

# CALIFORNIA WATER<sup>TM</sup>

L A W & P O L I C Y

*Reporter*

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## CALIFORNIA WATER NEWS

### SPORADIC RAINFALL BRINGS SONOMA AND MENDOCINO COUNTY RESERVOIRS CLOSER TO HISTORIC DROUGHT LEVELS

With this water year's weather patterns swaying drastically back and forth between cool-rainy and warm-dry days, the northern mile or so of Lake Mendocino has been turned into a barren landscape of dry, cracked earth, leaving the North Ramp boat launch to rest on the now-revealed lakebed. Since the latter half of January, California received a welcome helping of precipitation, but has this sprinkling of rainfall been enough to alleviate drought concerns?

#### Late January Showers

Fueling a population of roughly 600,000 Sonoma and Marin County residents, Lake Mendocino and Lake Sonoma both saw dips in reservoir levels that were rapidly approaching their lowest point since 2014-2015. Up north near Ukiah, California, Lake Mendocino has only recently pushed back over the 30,000 acre-feet marker, sitting at a mere 45.1 percent of its target water supply curve. Prior to the rains that came in late January and early February, Lake Mendocino water levels were on pace to drop below 2014's lowest point at 27,000 acre-feet. This drop is a sharp departure from last year's reservoir levels where they peaked at over 80,000 acre-feet in February of 2020.

With nearly three times the capacity as Lake Mendocino, Lake Sonoma was designed to hold a three-year water supply for Sonoma and Marin county residents, contrasting Lake Mendocino's heavy reliance on yearly replenishment. Located about 40 miles south, Lake Sonoma has remained a touch more stable than Mendocino at 64.2 percent of its target

water supply curve. While still holding over 150,000 acre-feet of water, this represents the lowest Lake Sonoma has been since December of 2015 when water levels dropped below 140,000 acre-feet.

#### Conclusion and Implications

The rainy season isn't quite over yet this year, but barring a "March Miracle" of sorts these reservoirs are currently on pace with the 2014 water year, if not a bit below that. At the start of the calendar year, the U.S. Drought Monitor for California had almost all of the state—95 percent—in one of four drought stages. As of the February 18, 2021 update, however, that number has decreased to 85 percent.

Despite this decrease, the report for Sonoma and Mendocino counties has remained largely the same, with an almost 50-50 split down the center with the west side in the "Moderate Drought" range and the east listed as "Severe Drought." The situation is not looking great for neighboring Napa County either, with the US Drought Monitor showing "Extreme Drought" conditions for northern California counties from Napa to Siskiyou.

In addition to the state's water supply concerns, California's wildfire season has become more and more threatening, and a dry year could spark elevated fire conditions for this upcoming year. With the fire season creeping longer into the winter months with each passing year, an unusually dry water year could turn California's wildfire "season" into a year-round dilemma.

(Wesley A. Miliband, Kristopher T. Strouse)

### CRIMINAL CHARGES FILED AGAINST FORMER MICHIGAN GOVERNOR STEMMING FROM FLINT DRINKING WATER CRISIS

In a move that surprised some observers of the Flint Michigan drinking water crisis and saga, the former Governor of Michigan, Rick Snyder, was indicted earlier this month on two criminal charges of willful neglect of duty.

#### Factual Background

The facts surrounding the Snyder indictments involve his being informed in advance that there were definite as well as additional possible health risks

involved in making the water supply switch, a move dictated primarily by a search for less expensive water. Because of the age and condition of the Flint system, the condition of the river water, and basic water delivery chemistry, the change resulted in there being pollutants, including lead leached from pipes, in the water delivered at peoples' taps. Snyder allowed the change to proceed and only declared a crisis after serious harm was obviously occurring.

### **The Charges**

Both are misdemeanor allegations that relate to the Governor's participation in the replacement of the drinking water supply for Flint Michigan. At least a dozen deaths are attributed to drinking the replacement water drawn from the Flint River, which was known to be polluted, rather than purchasing water supplies drawn from Lake Huron. The charges were sought and are being advanced by the Attorney General of Michigan, Dana Nessel. Prosecution is in the hands of the Michigan Solicitor General and the Wayne County prosecutor. Eight other officials were indicted at the same time as Snyder, with the charges individualized for each. In two cases, the indictments include involuntary manslaughter felony allegations. In another, perjury is alleged.

### **Procedural Summary of Case**

In mid-year 2020 the Sixth Circuit U.S. Court of Appeals had remanded to federal District Courts the pending class actions for tort recovery against Snyder and several other Michigan state and local government officials, finding that Snyder's alleged conduct was egregious enough to believe he may be found by a jury to have violated the substantive due process rights of Flint citizens by his lack of actions to protect against dangers of illness explained to him. He is the first governor in Michigan history to face indictment for conduct in office.

### **Issue of Immunity**

Throughout the saga there have been reports of officials at different levels of federal, state and local government not taking seriously enough or acting fast enough to prevent the foreseeable and foreseen

problems of health issues for those Flint residents and others drinking the replacement water. Usually in the past, where tragedies have occurred, governmental officials have enjoyed the protection of immunities that are afforded by law. If the Flint saga teaches nothing else to lawyers and officials, those days of expected and rather regularly accorded immunity are apparently gone.

### **The Parties Weigh in**

The criminal charges were denounced by several Flint activists as being a mere slap in the face. Some advocated for manslaughter charges that would result in hard time for the former governor.

Governor Snyder's counsel denounced the indictment as a political stunt. Attorney General Nessel had ordered her predecessor's investigation into the same situation curtailed, claiming that the investigation was not proceeding in a professional enough manner. She had then appointed the Solicitor General and Wayne County prosecutor to conduct a new investigation, from which the current indictments have resulted. A special grand jury consisting of a circuit judge reviewed the evidence and returned the indictments.

### **Conclusion and Implications**

As these charges pend, a federal district judge in Ann Arbor has taken under advisement a proposed settlement on behalf of affected people in Flint. The settlement is valued at about \$640 million, with not all potential defendant parties involved participating. The federal EPA itself, along with engineering firms, remain targets of additional litigation for tort recovery. Proceeds are to be distributed to citizens who drank the Flint water. The opposition to the settlement contends the money received per Flint resident, reportedly around \$500, is too little to be serious compensation for the harms caused.

The case and defense of the governor may well explore the limits of power, both legal and practical, in the 21st century. Although governors of states are singularly powerful officials, their actions are constrained not only by state, but federal laws. Local decisions and authority also must often be consulted. (Harvey M. Sheldon)

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## LEGISLATIVE DEVELOPMENTS

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### CONGRESS INTRODUCES BILL TO COORDINATE RIVER RESTORATION EFFORTS BETWEEN THE UNITED STATES AND MEXICO AND TO PROTECT THE SALTON SEA

On January 25, 2021, U.S. House of Representatives Members Raul Ruiz (CA -36) and Juan Vargas (CA-51) introduced HR 491, the “California New River Restoration Act of 2021,” which would direct the administrator of the U.S. Environmental Protection Agency (EPA) to establish a federal restoration program for the California New River that flows from Mexico to the Salton Sea.

#### Background

The Salton Sea is California’s largest lake, situated along the San Andreas Fault in southern California, between Imperial and Riverside counties. In addition to its size, the Salton Sea is notable for its low elevation (226 feet below sea level) and high salinity (25 percent higher than the Pacific Ocean). The Salton Sea serves as an important stopover for hundreds of species of migratory birds traversing the 5,000-mile Pacific Flyway, and has been identified by the National Audubon Society as a bird area of global significance. It provides habitat for numerous listed species, including the desert pupfish, the brown pelican, and the Yuma clapper rail. The Salton Sea started as a freshwater lake formed by Colorado River floods in the early 20th century, but became saline over time due to declining water levels and the steady inflow of agricultural tailwaters high in salts and nutrients from the Imperial, Coachella, and Mexicali valleys.

While it was once regarded as one of California’s most productive fisheries, the Salton Sea has become less hospitable to wildlife, due in part to reduced inflows, climate fluctuations, and a lack of natural outlets beyond evaporation and seepage. Over the past few decades, deteriorating conditions in the Salton Sea have led to fish and bird die-offs, a reduction in overall bio-diversity, and an increased threat of harmful dust storms due to reduced water levels and exposed lake bed. Numerous programs and initiatives have been developed to address conditions in the Salton Sea, including one of its primary pollutant sources, the New River.

The New River originates near the City of Mexicali, Mexico and flows north through agricultural lands in the Imperial Valley, to the Salton Sea. Once regarded as one of the most polluted rivers in the country, the New River contributes nearly 400,000 acre-feet of water to the Salton Sea each year, constituting approximately 10-15 percent of the annual inflow. As such, the discharge of urban runoff, agricultural tailwater, treated municipal waste, and partially treated industrial waste in the New River affects the water quality and habitat conditions in the Salton Sea, as well as human health and economic development in the Imperial Valley.

#### New River Restoration

The California-Mexico Border Relations Council (CMBRC) was created in 2006 to coordinate inter-agency programs, initiatives along the California-Mexico border between California agencies and their counterparts in Mexico. In 2010, the CMBRC formed a New River Technical Advisory Committee to oversee the development of a New River Strategic Plan to monitor, study, and address prevailing water quality concerns in the New River. The Technical Advisory Committee released a Strategic Plan to the public in 2012, which it revised based on community input in 2016. The revised Strategic Plan delivered to the California legislature included recommendations to construct a trash screen, disinfection facility, and associated conveyance structures in Calexico to remove pollutants from the New River. California’s legislature appropriated \$1.4 million to provide grants and contracts to implement the planning, design, and permitting work needed for the recommended project components.

Citing a need for coordination of federal and non-federal funding and resources to assist restoration efforts in the New River, Representatives Ruiz and Vargas introduced HR 491 to direct the EPA to form the California New River Restoration Program (Program). Under the Program, the EPA adminis-



trator would facilitate restoration and protection activities for the New River among Mexican, federal, state, local, and regional agencies and groups. The objectives of those activities include the enhancement of habitat restoration and protection activities, the improvement of water quality to support fish and wildlife, enhancement of water and flood management, and increased opportunities for public access to, and recreation in, the New River.

The EPA administrator would coordinate and consult with representatives of the Mexican government, the United States Department of the Interior, Department of Agriculture, and Department of Homeland Security, the California Natural Resources Agency, California Environmental Protection Agency, State Water Resources Control Board, and Department of Water Resources, as well as local government agencies and other stakeholder groups, to implement the Program.

HR 491 also calls for the provision of federal grants and technical assistance to state and local governments and other stakeholders, both in the U.S. and in Mexico, to carry out the aforementioned purposes of the Program. These grants would incorporate criteria developed to ensure that the activities are aligned

with and accomplish the goals of the Program, and include a federal cost-sharing allotment of up to 55 percent. While HR 491 does not directly involve projects in the Salton Sea, the New River restoration activities would reduce the volume of pollutants entering the Salton Sea and work to improve overall water quality.

### **Conclusion and Implications**

House Resolution 491 declares federal coordination and funding is needed to build on and support activities already in motion to restore conditions in the New River. However, similar federal legislation introduced in 2016, 2017, and 2019, was unsuccessful. After its introduction, HR 491 was referred to the House Committee on Transportation and Infrastructure, the Committee on Natural Resources and the Subcommittee on Water Resources and Environment for review and consideration.

A copy of HR 491, the California New River Restoration Act of 2021, is available at: <https://www.congress.gov/bill/117th-congress/house-bill/491/text?r=24&s=1>

(Austin C. Cho, Meredith Nikkel)

## **CALIFORNIA LEGISLATION INTRODUCED TO ADDRESS THE IMPACTS OF AGRICULTURAL LAND FOLLOWING UNDER THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT**

California Assembly Bill 252 (AB 252 or Bill) was recently introduced by Assemblymembers Robert Rivas (D-Hollister) and Rudy Salas (D-Bakersfield). The Bill declares that the Sustainable Groundwater Management Act of 2014 (SGMA) is imperative to the state's future in managing water resources, but that implementation of SGMA will result in significant changes to the rural landscape, placing additional burdens on rural communities and economies. The Bill proposes that coordinating "land repurposing" at a regional scale presents an opportunity to maximize use and multiple benefits of converted lands. AB 252 seeks to create a pilot program, designed to sunset in 2032, to incentivize multibenefit land repurposing.

### **Background**

SGMA is designed to achieve long-term sustain-

ability of the state's groundwater basins by as early as 2040. The law promotes local sustainable groundwater management by Groundwater Sustainability Agencies (GSAs), which are required to prepare, adopt and implement Groundwater Sustainability Plans (GSPs) that are designed to achieve groundwater sustainability over a 20-year period. A failure or refusal to establish a GSA or adopt and implement an effective GSP can result in direct management by California's State Water Resources Control Board.

Under the Sustainable Groundwater Management Act GSAs are authorized to manage groundwater through various means, including regulating, limiting, or suspending groundwater extractions. GSAs are also authorized to implement voluntary following programs for agricultural lands or validate existing

following programs. Some experts have estimated that 500,000 to 750,000 acres of agricultural land could be taken out of production to balance water supply and demand and to meet SGMA mandates.

### **Assembly Bill 252**

AB 252 would require the California Department of Conservation (DOC) to establish and administer a program named the “Multibenefit Land Repurposing Incentive Program” (Program). The Program would provide grants to GSAs, counties, or agencies or nongovernmental organizations designated by GSAs or counties, to develop and implement local programs supporting or facilitating reduced use of groundwater and multibenefit land repurposing at the basin scale.

AB 252 defines “multibenefit” as providing more than one benefit including:

...improving water quality, increasing water supplies or water supply reliability, reducing groundwater demand, preserving, enhancing, or restoring wildlife habitat, improving flood protection, improving soil health and carbon storage, supporting jobs, local communities, and economies, including disadvantaged communities, and preserving or enhancing recreational opportunities.

“Land repurposing” is defined in the Bill as converting previously irrigated agricultural land to new uses through any of the following methods:

- Restoring upland habitat;
- Creating pollinator habitat;
- Restoring floodplains;
- Creating dedicated wildlife-friendly recharge areas;
- Dryland farming or planting cover crops;
- Switching from irrigated agriculture to rangeland; or
- Creating parks or community recreation areas.

If enacted, the Bill would establish procedures the

DOC to administer the Program and would require the DOC to create Program implementation and funding eligibility guidelines. Program funds would only be available for local programs that satisfy certain criteria, including: 1) limiting implementation to critically overdrafted basins; that special consideration be given to providing incentive payments to farms and ranches of 500 acres or less and to socially disadvantaged farmers and ranchers, as defined in § 512 of the Food and Agricultural Code; and 2) that input must be received from local stakeholders and community members during the development of the local program.

Applicants would need to satisfy a number of requirements including agreeing to use funds received from the DOC pursuant to the Program for land repurposing to implement one or more of the following purposes:

- Habitat restoration;
- Maintaining habitat;
- Converting to rangelands;
- Constructing wildlife-friendly groundwater recharge facilities;
- Restoring floodplains;
- Planting cover crops; or
- Dust control measures.

To facilitate accountability and oversight, the Bill would require Program participants to prepare and submit annual reports on the implementation of local programs and use of Program funds.

### **Conclusion and Implications**

SGMA has already begun to dramatically reshape groundwater management in California. Many agricultural water users and GSAs are grappling with the challenges of meeting SGMA requirements. Groundwater Sustainability Plans for critically overdrafted basins are currently under review by the California Department of Water Resources. Those GSPs contain a wide range of projects and management actions pertaining to agricultural water uses within their local

groundwater basins, including controversial fallowing programs that have already ignited litigation. Assembly Bill 252 was referred to committee on January 28, 2021, and is expected to be heard in the Spring. If it becomes law, the Bill could potentially provide some relief and flexibility to GSAs and landowners in

implementing GSPs. To track the progress of AB 252, go to the state's legislative website at: [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220AB252](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB252)  
(Gabriel J. Pitassi, Derek R. Hoffman)



## REGULATORY DEVELOPMENTS

### FERC RULES STATE WATER BOARD DID NOT WAIVE ITS AUTHORITY TO ISSUE WATER QUALITY CERTIFICATIONS FOR DON PEDRO AND LA GRANGE PROJECTS

The Federal Energy Regulatory Commission (FERC) recently issued an order denying a declaratory petition by the Turlock and Modesto Irrigation districts (Districts) that sought a ruling that the California State Water Resources Control Board (SWRCB or Board) had waived its authority to issue water quality certifications under § 401(a)(1) of the Clean Water Act in connection with licensing proceedings for two projects on the Tuolumne River. In doing so, however, FERC also denied a request by various environmental groups that sought to dismiss the Districts' licensing application for the projects.

#### Background

Under § 401(a)(1) of the federal Clean Water Act (CWA), an applicant for a federal license or permit to conduct activities that may result in a discharge into the navigable waters of the United States must obtain a water quality certification from the state in which the discharge originates. *See*: 18 C.F.R. § 385.214(d)(1)(iii). Alternatively, the applicant may also submit evidence that the state waived certification. *Id.* On January 25, 2019, the U.S. Court of Appeals for the D.C. Circuit held that a state waives its certification authority when it allows an applicant to repeatedly withdraw and refile the same water quality certification request. *See generally, Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (2019).

The Don Pedro and La Grange projects are both located on the Tuolumne River. Declaratory Order on Waiver of Water Quality Certification (FERC Jan. 19, 2021), ¶¶ 2-3. The 168-megawatt Don Pedro Project was originally licensed for 50 years in 1964, and the Districts timely filed an application for a new license in 2014. Since 2016, the Districts have operated the Don Pedro Project under an annual license. *Id.* at ¶ 2. In 2012, FERC staff found that the unlicensed 4.7-megawatt La Grange Project needed to be licensed because it is located on a navigable river and occupies federal land, and the Districts filed an application for an original license to continue its operation

and maintenance in 2017. *Id.* at ¶ 3.

In connection with their applications, the Districts sought water quality certifications from the State Board in January 2018. *Id.* at ¶ 5. Although the SWRCB quickly provided preliminary certification conditions, it ultimately denied the Districts' certification applications without prejudice just days before the one-year deadline for certification under the CWA. *Id.* at ¶¶ 5-6. When the Districts filed their second requests for certification in April 2019, the Board repeated this process. *Id.* at ¶ 8-9. The Districts then submitted their third request for water quality certification on July 20, 2020. *Id.* at ¶ 10. Less than three months later, the Districts filed a petition for a declaratory order with FERC asserting that the SWRCB had waived certification under the precedent set in *Hoopa Valley Tribe*. *Id.* at ¶ 11. Although they subsequently withdrew their third requests for certification shortly thereafter, the SWRCB filed draft certifications less than two weeks after the Districts' withdrawal, and issued its final water quality certifications for the project on January 15, 2021. *Id.*; State Water Resources Control Board, *In the Matter of Water Quality Certification for Turlock Irrigation District and Modesto Irrigation District Don Pedro Hydroelectric Project and La Grange Hydroelectric Project Federal Energy Regulatory Commission Project Nos. 2299 and 14581* (Jan. 15, 2021) (hereinafter, Final Certification).

#### Petition for Declaratory Order

In its petition for a declaratory order, the Districts made two principal arguments in support of the position that the State Board had waived certification under the CWA.

First, the Districts argued that FERC was required to find that the SWRCB had waived certification because its denials of the Districts' requests without prejudice were the "functional equivalent" of the withdraw-and-resubmit arrangement that the D.C. Circuit rejected" in *Hoopa Valley Tribe*. *Id.* at ¶ 26.

Second, the Districts argued that the Board waived certification because its denial of the Districts' certification requests without prejudice were invalid under the CWA because they did not constitute "action" on the Requests. *Id.* at ¶ 29.

### FERC's Ruling

FERC rejected both arguments. It found that *Hoopa Valley Tribe* was not dispositive because the SWRCB did not engage in a "coordinated scheme to evade the waiver period." *Id.* at ¶ 28. Unlike previous FERC cases that had found a state waiver of certification under § 401 of the CWA, FERC concluded there was no evidence in the record that the Districts and the SWRCB's actions amounted to "an agreement, formal or functional, to circumvent § 401's" one-year deadline. *Id.*

In rejecting the Districts' argument that the Board's denials of their certification requests were not valid actions under § 401, FERC agreed with the Board that the validity of its actions was governed by state law. *Id.* at ¶ 32. FERC explained that although a state's decision to issue a water quality certification is often reviewable under federal law, state law governs a state's decision to deny certification because "section 401 contains no explicit requirements restricting a state's authority to deny certification[.]" *Id.* at ¶¶ 32-33. Although FERC expressed sympathy for the Districts' arguments that they could not challenge the SWRCB's actions in state court because the denials of their requests without prejudice did not constitute final administrative actions, it found that the Districts failed to establish that they were actually foreclosed from challenging those denials. *Id.* at ¶ 34.

FERC thus denied the Districts' petition for a declaratory order, but it also rejected arguments from

several environmental groups, including the California Sportfishing Protection Alliance, that the Districts' licensing applications for the Projects should be dismissed. These environmental groups argued that the Districts' licensing applications should be dismissed pursuant to FERC's policy of dismissing an application after the denial of a second state water quality certification request unless the applicant's appeal of the first denial is still pending. *Id.* at ¶ 37. This policy is designed to promote the public interest in freeing up potential sites for hydroelectric development by others or for other purposes. *Id.* In rejecting the environmental groups' request for dismissal, FERC explained that the rationale underlying its policy did not apply to relicensing applications or original license applications for existing, unlicensed projects because dismissing such applications would effectively shut down existing, operational projects. *Id.* at ¶ 38.

### Conclusion and Implications

FERC's denial of the Districts' petition means that the State Water Resources Control Board's final water quality certification for the Projects will stand unless overturned by a California court. Because the final certification incorporates the unimpaired flow requirements of the update to the Bay-Delta Water Quality Control Plan, the Districts will be required to allow 40 percent of the unimpaired February-June inflow to Don Pedro Reservoir to pass downstream if FERC ultimately grants their licensing applications. Final Certification at 50. As of the day this article was written, the Districts had not yet challenged the Final Certification.

(Sam Bivins, Meredith Nikkel)

## U.S. FISH AND WILDLIFE SERVICE FINALIZES REGULATORY DEFINITION FOR THE TERM 'HABITAT' AS USED IN THE ENDANGERED SPECIES ACT

On December 16, 2020, the U.S. Fish & Wildlife Service (FWS) finalized for the very first time a regulatory definition for the term "habitat," as the term is used in the Endangered Species Act (16 U.S.C., § 1531, *et seq.* (ESA) and its various implementing regulations. (85 Fed. Reg. 81411 (Dec. 16, 2020).

The definition, which modified a proposed regulatory definition of "habitat" that was originally published on August 5, 2020 (85 Fed. Reg. 47333) based upon public comments and further consideration of the relevant issues, became effective on January 15, 2021.

## Critical Habitat Designations under the ESA

The FWS proposed a regulatory definition of “habitat” with respect to the use of the term in the context of critical habitat designations under the ESA. The ESA defines “critical habitat” in § 3(5) (A), establishing separate criteria depending on whether the relevant area is within or outside of the geographical area occupied by the species at the time of listing, but it does not define the broader term “habitat.” (16 U.S.C. 1532(5)(A).) The FWS had not previously adopted a definition of the term “habitat” through regulations or policy, but had instead traditionally applied the criteria from the definition of “critical habitat” based on the implicit premise that any specific area satisfying that definition was habitat.

However, the U.S. Supreme Court recently held that an area must logically be “habitat” in order for that area to meet the narrower category of “critical habitat” as defined in the ESA. (*Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018). The Court stated: “. . . Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species.” (*Id.* at p. 368; see *id.* at 369 n.2 [“we hold that an area is eligible for designation as critical habitat under section 4(a)(3) (A)(i) only if it is habitat for the species”].) Given this holding in the Supreme Court’s opinion in *Weyerhaeuser*, the FWS determined to establish a regulatory definition of “habitat.”

After reviewing and considering public comments on the proposed alternative definitions published in August 2020, the FWS revised and simplified the final definition of “habitat” as follows:

For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species. (85 Fed. Reg. at 81412.)

## No New Regulatory Procedures or Processes

In addressing public comments, the FWS noted that:

. . .the regulatory definition of ‘habitat’ will not be used to create a new procedural step or regulatory process, nor will it result in any new

regulatory burdens or landowners or other parties. (85 Fed. Reg. at p. 81414.)

The criteria and process for designating critical habitat will continue to rely, primarily, on the regulatory requirements found in 50 Code of Federal Regulations § 424.12. The FWS also reiterated that the new definition applied only prospectively and would not require that previously finalized critical habitat designations be revisited. (85 Fed. Reg. at p. 81411.)

## Key Changes

The final definition of “habitat” incorporated several key changes from the alternative definitions that were previously proposed by the FWS, including:

- reducing the definition to a single sentence;
- adding an introductory phrase that explicitly limits the scope of applicability of the definition to the designation of critical habitat and thereby address commenter’s concerns about the potential for the definition to apply to other sections of the ESA or other Federal programs that use the term “habitat” and thus have unintended consequences on implementation of these other sections and programs;
- replacing the phrase “physical places” with abiotic and biotic setting” to address comments that habitat is more than simply a physical location;
- adding the phrase “resources and conditions” to clarify that the definition of “habitat” is inclusive of all qualities of an area that can make that area important to the species; and,
- replacing the phrase “depend upon to carry out” with the phrase “necessary to support” to clarify that the definition applies to areas needed for one or more of a species’ life processes.

## Conclusion and Implications

Despite confirming that the revised definition of “habitat” won’t “be used to create a new procedural step or regulatory process, nor will it result in any new regulatory burdens or landowners or other parties” the change is significant and land use practitioners should

avail themselves of the nature of the changes in the context of critical habitat matters.

The new definition is codified at 50 Code of Federal Regulations § 424.02, available online at: [https://](https://www.govregs.com/regulations/expand/title50_chapterIV_part402_subpartA_section402.02#regulation_1)

[www.govregs.com/regulations/expand/title50\\_chapterIV\\_part402\\_subpartA\\_section402.02#regulation\\_1](https://www.govregs.com/regulations/expand/title50_chapterIV_part402_subpartA_section402.02#regulation_1)  
(Paige Gosney)

## U.S. BUREAU OF RECLAMATION REPORT SUMMARIZES FACTORS IMPACTING WATER RESOURCES IN THE WESTERN UNITED STATES

In January, the U.S. Bureau of Reclamation released its 2021 SECURE Water Act Report, which provides a summary of projections on several factors that influence water resources and management in the western United States. The report discusses projections for temperature, precipitation, snowpack, streamflow, drought, water demand, and groundwater in eight river basins, including the Sacramento-San Joaquin River and Klamath River basins. The report also outlines mitigation strategies the Bureau is undertaking in response to the projected risks to water supplies in the West.

### Background

The U.S. Bureau of Reclamation (Bureau) is the nation's largest wholesale water supplier, operating 338 reservoirs and providing water to 140,000 farmers in the western United States. The Bureau is also the second largest producer of hydroelectric power in the United States with 53 power plants. In 2009, Congress passed the SECURE Water Act (Act), which authorizes the Bureau to assess the risks from climate change to water supplies in each major Bureau river, analyze the impact on various water uses and services as a result of such changes, and develop appropriate mitigation strategies. The Bureau is required to submit a report to Congress every five years on these issues. In January of this year, the Bureau issued its third such report under the Act (Report). The Report summarizes basin reports and factsheets for each of the eight major river basins identified in the Act and a 2021 West-Wide Climate and Hydrology Assessment (2021 Assessment).

Eight major river basins are identified under the Act and discussed in the Report. Among the basins reviewed are arguably two of the most important water basins in California: the Sacramento and San Joaquin River basins. Given the closely interrelated

water management issues of these two basins, the Report discusses them jointly. The other basins discussed in the report are the Klamath river basin, Truckee and Carson River basins, the Colorado River Basin, Columbia River Basin, Missouri River Basin, and Rio Grande Basin.

### Summary of the Report

The Bureau uses observations and future projections to operate its reservoirs, deliver water and power, and develop water management strategies. These observations and future projections on water supply and demand are based on the assessment of seven factors: temperature, precipitation (rainfall and snowfall), snowpack, streamflow (runoff), droughts, water demands, and groundwater.

### Temperature and Precipitation Models

The Bureau's future projections of temperature and precipitation are based on two models, both of which generally yielded similar broad trends. In general, the Report projects that temperatures will increase over the West during the 21st century, with temperature increases becoming greater over time. For example, the area around the Sacramento-San Joaquin rivers at Delta are projected to increase in temperature between 2-3 degrees Fahrenheit through the 2020's and increase between 4-6 degrees Fahrenheit in the 2070s. Projections under scenarios with higher greenhouse gas (GHG) concentrations generally yield more severe increases in temperature than scenarios with lower GHG concentrations. Precipitation is projected to increase over the northwestern and northcentral United States, particularly in the Columbia and Missouri River basins, but decrease in the southwestern and southcentral portion of the country. The Bureau projects decrease snowpack overall in the West. Snowmelt is also projected to occur sooner,



changing the timing and quantity of streamflow. The Report predicts that many locations are likely to experience increased stream flow from December through March and decreased streamflow from April through July.

Drought are projected to increase in duration, severity, and frequency. While periods of drought are not uncommon in the West, the Bureau's projection is particularly significant because these projected increases are in relation to droughts of the distant past. Drought maps provided in the Report project that large portions of California, Nevada, Arizona, and southern Idaho, as well as several central states, will experience more severe droughts on average over the coming century. Drought is also expected to generally last longer overall. The Bureau predicts that increased temperatures and longer growing seasons will result in increased evaporation and irrigation requirements. While natural groundwater recharge is generally predicted to follow changes in precipitation and increased evaporation from soil, the Report acknowledges that the unique circumstances within each area will play an important role in natural groundwater recharge.

### **Anticipated Impacts to Water Uses**

In addition to providing projections of the foregoing factors and summary of the 2021 Assessment, the Report also includes a summary of expected impacts to water uses. In particular, due to the projections of the foregoing factors, water supplies are expected to become less predictable and water deliveries more difficult to manage. The Report points out that end-of-year water storage is projected to decrease in areas, including reservoirs identified in a 2016 Sacramento-San Joaquin Rivers basin study. The Bureau also notes that warming water temperatures and shifts in streamflow may have an effect on water quality and fish populations. Recreation may suffer from the negative impact of climate change in some areas leading to shortened fishing seasons, diminished wildlife viewing opportunities, and a reduction in hunting game. Reduced hydropower operational flexibility may also occur during summer months causing supply and demand problems on communities dependent on hydropower.

### **Mitigation Strategies**

The Report also discusses actions the Bureau has taken to develop appropriate mitigation strategies, including strategies in water delivery, hydropower, habitat, ecosystem and reaction, and risk management. According to the Report, the Bureau has about 350 active construction activities, including new delivery systems and storage, recreation rehabilitation activities, and dam safety projects. The Report also highlights certain projects supported in part by Water Infrastructure Improvements for the Nation (WIIN) Act and WaterSMART funding. Among these projects is a North-of-Delta Off-Stream Storage Investigation, which was finalized using WIIN Act funding. The Bureau also notes that it provides grant funding through the Title XVI Water Reclamation and Reuse Program for projects that reclaim and reuse wastewater and impaired ground and surface water. One project cited under Title XVI is the Pure Water Monterey Title XVI Project, which is expected to produce up to 8,200 acre-feet of water for communities in Monterey County, California. The project includes collection and conveyance facilities and an advanced treatment plant. The Report provides many more details about its mitigation strategies, including drought planning and managing risks from increasing wildfires.

### **Conclusion and Implications**

The projections provided by the Bureau in its Report provide a starting point for stakeholders and affected parties to begin planning for the projected changes affecting water resources in the West. While the Report provides general trends and observations, it is important for stakeholders to understand the projected changes specific to their region and how those changes may affect their water resources over time. Stakeholders may check the Bureau's climate website after March 2021 to review more detailed information provided in associated documents summarized in the Report. Stakeholders may also want to research further into the various funding programs and mechanism mentioned in the Report when assessing their own mitigation strategies with regard to their water resources and requirements. The Bureau's Report is available online at: <https://www.usbr.gov/climate/secure/docs/2021secure/2021SECUREReport.pdf> (Steve Anderson)



## **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS NEW ORDER ESTABLISHING STATEWIDE WASTE DISCHARGE REQUIREMENTS FOR WINERIES**

On January 20, 2021, the State Water Resources Control Board (SWRCB or Board) voted unanimously in favor of the adoption of a resolution that will establish waste discharge requirements for wineries throughout the state. With the adoption of this new Winery Order, the SWRCB is seeking to protect California's surface and ground water sources while streamlining and improving permitting consistency, but the Order has so far seen a mixed reception by industry members.

### **Statewide General Waste Discharge Requirements for Wineries**

Up until the adoption of the Winery Order, waste discharge requirements and permitting has been handled by Regional Water Quality Control Boards (RWQCBs) on a case-by-case basis. Because of this, many large wineries spanning multiple counties had been subject to the permitting and discharge requirements of multiple RWQCBs.

Furthermore, the utilization of the regional water boards in handling these matters led to most wineries remaining outside the purview of the Board's permitting requirements. Of California's roughly 3,600 bonded wineries, only 589 wineries held permits from RWQCBs to protect water quality.

The new system—adopted in the Board's Winery Order—would implement statewide rules for waste discharge from wineries. Specifically, the SWRCB developed general Waste Discharge Requirements for winery process water for wineries and similar facilities that generate winery waste and discharge it to land for reuse or disposal.

### **A Tiered System by Size**

Classifying wineries by size, the Winery Order uses a tiered system which exempts wineries generating less than 10,000 gallons of processed water discharge annually and imposes the most stringent requirements on wineries producing over 1,000,000 gallons annually.

Among the requirements introduced by the Winery Order, winery operators can expect to see reporting requirements established or increased for process

water discharges and new requirements for water treatment systems and ponds. Winery operators will also see caps to the amount of processed water they can dispose of through land applications and subsurface disposal. Additionally, the state's largest wineries—those producing more than 1,000,000 gallons in processed water discharges annually—will also be subject to groundwater monitoring requirements.

Over 2,000 wineries that apply winery process water to land for reuse and disposal will be affected by the new regulation once implementation by regional water boards begins, which will likely occur sometime after the state board adopts a fee schedule for the statewide order at its meeting scheduled for March 9.

### **Conclusion and Implications**

The State Water Resources Control Board has given wineries a three-year window for permitting under the Winery Order, with an additional five-years to come into compliance, meaning the ultimate aim of this new system won't fully come to fruition for nearly a decade.

With that said, critics on both sides have issues with the Order at the outset. On one side of the aisle, smaller winery owners have expressed concerns that the implementation of more strict discharge and reporting requirements will impose a financial burden these wineries are not in the position to endure—especially in a time like now where wineries are seeing increased challenges from both Covid-19 and California's increasingly common wildfires.

On the other hand, the Order has been attacked as not going far enough. The California Coastkeeper Alliance, in a recent news release on the Winery Order, expressed their concerns with the Order's limited groundwater monitoring and absence of stricter spill prevention requirements. Just last January, for example, Sonoma County had one of the worst spills in state history when a local winery's tank failed, spilling nearly 97,000 gallons of wine into Reiman Creek, a tributary to the Russian River.

For better or worse, the new statewide system will at least serve as a step in the for seeking to protect California's groundwater and surface water resources.

The final Resolution and Winery Order documents will be available soon on the State Water Resources Control Board's website at: [https://www.waterboards.ca.gov/water\\_issues/programs/waste\\_discharge\\_requirements/winery\\_order.html](https://www.waterboards.ca.gov/water_issues/programs/waste_discharge_requirements/winery_order.html)

[https://www.waterboards.ca.gov/water\\_issues/programs/waste\\_discharge\\_requirements/winery\\_order.html](https://www.waterboards.ca.gov/water_issues/programs/waste_discharge_requirements/winery_order.html)

(Wesley A. Miliband, Kristopher T. Strouse)

## STATE WATER RESOURCES CONTROL BOARD RELEASES REPORT DESCRIBING COVID-19 FINANCIAL IMPACTS ON WATER SYSTEMS AND CUSTOMERS

Financial challenges arising from the COVID-19 pandemic have affected water ratepayers for months. The California State Water Resources Control Board's (SWRCB or Board) recently released its Covid Drinking Water Survey Report (Report) indicating that an alarming percentage of residents are unable to pay their water bills. This, in turn, has also begun to strain budgets for the public water systems that continue to supply water to their customers.

### Background

The SWRCB recently released its Report findings that 1.6 million California residential water customers, or 12 percent of all households in the state, have been unable to pay their water bills at some point during the pandemic.

The survey that formed the basis of the Report requested information from more than 500 small- to medium-sized water systems (fewer than 10,000 service connections) and 150 large systems (more than 10,000 service connections). Collectively, these water systems provide service to approximately 70 percent of Californians representing 28 million people. More than 80 percent of the systems responded to the survey.

### The Report

The Report highlighted that many low-income Californians face high levels of water bill debt, with over 155,000 households owing more than one thousand dollars to their water suppliers. The Report found that zip codes within the Counties of Los Angeles, Sacramento, San Bernardino and Santa Barbara comprised areas where residents had the highest levels of outstanding water bills. The Report estimated that total household outstanding water bills specifically for drinking water was approximately \$600 million.

### Governor's Executive Order and Impact on Water Systems

In an effort to maintain access to water during the pandemic, California Governor Gavin Newsom issued an Executive Order in April 2020 that prohibits water suppliers from shutting off water service due to non-payment. With limited means to enforce payment for outstanding water bills, some water suppliers reported experiencing revenue shortfalls that threaten their ability to cover fixed costs and could soon disrupt their operations. As a result of revenue shortfalls, 20 percent of water suppliers are estimated to have less than 60 days of operating cash on hand. The Report indicates that up to 25 small- to medium-sized water systems are at extreme risk and may need financial assistance before April 2021, based on certain self-reported factors.

Some water suppliers reported having to reduce their workforce, delay implementation of long-term projects and consider raising rates to cover fixed costs. The Report anticipates that some water suppliers will not be able to provide long-term water delivery without government intervention.

The Report observed that the majority of water suppliers, and primarily larger suppliers, are likely positioned to absorb the impact of the reduced revenues that constitute a fraction of their annual operating budgets. According to the Report, the San Francisco Public Utilities Commission reported \$7.8 million in unpaid water bills as of November 2020 which represented less than 2 percent of its annual revenues. The East Bay Municipal Utility District, which serves more than 1.4 million customers, reported \$6.1 million in unpaid water bills as of October 2020, which represents less than 2 percent of the total amount billed to customers as of that date. The Marin Municipal Water District reported \$3.4 million in unpaid water bills at the end of 2020, which represented approximately 3 percent of its annual budget.

### State Water Board Assistance

The SWRCB is currently implementing its Safe and Affordable Fund for Equity and Resilience (SAFER) program to address non-compliant water systems through funding and related programs. This new data will better inform those efforts, but also highlights a greater demand on limited resources allocated to help water systems that were already at risk prior to the pandemic. The SWRCB indicates that it will be exploring all avenues to help systems and households to recover from the impacts of the pandemic.

### Conclusion and Implications

Water managers and community leaders statewide have begun calling for state and federal aid both

directly to customers and also to water suppliers. The Consolidated Appropriations Act, 2021, signed by former President Trump in December 2020 provides for \$683 million to help low-income households nationwide pay for water service; however, many states are competing for those funds. Whether further aid will be forthcoming remains to be seen. In the meantime, many ratepayers and water systems continue to grapple with the impacts of unpaid water bills. The Report can be found on the State Water Resources Control Board's website at: [https://www.waterboards.ca.gov/drinking\\_water/programs/documents/ddwem/covid\\_financial\\_survey\\_report.pdf](https://www.waterboards.ca.gov/drinking_water/programs/documents/ddwem/covid_financial_survey_report.pdf).  
(Chris Carrillo, Derek R. Hoffman)

## RECENT FEDERAL DECISIONS

### DISTRICT COURT DISMISSES CLEAN WATER ACT CITIZEN SUIT FOR FAILURE TO SHOW AN ENVIRONMENTAL INJURY TO ESTABLISH STANDING

*Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC*,  
\_\_\_F.Supp.3d\_\_\_, Case No. 2:2019-cv-00050 (S.D. Ga. Jan. 29, 2021).

The U.S. District Court for the Southern District of Georgia recently granted a motion to dismiss a Clean Water Act citizen suit. The ruling held that plaintiffs failed to establish Article III standing due to the failure to plead a specific injury-in-fact.

#### Factual and Procedural Background

On February 20, 2013, the U.S. Army Corps of Engineers (Corps) authorized defendant Sea Island, LLC to fill 0.49 acres of wetland (Subject Wetland) located on St. Simons Island, Georgia. Plaintiffs, the Glynn Environmental Coalition (GEC) and Center for a Sustainable Coast (CSC), initially filed suit against Sea Island on April 17, 2019 for alleged violations of the federal Clean Water Act (CWA), alleging that defendant failed to construct a commercial structure on the Subject Wetland in violation of their Nationwide Permit. Plaintiffs further alleged that defendant was required to obtain an individual § 401 certification and § 404 permit to fill the Subject Wetland, requiring a more stringent permitting process. By filling the Subject Wetland, plaintiffs contended that defendant harmed the surrounding vegetation and habitat as well as the aesthetic and recreational uses of Dunbar Creek, a body of water downstream of the Subject Wetland.

The U.S. District Court found that the plaintiffs failed to show standing and granted leave to amend their complaint. On March 23, 2020, the plaintiffs filed an amended complaint, joining Jane Fraser (Fraser) as a plaintiff to the suit. According to the amended complaint, Fraser is a member of GEC and CSC who owns interests in real property in the immediate vicinity of the Subject Wetland. Fraser further alleged that she recreates in and enjoys the aesthetics of the Subject Wetland. In response to the amended complaint, defendant moved to dismiss the

amended complaint for lack of standing and failure to state a claim.

#### The District Court's Decision

To establish standing under Article III of the United States Constitution, plaintiffs have the burden to show: 1) they have suffered an "injury in fact" that is actual or imminent; 2) the injury is traceable to the challenged action of the defendant; and 3) it is likely that the injury will be redressed by a favorable decision. An organization has standing to sue on behalf of its members when: 1) one of its members would have standing to sue individually; 2) the member's interests at stake in the suit are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit. Plaintiffs asserted standing was proper in this action because Fraser had standing to sue in her individual capacity and GEC and CSC had associational standing.

#### Issue of Individual Standing

Based on the elements of Article III standing and organizational standing, the District Court reasoned that the motion to dismiss turned on whether Fraser had individual standing to sue. As a result, the District Court analyzed whether Fraser suffered an "injury in fact." In the amended complaint, Fraser alleged that she suffered environmental and procedural injuries.

With regards to environmental injuries, the plaintiffs generally alleged that the filling in of the Subject Wetland allowed non-point source pollutants to make their way into Dunbar Creek. The District Court found that plaintiffs offered no specific factual allegations that the fill of the Subject Wetland has caused pollution in Dunbar Creek. While there may

be a possibility of an increase in pollution, the mere possibility is not an “actual or imminent” injury. Fraser also claimed that she owns real property that adjoins and is located in the immediate vicinity of the Subject Wetland. She asserted that filling the Subject Wetland disturbed habitats surrounding the Subject Wetland, impacting her real property. Again, the District Court found these allegations to be conjectural and conclusory because Fraser do not allege that any specific disturbance to her property interest had or will occur. The allegations merely speculated the type of harm generally associated with the fill of wetlands.

While generalized harm will not support standing alone, environmental plaintiffs can adequately allege injury in fact when the aver that they use the affect area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. Fraser alleged that she regularly recreated in and enjoyed the aesthetics of the Subject Wetlands. The District Court found that Fraser failed to allege a specific recreation, distinguishing Fraser’s allegations from the body of case law providing for

a recreational injury. Fraser also alleged that while driving, she noticed a significant difference in the water quality in Dunbar Creek. However, the District Court again found this allegation to be broad and conclusory because Fraser failed to establish how this allegation led to an environmental injury suffered by Fraser.

### **Conclusion and Implications**

As a result, Fraser failed to show an environmental injury sufficient to confer standing. Because the District Court found that Fraser failed to show standing, GEC and CSC did not have organization standing, and the motion to dismiss was granted.

It remains to be seen if this matter will be appealed. However, this case highlights the importance of pleading with particularity in order to avoid a motion to dismiss. For environmental cases, potential plaintiffs should take care to avoid merely stating conclusory statements in allegations in order to establish a specific injury.

(Jeremy Holm, Rebecca Andrews)



## RECENT CALIFORNIA DECISIONS

### FIFTH DISTRICT COURT AFFIRMS RULING IN ANTELOPE VALLEY GROUNDWATER ADJUDICATION DENYING WATER RIGHTS TO COMMUNITY SERVICES DISTRICT

*Antelope Valley Ground Water Cases: Phelan Piñon Hills Community Services District v. California Water Service Company*, \_\_\_Cal.App.5th\_\_\_, Case No. F082094 (5th Dist. Dec. 9, 2020; *Partially Published*, Jan 7, 2021).

The Fifth District Court of Appeal has upheld a trial court's ruling that Phelan Piñon Hills Community Services District (Phelan) did not have water rights in the Antelope Valley Groundwater Basin, although the Physical Solution for the basin recognizes a pumping allotment in favor of Phelan provided it pays a replenishment assessment. The appellate court rejected four theories raised by Phelan, and instead concluded that substantial evidence supported the trial court's ruling.

#### Background

Beginning in 1999, the first lawsuits were filed that ultimately evolved into the *Antelope Valley Ground Water Cases* (AVGC). The AVGC adjudicated water rights in the Antelope Valley Groundwater Basin where overdraft conditions existed due to over extraction of groundwater (Basin). According to many of the parties claiming water rights in the Basin, a full adjudication and Physical Solution were necessary to prevent further depletion of the Basin. Eventually, all of the pending lawsuits were consolidated into a single adjudication proceeding.

The AVGC was divided into four phases: 1) determining the appropriate adjudication area; 2) determining the existence and extent of overdraft conditions; 3) quantifying pumping activities; and 4) adjudicating federal reserved rights and imported water return flow credits. Only the first three phases were completed. Ultimately, settlement discussions produced an agreement among the majority of parties, including a proposed Physical Solution designed to bring the Basin into hydrological balance. Phelan, which was a party to the adjudication, was not among the settling parties. Nonetheless, the trial court found that the Physical Solution was reasonable, fair, and beneficial as to all parties and approved the Physical Solution. In so ruling, the court found that Phelan

did not have water rights in the Basin, but that Phelan could continue operating a specific well (Well 14) to draw up to 1,200 afy to distribute to its customers outside the Basin on condition that Phelan's pumping cause no material harm to the Basin and that Phelan pays a "Replacement Water Assessment" for any water it pumped for use outside the Basin. Phelan appealed.

#### The Claims on Appeal

Phelan asserted four claims of error on appeal. First, Phelan asserted that there was no substantial evidence to support the trial court's conclusion the Physical Solution will bring the Basin into hydrological balance. Second, it argued the trial court erred when it rejected Phelan's claim that Phelan was entitled to water rights in the Basin as an "appropriator for municipal public use" under Water Code §§ 106 and 106.5. Third, Phelan asserted that, assuming the existence of a "surplus" in the Basin was a condition precedent to Phelan's acquisition of water rights as an appropriator, the phasing of the various trials denied Phelan its due process rights to establish that the Basin did have a surplus at the time Phelan began operating Well 14. Finally, Phelan contended the trial court erred when it rejected its claim that it was entitled to credit for "return flows" and erred by imposing a Replacement Assessment Fee based on the gross amount of water extracted by Well 14.

#### The Court of Appeal's Decision

The appellate court found all of Phelan's claims unpersuasive, but only designated the judgments for the first and third claims to be certified for publication.

Phelan's insufficient evidence claim rested principally on the contention that the testimony of two experts did not provide evidence that the Physical

Solution would bring the Basin into balance. Specifically, Phelan asserted that the methodology employed in a computer modeling program was flawed. However, the appellate court found that the testimony of the two experts provided sufficient evidence in approving the Physical Solution, and that Phelan had not properly challenged the expert testimony. Similarly, the Court of Appeal determined that the trial court's finding that Phelan's pumping caused injury to the water balance of the Basin was supported by substantial evidence, and thus rejected Phelan's argument that there was inadequate evidence for the trial court to approve the Physical Solution.

### **Due Process Claims**

The Court of Appeal also rejected Phelan's due process claims. Phelan first argued on appeal that the trial court erred by segregating its overdraft analysis, which compared current extractions to average safe yield figures, from its analysis of whether water users were applying extracted water for reasonable and beneficial uses. Second, Phelan argued that the trial court's delimitation of those issues foreclosed Phelan from proving its claim that there was (or could have been) a surplus which Phelan could pump as an appropriator, thus erroneously placing on Phelan the burden of showing there was a surplus available for appropriation by Phelan. The appellate court instead held that the bifurcated issue was a core issue common to all of the various actions, and justified the

trial court's discretion to resolve the claim when it did.

Moreover, the Court of Appeal agreed with the trial court that Phelan, as the party asserting an appropriative right, had the burden to show a surplus existed in the Basin. (See, e.g., *Allen v. California Water & Tel. Co.*, 31 Cal. 2d 466, 481 (1946). As the court observed, determining surplus can include consideration of whether the actual amounts used by paramount water rights holders are being applied to reasonable and beneficial uses; however, the party claiming an appropriative right must still show there is available surplus after accounting for paramount rights holders' beneficial uses. As a result, the appellate court concluded that the trial court correctly placed on Phelan the burden of proving its claims, that Phelan was provided adequate opportunity to proffer evidence in support of its claim to water rights in the Basin, and that the phased proceedings did not impair Phelan's opportunity to present its case.

### **Conclusion and Implications**

It remains to be seen if Phelan will attempt to appeal this ruling to the California Supreme Court. However, the Court of Appeal's affirmance of the trial court's ruling underscores the importance of preserving issues for appeal by timely raising them, particularly in the context of a substantial water rights adjudication. The court's *partially published* opinion is available online at: <https://www.courts.ca.gov/opinions/documents/F082094A.PDF>

## **FOURTH DISTRICT COURT FINDS CALIFORNIA WATER BOARDS APPROPRIATELY CONSIDERED ECONOMIC FACTORS WHEN ISSUING MS4 PERMIT**

*City of Duarte v. State Water Resources Control Board*,  
\_\_\_Cal.App.5th\_\_\_, Case No. G058539 (4th Dist. Jan. 28, 2021).

The California Court of Appeal for the Fourth District recently upheld a federal Clean Water Act (CWA) municipal stormwater discharge permit issued to 86 entities in Los Angeles County, reversing a lower court decision. The court of appeal determined that the State Water Resources Control Board (SWRCB or Board) and Los Angeles Regional Water Quality Control Board (RWQCB) acted within their

discretion when analyzing the economic considerations of issuing the permit.

### **Factual and Procedural Background**

In 2012, the RWQCB for the Los Angeles Region, issued a Clean Water Act, National Pollutant Discharge Elimination System (NPDES) discharge permit to 86 municipal entities that own or operate

municipal separate storm sewer systems (MS4s) in Los Angeles County, including the City of Duarte (City). In June 2015, the SWRCB upheld the permit with modifications (Permit). The Board's decision upholding the Permit noted that, while all MS4 discharges must reduce pollutants to the maximum extent practicable, as required by federal law, strict compliance with water quality standards by imposing numeric effluent limitations is at the discretion of the permitting agency.

In July 2015, the City challenged the Permit, alleging that the Regional and State Boards (collectively: Water Boards) abused their discretion by imposing numeric effluent limitations in excess of federal law requirements without considering factors, including "economic considerations," set forth in the California Water Code. At trial, the City argued that the numeric effluent limits in the Permit were more stringent than what was required under the CWA, and therefore the Water Boards were required to consider the Water Code factors. The trial court agreed, finding that the Permit's numeric effluent limitations were more stringent than required by federal law and concluding that the Water Boards did not comply with the Water Code in adopting the numeric effluent limitations. Specifically, the trial court found that the Water Boards failed to sufficiently take into account the economic considerations factor before issuing the Permit because it did not include any reference to or estimate of the possible cost or range of costs of compliance with the numeric effluent limitations. Under the trial court's reasoning, economic consideration without some kind of estimate of cost was insufficient. The trial court thus issued a writ of mandate and judgment ordering the Water Boards to set aside all Permit provisions pertaining to numeric effluent limits and to reconsider the Permit. The Water Boards appealed.

### **The Court of Appeal's Decision**

The parties to the appeal agreed that the issue on appeal was two-fold: 1) did the numeric effluent limitations in the Permit require more than federal law required? 2) If so, did the Water Boards sufficiently consider the economic considerations factor required by the Water Code?

The Court of Appeal first determined that it did not need to rule on whether the Permit was more or less stringent than federal law. The court assumed,

without deciding, that the numeric effluent limitations were more stringent than federal law.

### **Consideration of Economic Factors**

The court next considered whether the Water Boards sufficiently considered the economic considerations factor as required under the Water Code. As an initial matter, the court of appeal observed that while a regional board must consider the cost of compliance when setting effluent limitations in a wastewater discharge permit, case law does not define "economic considerations" or describe how an agency may comply with statutory requirements. Rather, the Water Boards may consider and comply with the Water Code requirements within the bounds of their discretion. The court thus examined whether the Water Boards acted within their discretion.

In this case, the court focused on what facts the Water Boards considered in the process of issuing the Permit. The court noted that the Permit included findings analyzing the economic considerations of both regulating and not regulating MS4 discharges. In particular, the court found that the Water Boards explained that the cost of regulating the MS4 discharges was highly variable among the permittees, provided ranges and cost data averages, considered how much more the permittees' costs could be under the Permit's terms, identified potential funding sources to cover such costs, and determined that lack of regulation would increase health-related expenses. Based on this review, the court concluded that the Water Boards had explained their reasoning and that analysis of these economic considerations was well within their discretion. The court thus found that the Regional Board developed an economic analysis of the Permit's requirements that satisfied statutory requirements.

### **Cost Consideration for Each Permittee**

The Court of Appeal also disagreed with the City's argument that the Water Boards abused their discretion as a matter of law by failing to analyze cost considerations for each permittee in more detail. On this point, the court noted that there was no precedent supporting the City's contention. The court further stated that, with regard to implementation of total maximum daily load requirements, estimated costs of several types of compliance methods and a cost comparison of capital costs and cost of operation and maintenance is adequate.

## Covid-19 Economic Impacts

Finally, the Court of Appeal addressed an argument by *amici curiae* that the economic situation caused by the Covid-19 pandemic establishes the need for the Water Boards to consider the cost to permittees. While acknowledging the exceptional financial downturn suffered throughout the country as a result of the Covid-19 pandemic, the court nonetheless rejected this argument. Specifically, the court concluded that the Water Boards are required to take into account economic considerations and not merely costs of compliance. The court further opined that later developments in the global economy is not relevant to the question of whether the Water Boards abused their discretion in 2012 and 2015. Having concluded that the Water Boards complied with their statutory obligations with regard to the Permit, the court of appeal reversed the trial court's ruling.

## Conclusion and Implications

This opinion is significant in that it offers some direction for analyzing the economic considerations factor for permit requirements that exceed federal law, which was previously undefined in case law. Under the court's approach, a court looks at what facts were considered in issuing a permit to determine whether the Water Boards acted within their discretion. While the opinion provides an example of the extent of this discretion, the court was careful to caution that every case will differ as to what economic considerations must be evaluated and that such discretion is not unlimited and remains subject to judicial review. The court's opinion is available at: <https://www.courts.ca.gov/opinions/documents/G058539.PDF>  
(Heraclio Pimentel, Rebecca Andrews)





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