a 5,500-page comprehensive appropriations package in advance of the vote on the matter. The “Consolidated Appropriations Act of 2021” (HR 133) includes 12 appropriation bills, containing a \$900 billion COVID-relief package and a \$1.4 trillion government funding package that gives pandemic aid to Americans, while also securing federal agency operations through September 2021. HR 133 was approved with a 359-53 vote in the House of Representatives and a 92-6 vote in the Senate. President Donald Trump signed the measure into law on December 27, 2020.

HR 133 provides for appropriations for a large variety of governmental projects. For example, the measure provides \$3.9 billion for rural development programs while also providing over \$33 billion for law enforcement grants. In addition to myriad projects, HR 133 also contains a large number of provisions that will have a potential impact on water projects throughout the country. Specifically, HR 133 contains several provisions authorizing funding for several California water projects as well as incorporating the Water Resources Development Act of 2020 (WRDA).

The Appropriations Act, the Water Resources Development Act and Water Projects in California

The WRDA authorizes \$9.9 billion in federal funds for 46 U.S. Army Corps of Engineers (Corps) projects, including those designed to achieve flood control, environmental restoration, coastal protection and other water infrastructure goals, as well as 27 feasibility studies and six comprehensive river basin studies. Additionally, the WRDA unlocks the Harbor Maintenance Trust Fund (HTMF) by providing the authority to appropriate up to \$1.5 billion annually in additional funds for harbor maintenance needs as well as providing additional federal resources for the construction of inland waterways projects. The WRDA also reaffirms a commitment to greater use of natural and nature-based projects by ensuring that natural alternatives are fully evaluated by the Corps and are provided the same cost-share as structural alternatives.

In addition to the implementation of the WRDA, HR 133 also provides for funding for the following California water projects.

The Sites Reservoir Project

Under HR 133, the Sites Reservoir Project was awarded \$13.7 million in federal funds. Situated on the west side of the Sacramento Valley, the Sites Reservoir Project seeks to substantially increase water supply flexibility and reliability in years of drought. Specifically, the Sites Reservoir does not rely on snowmelt, but instead seeks to capture winter runoff from uncontrolled streams below the existing reservoirs located in the Sacramento Valley. The project has previously received approximately \$449 million from the USDA and \$816 million from the State of California.

The Friant-Canal Repair Project

The Friant-Kern Canal is an aqueduct managed by the U.S. Bureau of Reclamation to convey water to augment irrigation capacity in Fresno, Tulare, and Kern counties. In November 2020, the Federal Government authorized nearly \$5 million to study and begin pre-construction work on repairing the Friant-Kern Canal, a move that will significantly augment irrigation capacity in Fresno, Tulare, and Kern counties. The repairs seek to remedy a 33-mile stretch of the canal which has lost over half of its original capacity to convey water due to subsidence, also known as the sinking of earth from groundwater extraction. Under HR 133, \$206 million in Federal funding is being set aside for the repairs, covering almost half of the estimated \$500 million in repairs.

The Delta-Mendota Canal Repair Project

Located in central California, the Delta-Mendota Canal is a 117-mile-long aqueduct that supplies freshwater to uses downstream of the San Joaquin River. Much like the Friant-Kern Canal, the Delta-Mendota Canal faces issues caused by subsidence. Specifically, the repairs seek to remedy cracks in the Delta-Mendota Canal caused by subsidence. The funds provided by HR 133 may allow the project to proceed.

The San Luis Low Point Improvement Project

Jointly owned and operated by the Bureau of Reclamation and the California Department of Water Resources, the San Luis Reservoir stores water taken from the San Joaquin-Sacramento River Delta. The San Luis Low Point Improvement Project seeks to address problems that occur when the reservoir falls below 300,000 acre-feet, typically in the summer and late fall. The low water level fosters algae growth, making the water unsuitable for municipal and industrial use. The funding provided by HR 133 may provide the first step in implementing the project.

The Los Vaqueros Reservoir Expansion Project

Owned and operated by the Contra Costa Water District, the Los Vaqueros Reservoir provides drinking water for approximately 550,000 customers in Contra Costa County. The Expansion Project would increase the reservoir's capacity by more than 70 percent when complete. The project is estimated to cost

\$895 million, with \$494 million covered by Proposition 1, which was approved in 2018. The federal government is expected to cover around 25 percent of the project's costs, with the remaining expenses to be covered by local agencies that will benefit from the project. Funding provided by HR 133 will significantly help cover the costs of the project.

The Sacramento Regional Water Bank

Water providers in the Sacramento Region are developing the Sacramento Regional Water Bank, a groundwater storage program that seeks to improve regional water supply reliability. The water bank is intended to operate by coordinating the use of surface and groundwater. When surface supplies are plentiful, water providers in the region will draw more water from Folsom Lake or local rivers and use it to offset existing demand for groundwater. During dry years, recovery of stored groundwater will occur through additional pumping, resulting in a withdrawal from the water bank. Implementation of the project will occur in two phases. Local water providers have secured funding for Phase 1, which is currently underway. Federal funding may significantly cover the remaining \$2.12 billion to fully complete the project.

The Del Puerto Canyon Reservoir

The Del Puerto Water District and San Joaquin River Exchange Contractors Water Authority supply federal Central Valley Project (CVP) supply water to farmlands in Stanislaus, San Joaquin, Merced, Fresno, and Madera counties. CVP water is pumped south from the San Joaquin-Sacramento River Delta through the Delta-Mendota Canal. The Del Puerto Canyon Reservoir Project seeks to construct a new reservoir, where water from the Delta-Mendota Canal will be stored and released on a managed basis. The funding provided by HR 133 will provide for the initial stages of the project.

Conclusion and Implications

The Consolidated Appropriations Act may have had at its origin funding for Covid-19 related need—but over the months of wrangling the act took on omnibus proportions to achieve the votes needed for its passage. However, the Appropriations Act's implementation of the WRDA demonstrates a federal commitment to improving water infrastructure nation-

wide. A majority of the projects outlined above seek to address water use in the San Joaquin-Sacramento River Delta area and tributary areas. While some of these projects may be years away from completion, the funding provided by HR 133 may ultimately have a notable impact on water use in California in the

future. With a Biden administration now at the nation's helm it will be interesting to see if any new or additional funding is appropriated for water projects in the state.

(Jeremy Holm, Steve Anderson)

REGULATORY DEVELOPMENTS

EPA FINALIZES GUIDANCE ON IMPLEMENTATION OF U.S. SUPREME COURT'S 'FUNCTIONAL EQUIVALENT' CWA TEST IN THE MAUI CASE FOR DISCHARGES TO GROUNDWATER THAT REACH SURFACE WATERS

On January 14, 2021, the U.S. Environmental Protection Agency (EPA) finalized guidance regarding the implementation of the U.S. Supreme Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. ___ (2020) (*Maui*), which established a "functional equivalent" test to determine when discharges to groundwater that ultimately reach surface waters should be regulated under the federal Clean Water Act in the same manner as a direct discharge to surface waters (*Maui* Guidance). The *Maui* Guidance states that any discharge must meet certain "baseline permitting principles" comprised of threshold conditions that trigger the National Pollutant Discharge Elimination System (NPDES) Permit requirement, and the type of analysis permit writers currently conduct for surface water discharges. In doing so, the *Maui* Guidance sets forth an additional factor that should be evaluated when determining whether a discharge to groundwater requires an NPDES Permit—"the design and function of the treatment system"—and provides guidance regarding the types of discharges and associated treatment systems for which NPDES Permits will not be required.

Background—The *Maui* Decision

In *Maui*, the Supreme Court held that an NPDES permit is required "if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters." According to the Court, evaluation of whether a discharge of a pollutant to groundwater is the "functional equivalent of a direct discharge from the point source into navigable waters," requires the application of the following seven factors: 1) the pollutant's travel time between the discharge point and the navigable water; 2) the distance traveled; 3) the material through which the discharge travels; 4) dilution or chemical changes during travel; 5) the amount of pollutant entering the navigable water as compared to the amount that leaves the point source;

6) the way or location the pollutant enters the navigable water; and 7) the degree to which the pollution has retained its identity upon reaching the navigable water. The opinion makes clear that the list is not exhaustive, but notes that time and distance may be the most important factors. (See: https://www.supremecourt.gov/opinions/19pdf/18-260_jjfl.pdf)

The *Maui* Guidance Summary

The primary focus of the *Maui* Guidance appears to be a reduction in the number of inquiries from the regulated community regarding whether or not an NPDES Permit is required for a particular discharge. To eliminate a number of those inquiries, the *Maui* Guidance describes "baseline permitting principles" that seek to resolve questions from the regulated community (and potentially frivolous litigation). The baseline permitting principles, which consume the majority of the eight-page guidance memorandum, are primarily a recitation of the elements that traditionally trigger the NPDES Permit requirement as applied to surface waters.

By confirming that all discharges are subject to the described framework, the EPA adopts an additional factor that:

... may prove relevant and thus should be considered when performing a 'functional equivalent' analysis: the design and performance of the system or facility from which the pollutant is released.

The *Maui* Guidance indicates that an evaluation of the design and performance of the facility or system from which a pollutant is released is customary when the agency evaluates whether a direct discharge requires an NPDES Permit. The *Maui* Guidance goes one step further by describing treatment system designs and discharge point locations that are unlikely to be subject to the NPDES Permit requirement, as

well as the influence of such system component designs and locations on the composition of any pollutants discharged to groundwater that ultimately reach surface water. For example:

. . .the point of discharge may be engineered to direct the pollutant into a subsurface aquitard or to a surface area designed to slow the transit time of a pollutant that ultimately reaches a water of the United States.

EPA also clarifies that the agency anticipates that the issuance of NPDES Permits for discharges of pollutants to groundwater:

. . . will continue to be a small percentage of the overall number of NPDES permits issued following application of the Supreme Court’s ‘functional equivalent’ analysis.

To emphasize this point, the *Maui* Guidance reminds practitioners that: 1) the discharge must first meet the threshold requirements that trigger the NPDES Permit requirement; and 2) all of the factors comprising the “functional equivalent” test must be applied to the discharge. In other words, a demonstration that pollutants associated with a point source discharge merely reach surface waters falls short of the analysis required by the *Maui* decision, and would not trigger the NPDES Permit requirement for discharges to groundwater.

Conclusion and Implications

The *Maui* Guidance provides insight into how the EPA will apply its current NPDES Permit program framework to groundwater discharges, confirmed by the establishment of the new “design and performance” factor. Moreover, the *Maui* Guidance crafts a distinction between the Ninth Circuit’s “fairly traceable” standard and the Supreme Court’s “functional equivalent” test by indicating that the fact that a pollutant associated with a point source discharge to groundwater reaches surface waters is *not enough* to trigger NPDES permitting.

However, whether the *Maui* Guidance will remain in effect is unclear, given the Biden administration’s recent adoption of the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which will require EPA to revisit all “regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021” that may be inconsistent with the Biden administration’s policy on environmental protection and public health. The outcome of that review process remains to be seen. For more information about the Guidance, see: <https://www.epa.gov/npdes/releases-point-source-groundwater>

(Nicole Granquist, Meghan Quinn, Meredith Nikkel)

STATE WATER RESOURCES CONTROL BOARD PROVIDES COMMENTS ON ‘CRITICALLY OVERDRAFTED’ BASIN GROUNDWATER SUSTAINABILITY PLANS

On December 8, 2020, the California State Water Resources Control Board (State Water Board or SWRCB) submitted comments to the California Department of Water Resources (DWR) and to individual Groundwater Sustainability Agencies (GSAs), providing preliminary input on Groundwater Sustainability Plans (GSPs) for certain “critically overdrafted” basins pursuant to the Sustainable Groundwater Management Act (SGMA). As the agency that would step in to regulate basins that fail to comply with SGMA, the State Water Board’s input is being (and should be) carefully considered by local GSAs.

Background

SGMA is designed to achieve long-term sustainability of the state’s groundwater basins by as early as 2040. All high- and medium-priority groundwater basins must be managed under a GSP. Of the more than 500 groundwater basins in California, 21 were designated critically overdrafted by DWR. For those basins, GSPs had to be submitted to DWR by January 2020. DWR has two years to review the GSPs and evaluate whether they meet SGMA requirements. Following the statutory 60-day public comment on

GSPs that were submitted to DWR, the SWRCB provided additional input on some of the GSPs.

State Water Board Preliminary Comments

The SWRCB provided comments on GSPs for multiple critically overdrafted basins. A few notable examples and a summary of the SWRCB's input on those GSPs is as follows:

The Salinas Valley—Paso Robles Area Subbasin (DWR Basin No. 3-004.06)

The GSA should include analysis of domestic wells and public water systems in setting its minimum threshold (MT) for declining water levels.

The GSP's MTs for degraded groundwater quality should include sustainable management criteria (SMC) and monitoring for arsenic in public water supply wells and domestic wells, which are not currently included in the water quality monitoring network.

Subbasin models should be evaluated against historical groundwater elevations trends, not current overdraft estimates.

Implementing some of the projects identified in the GSP may require new or amended water rights; however, approval timelines for water right permits or petitions can vary, if approval is obtained at all. Due to this uncertainty, the GSP should clarify its proposed timelines for projects and management actions and consider how changes to those timelines could impact achieving sustainability by 2040.

While the GSA delivered an invitation letter to California Native American Tribes (Tribes) in the Subbasin, there is no record that these Tribes responded. The GSA should consult with the Native American Heritage Commission (NAHC) to obtain information about current or ancestral Tribes in the Subbasin.

The Cuyama Valley Basin (DWR Basin No. 3-013)

The GSP should include SMC and monitoring for nitrate and arsenic. The GSP reasons that the GSA cannot set SMC for arsenic because concentrations are localized and vary from well to well; however, the SWRCB states that SGMA does not preclude a GSA from addressing localized water quality issues that may be exacerbated by pumping or management

actions.

The GSP does not identify interconnected and disconnected stream reaches when defining SMC for depletions of interconnected surface water.

While the GSP states that no Tribes are present in the Basin, the GSP does not describe the GSA's process for identifying or reaching out to tribes with potential interests in groundwater management in the basin. Thus, it is difficult for the SWRCB to determine whether the GSA appropriately considered the interests of Tribes in developing the GSP as required by SGMA. The GSA should consult with NAHC for information regarding Tribes with current or ancestral ties in the basin.

The Salinas Valley—180/400 Foot Aquifer Subbasin (DWR Basin No. 3-004.01)

The GSP fails to consider other sustainability indicators (such as localized water level requirements for beneficial users and uses, and seawater intrusion) in its estimation of sustainable yield. The GSP's estimation of sustainable yield is based only on groundwater storage. The GSP should evaluate the potential for causing other undesirable results when defining sustainable yield.

The GSP states that only water quality impacts caused by GSP implementation are unacceptable, but it does not explain how SGMA-related water quality changes will be distinguished from other water quality changes. The GSP should outline the process the GSAs would use to decide whether or not an exceedance of an MT for water quality degradation was caused by GSP implementation.

GSP implementation may require new or amended water rights, which involve uncertain timelines for related approvals, if approval is obtained at all. The GSP should clarify its proposed timelines for projects and management actions and consider how changes to those timelines could impact achieving sustainability by 2040.

The GSP does not describe any process for identifying or reaching out to Tribes with potential interests in groundwater management in the Subbasin. Thus, it is difficult for the SWRCB to discern if the GSA appropriately considered Tribes in developing the GSP as required by SGMA. The GSA should consult with NAHC for information regarding Tribes in the subbasin.

Conclusion and Implications

Carefully establishing sustainable management criteria, appropriately tailoring projects and management actions, and ensuring necessary stakeholder engagement were consistent areas of focus by the board. Though the State Water Resources Control Board's comments were made to support DWR's review of GSPs, it is interesting (and alerting to GSAs) that the SWRCB would provide comments on GSPs following the statutory public comment period, as the State Water Board is the regulatory enforcement agency that would manage non-compliant groundwater basins through interim plans.

The Department of Water Resources' evaluation of the first wave of GSPs is due around January 2022—the same time that dozens of high- and medium-priority basin GSPs will be submitted to DWR. Many GSAs that received SWRCB comments have already responded to the feedback, including providing explanatory responses and also commitments to address any deficiencies through updates and amendments. For GSAs still developing their GSPs, the SWRCB's input should be carefully reviewed and considered to guide their own GSP development.
(Gabriel J. Pitassi, Derek R. Hoffman)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT UPHOLDS DECISION TO CREDIT NEW MEXICO FOR EVAPORATION LOSS FOR WATER STORED BY NEW MEXICO FOR TEXAS UNDER THE PECOS RIVER COMPACT

Texas v. New Mexico, ___U.S.___, 141 S.Ct. 509 (2020).

On December 14, 2020, in *Texas v. New Mexico*, the U.S. Supreme Court issued an opinion holding that New Mexico was entitled to a delivery credit for water from the Pecos River lost to evaporation while stored by New Mexico on behalf of Texas. Applying its original jurisdiction over disputes between states, the High Court reviewed the decision of the Pecos River Master granting New Mexico's motion for such credit. Justice Kavanaugh wrote the decision for the majority. He was joined by Justices Roberts, Thomas, Breyer, Sotomayor, Kagan, and Gorsuch. Justice Alito wrote a separate opinion concurring in part and dissenting in part. Justice Barrett did not take part in the consideration of the case.

Background of the Dispute

The Pecos River's source is in New Mexico and runs through west Texas before reaching the Rio Grande. The River drains an arid basin extending across the two states. New Mexico's position upstream puts it in a position to control the amount of water flowing into Texas. In 1949, New Mexico and Texas entered the Pecos River Compact to equitably apportion the Pecos River. The U.S. Supreme Court retains original jurisdiction over disputes between the states, including disputes involving the Pecos River Compact. In 1988, the Court issued an amended decree clarifying the states' rights under the Pecos River Compact. Pursuant to the amended decree, the Court appointed a River Master to calculate the amount of water New Mexico was required to allow to flow to Texas. The amended decree adopted the River Master's Manual, which sets forth the procedure and methodology for the River Master's calculations. The River Master's Manual provides that if New Mexico stores water allocated to Texas at Texas' request, New Mexico would be entitled to a delivery credit for "losses incidental to its storage."

In November 2014, Texas was hit by a Tropical

Storm Odile. The storm filled Red Bluff Reservoir on the Texas reach of the Pecos River. Texas' Pecos River Commissioner sent an email to New Mexico's Pecos River Commissioner asking New Mexico to store water from the Pecos River in order to prevent flooding. New Mexico did so until August 2015. But approximately 21,000 acre-feet of the stored water evaporated during this time. New Mexico released the full amount of water stored on Texas' behalf, but New Mexico's commissioner informed Texas' commissioner that New Mexico was entitled to a credit for the quantity of water that evaporated.

Texas and New Mexico were unable to reach an agreement about how to treat the evaporated water. In 2015, the River Master issued a report stating that the dispute over the evaporated water would be resolved at a later date. The report stated that Texas and New Mexico could either reach an agreement or either state could file a motion with the River Master. Neither state objected to the procedure set forth in the River Master's report. But the states were unable to resolve the dispute, and in 2018, New Mexico filed a motion asking the River Master to credit New Mexico for the evaporated water. The River Master granted the motion, and Texas brought a motion to the U.S. Supreme Court, to review the River Master's decision.

The Supreme Court's Decision

Majority Upholds the River Master's Decision Crediting New Mexico for Evaporative Losses

The question before the Court was whether New Mexico was entitled to a credit for water that evaporated during the period of storage. According to the Justice Kavanaugh, writing for the majority, the River Master's Manual was clear: "if Texas asked New Mexico to store water, New Mexico was entitled to a

delivery credit for losses incidental to storage, including water lost to evaporation.”

The Court rejected Texas’ argument that the water was not part of its allocation under the Pecos River Compact. The Court noted that Texas asked New Mexico to store water that otherwise would have flowed into Texas and thus would have been included in the allocation to Texas. The Court also rejected Texas’ argument that the water was not being “stored” as the term is defined in the River Master’s Manual. Instead, Texas asserted that “stored” only applied to long-term storage for later beneficial use. But the Court determined that that “stored” should be afforded its ordinary meaning—holding water for Texas. This determination was supported by the fact that Texas’ actual request to New Mexico to hold the water was an email with the subject line “Texas request for storage.” Last, Texas argued that it only requested that the water be stored until March 2015, thus New Mexico should not be credited for water that evaporated between March 2015 and August 2015. The Court rejected this argument because Texas did not ask New Mexico to release the water until July 2015, which New Mexico did shortly thereafter.

In addition to its substantive arguments, Texas also argued that New Mexico’s motion was untimely. The majority held that, because neither Texas or New Mexico objected to the procedure set forth in the River Master’s 2015 report, Texas had waived that argument.

Justice Alito Dissents in Part

Justice Alito concurred in part and dissented in

part. Justice Alito concurred in the majority’s conclusion that Texas had waived its objections. But Justice Alito would have remanded the case with instructions for the River Master to reconsider the nature of the request for storage. According to the dissent, the majority elided the fact that it was the federal Bureau of Reclamation that made the decision to store and then release the water for flood control purposes, and the record is unclear on whether the emails between the state’s respective commissioners were relevant if the decision was always in the hands of the Bureau of Reclamation. Accordingly, Justice Alito would have remanded to the River Master to determine whether the water was actually stored for flood control purposes by the Bureau of Reclamation for at least part of the relevant time period. And if so, the River Master should then reanalyze the effect of such a determination on the credit afforded to New Mexico. Justice Alito would also have reached the question of the validity of the River Master’s amendments to the River Master’s Manual to conclude that the River Master lacks the authority to amend the River Master’s Manual.

Conclusion and Implications

Justice Kavanaugh observed—and perhaps understated—that states have a “natural propensity to disagree.” This is especially true in disputes over water in the arid west. *Texas v. New Mexico* is the latest interstate dispute resolved pursuant to the U.S. Supreme Court’s original jurisdiction. As growing populations continue to share limited water resources, such disagreements will only continue.

ELEVENTH CIRCUIT FINDS MERE ALLEGATIONS OF A HYDROLOGICAL CONNECTION ARE INSUFFICIENT FOR A CRIMINAL CONVICTION UNDER THE CLEAN WATER ACT

United States v. Coleman, Unpub., Case No. 19-15127 (11th Cir. Dec 21, 2020).

The U.S. Court of Appeals for the Eleventh Circuit, in an *unpublished* decision, recently vacated an accepted guilty plea for knowingly violating the federal Clean Water Act. The court determined that the government failed to provide a sufficient factual basis to demonstrate a discharge significantly affected the chemical, physical, and biological integrity of a

navigable water through allegations of a hydrological connection alone.

Factual and Procedural Background

Plaintiff, Coleman, drove a fuel truck that provided fuel to gas stations. When he realized his truck

was loaded with 3,000 gallons of the wrong type of diesel fuel, he dumped the fuel on the ground near Highway 319 in Thomas County, Georgia. In 2019, plaintiff was charged by information with one count of violating the federal Clean Water Act by knowingly discharging 3,000 gallons of diesel fuel into a water of the United States.

The Clean Water Act prohibits the discharge of pollutants into “navigable waters” and defines this term as “the waters of the United States, including the territorial seas.” Under *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality of the U.S. Supreme Court determined that a water is navigable if the waters are navigable in fact or there is a significant nexus between the water or wetland and a navigable water. There is a significant nexus when there is a significant impact to the chemical, physical, and biological integrity of a navigable water. A “mere hydrologic connection” alone is insufficient.

Plaintiff waived indictment and pled guilty without a plea agreement. The plea colloquy alleged:

The diesel fuel dumped on the ground migrated into adjacent storm water drainage that flows directly into a creek. That unnamed creek is a tributary of Good Water Creek which flows into Oquina Creek and then into the Ochlocknee River, a traditionally navigable water of the United States.

Plaintiff was sentenced to an 18-month imprisonment, followed by a year of supervised release and was required to pay a fine of \$5,000. Plaintiff appealed.

The Eleventh Circuit’s Decision

Plaintiff appealed on three grounds—all related to how navigable waters are defined. Plaintiff first claimed the U.S. District Court erred by failing to establish a sufficient factual basis for the navigable waters element during the plea colloquy as specified in Federal Rules of Criminal Procedure Rule 11(b) (3). Rule 11 requires a factual basis before entering

a judgment of guilty, so as to be sure that a factually innocent defendant does not mistakenly plead guilty. To satisfy Rule 11, the government must present the trial court with evidence from which it could reasonably find that a defendant was guilty. The key issue in Coleman’s appeal was whether the government provided a sufficient factual basis to determine that Plaintiff was guilty of knowingly discharging a pollutant into a navigable water.

Applying the *Rapanos* Decision

The court reasoned that the plea colloquy only established that the diesel fuel migrated into an adjacent storm water drainage that flows directly into a creek and that the unnamed creek is a tributary of other creeks that eventually flow into a traditionally navigable water of the United States. Because the Eleventh Circuit follows the *Rapanos* “significant nexus” test, the government was required to demonstrate that the fuel entered water that “significant affect” the “chemical, physical, and biological integrity” of a navigable water. Allegations of a hydrologic connection alone were inadequate to establish this showing on a “four-steps-removed” navigable water in light of the standard imposed by Rule 11.

The court vacated its prior ruling based on plaintiff’s first argument and declined to discuss the two remaining arguments.

Conclusion and Implications

This *unpublished* case cannot provide any precedential authority in other criminal cases; however, its reasoning suggests that a criminal conviction for knowingly discharging to a water of the United States under the Clean Water Act may not be legally supportable under Federal Rules of Civil Procedure Rule 11 without facts showing there is a significant chemical, physical, and biological impact on a navigable water. Allegations of a “mere hydrologic connection” may not provide such a sufficient factual basis. The court’s decision is available online at:

<https://media.ca11.uscourts.gov/opinions/unpub/files/201915127.op2.pdf>

(Anya Kwan, Rebecca Andrews)

MONSANTO PCB CLEAN WATER ACT CLASS ACTION SETTLEMENT REJECTED BY THE DISTRICT COURT

City of Long Beach v. Monsanto Company, et al.,
___F.Supp.3d___, Case No. CV 16-3493 FMO (C.D. Cal. Nov. 25, 2020).

The U.S. District Court for the Central District of California recently denied plaintiffs' Renewed Motion for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, Approval of Notice Plan, Appointment of Class Action Settlement Administrator, and Appointment of Class Counsel in a Clean Water Act class action lawsuit against Monsanto. The court enabled plaintiffs to file a renewed motion by December 31, 2020.

Background

Monsanto Company manufactured polychlorinated biphenyls (PCBs) between the 1930s and 1977. The City of Long Beach and twelve other governmental entities (plaintiffs) filed a class action citizen suit against Monsanto under the Clean Water Act seeking funds for PCB remediation and monitoring programs. Plaintiffs allege PCBs contaminated their stormwater systems and environmental resources.

Plaintiffs recently filed a motion to certify the class and approve a settlement agreement for this class action lawsuit. The court must approve these proposals to ensure all class members are adequately protected before the case can settle.

The District Court's Decision

The court considered and rejected the proposed settlement agreement for five reasons. First, the court assessed the settlement agreement's release of claims. The release provided, in part, language that sought or suggested the claims of persons or entities who were not parties to the case would be barred. The release also referenced claims under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court reasoned that Monsanto is only entitled to the release of claims plaintiffs asserted, or could have asserted, in the current case. Monsanto cannot have class members indemnify it for other claims asserted in future cases by non-class members. Similarly, the court determined it was improper to release Monsanto from CERCLA

claims because there were no such claims in the operative complaint. Finally, the court was especially concerned about the release's breadth in relation to the "very modest payout" most class members would receive under the settlement.

Second, the court considered a provision that would reduce class members' payments if a state attorney general filed a future action against Monsanto. Plaintiffs argued this clause was intended to prevent double payment by Monsanto. The court saw no reason why class members' payments should be reduced because of government law enforcement conduct, because the class members and the government had different interests that should not affect each other's potential recovery.

Third, the court considered a cancellation provision. The provision provided that the settlement fund (which funds payments to class members) would be reduced if any class members opted out of the settlement. The court reasoned such a provision could unfairly affect settlement fund allocation, which would be determined by a Special Master in the future, after applications were made for such allocations.

Fourth, the court considered the attorneys' fees provision, which required Monsanto to pay \$98 million for attorneys' fees. The court considered the fee amount to be excessive for this stage in the proceedings, especially because plaintiffs had included fees and costs of a Special Master and consulting experts to assist the Special Master, which Plaintiff should not have included.

Fifth, the court considered the settlement agreement's lack of specificity regarding how the agreement would be monitored and implemented over time. Estimating that this settlement would take several years and would be complex to administer, the court required that the parties appoint a Special Master to report to the court and implement the settlement.

Based on these critiques of the settlement agreement, the court denied plaintiffs' motions for Certification of Settlement Class, Preliminary Approval of Class Action Settlement, Approval of Notice Plan,

Appointment of Class Action Settlement Administrator, and Appointment of Class Counsel, without prejudice. Plaintiffs' had until December 31, 2020 to file renewed motions that took the court's criticisms into account.

Conclusion and Implications

This decision rejects the proposed settlement agreement between plaintiffs and Monsanto in the longstanding dispute over PCB contamination. It also

provides guidance on what terms are acceptable and unacceptable in a class action settlement agreement under the Clean Water Act. Importantly, a settlement agreement should operate to settle disputes between the parties and should not act as a broad shield that extends to protect a defendant from actions by non-parties. The court's rulings are available online at: <https://www.courtlistener.com/recap/gov.uscourts.cacd.648298/gov.uscourts.cacd.648298.254.0.pdf> (William Shepherd, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FIFTH DISTRICT COURT REVERSES DENIAL OF WRIT OF MANDATE CHALLENGING WATER BOARD ADMINISTRATIVE PENALTIES WITHOUT CONSIDERATION OF CERTAIN DEFENSES

Malaga County Water District v. State Water Resources Control Board,
___Cal.App.5th___, Case No. F075868 (5th Dist. Dec. 10, 2020).

The Fifth District Court of Appeal has held that the Superior Court, in upholding the Central Valley Regional Water Quality Control Board's (RWQCB or board) administrative decision to impose \$78,000 in civil penalties against Malaga County Water District (Malaga) for violation of its wastewater discharge permit requirements failed to consider Malaga's defenses of laches and underground regulation. This summary focuses only on the facts and legal issues relating to the laches defense. [Note: This is one of several cases before the Court of Appeal involving disputes between the Malaga County Water District (Malaga) and the agencies involved in issuing and enforcing the permits necessary for Malaga to operate its waste treatment facility. Two separate opinions were issued on December 10, 2020 in Case Nos. F078327 (pertaining to underground regulation in the administrative proceedings on a separate administrative civil liability complaint) and F075851 (pertaining to improper delegation of authority in the verification process for Malaga's permit).]

Factual and Procedural Background

On July 8, 2010, the RWQCB sent Malaga notice of violations of Malaga's wastewater discharge permit requirements, and on November 5, 2010 the RWQCB sent a revised notice. A new notice of violation and draft record of violations issued December 8, 2011, identifying violations occurring between March 14, 2008 and October 30, 2011.

On May 1, 2013, the board filed an administrative civil liability complaint for violations of Malaga's wastewater discharge requirements occurring between 2007 and 2011. The complaint also stated that Malaga had additional violations between February 1, 2004, and March 13, 2008, that were subject to mandatory minimum penalties pursuant to Water Code § 13385.

Malaga claimed it responded to each of the notices of violation, and that the RWQCB did not further communicate. Malaga also claimed that early violations occurring between 2008 and 2010 were addressed and suspended prior to the notices, provided Malaga completed certain compliance projects.

Malaga objected to the board's prosecution team submitting any evidence in the case, claiming it was irrelevant because the proceedings were barred by laches.

The administrative hearing occurred on July 25, 2013. At that hearing, the prosecution team primarily relied upon a witness who presented a summary of the known violations compiled by board staff from Malaga's self-monitoring reports, provided his opinion on why certain violations required imposition of mandatory minimum penalties, and explained why the total violation penalty recommendation was \$78,000.

Malaga's president testified that due to the delay in proceedings, Malaga had lost the ability to determine who had caused the effluent violations and therefore could not shift the cost of the penalties to the polluter.

He further testified that the proposed penalty was around 15 percent of Malaga's budget, and that Malaga could not afford to pay such a penalty. Malaga claimed that it was precluded from presenting additional evidence about its claimed inability to pay, in part because the RWQCB voted to approve an opinion that a laches defense was not valid.

The RWQCB imposed the recommended \$78,000 penalty. The order entered parroted the language of the complaint, with additional language rejecting the laches claim.

Malaga petitioned the State Water Resources Control Board (SWRCB) for review of this order. This petition was dismissed by the executive director of the SWRCB for failing to raise substantial issues that

are appropriate for review by the SWRCB.

Malaga then filed a petition for writ of administrative *mandamus* pursuant to Code of Civil Procedure § 1094.5. The trial court concluded that laches was not a defense to the assertions brought by the RWQCB, and otherwise concluded no substantive or procedural errors arose in the proceedings.

The Court of Appeal's Decision

The Court of Appeal held that the trial court erred in concluding that laches was not a viable defense. The Court of Appeal also held that claims where the SWRCB could be said to have known of the violation more than three years before the enforcement action was initiated are subject to a burden shifting presumption that the delay in initiating an action was unreasonable and prejudicial.

Laches in Administrative Proceedings

It is well understood that statutes of limitation are inapplicable to administrative proceedings. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal.4th 1072, 1088 (2005).)

Laches is an equitable principle that bars certain claims or proceedings based on a combination of unreasonable delay in pursuing the claims and prejudice based on that delay. Laches applies to quasi adjudicative proceedings pursuant to the common law inherent power of courts to dismiss when a case is not diligently prosecuted. (*Brown v. State Personnel Bd.*, 166 Cal.App.3d 1151, 1158 (1985) (*Brown*).)

There are two general ways to demonstrate unreasonable delay and resulting prejudice. In the first, the party arguing laches bears the burden of proof and is required to present evidence sufficient to tip the equitable balance toward preclusion in order to prevail. In the second, an unreasonable delay is established as a matter of law and prejudice is presumed when there is a statute of limitations governing an analogous action at law and the claims pertain to a period beyond that statute of limitations. (*Brown, supra*, 166 Cal.App.3d at p. 1159.)

Issue Whether Section 13385 Precludes Laches

The RWQCB argued that the policy embodied in *Brown* that laches should typically be available as a

defense in administrative proceedings run by the state does not apply to administrative proceedings under § 13385.

First, the RWQCB argued that equitable defenses cannot be used to countermand statutory commands on matters that are plain and fully covered by a positive statute. The board contended that § 13385 is plain and clear on the position that the only recognized defenses to the mandatory minimum penalties contained in subdivisions (h) and (i) are those specific examples contained in subdivision (j), which do not include any equitable rights.

The Court of Appeal rejected that argument, noting that the language of § 13385 does not plainly exclude a defense of laches. The Court of Appeal analyzed the various subdivisions of § 13385 and found that those subdivisions requiring mandatory minimum penalties in certain situations and limiting defenses to those penalties did not limit the:

... long-standing judicial policy curtailing the ability to belatedly prosecute stale claims to the detriment of one who had relied upon their lack of prosecution.

Second, the board contended that imposition of laches cannot be invoked against a government agency's actions because it would impermissibly nullify an important policy adopted for the public's benefit. The Court of Appeal rejected that argument, noting that the limited substantive defenses and mandatory minimum penalties of § 13385 are equally applicable to judicial proceedings brought by the Attorney General under § 13385, to which the three-year statute of limitations under Code of Civil Procedure section 338, subdivision (i) applies. Nothing in the statutory scheme or the case law suggests that the Legislature intended to limit potentially stale actions brought in court but permit those same actions to proceed through administrative hearings.

The Court of Appeal noted that the § 13385 legislative history suggests the opposite. In streamlining the proof required for demonstrating a violation, specifically creating a statute of limitations for court actions while permitting state-level administrative actions to enforce these violations where a common-law application of laches exists, and in highlighting the need to ensure speedy and effective prosecutions, the overall framework of California's enforcement

scheme is designed to quickly stop and remedy polluting discharges. Indeed, it was a history of delays in administrative prosecution that led to § 13385.

The Relevant Statute of Limitations for Presumed Prejudice under Laches

Having concluded that laches may be asserted as a defense to administrative enforcement actions under Water Code § 13385, the Court of Appeal adopted the three-year statute of limitations for violations of the Porter-Cologne Water Quality Control Act contained in Code of Civil Procedure § 338, subdivision (i), as the period for presumed prejudice under laches. It is the more specific statute of limitations that applies to similar types of penalties as those contained in § 13385.

The Court of Appeal rejected Malaga's argument that the one year statute of limitations contained in Code of Civil Procedure § 340 for actions upon a statute for a penalty or forfeiture because the three-year statute of limitations contained in Code of Civil Procedure § 338, subdivision (i) specifically referencing

the Porter-Cologne Water Quality Control Act is the more specific limitation period involved and applies to similar types of penalties as those now contained in Water Code § 13385.

Conclusion and Implications

This opinion by the Fifth District Court of Appeal is important in preserving the ability to resort to principles of equity such as laches in administrative proceedings to avoid the threat of government administrative overreach, in situations such as where the government tries to leverage stale inconsequential violations. While the Court of Appeal did not believe that Malaga would be able to satisfy the burden of proving prejudice sufficient for laches given evidence of violations established by Malaga's self-reporting, there may be previously unreported evidence of prejudice sufficient to overcome Malaga's awareness of the violations, such as inability to halt violations from third parties discharging within Malaga's system. The court's opinion is available online at: <https://www.courts.ca.gov/opinions/documents/F075868.PDF> (Boyd Hill)

FIRST DISTRICT COURT HOLDS REGIONAL WATER BOARD, ACTING AS RESPONSIBLE AGENCY UNDER CEQA, COULD IMPOSE ADDITIONAL MITIGATION MEASURES UNDER THE PORTER-COLOGNE ACT

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board,
59 Cal.App.5th 199 (1st Dist. 2020).

The First District Court of Appeal has held that the California Environmental Quality Act (CEQA) did not preclude a responsible agency—the San Francisco Bay Regional Water Quality Control Board (RWQCB)—from imposing additional waste discharge requirements via the Porter-Cologne Water Quality Control Act—beyond the mitigation measures the lead agency—Santa Clara Valley Water District—set forth in its project Environmental Impact Report (EIR).

Factual and Procedural Background

The Upper Berryessa Creek (Creek) in Santa Clara County, drains from the Diablo Range Hills to the Coyote Creek tributary, and ultimately into

the San Francisco Bay. Every 10-20 years, the Creek historically flooded the nearby areas of Milpitas and San Jose, CA. In the 1980s, the U.S. Army Corps of Engineers (Corps) began working on plans to build a flood control project on the Creek. The project did not move forward until 2013, when renewed interest was sparked by construction of a nearby Bay Area Rapid Transit (BART) station that could be impacted by flooding.

In 2014, the Corps conducted federal environmental review for the proposed flood control project under the National Environmental Policy Act (NEPA). The Corps' Environmental Impact Study (EIS) named the Santa Clara Valley Water District (District) as the project sponsor. An agreement between

the Corps and the District articulated that the Corps was responsible for the design and construction of the project, while the District was responsible for land acquisition, operating, and maintaining the project.

In early 2015, staff from the San Francisco Bay Regional Water Quality Control Board submitted comments on the Corps' design of the project. The comments suggested various changes to mitigate the project's impacts on wetlands. The Corps rejected the changes, citing they exceeded the scope of the Corps' environmental review. In September 2015, the District, acting as CEQA lead agency, issued a Draft EIR for the project. That same month, the Corps applied to the RWQCB for a § 401 federal Clean Water Act certification for the project. The RWQCB notified that the Corps' application was incomplete because it lacked compensatory mitigation to address the project's impacts on waters and wetlands. This action prompted pressure from both the Governor's office and the California Congressional delegation, based on concerns that the BART station was already under construction and could lose federal funding absent the board's § 401 certification. In an effort to compromise, the RWQCB agreed to quickly issue the § 401 certification so that the Corps could proceed with project construction. However, the board informed the District that it would issue Waste Discharge Requirements (WDRs) under the Porter-Cologne Act to address project impacts that were not handled by the § 401 certificate.

In January 2016, the District issued its Final EIR on the project. In March 2016, the RWQCB's executive officer issued the § 401 certification. As a CEQA responsible agency, the board found that all impacts within its purview would be mitigated to less-than-significant levels, but qualified that the board would later consider WDRs to "compensate for temporal and permanent losses of functions and values."

In April 2017, when project construction was nearly complete, the RWQCB issued a WDR order requiring the Corps and the District to provide off-site mitigation of the project's effects by enhancing about 15,000 linear feet or 15 acres of waters of the state. The order suspended and replaced the board's prior 401 certificate, and addressed CEQA by stating the board had considered the EIR and found that with mitigation, project impacts would be less than significant.

In May 2017, the District appealed the RWQCB's

order to the State Water Resources Control Board (SWRCB). During the pendency of their appeal, the District filed a petition for writ of mandate against the RWQCB, challenging the WDR order under CEQA. The SWRCB failed to take action on the District's appeal, thereby denying it by operation of law. The District amended its petition to add causes challenging the order under § 401 of the Clean Water Act, the Porter-Cologne Act, and other state laws. The trial court denied the District's petition in February 2019, and the District timely appealed.

The Court of Appeal's Decision

On appeal, the District claimed the trial court erred in denying the administrative writ petition challenging the RWQCB's WDR. As to its CEQA claim, the District argued: 1) the board's failure to impose mitigation requirements as part of the board's CEQA review of the project barred it from imposing mitigation via the WDR order; and 2) the board prejudicially abused its discretion by failing to support the mitigation requirements with substantial evidence.

The First District Court of Appeal affirmed the trial court's judgment, finding that the District failed to demonstrate reversible error. The appellate court begun its analysis of the District's CEQA claim by reviewing the role of a responsible agency. Citing to CEQA Guidelines § 15096, the court reiterated that a responsible agency that disagrees with the adequacy of a lead agency's final EIR must either timely sue the lead agency, be deemed to have waived any objections to the EIR, prepare a subsequent EIR if legitimate grounds exist, or, assume the role of a lead agency as provided by Guidelines § 15052, subdivision (a)(3).

Regional Board Had Authority under Porter-Cologne

Accordingly, § 15096 prohibits a responsible agency from requiring additional environmental review after a lead agency completes its CEQA review, so long as the responsible agency does not have separate independent authority to enforce or administer a different environmental law. However, the savings clause in Public Resources § 21174, makes clear that CEQA does not prevent an agency from exercising independent authority under a separate statute. Here, the court found that RWQCB did not violate CEQA

by issuing the WDRs against the District because it did so pursuant to its duties under the Porter-Cologne Act. Although the District, acting as lead agency, had not formulated CEQA mitigation measures requiring WDRs, the board, as a responsible agency, was not precluded from separately discharging its authority under the Porter-Cologne Act. The appellate court conceded that while unified CEQA review and environmental regulation should be the norm, there may be times when an agency's own environmental regulation can take place after CEQA review, as permitted by Public Resources Code § 21174. Towards this end, the RWQCB and District could be subject to legal challenges by a third party on grounds that the agencies divided their CEQA approval process "into two stages." But, that situation did not arise here, and the District agreed to the board's two-stage approval process due to the hurried 401 certification.

Issue of 'Excessive' Mitigation

Finally, the Court of Appeal rejected the District's claim that the RWQCB's WDR order imposed "excessive" mitigation. The court concluded that the District failed to engage in sufficient analysis of the evidence support the trial court and board's conclusions. By failing to cite to the evidence that the trial court relied on and explain why such evidence

was insufficient to support the board's decision, the District failed to carry its burden to rebut the presumption, as required under the substantial evidence standard of review.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies the effect of an agency's overlapping responsibilities under CEQA and other environmental statutes. CEQA's savings clause does not prevent a responsible agency from discharging its duties under separate environmental laws, even if the exercise of that authority does not neatly align with its duties under CEQA. The court of appeal's decision will likely play an important role in future matters between local, regional, state, or federal agencies, particularly where a lead agency's authority under CEQA must heed to a responsible agency's other statutory duties to mitigate a project's potential effects. To avoid miscommunication, lead and responsible agencies should collaborate early in the environmental review process and identify potential mitigation measures promulgated by other statutes to ensure they are appropriately included in all draft and final CEQA documents. The court's decision is available online at: <https://www.courts.ca.gov/opinions/documents/A157127.PDF> (Bridget McDonald)

SUPERIOR COURT LIMITS REACH OF RECENT WATER QUALITY CONTROL PLAN AMENDMENTS

San Joaquin Tributaries Authority v. State Water Resources Control Board,
Sacramento Superior Court, Case No. 34-2019-80003133 (Hearing Dec. 4, 2020; order filed Dec. 17, 2020).

The California Superior Court for Sacramento County recently determined that the State Water Resources Control Board's (SWRCB) authority to amend the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries of California is limited to waters subject to the federal Clean Water Act. However, the court upheld the board's amendments to the Water Quality Control Plan for Ocean Waters.

Background

In California, water quality is governed under the federal Clean Water Act (CWA) and the state

Porter-Cologne Water Quality Act (Porter-Cologne). While the CWA's authority extends only to "waters of the United States," Porter-Cologne's reach extends to all waters of the state, including any surface water or groundwater within the state's boundaries. Responsibility for implementing water quality laws rests with the SWRCB and the nine Regional Water Quality Control Boards (RWQCBs).

Under the CWA, effluent limitations and water quality standards are enforced through a discharge permitting system. In California, RWQCBs set discharge requirements which are the equivalent of these federal permits. The RWQCBs are also primar-

ily responsible for establishing Water Quality Control Plans (WQCP) under Porter-Cologne. The SWRCB is responsible for approving WQCPs adopted by the RWQCBs, but has authority to establish WQCPs for waters for which water quality standards are required under the CWA and for ocean waters of the state.

After U.S. Supreme Court decisions withdrew protection for some wetlands under the CWA in the early 2000s, as reflected in the Trump administration's definition of "Waters of the United States," the SWRCB began developing a policy to protect the state's wetlands, including broadly defining that term to reach waters within the state that are no longer protected by the CWA (*i.e.*, non-jurisdictional waters). Specifically, the SWRCB issued a draft document entitled Water Quality Policy for Wetland Area Protection and Dredge and Fill Permitting, which was revised in 2013. In 2019, the SWRCB adopted the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (Procedures), which effectively converted its 2013 policy document into amendments of the WQCP for Ocean Waters and WQCP for Inland Surface Waters and Enclosed Bays and Estuaries of California. The Procedures define "wetlands" and broadly categorizes them as "waters of the state." The Procedures also establish application requirements for permits to discharge dredged or fill material into state waters, including wetlands.

The San Joaquin Tributaries Authority (SJTA) brought a petition for writ of mandate to set aside the Procedures on substantive and procedural grounds. Several environmental groups, including the Center for Biological Diversity and Defenders of Wildlife, intervened in the action to defend the SWRCB's actions.

The Superior Court's Decision

Section 13140 Does Not Authorize the State Board to Amend the WQCPs

SJTA first argued that the State Water Resources Control Board exceeded its authority under Porter-Cologne, which SJTA maintained did not authorize the SWRCB to regulate wetlands and discharges of dredged or fill material for waters other than waters subject to the CWA. The SWRCB contended that its policy-making authority under Porter-Cologne

(*i.e.*, Water Code § 13140)—and not its authority to regulate WQCPs for waters of the United States (*i.e.*, Water Code § 13170)—is the basis for its authority to amend the WQCPs for all waters of the state. The court agreed with SJTA, ruling that the SWRCB's policy-making authority does not authorize the board to amend WQCPs to include non-jurisdictional waters. Therefore, according to the court, the SWRCB's wetland definition and policy cannot be used to modify or implement WQCPs.

In its review of the relevant statutes, the court determined that § 13140 directs the SWRCB to formulate and adopt state policy for water quality control, but makes no mention of WQCPs. The court also found that the components of state policy described in § 13142 contain no mention of WQCPs and connote a level of generality higher than that associated with WQCPs. In contrast, § 13240 commands the RWQCBs to establish WQCPs and distinguishes WQCPs from state policies which, according to the court, undermines the argument that state policies could serve as WQCPs. The court further reasoned that WQCPs consist of certain elements, such as a program of implementation, which are not required of a state policy developed under § 13140 and that WQCPs and policies differ in rulemaking procedures, indicating that a state policy established under § 13140 could not serve as a WQCP. The court also rejected an argument by amici that §§ 13140 and 13170 collectively authorized the SWRCB to enact the Procedures, concluding that the SWRCB's authority could be no greater than the sum of its parts. Thus, the court held, while the board is authorized to adopt WQCPs for California waters subject to the CWA, it is not authorized to do so for all waters of the state, and the SWRCB could not use its policy-making authority under § 13140 to amend statewide WQCPs.

The State Board Has Limited Authority to Amend WQCPs Falls under Section 13170

Having concluded that § 13140 does not authorize the SWRCB to amend the WQCPs, the court determined that the board's only authority to amend the WQCP for Inland Surface Waters and Enclosed Bays and Estuaries of California was under § 13170. The court therefore enjoined the SWRCB from applying the amendments to this WQCP to waters other than those for which water quality standards are required

under the CWA. As to the WQCP for Ocean Waters, the court found that § 13170.2 provided independent authority for the SWRCB to adopt a WQCP for Ocean Waters. The court rejected SJTA's argument that the Procedures exceeded the SWRCB's authority under § 13170.2 by amending "waters of the state," concluding that the WQCP for Ocean Waters by its terms is limited to oceans and could not be applied to waters outside its scope.

Issue of Hardship and the Ripeness Doctrine

SJTA also argued that the SWRCB exceeded its authority by regulating dredged and fill material as "waste" under Porter-Cologne, conceding, however, that the SWRCB could regulate some dredged and fill materials under Porter-Cologne's definition of "waste." The Superior Court held that the issue was not yet ripe, reasoning that the circumstances for its review of the issue were hypothetical at this point. Further, while the SWRCB had incorporated the federal definitions of dredged or fill material, which differed from Porter-Cologne's definition of "waste," SJTA did not show that any particular provision of the federal definitions exceeded the scope of the definition of "waste" or requested a remedy based on the distinction between the definitions. The court therefore determined that SJTA had not established a hardship requiring immediate judicial action.

Issue of the Procedures Serving as Amendments to the WQCPs

The Superior Court also rejected SJTA's claim that the Procedures may not serve as amendments to the WQCPs because they neither constitute nor amend the statutory components of the WQCPs. In this regard, the Superior Court determined that SJTA failed to show in the first instance not only that the

Procedure's provisions failed to qualify as components of the two WQCPs it presumed to amend, but that the Procedures also did not amend any existing components within those WQCPs. Further, the court was unpersuaded by SJTA's contentions that the SWRCB had not identified any specific objectives in the WQCPs that the Procedures would help achieve and that the SWRCB failed to include the WQCPs in the rulemaking record. The court concluded that it was SJTA's burden as the petitioning party to show an abuse of discretion. The court also rejected SJTA's argument that the Procedures were void for failing to comply with federal rulemaking requirements.

The Court's Injunction

Based on the foregoing, the Superior Court granted SJTA's petition in part, enjoining the SWRCB from applying the amendments to the WQCP for Inland Service Waters and Enclosed Bays and Estuaries of California to waters other than those subject to the Clean Water Act.

Conclusion and Implications

The Superior Court's ruling effectively means that the SWRCB cannot use its definition of wetlands or wetlands policy to modify or implement WQCPs. More broadly, the SWRCB cannot, under the current ruling, rely on its policy-making authority under Porter-Cologne to extend or modify WQCPs to include non-jurisdictional waters, i.e., waters that are outside the purview of the CWA. As a practical matter, the Superior Court's ruling may remove some uncertainty about the applicability of the SWRCB's wetland definition and policy to many projects around the state. However, it is not yet known whether the SWRCB will appeal the trial court's ruling. (Heraclio Pimentel, Steve Anderson)

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