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# CALIFORNIA WATER™
## LAW & POLICY Reporter

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CALIFORNIA WATER™ LAW & POLICY Reporter

FEATURE ARTICLE

# AS THE CLIMATE CHANGES, SO WILL NATURAL RESOURCE DAMAGE CLAIMS

*By Steve Goldberg, Darrin Gambelin, and Holly Tokar*

The effects of climate change present new challenges to the government and private sector. This will mean new policies and regulations, particularly at the federal level. Rejoining the Paris Climate Accord, renewed emphasis on evaluating greenhouse gas (GHG) emission impacts and potential changes to the Securities and Exchange Commission Environmental, Social and Governance reporting for public companies are just a few examples. There are also well-established existing regulatory frameworks and related policies that are, and will increasingly need to adapt to the effects of climate change. This article examines the impacts of climate change on Natural Resource Damages (NRD)—an established regulatory program at the intersection of climate change science, economics, planning and their application to the legal remedies provided by the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)—to recover damages for injuries to natural resources from oil spills and releases of hazardous substances.

CERCLA NRD claims have increased in recent years and creative remediation projects are looking at restoration of injured resources as a remedial component at federal Superfund sites. Examples of CERLCA sites with NRD include sediment contamination in a river or bay or discharges from inactive mining sites. Evaluating the effects of climate change at CERCLA sites is complicated by multiple factors. Injuries to resources from hazardous substance releases at these sites typically occur over extended periods of time with changes in the climate impacting baseline conditions—increasing the difficulty of differentiating the injury to resources that were caused by climate change from the effects of exposure and injury caused by the release of hazardous substances. Contrast this with the effects of an oil spill, covered by OPA, which are typically sudden events of shorter duration with impacts to resources from climate change, as well as the spill, more easily measurable. Accordingly, while this article focuses on the effects of climate change as applied to NRD for oil spills, similar NRD concepts apply to NRD claims under CERCLA.

First, we provide an overview of climate change impacts and the key legal and regulatory concepts of NRD that invoke climate change considerations. Next we provide examples from recent NRD settlements that considered the effects of climate change in the selection and planning for restoration projects—a key component of NRD discussed further below. Last, we consider how climate change factors will be a more substantial factor in future NRD settlements and the selection, planning and implementation of restoration projects.

## Climate Change Background

There is scientific consensus that "human interference with the climate system is occurring, and climate change poses risks for human and natural systems." Field et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects*, Intergovernmental Panel on Climate Change, 3 (2014) https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf. Climate change includes changes to the climate system that are evolving over a longer period of time (*e.g.*, sea level rise or gradual increases in ocean temperature), as well as an increase in the frequency of extreme weather events. These climate change effects complicate NRD claims arising from oil spills because they may impact the same resources. For example, coastal

wetlands ecosystems and marine life may be impacted by an oil spill, but they may also be impacted by climate change. Indeed scientists predict with very high confidence that, throughout the 21st century and beyond, coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion due to sea level rise. Further, sea level rise, ocean warming, and ocean acidification impact marine ecosystems. For example, warmer ocean temperatures can raise the metabolism of species exposed to the higher temperatures, and in some cases can be fatal. It is these climate changes and impacts—including the increased frequency and intensity of extreme weather events—that may harm the same wetland ecosystems and marine life injured by an oil spill. This complicates both the injury assessment and restoration planning components of NRD claims.

### Key Legal and Regulatory Concepts of NRD

The goal of NRD is to make the public whole for injuries to natural resources and services resulting from an incident involving a discharge of oil (OPA 1002(a)) or from injuries caused by the releases of hazardous substances. (CERCLA 107(a)(4)(c)). The NRD process involves two important steps: 1) determination of the nature, degree, and extent of any injury to natural resources and services, the NRD Assessment or NRDA; and 2) development of a suite of cost-effective projects to restore any lost resources or services to baseline, *i.e.* pre-incident conditions, and to compensate for interim losses to the damaged resources. 15 C.F.R. § 990.50-990.53; *see also,* Injury Assessment, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Injury Assessment*), p. 1-4, *available at*: https://darrp.noaa.gov/sites/default/files/Injury%20assessment.pdf; Restoration Planning, Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, prepared for the Damage Assessment and Restoration Program, National Oceanic and Atmospheric Administration (hereinafter *Restoration Planning*), p. 1-5, *available at*: https://darrp.noaa.gov/sites/default/files/Restoration%20Planning.pdf.

Various environmental statutes designate federal and state agency trustees to bring NRD claims on behalf of the public. Federal agency trustees typically include the National Oceanic and Atmospheric Administration (NOAA) and the Department of the Interior U.S. Fish & Wildlife Service. In California, the lead agency is generally the California Department of Fish & Wildlife, however other agencies also serve in trustee roles depending on the jurisdiction for the state resources affected by the incident. Examples include the California Department of Parks and Recreation and the State Lands Commission.

### Causal Link between the Incident Injuries to Natural Resources

The effects of climate change on the affected resources should be a critical factor in assessing whether, and to what extent, a resource has been injured. A successful NRD claim requires a causal link between the injury to a natural resource and the release of oil or hazardous substances. *See, e.g.*, *Gen. Elec. Co. v. U.S. Dep't of Commerce*, 128 F.3d 767, 777 (D.C. Cir. 1997). What is considered injury to a natural resource? Injury is "an observable or measurable adverse change in a natural resource or impairment of a natural resource service." 15 C.F. R § 990.30. Natural resource damages assessment then involves "collecting and analyzing information to evaluate the nature and extent of injuries *resulting from* an incident." *Id.* (emphasis added). Implicit in that analysis is that the adverse change in a natural resource or impairment of services is not attributable to another cause—for example, a climate change related event. 15 C.F.R. § 990.51. Injuries attributable to natural causes are not compensable under NRD.

Determination of the causal link between the release and injury to resources may be complicated by climate change and related extreme weather events. Climate related changes, including changes in temperature, precipitation, and sea level rise are causing rapid changes to habitat. Often there are data gaps on the abundance of a species or the health of a habitat resulting from these changes. Thus when an incident occurs, it is difficult to determine whether degradation to habitat or species results from the incident or climate change.

### Injuries Are Measured against the Baseline

Even where a causal link is found between resource injury and the incident, damages are only found and

measured against the injury to resources above "baseline." Baseline is the condition of natural resources and services that would have existed if the incident had not occurred. 15 C.F.R. §§ 990.30, 990.52. NRDA allows compensation for total injury in relation to baseline. This is a function of the magnitude of the injury and the time it takes for the resource to recover to baseline.

Climate change events also make it more difficult to determine the extent and duration of the injury. First, the magnitude of the injury may be difficult to determine when the baseline may have recently shifted due to climate change. For example, determination of the baseline for marine mammals injured in the Refugio Beach Oil spill was effected by an anomalous stranding year for California sea lion pups, tied to reduced prey availability and climate events.

Second, if the baseline is not well known or is changing, it is difficult to determine when the resource has recovered to baseline. In addition, if the resource was in a vulnerable condition such that the incident was the tipping point, the resource may not recover or recovery to baseline may be extended for a longer period.

### Restoration Planning and Climate Change

Following the determination of injury, the Trustees must develop a suite of restoration projects to restore the injured resources and services. 15 C.F.R. § 990.53(a). The Trustees develop a range of feasible alternative projects and evaluate each for several key factors. 15 C.F.R. § 990.54. These projects may be primary, which return the resource to its pre-incident condition, and compensatory, which compensate for interim losses pending recovery to baseline. 15 C.F.R. § 990.53

In comparing alternative restoration projects, the trustees evaluate several key factors in accordance with NRD regulations. Factors relevant to climate change, in particular, include (i) the cost to carry out the projects, (ii) the extent to which each alternative is expected to return the injured natural resources and services to baseline and compensate for interim loss, (iii) the likelihood of success of each alternative, and (iv) the nexus between the project and the injured resource, including location. *See,* 15 C.F.R. § 990.54.

Climate change can affect the selection and potential success of restoration projects. For example, following an oil spill, sea level rise and coastal erosion may make shoreline habitat restoration projects a less preferred alternative. Considering the key factors, such as likelihood of success, trustees may determine that there are greater long-term benefits in engaging in more inland projects.

### NEPA and CEQA

Federal and state law and guidance directing trustee actions in implementing restoration plans for NRD also require consideration of climate. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* and Council on Environmental Quality (CEQ) regulations implementing NEPA, 40 C.F.R. Chapter V, apply to restoration actions by federal trustees, except where a categorical exclusion or other exception to NEPA applies. 15 C.F.R. § 990.23 (a). As trustees develop restoration plans, they must also prepare an Environmental Assessment or Environmental Impact Statement. 15 C.F.R. § 990.23 (c). Federal courts have held that NEPA requires federal actors to disclose and consider climate impacts in their environmental reviews. *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008). In 2016, the CEQ issued guidance to help federal agencies consider greenhouse gas emissions and climate change in such reviews. 81 Fed. Reg. 51866 (Aug. 5, 2016). Although this guidance was withdrawn in 2017, on January 20, 2021, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which in part directed CEQ to review, revise, and update its 2016 Greenhouse Gas Guidance. 86 Fed. Reg. 7037 (Jan. 25, 2021). It can be expected that in the near future all restoration alternatives will be evaluated for climate impacts through the environmental review process.

Similarly, California agencies evaluating restoration projects must consider both the impact of the project on climate change and the impacts of climate change on the project under the California Environmental Quality Act (CEQA). 14 Ca. Code Regs. § 15064.4. The analysis must reasonably reflect evolving scientific knowledge of climate change.

The Trustees publish the results of their assessment of the injuries to natural resources as well as the selection of restoration projects for each incident, in a Damage Assessment and Restoration Plan (DARP) which typically includes an assessment of the selected

restoration projects under NEPA and, for California incidents, under CEQA.

### Climate Change and NRD Claims

The regulations governing the NRD process do not mention climate change. When OPA was passed, the focus was on preventing and responding to oil spills. At the time, climate change was perhaps not an obvious consideration. *See, Summary of the Oil Pollution Act*, United States Environmental Protection Agency (last updated July 28, 2020) https://www.epa.gov/laws-regulations/summary-oil-pollution-act. But, as discussed above, the effects of climate change on NRD can affect both the assessment of injury to resources as well as restoration projects.

There is little evidence to date that climate change has played a significant role in injury assessment. Most DARP's will include a discussion of baseline as required by OPA and the NRD regulations, but little to no discussion of the effects of climate change on the injured resources. Although there is scant evidence in published DARPs of the effects of climate change, it is possible that this has been, (and if not, will be), a topic discussed by technical experts for the Trustees and the responsible parties in evaluating the extent of injury.

In contrast to the lack of evidence of climate change effects on the injury assessment component of NRD, it appears climate change is being considered more frequently when evaluating restoration projects.. We expect this will only become more common as climate change studies, data and policies become more prevalent.

### Recent Restoration Plans Considering Climate Change

Several NRD claims and related DARPs from the last few years illustrate the increasing consideration of the effects of climate change on restoration planning and implementation.

Below we discuss three oil spill incidents, including two in California, and one chemical release site in Michigan that involved NRD claims and illustrate how climate changes are being considered in the assessment of resource injuries (very few with minimal consideration) and in the selection and implementation of restoration projects (still few but increasing).

### Deepwater Horizon

The Deepwater Horizon oil spill resulted in a NRD settlement of $8.8 billion, the largest settlement of an NRD claim under OPA or CERCLA. Deepwater Horizon also has influenced other NRD claims in the past decade. Restoration projects have and will continue to be implemented over many years. The impact of climate change on restoration projects remains to be considered and studied, but still merits discussion here. The scientific studies and the magnitude of the settlement and restoration project efforts are precedents being considered by trustees and responsible parties at all other NRD related incidents. As the restoration projects are designed and implemented, the effects of climate change and extreme weather events on such efforts must be watched.

On April 20, 2010, the *Deepwater Horizon* mobile drilling unit exploded, caught fire, and sank in the Gulf of Mexico. This incident resulted in a massive oil spill, as 3.19 million barrels of oil were released into the Gulf. During the injury assessment and restoration planning stages, the Trustees determined that injuries caused by the spill were so widespread that the entire Northern Gulf of Mexico ecosystem was injured.

The Trustees identified five overarching goals to address the suite of injuries that occurred at both local and regional scales: restore and conserve habitat, restore water quality, replenish and protect living coastal and marine resources, provide and enhance recreational opportunities, provide for monitoring adaptive management, and administrative oversight to support restoration implementation. Several public comments raised the issue of climate change. For example, one comment urged implementation of both habitat restoration plans with a shorter lifespan and long-term adaptation plans. In their response, the Trustees acknowledged "the systemic threats of climate change" and said they would consider key ecological factors such as connectivity, size, and distance between projects, as well as factors such as resiliency and sustainability in project selection, design, and implementation. The Trustees further explained that restoration planning, project development, and an "appropriate level of tiered NEPA analysis" would "consider climate change and resiliency planning." *Deepwater Horizon Oil Spill:* Programmatic Damage Assessment and Restoration Plan and Final Program-

matic Environmental Impact Statement, https://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan.

### Kalamazoo River (Michigan)

From the late 1950s to the 1970s, releases of polychlorinated biphenyls from Kalamazoo-area paper mills caused the contamination of sediments, floodplain soils, water, and living organisms in and near Portage Creek and the Kalamazoo River in Michigan. During the restoration planning process, the Trustees considered which projects would provide maximal benefits overtime. The Trustees gave preference to projects that incorporated resiliency to the impacts of climate change, and therefore provided longer-term benefits.

In the Environmental Impact Statement (EIS) for Restoration Resulting from the Kalamazoo River NRDA, there was a particular focus on climate change. The EIS examined how climate change might interact with proposed restoration projects. It notes increases in temperatures, shifts in timing and intensity of precipitation events, increases in the duration of the growing season, and decreases in the amount and duration of snow cover and lake ice formation. The analysis further discusses greenhouse gas emissions, and the uncertainty in underlying relationships and feedback loops. The Trustees, while identifying the various aspects of climate change, also recognized the high degree of uncertainty regarding the effects of climate change on restoration. The Trustees considered climate change adaptation principles such as prioritizing habitat connectivity, reducing existing stressors, protecting key ecosystem features, and maintaining diversity to lessen the compounding effects of climate change. *See Final Restoration Plan and Programmatic Environmental Impact Statement for Restoration Resulting from the Kalamazoo River Natural Resource Damage Assessment*, August 2016, https://www.fws.gov/midwest/es/ec/nrda/KalamazooRiver/pdf/RestorationPlanPEISKalRiverAugust2016Final.pdf.

### Castro Cove (Richmond, California)

From 1902 to 1987, Chevron USA Inc. (Chevron) owned and operated a petroleum refinery in Richmond, California that discharged hazardous substances in Castro Cove, a portion of San Pablo Bay in northern California. A Final DARP/EA was released in 2010. After estimating the total resource injury caused by contamination in Castro Cove, the Trustees analyzed a suite of alternative restoration projects. In making their project selections, the Trustees considered the future effects of global sea level rise on coastal resources in the San Francisco Bay, recognizing that climate change could affect the long-term success of restoration projects.

The Trustees devoted a subsection of the Final DARP/EA to uncertainties behind global sea level rise and how this affected project alternatives. The Trustees acknowledged the 2007 Intergovernmental Panel on Climate Change (IPCC) report that projected estimated global average sea level rise between 0.6 and 2 feet, and the Pacific Institute report projecting a 1.4 meter average sea level rise along the California Coast, by the end of the 21st century. The Trustees considered the effects of sea level rise on coastal flooding, wetland habitats, salinity of estuaries and freshwater aquifers, tidal ranges in rivers and bays, transport of sediment and nutrients, and contamination patterns in coastal areas. Ultimately, the Trustees selected the preferred restoration projects with an eye to these climate uncertainties. *Castro Cove/Chevron Richmond Refinery Damage Assessment and Restoration Plan/Environmental Assessment*, June 2010, https://repository.library.noaa.gov/view/noaa/3874.

### Refugio (Santa Barbara, California)

In May 2015, an underground oil pipeline running parallel to Highway 101 accidentally released approximately 2,900 barrels of crude near Refugio State Beach in Santa Barbara County, California. About 20 percent of the released oil reached the Pacific Ocean and adjoining shorelines. Eighty percent of the released oil remained in the upland area between the oil pipeline and the ocean, where it evaporated, biodegraded in the soil, or was recovered by responders. Although only a draft DARP/EA has been released, there is some consideration of climate change in both the injury assessment and the selection of restoration projects.

In the 2020 Draft DARP/EA, the Trustees noted that the injury analysis may be complicated by the 2015 El Nino event and the presence of a warm water mass, known as "the blob." These events took place within the same time frame as the oil spill, and had their own distinct impact on marine life and resource

health. The blob, as an atmospheric anomaly, impacted ocean productivity and food availability for marine species, while El Nino conditions were associated with warmer sea surface temperatures.

In the restoration planning section of the draft DARP/EA, the Trustees identified "[m]ajor anthropogenic stressors" that effect the shoreline environment as a factor when considering shoreline restoration projects. These stressors include sediment deficit, coastal armoring, beach nourishment, beach grooming, invasive species, and changing environmental conditions. The Trustees noted that future climate scenarios predict rising sea levels, which results in increased overall coastal erosion, as well as ocean acidification and large storms. The shoreline restoration projects proposed by the Trustees aim to reverse and portion of the negative effects of these stressors, and have long-term beneficial effects. https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=178526&inline.

### The Future of Climate Change in NRD

Consideration of climate change is likely to become more prominent in future NRD analyses and settlements. Determining causation of resource injury—as a result of the release of oil or hazardous chemicals or linked to climate change—will become more difficult in areas impacted by climate change. For example, it may be difficult to determine whether and to what extent coastal habitat is damaged by an oil release versus a recent storm event, such as a hurricane. Determining when resources have recovered also may become more difficult where climate change has impacted habitat. Areas subject to prolonged drought may no longer support habitat requiring frequent precipitation, so this habitat may not recover to pre-incident conditions. Developments in climate change science and development of more comprehensive baseline data should assist with the determination of causation and when a resource has recovered.

More flexibility on the selection of restoration projects also will be necessary for many incidents. Typically, Trustees will select restoration projects closely linked to the type of resources damaged and in close physical proximity to the incident. However, another factor that must be considered in the selection of projects, likelihood of success, may force Trustees to consider other projects. Where climate change has impacted habitat such that a damaged resource or species is no longer viable in the area of incident, Trustees must either consider projects that restore habitat or species other than those damaged by the incident, or projects located outside the area of the incident.

### Conclusion and Implications

As studies about climate change become more widespread, the existing regulatory framework for NRD claims will need to adapt. Currently, the regulations governing NRD claims do not mention climate change, but this also may change. Nevertheless, even within the existing regulatory framework, we expect technical experts engaged in the NRDA process will focus more on climate change evaluating the extent of injury to resources. Climate change has already been a factor in the selection and implementation of restoration projects, particularly within the last decade. We can expect climate changes and the effects of extreme weather events will get more attention in future NRD assessments, settlements, and the selection, planning and implementation of restoration projects, particularly with additional study on the effectiveness and resiliency of restoration projects in the fact of climate change and extreme weather events.

**Editor's Note:* Steve Goldberg and Darrin Gambelin served as counsel for Plains Pipeline, L.P. during the Refugio NRD. The views expressed in this article are those of the authors and do not reflect the views of Plains Pipeline, L.P.

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## LEGISLATIVE DEVELOPMENTS

# PROGRESS CONTINUES WITH SENATE BILL 223 AS RESIDENTIAL WATER SHUT OFF MORATORIUM NEARS ITS END

Originally, Senate Bill (SB) 998 made changes to policies to discontinue residential water service due to nonpayment, requiring that all public water systems with more than 200 service connections have a written policy on discontinuation of residential water service due to nonpayment, include provisions for not shutting off water for certain customers that meet specified criteria, prohibits the shutoff of water service until the residential water bill has been delinquent for 60 days, and cap the reconnection fees for restoring water service. On April 2, 2020, however, Governor Newsom issued Executive Order N-42-20 setting a moratorium on water disconnections. The California Public Utilities Commission (CPUC) has since extended the moratorium on suspension of discontinuation of service due to nonpayment through June 30, 2021, with the option to continue to extend the moratorium.

### Senate Bill 223

Senate Bill 223, expands provisions from SB 998 to "very small community water systems" (those with fewer than 200 service connections), expands the conditions prohibiting discontinuation of residential water service, and requires the CPUC to establish arrearage management plans for CPUC-regulated water utilities.

With the timing of COVID-19 and the subsequent moratorium on discontinuation of residential water service, SB 998 has yet to have an effect on residential customers or water service providers. Prior to the COVID-19 crisis, the Pacific Institute April 2020 report showed that nearly 200,000 single-family households had their water shut off for nonpayment in 2018, affecting over 500,000 California residents. Since then, the issue of nonpayment has only become more significant. The State Water Resources Control Board (SWRCB) estimates that there is roughly $1 billion in household debt from nonpayment of water bills amongst Californians as of January 2021. Although some of this figure comes from the fact that many of these debts include bills that combine water with sewer, energy, and other expenses on one bill, the SWRCB nonetheless estimates that drinking-water specific debt is somewhere in between $600 and $700 million.

### Revisions to Conditions When Discontinuance of Service Permitted

Notably of SB 223 are the revisions made to the conditions under which public water systems (including urban, community, and very small community water systems) may discontinue service to residential customers for nonpayment. Under this new bill, the conditions under which a public water system will be prohibited from discontinuing residential service include:

- Until delinquency of payments has reached at least 90, rather than 60, days or the total amount of the delinquency, exclusive of late charges and interest, is at least $250;

- When a residential customer makes payments on a utility bill that includes water service in amount exceeding the cost of such water service;

- To a master-metered multifamily residence with at least four units or to a master-metered mobile-home park;

- If a residential customer self-certifies that they do not have a primary care provider and that discontinuation of residential service will pose a serious threat to a resident of the premises, which includes the presence of a resident younger than 18 year of age; or

- During a state or local emergency when the area of the declared state or local emergency encompasses the customer's residence.

### Arrearage Management Plans

In addition to these added or changed conditions, the bill also requires the written policy on discontinuation of residential service for nonpayment (as noted in SB 998) to include an arrearage management plan, and, for those systems that provide water use audits or have the capacity to do so, to include a free water use audit for low-income households. Furthermore, the bill requires the State Water Resources Control Board to assist very small community water systems with compliance and requires all public water systems to waive fees for disconnection and reconnection of service for low-income customers.

### Conclusions and Implications

With the moratorium on water service shut-offs potentially coming to an end in the coming months, future protections on residential customers will become increasingly important for struggling households. On the other hand, public water systems will also be facing a significant challenge in handling the coming surge of overdue accounts. Finding a balance between protecting customers and maintaining effective functioning water systems will be the sweet spot for the state to find moving forward, so these and future amendments to SB 223 will be worth keeping an eye on. The bill can be tracked online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB223.
(Wes Miliband)

## ASSOCIATION OF CALIFORNIA WATER AGENCIES SEEKS TO AMEND PROPOSED LEGISLATION TO IMPROVE WATER AFFORDABILITY

Two bills recently introduced in the California State Senate to improve water affordability for California residents have been met with concerns from the Association of California Water Agencies (ACWA), the country's largest coalition of water agencies. ACWA has taken an oppose-unless-amended position on both bills and has committed to working with the bills' sponsors toward achieving amendments.

### Background

California State Senator Bill Dodd (D-Napa) is the author of companion bills Senate Bill 222 and Senate Bill 223. The bills' stated shared objective is to increase California residents' access to affordable water. SB 222 would require the State Water Resources Control Board to create a water and wastewater affordability program implemented in part by roughly 2,900 public water systems.

### Senate Bill (SB) 222

More specifically, SB 222 proposes to establish a "Water Affordability Rate Assistance Fund" (Fund) in the State Treasury. The Fund would provide water affordability assistance, for both drinking water and wastewater services, to low-income ratepayers and ratepayers experiencing economic hardship. SB 222 would require the California Department of Community Services and Development (Department) to develop and administer the program. Under SB 222, the California Legislature would be responsible for appropriating funding for the Department for the Fund, which would be used for direct water bill assistance, water bill credits, water crisis assistance and affordability assistance.

### Senate Bill 223

SB 223 would require public water systems to forgive the entire balance of a customer's unpaid water debt if the customer enters into an arrearage management plan. It seeks to amend existing law regarding circumstances in which a public water system may discontinue service for delinquent payments.

As stated in the SB 223 legislative digest, existing law prohibits a public water system that supplies water to more than 200 service connections from discontinuing residential water service for nonpayment until a payment by a customer has been delinquent for at least 60 days. SB 223 would apply those provisions, on and after July 1, 2022, to very small community water systems, defined as public water

systems that supply water to 200 or fewer service connections used by year-long residents; and, it would prohibit these systems from discontinuing residential water service for nonpayment until a payment by a customer has been delinquent for at least 90 days or the total amount of the delinquency, exclusive of late charges and interest, is at least $250. SB 223 would require an urban and community water systems and very small community water systems to waive fees for disconnection and reconnection of service for those customers.

SB 223 further requires the State Water Resources Control Board to provide technical assistance to very small community water systems, as appropriate, to assist with compliance with these requirements and to establish a bridge loan program to assist very small community water systems that may suffer revenue loss or delayed collection while complying with these requirements.

It would require the California Public Utilities Commission (PUC), by January 1, 2023, to establish an arrearage management plan program and eligibility criteria and conditions for arrearage management plans to be offered by urban and community water systems regulated by the PUC.

SB 223 describes existing law to prohibit urban and community water systems from discontinuing residential service for nonpayment if certain conditions are met, including that a customer or a tenant submits certification that discontinuation of residential service will be life threatening to, or that it would pose a serious threat to the health and safety of a resident of the premises. SB 223 would prohibit these systems from discontinuing residential service for nonpayment during a state or local emergency when the area of the declared state or local emergency encompasses the customer's residence, unless the entity declaring the emergency finds that the emergency will not impact the customers' ability to pay for residential service. The bill would authorize a customer, or tenant of the customer, to submit in writing, under penalty of perjury, specified information that would prevent the discontinuation of water services and thereby also expands the scope of the crime of perjury.

### ACWA's Position

As of the date of this writing, ACWA has taken an oppose-unless-amended position on both bills. The statewide coalition argues that SB 222 is overly broad and costly. ACWA asserts that rather than establishing new funding programs, the state should build on an existing low-income financial assistance programs, such as CalFresh and the California Food Assistance Program. ACWA argues that this approach would help low-income households across the state and would have lower administrative costs.

ACWA also challenges the constitutionality of SB 223. ACWA asserts that under Proposition 218, California public water agencies cannot legally use revenue from some of their customers to subsidize the cost of service for other customers. In addition, ACWA argues that the proposal would harm the financial stability of public water agencies and would consequently jeopardize their ability to provide safe drinking water to all customers, to comply with other regulatory requirements and to replace aging infrastructure.

As SB 222 and SB 223 head into committees for markup this spring, ACWA continues to assert its views on the bills, and it has committed to working with the author and sponsors on necessary amendments to improve affordability in an effective, efficient, legal and sustainable way.

### Conclusion and Implications

Only time will tell how SB 222 and SB 223 will look in their final form. Recent statewide data indicates delinquent water bills are extensive and growing. Notably, ACWA's position acknowledges the importance of improving water affordability for the state's residents and has committed to working with the author to amend the legislation toward more practical and sustainable outcomes.
(Chris Carrillo, Derek R. Hoffman)

## REGULATORY DEVELOPMENTS

# CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES DRAFT BULLETIN-118 UPDATE 2020—DEFINING THE STATE'S GROUNDWATER BASINS

The California Department of Water Resources (DWR) recently released its much-awaited report, *California's Groundwater Update 2020* (Update 2020). Update 2020 is the most recent version of Bulletin 118, the state's official publication on the occurrence and nature of groundwater in California. Bulletin 118 defines the state's groundwater basins and summarizes information for each of the state's ten hydrologic regions. Update 2020 synthesizes the latest groundwater data—including new information derived from implementation of the Sustainable Groundwater Management Act of 2014 (SGMA)—to bring current the state's comprehensive inventory and analysis of groundwater information.

### Background

California Water Code § 12924 requires DWR to update Bulletin 118 every five years to report timely information on the conditions of California's groundwater basins, patterns of groundwater extraction and recharge, and the current groundwater basin boundaries and priorities. Update 2020 is the first complete Bulletin 118 Update since SGMA took effect in January 2015. California water policy increasingly requires greater transparency, data, and detail regarding groundwater information, as well as the concentration of that information into fewer, comprehensive databases accessible to the public. Update 2020 aims to achieve these objectives.

### Update 2020

The primary purposes of Bulletin 118 are to: 1) inform local water providers, statewide elected officials, decision-makers, and the public at-large about the condition of California's groundwater resources; 2) provide an updated inventory and analysis of the conditions, use, and management of groundwater statewide; and 3) identify recommendations for better understanding and more sustainable management of groundwater resources.

Update 2020 includes a Highlights document, which summarizes the state's groundwater conditions and management, and an extensive statewide report document, which provides detailed information on statewide and regional groundwater conditions and management activities.

Update 2020 states that SGMA provides the foundation to bolster groundwater management in response to climate change, which is predicted to significantly decrease water supply to California. It provides that California's groundwater basins must be leveraged to provide the flexibility needed to manage this future impact. Update 2020 reports that groundwater has historically been over utilized, resulting in overdraft conditions in groundwater basins comprising approximately one-fifth of total groundwater basin areas of the state.

Update 2020 clarifies that while California's groundwater occurs mostly within its 515 defined basin aquifers (94 percent), it also occurs in non-basin areas (6 percent).

### Summary of Key Findings

Key findings in Update 2020 are summarized as follows.

#### California's Groundwater

New technology, such as airborne electromagnetic (AEM) surveying, is being deployed to help improve understanding of basin hydrogeologic characteristics.

The state's high- and medium-priority basins supply approximately 98 percent of groundwater pumping.

Update 2020 provides an enhanced characterization of the non-basin areas, finding that while approximately 60 percent of California's total land area covers non-basin areas, groundwater extraction in these areas accounted for just 6 percent of the total groundwater extraction in 2014. That percentage is expected to grow.

### Groundwater Use

Groundwater supplies over 40 percent of the state's total water supply during average years and nearly 60 percent in dry years.

Currently, groundwater use data by sector is not available at the local groundwater basin scale. Update 2020 indicates that this limits the ability to effectively manage groundwater basins.

SGMA annual reporting is expected to fill data gaps in local groundwater use information for all high- and medium priority basins.

A lack of accurate measurement of groundwater use throughout the state creates difficulty in accurately quantifying total groundwater use.

### Groundwater Management

Update 2020 finds that local groundwater management efforts have progressed through SGMA implementation. Many basins, including all 20 basins that DWR designated as subject to critical conditions of overdraft, have submitted their Groundwater Sustainability Plans (GSPs) or statutorily authorized Alternatives to GSPs.

More than 250 Groundwater Sustainability Agencies (GSAs) have been formed for nearly 150 basins in California, including all of the high- and medium-priority basins.

Update 2020 indicates that water markets and water transfers are emerging as an effective tool for achieving basin sustainability by providing flexibility in the allocation and use of water resources. Nearly half of the GSPs submitted include groundwater market activities. It references the California Water Resilience Portfolio, which identified actions to improve water markets, primarily needed regulatory and policy reforms and improved access to accurate data and trading platforms.

Update 2020 summarizes DWR's local assistance activities include planning, financial, and technical assistance services for GSAs and other stakeholders. Since 2010, DWR has provided $342.3 million in grants for groundwater projects. DWR has also developed an assortment of tools to facilitate access and transparency and to allow local agencies, GSAs, and watermasters to submit, modify, and view the information required by SGMA. Update 2020 notes, however, that state and local agencies need more assistance in building capacity to support the development and use of advanced technical tools that are necessary to implement SGMA.

### Groundwater Monitoring and Conditions

Update 2020 explains that DWR's California Statewide Groundwater Elevation Monitoring (CASGEM) program has substantially improved the collection, analysis, and reporting of groundwater level data.

As SGMA monitoring and reporting efforts continue to expand, water managers anticipate a significant increase in the number of monitoring stations and data.

Groundwater monitoring is occurring in nearly 50 percent of groundwater basins that produce 99.5 percent of total annual groundwater use in the state.

Over 1,300 new groundwater level monitoring wells and over 100,000 groundwater level measurements have been included as part of the 46 GSPs that were submitted by January 2020.

Since 1998, groundwater elevations have been generally declining in most areas. Groundwater storage in California has also been declining. However, estimates of changes in storage require accurate data on groundwater pumping, which are not widely available or measured.

Update 2020 also addresses conditions regarding water quality, land subsidence, sea water intrusion, and surface water depletion in each region.

### Moving Forward to Sustainable Groundwater Management

Update 2020 observes that sustainable groundwater management is not a one-size-fits-all issue. Instead, locally-developed, comprehensive GSPs that implement monitoring and measuring programs and effective projects and management actions will enable longterm, adaptive management practices that will lead to sustainable groundwater management.

Update 2020 provides four categorical recommendations to achieve sustainable groundwater management: 1) advance data-driven decision-making; 2) maintain momentum for sustainability; 3) engage, communicate, educate; and 4) invest, innovate and incentivize.

### Conclusion and Implications

The Update 2020 Final Draft is expected to be released in Summer 2021. A 45-day public comment period on the draft occurred and accepted comments through April 26, 2021. Update 2020 aims to improve access to essential groundwater data and analysis statewide and at the regional level. Some recommendations can be implemented immediately, while others require longer implementation timelines as they depend upon achieving various SGMA implementation milestones.

Update 2020 delivers a significant update to the Bulletin 118 series. Future updates may be even more robust as DWR and water managers throughout the state garner data, insight and experience from SGMA implementation. Update 2020 can be found on the DWR website at: https://water.ca.gov/Programs/Groundwater-Management/Bulletin-118.
(Gabriel J. Pitassi, Derek R. Hoffman)

## CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES FINAL DROUGHT PLANNING REPORT FOR SMALL AND RURAL WATER SUPPLIERS

In March 2021, the California Department of Water Resources (DWR) released a final report with recommendations and tools to help small water suppliers and rural communities plan for drought and other events that may contribute to water shortages (Drought Planning Report).

### Background

Only four years since the last drought emergency, California is once again experiencing critically dry conditions and is facing the possibility of another statewide drought. Small water systems (*i.e.* those with fewer than 3,000 service connections) and self-supplied rural communities (*i.e.* those communities delineated by U.S. Census Block Groups with one or more domestic wells installed within the last 50 years) are particularly vulnerable to water supply and quality issues and higher water costs during extended dry periods. However, unlike larger urban water suppliers, small and rural systems are not required to adopt and maintain drought contingency plans.

In 2018, the California Legislature passed Assembly Bill 1668 (AB 1668) in the wake of the last major drought, directing DWR to identify the small suppliers and rural communities at risk of vulnerability due to drought or water shortage and develop recommendations for improving drought contingency planning for those areas. DWR prepared its Drought Planning Report pursuant to the mandate in AB 1668 through stakeholder engagement and consultation with experts over the past couple years. The Drought Planning Report sets out detailed guidance for developing water shortage contingency plans and provides tools for the thousands of smaller water systems in the state to better understand and plan for their water shortage vulnerability risk factors.

### Recommendations for Drought and Water Shortage Contingency Plans

Part 1 of the Drought Planning Report consists of DWR's recommendations for drought and water shortage contingency planning for small and rural water systems. Small water suppliers for 1,000 or more customers are strongly encouraged to create water shortage contingency plans akin to the Urban Water Management Plans developed for larger urban water systems. DWR recommends that contingency plans identify the resources needed in the event of water shortage emergencies and coordinated planning among suppliers, counties, and other regional entities to ensure those resources can be made available.

The Drought Planning Report includes a seven-step framework approach with key components that small water suppliers and rural communities can utilize to develop or improve their drought contingency plans.

- Step 1 calls for the formation of a water shortage response team that will establish the goals and objectives for managing drought-related problems and coordinate with other regional water planning groups. Key duties of a response team would

include drought contingency planning and establishment of effective emergency notification and communication systems.

•Step 2 covers forecasting supply in relation to demand. This step requires suppliers to take inventory of existing and future water supply and demand, and become familiar with the impacts that water shortages and drought conditions have on the system.

•Step 3 involves balancing of projected supply and demand levels, identifying potential mitigation measures, and securing alternative water sources to improve supply vulnerabilities.

•Step 4 sets the threshold trigger mechanisms for drought or water shortage response actions, based on the needs and vulnerability of each system or community.

•Step 5 calls for a staged program for demand reduction during a water shortage with criteria and triggers established at 10%, 25%, and 50% shortage levels. This step includes developing an approach to interface with the public to manage water user expectations.

•Step 6 is the plan adoption, in which the community and stakeholders would be asked to participate and necessary revenue programs are established.

•Step 7 covers implementation of the water shortage plan, with measures in place to determine actual water use reductions and criteria for returning to normal operation.

The Drought Planning Report also provides a template for drought contingency planning for tribal public water systems, developed by the Indian Health Service, California Area Office of Environmental Health and Engineer, and incorporating elements from existing drought contingency plans for urban suppliers in the state. Finally, the Drought Planning Report suggests several funding ideas for small water systems to finance contingency planning efforts, including state-level block grants, incentivized urban water system assistance, state reimbursements for interest and loan fees for capital construction projects to bolster the smallest water systems, and technical assistance programs focused on implementation of the recommendations in disadvantaged communities.

### Water Shortage Vulnerability Risk Scores

Part 2 of the Drought Planning Report contains a scoring rubric for drought and water shortage risks and a Risk Explorer Tool that assesses the drought and water shortage risks for small water systems and rural communities through a more holistic, statewide lens. To inform these tools, DWR analyzed the relative risks for California's 2,419 small water suppliers and 4,987 rural communities based on 29 separate risk indicators. The risk indicators are broken down into three main classifications: 1) the exposure of systems to hazardous conditions or events such as drought, wildfires, and sea-level rise; 2) the relative physical and organizational vulnerability of the exposed communities and their infrastructures; and 3) the historical impacts of past drought events.

With a total scoring range of 0 to 100 (100 being the highest risk) the Risk Explorer Tool indicates a wide variety of risk vulnerability among water systems across the state, scaled so that some small water suppliers and rural communities have a score of zero while others reach 100. The small water suppliers have a mean and median score of 54, indicating a normal distribution. For rural communities, the mean and median scores were 42, also showing a normal distribution. The Drought Planning Report notes that the scaled scores should not be interpreted as a clear ranking among evaluated systems, nor does it forecast drought events or predict the severity of drought-related impacts. Rather, the tool and accompanying recommendations are intended to inform and support regional risk planning efforts.

### Conclusion and Implications

DWR's Drought Planning Report builds on the state's ongoing efforts to make water conservation a new way of life and facilitate the resources and opportunities needed to ensure access to safe and secure water supplies throughout California. With the impending drought conditions for parts of California, the guidance and analytical tools contained in the Drought Planning Report will certainly be useful for identifying vulnerable systems and facilitating

regional planning work. DWR acknowledges that for many of these smaller systems to implement the recommended measures, funding and financing are key, but in most cases, additional action from State will be needed for those funding resources to materialize.

The Department of Water Resources' Drought Planning Report and Risk Explorer Tool are available at: https://water.ca.gov/Programs/Water-Use-And-Efficiency/2018-Water-Conservation-Legislation/County-Drought-Planning.
(Austin C. Cho, Meredith Nikkel)

## RECENT FEDERAL DECISIONS

# SECOND CIRCUIT DETERMINES CLEAN WATER ACT, SECTION 401, DEADLINE CANNOT BE MODIFIED BY AGREEMENT

*New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, ___F.3d___, Case No. 19-1610 (2nd Cir. Mar. 23, 2021).

The U.S. Court of Appeals for the Second Circuit recently determined that the one-year time period for issuing a federal Clean Water Act, Section 401 water quality certification is mandatory, and a certifying agency cannot enter into an agreement or otherwise coordinate with an applicant to alter the time period. If the certifying agency does not act within the provided statutory time period the authority is waived.

### Factual and Procedural Background

Section 401 of the Clean Water Act requires an applicant for a federal permit to obtain a certification that the proposed project complies with state water quality standards and other requirements of state law. It also requires the state to "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request," or their certification authority is waived. If a state denies certification within the statutory time period, then no license or permit shall be granted. If a state issues a certification contingent on the applicant's satisfaction of various conditions, the appropriate federal agency must incorporate those conditions into the final license.

National Fuel proposed to construct a 99-mile long natural gas pipeline from western Pennsylvania to upstate New York known as the Northern Access 2016 Project. Before proceeding with this type of project, the Natural Gas Act required a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC). Because construction and operation of the pipeline could result in discharges into New York waterways, National Fuel was also required to obtain a Section 401 water quality certification.

Accordingly, in March 2015, National Fuel applied to FERC for a certificate of convenience and necessity and, the following year, applied to the New York Department of Environmental Conservation (DEC) for a Section 401 water quality certification. At some point after National Fuel was asked to supplement the second time, it became clear that the DEC would not be able to make a final determination within one year of the date of the initial application because it had not completed the notice-and-comment process required by the Clean Water Act and by state regulations.

In an attempt to extend the one-year deadline, the DEC and National Fuel entered into an agreement revising the date on which the application was deemed received by the DEC to April 8, 2016, extending the deadline for the DEC to issued or deny the required certification by 36 days. Subsequently, DEC denied National Fuel's application and National Fuel petitioned for review. While the petition was pending, National Fuel filed with FERC a motion for expedited action. FERC concluded that Section 401 established a deadline that could not be extended by private agreement. DEC petitioned for review of FERC's decision as well.

### The Second Circuit's Decision

The threshold issue for the petitions is whether a state and a project applicant may extend the one-year deadline for acting on a Section 401 water quality certification application. The circuit court previously determined that a statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision. The court determined that Section 401's one year deadline is mandatory in that it does not merely "spur" the agency to action but it bars untimely action by depriving the agency of its authority after the prescribed time limit.

The court next considered whether DEC's denial

of National Fuel's certification request should be regarded as untimely because the agreement to change the receipt date must be deemed void. To make this determination, the court examined the legislative history of Section 401. In examining the legislative history the court concluded "with a good deal of clarity" that limiting a certifying state's discretion and eliminating a potential source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve. The original version of the House Bill did not set any time limit for state action, but was later amended to require affirmative state action "within a reasonable period of time" in order to prevent delay due to a certifying state's passive refusal or failure to act. Eventually, that language was refined and the one-year time limit was included in the final version of the bill after the Senate bill was combined with the House bill. The legislative history, the court determined, showed that Congress was not primarily concerned with protecting the rights of individual applicants. Rather, Section 401's time limit was meant to protect the regulatory structure, particularly in situations involving multiple states: in other words, to guard against one state "sitting on its hands and doing nothing" at the expense of other states that are also involved in a multi-state project.

Accordingly, the court held that it was bound by Congress' intention expressed in the text of Section 401 and reinforced in its legislative history to reduce flexibility in favor of protecting the overall federal licensing regime. The court therefore held that Section 401 prohibits a certifying agency from entering into an agreement or otherwise coordinating with an applicant to alter the beginning of the review period, and that the DEC waived its certification authority by failing to act within one year of the actual receipt of the application.

The court upheld the FERC's conclusion that the DEC waived its authority under Section 401.

### Conclusion and Implications

This case provides that the one-year deadline for a state to act on an application for a Clean Water Act Section 401 water quality certification cannot be extended by agreement with a project applicant. Such an agreement may waive a state's authority to review and act on such an application. The Second Circuit's opinion is available online at: https://casetext.com/case/ny-state-dept-of-envtl-conservation-v-fed-energy-regulatory-commn-1.

(Henry Castillo, Rebecca Andrews)

## RECENT CALIFORNIA DECISIONS

# FIFTH DISTRICT COURT ISSUES TWO OPINIONS AFFIRMING JUDGMENT IN ANTELOPE VALLEY GROUNDWATER CASES

*Antelope Valley Groundwater Cases*, Case No. F082492 (5th Dist. Mar. 16, 2021);
*Antelope Valley Groundwater Cases*, Case No. F082469, (5th Dist. Mar. 16, 2021), *Published* Apr. 14, 2021).

On March 16, 2021, the Fifth District Court of Appeal issued two opinions affirming the Los Angeles County Superior Court's approval of a physical solution that equitably apportioned the rights of thousands of existing and potential users to extract groundwater in the Antelope Valley. (*See, Antelope Valley Groundwater Cases*, Case No. F082492 (*Tapia* Opinion); *Antelope Valley Groundwater Cases*, Case No. F082469 (*Willis* Opinion).) These opinions clarify that prescriptive groundwater rights are equal in priority to overlying rights and that dormant overlying rights may be subordinated to existing overlying uses of groundwater after a comprehensive groundwater adjudication.

### Factual and Procedural Background

The first of the lawsuits that ultimately evolved into the Antelope Valley Groundwater Cases and resulted in the issuance of the *Tapia* and *Willis* Opinions were filed in 1999. (*Tapia* Opinion at 2.) A number of parties asserted that, without a comprehensive adjudication of all groundwater rights to a single aquifer in a vast desert area of over a thousand square miles (the Basin), the Basin's groundwater resources would remain in a condition of long-term overdraft. (*See, Tapia* Opinion at 2, 5-6.) The Judicial Council ultimately ordered that all then-pending lawsuits be coordinated into a single adjudication proceeding. (*Willis* Opinion at 4.)

After the pending lawsuits were coordinated, the trial court spent 11 years conducting phased proceedings aimed at comprehensively adjudicating all rights to extract groundwater from the Basin. (*Willis* Opinion at 4.) In the first four phases, the trial court: 1) defined the geographical boundaries of the Basin; 2) concluded that the Basin consisted of a single aquifer; 3) found the Basin was in a state of chronic overdraft because extractions far exceeded its annual safe yield; and 4) determined the annual "baseline" amounts actually extracted by the largest of the competing litigants with claims to water from the Basin, which themselves exceeded the Basin's safe yield. (*Tapia* Opinion at 3-4.)

Phase 5 contemplated trial of the issues of federal reserved water rights and imported water return flow rights, but was interrupted by settlement discussions. (*Id.* at 4.) Ultimately, the vast majority of parties settled their competing claims to the Basin's groundwater and agreed to support a physical solution. (*Id.*) In doing so, the settling parties essentially agreed to reduce their groundwater pumping to a level that would match their assigned allocation of the Basin's safe yield, and to pay for imported water for any extractions above that allocation. (*Id.*)

Charles Tapia (Tapia) was an overlying landowner who, along with a class of overlying landowners who had not previously extracted groundwater from the Basin (collectively: Willis), opposed the physical solution. The trial court thus held a trial on the "rationale for and efficacy of the proposed" physical solution. (*Id.* at 5.) After that trial, the trial court entered a judgment approving the physical solution.

### The Court of Appeal's Decisions

Although Tapia and Willis appealed the trial court's judgment approving the physical solution on a variety of grounds, both appellants contended that the trial court's approval of the physical solution violated key principles of California groundwater law. First, both Willis and Tapia argued that the trial court's decision denying them an initial allocation of the Basin's safe yield while granting such an allocation to a group of public water suppliers based on their prescriptive rights violated the longstanding legal principle that overlying landowners have a higher priority to pump and use groundwater than ap-

propriative rights holders. (*Tapia* Opinion at 25; *Willis* Opinion at 39.) Second, Willis and Tapia both argued that the physical solution disregarded their overlying rights because it extinguished their future access to any part of the Basin's safe yield. (*Willis* Opinion at 43-44; *Tapia* Opinion at 28-29.) Finally, both parties claimed that the physical solution violated the California Constitution's requirement that water be put to reasonable and beneficial use because it allocated the Basin's safe yield on a permanent basis and was not based on a sufficient evaluation of the reasonableness of each individual party's existing use. (*Tapia* Opinion at 32; *Willis* Opinion at 50.) The Court of Appeal rejected all three of these arguments.

First, the court found that although a public water system's use of groundwater is not an overlying groundwater right even where the lands supplied with such water overlie the groundwater basin, public water suppliers may acquire *prescriptive* water rights that have equal priority with overlying rights. (*Willis* Opinion at 39; *Tapia* Opinion at 25-26.) The court further noted that Willis and Tapia had made no arguments that the trial court's findings as to the public water suppliers' prescriptive rights were not supported by sufficient evidence. (*E.g.*, *Willis* Opinion at 40.) Indeed, the court specifically noted that Willis had consented to the trial court's allocation of a portion of the Basin's safe yield to those public water suppliers. (*Id.*)

The court also determined that the physical solution lawfully subordinated the rights of overlying landowners who could not prove their use of Basin groundwater in favor of overlying landowners who had proved their historical use of such groundwater. In holding that the trial court's subordination of dormant overlying rights to active overlying rights was consistent with its authority to adopt a physical solution based on equitable apportionment, the court relied on the California Supreme Court's decision in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339 (*Long Valley*). (*E.g.*, *Tapia* Opinion at 29-31.) Although *Long Valley* held that a court could subordinate unexercised riparian rights to surface water in favor of existing uses, the appellate court determined that this holding was equally applicable to a comprehensive groundwater adjudication. (*See*, *Tapia* Opinion at 30; *Willis* Opinion at 46-47.)

Finally, the court rejected the appellants' arguments that the physical solution was inconsistent with the constitutional requirement that water be put to reasonable and beneficial uses to the fullest extent possible. Although water users who obtained a permanent allocation of water from the Basin's safe yield could theoretically change their existing uses into unreasonable future uses, the court held that the trial court's reservation of continuing jurisdiction to address such changes provided "adequate protection against potential future uses which might transgress the reasonable and beneficial use" requirement. (*Willis* Opinion at 52; *Tapia* Opinion at 34.) The court also found that testimony from two experts who opined that the parties who received allocations "*were* reasonably using the amounts of water they extracted and were devoting it to beneficial purposes" was sufficient evidence to support the trial court's approval of the physical solution under Article X, § 2 of the California Constitution. (*Tapia* Opinion at 34 (emphasis in original); *see also*, *Willis* Opinion at 55.)

## Conclusion and Implications

Although the *Tapia* and *Willis* Opinions were initially issued as unpublished decisions, the Court of Appeal ultimately certified both decisions for publication as of April 14, 2021. At the time of this writing, it is unclear whether any of the parties will petition the California Supreme Court for review of the Court of Appeal's decisions. The Court of Appeal's decision[s] are available online at: https://www.courts.ca.gov/opinions/documents/F082469.PDF and here: https://www.courts.ca.gov/opinions/documents/F082492.PDF.

(Sam Bivins, Meredith Nikkel.)

# SIXTH DISTRICT COURT FINDS DEVELOPMENT RELIANT ON GROUNDWATER SUPPLIES BENEFITED BY WATER SUPPLY PROJECT SURVIVES CEQA CHALLENGE

*Landwatch Monterey County v. County of Monterey, Unpub.*, Case No. H046932 (6th Dist. Mar. 29, 2021).

On March 29, 2021, the California Court of Appeal for the Sixth Appellate District held in an *unpublished* decision that a final Environmental Impact Report (EIR), under the California Environmental Quality Act (CEQA) for a residential subdivision project prepared by the County of Monterey (County) adequately addressed groundwater resources issues, despite overdraft conditions and downward trending groundwater levels in certain areas of the groundwater basin.

## Background

In 2001, Harper Canyon Realty, LLC, a developer (Harper), proposed the development of the Harper Canyon Subdivision Project (Project) in Monterey County (County). Harper's development application was deemed complete in 2002. In 2005, the County began preparing an environmental impact report (EIR) for the Project.

The Project involved a combined development permit for the subdivision of 344 acres into 17 residential lots for single-family homes. Water for residences in the proposed subdivision would come from two existing wells, one that was drilled for an existing housing subdivision and another drilled on Harper's land. Two scientific studies had directly or indirectly analyzed the potential effects of operations of the wells proposed for the Project, including a 2002-2003 Project-specific study, and a regional groundwater study prepared for another County entity in 2007 to evaluate groundwater resources capacity within a planning area that encompassed the two wells. The 2007 study was supplemented in 2010. The 2007 study observed overdraft conditions in portions of the Salinas Valley Groundwater Basin as well as declining groundwater levels, but the 2010 supplement found that current and increased groundwater pumping could be sustained for decades where "large saturated thickness of the aquifer stored large volumes of water." Neither the 2007 study nor the 2010 supplement referenced the Project specifically.

The purpose of the 2007 study was to recommend maintaining or revising a particular zoning overlay that limited land use due to scarce groundwater resources. Notably, the two wells for the Project were not located within that zoning overlay. Instead, the two wells received the benefits of sustained groundwater levels due to the operation of two reservoirs and an ongoing water project called the Salinas Valley Water Project, which helps hydrologically balance the Salinas Valley Groundwater Basin. The Salinas Valley Water Project, which became operational in 2010, formed a central component of the analysis in the County's EIR for the Project, the first draft of which was issued in 2008. The final EIR was issued in 2013, and noted that the Project was located within the Corral de Tierra Subbasin of the Salinas Valley Groundwater Basin.

## The Court of Appeal's Decision

The Court of Appeal rejected petitioners' argument that the final EIR was informationally inadequate under CEQA with respect to its discussion of groundwater resources. First, petitioners contended that the final EIR's environmental setting related to groundwater resources was internally contradictory, in that the final EIR asserted both overdraft and surplus in the groundwater basin and asserted that the Project's wells were hydrologically connected and not connected to adjacent areas where groundwater resources are stressed. Similarly, petitioners argued that the environmental setting description was incomplete because it failed to disclose the declining groundwater levels and aquifer depletion described in the 2007 study. Second, petitioners argued that the EIR improperly concluded that the Project would not result in a considerable cumulative impact when combined with other development within the groundwater basin. The Court of Appeal rejected all of petitioners' arguments.

### The Claims Made by Petitioners

With respect to petitioners' argument that the EIR was internally inconsistent, the court observed

that the final EIR acknowledged an overdraft condition existed within the Salinas Valley Groundwater Basin. The court also determined that the EIR did not improperly rely on or claim that a surplus existed in reaching its conclusion that the Project lacked a cumulative impact on groundwater resources. Instead, the court held that the final EIR relied on the property owners' financial contributions to the Salinas Valley Water Project, which benefited groundwater levels in the vicinity of the development project. Those payments also supported the County's conclusions that the Project would have a long-term sustainable groundwater supply, and would likewise have a less than significant impact on groundwater resources.

The court also rejected petitioners' argument that the EIR omitted reference to the existence and magnitude of aquifer depletion as identified in the 2007 study. According to the court, because the EIR referenced overdraft in the Salinas Valley Groundwater Basin and discussed the 2007 report, the EIR "reasonably acknowledged" the overdraft problem.

Finally, the court rejected petitioners' argument that the final EIR was internally inconsistent because the Project's wells were said to be both hydrologically connected and not hydrologically connected. The court observed that the EIR concluded the wells were hydrogeologically contiguous with aquifers in the east Salinas Valley that were not in the less productive or stressed areas within the 2007 study area. Accordingly, the court held that the EIR was not internally contradictory and therefore was not informationally inadequate under CEQA.

With respect to petitioners' argument that the Project would result in cumulatively considerable impacts to groundwater resources, the court observed that the EIR relied on the 2010 supplement's conclusion that the Project is located in an area of large saturated thickness within the Salinas Valley Groundwater Basin and which was hydrogeologically connected to the non-stressed subareas within the basin. Moreover, the EIR concluded that the potential effect of cumulative groundwater pumping on groundwater supply would be mitigated by the Salinas Valley Water Project. The Court of Appeal held that the EIR's discussion of cumulative impacts was sufficient under CEQA.

### Conclusion and Implications

This *unpublished* decision stands for the proposition that an overdrafted groundwater basin is not an absolute bar to future development. However, adequately funded water supply projects that benefit local groundwater basins, including discrete areas within such basins, may be an important factor for the viability of future developments, including their ability to withstand challenges under environmental laws like CEQA. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/H046932.PDF.
(Miles Krieger, Steve Anderson)

## SUPERIOR COURT FINDS L.A. DEPARTMENT OF WATER AND POWER MUST CONDUCT ENVIRONMENTAL REVIEW BEFORE REDUCING PASTURELAND ALLOCATIONS

*County of Mono v. City of Los Angeles*, Case No. RG18-923377 (Alameda Super Ct. Mar. 8, 2021).

On March 8, the Alameda County Superior Court granted a writ of mandate in favor of Mono County (County) requiring the Los Angeles Department of Water and Power (LADWP) to conduct appropriate environmental review under the California Environmental Quality Act (CEQA) for proposed changes to the use of water by ranchers on leased land owned by LADWP in the County.

### Background

LADWP owns 6,4000 acres in Mono County, and owns the water rights associated with that land. The land itself is ranch land that is also habitat for the Bi-State Sage Grouse. Historically, LADWP provided approximately 3.9 acre-feet of water annually to each acre on the ranch for habitat management and wildlife, for the maintenance and restoration of native vegetation, and for agricultural irrigation. During the

2013-2018 period, however, LADWP only provided 1.9 acre-feet per acre, which was below the ten-year average of 2.9 acre-feet per acre. The amount of water provided to the acreage depended each year on variations in precipitation, runoff, and other factors.

In 2010, LADWP began leasing the land to several ranchers. The leases included provisions for water supply and irrigation water. For instance, the leases provided for up to five acre-feet per year for irrigation water, although the leased water was subject to the paramount rights of LADWP, and the availability of water under the terms of the lease was determined solely by LADWP.

In 2013, LADWP adopted a conservation strategy to protect sage grouse. The conservation strategy set LADWP water policy for the pastures used by sage grouse, and recognized that lessees of pasturelands received a water allotment of up to five acre-feet of water per acre for irrigation. Minimum flows were required to be maintained in creeks to maintain aquatic life, and no irrigation was allowed when creek flows were at or below such minimums. Importantly, with respect to irrigated agriculture, the conversation strategy indicated that LADWP did not expect surface water management practices to change from current practices regarding pasturelands. This included pasture acreage receiving up to five acre-feet of water per acre in some years, while in other years irrigation might be prohibited due to minimum flow requirements in creeks. Under the terms of the leases, lessees were required to maintain irrigated pastures in good to excellent condition, and a drop-in pasture rate (as scored by an official scoring system) below 80 percent would require changes to pasture management.

In 2018, LADWP issued new proposed five-year leases to existing lessees. The new lessees provided that "at no time shall water taken from the well(s) be used for irrigation or stockwater purposes," and that LADWP "shall not furnish irrigation water" to lessees or the leased lands, and lessees "shall not use water supplied to the leased premises as irrigation water." In correspondence between the County and the City of Los Angeles following LADWP's proposal of the new leases, the City indicated that water allocations for 2018 would likely be similar to those in 2016, *i.e.* 0.7 acre-feet per acre.

## The Superior Court's Ruling

The central issue in this case is whether LADWP approved a "project" without first conducting an environmental review under CEQA. The County argued that LADWP was required to conduct environmental review before it proposed the new leases in 2018, which included the change in water use and simultaneously implemented water allocations consistent with the provisions of the new leases, *i.e.* reduced water allocations. The Superior Court concluded that LADWP was required to conduct environmental review under CEQA but had not done so.

### Proposing 2018 Leases and Announcement Was a Project

The Superior Court found that when LADWP proposed the 2018 leases, and announced the 2018 water allocations, it committed to a definite course of action that triggered environmental review. For instance, the Superior Court found that LADWP had revised the terms of the leases to change the water use on LADWP's land when it sent the proposed leases, and set a short timeframe of less than a month for the proposed lessees to negotiate the new leases. Additionally, the court observed that a May 2018 letter from the mayor of Los Angeles to the County indicated the amount of water allocated that year under the existing leases would be similar to a prior dry year's allocation of 0.7 acre-feet. The court reasoned that this figure reflected the first year of a plan to decrease water allocations that the proposed leases would implement on a multi-year basis.

While the court weighed the evidence that LADWP was only proposing the new leases—as opposed to approving them—and that the low water allocation represented only a single year's allocation, the court found on balance that the proposed leases and the actual water allocation for 2018 demonstrated that LADWP was committed to a definite course of action and therefore had approved an action to significantly reduce or eliminate water deliveries.

### Reductions in Water Allocations Was a Project

The Superior Court also found that LADWP's proposed reductions in water allocations under the new leases constituted a "project" subject to CEQA. CEQA defines a project as:

> . . .an activity which may cause either direct physical change in the environment, or a

> reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) an activity directly undertaken by a public agency […]. (Pub. Res. Code § 21065.)

In finding that the proposed change in water use under the new leases was a project, the Superior Court relied on several pieces of relevant evidence: the amount of water previously released for irrigation purposes from 1992 to 2018, averaging 1.9 acre-feet per acre to 3.9 acre-feet per acre; LADWP's conservation strategy to protect sage grouse by keeping irrigated pastures in good condition; the provisions of the proposed leases largely eliminating irrigation water; and LADWP's 2018 allocation of 0.7 acre-feet per acre. According to the Superior Court, the water use changes in the proposed leases altered the historical irrigation water baseline that provided significant environmental benefits. The Superior Court found that the 5-year historical average of 1.92 acre-feet per acre, which existed at the time LADWP proposed the changes to the lease terms and reduced the water allocation for 2018, was appropriate.

### Conclusion and Implications

It is not clear whether LADWP will appeal the Superior Court's ruling, and whether the court's ruling would be upheld on appeal. However, this decision may indicate that reliance interests arising from long-standing water use practices or environmental benefits accruing from such practices may be more difficult to modify than is otherwise provided for under the terms of a contract, because even proposing modifications could trigger environmental review requirements that did not previously apply.
(Miles Krieger, Steve Anderson)

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