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CALIFORNIA WATER LAW & POLICY Reporter™

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CALIFORNIA WATER NEWS

SOUTH FORK DISCONNECTED FROM EEL RIVER—STATE'S RESERVOIRS ARE CURRENTLY HOLDING SIGNIFICANLY LESS WATER—DUE TO RECORD SETTING DROUGHT

If you drive north on Highway 101 past Sonoma County, you'll eventually reach California's world-famous Avenue of the Giants, a 30-plus mile stretch of ancient redwoods towering hundreds of feet over residents and tourists alike. Slithering along below these lumbering beauties, however, the South Fork Eel River is experiencing record low flows, so low in fact that the South Fork has been cut off entirely from the Eel River.

USGS Flow Gauge Results

As of September 17, the US Geologic Survey flow gauge results at Leggett showed flows had dropped to 6.98 cubic feet per second (cfs). Before that, the previous historic low of 8.86 cfs was set back in 2002. Just south of Leggett, flows at the South Fork's tributary Elder Creek were only 0.5 cfs. Disturbingly enough, however, these flows weren't even the most concerning along the South Fork: flow gauge results at Bull Creek, which feeds into the South Fork just above Dyerville, reached a record low flow of a pitiful 0.03 cfs. This virtual non-flow at Bull Creek unsurprisingly comes just before the point of disconnect between the South Fork and the Eel River.

While flows at the Miranda gauge also dipped to a record low of 7.07 cfs—down from the previous record low of 12.1 cfs in 2008—some weekend rainfall following September 17's gauge readings was able to revive the South Fork's flows, bringing them back up to around 30 cfs. For reference, wet years normally lead to flows around 40 to 80 cfs around this time of the year.

Timber Industry and Groundwater Extraction Impacts

Adding to the problems brought on by the recent droughts, the South Fork is also suffering from the effects of the timber industry and groundwater extractions from nearby wells. The historical clearcutting practices and development in the area has led to a lack of riparian coverage, allowing for increased evaporation from the creeks and therefore resulting in lower flows.

As for groundwater extractions, the only confined aquifer in the area lies underneath the lower Eel River. Accordingly, wells along the South Fork, for example, that do not pump from this confined aquifer can have a significant impact on surface water flows. Over time, these groundwater extractions along the river have made it so that the South Fork is no longer a "gaining stream," as geologists call it. Rather, contributions from both groundwater extractions and the loss of riparian coverage have led to the South Fork becoming a losing stream.

California's Reservoirs are Also in a Dire State

Diminished river flows also implicate the storage of precious water in the state's largest reservoirs. The California Department of Water Resources has reported recently the following percentage information *for September* for the following reservoirs:

- *Trinity*: The Trinity Reservoir has historically been at 43 percent capacity and currently is at 30 percent of total capacity;

- *Shasta*: The Shasta Reservoir has historically been at 40 percent capacity and currently is at 24 percent of total capacity;

- *Oroville:* The Oroville Reservoir has historically been at 36 percent and currently is at 22 percent of total capacity;

- *Melones:* The Melones Reservoir has historically been at 63 percent and currently is at 35 percent of total capacity;

- *Folsom:* Folsom Reservoir has historically been at 41 percent and currently is at 24 percent of total capacity;

•*San Luis:* San Luis Reservoir has historically been at 27 percent and currently is at 13 percent of total capacity;

•*Don Pedro*: Don Pedro Reservoir has historically been at 74 percent and currently is at 50 percent of total capacity;

•*Millerton*: Millerton Reservoir has historically been at 139 percent and currently is at 57 percent of total capacity. (*See:* https://cdec.water.ca.gov/resapp/RescondMain)

All the other key state reservoirs, with the exception of Perris Reservoir [which is at 84 percent currently, are down substantially as well. (Ibid)

Conclusion and Implications

The Eel River is California's third largest watershed and is designated as a Wild and Scenic River at both the state and federal level. It supports one of the California's largest salmon and steelhead runs as well as its largest remaining old-growth redwood forests. The South Fork Eel River has also been a recreational hot spot for Californians, providing recreation among its thousands of acres of protected wilderness and hundreds of miles of river.

Unfortunately for this northern Californian gem, not much can be done to aid the South Fork other than to just wait and see when the next rains will come. The recent spurt of rain was a huge help in bring flows back up to near-normal conditions, but it is looking more and more like these dry conditions are the new normal. The disconnection of the hundred-plus mile stretch of the South Fork is reflective of the state's current battle with the persistent drought conditions, and California regulators will need to continue to improve the state's response to this ongoing threat. Reservoirs, too, are feeling the pain of this record drought.
(Wesley A. Miliband, Kristopher T. Strouse)

SANTA CLARA VALLEY WATER USERS FALLING SHORT OF WATER CONSERVATION GOALS

As with many others across the state, Santa Clara Valley Water (SC Valley Water) has been operating under a state of drought emergency since June 2021. In declaring this state of drought emergency, SC Valley Water established mandatory conservation goals throughout the district, tasking the residents of the Silicon Valley with reducing their water use by 15 percent when compared to their 2019 water usage. When July came and went, Stanford was the only retailer able to accomplish this feat.

Santa Clara Valley Water's Dwindling Supplies

With ten reservoirs and around 5,000 groundwater wells, SC Valley Water acts a wholesaler to several retailers in the area. SC Valley Water's local supply, however, is quickly drying up. Back in April of 2017, SC Valley Water's reservoirs were sitting around a healthy 85 percent capacity. As of early September, the reservoirs are down to a mere 12 percent of their total unrestricted capacity. On top of the already worrying storage levels, the Federal Energy Regulatory Commission (FERC) has ordered SC Valley Water to drain Anderson Lake just outside Morgan Hill for public safety reasons. This order is expected to put the largest reservoir in the county out of commission for almost a decade as Valley Water completes a seismic retrofitting.

In supplying local retailers, SC Valley Water also customarily receives over half of its water from imported water from other regions of the state. That being said, the grass has not been greener outside of the Silicon Valley. Lakes and reservoirs across the state have dropped to historically low levels. To the north, for example, Lake Shasta has dropped to 25 percent of its capacity. Furthermore, neither Oroville nor Folsom have fared as well as Shasta, with Folsom sitting at 24 percent capacity and Oroville at a meager 22 percent capacity.

SC Valley Water holds an annual allocation of 100,000 acre-feet from the State Water Project. While the district rarely receives its full allotment, this year it is expected that they will only get 5,000 acre-feet.

In addition to its usual allocation from the State Water Project, SC Valley Water also receives an allocation from the federal Central Valley Project of up to 152,000 acre-feet. As with the reservoirs to the north, however, the San Luis reservoir has struggled this year, dipping down to just 12 percent of its capacity. Because of this, SC Valley Water's initial allocation of 55 percent of that 152,000 acre-feet was cut back in May down to 25 percent for manufacturing and industrial purposes and a whopping zero percent for agriculture.

Conservation Efforts within the Silicon Valley

Looking back at SC Valley Water's conservation goals, Stanford was the only retailer within the district to achieve the 15 percent conversation figure required by Valley Water as part of its response to the drought emergency. While Palo Alto also made respectable efforts in conservation, achieving 13 percent conservation compared to their 2019 usage, these two retailers were the only ones to breach even 10 percent conservation.

Here is how the other retailers in the area fared in their conservation efforts: Milpitas (8 percent), California Water Service (6 percent), Great Oaks (6 percent), San Jose Water Company (6 percent), San Jose Municipal Water (6 percent), Sunnyvale (6 percent), Purissima Hills Water (5 percent), Morgan Hill (5 percent), Gilroy (3 percent), Mountain View (2 percent), City of Santa Clara (2 percent).

Although these numbers are still well below where SC Valley Water had hoped, they are at least an improvement on water use from earlier this year, where water use in March was up 25 percent from 2019's figures.

In response to the seemingly perpetual drought, SC Valley Water has implemented several conservation programs, including rebates for water conscious landscaping and Graywater "laundry-to-landscape" systems. Promisingly, interest in these programs has been steady: in August, for example, SC Valley Water received 360 applications for the landscape rebate, 965 orders for water-efficient devices from its website, and 230 water waste reports. More notably, San Jose Water Company filed a proposal with the state that would require customers to reduce water use by 15 percent and pay a surcharge for every unit of water they use in excess of that amount.

Conclusion and Implications

Water conservation goals by localities are nothing new in California. Fortunately, rebates and other more direct conservation programs are being implemented as well. San Jose Water's proposal to impose surcharges on those who use water in excess of these water conservation requirements, however, shifts the onus—at least in part—to the user to meet these requirements. Likely an unpopular move by the company, it will certainly be worth keeping an eye on how many others will follow suit and take the same approach to reducing water use in California. (Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

BIPARTISAN U.S. SENATE INFRASTRUCTURE BILL INCLUDES $2.3 BILLION TO IMPROVE OR REMOVE DAMS

On August 10, 2021, the Senate adopted a $1 trillion infrastructure bill that includes over $2.3 billion for the rehabilitation, retrofit, or removal of America's dams. The $2.3 billion proposal comes less than four months after a $63.17 billion proposal submitted by a diverse group of non-governmental organizations, companies, trade associations, and academic institutions.

Background

There are more than 90,000 dams across America, of which only 2,500 currently generate electricity. Dams throughout the nation provide flood control, electricity generation, navigation, irrigation, water supply, and recreation. However, where dams are improperly maintained or exist beyond their useful life, they can also pose safety hazards.

In the last few years, the U.S. hydropower industry and environmental and river conservation organizations have convened to address the nation's dams. The coalition has focused on the role U.S. hydropower plays as a renewable energy resource, and to integrate variable solar and wind power into the U.S. electric grid. The group has also focused on the need to maintain the nation's waterways, and the biodiversity and ecosystem services they sustain.

On October 13, 2020, a group of organizations, companies, government agencies, and universities issued the "*Joint Statement of Collaboration on U.S. Hydropower: Climate Solution and Conservation Challenge*" (Joint Statement). The Joint Statement provides a commitment by the group to chart hydropower's role in a U.S. clean energy future, while also supporting healthy rivers. The Joint Statement focused on what it terms the "3Rs" of U.S. dams: rehabilitation for safety; retrofit for power; and removal for conservation. Driven to address the dual challenges of climate change and river conservation, the parties identified seven areas for joint collaboration and invited other key stakeholders, including tribal governments and state officials, to join the collaboration and address implementation priorities, decision-making, timetables, and resources.

'Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress'

About six months after the Joint Statement was issued, on April 23, 2021, a group of non-governmental organizations, companies, trade associations, and academic institutions released a proposal entitled the "Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress," which builds on the Joint Statement by providing specific spending recommendations for the federal infrastructure package and related legislation. The spending recommendations aim to advance both the clean energy and electricity storage benefits of hydropower, and the environmental, safety, and economic benefits of healthy rivers. The recommendations do not focus on any particular U.S. dam, river, or region, but rather aim to accelerate the "3Rs" across all of America's 90,000 dams.

If enacted in whole, the proposal would result in $63.17 billion in spending over ten years for what it classifies as four, tightly-related U.S. infrastructure needs. The first need is federal financial assistance to improve dam safety. This includes building on existing state regulatory oversight capacity, expanding funding for the rehabilitation of existing dams, mapping the potential consequences of dam failure, and reimagining the National Dam Safety Program. The proposal recommends $19.46 billion for this first category of spending over ten years.

The second category of spending focuses on leveraging the federal tax code to incentivize investments in dam safety, environmental improvements, grid flexibility and availability, and dam removals. The proposal suggests a 30 percent tax credit for investment at qualifying facilities in dam safety, environ-

mental improvements, grid flexibility and availability, and dam removals, with a direct pay alternative. This program would cost $4.71 billion over ten years.

The third category of spending focuses on creating a public source of climate resilience and conservation funding for the removal of dams that have reached the end of their useful life. The proposal recommends that Congress authorize a mandatory annual grant that would fund the removal of 2,000 U.S. dams over a decade. The proposal further recommends that the Biden Administration issue an executive order establishing an inter-agency and stakeholder advisory committee to coordinate agency assistance in dam removal planning and funding, harmonize agency permitting to ensure a predictable regulatory process, and serve as a forum to address programmatic challenges. This program would cost $15 billion over ten years.

Finally, the fourth category of spending focuses on investing in existing federal dams and relevant research programs to accelerate decarbonization, increase renewable power generation, enhance environmental performance, improve dam safety, and leverage innovative technologies. This program would cost $24 billion over ten years.

Senate Adopts Amended Infrastructure Bill HR 3684

Less than four months after the proposal, on August 10, 2021, the Senate adopted its $1 trillion infrastructure bill by amendment to the House Bill HR 3684. As amended, the bill includes over $2.3 billion to improve and remove dams. The bill includes $753 million for safety and environmental improvements at existing hydropower facilities, adding hydropower generation to dams that currently do not produce power and for "pumped storage" projects; $800 million for rehabilitation and repair of high hazard dams and safety projects; and $800 million for the removal of dams in the interest of safety and the environment. While $2.3 billion is only a fraction of the $63.17 billion proposed by the coalition of stakeholders, the parties to the proposal are encouraged by this "federal down payment" to address the nation's dams. (*See:* $2.3 billion to improve or remove U.S. dams included in new federal infrastructure bill in wake of a Stanford Uncommon Dialogue agreement, *Stanford News* (Aug. 30, 2021).)

Conclusion and Implications

The Senate Infrastructure Bill is currently being considered in the House of Representatives and was scheduled for a vote on September 27, 2021. Meanwhile, in July of 2021, the bipartisan Twenty-First Century Dams Act was introduced in by Senator Dianne Feinstein (D-Calif.), Representative Annie Kuster (D-NH), and Representative Don Young (R-Alaska). This bill would invest over $25 billion for the rehabilitation, retrofit, and removal of America's dams.

The full text of the Senate Infrastructure Bill can be found at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text?r=1&s=2. The full text of the proposal entitled "Climate Change, River Conservation, Hydropower and Public Safety: An Infrastructure Proposal for the Biden Administration and Congress" can be found at: hydropower-proposal.pdf (documentcloud.org). The full text of the Twenty-First Century Dams Act, as introduced in the Senate can be found at: Text - S.2356 - 117th Congress (2021-2022): Twenty-First Century Dams Act | Congress.gov | Library of Congress.

CLIMATE CHANGE BILL PASSES CALIFORNIA LEGISLATURE—THE SEA LEVEL RISE MITIGATION AND ADAPTATION ACT OF 2021

In response to climate change conditions and scientific modeling predicting a rise in California sea levels, the California Legislature recently passed the Sea Level Rise Mitigation and Adaptation Act of 2021 (Senate Bill 1(Atkins-D San Diego) (SB 1). SB 1 provides resources to coastal communities and municipal governments to address the rise in sea levels associated with climate change. As of the date of this writing, SB 1 awaited the Governor's signature to become enacted into law. [*Note:* Just as this article went to "print" we learned that Governor Newsom signed SB 1 into law on September 23, 2021]

Background

According to the Legislative Analyst's Office (LAO), sea level rise poses a significant threat to California's 1,100-mile coastline. The LAO predicts California's sea levels will rise by seven feet by the year 2100, causing devastating impacts to coastal communities' infrastructure, roadways and drinking water supplies. UC San Diego Scripps Institution of Oceanography forecasts that subtle changes in sea level will worsen flooding, negatively impact freshwater sources, impede coastal areas' ability to provide adequate drainage and, in some cases, submerge communities altogether.

LAO Projections

The LAO summarizes that in 2019, U.S. Geological Survey conducted an extensive study and comprehensive modeling effort evaluating sea level rise, precipitation patterns, cliff erosion, beach loss and other coastal threats. The modeling results projected that approximately one-half million Californians and approximately $150 billion in property are at risk of flooding along the coastline by the year 2100. According to the LAO, these damages equate to approximately 6 percent of the state's gross domestic product. The LAO projects that these economic impacts would be similar in scale to the damage caused by Hurricane Katrina, and that the cumulative damage by the end of the century could be more impactful than the State's most devastating earthquakes and wildfires.

Coastal Commission Policies

SB 1 directs the California Coastal Commission to account for sea level rise in its planning, policies and activities. In particular, it requires the Coastal Commission to consider recommendations and guidelines for the identification, assessment, minimization and mitigation of sea level rise within each local coastal program. SB 1 also requires state and regional agencies to identify, assess and mitigate the impacts of sea level rise.

Sea Level Rise State and Regional Support Collaborative and Funding

SB 1 establishes the California Sea Level Rise State and Regional Support Collaborative (Collaborative) to advise local, regional and state governments on sea level rise mitigation efforts. It requires the Collaborative to expend up to $100 million per year for grants to local and regional governments to update local and regional land use plans to take into account sea level rise and to fund investments to implement those plans.

Additional Funding for Environmental Justice Small Grant Program

Finally, existing law establishes the Environmental Justice Small Grant Program which provides grants to community groups for environmental justice issues. The California Secretary for Environmental Protection is currently authorized to spend up to $1.5 million per year under the grant program. SB 1 authorizes the Secretary to spend up to $2 million per year and requires $500,000 of the funds to be allocated for grants to organizations addressing and mitigating the effects of sea level rise in disadvantaged communities.

SB 1 passed the California Senate on a 33-2 bipartisan vote [and we learned that Governor Newsom signed the bill into law on September 23, 2021].

Comments from Senator Atkins

Senator Atkins has stated, in part:

> Sea level rise and climate change have begun to threaten iconic communities, precious ecosystems, and critical infrastructure up and down California's coast. It's vital that we make key investments and changes to our planning strategies to account for this climate reality. SB 1 gives our local governments and communities tools and funding, which helps foster coordination and more inclusive solutions to the challenges of sea level rise. . . .

Conclusion and Implications

The California Legislature is taking a proactive approach to mitigate projected significant threats to California's coastline and coastal economy. Scientific research and modeling referenced by the LAO indicates that if the problem is not addressed now, it will become a coastal and economic crisis costing taxpayers, homeowners, businesses and local communities massive losses in the not-too-distant future. Senator Atkins' website contains additional information

on the background and workings of SB 1: https://sd39.senate.ca.gov/news/20210923-governor-newsom-signs-senate-leader-atkins'-historic-sb-1-—-sea-level-rise-mitigation. For the complete history and final text of SB 1, *see:* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1.
(Chris Carrillo, Derek R. Hoffman)

REGULATORY DEVELOPMENTS

CALIFORNIA FISH AND GAME COMMISSION FORMALIZES SCHEDULE TO EVALUATE STATE ESA PETITION TO LIST THE SOUTHERN CALIFORNIA STEELHEAD AS ENDANGERED

In August 2021, the California Fish and Game Commission (Commission) formalized its schedule to evaluate a petition to list the Southern California Steelhead as an endangered species under the California Endangered Species Act (CESA). The petition submitted by CalTrout asserts that the steelhead's continued existence is in jeopardy due to habitat loss compounded by the impacts of climate change. The California Department of Fish and Wildlife's (Department) initial evaluation of the petition is due to the Commission by mid-December. Thereafter, the Commission is expected to determine whether listing may be warranted, and hence whether steelhead will receive a formal candidate species designation, in February 2022.

Background

According to the California Fish and Game Commission, the Southern California steelhead (steelhead) is a highly migratory and adaptive species that occupies multiple habitat types over their complete life-history. The steelhead spends one to four years maturing in the Pacific Ocean, at which point they will typically return to their natal river system to spawn. Once they re-enter the river system, steelhead migrate several to hundreds of miles to reach suitable spawning habitat that typically consists of cool, clean water, and complex, connected habitat that provides sufficient nutrients and foraging opportunities. Freshwater spawning sites require sufficient water quantity and quality. The primary habitat conditions that influence the species are temperature, dissolved oxygen, water depth and velocity.

Steelhead below natural and man-made fish passage barriers in southern California were listed as endangered under the federal Endangered Species Act (ESA) in 1997. The range of federally protected steelhead now extends from the United States-Mexico border to the Santa Maria River. Despite being listed under the ESA, the steelhead population has continued to decline, according to CalTrout.

CalTrout submitted its petition to list the steelhead as endangered under the California Endangered Species Act to the California Fish and Game Commission on June 7, 2021. CESA provides a state law equivalent to the federal ESA. Pursuant to state law, the Commission transmitted the petition to the Department of Fish and Wildlife (Department). The Department then had until September 21, 2021, to submit a written evaluation report with a recommendation to the Commission regarding whether to reject or accept and consider the petition. The Department requested a 30-day extension to submit its written evaluation, which the Commission granted. The Commission now expects to formally receive the Department's evaluation by December 15, 2021.

Evaluating Listing the Steelhead

The Department is currently evaluating whether to recommend that the Commission reject or, on the other hand, accept and consider the petition. Fish and Game Code § 2073.5 provides that, within 90 days of receiving a listing petition, the Department must evaluate the petition on its face and in relation to other relevant information the Department possesses or receives. The Department must then submit to the Commission its written evaluation recommending either that: 1) there is not sufficient information to indicate that the petitioned action may be warranted and thus the petition should be rejected, or 2) there is sufficient information to indicate that the petitioned action may be warranted, and the petition should be accepted and considered. If the petition is sufficient and is accepted by the Commission, the Department then prepares a written status report on the species. (Fish & G. Code, § 2074.6; *Mountain Lion Foundation v. Fish & Game Commission*, 16 Cal.4th 105, 115 (1997).) During the process, interested parties may also submit written comments and scientific reports. (Cal. Code Regs., tit. 14, § 670.1, subd. (h).)

Once the Department's final report and recommendation are received by the Commission, the Commission schedules a hearing for final consideration of the petition (Fish & G. Code, § 2075) and decides whether the petitioned action is warranted or not warranted (*id.*, § 2075.5).

The Commission is required to find a listing warranted if the continued existence of the species is in serious danger or threatened by any one or any combination of six factors, including: 1) present or threatened modification or destruction of its habitat; 2) overexploitation; 3) predation; 4) competition; 5) disease; or 6) other natural occurrences or human-related activities. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A).)

The stated goal of the CalTrout petition is to establish a state-level endangered species "redundancy" with federal coverage for steelhead under the federal ESA. Listing the species as endangered under CESA would also, according to CalTrout, preserve organizing principles that currently direct recovery actions for the species.

With respect to the first CESA listing factor—present or threatened modification or destruction of habitat—CalTrout's petition asserts that the steelhead population has declined largely due to degradation, simplification, fragmentation, and total loss of habitat. The petition cites water withdrawal, storage, conveyance, and diversions—for instance, large dam construction, mainstem channel straightening, and floodplain disconnection—as reducing or eliminating historically accessible habitat. The petition also cites modification of natural flow regimes by water infrastructure development resulting in increased water temperatures and depleted flow necessary for migration, spawning, rearing, and forging, all of which is asserted to be amplified by climate change.

The petition also attributes steelhead population decline on overfishing (which CalTrout suggests is not a principal cause of decline), predation by and competition with expanding populations of non-native aquatic invasive species such as largemouth bass and bullfrogs, disease impacts that are currently unseen and/or unknown but which may be exacerbated by climate change, and other occurrences like increased air and water temperature due to climate change and existing water infrastructure.

Future Management Activities Sought

In addition to asserting the six factors required under CESA have been met, the petition suggests specific future management activities to be undertaken should the steelhead be listed as endangered so as to:

> . . .ensure that all state agencies have the clear mandate to prioritize [steelhead] protection and conservation in strategic planning, funding appropriations, and resource management plans.

Listing the steelhead as endangered would, according to CalTrout, provide the Department with direct authority to oversee projects proposed within the current limits of the steelhead's geographic range over its life-cycle, which includes historical watersheds currently blocked by water infrastructure as well as critical habitat designated by the federal government ranging from Santa Maria to Tijuana. Moreover, listing the steelhead would also allow the Department to establish species-specific mitigation measures that must be met for take coverage to be authorized.

Angling and Stocking Restrictions

The petition also identified specific suggested angling and stocking restrictions, and supports current coverage under the federal Endangered Species Act for steelhead downstream of physical barriers like dams while upstream rainbow trout would remain unlisted under both CESA and the federal ESA.

Conclusion and Implications

While the stated purpose of the petition is to provide redundancy with federal protections, listing the steelhead as endangered under CESA could well have impacts on development and water projects in coastal areas across southern California, from Santa Maria to southern San Diego County. However, it remains to be seen whether the Department will recommend that the Commission consider the petition or reject it. For more information, *see:* Upcoming Evaluation of Southern California Steelhead CESA Petition Fish and Game Commission Action Item, available at: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=193326&inline.
(Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

SAN JOAQUIN TRIBUTARIES AUTHORITY FILES LAWSUIT CHALLENGING STATE WATER BOARD DIVERSION CURTAILMENT ORDER FOR SACRAMENTO-SAN JOAQUIN DELTA

In response to ongoing drought conditions that show no sign of letting up, the California State Water Resources Control Board (State Water Board or SWRCB) issued an emergency drought order on August 20, 2021 (Curtailment Order), ordering approximately 4,500 water rights holders to cease diversion of water in the Sacramento-San Joaquin Delta (Delta). The Curtailment Order follows the State Water Board's adoption of Resolution No. 2021-0028 and the Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Delta Watershed (Curtailment Regulation) of August 3, 2021, which provides the authority for issuance of the Curtailment Order. Not surprisingly, litigation challenging those directives has begun. [*San Joaquin Tributaries Association, et al., v. State Water Resources Control Board,* Case No. 21CECG02632, *filed* September 2, 2021 (Fresno County Super Ct.).]

Background

The Delta watershed is the state's largest source of surface water, supplying a substantial portion of the water supply for two-thirds of Californians and millions of acres of farmland. The Curtailment Regulation and Curtailment Order state that they seek to protect drinking water supplies for 25 million Californians and irrigation supplies for over three million acres of farmland. Any diversion of water in violation of the Curtailment Order may be subject to administrative fines of $1,000 per day and $2,500 per acre-foot of water diverted, cease and desist orders, and other severe penalties. According to the SWRCB, the Curtailment Order impacts approximately 4,500 of the 6,600 water right holders in the Delta. The Curtailment Regulation and Curtailment Order do not provide a specific date that irrigation districts and others may resume diverting and storing water. In early September 2021, the San Joaquin Tributaries Association (SJTA), comprising Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, Modesto Irrigation District, and the City and County of San Francisco, filed a petition for writ of mandate and verified complaint for declaratory and injunctive relief in the Fresno Superior Court seeking to set aside the Curtailment Regulation and the Curtailment Order.

Suit Claims State Water Board Lacks the Authority over Pre-1914 Rights

The complaint asserts that while the SWRCB has exclusive jurisdiction to issue post 1914 appropriative permits and licenses, only the courts have jurisdiction to adjudicate disputes between and among pre-1914 and riparian water right holders. SJTA further asserts that the State Water Board lacks authority and jurisdiction to administer, oversee or regulate riparian and pre-1914 water rights or the diversion of water pursuant to those rights.

Further Allegations

The SJTA asserts that the Curtailment Order is unlawful, and that the Curtailment Regulation is flawed and invalid on further grounds, including that:

- It is based on deficient methodology;

- It violates the Due Process clauses of the United States and California Constitutions because it does not require the State Water Board to provide notice and a hearing before depriving water right holders of rights to divert water and put it to beneficial use;

- It is an unlawful adjudicatory action conducted without a hearing because it determines the validity of numerous unverified water right claims in the Delta, it determines the relative priority of water rights across multiple sub-watersheds within the Delta watershed, and it unlawfully takes property rights without due process or just compensation;

- It violates the rules of water right priority by excepting certain beneficial uses by junior water right holders from curtailment; and

- Unless invalidated and/or enjoined, the Curtailment Regulation will unlawfully injure the water rights and impair the operations of the SJTA member agencies.

The complaint seeks several forms of relief, including that the court set aside the Curtailment Regulation and make a determination that it: 1) exceeds the SWRCB's authority and jurisdiction; 2) violates the due process rights of the SJTA; 3) violates the rules of priority; (4) is arbitrary, capricious and not supported by evidence; and (5) amounts to an unauthorized amendment to the Water Quality Control Plan. The complaint further requests that the Superior Court issue a judicial declaration that the Curtailment Regulation violates various provisions of the Government Code and Water Code, as well as the Governor's Drought Emergency Proclamation of May 10, 2021.

Conclusion and Implications

California is enduring yet another year of historic drought conditions. This, in turn, has again prompted the State Water Board to take aggressive management measures. Rather than beginning with the curtailment of junior water rights holders and phasing in later curtailment of senior water rights holders, the State Water Resources Control Board's curtailment directives immediately include pre-1914 and riparian water rights holders without providing any delay for seniority. This appears to be even more aggressive than curtailment orders previously issued by the State Water Board during the last drought, and has, not surprisingly, drawn prompt legal challenges.
(Gabriel J. Pitassi, Derek R. Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT CONTINUES TO UPHOLD THE SIGNIFICANT NEXUS TEST FOR NAVIGABLE WATERS UNDER THE FEDERAL CLEAN WATER ACT

Sackett v. U.S. Environmental Protection Agency, et al., 8 F.4th 1075 (9th Cir. 2021).

For the last 13 years, the U.S. Environmental Protection Agency (EPA) and the Sacketts, Michael and Chantell, have been engaged in what can only be described as a federal Clean Water Act (CWA) saga, that has generated largely procedural CWA case law. For instance, in 2012, upon hearing one of the Sacketts' cases, the U.S. Supreme Court determined that issuance of a jurisdictional determination by the U.S. Corps of Engineers (Corps), that identifies jurisdictional "Waters of the United States" (WOTUS), constituted final agency action subject to challenge in federal court. (*Sackett v. U.S. Environmental Protection Agency*, 566 U.S. 120 (2012).) In the most recent case, the Ninth Circuit Court of Appeals primarily considered whether the Sacketts' Idaho property contained wetlands subject CWA Section 404 dredge and fill permitting requirements. (*Sackett v. U.S. Environmental Protection Agency*, (9th Cir. 2021); 33 U.S.C. § 1344.) To reach a conclusion, the Ninth Circuit examined which of the now-many WOTUS definitions controlled the character of wetlands in this case, as well as which opinion, in the notoriously fractured *Rapanos v. United States,* (547 U.S. 715 (2006)), applies. Ultimately, the Ninth Circuit found that the WOTUS definition in place at the time of agency action controls the analysis, and that, pursuant to the holding in *Northern California River Watch v. City of Healdsburg,* 496 F.3d 993 (9th Cir. 2007)), Justice Kennedy's significant nexus test is the controlling case law in the Circuit.

Factual Background of the Sacketts' Case

In 2004, the Sacketts purchased a residential lot near Priest Lake in Idaho, which they intended to develop. In 2007, after obtaining county building permits, the Sacketts placed sand and gravel fill on the property, prompting EPA to issue a compliance order requiring restoration of the property's jurisdictional wetlands, and spurring a challenge by the Sacketts, which has been winding through the federal courts in a myriad of ways ever since. Moreover, in 2008, the Corps issued a jurisdictional determination (JD) indicating that the property contained wetlands subject to regulation under the CWA and supporting the compliance order.

On the eve of a 2020 EPA briefing deadline, which the court had twice extended, EPA issued a letter to the Sacketts withdrawing the amended compliance order issued 12 years prior. Consequently, EPA moved to dismiss the case as moot. However, the court did not find EPA's mootness arguments persuasive in light of the agency's ongoing modification of the WOTUS definition, among other issues. The Ninth Circuit explained that one EPA administration's decision not to enforce a compliance order did not bind the agency in the future under different leadership. Ultimately, the court determined the case was not moot, as enforcement of the compliance order could resume with a new administration, and proceeded to hear oral argument.

Background of the WOTUS Definition

As the Sacketts' case made its way through the federal courts, the EPA and Corps (Agencies) modified the WOTUS definition on a number of occasions: in 2015, under the Obama Administration, the Agencies issued the Clean Water Rule (80 Fed. Reg. 37054); in 2019, the Agencies, under the Trump administration, restored the pre-2015 WOTUS definitions as a part of its repeal and replace effort (84 Fed. Reg. 56626); in 2020, the Agencies, again under the Trump administration, issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250); and most recently, a U.S. District Court in Arizona vacated the Navigable Waters Protection Rule, (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*,

___F.Supp.4th___,Case No. CV-20-00266-TUC-RM (D. Ariz. 2021)), prompting the Agencies' to issue a statement that the earlier pre-2015 regime applies once again for the time being. The Agencies, under the Biden administration, also intend to place their stamp on the WOTUS definition; however, the timing of a new WOTUS definition is uncertain. (86 Fed. Reg. 41911.)

In addition to the Agencies' ongoing modification of the WOTUS definition, Supreme Court case law has shaped the interpretation of WOTUS over the years. In 1985, the Court held that wetlands abutting traditional navigable waterways were considered WOTUS in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In 2001, the Court clarified that "non-navigable, isolated, intrastate waters" did not constitute WOTUS subject to regulation, and effectively eviscerated the "migratory bird rule" in *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001). And perhaps most famously, in 2006, the Supreme Court issued a notoriously fractured opinion in *Rapanos v. United States*, which articulated no clear majority interpretation of the WOTUS definition. Justice Scalia, writing for the plurality, articulated that jurisdictional wetlands are confined to those with a "continuous surface connection" to "relatively permanent, standing or flowing bodies of water." While, Justice Kennedy issued a separate concurrence, establishing the "significant nexus test," which turns on whether wetlands, "alone or in combination with similarly situation lands" would "significantly affect the chemical, physical, and biological integrity" of more traditional navigable water bodies.

The Ninth Circuit's Decision

The Sacketts argued that the Scalia plurality opinion set forth in the *Rapanos* case is the governing standard; because their property does not have a continuous surface connection to a navigable water, it is not subject to regulation under the CWA. However, the Ninth Circuit disagreed, finding that *Northern California River Watch v. City of Healdsburg*, which applied Justice Kennedy's significant nexus test, is the controlling law of the Circuit. The Sacketts argued that when the Ninth Circuit held Justice Kennedy's significant nexus test was controlling law for the Ninth Circuit, the court failed to apply a reasoning-based approach for determining which opinion applies under a fractured case with no prevailing majority, as required by *United States v. Davis*, (825 F.3d 1014 (9th Cir. 2016) (*en banc*)). However, the court rejected the Sacketts' argument and upheld *Healdsburg* and the significant nexus test, paving the way for a determination that the Sacketts' property contained wetlands subject to the CWA.

Conclusion and Implications

The 2020 Navigable Waters Protection Rule attempted to do away with the significant nexus test, initially making *Sackett v. EPA* notable for the continued application of the significant nexus test in the Ninth Circuit. However, the import of *Sackett v. U.S. EPA*, in terms of applying the significant nexus test despite adoption of the Navigable Waters Protection Rule, has likely been diminished by the Agencies' purported return to the pre-2015 WOTUS definition, which includes application of the significant nexus standard. Additionally, in *Sackett*, the Ninth Circuit Court of Appeals found that the WOTUS definition in place at the time of the challenged agency action (here, issuance of the compliance order and JD) controlled, allowing the court to apply the significant nexus test without controversy, to determine the status of Sacketts' property. Taken together, recent developments confirm that the significant nexus test is likely the law of the land in the Ninth Circuit, at least for now. The Ninth Circuit's opinion of August 18, 2021 is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca9-19-35469/pdf/USCOURTS-ca9-19-35469-0.pdf.

(Meghan A. Quinn, Alexandra L. Lizano, Darrin Gambelin)

NINTH CIRCUIT UPHOLDS ARMY CORPS PLAN TO DREDGE NAVIGATIONAL CHANNELS IN SAN FRANCISCO BAY UNDER THE COASTAL ZONE MANAGEMENT ACT

San Francisco Bay Conservation & Development Commission v. U.S. Army Corps of Engineers, 8 F.4th 839 (9th Cir. 2021).

The Ninth Circuit Court of Appeals in *San Francisco Bay Conservation and Development Commission v. U.S. Army Corps of Engineers* affirmed summary judgment in favor of the U.S. Army Corps of Engineers (Corps) in an action challenging the Corps' 2017 plan to dredge 11 navigational channels in the San Francisco Bay. The San Francisco Bay Conservation and Development Commission (Commission), which approved the plan subject to conditions, claimed the Corps violated the Coastal Zone Management Act (CZMA) by failing to adhere to dredging disposal conditions. The Ninth Circuit rejected the Commission's claim on grounds that the conditions were not enforceable under the governing CZMA management program.

Facts and Procedural Background

The Coastal Zone Management Act (CZMA) was enacted in 1972 to protect the nation's coastal zone resources. The act facilities cooperative federalism by encouraging states to develop management plans for their coastal zones, for submission and approval by the National Ocean and Atmospheric Administration (NOAA).

Before a federal activity may be conducted in a state's coastal zone, the federal agency must obtain the state's approval in the form of a "consistency determination" (CD). The CD must explain how the federal activity is consistent with the enforceable policies of the state-approved management program. The implementing state agency may concur, conditionally concur, or object to the CD. If the state conditionally concurs, it must set forth conditions for compliance and explain why those conditions are necessary to ensure consistency with the program's enforceable policies. The federal agency may reject the state's conditions, but doing so renders the concurrence an objection. The federal agency is prohibited from proceeding with a project over a state's objection, unless the federal agency concludes that the action is fully consistent with the management program's enforceable policies, or, that full consistency is prohibited by existing law. The federal agency generally cannot evade an enforceable program policy solely based on cost.

Dredging in the San Francisco Bay

The U.S. Army Corps of Engineers oversees the dredging of navigable waterways in the San Francisco Bay. Dredging removes sediment that accumulates in the Bay's channel beds via one of two methods: hydraulic dredging, which uses suction to remove material from the channel floor; or mechanical (clamshell) dredging, which scoops sedimentary material from the channel to remove it. The dredged sedimentary material is then deposited in one of three alternative sites: 1) in-Bay disposal sites, which are the least expensive but environmentally disfavored; 2) beneficial reuse sites, which are environmentally favored but more costly; and 3) ocean disposal sites.

The San Francisco Bay area is managed by the San Francisco Bay Plan. The Bay Plan was adopted in 1965 and created the San Francisco Bay Conservation and Development Commission to oversee its implementation and management. Because the Bay Plan was adopted prior to the enactment of the CZMA, NOAA formally approved the Bay Plan and wholly incorporated it into the CZMA's federal scheme in 1977. Therefore, any amendments to the Plan must be approved by NOAA in order to render it legally enforceable against the federal government.

The Bay Plan is one of many federal-state cooperative efforts that has shaped how dredged material in the San Francisco Bay area is disposed of. Another effort, the Long-Term Management Strategy (LTMS), was released in 1999 through a collaboration between several regional, state, and federal agencies. The LTMS was created to guide agency decisions about the placement of dredged material in the Bay Area over the next 50 years. The LTMS endorsed a "long-term approach" of low in-Bay disposal (approximately 20 percent), medium ocean disposal (approximately

40 percent), and medium upland/wetland reuse (approximately 40 percent) (the 20/40 Goal). In 2001, the LTMS was used to inform several NOAA-approved amendments to the Bay Plan, including three policies that envisioned reducing the disposal of dredged material back into the Bay and increasing reuse of such material for environmentally friendly purposes.

The Army Corps' 2017 San Francisco Bay Dredging Plan

In March 2015, the Corps submitted proposal to the Commission and the Regional Water Quality Control Board (RWQCB) to dredge 11 of the Bay's navigational channels. The Corps submitted a CD to the Commission that proposed dumping up to 48 percent of the Corps' dredged material back into the Bay. The Corps concurrently applied to the Regional Water Board for a related Water Quality Certification (WQC).

In June 2015, the Commission responded to the Corps with a Letter of Agreement (LOA) that conditionally concurred with the CD. The LOA set forth two conditions of approval: 1) the "20/40 Disposal Condition," which reduced the volume of material deposited in the Bay to meet the 20/40 goal of the LTMS; and 2) the "Hydraulic Dredge Condition," which limited the Corps to using one hydraulic dredge in certain channels. Citing the Corps' regulations, the LOA directed the Corps to obtain funding to accomplish these conditions. A Corps representative signed the LOA on June 23, 2015.

In November 2015, the Corps rescinded its acceptance of the LOA and conditions, citing funding limitations and the costs associated with complying with the Disposal and Dredge Conditions. The Corps sent a similar letter to the RWQCB, which disavowed a WQC condition that limited hydraulic dredging to a maximum of one federal in-Bay channel per year.

After consulting with the Commission and RWQCB, the Corps proposed four potential courses of action (COA): (1) status quo dredging and placement; (2) dredging in accordance with the WQC, but not the LOA; (3) dredging in accordance with the LOA, but not the WQC; and (4) defer all maintenance dredging of the Bay. In January 2017, the Corps adopted the second course of action (COA #2), which amounted to a final action that rejected the 20/40 Disposal Condition and committed the Corps to hydraulically dredging only one of the federal channels.

At the U.S. District Court

In September 2016, the Commission filed suit seeking a declaration that the Corps was required to conduct dredging pursuant to the LOA. The San Francisco Baykeeper intervened in June 2017 after the Corps adopted COA #2. The parties filed cross-motions for summary judgment. The plaintiffs argued that the Corps' actions violated the CZMA because lack of funding and cost could not excuse the Corps from its obligation to comply with the LOA's conditions. The plaintiffs contended that the LOA's conditions were enforceable because they were necessary to ensure the Corps' operations were consistent with the enforceable policies under the Bay Plan. The Corps opposed by claiming the conditions were not based on enforceable policies under the CZMA.

The U.S. District Court for the Northern District of California granted summary judgment in favor of the Corps, holding that the Bay Plan's dredging policies related to the 20/40 Disposal Condition were generalized policy statements and not legally enforceable under the CZMA. The court further found that COA #2 met the hydraulic dredge condition imposed by the WQC and LOA.

Plaintiffs timely appealed, arguing, among other claims, that the Corps' adoption of COA #2 violated the CZMA because the Commission's conditions are linked to federally enforceable policies.

The Ninth Circuit's Decision

A panel for the Ninth Circuit Court of Appeals affirmed the District Court's grant of summary judgment in favor of the Corps. Writing for the panel, Judge Schroeder rejected the plaintiffs' claim that the Corps was required to comply with the 20/40 Condition because the condition was not supported by an enforceable policy under the CZMA.

The Ninth Circuit reasoned that the plaintiffs had correctly explained how the CZMA prohibits federal agencies, such as the Corps, from refusing to comply with a conditional concurrence solely on the basis of cost. However, the 20/40 Disposal Condition was not based on an "enforceable policy" of the Bay Plan. Instead, the 20/40 Disposal Condition required the Corps to meet specific numerical targets

that achieved the LTMS's goals—*i.e.*, no more than 20 percent of the Corps' dredged material could be disposed of in the Bay, and no less than 40 percent of the dredged material must be committed to beneficial reuse. However, the court explained that these metrics were not drawn from any actual or related provision of a NOAA-approved coastal management program.

The panel further explained that the 20/40 Disposal Condition was based on the LTMS, which never received NOAA approval, As such, its numerical targets were unenforceable as conditions under the Bay Plan or any other CZMA management program. The court rejected plaintiffs' counterargument that the Disposal Condition was based on the 2001 NOAA-approved amendments to the Bay Plan, observing that the policies spoke in general terms and did not contain any ratios or percentage-based targets. While it is true that the CZMA does not require policies to contain specific criteria to be enforceable, they must provide some meaningful guidance as to what is and is not permissible. For these reasons, the appellate court held that the Bay Plan's dredging policies did not contemplate specific ratios or allocations among different sites for the disposal of dredged materials, much less impose such requirements on an individual basis.

Because plaintiffs had not shown any textual or practical connection between the 20/40 Disposal Condition and the approved Bay Plan Policies in support thereof, the Ninth Circuit concluded that the condition was neither necessary to ensure consistency with, or based on enforceable policies, as permitted under the CZMA. Accordingly, the court held the 20/40 Disposal Condition was unenforceable and the Corps was not required to comply with it.

Conclusion and Implications

The Ninth Circuit's opinion provides a straightforward interpretation and analysis of the Coastal Zone Management Act. The opinion highlights the delicate balance of cooperative federalism between state and federal agencies, particularly with respect to activities in coastal zones. As the court's opinion explains, the CZMA defers to state agencies to ensure federal activities are consistent with the state coastal zone management programs. However, conditions of approval must be premised on specific and enforceable policies. Where, as here, policies merely contained overarching goals for the aggregate allocation of dredged material, state agencies should exercise caution in relying on them to impose specific obligations on individual federal actors such as the Corps. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/06/20-15576.pdf.
(Bridget McDonald)

DISTRICT COURT VACATES AND REMANDS THE NAVIGABLE WATERS PROTECTION RULE: PRE-2015 WOTUS RULES SPRING BACK INTO EFFECT

Pascua Yaqui Tribe v. U.S. Environmental Protection Agency, ___F.Supp.4th___, Case No. CV-20-00266-TUC-RM (D. Ariz. Aug. 30, 2021).

On August 30, 2021, a U.S. District Court judge in Arizona vacated the 2020 Navigable Waters Protection Rule (NWPR), which defines what constitutes "waters of the United States" (WOTUS) under the federal Clean Water Act (CWA) and remanded the rule to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) for further review.

Clean Water Act Background and History of Recent WOTUS Regulation

The CWA was enacted for the specific purpose of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Importantly, the CWA regulates discharge of pollutants into "navigable waters." Navigable waters are in turn defined as "waters of the

United States, including the territorial seas"—WOTUS. 33 U.S.C. § 1362(7). However, the text of the CWA does not further define WOTUS and as such, the EPA and Corps (collectively: Federal Agencies) are tasked with creating regulations to define WOTUS. Whether certain water bodies fall within the definition of WOTUS determines whether the EPA and Corps can regulate those water bodies under the Federal Agencies' CWA authority, or whether regulation is left to the relevant state and its own region-specific water protection rules.

Since the late 1980s, project stakeholders and potential permittees relied upon the 1986/1988 regulations and associated guidance issued by the Federal Agencies to determine what constitutes a WOTUS, as further interpreted through relevant evolving case law (*e.g.*, more recently, the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 716 (2006), among others). Differing interpretation and application of that evolving case law became a lightning rod for controversy. Responding to stakeholder demands for more clarity as to what constitutes a WOTUS, in 2015, the Obama-era Federal Agencies promulgated the "Clean Water Rule," which broadly redefined the term "navigable waters," so as to become the unified rule. In 2020, the Trump-era Federal Agencies repealed the Clean Water Rule and replaced it with the NWPR, which again redefined navigable waters into more narrowed, enunciated categories, largely based on Justice Scalia's plurality opinion in *Rapanos*.

On Inauguration Day in 2021, the Biden administration issued Executive Order 13990 (*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*), directing the Federal Agencies to review Trump administration regulations, including the NWPR. Thereafter, on June 9, 2021, the Federal Agencies announced their intention, through two separate rulemakings, to again revise the definition of WOTUS.

Factual Premise of *Pascua Yaqui Tribe* Case

Plaintiffs are Native American Tribes relying on waters subject to CWA regulation and protection. Plaintiffs had challenged two federal rules: 1) the 2019 rule enacted during the Trump administration that repealed the Obama administration's 2015 Clean Water Rule; and 2) the 2020 NWPR enacted under the Trump administration, arguing that both rules were arbitrary and capricious because they were contrary to scientific and technical evidence before the Federal Agencies. Instead of defending either rule in response to motions for summary judgment, and because the Federal Agencies already indicated their intent to revise the NWPR, the Federal Agencies sought voluntary remand of the NWPR. Importantly, the Federal Agencies did not seek *vacatur* of the NWPR (meaning, the NWPR would remain in effect during that period) so as to avoid further regulatory upheaval.

Remand of the NWPR with *Vacatur*

The plaintiff tribes argued that remand should include *vacatur* in order to prevent "significant, irreversible harms." The Ninth Circuit Court of Appeals will generally remand challenged rules without *vacatur* in circumstances in which there is a risk of environmental harm stemming therefrom, or the agency could offer better reasoning and adopt the same rule to moot the challenge. The inquiry of whether *vacatur* is appropriate is also a function of the seriousness of the agency's errors.

Agency action is deemed arbitrary and capricious if the agency: 1) relied on factors Congress did not intend it to consider; 2) failed to consider an important aspect of the problem; 3) relies on reasoning contrary to evidence before it; or 4) is so implausible it is not the product of agency expertise.

The District Court's Decision

Plaintiffs argued that the Federal Agencies' adopted the NWPR in a manner that disregarded established science and the Federal Agencies' own expertise, resulting in serious error arising to the level of arbitrary and capricious, and the U.S. District Court was persuaded. The court also found telling that the Federal Agencies in their papers agreed there were "substantial concerns about certain aspects of NWPR." As such, the District Court reasoned that the errors involved "fundamental, substantive flaws that cannot be cured without revising or replacing" the NWPR. The District Court explained that the combination of the Federal Agencies' error and potential for serious environmental harm if the NWPR remains in place warranted *vacatur*. *Pascua Yaqui Tribe*, 2021 WL 3855977, at *5.

Defendant-Intervenors' Objection to *Vacatur*

Defendant-Intervenors (comprised of individuals and affected businesses) did not object to the remand (with one exception related to adjacent wetlands), but did object to *vacatur* because of the alleged regulatory uncertainty that would result. The District Court rejected that argument, reasoning that regulatory uncertainty is present any time a rule is vacated. The District Court also noted that the Federal Agencies' are familiar with implementing the pre-2015 WOTUS regime, and would simply return to that approach.

Conclusion and Implications

This District Court decision was the first to remand and vacate the NWPR, and its immediate implications were murky as to its regional or national effect. In an effort to eliminate any uncertainty, within days of the District Court's decision, on September 3, 2021, the Federal Agencies publicly announced that they are halting implementation of the NWPR nationwide, and directed stakeholders and regulatory agencies to resort to the pre-2015 regulatory regime until further notice (*See* https://www.epa.gov/wotus/current-implementation-waters-united-states). As such, jurisdictional determinations as to whether a water or wetland is a WOTUS will be based on the 1986/1988 rules and guidance, and relevant case law such as the *Rapanos* decision.
(Nicole E. Granquist, Alexandra L. Lizano, Meredith Nikkel)

RECENT CALIFORNIA DECISIONS

FIFTH DISTRICT COURT FINDS SUFFICIENCY OF WATER SUPPLY NECESSARY FOR EMINENT DOMAIN ACTION SUBJECT TO CEQA

Los Angeles Department of Water and Power v. County of Inyo, ___Cal.App.5th___, Case No. F081389 (5th Dist. Aug. 17, 2021).

In August, the California Court of Appeal for the Fifth Appellate District affirmed a lower court ruling determining that the County of Inyo's (County) attempt to condemn in fee simple certain parcels of land owned by the Los Angeles Department of Water and Power (LADWP), which the County leased for landfill sites did not comply with the California Environmental Quality Act (CEQA). In upholding the lower court's ruling, the Court of Appeal determined that the County had not, among other deficiencies, adequately considered the sources of water for continued operation of the landfills if the County were to succeed in its condemnation effort, including the potential development of new groundwater rights. The court's opinion was certified for *partial publication*.

Background

The City of Los Angeles, acting through the Los Angeles Department of Water and Power leases land to the County of Inyo for waste management purposes. The three landfills that are the subject of the lawsuit are located on sites the County leases from LADWP. Each landfill is unlined.

The landfills are operated by Inyo County Recycling and Waste Management. Landfill operations are subject to regulatory oversight and permits issued by several state agencies, including the California Department of Resources Recycling and Recovery (CalRecycle) and the Regional Water Quality Control Board for the Lahontan Region (Regional Board or RWQCB). Each landfill is subject to conditions imposed by CalRecycle, including the type and daily maximum tonnage of waste, the landfill's area, design capacity, maximum elevation, maximum depth, and the estimated closure year. The Regional Board is required under the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 *et seq.*) to review and classify operating waste disposal sites within its region. By 2001, the RWQCB had issued waste discharge permits for the three landfills.

In 2015, the County prepared an application for revisions to its operating permit with CalRecycle seeking, among other changes, to increase peak daily tonnage by 33 percent, increase average daily tonnage by 25 percent, increase capacity by approximately 50 percent, and accelerate the closure date by nearly 40 percent from 2097 to 2064. The County submitted an updated application in 2017 seeking similar changes, which were based on prior CEQA review the County had conducted in 1999 and 2012 related to updated operating permit applications. The County's prior CEQA review concluded that the operation of the landfills, with implementation of recommended mitigation measures, would not result in significant environmental effects and thus the County was not required to prepare an Environmental Impact Report (EIR) for any of the landfills.

In July 2017, the County provided LADWP notice of its intent to adopt a resolution of necessity to acquire the landfill sites by eminent domain. A prominent feature of the County's rationale for seeking condemnation was alleged uncertainty about the County's ability to provide long-term waste management services in light of lease negotiations with LADWP, which included rent terms and termination rights in LADWP that the County found objectionable, as well as restrictions on importing waste from neighboring counties for disposal at the County's landfills. Accordingly, County staff proposed acquiring fee title to the landfill sites, including its water rights.

LADWP objected to the County's proposed taking of the landfill sites, including by asserting that the County did not need fee simple ownership of its proposed continued operation of the landfill and that there was no public necessity for the County to ac-

quire ownership of appurtenant water rights. LADWP specifically asserted that the County had historically been lax in its landfill operations and, without adequate oversight, the County's operations would likely pose a significant threat to the Owens Valley watershed and groundwater that supplies the Owens River and the Los Angeles Aqueduct. LADWP also asserted that compliance with CEQA was required before the County could condemn the landfill sites, including an adequate description of the proposed project and analysis of its potential environmental effects.

The County board of supervisors proceeded to unanimously adopt separate resolutions of necessity authorizing the condemnation of the three landfill sites for continued landfill purposes. Specifically, the resolutions stated that the County intended to continue to use and operate the landfills, and in connection with such use and operation, to acquire interests in certain real property. The County collectively defined such use, operation, and acquisition of additional interests as the "project."

At the Superior Court

LADWP filed a petition for writ of mandate in Inyo County Superior Court in February 2018 alleging that the County failed to property identify the true nature and scope of the "project" as that term is used in CEQA. LADWP also alleged that the County improperly determined its approval of the three resolutions of necessity were categorically exempt from CEQA. The County contended that it did not need to conduct CEQA review of future changes that the County had not yet proposed, such as digging new groundwater wells, and that substantial evidence supported the County's conclusion that acquisition of the landfill sites will not itself result in any environmental changes.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (§ 21080, subd. (a).) CEQA broadly defines a "project" as:

> . . .an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is […] [a]n activity directly undertaken by any public agency. (§ 21065.)

In its petition, LADWP argued that the County inaccurately described the project by omitting several integral parts, including critical information about: 1) the nature and extent of the project; 2) the development of new groundwater rights; 3) the acquisition of property with existing and threatened soil and groundwater contamination; 4) the expansion of permitted daily tonnage and site capacity; 5) the import of waste; and 6) the remaining operational life of the landfills. The trial court ruled that the County's description of the project impermissibly omitted reasonably foreseeable consequences of the project, including the development and use of groundwater below the three landfills.

The Court of Appeal's Decision

The Court of Appeal first reviewed the trial court's finding related to water for the project, including its source and use. According to the court, the fee interest the County sought to acquire "plainly establishe[d]" that the County intended to acquire ownership of the land and the appurtenant water rights, which the County acknowledged were critical for the operation of the landfills. However, the County omitted identifying the sources of water for continued operation of the landfills. The Court of Appeal deemed this significant because the largest landfill relies on water from a domestic well on an adjacent parcel leased from LADWP, but which was not certain to remain available to the County if it acquired the landfill site in fee. Similarly, the court observed that the County's approval of acquiring the land in fee, including water rights, established that the development of the water rights being acquired was reasonably foreseeable. Accordingly, the court concluded that continued operation of the largest landfill was dependent on securing a water source, which in turn constituted part of the "project" under CEQA. However, the County did not include securing a source of water for the continued operation of the largest landfill in its description of the project nor include the development of groundwater rights at the other sites. The court therefore determined that the County failed to proceed in the manner required by CEQA when it described the project.

Conclusion and Implications

It remains to be seen whether Inyo County will continue to pursue acquiring the LADWP, owned

landfill sites by eminent domain in compliance with the Court of Appeal's affirmance of the trial court's ruling. However, the court's decision is instructive because it holds that transfers of ownership in property via eminent domain may constitute projects under CEQA that require review and analysis of water sources for the project, even if the project currently has access to an adequate supply of water. Thus, careful consideration of available water supplies in supporting or opposing an action to acquire property in eminent domain may be crucial to the viability of such actions. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F081389.PDF.
(Miles Krieger, Steve Anderson)

SECOND DISTRICT COURT UPHOLDS ENVIRONMENTAL IMPACT REPORT ANALYZING IMPROVEMENT PROJECT BY THE WATERSHED CONSERVATION AUTHORITY IN THE ANGELES NATIONAL FOREST

Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority, 68 Cal.App.5th 8 (2nd Dist. 2021).

Save Our Access-San Gabriel Mountains (Save Our Access) petitioned for a writ of mandate challenging an action by the Watershed Conservation Authority (Authority) to certify an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA) and approve an improvement project in the Angeles National Forest. The Superior Court granted the petition in part and issued a writ of mandate, and then awarded Save Our Access $154,000 in attorney fees. Both parties appealed, and the Court of Appeal reversed, finding that the EIR's analysis of parking and alternatives was sufficient, and that the project did not conflict with a land management plan or presidential proclamation regarding the forest.

Factual and Procedural Background

The project at issue was known as the San Gabriel River Confluence with Cattle Canyon Improvements Project, which would occur within 198 acres along a 2.5-mile stretch of the East Fork of the San Gabriel River, in the Angeles National Forest. The overall intent of the project is to provide recreational improvements and ecological restoration to address resource management challenges with a focus on reducing impacts along the most heavily used sections of the river. Enhancements include, among other things, the development of new picnic areas, pedestrian trails, river access points and upgrades to existing facilities, improvements to paved and unpaved roadways, parking improvements, restrooms and refuse disposal improvements, restoration of riparian and upland vegetation communities, and implementation of a Forest Closure Order to prohibit overnight camping.

A Draft EIR for the proposed project was circulated in November 2017 for public comments. With respect to parking, which was the focus of Save Our Access's legal challenge, the Draft EIR described the existing limited number of designated parking spaces and the widespread practice of parking in undesignated areas. The Draft EIR proposed to formalize parking spaces by adding features such as pavement, stripes, and signage. Undesignated parking areas would be blocked with boulders and "no parking" signage would be installed, resulting in a reduction in the available parking and a corresponding reduction in the number of visitors able to park within the project site. Displacement that would occur, the Draft EIR found, would lead to increased use at other areas with similar amenities within the region, and it was assumed that displaced visitors would be dispersed across the region as they find substitute activities. However, the Draft EIR concluded that—notwithstanding the reduction in overall parking—the project would not increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial deterioration of those facilities would occur or be accelerated.

Following completion of a Final EIR, including responses to all public comments, the Authority certified the EIR and approved the project in October 2018. Save Our Access then sued in November 2018,

seeking a writ of mandate directing the Authority to set aside its approval. The Superior Court granted the petition in part, concluding the project would create or exacerbate a parking shortage and, without adequate analysis and evidence of how that shortage would materialize, it could not be said that the project's parking impacts are insignificant. In a later order, the court awarded Save Our Access $154,000 in attorney fees. Appeals then followed.

The Court of Appeal's Decision

Parking

The Court of Appeal first addressed parking, disagreeing with the Superior Court that the EIR's analysis of parking was deficient. In particular, the Court of Appeal found that Save Our Access had not identified any adverse physical impact on the environment resulting from the reduction in parking, much less a potentially substantial, adverse change in any of the physical conditions within the area affected by the project. Nor had Save Our Access put forth evidence of any secondary adverse environmental effects of reduced parking, such as secondary traffic or air quality impacts at the project site. The court also agreed with *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App.4th 656 (2002), which stated "[t]he social inconvenience of having to hunt for scarce parking spaces is not an environmental impact; the secondary effect of scare parking on traffic and air quality *is*." While the court also acknowledged that in some instances parking could have a significant adverse impact on the environment, citing *Taypayers for Accountable School Bond Spending v. San Diego Unified School District*, 214 Cal.App.4th 1013 (2013), it found that the circumstances of the particular case are determinative. Here, given that Save Our Access had not alleged anything other than essentially a social inconvenience, and that the improvement project overall was intended to prevent further adverse physical impacts on the environment associated with the public's use of the area, the Court of Appeal rejected Save Our Access's claims regarding parking.

Alternatives Analysis

The Court of Appeal next addressed Save Our Access's claims that the EIR's alternatives analysis was deficient. Generally, an EIR is required to evaluate a reasonable range of alternatives that would feasibly attain most of the basic project objectives but would avoid or substantially lessen any of the significant effects of the project. There is no rule governing the specific number of alternatives that must be analyzed, but the EIR must set forth a range of alternatives necessary to permit a reasoned choice and examine those that the lead agency finds could feasibly attain most of the basic objectives of the project.

Here, the project EIR analyzed only two alternatives: 1) the proposed project; and 2) a "no project" alternative, which is required under CEQA. The Court of Appeal found that, under the circumstances of the case, this was reasonable. As a threshold matter, the Court of Appeal first rejected Save Our Access's contention that, under CEQA, an EIR must necessarily address more than the proposed project and the "no project" alternative. The court then noted, among other things, that the Authority had taken extensive pre-Draft EIR initiatives to design a project that would meet its stewardship and recreational goals. Environmental impacts of the project were studied in the Draft EIR, which found no significant impacts that could not be avoided or reduced to a less than significant level. The EIR also described various alternatives that were considered but ultimately were eliminated from full analysis. The EIR then analyzed the project and the "no project" alternative in detail. Under these circumstances, the Court of Appeal agreed with the Authority that consideration of other project alternatives was unnecessary.

Conflicts With Land Management Plans

The Court of Appeal next addressed Save Our Access' claim that the project conflicted with the Angeles National Forest Land Management Plan and President Obama's designation of the area as a national monument in Proclamation 9194. In particular, Save Our Access asserted that the project's reduction in parking conflicted with Proclamation 9194's objective to facilitate the growing population's use of the area. The court disagreed, finding this argument elevated parking concerns above all other objectives of the proclamation. The Court of Appeal also disagreed with Save Our Access' claim that the project was inconsistent with the Angeles National Forest Land Management Plan because it would limit recreational use. The court noted that the project's purpose was to

improve the existing multi-use areas for public enjoyment. It would not restrict access to the area; it would provide for new and improved facilities.

Finally, the Court of Appeal noted that its resolution of the parties' appeals on the merits compelled reversal of the Superior Court's award of attorney fees to Save Our Access.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the discussion of parking under CEQA as well as a discussion of alternatives. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B303494.PDF. (James Purvis)

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