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CALIFORNIA WATER™
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CALIFORNIA WATER NEWS

BIDEN ADMINISTRATION FISCAL YEAR 2022 PROPOSED BUDGET PRIORITIZES U.S. BUREAU OF RECLAMATION WATER PROJECTS

The Biden administration (Administration) recently submitted a proposed budget for Fiscal Year 2022 to Congress (Proposed Budget), which includes a $1.5 billion investment for the United States Department of the Interior, Bureau of Reclamation (Bureau) to combat widespread drought in the West. The Proposed Budget supports the Administration's goals of ensuring reliable and environmentally responsible delivery of water and power for farms, families, communities and industry, while providing tools to confront widening imbalances between water supply and demand throughout the West.

Background

The National Oceanic and Atmospheric Administration (NOAA) recently reported 47 percent of the contiguous United States is experiencing drought conditions due to lack of precipitation and higher than average temperatures. NOAA reports that in 2020, drought conditions broadened and intensified throughout the western United States, particularly in California, the Four Corners region and western Texas.

Earlier this year, the Administration announced the formation of an Interagency Working Group (Working Group) to address worsening drought conditions in the West and to support farmers, tribes, and communities impacted by water shortages. The Working Group is tasked to coordinate resources across the federal government, working in partnership with state, local, and tribal governments to address the needs of communities suffering from drought-related impacts.

The Proposed FY 2022 Budget

The Proposed Budget includes four key components to manage water resources in the West, including: water reliability and resilience, racial and economic equity, conservation and climate resilience, and infrastructure modernization.

Specifically, the Proposed Budget would provide the following funding to the Bureau.

Increase Water Reliability and Resilience

The Proposed Budget includes $1.4 billion for the Bureau's Water and Related Resources Operating Account, which funds planning, construction, water conservation, management of Bureau lands, and efforts to address fish and wildlife habitat needs. The Proposed Budget also supports the operation, maintenance and rehabilitation activities-including dam safety-at Bureau facilities. It includes $33 million to implement the California Bay-Delta Program and to address California's current water supply and ecological challenges, while $56.5 million is allocated for the Central Valley Project Restoration Fund to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins.

Support Racial and Economic Equity

The Proposed Budget seeks to address what it describes as racial and economic equity in relation to water by supporting underserved communities and tribal areas. It proposes allocating $92.9 million to advance the construction and continue the operations and maintenance of authorized rural water projects. Additionally, the Proposed Budget includes a total of $157.6 million for Indian Water Rights Settlements. Finally, it allocates $20 million for the Native American Affairs Program, which provides technical support and assistance to tribal governments to develop and manage their water resources.

Enhance Water Conservation and Climate Resilience

The Proposed Budget requests Congress fund: $45.2 million for the Lower Colorado River Operations Program, including $15 million to build on the work of the Bureau, Colorado River partners and stakeholders to implement drought contingency plans; $3.3 million for the Upper Colorado River Operations Program to support Drought Response Operations; $184.7 million to find long-term, com-

prehensive water supply solutions for farmers, families and communities in California's Central Valley Project; and, $54.1 million for the WaterSMART Program to support the Bureau's collaboration with non-federal partners to address emerging water demands and water shortage issues in the West. A total of $27.5 million would continue the Bureau's research and development investments in science, technology, and desalination research in support of prize competitions, technology transfers, and pilot testing projects.

Modernize Infrastructure

The Bureau's dams and reservoirs, water conveyance systems, and power generating facilities continue to represent a primary focus area of organizational operations. The Proposed Budget allocates $207.1 million for the Dam Safety Program, including $182.5 million for modification actions, while $125.3 million is requested for extraordinary maintenance activities across the Bureau as a strategy to improve asset management and address aging infrastructure to ensure continued reliable delivery of water and power.

Next Steps

With the release of the President's Proposed Budget, Congress will now begin drafting spending bills. The House Appropriations Subcommittees were, as of this writing, expected to begin the process of voting on Fiscal Year 2022 spending bills in late June, with full committee votes to be held through mid-July and voting in the Senate in August. Congress has until September 30, 2021—when Fiscal Year 2021 funding levels lapse—to pass new spending bills to avert partial government shutdown on October 1, 2021.

Conclusion and Implications

With the Proposed Budget and the establishment of the Working Group, the Biden administration aims to take a proactive and heavily-funded federal approach in combatting worsening drought conditions in the western United States. The ball is now in Congress' court to present an approved budget for Presidential signature. Whether the Biden Administration's unprecedented $6 trillion Proposed Budget will be approved remains to be seen and will likely face legitimate concern and opposition. When it comes to prioritizing funding for new water projects and maintaining aging infrastructure, the most significant long-term risk may be under—not over—spending. (Chris Carrillo, Derek R. Hoffman)

WATER SUPPLIERS PLAN MANDATORY WATER CONSERVATION RESTRICTIONS IN RESPONSE TO DROUGHT CONDITIONS

Drought conditions have emerged again in California after back-to-back dry years, belowaverage snowpack, and warm temperatures. Governor Gavin Newsom has already declared multiple drought emergencies this year, the most recent of which expanded the declaration to 41 counties, representing 30 percent of the state's population. As of this writing, the declaration has not been extended statewide, nor has the California State Water Resources Control Board (SWRCB or State Board) imposed statewide mandatory restrictions. Many local water suppliers are already planning to impose local conservation restrictions to prepare against potentially dire water supply conditions.

Background

Recent reports indicate that precipitation runoff to the Sacramento River Basin has dropped far below projected levels for the year and may cause 2021 to be the second driest year on record. The California Department of Water Resources (DWR) recently announced that State Water Project initial allocations would be reduced from ten percent to five percent. In May, the U.S. Bureau of Reclamation (Bureau), announced reduced Central Valley Project water deliveries from 55 percent to 25 percent for urban and industrial customers, and from 5 percent to zero percent for agricultural customers. Both Santa Clara Valley Water District (SCVWD), which serves 2,000,000 residents in the Silicon Valley region, and

Contra Costa Water District (Contra Costa Water), which serves 500,000 residents in the East Bay, have asked Reclamation to increase allocation to the minimum health and safety requirements, which are above the 25 percent level.

Local Mandatory Water Conservation Restrictions

In response to current conditions, these and other water suppliers are taking steps to impose local water conservation restrictions.

SCVWD and Contra Costa Water

In June, SCVWD declared a water shortage emergency condition throughout its vast service territory, and called for a mandatory 15 percent reduction in water use compared to 2019. About 50 percent of SCVWD water supply comes from outside the county, and the declaration noted that imported water supplies are decreasing. SCVWD reported that depleted Sierra Nevada snowpack caused a significant reduction in the amount of imported water that the district will receive in 2021. SCVWD CEO Rick Callender described the current dry conditions as "an emergency." SCVWD Vice-Chair Gary Kremen said:

> We're having problems buying water on the open market because everyone else is buying it at the same time. The price is like 10 times what it was two years ago.

Compounding the issue, the Federal Energy Regulatory Commission ordered Anderson Reservoir (the largest surface reservoir in the county) to be drained for public safety reconstruction work. The Anderson Reservoir is not expected to be usable again for ten years.

It was also recently reported that Contra Costa Water is planning to vote on a conservation order in July 2021.

City of Pismo Beach

Other water suppliers are also responding to drought conditions. At its June 1, 2021 City Council meeting, the City of Pismo Beach (Pismo Beach) declared a Moderately Restricted Water Supply. This declaration imposed similar restrictions to those imposed in 2014 and include no outdoor irrigation (such as sprinklers) between the hours of 10 a.m. and 4 p.m., required use of hand-controlled water shut-off devices for those washing cars or boats, and prohibiting restaurants from serving water to customers unless specifically requested. Other rules include prohibiting water use for cleaning driveways, patios, parking lots, sidewalks, and streets, except by the city contracted street sweeper, or where necessary to protect the public health and safety. The city also prohibited the use of potable water in a decorative manner that does not recirculate the water. Pismo Beach Public Works Director Ben Fine said anyone who violates these restrictions will first receive a warning letter, and subsequent offenses will be met with an increasing fine, starting at $100.

Voluntary Conservation

Other public agencies are taking a voluntary conservation approach. The City of Napa recently asked residents to voluntarily cut 15 percent of their water use, while Sonoma County is asking for 20 percent. Grant Davis of Sonoma Water, which has 600,000 customers, said "(I)f we do not see a 20 percent reduction, then we will likely move into a mandatory conservation situation, probably on July 1," and he says he intends to ask the state to reduce flows along the Russian River by 20 percent to conserve water in Lake Sonoma and Lake Mendocino. Will Reisman of the San Francisco Public Utilities Commission, which has 1,600 irrigation customers, says the agency is asking its customers to reduce their use by 10 percent.

Conclusion and Implications

Many water suppliers have sized up the current and future availability of water and have decided that water conservation is now necessary. Other agencies are starting with requests for voluntary conservation. Whether statewide restrictions will emerge like those during the 2012-2016 Drought remains to be seen, though much of state is already declared to be in a state of emergency. At the current trend, much of the state could be forced to grapple with this issue by the end of the summer, and it would not be surprising to see many local agencies again imposing mandatory conservation restrictions on end users.
(Gabriel J. Pitassi, Derek R. Hoffman)

MARIN MUNICIPAL WATER DISTRICT CONTINUES DISCUSSIONS ON MORATORIUM FOR NEW WATER SERVICE CONNECTIONS

Over the last month, Marin Municipal Water District (District) has been discussing the idea of enacting a moratorium on new water service connections, and this wouldn't be the first time the District has put such a moratorium in place during a water shortage emergency.

In 1973, the District first enacted an ordinance prohibiting new water service connections, leading to a decision from the Court of Appeals for the First Judicial District of California affirming the District's authority to do so during a water shortage emergency in the case of *Swanson v. Marin Municipal Water District*, 56 Cal.App.3d 512 (1976). This moratorium would persist until 1978 when the end of the drought was declared. In the almost 50 years since then, the District has only placed a moratorium on new service connections on one other occasion, with that lasting from 1989 to 1993.

Now, the District is looking at its options on restricting new water service connections, including a total prohibition on all but a select few exempted categories.

The Proposed Moratorium

As of now, the District is still considering its options with respect to enacting a full on moratorium. While both the June 1 and June 15 board meetings resulted in the board kicking the can down the road, so to speak, the board was not oblivious to the severity of the current drought. "It's a pretty grim picture," said Director Larry Bragman of the District's water supply during the board's June 1 meeting. "The numbers don't lie, and the numbers are very concerning."

As discussed in the board's June 1 meeting, the proposed ordinance establishing a moratorium would provide that:

> "No new, additional, expanded or increased-in-size water service connections, meters, service lines, pipeline extensions, mains or other water service facilities of any kind, shall be made, allowed, approved or installed as of the effective date of this chapter, except as expressly provided herein."

These exceptions include new connections for fire hydrants, connections required solely for fire protection, improvements to public agencies' facilities, expansion of existing water services if it does not require payment of any additional connection fees, and for Accessory Dwelling Units meeting certain criteria. Furthermore, a proposed additional exemption was discussed for affordable housing units offering 100 percent affordable units other than on-site manager units.

An area of concern that appeared to be a primary focus for the board was the importance of adding a sunset provision. Numerous ideas were tossed around on this front, including setting a date for the board to reevaluate the ordinance or tying the board's reevaluation of the ordinance to certain storage goals, but the constant was that the board was supportive of including a sunset provision. During the discussions, Director Jack Gibson focused on emphasizing the word "temporary," stressing that this moratorium is designed to be a temporary action.

The District estimates that the proposed moratorium would save anywhere from 20 to 60 acre-feet of water per year, or approximately 0.1 percent of the District's annual potable demand. While this number seems small, proponents of the moratorium remain concerned by the uncertainty of new developments within the District. Under the direction of the Association of Bay Area Governments, for example, Marin may be required to produce close to 15,000 new residences between 2023 and 2031, making the situation even more complicated for the District.

Ultimately, board President Cynthia Koehler stressed at the board's June 15 meeting that no single solution exists to address the current drought:

> The issue around a moratorium isn't whether it's going to solve all of our problems. I think that's a false question and I think we should reject looking at it through that lens. There's not one single thing we're going to do that's going to be the panacea that's going to solve all our problems. It's going to be the accumulation of a lot of different efforts.

Conclusion and Implications

The moratorium is still being considered by the board and nothing definitive has been enacted as of this writing, but the board is expected to discuss its options on the matter at its next meeting on July 6 and has directed staff to include alternatives to the moratorium for restricting the water use of new service connections. The Marin Municipal Water District has so far taken a strong stance on conservation, with mandatory conservation measures already in place, and the enactment of a moratorium such as this for the third time in the last fifty years would highlight just how strained the State's water supply really is this year.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE PASSES BILL TO HELP REPAIR THE STATE'S WATER INFRASTRUCTURE

Droughts in California have led the State Legislature to invest in improving water facilities. Senate Bill 559, The State Water Resiliency Act of 2021, authorizes state funding to help restore the Friant-Kern Canal, Delta-Mendota Canal, San Luis Field Division of the California Aqueduct, and the San Joaquin Division of the California Aqueduct. On May 28, the California Senate passed the bill and it awaits Governor Newsom's approval.

Background

The U.S. Bureau of Reclamation constructed and operates the federal Central Valley Project (CVP), which distributes almost seven million acre-feet of water yearly to agricultural and other contractors in the Central Valley and other areas. The CVP begins at the Cascade Range in Northern California and runs over 400 miles south to the Kern River in Southern California. The CVP provides on average 5 million acre-feet of water each year to farms and cropland, 600,000 acre-feet to urban and industrial users, 410,000 acre-feet to wildlife refuges, and 800,000 acre-feet for environmental purposes. In addition to conduits, tunnels, and other storage and distribution facilities, the CVP includes 20 dams and reservoirs, 11 power plants, and 500 miles of canals.

The CVP is operated in close coordination with the State Water Project (SWP), which is managed by the California Department of Water Resources (DWR). The Projects deliver water to over 25 million California citizens as well as millions of acres of farmland across the state. The SWP is the largest state-built water storage and delivery project in the United States.

The U.S. Bureau of Reclamation manages the Friant-Kern Canal, which transports water to augment irrigation capacity in Fresno, Tulare, and Kern counties. The Friant-Kern Canal is 152 miles long, delivering water to more than 1 million acres and 18,000 individual family farms. As a result of subsidence, the Friant-Kern Canal has suffered, in some places, a 60 percent loss of its carrying capacity, limiting the amount of water delivered. The federal government approved approximately $5 million in November 2020 to study and begin pre-construction work on rehabilitating the Friant-Kern Canal.

The Delta-Mendota Canal is a 117-mile-long canal in central California that distributes fresh water to consumers downstream of the San Joaquin River. The Delta-Mendota canal, like the Friant-Kern Canal, is affected by subsidence induced by groundwater production.

The San Luis Reservoir is jointly owned and maintained by the Bureau of Reclamation and the California Department of Water Resources, stores water from the San Joaquin-Sacramento River Delta. This reservoir faces issues with low water levels causing algae growth that makes the water unfit for municipal and industrial use.

Senate Bill 559

Senate Bill 559, the State Water Resiliency Act of 2021 would provide up to $785 million to restore some of California's crucial water delivery infrastructure and repair declining roads and bridges. Senator Melissa Hurtado first introduced the bill two years ago. The bill was initially vetoed by Governor Gavin Newsom last September. The second version of the bill includes four major canals instead of just the Friant-Kern Canal. Senate Bill 559 was developed with the assistance of Hurtado's Valley colleague, current Senate Agriculture Committee chairman Senator Andreas Borgeas (R–Fresno). On May 28, 2021, Senate Bill 559 passed with overwhelmingly support from California State Senators 34-1.

Senate Bill 559 will create a ten-year Canal Conveyance Capacity Restoration Fund to Repair State Water Project and Central Valley Project Infrastructure. The bill establishes the Fund in the State Treasury to be administered by the Department of Water Resources. The funds deposited into the account will support subsidence repair costs. These repair costs include environmental planning, design, permitting, and necessary road and bridge upgrades.

Senate Bill 559 would help create a government approach to droughts with short and long-term solutions. The bill includes improving the Valley's two largest canal systems from subsidence-driven damage. Senate Bill 559 authorizes the Department of Water Resources to expend from the fund: 1) $308 million for a grant to the Friant Water Authority to restore capacity of the Friant-Kern Canal, 2) $187 million for a grant to the San Luis and Delta-Mendota Water Authority to restore capacity of the Delta-Mendota Canal, 3) $194 million ($19 million to restore capacity in the San Luis Field Division of the California Aqueduct, and 4) $96 million to restore capacity of the San Joaquin Division of the California Aqueduct. These canals have degraded and are losing water conveyance capacity due to subsidence. Money expended for each of these individual projects cannot exceed one-third of the total costs of each project. Further, the total amounts of these four projects cannot exceed $785 million.

Currently, the Friant-Kern Canal, Delta-Mendota Canal, San Luis Field Division of the California Aqueduct, and the San Joaquin Division of the California Aqueduct have significant impairment to their capacity. The chronic over drafting of groundwater has damaged the canals' conveyance capacity. bill intends to restore the lost capacity along the entire canal. Beyond financial assistance anticipated to be provided by the federal government, water users are expected to cover the remaining costs.

Conclusion and Implications

Senate Bill 559 will help repair vital water delivery systems that provide water for millions in California and help sustain the agricultural economy. The second version of Senate Bill 559 responds to Governor Newsom's veto last year and now addresses four major water conveyance facilities. Senate Bill 559—The State Water Resiliency Act of 2021, is available online at:
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB559.
(Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES AND THE U.S. BUREAU OF RECLAMATION RELEASE THE STATE WATER PROJECT AND CENTRAL VALLEY PROJECT DROUGHT CONTINGENCY PLAN

In connection with the state's current drought conditions, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) released the Drought Contingency Plan (Drought Plan) for the State Water Project (SWP) and the Central Valley Project (CVP). The Drought Plan contains important data and operational criteria for addressing the state's water shortage, including current hydrological conditions, a drought monitoring plan, and species status updates.

Background

DWR manages the SWP, a water delivery and storage system that supplies water to municipal, industrial, and agricultural users across the state. The SWP serves more than 27 million people and irrigates roughly 750,000 acres of farmland. The Bureau manages the CVP, a federal water delivery and storage system in California operated in coordination with the SWP. The CVP delivers enough water to irrigate approximately 3 million acres of farmland and supply nearly 1 million households with water.

The current water year, Water Year (WY) 2021, is one of the driest years on record; in conjunction with data from last year, WY 2020 and WY 2021 constitute the second driest two-year period in California history. Additionally, reservoir storage is far below average going into the summer months. For example, at the end of April, Lake Oroville was at 42 percent capacity, Lake Shasta was at 50 percent capacity, and Folsom Lake was 37 percent capacity. In light of these dry conditions, water quality is also of concern. Salinity in the Sacramento-San Joaquin Delta (Delta) is expected to rise through the fall months. Consequently, DWR and The Bureau project that a slightly higher outflow of water to the Delta is necessary to maintain low salinity.

In May of 2021, Governor Gavin Newsom issued an Emergency Proclamation on the state's drought conditions. This Emergency Proclamation expanded the state of emergency to include the Delta, among other watersheds, and a total of 41 counties.

In response to the Emergency Proclamation and the state's extremely dry conditions, DWR and the Bureau released the Drought Plan to provide an important update on water supplies and information on potential areas of concern. In addition to this report, DWR and the Bureau will continue providing weekly water condition and hydrology updates.

The Drought Contingency Plan

The Drought Plan includes a May operational forecast that runs through December 31, 2021. The forecast is based on a 90 percent exceedance forecast from DWR's Hydrology and Flood Operations Office's May 1 Bulletin 120 forecast. The 90 percent exceedance forecast represents a 90 percent chance that the inflow of water will be greater than the forecasted value and a 10 percent chance that inflow will be less than the forecasted value. In simpler terms, there is a 10 percent or less chance that California's conditions will be equally dry or drier moving forward this year. DWR and the Bureau designed the forecast to account for multiple water uses, manage the potential risk of the drought continuing into WY 2022, and meet various regulatory requirements. The Drought Plan discusses three goals for the SWP and the CVP with the operational forecast: 1) meet CVP and SWP service area health and safety requirements; 2) preserve upstream water storage; and 3) meet water right and regulatory obligations.

In light of the 90 percent exceedance operations forecast, DWR and the Bureau identified multiple areas of potential concern in the SWP and CVP. First, meeting State Water Resources Control Board Decision 1641 water quality standards for the Delta. Other areas of concern include, but are not limited to, water storage levels and temperature management on the Sacramento and Trinity River systems; meeting the minimum health and safety requirements in

the American River basin; and reduced carryover storage of the New Melones Reservoir into WY 2022.

To deal with the water shortage, DWR and The Bureau implemented various drought actions. The Drought Plan first discusses the development of the Drought Toolkit. The Toolkit outlines a coordination process with other agencies and provides actions and measures that can be implemented during droughts. In addition, the Bureau has coordinated with the Sacramento River Settlement Contractors (SRSC) regarding solutions to address demand reductions and water temperature management.

In an action to address concerns with meeting Decision 1641 standards, DWR and The Bureau filed a Temporary Urgency Change Petititn (TUCP) in May for approval by the State Water Resources Control Board (SWRCB). The TUCP requested a reduction of outflow requirements for both June and July, changed the combined maximum SWP and CVP exports for June and July to 1,500 cubic feet per second, and petitioned to modify one salinity compliance location to meet critical year Delta salinity standards. To satisfy Decision 1641 outflow requirements in the month of May, The Bureau also made increased releases from the New Melones Reservoir. Similar releases are anticipated over the summer months to continue supporting water quality and outflow in the Delta.

As part of drought actions made in conjunction with the SWRCB, DWR and the Bureau expect the SWRCB will issue curtailment orders to water users located in the Central Valley and Delta. On June 15, 2021, the SWRCB sent notices of water unavailability to all post-1914 water right holders in the Sacramento-San Joaquin watershed. Additionally, SWP and CVP contractors across the state are individually taking actions to reduce their water use and increase flexibility for water operations across the state. The Drought Plan includes a list of those contractors and agencies and the measures they are taking to address the water shortage.

DWR and the Bureau are also considering avoiding water releases from Friant Dam while using the SWP's share of the San Luis Reservoir to supply or support water deliveries to The Bureau's senior water rights holders.

Conclusion and Implication

The Drought Plan emphasizes the overall shortage of water in California. The Drought Plan lists multiple proposals and actions aimed at addressing the water shortage across the state. Like those discussed in this article, the remainder focus on water quality, wildlife management, and water supply management. The Department of Water Resources and the U.S. Bureau of Reclamation will continue updating this plan as conditions change.
(Taylor Davies, Meredith Nikkel)

CALIFORNIA STATE WATER RESOURCES BOARD TAKES EMERGENCY ACTION TO PRESERVE WATER IN THE RUSSIAN RIVER AMID DROUGHT

In response to the drought conditions, the California State Water Resources Board (SWRCB or State Board) approved an emergency plan on June 15, 2021 authorizing the Division of Water Rights to issue curtailment notices to water right holders in the Russian River watershed if and when "water levels fall below storage targets in Lake Mendocino or when flows cannot meet demands of the Lower Russian River." The primary purpose of the potential curtailment is to preserve the community's drinking water as California enters its fourth driest year on record.

Background

The Russian River watershed is a rich and diverse region of nearly 1,500 square miles. The Russian River starts in Mendocino County and flows through Sonoma County before entering the Pacific Ocean. With its main channel 110 miles long, it is the second-longest river flowing through the nine-county Greater San Francisco Bay Area. The Russian River watershed is home to approximately 360,000 people, 283 streams and creeks, and 63 species of fish. In addition, the river provides water for municipal and private wells, agriculture, wineries, and recreation.

California is facing its second consecutive dry year, resulting in a drought or near-drought throughout many areas of the state. In April 2021, Governor Newson issued a Proclamation, specifically naming the Russian River watershed as extremely dry and facing substantial challenges to its water supply. Governor Newsom proclaimed a State of Emergency to exist in Mendocino and Sonoma counties due to the significant drought conditions in the Russian River watershed. In addition, the Governor urged the State Board to adopt regulations to curtail water diversions when water is not available in an attempt to protect the health and safety of the community and the surrounding environment. Water curtailments require the reduction or elimination surface water diversions for commercial or private use.

Two reservoirs, Lake Mendocino and Lake Sonoma, store and release water to the Russian River. According to a State Board Board Press Release on June 15, 2021, Lake Mendocino was at 40 percent capacity and Lake Sonoma was at 58 percent capacity, both numbers being the lowest on record for this date.

The SWRCB has already implemented measures to slow water diversions. On May 26, 2021, the State Board sent letters to a significant number of junior water right holders in the Upper Russian River informing them that water was unavailable. In addition, the SWRCB sent letters to more senior water right holders, encouraging them to conserve water. The emergency regulations adopted on June 15, 2021 giving authority to issue curtailments are the next step in combatting drought conditions and preserving water. According to a SWRCB Media Release on June 15, 2021, the State Board's adoption of the regulations will be sent to the Office of the Administrative Law for approval. If approved, the regulations would become effective in early July and remain in effect for up to one year.

SWRCB Authority to Issue Regulations and Curtailment Orders

California Senate Bill 104, approved in March 2014, expanded the State Water Resources Control Board's authority to issue emergency drought regulations in a critically dry year, or when the Governor has declared a State of Emergency. In addition, Senate Bill 104 gave the State Board authority to issue emergency regulations that require the curtailment of water diversions when water is unavailable to satisfy a water right holder's priority.

The Office of Administrative Law (OAL) is responsible for reviewing agency regulations with respect to their compliance with the Administrative Procedure Act, *see*, Cal. Gov't Code § 11340 *et seq*., and OAL regulations. The OAL can use a regular or emergency rulemaking process, depending on the nature of the regulation. If the OAL uses the emergency process, it has ten calendar days to review the emergency regulation and make a decision. In the emergency rulemaking process, the OAL reviews the proffered regulation for the following: 1) Does the agency's finding of emergency demonstrate that the situation addressed by the regulations is an emergency; 2) Do the proposed emergency regulations comply with the six substantive standards of Government Code § 11349.1; 3) Did the agency comply with the procedural requirements of Government Code § 11346.1?

Does the Agency's Finding of Emergency Demonstrate the Situation Addressed by the Regulations As an Emergency?

The SWRCB's emergency regulation gives the Division of Water Rights authority to issue curtailment notices to identified water right holders when water levels fall below storage targets in Lake Mendocino or when flows cannot meet demands of the Lower Russian River. Given the extent of the drought in California and the near certainty that water availability conditions in the Russian River will worsen, it appears the situation addressed by the regulations will be considered an emergency. The low water supply in the Russian River watershed has the potential to affect private individuals, agriculture, the surrounding environment, and businesses in the area.

Do the Proposed Emergency Regulations Comply with the Six Substantive Standards of Government Code Section 11349.1?

Government Code with § 11349.1 provides that the OAL shall make determinations about proposed regulations using the following standards: necessity, authority, clarity, consistency, reference, and nonduplication. First, the regulation must be necessary, meaning there is substantial evidence for the need of the regulation to effectuate the purpose of the regula-

tion. Here, the regulation may be deemed necessary for the same reasons that make conditions in the Russian River an emergency. There is significant risk that if water continues to be used the way it is currently, that the river and its reservoirs will dry up by the end of the year.

Second, the SWRCB has authority under existing law to implement temporary emergency regulations curtailing water diversions. *See, Stanford Vina Ranch Irrigation Co. v. State of California,* 50 Cal.App.5th 976 (Cal. App. 2020).

Third, the OAL will consider whether the regulations are written or displayed so that its meaning is easily understood by those directly affected by them. *See,* Cal. Gov't Code § 11349. Here, the language of the regulation and when the curtailment notices will be issued will be analyzed for clarity.

Fourth, the OAL will consider the consistency of the regulation, meaning whether it is in harmony with, rather than is contradictory to, existing statutes, court decisions, or other provisions of law. Given SB 104, which expanded the Board's authority to issue emergency drought regulations in dry years, the OAL may find that the Board's regulations on diversion from the Russian River will be consistent with existing law.

Fifth, the OAL will consider the statutes, court decisions, or other provisions of law that the agency references in adopting the emergency regulation.

Lastly, the OAL will ensure that the regulation does not duplicate, or serve the same purpose as, a state or federal statute or another regulation. If all of these requirements are met, the OAL may decide to adopt the Board's emergency regulations.

Did the Agency Comply with Procedural Requirements of Government Code Section 11346.1?

California Government Code § 11346.1 provides the procedural requirements for adopting regulations. The provision provides, in part, that the adopting agency shall send a notice to anyone who has filed a request for notice of regulatory action with the agency and include a written statement demonstrating the existence of an emergency and the need for immediate action. The State Water Board held a public workshop on the proposed Russian River emergency regulations, providing information and answering questions related to the Notices of Water Unavailability and the proposed emergency regulations. If the OAL finds that the SWRCB has complied with the requirements in § 11346.1, the OAL may adopt the regulation.

Conclusion and Implications

If the OAL finds that the SWRCB's process met the requirements, the OAL will have authority to adopt the regulations. If adopted by the Office of Administrative Law, approximately 2,400 water right holders could be ordered to stop diverting water as early as July 5th, when water availability is expected to worsen. This includes 1,600 water users in the Upper Russian River and up to 800 in the Lower Russian River.

While it remains to be seen whether the Office of Administrative Law will approve the SWRCB's emergency regulations, the outcome of this will have significant implications on drought conditions in the Russian River. For more information, *see:* California State Water Resources Board, *Worsening Drought Conditions Prompt Emergency Action in Russian River Watershed,* Media Release, June 15, 2021; https://www.waterboards.ca.gov/press_room/press_releases/2021/pr06152021_russian_river_curtailments.pdf. (Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

SAN FRANCISCO CHALLENGES CONDITIONS IMPOSED BY STATE WATER RESOURCES CONTROL BOARD ON THE CITY'S WATER QUALITY CERTIFICATION ISSUED FOR PROJECTS ON THE TUOLUMNE RIVER

On May 13, 2021, San Francisco City Attorney Dennis Herrera filed a lawsuit in Tuolumne County Superior Court against the State Water Resources Control Board (SWRCB) to challenge the SWRCB's January 15, 2021 decision to issue a water quality certification pursuant to section 401 of the federal Clean Water Act (CWA). The SWRCB's certification requires greater flows in the Tuolumne River to protect salmon and requires San Francisco and other entities with projects on the Tuolumne River to reduce the amount of water they divert from the Tuolumne River. Several projects are impacted by the certification, including the Hetch Hetchy Regional Water System, which provides water to San Francisco and other Bay Area counties. Modesto Irrigation District (MID) and Turlock Irrigation District (TID) joined the lawsuit as real parties in interest over similar concerns that the SWRCB's certification would reduce the flow of water from the Tuolumne River to the Don Pedro and La Grange hydroelectric projects. [*City and County of San Francisco v. California State Water Resources Control Board,* (Tuolumne Cnty Super Ct.).]

Factual Background

The Tuolumne River originates in Yosemite National Park and is the largest river draining from the southern Sierra Nevada. The river is tributary to the San Joaquin River, which eventually flows into the Sacramento-San Joaquin River Delta and then the San Francisco Bay. Flowing for 149 miles, the Tuolumne River is home to chinook salmon and steelhead trout, whose populations in the Tuolumne River have declined over the years from the diversion of water for projects such as the Don Pedro Project, the La Grange Project, and the Hetch Hetchy Regional Water System. The Don Pedro Project generates hydroelectric power from water stored in the New Don Pedro Reservoir on the Tuolumne River. The New Don Pedro Reservoir is used for a variety of purposes, including hydropower generation, municipal, agricultural, environmental, and recreational uses, and flood control. The La Grange Project generates hydroelectric power from water stored by the La Grange Diversion Dam, which receives downstream flows discharged from the New Don Pedro Reservoir. The Hetch Hetchy Regional Water System, which includes a complex series of reservoirs, tunnels, pipelines, and treatment systems stretching from the Sierra Nevada mountains to the Pacific Ocean, is located upstream of the New Don Pedro Reservoir. It also receives water from the Tuolumne River.

The Don Pedro Project and the La Grange Project are permitted to operate by the Federal Energy Regulatory Commission (FERC), but these projects must also abide by the SWRCB's rules. San Francisco, MID, and TID are suing the SWRCB to challenge the new rules that they must follow to continue operating under their FERC permits.

Federal Energy Regulatory Commission Licensing Process

In 1935, Congress enacted the Federal Power Act (FPA), which regulates the development of water resources in the United States. Under the FPA, FERC has exclusive authority to issue licenses that authorize the construction, operation, and maintenance of new and existing hydropower projects. Project operators are required to apply for a new license through FERC's relicensing process whenever their current license is about to expire. During the relicensing process, FERC evaluates the project and determines whether continued operation is in the public interest. If it is, FERC also determines under what conditions continued operation would benefit the public.

FERC first issued a license for operation of the Don Pedro Project on March 10, 1964. On April 28, 2014, MID and TID timely filed an application for FERC to reissue their license; their original license

for the project expired on April 30, 2016. The Don Pedro Project is now on a year-to-year license based on the terms in their expired license while FERC's relicensing process continues. Conversely, the La Grange Project has never been operated under a FERC license. On December 19, 2012, FERC determined that MID and TID were required to obtain a license for the La Grange Project. Accordingly, they filed an original application for a FERC license on October 11, 2017. In early 2018, San Francisco intervened in the FERC proceedings for MID's and TID's pending applications. On July 20, 2020, FERC issued a Final Environmental Impact Statement (FEIS) for the projects and ultimately rejected the SWRCB's Bay-Delta Plan Unimpaired Flow Objective, asserting that it does not appropriately balance power and non-power values associated with the operation of the projects.

Clean Water Act Section 401 Water Quality Certification Process

Section 401 of the CWA requires any applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters to obtain a water quality certification from the state in which the discharge originates, unless the state waives its authority. The SWRCB is designated as the state water pollution control agency for purposes of certification under Section 401. The SWRCB is required to set forth conditions in water quality certifications to assure that an applicant will comply with the CWA and relevant state law.

MID and TID initially submitted two rounds of applications to the SWRCB, who denied them without prejudice. MID and TID subsequently submitted a third round of applications, requesting certification on June 20, 2020, but they withdrew these applications on November 19, 2020. Despite the withdrawal, the Water Quality Certification Program Manager in the Division of Water Rights for the SWRCB issued a Draft Water Quality Certification for the projects on November 30, 2020.

Claims Asserted by San Francisco against the SWRC

On January 15, 2021, the SWRCB issued its final Section 401 certification of MID's and TID's project application. The certification included several conditions to continue operations. These conditions require higher flows on the Tuolumne River for the purpose of salmon conservation. But according to San Francisco, this condition will diminish the amount of water that San Francisco, MID, and TID can divert. San Francisco argues that the conditions are not supported by substantial evidence, that MID and TID had formally withdrawn their only pending application for certification on November 19, 2020, and that the SWRCB failed to undertake California Environmental Quality Act (CEQA) review before issuing the certification. The city's main concern is that the conditions could result in the near-total depletion of its water supplies during periods of drought, such as this year.

Conclusion and Implications

Although the SWRCB has not yet filed a response to San Francisco's complaint, several environmental groups oppose the lawsuit. These groups argue that the SWRCB's conditions are necessary to protect salmon in the Tuolumne River while leaving plenty of water to support consumers in the Bay Area, Modesto, and Turlock when higher flow conditions are implemented.

Because this lawsuit was filed less than a month ago, the outcome and consequences of this lawsuit remain to be seen.

(Lauren Murvihill, Meredith Nikkel)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DETERMINES CONTRIBUTION ACTION UNDER CERCLA SECTION 113(F) REQUIRES SETTLEMENT OF CERCLA LIABILITY—NOT CLEAN WATER ACT LIABILITY

Territory of Guam v. United States, ___U.S.___, 141 S.Ct. 1608 (2021).

The U.S. Supreme Court recently held that a party may seek contribution under Subsection 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) only after settling a CERCLA-specific liability. The Court's holding reverses the U.S. Court of Appeals for the District of Columbia Circuit's earlier ruling that the Territory of Guam's (Guam) settlement of alleged federal Clean Water Act (CWA) violations triggered the statute of limitations on Guam's ability to seek contribution against the United States under CERCLA subsection 113(f)(3)(B).

Factual and Procedural Background

In 2004, Guam and the U.S. Environmental Protection Agency (EPA) entered into a consent decree regarding the Ordot Dump (Site) after the EPA sued Guam for alleged violations of the CWA. The site had originally been constructed by the United States Navy, who had deposited toxic military waste at the site for decades prior to ceding control of it to Guam. Guam's compliance with the consent decree, which included a civil penalty, would constitute full settlement and satisfaction of the claims against it under the CWA.

Thirteen years later, Guam sued the United States under CERCLA for its earlier use of the site, alleging the United States was liable under CERCLA §§ 107(a) and 113(f)(3)(B). Section 107(a) allows a state, including a territory, to recover:

> . . .all costs of [a] removal or remedial action' from 'any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

Section 113(f)(3)(B) provides that a:

> . . .person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement.

Actions for contribution under § 113(f)(3)(B) are subject to a three year statute of limitations.

On appeal, the D.C. Circuit determined that Guam could not bring an action under Section 107(a) because it could have brought a contribution claim under § 113(f) as a result of settling its CWA liability in the 2004 consent decree. However, because the three-year statute of limitations had expired, Guam could no longer proceed with its contribution action either. The Supreme Court granted Guam's petition for writ of *certiorari*.

The Supreme Court's Decision

Guam presented two arguments challenging the D.C. Circuit's decision, however the Court only needed to address Guam's first argument to resolve the issue. In its first argument, Guam contended that it never had a viable contribution claim under § 113(f) because this section only applies when a settlement resolves liability under CERCLA, and it should therefore be able to pursue a recovery action under § 107(a). The Supreme Court agreed, holding that a settlement must resolve a CERCLA liability to trigger a contribution action under Subsection 113(f)(3)(B).

The Supreme Court's analysis focused on the totality of § 113(f), which, the Court explained, governs the scope of a contribution claim under CERCLA. Reading § 113(f) as a whole, the Court determined that the provision is concerned only with distribution of CERCLA liability. The Court reasoned that because a contribution suit is a tool for apportioning the burdens of common liability among responsible parties, the most obvious place to look for the threshold

liability in this case was CERCLA. The Court noted that this approach was consistent with the principle that a federal contribution action is almost always a creature of a specific statutory regime.

According to the Court, this interpretation is confirmed by the language of Subsection 113(f)(3)(B), which provides a right to contribution in the specific circumstance where a person has resolved liability through settlement. This right to contribution, the Court stated, exists within the specific context more broadly outlined in § 113(f). Further, the Court explained that a predicate CERCLA liability is apparent in § 113(f) when its provisions are read in sequence as integral parts of a whole. The Court pointed out that Subsection 113(f)(1), the "anchor provision," is clear that contribution is allowed during or following any civil action under CERCLA §§ 106 or 107. The Court concluded that the context and phrasing of Subsections 113(f)(2) and (3) also presume that the right to contribution is triggered by CERCLA liability, and that these provisions are best understood only by reference to the CERCLA regime, including Subsection 113(f)(1). On this point, the Court noted that Subsection 113(f)(3)(B) ties itself to Subsection 113(f)(2), which in turn mirrors Subsection (f)(1)'s anchor provision requiring a predicate CERCLA liability. The Court further noted that Subsection 113(f)(3)(B) used the term "response action," which is used in several places throughout CERCLA.

Remedial Actions under CERCLA Are Not the Same as Remedial Actions under the Clean Water Act

Addressing the United States arguments, the Court opined that while remedial measures taken under another environmental statute might resemble action taken in a formal CERCLA response action, applying Subsection 113(f)(3)(B) to settlement of environmental liability that might have been actionable under CERCLA would stretch the statute beyond its statutory language. The Court was similarly unpersuaded by United States' argument that there was a lack of express demand of a predicate CERCLA action in Subsection 113(f)(3)(B), focusing instead on Subsection 113(f)(3)(B)'s use of the phrase "response action," an express cross-reference to another CERCLA provision, and placement in the statutory scheme. Finally, the Court dismissed the United States argument that interpreting Subsection 113(f)(3)(B)'s as only allowing a party to seek contribution after settling a CERCLA liability would be redundant in light of Subsection 113(f)(1). To this, the Court stated that it was interpreting Subsection 113(f)(3)(B) according to its text and place within a comprehensive statutory scheme rather than trying "to avoid surplusage at all costs." The Court thus held that the "most natural" reading of Subsection 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling a CERCLA-specific liability.

Conclusion and Implications

The importance of the Court's opinion to parties who may seek cost recovery or contribution from other responsible parties under CERCLA after entering a settlement agreement to discharge potential environmental liability under federal law cannot be understated. In particular, as the Court points out in the final footnote of the opinion, this case has the added benefit of providing clarity as to the application of the three-year statute of limitations for contribution actions under Subsection 113(f)(3)(B). Beyond this specific holding, the Court's view of contribution provisions in general is useful precedent for courts and interested parties in interpreting contribution provisions in other statutes. The Supreme Court's opinion is available online at:
https://www.supremecourt.gov/opinions/20pdf/20-382_869d.pdf.
(Heraclio Pimentel, Rebecca Andrews)

NINTH CIRCUIT FINDS U.S. FISH AND WILDLIFE SERVICE FAILED TO EXPLAIN WHY IT REVERSED PREVIOUS LISTING DECISION REGARDING PACIFIC WALRUS

Center for Biological Diversity v. Haaland, ___F.3d___, Case No. 19-35981 (9th Cir. June 3, 2021).

The Center for Biological Diversity brought an action challenging a decision by the U.S. Fish and Wildlife Service (FWS or Service) to reverse its previous decision that the Pacific walrus qualified for listing as an endangered or threatened species under the federal Endangered Species Act (ESA). The U.S. District Court had granted summary judgment for the Service, but the Ninth Circuit Court of Appeals reversed, finding that the FWS did not sufficiently explain its change in position.

Factual and Procedural Background

In 2008, the Center for Biological Diversity petitioned the FWS to list the Pacific walrus as threatened or endangered under the ESA, citing the claimed effects of climate change on walrus habitat. In February 2011, after completing a special status assessment, the FWS issued a decision finding that listing of the Pacific walrus was warranted, finding that: the loss of sea-ice habitat threatened the walrus; subsistence hunting threatened the walrus; and existing regulatory mechanisms to reduce or limit greenhouse gas emissions to stem sea-ice loss or ensure that harvests decrease at a level commensurate to predicted population declines were inadequate. Although the Pacific walrus qualified for listing, however, the need to prioritize more urgent listing actions led the Service to conclude that listing was at the time precluded.

The FWS reviewed the Pacific walrus's status annually through 2016, each time finding that listing was warranted but precluded. In May 2017, the Service completed a final species status assessment. Among other things, that assessment concluded that while certain changes, such as sea-ice loss and associated stressors, continued to impact the walrus, other stressors identified in 2011 had declined in magnitude. The review team believed that Pacific walruses were adapted to living in a dynamic environment and had demonstrated the ability to adjust their distribution and habitat use patterns in response to shifting patterns of ice. The assessment also concluded, however, that the walrus' ability to adapt to increasing stress in the future was uncertain.

In October 2017, after reviewing the assessment, the FWS issued a three-page final decision that the Pacific walrus no longer qualified as threatened. Like the 2011 decision, this decision identified the primary threat as the loss of sea-ice habitat. Unlike the earlier decision, however, the 2017 decision did not discuss each statutory factor and cited few supporting studies. Mainly, it incorporated the May 2017 assessment by reference, finding that, although there will likely be a future reduction in sea ice, the Service was unable to reliably predict the magnitude of the effect and the behavioral response of the walrus to this change. Thus, it did not have reliable information showing that the magnitude of the change could be sufficient to put the species in danger of extinction now or in the foreseeable future. The decision also found that the scope of any effects associated with an increased need for the walrus to use coastal haulouts similarly was uncertain. The 2017 decision referred to the 2011 decision only in its procedural history.

The Center for Biological Diversity filed its lawsuit in 2018, alleging that the 2017 decision violated the Administrative Procedure Act (APA) and the ESA. In particular, the Center for Biological Diversity claimed that the Service violated the APA by failing to sufficiently explain its change in position from the earlier 2011 decision. The U.S. District Court granted summary judgment to the FWS, and the Center for Biological Diversity in turn appealed.

The Ninth Circuit's Decision

The Ninth Circuit reversed the grant of summary judgment, finding that the "essential flaw" in the 2017 decision was its failure to offer more than a cursory explanation of why the findings underlying the 2011 decision no longer applied. Where a new policy rests upon factual findings contradicting those underlying a prior policy, the Ninth Circuit explained, a sufficiently detailed justification is required. The 2011 decision had contained findings, with cita-

tions to scientific studies and data, detailing multiple stressors facing the Pacific walrus and explained why those findings justified listing. The 2017 decision, by contrast, was "spartan," simply containing a general summary of the threats facing the Pacific walrus and the agency's new uncertainty on the imminence and seriousness of those threats. The Ninth Circuit found that more was needed.

The Ninth Circuit also found that the 2017 decision's incorporation of the final species status assessment did not remedy the deficiencies. The assessment did not purport, for example, to be a decision document, and while it provided information it did not explain the reasons for the change in position. The assessment itself also reflected substantial uncertainty and, while it did provide at least some new information, it did not identify the agency's rationale for concluding that the specific stressors identified as problematic in the 2011 decision no longer posed a threat to the species within the foreseeable future.

Ultimately, the Ninth Circuit noted, the FWS may be able to issue a decision sufficiently explaining the reasons for the change in position regarding the Pacific walrus. But the 2017 decision was not sufficient to do so, and the Ninth Circuit found that it could not itself come up with the reasons from the large and complex record. It therefore reversed the grant of summary judgment with directions to the U.S. District Court to remand to the Service to provide a sufficient explanation of the new position.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the standards of judicial review that apply when an administrative agency alters a previous policy and a general discussion of the listing process under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/03/19-35981.pdf.
(James Purvis)

NINTH CIRCUIT FINDS RULE REQUIRING 30-DAY NOTICE OF INTENT TO STATES FOR LISTING PETITIONS UNDER THE ENDANGERED SPECIES ACT WAS INVALID

Friends of Animals v. Haaland, 997 F.3d 1010 (9th Cir. 2021).

Friends of Animals brought an action challenging the U.S. Fish and Wildlife Service's (FWS or the Service) summary denial of its petition to list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the federal Endangered Species Act (ESA). The U.S. District Court granted summary judgment for the FWS. The Ninth Circuit reversed, finding the rule requiring that private parties seeking to list species provide affected states 30-day notice of their intent to file a petition was invalid, and thus the FWS' summary denial of the organization's petition was arbitrary and capricious.

Factual and Procedural Background

There are two ways to list species as threatened or endangered under the federal ESA: 1) the Secretary of the United States Department of the Interior and delegated agencies, the FWS and the National Marine Fisheries Service (collectively: the Services), may identify species for protection; 2) or interested persons may petition the Secretary of the Department of the Interior and the FWS to list a species as threatened or endangered. In September 2016, the Services promulgated a rule requiring any petitioner to "provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs" at least 30 days prior to submitting a petition.

The Services stated that the new rule would give affected states the opportunity to submit data and information in the 30-day period before a petition is filed, which the Services could then rely on during their 90-day review of the petition. Although the Services acknowledged that the use of state-supplied information in its 90-day review was a change from prior practice, it found that the change would expand the ability of the states and any interested parties to

take the initiative of submitting input and information to the Services to consider, thereby making the petition process both more efficient and thorough.

In 2017, Friends of Animals filed a petition requesting that the FWS list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the ESA. The FWS in turn notified Friends that the submission did not qualify as a petition because it did not include copies of required notification letters or electronic communications to state agencies in affected states. The FWS did not identify any other deficiencies with the petition.

Friends filed an action in federal court, requesting a declaration that the FWS violated the ESA and Administrative Procedure Act (APA) by impermissibly requiring that the 30-day notice be made to affected states and refusing to issue a finding on Friends' petition within 90 days. Friends also sought vacatur of the 30-day notice requirement and issuance of a finding on the Pryor Mountain wild horse petition within 60 days. Friends then moved for summary judgment. A magistrate judge found that the notice provision contravened the ESA and recommended granting summary judgment to Friends. The U.S. District Court, however, found that the pre-file notice requirement was a permissible construct of the ESA and therefore granted summary judgment to the FWS.

The Ninth Circuit Opinion

Because the pre-file notice requirements were enacted through formal "notice and comment" rulemaking procedures, the Ninth Circuit reviewed the rulemaking under the two-step *Chevron* framework. Under this framework, a court first determines whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that will end the matter. If the statute is silent or ambiguous, however, the question for a court is whether the agency's answer is based on a permissible construction of the statute. With respect to the first step, the Ninth Circuit first found that Congress had not spoken to the precise issue. Although the ESA includes guidance on when to involve the states, it does not prohibit the Services from providing notice to states and does not directly address procedures prior to filing a petition.

Accordingly, the Ninth Circuit considered whether the Services' construction of the rule was reasonable. The FWS contended that Congress had explicitly left a gap for the agencies to fill with regard to petition procedure, that the pre-file rule was based on a permissible construction of the statute, and that the rule imposed only a small burden on petitioners. The Ninth Circuit noted, however, that courts have "repeatedly admonished" the Services for soliciting information from states and other third parties during the 90-day finding period, noting that the ESA requires that the 90-day finding determine whether the petition itself presents sufficient information to warrant a 12-month review, and that the Services' solicitation or consideration of outside information not otherwise readily available is contrary to the ESA.

The FWS tried to distinguish the pre-file notice rule, claiming the rule did not mandate that states submit any information or that the Services consider any information submitted by a state, and thus did not rise to the level of soliciting new information from states. The Ninth Circuit found this a distinction without practical effect, concluding that the rule provided an avenue for the Services to consider factors it was not intended to consider during the 90-day finding and thus ran afoul of the ESA's plain directive that the Services' initial assessment be based on the contents of the petition. It also found that the pre-file notice rule created a procedural hurdle for petitioners that did not comport with the ESA. That is, the Services' authority to establish rules governing petitions does not extend to restrictions that frustrate the ESA by arbitrarily impeding petitioner's ability to submit—or the Services' obligation to review—meritorious petitions.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding review of agency decisions under the two-step *Chevron* framework as well as a general discussion of the petition process under the Endangered Species Act. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/17/20-35318.pdf.
(James Purvis)

D.C. CIRCUIT ADDRESSES PETITION CHALLENGING FERC DECISION ON HYDROPOWER LICENSE AND RELATED ENDANGERED SPECIES ACT CLAIMS

Shafer & Freeman Lakes Environmental Conservation Corporation v. Federal Energy Regulatory Commission, 992 F.3d 1071 (D.C. Cir. 2021).

The D.C. Circuit Court of Appeals has granted in part, denied in part, and dismissed in part a petition challenging the Federal Energy Regulatory Commission's (FERC) decision on an amended hydropower license for the Oakdale and Norway Dams in Indiana, and the related Biological Opinion from the U.S. Fish and Wildlife Service (FWS or the Service). The amended license increases flow below the Oakdale Dam during periods of drought, in order to protect threatened and endangered species of mussels. Petitioners challenged the scientific basis for mandating increased flows, which have the effect of lowering water levels in the lakes behind the dams. In line with petitioners, FERC would have required water levels in the lakes to be maintained, in line with the multiple-use considerations detailed in the Federal Power Act under which the dam license is issued. However, the FWS directed in its Biological Opinion on the amendment that flows below the dam meet certain minimum levels, as a reasonable and prudent measure to minimize incidental take.

The Court of Appeals found that the Service provided a reasoned and thorough justification for its conclusions in the Biological Opinion, supported by substantial evidence, but held that neither FERC nor the Service had adequately considered whether this reasonable and prudent measure was more than a "minor" change to FERC's proposed license amendment and therefore in violation of Service regulations. Accordingly, the Court of Appeals remanded the case to FERC for further proceedings on that issue, without vacating the amended license or Biological Opinion.

Factual and Procedural Background

Northern Indiana Public Service Company (NIPSCO) operates the Oakdale and Norway Dams, built in the 1920s on the Tippecanoe River. The Oakdale Dam creates Lake Freeman, and further upstream, the Norway Dam creates Lake Shaffer. With more than four thousand private lakefront properties, the lakes have a significant recreational and economic nexus with the surrounding communities. NIPSCO's 2007 FERC license required operation of the dams in an instantaneous run-of-river mode. The license did not allow the water level of the lakes to fluctuate more than three inches above or below a specified elevation.

During a drought in 2012, the Service found several species of threatened or endangered mussels were dying downstream from the Oakdale Dam, at least in part from low water flows. At the Service's direction, NIPSCO increased water flow out of Oakdale Dam to avoid liability under the federal Endangered Species Act (ESA). NIPSCO concurrently obtained variances from FERC to lower water levels in the lake below the elevation dictated in the license.

The FWS issued a Technical Assistance Letter, outlining procedures for NIPSCO to avoid ESA liability by mimicking natural run-of-river flow. While both the FERC license and the Technical Assistance Letter required "run-of-river" operations, the FWS defined this differently than FERC. Using a linear scaling methodology to determine that the natural water flow directly below Oakdale Dam would be 1.9 times the flow measured above Lake Shaffer, the Service advised NIPSCO to meet this flow requirement and cease electricity generation during low-flow events. NIPSCO sought an amendment of its FERC license to implement the Technical Assistance Letter.

Carroll and White Counties and the City of Montecello, which border Lake Freeman, and the non-profit that owns much of the land beneath the lakes, Shafer & Freeman Lakes Environmental Conservation Corporation (together: Coalition) intervened in the FERC proceeding to oppose the license amendment, objecting to the Service's formula for calculating river flow. The environmental assessment prepared by FERC under the National Environmental Policy Act (NEPA) analyzed NIPSCO's proposed alternative to operate in accordance with the Service's guidance and FERC's preferred alternative to cease diversion of water for the generation of electricity during periods of low flow, but maintain Lake

Freeman's target elevation. FERC cited its obligation under the Federal Power Act to balance wildlife conservation with other interests.

After a contentious formal ESA consultation, the Service published a Biological Opinion which concluded that FERC's alternative was not likely to jeopardize threatened or endangered mussel species. However, the Incidental Take Statement included a "reasonable and prudent measure" to minimize incidental take that required NIPSCO to maintain water flows below the Oakdale Dam measuring 1.9 times that of the average daily flow above the dams. The Coalition objected to this measure, which would draw down lake levels, and NIPSCO expressed concern about the clear conflicts between the Biological Opinion and FERC's alternative, which required a minimum lake elevation. While FERC disagreed with the Service, it treated the Service's reasonable and prudent measure as "nondiscretionary" and issued an amended license consistent with NIPSCO's application and the Service's Biological Opinion. The Coalition brought suit to challenge the amended FERC license and the Biological Opinion.

The D.C. Circuit's Opinion

Challenges to the Biological Opinion

The Coalition raised numerous challenges to the scientific foundation of the Biological Opinion and argued that these errors required invalidation of both the Biological Opinion and the amended FERC license that incorporated the reasonable and prudent measure Biological Opinion. The Court rejected each of these arguments.

The Court of Appeals considered whether the Service's issuance of the Biological Opinion, or FERC's licensing decision incorporating the Biological Opinion, were arbitrary and capricious or unsupported by substantial evidence. The court noted that under the ESA, the Service and FERC are required to use the best scientific and commercial data available when making decisions. But, the court reviews scientific judgments of an agency narrowly, holding agencies to certain "minimal standards of rationality," and vacating a decision only if the agency:

> . . .relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The Court of Appeal rejected the Coalition's argument that the Service's scientific conclusions did not deserve deference because the Service personnel who worked on the Biological Opinion lacked hydrological expertise. As the Service consulted hydrologists as part of its decision-making process, the court found that the Service' judgment merited the deference traditionally given to an agency when reviewing a scientific analysis within the agency's area of expertise.

The Coalition's arguments against the Biological Opinion centered on the Service's calculations of river flow using linear scaling methodology. Acknowledging the method's imperfections, the Service determined that this was the soundest available method for guaranteeing that water flow out of Oakdale Dam represented the natural flow of the river during low-flow periods. The court found that the Service provided a reasoned and thorough justification for its approach to managing the river's flow, explaining the scientific basis for its decision, identifying substantial evidence in the record buttressing its judgment, and responding to the Coalition's concerns. The court found the Service's analysis "comfortably passes" review under the standards of the Administrative Procedure Act.

Since the court found that the Service had acted reasonably in using the linear scaling methodology, it held that FERC had acted reasonably in relying on the Service's corresponding scientific judgments FERC's reliance on the determination that additional flows were needed to protect listed species of mussels, despite certain critiques of the methodology, was not arbitrary or capricious.

On other counts, the court held that it lacked jurisdiction because the Coalition had not raised the issues in its petition for rehearing before FERC. The Coalition had sufficiently raised the validity of the Biological Opinion itself on rehearing, but did not raise several specific objections it brought before the court. Because of this failure to exhaust its administrative remedies under the Federal Power Act with regards to these objections, they could not be considered by the court.

The Service's 'Reasonable and Prudent Measure' and Minor Changes to the FERC License

ESA regulations provide that any reasonable and prudent measures the Service proposes to reduce incidental take cannot involve more than a minor change to the proposed agency action for which the Service prepared the incidental take statement. A reasonable or prudent measure that would alter the basic design, location, scope, duration, or timing of the agency action is prohibited. Service guidance provides that substantial design changes are inappropriate in the context of an incidental take statement issued under a no jeopardy biological opinion. With a finding of no jeopardy, the project, as proposed by the action agency, would be in compliance with the statutory prohibition against jeopardizing the continued existence of listed species.

Here, the Service required a level of flow through Oakdale Dam that could materially reduce the water level in Lake Freeman during drought. The Coalition contended that this reasonable and prudent measure was not a minor change, and therefore a violation of ESA regulations. The Court of Appeals found that the Service and FERC had acted in an arbitrary manner, having failed to adequately explain why the Biological Opinion's reasonable and prudent measure qualified as a minor change.

FERC's proposed alternative for the NIPSCO license amendment provided that during low-flow periods, NIPSCO would cease electricity generation, but would continue to operate the Oakdale Dam to maintain a constant water elevation in Lake Freeman. The Service concluded this alternative would not jeopardize threatened and endangered mussels, yet established a reasonable and prudent measure that required NIPSCO to draw down Lake Freeman during low-flow periods, in direct conflict with the terms of the license as proposed by FERC. The court found that the Service had failed to analyze whether it's reasonable and prudent measure complied with its own regulations on the scope of reasonable and prudent measures.

The Service argued that its proposal should be compared with NIPSCO's application, which incorporated the Service's requirement to provide downstream flows, rather than FERC's alternative. Against NIPSCO's application, the Service's reasonable and prudent measure did not represent a change. However, the court found that the alternative with which to compare the Service's proposal was FERC's proposed action, not NIPSCO's application. It was FERC's alternative that was analyzed in the Biological Opinion, and considered in formulating reasonable and prudent measures. Given the conflict between its alternative and the Incidental Take Statement, FERC adopted the NIPSCO alternative, reasoning that it considered implementation of the Service's reasonable and prudent measure as nondiscretionary. The court noted that FERC's treatment of the measure as nondiscretionary would be sensible in the normal course. But here, the Service's failure to address an important issue was apparent on the face of the Biological Opinion and infected FERC's license amendment as well.

With this flaw, the court remanded the case to FERC for further proceedings consistent with the opinion, without vacating the license amendment or the Biological Opinion and Incidental Take Statement, given that vacatur would leave NIPSCO again with conflicting directives in the original FERC license and the Service's Technical Advice Letter.

Conclusion and Implications

This case highlights the potentially contradictory mandates among federal environmental and energy laws that agencies and facilities must navigate. The Federal Power Act's provisions for hydropower licensing has a multiple use doctrine at its core, as we see in other federal laws governing the use of federal lands and resources. The ESA, on the other hand, has a focus on the protection of species and habitat, with incidental take permits available where consistent with conservation of the species. In this case, FERC felt unable to reject the Service's reasonable and prudent measure in the Incidental Take Statement for Oakdale Dam. NIPSCO itself urged the agencies to not saddle it with contradictory directives, preferring flow and generation restrictions in the FERC license to the prospect of ESA liability. With this opinion, the Court has hinted that the agencies may not have struck the right balance between the dictates of the ESA and the Federal Power Act, and reminded the Service that where it has found an agency action will result in no jeopardy to a protected species, it must consider whether further would amount to a substantial change in the proposed action itself.
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