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CALIFORNIA WATER™ LAW & POLICY Reporter

FEATURE ARTICLE

THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD APPROVES EMERGENCY REGULATIONS FOR WATER RIGHT CURTAILMENT ORDERS IN SCOTT AND SHASTA RIVERS

By Austin C. Cho

On August 17, 2021, the State Water Resources Control Board (State Water Board) approved Emergency Regulations for the Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath Watershed (Emergency Regulations), authorizing curtailments of water rights on the Scott and Shasta rivers in Siskiyou County, to meet minimum instream flows for fish while allowing for necessary livestock watering and minimum human health and safety needs. The Emergency Regulations are part of the state's ongoing efforts to address one of California's worst drought on record. Along with establishing minimum stream flow requirements for fish and setting forth State Water Board enforcement authority, the Emergency Regulations also provide opportunities for local cooperative solutions and voluntary efforts that may reduce the need for direct curtailment orders.

Background

The Scott and Shasta rivers are tributary to the Klamath River, the second largest river in the state, and supply water necessary for agriculture, domestic uses, tribes, and recreational activities. The tributaries also provide spawning habitats and nurseries for the threatened coho salmon, culturally significant chinook salmon, and steelhead trout. Klamath Basin tribes have historically relied on the chinook and coho salmon for sustenance and spiritual wellbeing. However, dry conditions and low natural flows in the Klamath watershed for the past two years, further exacerbated by water demands in the system, have impaired the ability of newly hatched fish fry to emerge from their gravel beds and reach their summer rearing habitats. Worsening drought conditions across California have prompted the State Water Board to evaluate what measures can be taken to protect the state's water supplies and the species and communities that depend on them.

Under existing law, the State Water Board is authorized to take enforcement actions to prevent unauthorized diversions of water or other violations of water right permits or licenses on an individual basis. Diversion of water in excess of a water right is considered a trespass against the State, with potential fines of up to $1,000 per day of violation and $2,500 per acre-foot of water diverted in excess of the diverter's rights. (Wat. Code, § 1052.) With a large-scale drought emergency and supplies dwindling, the State Water Board has utilized its emergency powers to limit diversions regionally. (*See*, Wat. Code, § 1058.5 [granting the State Water Board authority to adopt emergency regulations to prevent the unreasonable use of water, to require curtailment of diversions when water is unavailable, and to require related monitoring and reporting].)

In May of this year, Governor Gavin Newsom issued a drought emergency proclamation for most of California, including Siskiyou County. The proclamation directed the State Water Board and the California Department of Fish and Wildlife (CDFW) to analyze what level of minimum flows are needed by salmon, steelhead trout, and other native fish, and determine what protective steps could be taken to protect those species and their habitats through emergency regulations or other voluntary measures. Under the Governor's drought proclamation, the State Water Board considered and adopted emergency

regulations for the Russian River watershed on June 15, 2021, and for the Sacramento-San Joaquin Delta watershed on August 3, 2021. On August 17, 2021, the State Water Board adopted the Emergency Regulations for the Scott and Shasta Rivers to respond to the severe drought conditions that may continue into 2022.

Curtailment Authority Under Emergency Regulations

The Emergency Regulations were adopted for the Klamath River watershed to authorize curtailments in the Scott and Shasta rivers when natural flows are insufficient to support the commercially and culturally significant fall-run chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. (Emergency Regulations, § 875.) Upon a determination that flows in the Scott or Shasta rivers are likely to fall below minimum stream flows specified in § 875(c), the Deputy Director of the State Water Board is authorized to issue curtailment orders based on diverter priority, in which water users subject to the order must cease diversions immediately. (Emergency Regulations, §§ 875, 875.5.) Similarly, curtailment orders may be issued upon a finding that flows in the Klamath River watershed are insufficient to support all water rights, under the provisions of § 875. (Emergency Regulations, § 875.4(b).) Where flows are found to be sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded in order of priority as set forth in § 875.5. In deciding to subject some diversions to curtailment, the Deputy Director must consider "the need to provide reasonable assurance that the drought emergency flows will be met." (Emergency Regulations, § 875(b).)

Curtailments are to be issued in the Scott River and Shasta River based on respective grouped priority levels, as established in § 875.5 of the Emergency Regulations, taking into account the classes of diverters and diversion schedules established in various court decrees for surface water and groundwater adjudications, and the relative priorities of other water rights not contemplated in those decrees. (Emergency Regulations, § 875.5(a)-(b).)

Rescission of Curtailment Orders

To the extent that curtailment of fewer than all diversions in the priority groupings listed in § 875.5 would reliably result in sufficient flow to meet the minimum fisheries flows for the drought emergency, the Deputy Director is authorized to issue, suspend, reinstate, or rescind curtailment orders for partial groupings, based on the priorities set forth in the relevant decrees or by appropriative priority date. (*Id.* at subd. (a)(1)(D); § 875.4(c).)

For the purpose of rescinding curtailment orders, the Deputy Director must determine the extent to which water is available under a particular diverter's priority of right, including consideration of monthly demand projections based on annual diversion reports, statements of water use for riparian and pre-1914 water rights, and judicial decrees of water right systems, and decisions and orders issued by the State Water Board. (Emergency Regulations at § 875.4(c)(1).) Precipitation forecast estimates, historical periods of comparable temperatures, precipitation, and surface flows, and available stream gage data are used to calculate water availability projections. (*Id.* at subd. (c)(2).) The Deputy Director may issue informational orders to some or all diverters or water right holders in the Scott River and Shasta rivers watersheds related to water use to support those determinations, taking into account the need for the information and the burden of producing it. (Emergency Regulations, § 875.8(a).)

Exceptions to Curtailments

Notwithstanding the issuance of curtailment orders, diversion under any valid basis of right may continue without further approval from the Deputy Director if the diversion and use does not act to decrease downstream flows. (Emergency Regulations, § 875.1.) Such non-consumptive use, such as diversion for hydropower generation, dedication to instream use for the benefit of fish and wildlife, or diversions in conjunction with approved releases of stored water, is not affected by the curtailment orders.

Like the other emergency regulations adopted this summer, the Emergency Regulations for the Shasta and Scott rivers provide an exception for diverters to draw water necessary for minimum human health and safety needs, despite the existence of curtailments. Section 875.2 provides certain water uses may qualify for this exception where there is no feasible alternate supply. Such human health and safety needs include domestic water uses for consumption, cooking and sanitation, energy sources necessary for grid stability,

maintenance of air quality, wildfire mitigation such as preventing tree die-off and maintaining ponds or other sources for firefighting, immediate public health or safety threats, and other water uses necessary for human health and safety as determined by a state, local, tribal, or federal health, environment, or safety agency. (Emergency Regulations, § 875.2.) Such human health and safety diversions may be authorized to continue after receipt of a curtailment order.

Livestock Watering

The Emergency Regulations find that inefficient livestock watering—diverting more than ten times the amount of water needed to reasonably support the number of livestock—during the fall migration of fall-run chinook salmon and coho salmon results in "excessive water diversion for a small amount of water delivered for beneficial use," and declares such diversion unreasonable during those conditions. (Emergency Regulations, § 875.7.) However, limited diversions will still be allowed, upon self-certification that the water is necessary to provide adequate water to the diverter's livestock based on established standards, and is conveyed without seepage. (Emergency Regulations, § 875.3.)

Voluntary Actions that May Mitigate the Need for Curtailments

The Emergency Regulations also include provisions for voluntary actions that may mitigate the need for curtailments of water use for certain diverters. Benefits to fisheries such as cold-water safe harbors, localized fish passage, strategic groundwater management, or the protection of redds (the depressions in gravel stream beds fish create to lay eggs) may be proposed to the State Water Board's Deputy Director through a petition for cooperative solution. (Emergency Regulations, § 875(f).)

Petitions, supported by reliable evidence, may propose:

> (a) watershed-wide solutions that provide assurances that minimum flows for fish will be achieved for specified periods;
>
> (b) tributary-wide solutions that a pro-rata flow for a tributary will be satisfied or CDFW finds sufficient in-tributary benefits to anadromous fish;
>
> (c) individual solutions where a water user has agreed to cease diversions in a specified time frame or has entered into a binding agreement with CDFW to provide benefits to anadromous fish equal or greater than the protections provided by their contribution to flow for that time period;
>
> (d) groundwater-basin-wide solutions of continued diversions in conjunction with measures would result in a net reduction (of 15 to 30 percent) of water use during the irrigation season compared to the prior year and other assurances are adopted; or
>
> (e) voluntary reductions to more senior rights in favor of continuing diversion under a more junior right otherwise subject to curtailment. (*Id.* at § 875(f)(4)(A)-(E).)

The Emergency Regulations were partially amended prior to the State Water Board's approval, in response to public requests to add increased flexibility for local solutions and an opportunity for CDFW and the National Marine Fisheries Service to revise the minimum instream flow recommendations if lower flows will be protective of fish.

Submission of a Certification for Water Rights Subject to Curtailment Orders

A water right user subject to a curtailment order is required to submit within seven calendar days of receipt of the order, a certification that water diversion under the curtailed right has ceased, or alternatively, continues to the extent that it is non-consumptive use, instream use, or is necessary for minimum human health and safety needs or necessary for minimum livestock watering as defined and limited in the Emergency Regulations. (Emergency Regulations, § 875.6.) Reporting on diversions during curtailment periods must provide sufficient information to ensure water is being used only to the extent necessary and consistent with the Emergency Regulations' constraints.

Conclusion and Implications

On August 20, 2021, the State Water Resources Control Board submitted its Emergency Regulations

for the Klamath River watershed to the California Office of Administrative Law (OAL), commencing a brief comment and review period. Before curtailment orders can be issued in the Scott or Shasta rivers, the State Water Board must obtain approval by OAL and file the Emergency Regulations with the Secretary of State. The Emergency Regulations, as well as information and updates on the State Water Board's Scott River and Shasta River watersheds drought response, are available at: https://www.waterboards.ca.gov/drought/scott_shasta_rivers/.

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CALIFORNIA WATER NEWS

CALIFORNIA STATE WATER PROJECT'S LAKE OROVILLE PLUMMETS TO LOWEST LEVEL IN DECADES

As the drought continues to ravage the western United States and California descends into one of the worst droughts on record, California's second-largest reservoir, Lake Oroville, has reached its lowest water level since September 1977.

Background

Lake Oroville was created by Oroville Dam, which the California Department of Water Resources (DWR) completed in 1967. Lake Oroville conserves water for distribution by the California State Water Project to homes, farms, and industries in the San Francisco Bay area, the San Joaquin Valley and throughout southern California. The Oroville facilities also provide flood control and hydroelectric power and recreational benefits.

Water from Lake Oroville contributes to the irrigation of more than 755,000 acres in the San Joaquin Valley and comprises a critical source of supply to water agencies that collectively serve more than 27 million people. At full capacity, the lake can supply enough water to 7 million average California households for one year.

Lowest Water Surface Levels Since 1977

When the lake is full, the water surface level is 900 feet above sea level. Two years ago, the lake reached 98 percent capacity at 896 feet. Now, the water level has plummeted and recently measured just 643.5 feet above sea level, which is 28 percent of its total capacity and 36 percent of its historical average for this time of year. According to California Department of Water Resources (DWR), Lake Oroville received only 20 percent of expected runoff from snowmelt this year, which DWR characterized as a record low. The reservoir dropped by an average of more than one foot per day in July as DWR made releases to meet water quality and wildlife sustainability requirements.

Imagery from the lake's levels, in particular the exposed barren lake floor in places, provides an illustrative snapshot of how dire the drought is in California.

Low Lake Elevation Threatens Edward Hyatt Power Plant

The water from Lake Oroville is used to power the Edward Hyatt Powerplant (Hyatt Plant). The Hyatt Plant is designed to produce up to 750 megawatts of power but typically produces between 100 and 400 megawatts, depending on lake levels. According to the California Energy Commission, the typical average high daily demand across California is approximately 44,000 megawatts. The Hyatt Plant's production of 400 megawatts alone represents meeting nearly 1 percent of California's total peak daily energy demand.

The Hyatt Plant opened in the late 1960s and has never been forced offline by low lake levels. DWR reports that once the lake's surface level falls below 630 feet above sea level, the Hyatt Plant will be unable to generate power due to lack of sufficient water to turn the plant's hydropower turbines. With the lake level at its recent condition, California State Water Project officials anticipated at the time of this writing that the Hyatt Plant could go offline as soon as late August or early September.

The California Energy Commission has confirmed it is actively planning for the Hyatt Plant to go offline this Fall. If the plant stops generating power, it will likely remain offline until November or December before sufficient precipitation hopefully arrives in the region to turn the underground turbines back on.

Conclusion and Implications

Lake Oroville serves as a stark emblem of the severity of this drought and its dramatic impact in such a relatively short period of time. Two years ago, the lake reached 98 percent capacity but has quickly plummeted to historically low levels not seen in nearly half a century. Lake Oroville also highlights the significant role water plays in energy generation and the implications that a far-reaching drought can have on hydro-energy generating facilities and power production in California.
(Chris Carrillo, Derek R. Hoffman)

MARIN MUNICIPAL WATER DISTRICT ADOPTS BAN ON POTABLE WATER USE FOR LANDSCAPING IN NEW DEVELOPMENTS

Continuing its efforts towards reducing the burden of new developments on the already limited water supplies within Marin County, the Marin Municipal Water District (District) has adopted a new restriction on the use of potable water for all new developments. Specifically, the use of potable water for the installation of any new landscaping for all new water service connections is now prohibited until after the termination of the current water shortage emergency.

The Marin Municipal Water District's Ban

The District's thrifty outlook on future water uses seems to stem from the disparity between the District's service area population of roughly 191,000 and its declining water storage levels fast approaching 30,000 acre-feet as of late August. Highlighting the concern over the low water storage levels, the District stated in its adoption of Ordinance No. 453 that:

> . . .as a result of this drought, the District reservoirs are projected to be as low as 25,000 acre-feet on December 1, 2021 in the absence of above average rainfall and runoff, which is less than one year of water supply based on recent demand.

For reference, the District's 2020 annual demand was 28,199 acre-feet.

Looking at the water savings this prohibition is slated to bring, the District estimates that new development would require an additional 42 acre-feet in new drinking water demand. With the implementation of these new restrictions, the District is estimated to reduce this demand by 14 acre-feet. Expanding this estimate to look at new developments over the next two years, the District further estimates that for the 62 acre-feet in new drinking water demand from new developments the new prohibition would provide a savings of 15 acre-feet. While as a static number, this may seem like penny-pinching at best, but the new prohibition is reducing the new drinking water demand from such new developments by roughly 30 percent, which is certainly an appreciable figure.

The new Ordinance is not a standout measure, either. The landscape restrictions imposed by Ordinance No. 453 are very similar to those approved by the District's neighbor to the north, the North Marin Water District, for its 60,000-plus Novato customers. There, Novato developments are allowed to move forward so long as the developments do not use any drinking water supplies to irrigate their landscaping.

In addition to the adoption of this emergency measure, the board of directors for the District further considered making these prohibitions permanent at its August 3, 2021 public meeting. There, the District discussed the possibility of extending the prohibitions beyond the water shortage emergency. While no official action on the matter was taken, the move would certainly be in keeping with the District's efforts to minimize the water use in new developments.

Conclusion and Implications

The Municipal Water District is working with an increasingly limited water supply, receiving the bulk of its water from its seven reservoirsJ: Alpine, Bon Tempe, Kent, Lagunitas, Nicasio, Phoenix, and Soulajule, which combine for a storage capacity of 79,566 acre-feet. As of August 22, these reservoirs held a combined 30,658 acre-feet in storage, or a mere 38.53 percent of the reservoirs' storage capacity. The District normally receives about 25 percent of its water from the Russian River Watershed via the North Marin Aqueduct, but the river up north is facing a severe water shortage of its own, so severe in fact that the State Water Resources Control Board has gone so far as to issue curtailment orders for water rights holders within the watershed.

With its water resources dwindling, the District should likely be looking at every feasible conservation measure, even if the measures individually bring about only minimal reductions in water use. Although the savings estimated from the new prohibitions, discussed above, only represent about 0.1 percent of the District's annual water demand, a better figure to compare this with is that the use of recycled water accounts for just 2 percent the District's total water supply. Expanding the utilization of recycled water has been a priority of the District for some time now, and while a "death by a thousand cuts" approach to staving off such extreme water shortages is not the most palatable of methods, every tool available should be seriously considered by the District moving. (Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

NEW CALIFORNIA LAW INCREASES FINES FOR WATER THEFT

California Senate Bill 427 (SB 427), sponsored by State Senator Susan Eggman (D-District 5), was recently signed into law enabling water agencies to impose enhanced penalties for water theft, a problem that has increased dramatically throughout the state.

Background

Senate Bill 427 proponents report that at least 1.8 billion gallons of water have been stolen in California since 2013. The American Water Works Association suggests water suppliers assume for budgeting and management purposes that 0.25 percent of the volume supplied is withdrawn unlawfully. The California Legislature finds that a significant portion of water theft is related to unlawful cannabis grow operations. According to the author's argument in support of the bill:

> ...water theft poses a serious public health and safety risk and an economic risk to communities. During water theft, contamination can occur when non-potable sources are illegally connected to a drinking water system … Protecting the safety of water systems is a crucial issue, and this bill does that without allowing for excessively punitive fines relative to the ability to pay.

Additionally, water agencies often pass on the lost revenue from water theft to customers who effectively absorb those costs through the water supplier's rate structures.

Existing Law

Under California Government Code §§ 25132 and 36900, a violation of a local ordinance is a misdemeanor unless by ordinance it is made an infraction. In general, every ordinance violation that is determined to be an infraction is punishable by: 1) a fine not exceeding one $100 for a first violation; 2) a fine not exceeding $200 for a second violation of the same ordinance within one year; and, 3) a fine not exceeding $500 for each additional violation of the same ordinance within one year.

Senate Bill 427 Enhanced Penalties

SB 427 authorizes local agencies that provide water service to adopt ordinances prohibiting water theft and to modify and enhance fines and penalties.

If water theft is committed via meter tampering in violation of an ordinance adopted under this section, it is punishable by: 1) a fine not exceeding $130 for a first violation; 2) a fine not exceeding $700 for a second violation of the same ordinance within one year of the first violation; and 3) a fine not exceeding $1,300 for the third violation and each additional violation of the same ordinance within one year of the first violation.

All other forms of water theft in violation of an ordinance adopted under this section are punishable by: 1) a fine not exceeding $1,000 for a first violation; 2) a fine not exceeding $2,000 for a second violation of the same ordinance within one year; and 3) a fine not exceeding $3,000 for each additional violation of the same ordinance within one year.

The new law defines water theft to mean "an action to divert, tamper, or reconnect water utility services" and references § 498 of the Penal Code for definitions of the terms "divert," "tamper," "reconnect," and "utility service."

SB 427 requires the local agency to adopt an ordinance that sets forth the administrative procedure that governs the imposition, enforcement, collection, and administrative review of the fines or penalties for water theft.

Hardship Waiver

SB 427 provides that a hardship waiver may be obtained to reduce the amount of the fine upon a showing by the responsible party that payment of the full amount of the fine would impose an undue financial burden. The phrase "undue financial burden" is not defined and appears to be left to the discretion of the local agency.

Conclusion and Implications

With California in the midst of extensive drought conditions, greater deterrence to water theft is needed

to maintain sufficient and safe water supplies. Municipalities, water agencies and other government agencies throughout the state are grappling with the challenges of widespread, unlawful cannabis grow operations. Though SB 427 imposes stiffer penalties, the "profitability" of such operations raises a question of whether the penalties are sufficiently high. Meanwhile, millions of California residential water bills have gone unpaid for many months due to Covid-19 hardship claims. Water agencies and their managers face increasing challenges in providing a service that many California residents might take for granted—a clean, reliable and affordable water supply.
(Gabriel J. Pitassi, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

STATE WATER RESOURCES CONTROL BOARD IMPLEMENTS EMERGENCY WATER REPORTING AND CURTAILMENT REGULATIONS IN LIGHT OF HISTORIC DROUGHT

At its August 3, 2021 Public Meeting, the State Water Resources Control Board (State Water Board) considered whether to adopt emergency regulations that would instate certain reporting requirements and allow for the curtailment of water rights in the Sacramento-San Joaquin Delta Watershed (Delta Watershed). As the public meeting came to an end, the State Water Board ultimately decided to adopt these Emergency Reporting and Curtailment Regulations, passing them on to the Office of Administrative Law who approved the Regulations as of August 19, 2021. With these new Regulations coming into effect, thousands of water users either have been or are expected to be issued curtailment orders to cease water diversions under their curtailed water rights.

Emergency Regulations as Adopted: Curtailment of Diversions due to Drought Emergency

The Emergency Regulations, as adopted, add to Title 23 of the California Code of Regulations, Division 3, Chapter 2, Article 24 §§ 876.1 and 878.2. The Emergency Regulations will also amend 23 CCR § 877.1, 878, 878.1, 879, 879.1, and 879.2.

Beginning with the newly added 23 CCR 876.1, this section applies to water diversions within the Delta watershed and authorizes the Deputy Director to issue curtailment orders, subject to: (a) the several exceptions provided in §§ 878, 878.1, and 878.2, and (b) to the considerations provided in § 876.1(d). This section also provides a process to request a correction to a water right's priority date or to propose that curtailment may not be appropriate for a specific diverter or stream system. Initial Orders issued pursuant to this section will require reporting under § 879 and will either require curtailment or will instruct right holders regarding procedures for potential future curtailments. Furthermore, § 876.1(g) authorizes temporary suspensions of curtailment orders in the event that water availability increases. Finally, § 876.1(h) provides that by October 1, 2021 the Deputy Director must consider the suspension, extending of suspensions, or reimposition of curtailments, and must continue to do so every "by no more than every 30 days thereafter."

As noted above, several exceptions to these curtailment orders are laid out in §§ 878, 878.1, and 878.2. First among these exceptions, diversions solely for non-consumptive use may not be required to curtail in response to a curtailment order if their diversion and use of water does not decrease downstream flows and if they submit to the Deputy Director a certification describing the non-consumptive use and evidencing how the use does not decrease downstream flows. Second, under § 878.1, diversions that are necessary for minimum human health and safety standards may not be required to curtail, so long as several conditions are met that vary based upon whether the diversions are less than or greater than 55 gallons per person per day. Lastly, § 878.2 provides an exception for water users under alternative water sharing agreements that achieve the purposes of the curtailment process and that are submitted to and approved by the Deputy Director.

In addition to the requirements imposed by curtailment orders issued pursuant to the Emergency Regulations, reporting requirements are also established, with water rights holders of rights in excess of 1,000 acre-feet annually potentially subject to more stringent and continuous reporting requirements.

Initial Orders in the Delta Watershed

On August 20, 2021, the day after the Emergency Regulations were approved, the State Water Board sent out Initial Orders to diverters in the Delta Watershed. These Initial Orders came with strict reporting requirements for such diverters, demanding a Compliance Certification be submitted by diverters no later than September 3, 2021—a turnaround of only two weeks. Furthermore, larger diverters (*i.e.* diverters in excess of 5,000 AFA) are subject to

enhanced reporting requirements, including monthly reporting for water diversions and use and monthly reporting of projected demand data.

In addition to the reporting requirements detailed in the Initial Orders, the orders also point out that any diverter seeking to utilize an exception as either non-consumptive use or necessary for human health and safety standards must submit a request by September 10, 2021, regardless of whether such water right has been curtailed as of this time.

Conclusion and Implications

The Initial Orders sent out by the State Water Resources Control Board will have major impacts on water users within the Delta Watershed. Thousands of users are expected to curtail diversions for the latter portion of August as well as for the duration of September, with many of these diverters facing the potential for further curtailments into October and beyond. The reporting requirements will certainly have water users' hands full in effort to maintain compliance. In any event, it seems just as likely that the State Water Board will face legal challenges to these new Emergency Regulations as water users scramble to respond to curtailment orders.

For more information on the Emergency Regulations and curtailments, readers can access the State Water Board's Sacramento-San Joaquin Delta Watershed Drought & Curtailment Information webpage at: Sacramento-San Joaquin Delta Watershed Drought Information | California State Water Resources Control Board.
(Wesley A. Miliband, Kristopher T. Strouse)

CALIFORNIA DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION PETITION THE STATE WATER BOARD TO EXCHANGE STORED WATER TO MEET DEMAND IN THE CENTRAL VALLEY PROJECT SERVICE AREA

The California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) recently filed a petition with the State Water Resources Control Board (State Water Board) to temporarily consolidate the place of use for the State Water Project (SWP) and Central Valley Project (CVP) south of the Sacrament-San Joaquin Delta (Delta) for the purpose of exchanging water supplies in the San Luis Reservoir due to persistent dry conditions facing the region. Specifically, the petition requests that the place of use for SWP water be expanded to include a portion of the CVP service area so that water stored for the SWP in San Luis Reservoir can be used in the CVP service area. The maximum volume of water subject to the request is 200,000 acre-feet.

Background

Under a 1972 agreement, DWR and the Bureau may exchange water and power. Both the SWP and CVP store water in the San Luis Reservoir to, in part, accommodate demand during the summer months. However, the SWP and CVP provide water for different types of uses, such as irrigation, municipal, industrial, and wildlife uses, which in turn affects the demand for and stored water supplies available to each entity at different times of year.

For the CVP, which provides water primarily for irrigation uses, the Bureau typically fills its portion of the San Luis Reservoir by April, drawing against its share of stored water in the summer months to meet peak irrigation demands (and smaller municipal and refuge demands). In wetter years, the Bureau is frequently able to meet all of its south-of-Delta demands, with carryover storage in San Luis Reservoir. The Bureau can also re-divert upstream storage withdrawals (*e.g.* from Lake Shasta) to San Luis Reservoir as capacity becomes available from Delta pumping facilities when peak demands are lower.

The SWP has a flatter demand curve than the CVP because the SWP provides water primarily to municipal and industrial uses, which tend to have more consistent levels of demand throughout the year than agricultural uses. Accordingly, DWR does not reach its lowest annual storage levels until the fall. Thus, the SWP typically has more stored water available to it from San Luis Reservoir during the late summer and early fall.

In late June, DWR and the Bureau requested an additional exchange of 50,000 acre-feet of SWP and CVP water at the San Luis Reservoir under a 2020 order by the State Water Board consolidating the place of use for those water supplies. The State Water Board approved that request on July 8. The instant petition requests the return of that 50,000 acre-feet of water by the end of the year, as well as the additional 150,000 acre-feet of water to be exchanged between the SWP and CVP for use in the CVP service area.

The Petition

DWR and the Bureau's petition seeks an exchange of 150,000 acre-feet of stored SWP and CVP water in the San Luis Reservoir, as well as the return of 50,000 acre-feet of CVP water to the SWP before December 31, 2021. The petition does not purport to increase the total water supply available to the CVP through February 2022. It also does not purport to increase the total water supply available to the SWP.

In their petition, DWR and the Bureau indicate that the two agencies have both been taking actions to meet the operational requirements of the SWP and CVP, respectively, and to protect environmental resources. For instance, the Bureau has been closely coordinating its deliveries to customers in order to maximize the use of very limited CVP supplies by reducing contract deliveries by 25,000 to 35,000 acre-feet and promoting transfers of non-CVP water in ecologically sensitive ways. However, extreme drought conditions have necessitated exchanging stored water in the San Luis Reservoir to meet peak demands in the CVP service area, which include water rights settlements with San Joaquin contractors and wildlife refuge, municipal, and industrial demands.

According to DWR and the Bureau, the water subject to the petition is part of the allocated supplies to SWP or CVP contractors in 2021 and 2022 diverted from the Delta, subject to various regulatory requirements. Moreover, absent the exchange, these supplies would have been stored in July as part of the SWP storage allotment and delivered to SWP contractors in the fall, while CVP water would have been stored to meet CVP demand in 2022. In other words, while pumping credits for Delta water are anticipated to change, there should not be any measurable change in streamflow, water quality, timing of diversions or use, or return flows, or any impact to other legal water users. Additionally, the exchange purports to avoid using water from Friant Dam to meet CVP contractor needs, and thus could avoid conveyance losses and potential temperature impacts on fisheries affected by Friant Dam.

Conclusion and Implications

The proposed exchange by DWR and the Bureau appear to be consistent with prior exchanges between the two agencies under their 1972 agreement to exchange water and power. The exchange is intended primarily to benefit irrigators and agricultural interests in the CVP service area. The comment period for the petition was recently closed. It is not clear whether or when the State Water Resources Control Board will consider DWR and the Bureau's petition, but given that the State Water Board has previously granted similar petitions by those agencies, the State Water Board may do so again. The Notice of Temporary Chang Petition available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_notices/2021/14443tt210726_notice2.pdf.
(Miles Krieger, Steve Anderson)

ADMINISTRATIVE HEARINGS OFFICE OF THE STATE WATER BOARD ENDS ON FIRST PHASE OF REVOCATION PROCEEDING FOR KINGS RIVER FULL APPROPRIATION DECLARATION

The hearing in the first phase of a proceeding to revoke or revise the fully appropriated stream declaration for the Kings River has concluded, with closing briefs recently filed, before the Administrative Hearings Office (AHO) of the State Water Resources Control Board (State Water Board).

The petitions, filed by opposing parties in the proceeding, seek a determination that water may be available for appropriation despite the existing declaration that the Kings River has been fully ap-

propriated. The first phase of the proceeding addresses whether evidence exists tending to show that licenses to appropriate water from the Kings River should be revoked and/or unlawful diversions are occurring, and whether the matter should proceed to a second phase.

Background

Two petitions to revoke or revise the fully appropriated stream declaration (FAS Declaration) for the Kings River are pending before the Administrative Hearings Office of the State Water Resources Control Board. Fresno Irrigation District's (FID) petition, filed jointly with Consolidated Irrigation District (Consolidated) and Alta Irrigation District (AID) on May 9, 2017, conditionally seeks to appropriate flood waters that may occur in the Kings River, typically every three years, to comply with groundwater sustainability mandates set by the Sustainable Groundwater Management Act (SGMA). Semitropic Improvement District, which is part of the Semitropic Water Storage District (collectively: Semitropic), seeks Kings River water that is available as a result of the alleged forfeiture, abandonment, or failure to perfect certain water rights licenses held by the Kings River Water Association (KRWA) on behalf of its members, including FID, AID, and Consolidated (Licenses).

The hearing on the FAS Declaration petitions is separated into Phase 1A, Phase 1B, and Phase 2.

Procedural Background and the Hearing

The State Water Board adopted Decision D-1290 in 1967 approving eight substantial water rights applications in the Kings River watershed, six of which were eventually licensed as Licenses 11517, 11518, 11519, 11520, 11521, and 11522. The licenses are currently held by KRWA on behalf of its member units. In 1989, the State Water Board declared the Kings River system to be a fully appropriated stream system (Order WR 89-25), meaning there is no water left to appropriate. The State Water Board's determination was later reaffirmed in 1991 and 1998.

On May 9, 2017, FID, Consolidated, and AID filed a joint petition requesting that, if the FAS Declaration is ever revised to recognize unappropriated water, the Boad consider FID, Consolidated, and AID's application that accompanied the petition (A015231) to appropriate up to 1 million acre-feet of Kings River water annually. The purpose is to secure excess flood flows for purposes of compliance with SGMA and for uses within Fresno, Kings, and Tulare counties. The joint petition acknowledges that KRWA's member units have not always been able to use all the runoff of the river in years of extreme flood.

On May 25, 2017, Semitropic submitted a petition and corresponding application (A032815) to: 1) determine whether it is proper to revoke and/or revise the FAS Declaration in light of evidence that there is unappropriated Kings River water available for appropriation, and 2) to appropriate Kings River water that the State Water Board determines is unappropriated and subject to appropriation. Semitropic's application seeks to divert up to 1.6 million acre-feet per year for irrigation and groundwater replenishment purposes, including under SGMA.

On July 2, 2018, Semitropic filed a complaint with the State Water Board against the KRWA, FID, Consolidated, and AID, alleging that KRWA violated License Nos. 11517 and 11521 by failing to store water in the bed of Tulare Lake as prescribed by the Licenses, and instead diverted that water through the James Bypass flood control channel that conveys water outside the Kings River watershed. Accordingly, Semtropic seeks declarations and orders from the Board related to forefeiture, abandonment, and failure to perfect water rights, as well as cease and desist orders, revocation of the Licenses, and an order revising the FAS Declaration to declare the availability of water for appropriation under Semitropic's application.

KRWA opposed the complaint on the grounds that Semitropic lacks standing; fails to establish forfeiture, abandonment, or failure to perfect water rights; and fails to show that KRWA's diversion from the Kings River through the James Bypass are unauthorized diversions. KRWA's opposition focuses on the federal operation of the flood control project regulating the Kings River, and the requirement to move flood water through the James Bypass. KRWA also refutes that its members have failed to use flood waters that reach the Tulare Lakebed.

On February 19, 2021, the AHO issued a procedural ruling segmenting the hearing on the FAS petitions into Phase 1A, Phase 1B, and Phase 2:

Phase 1A addresses the threshold issue of whether there is evidence tending to show that the Licenses should be revoked or that an unlawful diversion is occuring or is threatening to occur, and whether the

AHO should conduct the Phase 1B hearing. If the AHO determines there is insufficeint evidence to proceed to Phase 1B, it will proceed directly to Phase 2.

Phase 1B will address whether the State Water Board should revoke the Licenses, and whether the Board should issue a cease and desist order. Any notice and statements of facts and information issued by the AHO regarding Phase 1A—as required by Water Code sections 1675.1 and 1834—are not binding on the AHO, and the parties may submit additonal evidence relevant to the Phase 1B issue.

Phase 2 will address whether the State Water Board should revoke or revise its FAS Declaration with respect to the Kings River.

The hearing on Phase 1A began on June 2, 2021. Closing briefs were filed on July 9, 2021. Motions to exclude certain evidence were made and partially granted by the AHO in early July.

Conclusion and Implications

More than four years after the FAS Declaration petitions were filed, the AHO appears only now to be considering whether there is sufficient evidence to proceed to determine whether the Licenses should be rescinded or revoked. If the AHO determines that there is insufficient evidence to proceed to Phase 1B, it is anticipated that the AHO will proceed directly to Phase 2 to determine whether cease and desist orders should issue. If there is insufficient evidence to revoke the Licenses, it is anticipated that the AHO will not recommend to the Board that it issue a cease-and-desist order against KRWA. However, if the AHO determines that sufficient evidence does exist to consider revoking the Licenses, there may be another extended period of time before the Phase 1B hearing. Notably, while a pre-hearing conference order issued on May 18, 2021 set the deadline for closing briefs on July 9, 2021, the order did not impose a deadline for a ruling on the Phase 1A threshold issue. Thus, it is not clear when the AHO might issue its decision regarding whether the parties will proceed to Phase 1B or Phase 2. The Fully Appropriated Declaration Revocation is avialable at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/kings_river.html.
(Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

CALIFORNIA COASTKEEPER FILES PETITION FOR WRIT OF MANDATE SEEKING TO COMPEL SONOMA COUNTY TO CONSIDER PUBLIC TRUST RESOURCES IN ISSUING WELL PERMITS

On June 23, 2021, California Coastkeeper (Coastkeeper) filed a petition for writ of mandate and ceclaratory and injunctive relief (Petition) against the County of Sonoma to prevent it from issuing well permits unless and until it develops a program to consider the effects additional groundwater extractions may have on public trust resources in the Russian River and its tributaries. The Petition was filed in Sonoma County Superior Court. Coastkeeper's Petition is primarily aimed at ensuring that endangered coho salmon are not adversely affected by groundwater extractions that deplete stream flows in the Russian River and its tributaries. [*California Coastkeeper v. County of Sonoma*, Case No. SCV-268718 (Sonoma Cnty Super Ct)]

Background

The Russian River is a navigable waterway that flows from its headwaters in central Mendocino County through Sonoma County, where it discharges into the Pacific Ocean in Jenner, California. (Petition at ¶ 72.) The Russian River and its tributaries are primarily fed by rainfall that occurs between November and April, with diversions of water peaking in the summer months while stream flows are at their nadir. (*Id.* at ¶¶ 77-78.) A variety of species inhabit the Russian River, including endangered Central California Coast coho salmon. (*Id.*at ¶ 84.) The Petition asserts that both the State Water Resources Control Board and the National Marine Fisheries Service (NMFS) have stated that groundwater extractions can deplete surface water flows in the Russian River and its tributaries. (*Id.* at ¶¶ 101-102.)

According to the Petition, Sonoma County's Code of Ordinances (Ordinance Code) provides that well construction permits must be issued so long as the proposed well specifications conform to the Ordinance Code's structural integrity and water quality requirements. (*Id.* at ¶ 106.) The Petition alleges that when the Ordinance Code's well permitting provisions were last updated in 2015, NMFS recommended that the County adopt a discretionary permitting scheme that requires an analysis of groundwater/surface flow impacts and CEQA review before issuing new well permits. (*Id.* at ¶ 118.) The Petition further explains that NMFS warned that granting ministerial well permits without such analysis would result in the "steady, cumulative loss of summer baseflow and the attendant disappearance of associated aquatic resources," including habitat for endangered salmon.

In 2018, California's Third District Court of Appeal held that Siskiyou County had a common law duty to consider whether groundwater extractions adversely affect public trust resources in the Scott River, a navigable waterway. (*Environmental Law Foundation v. State Water Resources Control Bd.* (*Environmental Law Foundation*), 26 Cal.App.5th 844, 851, 859-860 (2018).) In the *Environmental Law Foundation* opinion, the court specifically noted that the scope of the ruling is "extraordinarily narrow" and further stated that the court "eschew[ed] consideration of any hypothetical scenarios." There, the parties had stipulated at trial that pumping of interconnected groundwater has an effect of surface flows in the Scott River, a navigable water for purposes of the public trust doctrine. (26 Cal.App.5th at 853.) The Third District Court of Appeal distinguished, and thus left intact, an earlier ruling out of the Sixth District Court of Appeal holding that the public trust doctrine "has no direct application to groundwater." (26 Cal.App.5th at 860 [citing *Santa Teresa Citizens Action Group v. City of San Jose*, 114 Cal. App. 4th 689 (2003).].) There have been no published cases applying the "extraordinarily narrow" ruling in *Environmental Law Foundation*.

Summary of the Petition

Coastkeeper's petition alleges that groundwater extractions in the Russian River watershed have negatively impacted stream flows and the species that

depend upon them, including coho salmon. (Petition at ¶ 138.) A biological opinion issued by NMFS in 2008 determined that coho salmon rearing habitat in the Russian River watershed has decreased from 710 miles to only 98 miles. (NMFS, *Biological Opinion for Water Supply, Flood Control Operations, and Channel Maintenance conducted by the U.S. Army Corps of Engineers, the Sonoma County Water Agency, and the Mendocino County Russian River Flood Control and Water Conservation Improvement District in the Russian River watershed* (Sept. 24, 2008) at pp. 108-109.) In addition to depleting surface stream flows needed to support endangered salmon, Coastkeeper alleges that groundwater extractions also harm salmon by raising water temperatures to unsuitable levels because they reduce the influx of cooler groundwater that keeps instream surface waters cooler, especially in late summer and early fall. (*Id.* at ¶ 98.) Indeed, Coastkeeper alleges that the likelihood of individual and cumulative impacts from water well permits issued in the Russian River watershed on public trust resources such as coho salmon "is not subject to reasonable dispute." (*Id.* at ¶ 134.)

Coastkeeper further alleges that it is entitled to a writ of mandate against Sonoma County because the County has failed to consider the adverse effects of increased groundwater extractions in the Russian River watershed by issuing well permits on a ministerial basis. (*Id.* at ¶ 140.) Coastkeeper claims that groundwater "over-extraction" has significant, deleterious effects on public trust resources, and thus seeks an order requiring the County to adopt and implement policies and procedures necessary to feasibly prevent harm from the "individual and cumulative impacts of water well permits" on coho salmon, other wildlife and ecosystems, and the Russian River itself. (*Id.* at ¶¶ 150, 159.) Until such policies and procedures have been implemented, Coastkeeper also seeks an injunction preventing Sonoma County from issuing any well permits. (*Id.* at ¶ 160.)

Conclusion and Implications

The Russian River watershed has experienced challenging conditions this year. (*See:* Mary Callahan, *The Santa Rosa Press Democrat*, Russian River on the brink: Lifeblood of North Coast imperiled by deepening drought (June 25, 2021).) The State Water Resources Control Board has issued emergency regulations and curtailment orders in the Russian River watershed to address the historic unavailability of surface water. However, not all groundwater basins within the Russian River watershed are subject to regulation under the Sustainable Groundwater Management Act. The Petition, if successful, would require additional consideration of impacts of groundwater pumping on surface water supplies in the Russian River watershed.

Although Coastkeeper filed its lawsuit on June 23, 2021, it apparently waited until August 17 to serve Sonoma County with the Petition and summons. Thus, Sonoma County has not yet responded to the Petition, and it is unclear how it intends to defend against Coastkeeper's claims. A case management conference is currently set for November 2, 2021. (Meredith Nikkel)

RECENT FEDERAL DECISIONS

FIRST CIRCUIT UPHOLDS MASSACHUSETTS' STATE LAW ENFORCEMENT AS BARRING CLEAN WATER ACT CITIZEN SUIT BUT REQUIRES NPDES PERMITS

Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., 995 F.3d 274 (1st Cir. 2021).

The U.S. Court of Appeals for the First Circuit recently determined that an enforcement action brought by the Massachusetts Department of Environmental Protection (Department) against a developer for sediment-laden stormwater discharges barred a citizen suit under the federal Clean Water Act (CWA) for the same violations. The court also determined that all operators on the project site were required to obtain a National Pollutant Discharge Elimination System (NPDES) CWA permit to discharge from the site.

Factual and Procedural Background

Robert and Janice Gallo and their son Steven Gallo (Gallos) served as the only officers, directors, and shareholders of Gallo Builders, Inc. (Gallo Builders) and as the only members of Arboretum Village, Inc. (Arboretum Village; collectively: defendants). The defendants have been involved in the construction of a large residential development in Worcester, Massachusetts, known as Arboretum Village Estates (Development).

Arboretum Village obtained an NPDES permit from the U.S. Environmental Protection Agency (EPA) for the Development (Construction General Permit). The Department monitored the Development for compliance with state regulations and discovered that the site was discharging silt-laden runoff from unstable, eroded soils into an unknown perennial stream, which ultimately ended up in the Blackstone River. As a result, the Department issued a Unilateral Administrative Order (UAO), which required Arboretum Village to undertake numerous remedial actions or face civil penalties. Following the issuance of the UAO, construction of the Development stopped. Arboretum Village appealed the UAO, resulting in Arboretum Village and the Department entering into a settlement agreement and the issuance of the Administrative Consent Order with Penalty (ACOP).

Despite approval of the ACOP, Blackstone Headwaters Coalition, Inc. (Blackstone) filed a citizen suit against Defendants, alleging that defendants violated the CWA by failing to obtain and comply with the Construction General Permit conditions for the Development. Specifically, Blackstone brought two claims: 1) the Gallo Builders failed to obtain the Construction General Permit for the Development—despite Arboretum Village obtaining their own, and 2) Arboretum Village failed to adhere to the conditions in the Construction General Permit.

The CWA prohibits the discharge of pollutants from point sources into waters of the United States. The CWA's NPDES permit program authorizes discharges into waters of the United States from point sources. The state of Massachusetts regulates and enforces water protection programs through the Massachusetts Clean Water Act (MCWA), but the state has not received authorization under § 402(b) of the CWA to administer the NPDES permit program under the MCWA.

The CWA authorizes individuals to file complaints against those who violate the CWA when the EPA or an authorized State fails to perform an act or duty required by statute. The CWA, however, precludes citizen suits when a state is diligently prosecuting the violation under a comparable state law.

Defendants and Blackstone filed cross-motions for summary judgment to determine whether the ACOP barred Blackstone's citizen suit. Defendants also sought summary judgment on Count I of the complaint concerning Construction General Permit coverage and Count II concerning discharges of sediment-laden stormwater. The district court granted summary judgment against Blackstone as to its claims in Counts I and II and denied Blackstone's cross-motion for summary judgment as to the applicability of

the statutory preclusion bar for diligent prosecution. Blackstone appealed these determinations.

The First Circuit's Decision

Diligent Prosecution Bar to Citizen Suits

The court first addressed the issue of whether the CWA's "diligent prosecution" barred Blackstone's claim that defendants discharged sediment-laden stormwater in violation of the CWA. The court considered four distinct questions under this issue: 1) whether the Department's action was commenced and prosecuted under a state law comparable to the CWA, 2) whether the Department's action sought to enforce the same violation alleged by Blackstone, 3) whether the Department was diligently prosecuting its action when Blackstone filed its complaint, and 4) whether Blackstone's suit is a civil penalty.

On the first question, the court noted that the Department appeared to have commenced its enforcement action under the MCWA, at least in part. Based on prior case law, the court determined that the MCWA was a comparable state law to the federal CWA. Blackstone did not dispute this conclusion. Instead, Blackstone contended the Department's enforcement action was brought under the Massachusetts Wetlands Protection Act (MWPA) and not under the MCWA, and that the MWPA was not a comparable state law to the CWA. The court agreed with Blackstone that the MWPA is not a comparable state law to the CWA, because it is narrower in scope than the CWA. Nevertheless, the court concluded the Department's enforcement action was brought, at least in part, under a comparable law: the MCWA.

On the second question, Blackstone argued its action targeted the causes of defendants' water pollution while the Department's action targeted only the Defendants' pollution *per se*, and that the particular violations referenced in the complaint occurred on different days than the violations alleged in the ACOP. The court rejected this argument, reasoning that the ACOP required defendants to implement actions that would prevent sediment-laden discharges, and that this forward-looking course of action would remedy the violations alleged in Blackstone's complaint.

On the third question, the court reasoned that the ACOP included a series of enforceable obligations on Defendants designed to bring the project into compliance and to maintain compliance with promulgated standards, while at the same time reserving to the Department a full set of enforcement vehicles for any instances of future non-compliance. Thus, the Department was "diligently prosecuting" the same violation.

On the fourth question, Blackstone argued that the "diligent prosecution" provision only bars duplicative citizen suits for civil penalties but not claims seeking declaratory and injunctive relief. The court reasoned that because the CWA's citizen suit provision does not authorize citizens to seek civil penalties separately from injunctive relief, the preclusion bar extends to civil penalty actions and to injunctive and declaratory relief. As a result, the Court of Appeals upheld the award of summary judgment to Defendants on Blackstone's claim for sediment-laden stormwater discharges.

Finally, the court considered whether the Gallo Builders were required to obtain coverage under the Construction General Permit. Defendants contended that because Arboretum Village obtained coverage under the Construction General Permit and because both Arboretum Village and Gallo Builders were both owned by the Gallos, any failure by Gallo Builders, to also enroll under the permit was a nonactionable technical violation. The court rejected this argument, reasoning that the Gallo Builders was an operator of a construction project, and thus needed to obtain coverage under the Construction General Permit in order to discharge from the Development, regardless of Arboretum Village's coverage under the same permit. The court thus reversed the district court's decision and required all operators to obtain coverage under the Construction General Permit.

Conclusion and Implications

This case supports a diligent prosecution bar to citizen suits, as long as the state enforcement action was brought, at least in part, pursuant to a comparable state law. The case also appears to support a contention that every operator on a construction site may be required to obtain individual permit coverage to discharge from the site. The court's opinion is available online at: https://casetext.com/case/blackstone-headwaters-coal-inc-v-gallo-builders-inc-2.
(Kara Coronado, Rebecca Andrews)

FOURTH CIRCUIT FINDS STATE AGENCY DID NOT WAIVE CLEAN WATER ACT SECTION 401 CERTIFICATION

North Carolina Department of Environmental Quality v. Federal Energy Regulatory Commission, 3 F.4th 655 (4th Cir. 2021).

The U.S. Court of Appeals for the Fourth Circuit recently vacated a Federal Energy Regulatory Commission (FERC) order issuing a license for a hydroelectric project. The Fourth Circuit vacated FERC's finding that the North Carolina Department of Environmental Quality waived its federal Clean Water Act § 401 authority to issue water quality certification.

Factual and Procedural Background

The Federal Power Act (FPA) is a comprehensive regulatory scheme governing national water resources including hydroelectric power. Under the FPA, the construction, maintenance, or operation of any hydroelectric project located on navigable waters of the U.S. requires a license issued by the Federal Energy Regulatory Commission.

In addition, under § 401 of the federal Clean Water Act (CWA), applicants seeking federal licensing of projects that would result in a discharge to navigable waters must obtain state water quality certification verifying the project complies with state water quality requirements. If the state denies 401 certification, the federal license or project may not be granted. If a state deems additional conditions are necessary to ensure compliance with state water quality standards, the conditions must be set forth in the 401 certification and the federal licensing agency must incorporate the conditions into the federal license. A state waives water quality certification if the state "fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*)" after receipt of the request.

On March 30, 2015, McMahan Hydroelectric applied to FERC for a license to operate the Bynum Hydroelectric Project (Project) on the Haw River in North Carolina. On March 3, 2017, McMahan applied for Section 401 certification from the North Carolina Department of Environmental Quality (NCDEQ). After the initial application in March 2017, McMahan withdrew and resubmitted its application twice. NCDEQ ultimately issued 401 certification on September 20, 2019. The first withdrawal and resubmission was due, in part, to FERC's failure to complete an Environmental Assessment of the Project. The second withdrawal and resubmission was due in part, to NCDEQ's inability to issue the 401 certification by the one-year deadline because of time frames imposed by the public notice-and-comment process.

On the same day that NCDEQ issued 401 certification, FERC issued an Order granting McMahan a license to operate the Project. FERC concluded that NCDEQ had waived its authority to issue Section 401 certification, determining that the statutory one-year period began on March 3, 2017 and was not restarted by the withdrawals and resubmissions. FERC argued that NCDEQ and McMahan coordinated on a withdrawal-and-resubmission scheme for the purpose of evading the Section 401 one-year review period.

NCDEQ filed a rehearing request with FERC, seeking rescission of the waiver determination and asking FERC to incorporate the Section 401 conditions into the license. FERC denied NCDEQ's rehearing request. NCDEQ petitioned the Fourth Circuit for review of FERC's Order.

The Fourth Circuit's Decision

NCDEQ argued two grounds for vacating the Order: 1) FERC's interpretation of the Section 401 waiver provision was inconsistent with the plain language and purpose of the CWA; and 2) alternatively, even if FERC's interpretation of the statute was correct, the waiver finding must be set aside because FERC's key factual findings were not supported by substantial evidence. The Fourth Circuit discussed the meaning of the waiver provision extensively, but ultimately declined to rule on the first issue of statutory interpretation and decided NCDEQ's petition on the second question of substantial evidence review.

The statutory interpretation question presented is the meaning of a state's failure or refusal "to act" as provided in CWA § 401. The court characterized FERC's understanding of the waiver provision

as requiring *final* agency action within the one-year period. In other words, because NCDEQ did not issue or deny certification within one year of receiving the initial request, it waived certification authority. The court expressed doubt over FERC's interpretation. According to the Court of Appeals, if Congress had intended for states to take final action within the one-year period, the statute could have clearly required states to "certify or deny" the request. The language of the statute, however, hinges on a state's failure to "act," which plainly means something other than failing to certify or deny. Based on this reading, the court found that a state would not waive its authority if it took "significant and meaningful action" on a certification request within a year of filing.

The court reasoned that the legislative history and purpose of the CWA supported this reading of the waiver provision. The Conference Report on § 401 stated that the time limitation was meant to ensure that "sheer inactivity by the State . . . will not frustrate the Federal application." Given that the CWA carefully allocated authority between federal government and states, the purpose of § 401 was "to assure that Federal licensing or permitting agencies cannot override state water quality requirements."

Circuit Court Precedent on the One Year Rule

The Fourth Circuit acknowledged its understanding of the one-year requirement diverges from decisions in the D.C. Circuit and the Second Circuit. The D.C. Circuit considered a case where a license applicant entered into written agreement with Oregon and California to withdraw and resubmit its 401 certification application in order to avoid waiver. The state agencies failed to grant or deny the application for over ten years. The D.C. Circuit found Oregon and California's "deliberate and contractual idleness" defied the one-year requirement. The Second Circuit adopted a straightforward reading of the one-year period, finding the New York agency waived certification by failing to grant or deny certification within one year after the initial request.

The Fourth Circuit maintained that its interpretation is consistent with the D.C. Circuit Court's decision, reasoning that decision should apply in narrow circumstances, where a withdrawal-and-resubmission scheme coordinated by the license applicant and state deliberately stalled action. In NCDEQ's case, however, there was no "contractual agreement for agency idleness," and overall no idleness on the part of the agency. NCDEQ consistently took "significant action" on the certification application, including after each withdrawal and resubmission. For example, NCDEQ continued to meet with McMahan to develop the water-quality monitoring plan and moved forward with the notice-and-comment process after FERC issued its Environmental Assessment. Ultimately, NCDEQ granted 401 certification.

The court did not decide the statutory interpretation question, leaving it for resolution in a future case where the outcome depends on the precise meaning of the statute. Even assuming FERC's interpretation of the waiver provision was correct, the court nevertheless concluded that FERC's factual findings—that NCDEQ and McMahan engaged in improper coordination—were not supported by substantial evidence. The court vacated FERC's Order and remanded to FERC to incorporate NCDEQ's 401 certification conditions into the license.

Conclusion and Implications

In this case, the Fourth Circuit Court of Appeals opined that state authority under Clean Water Act § 401 is not waived when the state has failed to take *final* action on a certification request within the statutory one-year period. If the state has taken "significant action" on the certification request, it is deemed to have "acted" on the request. The Fourth Circuit's statutory interpretation of state action under the § 401 waiver provision diverges from decisions in the D.C. and Second circuits. The court's opinion is available online at: https://www.ca4.uscourts.gov/opinions/201655.P.pdf.
(Julia Li, Rebecca Andrews)

DISTRICT COURT OF HAWAI'I APPLIES THE CLEAN WATER ACT 'FUNCTIONAL EQUIVALENT' STANDARD SET FORTH BY THE U.S. SUPREME COURT

Hawai'i Wildlife Fund v. County of Maui, ___F.Supp.3d___, Case No. 12-00198 (D. HI July 26, 2021).

To determine if the County of Maui required a federal Clean Water Act permit, the U.S. District Court for the District of Hawai'i applied the "functional equivalent" standard set forth by the U.S. Supreme Court in *County of Maui v. Hawai'i Wildlife Fund*, 140 S.Ct. 1462 (2020). The standard includes criteria for courts to utilize when determining whether or not a discharge into navigable waters requires a National Pollutant Discharge Elimination System (NPDES) permit, as prescribed in the Clean Water Act (CWA).

Factual and Procedural Background

The County of Maui operates a wastewater reclamation facility on the island of Maui, Hawai'i. The facility collects sewage, treats it, and disposes of the treated water underground in four wells. This effluent then travels a further half mile or so, through groundwater, to the Pacific Ocean, although with certain components, like nitrogen, being reduced before the wastewater reaches the ocean.

Monitors at a handful of locations near the shoreline detected less than 2 percent of the wastewater from two of the four wells. No scientific study conclusively established the path of the other 98 percent of the wastewater. The 2 percent of treated wastewater reaching the ocean amounts to tens of thousands of gallons every day. While the parties and court could not point to the exact path of the rest of the 98 percent of wastewater, it is likely that that remainder enters the Pacific Ocean within a few miles of the facility.

With a few exceptions, the Clean Water Act requires a permit when there is the discharge of any pollutant to a navigable water. The Ninth Circuit previously heard this case and ruled that the County of Maui's discharges required an NPDES permit as the pollution and pollutants were "fairly traceable" to their injection wells. On *certiorari*, the U.S. Supreme Court ruled that the fairly traceable standard was too broad and replaced the standard with the functional equivalent standard. With the new standard, the Court provided a non-exclusive framework for other courts to utilize when reviewing this question:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point sources, (6) the manner by or the area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identify. Time and distance will be the most important factors in most cases, but not necessarily every case.

The District Court's Decision

On remand, the U.S. District Court applied the functional equivalent standard articulated by the Supreme Court to determine whether the discharges from the County of Maui's injection wells were the functional equivalent to a discharge from a point source. The court applied seven factors identified by the Supreme Court, one factor from U.S. Environmental Protection Agency (EPA) Guidance, and *added* its own factor as follows:

- *Time*—The court found that the time between the effluent leaving the injection wells and reaching the ocean was less than "many years." The court concluded the amount of time was within the window that the Supreme Court expected to require a permit, reasoning that "even if the court double[d] the longest time measured at the seeps" it would still be less time than the ceiling of this factor set forth.

- *Distance*—The court found that the distance from the injection wells to the ocean, when calculated both horizontally and vertically, was a "relatively short distance." Further the court found that even

when the pollutant arrived diluted, its journey to the ocean was short enough and less than the "50-mile extreme" set forth by the Supreme Court.

•*Nature of the Material the Pollutant Travels*—The court quickly found that this factor weighed in favor of no permit being required. The court found that the effluent travels and mixes with "other waters flowing through rock and other substances."

•*Extent to Which the Pollutant is Diluted or Chemically Changed as it Travels*—Similar to factor three, the court here found that while there is a pollutant entering the navigable waters, the pollutant is significantly diluted or otherwise removed. Despite the presence of pollutants, this factor weighed in favor of no permit being required as it was significantly diluted or otherwise removed.

•*Amount of the Pollutant Entering the Navigable Waters Relative to the Amount of the Pollutant that Leaves the Point Source*—The court found that this factor weighed in favor of requiring a permit. It reasoned that whether or not some of the pollutant is removed, pollutants still reach the ocean.

•*Manner By or Area in Which the Pollutant Enters the Navigable Waters* – The court reasoned that the manner by which the pollutant enters the ocean is partially known but not completely known. The court reasoned that the lack of complete information in this factor did not weigh in favor or against a permit.

•*Degree to Which the Pollution Maintains its Specific Identity*—The court weighted this factor in favor of needing a permit. Its reasoning being that, even if some of the pollutants are diluted or otherwise removed, the "wastewater maintains its specific identity as polluted water emanating from the wells."

•*System Design and Performance*—Following the Supreme Court decision, the EPA issued guidance on the application of the functional equivalent test. In its guidance, the EPA urged courts to review the design and performance of facilities as it pertains to the factors put forth by the Supreme Court. Ultimately, the District Court found that this factor did not weigh in favor or against the permit in this matter. The reason being is that the Supreme Court and all parties concur on the purpose of the treatment plants and from there to flow to the ocean.

•*Volume of Wastewater Reaching Navigable Waters*—The court added this factor to those provided by the Supreme Court and the EPA. The court stated that it was necessary to separately consider the volume of wastewater reaching the ocean as the other factors had not considered the "immensity of the wastewater volume." The court reasoned that the "raw volume [f wastewater] is so high that it is difficult to imagine why it should be allowed to continue without an NPDES permit."

The court ultimately found that even if the ninth factor were not considered, the balancing of all the other factors weighted heavily towards the County being required to have a NPDES permit.

Conclusion and Implications

This case is the first published case in which a court has applied the "functional equivalent" standard created by the U.S. Supreme Court. The fact-specific nature of the standard means this case will likely be the first of many to come. The District Court's opinion is available online at: https://casetext.com/case/haw-wildlife-fund-v-cnty-of-maui-5.
(Ana Schwab, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT FINDS COASTAL DEVELOPMENT PERMIT APPLICATIONS FOR MOBILE HOME REMODELS WERE 'DEEMED APPROVED' UNDER THE PERMIT STREAMLINING ACT

Linovitz Capo Shores LLC v. California Coastal Commission, 65 Cal.App.5th 1106 (4th Dist. 2021).

Owners of beachfront mobile homes petitioned for a writ of mandate declaring that the coastal development permits they sought from the California Coastal Commission were deemed approved by operation of law under the Permit Streamlining Act. The Superior Court denied the petition, and the homeowners appealed. The Court of Appeal for the Fourth Judicial District reversed, finding that the requisite "public notice required by law" had occurred, and the permits were deemed approved.

Factual and Procedural Background

The petitioners in the case were homeowners of beachfront mobile homes in Capistrano Shores Mobile Home Park, located in the City of San Clemente. Between 2011 and 2013, the homeowners each applied for, and received, a permit from the California Department of Housing and Community Development (HCD) to remodel their respective mobile homes. They planned to change interior walls, outfit the exteriors with new materials, replace the roofs, and add second stories. The homeowners also applied for coastal development permits from the California Coastal Commission. Their applications expressly indicated that they were not addressing any component of the remodels for which they obtained HCD permits, including the addition of second stories. Rather, their coastal development permit applications concerned desired renovations on the grounds surrounding the structures.

The homeowners completed their remodels at various times between 2011 and 2014. In 2014, the Coastal Commission issued notices to the homeowners that their then-complete remodels were unauthorized and illegal without also having obtained a coastal development permit for that work. The Coastal Commission gave the homeowners two options. First, they could revise their previously submitted applications to instead request authorization to remove the allegedly unpermitted remodels and resubmit the applications within 30 days. Second, they could apply for "after-the-fact" authorization to retain the unpermitted development. The notice, however, indicated that Coastal Commission staff would not support requests to retain the second stories.

The homeowners believed that the Coastal Commission did not have any authority over their structure renovations but chose to apply for after-the-fact permits, reserving their right to later challenge the Commission's jurisdiction. The Coastal Commission issued individual public hearing notices for each application. In accordance with the notices, the Coastal Commission held a public hearing concerning all the applications in July 2016. At that meeting, staff gave a presentation concerning the projects and recommended approval of the applications with certain conditions, one of which was to limit the height of the mobile home units to 16 feet to protect views to and along the ocean and coastal scenic areas. Approval of such a condition, however, would have required each applicant to demolish their home and start construction anew.

Following a presentation by the homeowners, the Commission considered the applications one-by-one. During this process, commissioners expressed various views regarding the applications. At one point, a commissioner suggested continuing the matters to a future date to allow more time for negotiations; however, the Coastal Commission's legal counsel stated that was not an option due to an impending deadline under the Permit Streamlining Act.

During this process, the homeowners' representative made a proposal regarding the remaining applications that would allow for discussion about alternatives to staff's recommendation. He indicated that the homeowners could withdraw the applications and resubmit them right away, and he simultaneously re-

quested a commissioner make a motion to waive the standard six month waiting period for resubmittal and waive all additional fees. The Commission voted to allow immediate resubmission of the applications, but it rejected the request to waive or reduce the required fees for resubmittal. Following these votes, the meeting was adjourned. Neither the homeowners nor the Commission took any further action regarding the pending applications.

A few months later, the homeowners filed a petition for writ of mandate, requesting declaratory relief that their applications were approved, without conditions, by operation of law under the Permit Streamlining Act. They moved for judgment, which the Coastal Commission opposed. The Superior Court ultimately agreed with the Commission, finding that the Commission had jurisdiction and that the notice prerequisite to deemed approval under the Permit Streamlining Act was not satisfied. In arriving at that later conclusion, the Superior Court relied on *Mahon v. County of San Mateo*, 139 Cal.App.4th 812 (2006). The homeowners appealed.

The Court of Appeal's Decision

Coastal Commission and HCD Jurisdiction

The Court of Appeal first addressed the homeowners' claim that HCD had exclusive jurisdiction over mobile home construction and design, and therefore the Coastal Commission lacked jurisdiction to require a coastal development permit for their projects. The Court disagreed, finding that the two state agencies have concurrent jurisdiction with respect to mobile homes located in the coastal zone.

In arriving at this conclusion, it examined the statutory schemes from which each agency derives its respective powers—the California Mobilehome Parks Act and the California Coastal Act of 1976, respectively, and concluded that the language of each evidenced the Legislature's intent for these statutes to operate concurrently with other state laws and permitting requirements. The court also found that there was no inherent conflict between HCD having authority over the construction and reconstruction of mobile homes from a health, safety, and general welfare standpoint, and giving the Coastal Commission authority to protect the natural and scenic resources, as well as the ecological balance, in the coastal zone. The statutes, and the agencies given authority by them, have distinct purposes. Thus, the Court of Appeal found that HCD and the Coastal Commission have concurrent jurisdiction over mobile home construction and replacement in the coastal zone.

The Permit Streamlining Act

The Court of Appeal next addressed the homeowners' claim that their applications were deemed approved by operation of law under the Permit Streamlining Act. The Coastal Commission did not dispute the lack of action on its end, but it maintained that the permits were not deemed approved because: 1) the homeowners withdrew their applications; and 2) the requisite public notice required for an application to be deemed approved was never given.

On the first issue, the Court of Appeal found that there was substantial evidence supporting the Superior Court's factual finding that the applications had not been withdrawn. The homeowners orally indicated their desire to withdraw the applications, but simultaneously asked the Coastal Commission to waive resubmittal fees and the resubmittal waiting period. After voting to waive the resubmittal waiting period, the Coastal Commission's counsel stated it was up to the applicants to decide whether to, in fact, withdraw in light of the Commission's vote. The Coastal Commission then declined to waive the resubmittal fees and the meeting recessed without further comment from appellants or their representative.

On the second issue, the parties agreed that some type of notice must be provided before an application may be deemed approved but disagreed about what must be included in such notice. Aside from the passage of the necessary amount of time (which was not disputed in the case), the only precondition to a permit being deemed approved by operation of law under Government Code § 65956 is provision of "the public notice required by law." The Court of Appeal found that the Coastal Commission's notices of a public hearing regarding the homeowners' permit applications satisfied this requirement because they were done in accordance with applicable statutes, and regulations promulgated thereunder, as well as in a manner consistent with constitutional procedural due process principles and decisional law.

In arriving at this conclusion, the Court of Appeal disagreed with the interpretation of the Permit Streamlining Act set forth in *Mahon v. County of San*

Mateo, 139 Cal.App.4th 812 (2006), instead finding that the plain language of § 65956 does not require an agency's public notice to include a statement that the permit at issue will be deemed approved if the agency does not act on it within a specified number of days. Accordingly, the Court of Appeal reversed the Superior Court decision, finding that the homeowners were entitled to judgment in their favor.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the "deemed approved" provision of the Government Code, particularly the type of notice that must be provided before an application may be deemed approved by operation of law. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/G058331.PDF.

(James Purvis)

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