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CALIFORNIA WATER LAW & POLICY Reporter™

CONTENTS

Continued on next page

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CALIFORNIA WATER NEWS

FEDERAL EMERGENCY MANAGEMENT FLOOD AGENCY RISK RATING 2.0 ROLLS OUT AS FIRST MAJOR UPDATE TO PRICING METHODOLOGY IN 50 YEARS

Formally taking effect as of October 1, 2021, Risk Rating 2.0 is the first time the Federal Emergency Management Agency (FEMA) has updated its pricing methodology for flood risk since the 1970s. The pricing of rates under the National Flood Insurance Program (NFIP) has been based on relatively static measurements, emphasizing a property's elevation within a zone on FEMA's Flood Insurance Rate Map. With the implementation of Risk Rating 2.0, however, FEMA expects the new rates to more accurately reflect the risks associated with properties throughout the country.

Background

According to FEMA, Risk Rating 2.0 is designed in part to correct the problem of policyholders with properties of lower value paying rates that more accurately reflect the risk associated with homes of higher value. Whereas the traditional pricing methodology relied heavily on FEMA's Flood Insurance Rate Map, Risk Rating 2.0 models a property's risk through various considerations like the probability of inland flooding, historical storm surges, the cost to rebuild the property, historical losses, elevation, and any natural surroundings and barriers to the property.

FEMA breaks down its projections for rate changes across four categories: immediate cost reductions; increases that are $10 or less a month; increases between $10 and $20 a month; and increases of more than $20 a month. Under the new rates, FEMA estimates that Risk Rating 2.0 will result in immediate cost reductions for 23 percent of existing policies nationwide. While this means that nearly 1.2 million policies nationwide will see costs decrease, more than 3.8 million policyholders will see their rates increase.

Impacts in California

Most California policyholders will see small increases but, overall, the state should see an average policy discount of more than 10 percent. Looking closer at the state's numbers, the number of policies benefitting from a decrease in premiums will be 27 percent in California. This means that roughly 58,000 policies will have their premiums decrease under Risk Rating 2.0 once they are eligible for renewal. By contrast, 69 percent of policies will see relatively minor increases of less than $20 per month and only 4 percent of policies will see increases in premiums greater than $20 per month.

State Regional Impacts

As for the specific regions throughout the state, 4 of California's top 5 zip codes with the most NFIP policies are located in the Greater Sacramento region. In the Natomas area, just north of Downtown Sacramento, policyholders see moderate declines in their policy premiums. South of downtown in the Pocket area, however, policyholders can expect to see their premiums increase. Generally speaking, premium decreases are also expected for most of the Sacramento and San Joaquin valleys.

In the San Francisco Bay Area, premium increases are to be expected in some of the lower lying coastal areas. Conversely, properties in the foothills around the Bay will experience significant discounts. Specifically, areas like South San Francisco, Pacifica and Millbrae will see increases of about $5-7 per month, while properties in the higher up areas such as the Oakland Hills and San Ramon will benefit from decreases of more than $20 per month.

To the south, those in Malibu will see some of the largest discounts in the entire state with an average reduction in policy premiums of more than $40 per month. In the Santa Monica foothills and Hollywood Hills, policyholders can also expect relatively large decreases in their premiums. For those in the San Fernando Valley and Los Angeles Basin, however, policy premiums will be seeing modest increases.

A Phased Approach

In rolling out Risk Rating 2.0, FEMA will be taking a phased approach. In Phase 1, which began on October 1, 2021, all *new* policies will be subject to the new pricing methodology. Furthermore, existing policyholders eligible for renewal will be able to take advantage of immediate *decreases* in their premiums. For Phase 2, all policies renewing on or after April 1, 2022 will be subject to the Risk Rating 2.0 pricing methodology. In essence, current policyholders set to receive premium decreases under Risk Rating 2.0 will transition to the lower rate immediately at the first renewal of their policy. Any premium increases will transition gradually and within the existing statutory limits until the full-risk rate for the property is reached.

Conclusion and Implications

FEMA's Risk Rating 2.0 is intended as a complete overhaul to the policy pricing methodology for policyholders under the NFIP. As changes to the methodology will be affecting policies throughout the State, drastically in some cases, policyholders should familiarize themselves with how Risk Rating 2.0 will impact their own policies. With the rainy seasons—hopefully—fast approaching, those without coverage should likewise act fast in ensuring that their property is protected given that flood insurance from the NFIP normally carries a 30-day waiting period before it takes effect. For information, *see:* https://www.fema.gov/flood-insurance/risk-rating.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

GOVERNOR NEWSOM SIGNS LEGISLATION STREAMLINING PROCESS TO IMPROVE STATE WATER PROJECT INFRASTRUCTURE

In response to severe drought conditions, California Governor Gavin Newsom recently signed Senate Bill 626 (SB 626, Dodd—D) into law. SB 626 streamlines processes to construct improvements to the State Water Project, California's massive water delivery system serving millions of residents and hundreds of thousands of acres of farm land.

Background

The state is experiencing one of its worst droughts on record. August 2021 was reported as the driest and hottest August since the State began reporting data, and just experienced its second driest year on record. Governor Newsom recently declared a statewide drought emergency. Meanwhile, California's landmark, decades-old water delivery system, the State Water Project, stands in need of significant improvements in order to effectively deliver critical water supplies throughout the state. The State Water Project serves more than 27 million people and 750,000 acres of farmland through its 700 miles of aqueducts, canals and pipelines. The slow process by which contracts are entered to perform that work has hindered the timeline to perform needed physical improvements.

Design-Build Versus Traditional Project Delivery

SB-626 authorizes the California Department of Water Resources (DWR) to employ a designbuild procurement process for construction projects, which was not previously allowed. In a traditional project delivery process, an owner typically directly manages separate contracts with the designer and the general contractor. SB 626 proponents observe that these arrangements harbor potential to create adversarial relationships resulting in litigation, project delays, and increased project costs.

Under the design-build approach, an owner manages one contract with a single entity that represents both the designer and the contractor, who collaborate from the beginning of the project. Design-build is intended to provide unified project recommendations that better fit the owner's schedule and budget. Changes throughout the design and construction process are addressed by the entire team, potentially leading to collaborative problem-solving, reduced project costs and improved timely project completion.

Proponents of the legislation asserted that the design-build approach is the fastest growing and most popular method used to deliver construction projects in the country. They further proclaim that the design-build procurement method would enable DWR to obtain the most qualified experts at the lowest cost.

Senate Bill 626 Highlights

SB-626 accomplishes the following:

- Prior law authorized DWR to use the design-build procurement process only for certain projects at the Salton Sea. The new law removes that limitation and allows DWR, until January 1, 2033, to utilize the design-build method for up to seven projects.

- SB 626 requires DWR to prepare and submit to the Legislature an interim report that describes each design-build project approved under these provisions by no later than July 1, 2025, and a final report providing specified data by July 1, 2028.

- Prior law required agencies authorized to use the design-build project delivery method to notify the State Public Works Board before advertising the design-build project (with an exception for projects at the Salton Sea, for which the Director of DWR must give notice to the California Water Commission). The new legislation excludes construction projects undertaken by DWR from the requirement to provide notification to another entity.

SB 626 was supported by the State Water Contractors, a non-profit organization representing twenty-seven public water agencies throughout the state. It was also supported by the Association of California Water Agencies.

Conclusion and Implications

California's current drought conditions and increasing pattern of record heat and dry conditions in recent years underscores the need for effective and efficient water infrastructure. The ability of the State Water Project to maximize delivery of available water resources throughout the state is a significant component in mitigating drought conditions both in dry years when allocations are low, and in wet years when water is available for storage. SB 626 aims to facilitate faster and more cost-efficient delivery of needed water delivery improvement projects, which if properly implanted, could greatly benefit millions of Californians, agriculture and the economy. The complete history and text of Senate Bill 626 is available online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB626.
(Chris Carrillo, Derek R. Hoffman)

GOVERNOR NEWSOM SIGNS SENATE BILL 323 IMPLEMENTING A 120-DAY STATUTE OF LIMITATIONS FOR CHALLENGES TO WATER AND SEWER SERVICE RATES

Since the California voter-approved Proposition 218 passed in 1996, voters regularly sue public agencies to challenge property-related rates and fees. In particular, the constitutional protections enacted by Proposition 218 have resulted in judicial challenges to water and sewer rate changes. However, Proposition 218 does not provide a specific statute of limitations for such actions. In September 2021, the Legislature passed and Governor Gavin Newsom signed into law Senate Bill 323 (SB 323), which creates a 120-day statute of limitations for challenges to public agencies' adoptions, modifications, or amendments to a fee or charge for water or sewer service.

Background

In 1996, California voters passed Proposition 218 to establish limits on state and local officials' ability to impose or increase property-related fees. (See California Constitution, article XIII D, § 6.) Consumers often call on the protections provided for by Proposition 218 and related constitutional and legal principles to challenge the ratemaking decisions of water districts and other local agencies imposing and increasing water and sewer fees. However, voters are not restrained by a statute of limitations in Proposition 218 or otherwise. This allows cases to challenge ordinances at any time in the future, including, for example, four years later. (*See, e.g., Goleta AG Preservation v. Goleta Water District* (Jan. 28, 2019, B277227) [*unpub.*] [appeal from a trial court order denying a petition for writ of mandate that would have directed Goleta Water District to reverse its rate structure adopted in June 2015, four years prior to the complaint].)

Unlike water and sewer rates set under Proposition 218, the Legislature has brought other fees under the short timelines of the Validation Statutes. These statutes expedite challenges against certain government actions: once a public agency takes an action, the opposing party must file a complaint within 60 days. (Code of Civ. Pro. § 863.) And if no challenger brings an action within 60 days or if the government agency files suit to validate their action without response, the action is deemed valid and becomes immune from attack. (Code of Civ. Pro. §§ 860, 863.) Relevant here, the Legislature, in the last 20 years, has expanded validating statutes to include ratemaking decisions put forth by municipal utilities and utility districts. For example, in 2000, the Legislature approved AB 1674 (Committee on Utilities and Commerce) Chap. 146, Stats. 2000, providing for a 120-day statute of limitations for electrical utilities to validate their rates using the Validation Statutes. Thus, while rates set by electric utilities now are governed by the validation statutes, water and sewer utilities do not when setting or adjusting fees.

Analysis of SB 323

Senator Anna Caballero (D-Salinas) authored SB 323 citing concerns about the stability of water agencies during the COVID-19 pandemic and Governor Newsom's Executive Order N-42-20 prohibiting water shutoffs. (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 323 (2020-2021 Reg. Sess.) Sep. 9, 2021, p. 4.) As a result of the executive order, water agencies were required to continue to deliver water to every customer regardless of their ability to pay. Additionally, unlike electric utilities, water utility agencies were not subject to a 120-day statute of limitations to validate or challenge the ratemaking decision. As a result of concerns about these challenges for local agencies, SB 323 applies the 120-day statute of limitations applicable to other utilities to actions challenging water and sewer ratemaking. Specifically, SB 323 creates Government Code § 53759:

> Any judicial action or proceeding to attack, review, set aside, void, validate, or annul an ordinance, resolution, or motion adopting a fee or charge for water or sewer service, or modifying or amending an existing fee or charge for water or sewer service, shall be commenced within 120 days of the effective date or of the date of the final passage, adoption, or approval of the ordinance, resolution, or motion, whichever is later. (Gov. Code § 53759(a).)

The limitations period does not apply to decisions made before January 1, 2022 or to billing errors. (Gov. Code § 53759(e)-(f).) The bill clarifies that, although the procedures of the Validation Statutes apply to the water agencies' actions, the statute of limitations to validate or challenge is not the 60-day validation statute of limitations, but rather the 120-day statute of limitations provided for in SB 323. (Gov. Code § 53759(b).)

Consumer Attorneys of California and Howard Jarvis Taxpayers Association opposed the bill. They contended that the bill circumvents constitutional protections, in particular those afforded by due process. The Howard Jarvis Taxpayers Association (HJTA) asserted that, beyond its opposition to "all attempts to enlarge the universe of government actions," SB 323 also contains "fundamental problems" with the limitations period start date and the validation statute application. (Assem. Com. on Local. Gov., Rep. on Sen. Bill 323 (2020-2021 Reg. Sess.) as amended Mar. 17, 2021, p. 7.) Specifically, HJTA contended that using the date of the fee's *motion*:

> . . .could create confusion if multiple motions on multiple dates preceded the actual enactment of the rate increase. (*Ibid.*)

It also found that the prior subsection (b) confused the matter by requiring that consumers challenge the action under the Validation Statutes while failing to clarify that the validation statutes' 60 day limitation period did not apply. (*Ibid.*) The Senate Judiciary Committee agreed with HJTA's assertions and recommended amendments to the bill's language. (Assem. Com. on Judiciary, com. on Sen. Bill 323 (2020-2021 Reg. Sess.) as amended Mar. 17, 2021, p. 8.) The recommendations are incorporated into the bill as adopted.

On the other side, SB 323 had wide-spread support among water, irrigation, wastewater, and conservation districts. The Association of California Water Agencies supported the bill and claimed:

> . . .[w]hile public water and sewer service providers require financial stability to meet [the demands of public infrastructure development and water provisions], existing law allows lawsuits that seek refunds or seek to invalidate existing rate structures years after rates have been adopted and collected. (Sen. Judiciary Com., com. on Sen. Bill 323 (2020-2021 Reg. Sess.) Mar. 17, 2021, p. 5.)

The proponents of the bill pointed to the gap in existing law that allowed customers to challenge water and sewer rate changes at any time but limited those same types of challenges to 120 days for other public utilities. By providing 120-day period, the bill's author and supporters contended that the bill continues to protect procedural requirements for ratepayers while allowing important public agencies, like sewer and water districts, reprieve from continued litigation and uncertainty. (Assem. Com. on Judiciary, com. on Sen. Bill 323 (2020-2021 Reg. Sess.) as amended Mar. 17, 2021, p. 4-5.)

Conclusion and Implications

By setting clear deadlines for challenging water and sewer rates, SB 323 can help provide certainty for the local officials in setting rates and stability in rate prices for ratepayers. In short, the 120-day statute of limitations balances the need to allow challenges to go forward to protect ratepayers constitutional rights with the need to ensure that local water districts, cities, and other agencies can set rates without the threat of litigation pending for years. For the full text and history of the bill is available online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB323.
(Tiffanie A. Ellis, Meredith Nikkel)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION FORECASTS REDUCED INFLOWS TO LAKE MEAD, EXACERBATING SHORTAGE CONDITIONS ON THE COLORADO RIVER

In October, the U.S. Bureau of Reclamation (Bureau) released its 24-month study and two-year projections for major reservoir levels in the Colorado River System, forecasting a median inflow in 2022 that is 800,000 acre-feet less than forecasted in September. The forecast comes on the heels of the Bureau's first-ever shortage declaration in August, which led to Colorado River water cutbacks for Arizona and Nevada, but not California. While California's allocation of Colorado River water has not been reduced at this time, further decreases in reservoir capacity at Lake Mead could lead to additional shortage declarations in the future, potentially impacting full use of California's allocation of Colorado River water.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water.

In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau releases operational studies called "24-Month Studies" that project future reservoir contents and releases. They include the latest inflow and water use forecasts. The October 24-Month Study included 30-year inflow data. The October 24-Month study also forecasts a 16 percent chance of a heightened shortage condition in 2023.

Regulation of the Colorado River

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). A seven-party agreement in 1931 apportioned California's allocation between the Palo Verde Irrigation District, Yuma Project, Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District, and the City and County of San Diego. Nonetheless, California river water users historically used more than California's 4.4 maf allocation due to water surpluses or unused water by Arizona or Nevada. In 2003, certain of these entities executed a quantification settlement agreement that reduced water use to California's allocated amount through water transfers, canal lining projects, and agricultural conservation.

Interim Guidelines

In 2007, the Bureau adopted interim guidelines to address shortages in the Colorado River system (Guidelines). The purpose of the Guidelines consists of three components. First, the Guidelines are intended to improve the Bureau's management of the Colorado River by considering trade-offs between the frequency and magnitude of reductions of water deliveries, including related impacts on water storage in Lake Powell and Lake Mead, water supply, power production, recreation, and other environmental resources. Second, the Guidelines provide mainstream federal water users a greater degree of predictability

regarding the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions. Finally, the Guidelines provide additional mechanisms for the storage and delivery of water supplies in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, including under drought and low reservoir conditions.

To accomplish the purpose of the Guidelines, the Guidelines have four operational elements: 1) shortage guidelines, 2) coordinated reservoir operations, 3) storage and delivery of conserved water, and 4) surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, as the Bureau currently forecasts, the Bureau will apportion to the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

2019 Drought Contingency Plan

Despite the Guidelines' reduction in Arizona and Nevada allocations when shortage conditions are forecasted for the lower basin, the lower basin states entered into a drought contingency plan in 2019, subsequently approved by Congress, to collaboratively redress lowering reservoir levels in Lake Mead. To this end, California agreed to make "contributions" when certain shortage conditions exist. Specifically, when Lake Mead levels are at or below 1,045 feet but above 1,040 feet, California will contribute 200,000 acre-feet to help remedy low reservoir levels. When Lake Mead levels are below 1,040 feet, California could contribute as much as 350,000 acre-feet. The Bureau would adjust its delivery schedules as necessary to reflect these contributions.

Forecasts

The Bureau's 24-Month Study forecasts Lake Mead levels at the end of calendar year 2022 to be 1,050.63 feet. This is less than one foot above the next shortage condition cutoff of 1,050 feet. While California's 4.4 maf allocation would not be affected—reductions would continue to be made to Arizona and Nevada's allocations—further decreases in Lake Mead levels could trigger California's drought contingency plan contributions which begin when lake levels reach 1,045 feet.

Conclusion and Implications

It remains to be seen whether Lake Mead levels will continue to decline. However, the Bureau's October forecast appears to reflect the continued impact of drought conditions on the Colorado River system. Thus, it is possible that California's drought contingency plan contributions could be triggered sometime after 2022, with corresponding adjustments made by the Bureau to lower basin delivery schedules. The U.S. Bureau of Reclamation's Updated Projections of Colorado River System Conditions, available online at: https://www.usbr.gov/newsroom/#/news-release/4013.
(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS GUIDELINES TO ADDRESS PANDEMIC-RELATED UNPAID WATER BILLS

The COVID-19 pandemic has affected the ability of many California households to pay their water bills on time, or at all. This, in turn, has resulted in revenue shortfalls for water systems serving communities throughout the state. In response, the state authorized nearly $1 billion to fund the California Water and Wastewater Arrearage Payment Program (Program) to provide financial relief to community water systems for the arrearages of residential and commercial customers who were unable to pay their bills due to financial hardship resulting from COVID-19. The State Water Resources Control Board (State Water Board or SWRCB) recently adopted guidelines for the administration of the Program. The funds will be

disbursed between November 1, 2021 and January 31, 2022, and will prioritize small community water systems. Applications for the Program are now available to be submitted.

Background

On April 2, 2020, Governor Newsom issued Executive Order N-42-20 (Executive Order), which prohibited shutting off water service to residences and certain small businesses, as well as requiring the restoration of service to residential customers who were disconnected for nonpayment after March 4, 2020.

The State Water Board conducted a survey on the financial impact to community water systems and water debt incurred by households that accrued as a result of the Executive Order and the pandemic. Based on the survey results, the SWRCB estimated that 1.6 million households had water debt totaling approximately $1 billion.

The American Rescue Plan Act of 2021 enacted by the United States Congress established the Coronavirus Fiscal Recovery Fund, which provided funding to states for revenue losses resulting from the pandemic. The California Legislature appropriated $985 million of those funds to the SWRCB to provide payments to community water systems experiencing significant pandemic-related revenue shortfalls.

California Water and Wastewater Arrearage Payment Program

Requirements for the Program were established by California Assembly Bill 148, which added provisions to the California Health and Safety Code. Funding for the Program is estimated to meet 100 percent of reported drinking water debt, and the balance of available funds will be applied to wastewater debt relief after January 31, 2022.

Program funding may be applied to delinquent water and sewer bills that accrued between March 4, 2020 and June 15, 2021 (COVID-19 pandemic bill relief period) and corresponding revenue shortfalls during that time. Community water systems must apply to receive Program funds and must provide documentation supporting the amount of outstanding customer arrearages that were incurred during the COVID-19 pandemic bill relief period.

The Program does not pay water customers directly; rather, community water systems that receive funding are required to credit the accounts of customers for arrearages accrued during the COVID-19 pandemic bill relief period. The community water system also must notify those customers of the amounts credited to their accounts and that they may enter into a payment plan within 30 days to repay remaining balances.

Meanwhile, California Senate Bill 155 amended § 116773.4 of the Health and Safety Code to extend the prohibition on water service shut-offs due to the nonpayment of past-due bills, until the later of December 31, 2021 or (for customers that have been offered a payment plan) the date the customer misses the enrollment deadline for, or defaults on, the payment plan.

Program Guidelines

State Water Board staff consulted with community water systems, community representatives, and others to develop the criteria SWRCB will use to administer the Program. The criteria include payment plan requirements for customers and prohibitions for community water systems participating in the Program regarding water service discontinuation. The guidelines establish community water system eligibility requirements, the type and amount of debt that will be eligible for the Program, the Program's payment prioritization, and the amount of administrative costs that can be recovered by Program funds. For example, the Program guidelines prioritize community water systems serving disadvantaged communities and require water systems without customer payment plans to offer them. The Program guidelines also provide that community water systems that transferred customer debt to third parties may still apply for funding to cover those debts as well.

Conclusion and Implications

The pandemic has resulted in widespread economic disruption, and the state is making efforts to provide relief with respect to unpaid water and sewer bills. The Program is reported to be particularly attractive to smaller community water systems, which have experienced substantial revenue shortfalls and do not have large operating budgets, reserves or readily available access to other funding sources. The Program aims to assist customers through credits on their accounts while requiring payment plans to pay

outstanding debt not covered by the Program. The duration and effectiveness of such payment plans remains to be seen as the State continues to navigate the economic challenges brought on by the pandemic and by policies enacted in response to it. The State Water Board's arrearage payment program is available online at: https://www.waterboards.ca.gov/arrearage_payment_program/. The SWRCB's media announcement on the Program guidelines is available online at: https://www.waterboards.ca.gov/press_room/press_releases/2021/pr20210923-water-arrearages-guidelines.pdf.

(Gabriel J. Pitassi, Derek R. Hoffman)

LAWSUITS FILED OR PENDING

WATER AGENCIES FILE LAWSUITS CHALLENGING STATE WATER BOARD'S SACRAMENTO-SAN JOAQUIN CURTAILMENT ORDER

The State Water Resources Control Board (State Water Board or SWRCB) issued curtailment orders to approximately 4,500 water rights holders in the Sacramento-San Joaquin Delta on August 20, 2021. The curtailment orders were issued pursuant to emergency regulations the State Water Board adopted on August 3, 2021—and approved by the Office of Administrative Law on August 19, 2021—granting the Deputy Director of the Division of Water Rights the authority to issue curtailment orders when the SWRCB determines water is unavailable. The curtailment orders directed water rights holders with the following priorities to cease diversions:

(1) All post-1914 appropriative water rights in the Delta watershed (including the Sacramento River and San Joaquin River watersheds and the Legal Delta);

(2) All pre-1914 appropriative water right claims in the San Joaquin River watershed;

(3) All pre-1914 appropriative water right claims in the Sacramento River watershed and in the Legal Delta with a priority date of 1883 or later; and

(4) Some pre-1914 appropriative water right claims on specific tributaries to the Sacramento River with a priority date earlier than 1883.

Lawsuits Filed

Several lawsuits were filed within a month of the State Water Board's August 3, 2021 adoption. Specifically, the following lawsuits were filed:

- *Banta-Carbona Irrigation District, Patterson Irrigation District, and West Stanislaus Irrigation District v. California State Water Resources Control Board, et al.* (Super. Ct., Sacramento County, 2021, No. 2021-80003718.) (hereafter *BCID, et al. v. SWRCB, et al.*)

- *Central Delta Water Agency and South Delta Water Agency v. California State Water Resources Control Board, et al.*, (Super. Ct., Sacramento County, 2021, No. 2021-80003720.) (hereafter *CDWA, et al. v. SWRCB, et al.*)

- *Merced Irrigation District v. California State Water Resources Control Board, et al.*, (Super. Ct., Fresno County, 2021, No. 21CECG02643.) (hereafter *MID v. SWRCB, et al.*)

- *San Joaquin Tributaries Association v. California State Water Resources Control Board, et al.*, (Super. Ct., Fresno County, 2021, No. 21GECG02632.)

The Delta Watershed and Curtailment Orders

The Sacramento-San Joaquin Delta watershed (Delta Watershed), spanning some 44,000 square miles, provides drinking water for 25 million Californians and irrigation for millions of acres of farm land. On May 10, 2021, Governor Gavin Newsom issued a proclamation of State of Emergency, directing the State Water Board to consider adopting emergency regulations to curtail diversion in the Delta Watershed. In response, the SWRCB released its first draft of the Water Unavailability Methodology (Methodology) for a 14 day comment and review period on May 12, 2021. The SWRCB released the Methodology for public comment nine days later. The SWRCB released a revised Methodology in June, and then a second revised Methodology on July 23, 2021.

The State Water Board issued a Notice of Proposed Emergency Rulemaking for Emergency Regulations on July 30, 2021, and adopted the Emergency Regulations on August 3, 2021. The Office of Administrative Law approved the regulations and the emergency regulations went into effect on August 19, 2021. By August 20, 2021, the Methodology had been revised a third time and the State Water Board incorporated it by reference into the curtailment orders.

The curtailment orders require water rights holders to cease diversions and certify compliance—under penalty of perjury—via an online compliance form. Failure to cease diversion could result in enforcement actions, including a fine of $1,000 per day and $2,500 per acre foot of water diverted in contravention of the curtailment order.

By early September 2021, four separate lawsuits been filed against the State Water Board, alleging several claims challenging the State Water Board's regulatory process and subsequent curtailment order.

Lawsuits Challenging the Emergency Regulations

One case, *San Joaquin Tributaries Association, et al. v. California State Water Resources Control Board*, was the subject of a recent article in this publication. (*San Joaquin Tributaries Authority Files Lawsuit Challenging State Water Board Diversion Curtailment order for Sacramento-San Joaquin Delta* (Oct. 2021) 32 Cal. Wat. Law and Policy Rptr., 1, p. 318.) The remaining suits make similar claims, as noted below.

BCID, et al. v. SWRCB, et al.

In this lawsuit, petitioners Banta-Carbona Irrigation District, Patterson Irrigation District, and West Stanislaus Irrigation District assert appropriative water rights that were subject to the curtailment order. The petitioners allege that the State Water Board acted arbitrarily, capriciously, and failed to proceed in a manner required by law by depriving them of property rights without due process. In addition, the petitioners claim neither the State Water Board nor the Deputy Director presented the petitioners with legal or factual determinations supporting the curtailment orders specific to their water rights. Similarly, the petitioners assert the State Water Board and the Deputy Director abused their discretion by not including legally sufficient findings in the curtailment order, which in turn relies on a flawed methodology.

In addition, the petitioners assert that the Methodology is an underground regulation because it is a standard, adopted by the State Water Board, to implement water rights administration. Finally, the petitioners claim the curtailment order violates the rule of priority because the Methodology underpinning the curtailment order considers only broad categories of priorities, presumed inflow and demand on a monthly basis, and did not consider the relative uses of the water users in the watersheds. The Methodology assumed, the petitioners claim, that any diversion by junior water right holders would injure senior water rights.

CDWA and SDWA v. SWRCB, et al.

The Central Delta Water Agency and South Delta Water Agency (collectively: Delta petitioners) represent landowners on 120,000 and 148,000 acres, respectively, of the Sacramento-San Joaquin Delta. The majority of their landowners assert riparian, pre-1914, and post 1914 permits or licenses to divert within San Joaquin County. The Delta petitioners make similar due process, exceeding statutory authority, underground regulation, violating rule of priority, and lack of evidentiary support claims as those made by the petitioners in the *Banta Carbona* lawsuit.

In addition to these claims, the Delta petitioners also argue that the doctrine of collateral estoppel preludes curtailment based on the Methodology. The Methodology, according to the Delta petitioners, is "fundamentally flawed . . . [because] it outright denies" Delta diverters their asserted entitlements to the incidental water quality benefit. For example, Delta petitioners claim the State Water Board acted arbitrarily and capriciously by failing to take into consideration the water quality needs of Delta diverters.

MID v. SWRCB, et al.

Merced Irrigation District (MID) is a California irrigation district serving 164,000 acres, 133,000 of which is irrigated farmland. MID asserts six riparian and pre-1914 rights, in addition to ten post-1914 appropriative rights. It also owns and operates two hydroelectric projects: the Merced River Hydroelectric Project and the Merced Falls Hydroelectric Project.

Like the previous petitioners, MID brings similar claims against the State Water Board and the Deputy Director. MID additionally argues that the State Water Board did not adequately demonstrate the existence of an emergency pursuant to Government Code, § 11346.1, as a requirement of enacting emergency regulations. Rather, MID states drought is a common feature of California, and not an emergency. As a result, MID alleges the State Water Board acted arbitrarily and capriciously by failing to support their finding of an emergency for the emergency regulations with substantial evidence.

MID also claims the Methodology violates the rule of priority by assuming that diverters in the legal delta who claim both a riparian and pre-1914 water rights should be treated as solely riparian.

Conclusion and Implications

In sum, the central component of the three new lawsuits is the Methodology that underpins the curtailment orders. All petitioners claim the Methodology was not subject to procedures required for due process and the Administrative Procedure Act, is in effect an underground regulation, and it violates the rule of priority.

On October 15, 2021, the Irrigation petitioners in *BCID, et al. vs. SWRCB., et al.*, submitted a petition to coordinate the Delta curtailment suits in a single court. The Irrigation petitioners state that their "case as well as all the other designated related cases pending in this court and in the Fresno and Contra Costa Superior Courts, are complex and should be coordinated in the same court." The Judicial Council has not yet ruled on the petition to coordinate and is expected to do so in the coming weeks.
(Nico Chapman, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT DECISION BROADENS SCOPE OF RCRA LIABILITY, UNDER ENDANGERMENT PROVISION, TO TRANSPORTERS

California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. Sept. 29, 2021).

In September, the Ninth Circuit Court of Appeals issued a decision in *California River Watch v. City of Vacaville*, holding that the City of Vacaville could be found liable under the Resource Conservation and Recovery Act (RCRA) for the presence of the contaminant hexavalent chromium in its potable water system. The Ninth Circuit's decision broadens the scope of RCRA liability to reach entities transporting materials discarded as waste, despite lacking involvement in the creation or generation of waste.

Background

The federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*., establishes a comprehensive regulatory framework governing the treatment, storage, and disposal of solid and hazardous waste. RCRA contains a citizen suit provision that allows for private causes of action. The "endangerment provision" allows any person to file a lawsuit against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

In 2017, *California River Watch*, an environmental non-profit organization, brought a citizen suit under RCRA's endangerment provision against the City of Vacaville (City), alleging the City's water supply was contaminated with hexavalent chromium (also known as chromium 6), which created an imminent and substantial endangerment to the health and safety of its residents. The City argued that the potable water served to customers, and the traces of chromium 6 contained in the water, did not constitute a solid waste under RCRA.

The case turned on whether the chromium 6 in the City's water supply qualifies as a "solid waste," which turns on the meaning of "discarded material." The U.S. District Court found for the City, holding the potable water supply containing chromium 6 did not qualify as solid waste. On appeal, the Ninth Circuit reversed the District Court's decision. The Ninth Circuit found that if the chromium 6 was previously discarded as waste and then reached the City's water system, it could qualify as discarded material and therefore as solid waste. The Ninth Circuit remanded the case to the District Court for further proceedings.

The Ninth Circuit's Decision

Under RCRA, solid waste is:

> . . .garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . . 42 U.S.C. § 6903(27).

'Discarded Material'

The issue disputed here was whether the chromium 6 qualified as "other discarded material."

As decided by previous Ninth Circuit decisions, the meaning of "discard" is to "cast aside; reject; abandon; give up." *Vacaville*, Case No. 20-16605 at 9. The Ninth Circuit has held that a key consideration is whether the product has "served its intended purpose and is no longer wanted by the consumer." *Id*. The District Court found that the chromium 6 existed prior to, and was not a result of, the City's water treatment process. Moreover, the potable water itself was still being delivered to intended customers as a drinking water product. Thus, the District Court found that the City's activities did not demonstrate any "discarding" of the chromium 6 as part of its water treatment process.

On appeal, the Ninth Circuit considered the origins of the chromium 6 in the City's water to arrive at the conclusion that the chromium 6 constitutes discarded material. River Watch had provided expert testimony establishing that chromium 6 was widely used for commercial wood preservation at a location near Elmira, California called the "Wickes site." *Id.* at 10. From 1972 to 1982, companies operated wood treatment facilities and used chromium 6 to treat wood for preservation. It was common practice to drip dry wood treated with chromium 6, which trickled directly into the soil. The expert additionally claimed that a large amount of chromium 6 waste was dumped into the ground at the location.

The Ninth Circuit found that if River Watch's expert testimony was found credible, to be determined by the District Court on remand, then the chromium 6 would meet the RCRA definition of solid waste. Once the chromium 6 was discharged into the environment after the wood treatment process, it was no longer serving its intended use as a preservative, nor was it the result of natural wear and tear. *Id.* at 11. Thus, River Watch had created a triable issue on whether chromium 6 was discarded material.

'Transporter' Liability

In addition, the Ninth Circuit discussed whether the City could be a "transporter" of the waste under RCRA's endangerment provision. *Id.* at 12. The District Court's decision did not depend on whether the City was *transporting* the waste, rather the court had framed River Watch's claims as alleging the City was *generating* the waste. The Ninth Circuit observed that a transporter of solid waste does not need to play a role in discarding or creating the waste in the first place. Based on the definitions of "contribution" and "transportation," a triable issue existed as to whether the City was a past or present transporter of solid waste. On remand, the District Court would determine whether evidence showed that the chromium 6 originated from the Wickes site, reached the City's water wells, and was pumped through the City's water distribution system.

Conclusion and Implications

The Ninth Circuit issued an opinion that broadens the definition of "discarded material" and therefore "solid waste" under RCRA. The holding extends RCRA liability to entities that may be transporting materials previously discarded as waste, despite lack of involvement in the actual discarding or waste generation process. This decision may broadly affect water suppliers and distributors facing contamination issues. In addition to being regulated under federal and state drinking water laws and regulations, water systems face increased litigation risk under RCRA's endangerment provision. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/29/20-16605.pdf.
(Steve Anderson)

NINTH CIRCUIT VACATES JUDGEMENT REQUIRING CLEAN WATER ACT CITIZEN SUIT TO PROVE ONGOING DISCHARGE IN CASE ALLEGING MONITORING VIOLATIONS

Inland Empire Waterkeeper and Orange County Coastkeeper v. Corona Clay Co., 13 F.4th 917 (9th Cir. 2021).

The Ninth Circuit Court of Appeals, on September 20, 2021, vacated a U.S. District court's grant of partial summary judgment and jury instructions. The court found that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations.

Factual and Procedural Background

The Corona Clay Company (Corona) processes clay products at an industrial facility overlooking Temescal Creek in Corona, California. Inland Empire Waterkeeper and Orange County Coastkeeper (Coastkeeper) are tw affiliated nonprofit organizations with the mission of protecting water quality and aquatic resources in Orange and Riverside counties.

Storm water discharges from Corona's industrial processing activities are regulated under a statewide general National Pollutant Discharge Elimination System (NPDES) permit (General Permit). The General Permit includes requirements to sample storm water discharges, and if the discharge exceeds specified pollutant levels, specific response actions are required.

In 2018, Coastkeeper filed a citizen suit under the federal Clean Water Act (CWA) alleging that Corona illegally discharged pollutants into the navigable waters of the United States, failed to monitor that discharge as required by the General Permit, and violated the conditions of the permit by failing to report violations. The District Court granted partial summary judgment for Coastkeeper after finding, with no dispute, that Corona had violated various requirements imposed by the General Permit and that the discharge was flowing into Temescal Creek.

On the remaining issues, the District Court instructed the jury that Coastkeeper must prove either a prohibited discharge after the complaint was filed, or a reasonable likelihood that discharge would recur. In issuing the jury instructions, the court determined Coastkeeper was required to show not only a monitoring violation, but also ongoing discharge violations to bring a CWA citizen suit.

The District Court's jury instructions asked the jury to determine two questions: First, whether Corona had discharged pollutants into "waters of the United States" and whether the discharge occurred after the complaint was filed. Second, whether the storm water discharge adversely affected the beneficial uses of Temescal Creek. The jury was also instructed to only answer the second question if it answered the first question in the affirmative. After the jury answered "No" to the first question, the court entered a final judgment in favor of Corona. Both parties appealed.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first considered and rejected Corona's arguments that Coastkeeper lacked standing to bring the action. To have standing, an organizational plaintiff must have a concrete and particularized injury fairly traceable to the challenged conduct that likely can be redressed by a favorable judicial decision. The court determined Coastkeeper showed standing by sworn testimony from several members that they lived near the creek, used it for recreation, and that pollution from the discharged storm water impacted their present and anticipated enjoyment of the waterway. The court then determined that failure to provide information can give rise to an injury for purposes of standing. Coastkeeper's allegations that Corona failed to file reports required by the General Permit was an injury in fact that could support Coastkeeper's standing.

Jury Instructions

The Circuit Court next considered the District Court's conclusion and jury instructions that a CWA suit alleging monitoring and reporting violations can only lie if there are also current prohibited discharges. Under this analysis, the Ninth Circuit first considered a Supreme Court decision issued after the District Court's final judgment, which determined that a National Pollutant Discharge Elimination System permit is required when discharge flows directly into navigable waters or when there is a "functional equivalent of a direct discharge." Here, the Ninth Circuit noted that the District Court failed to ask the jury whether Corona's indirect discharge amounted to a "functional equivalent" of a discharge.

Demonstration of Ongoing Discharge Violations as Prerequisite to Citizen Suit

The Ninth Circuit then considered whether the District Court erred by requiring Coastkeeper to demonstrate ongoing discharge violations in order to bring a citizen suit alleging monitoring and reporting violations. Under current Supreme Court case law, entirely past violations which are not likely to recur cannot support a citizen suit seeking injunctive relief. In support of the District Court's decision, Corona asserted Congress left violations of monitoring and reporting requirements to regulatory agencies alone. The Ninth Circuit rejected the District Court's conclusion and Corona's assertion, reasoning that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations; the CWA allows a citizen suit based ongoing or imminent procedural violations. Because the District Court's partial summary judgement was

predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court case law.

Conclusion and Implications

Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

This case affirms that if a prohibited discharge into waters of the United States occurred, a Clean Water Act citizen suit can be premised on ongoing or reasonably expected monitoring or reporting violations. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/20/20-55420.pdf; or at: https://scholar.google.com/scholar_case?case=5623238957513399766&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
(Carl Jones, Rebecca Andrews)

DISTRICT COURT DENIES PRELIMINARY INJUNCTION SEEKING TO BAR THE BUREAU FROM CONTINUING VOLUNTARY GROUNDWATER PUMPING PROGRAM

Aqualliance, et al, v. U.S. Bureau of Reclamation, et al,
___F.Supp.4th___, Case No. 2:21-cv-01533 WBS DMC (E.D. Cal. Sept. 14, 2021).

Plaintiffs, Aqualiance, California Sportfishing Protection Alliance, and the California Water Impact Network, filed their complaint on August 26, 2021 and a Motion for Temporary Restraining Order and Preliminary Injunction shortly thereafter. Responding to the Bureau of assertion that no Environmental Impact Statement (EIS) was required, the environmental groups claim that:

> . . .[the Bureau] grossly failed its statutory mandates under the National Environmental Policy Act (NEPA) to disclose and consider the Project's effects prior to approval, and prior to irreversible effects occurring.

Attacking the Bureau's reactive efforts, the groups further asserted that with the knowledge of California's climate and history, "Reclamation failed to prepare for the dry year before us."

Ultimately, plaintiffs' Motion for Temporary Restraining Order was denied and the U.S. District Court on September 14, 2021.

Background

In an effort to incentivize the use of groundwater extractions in lieu of surface water from the Sacramento River, the Bureau approved a Voluntary Groundwater Pumping Program (Program) designed to provide funding to offset costs to those who obtain water from groundwater pumping rather than Sacramento River water.

On July 7, 2021, the Bureau released a draft Environmental Assessment (EA) for the Program evaluating its impacts. Following the public comment period, the Bureau issued a Finding of No Significant Impact (FONSI), determining that the Program did not require further evaluation via an EIS. In considering whether the effects of the Proposed Action are significant, Reclamation's EA analyzed the affected environment and degree of the effects of the action:

> The Proposed Action will occur within existing facilities and there would be no effects to the following resources: aesthetics; geology, soils, & mineral Resources; land use; population & housing; transportation and traffic; recreation; hazards & hazardous materials; cultural resources; public services & utilities.

The District Court's Decision

In order to obtain a preliminary injunction, the moving party must establish that: 1) it is likely to suc-

ceed on the merits, 2) it is likely to suffer irreparable harm in the absence of preliminary relief, 3) the balance of equities tips in its favor, and 4) an injunction is in the public interest. Denying the environmental groups' request for a preliminary injunction, the District Court concluded that Plaintiffs had not satisfied their burden on any of these elements.

Beginning with the analysis on irreparable harm, the court found that it:

> . . .does not expect plaintiffs to be able to predict with scientific exactitude the harm which will result if defendants are not enjoined. But the court does expect more than the kind of vague generalizations and unquantified conclusions presented here.

For the next three pages, the court continued to discuss deficiencies in plaintiffs' request for preliminary injunction and explain why the Court ultimately concludes that Plaintiffs failed to meet their burden in proving irreparable harm.

The Speculative Nature of the Harm Alleged

Primarily, the court's analysis of plaintiffs' request for preliminary injunction takes issue with speculative nature of the harm alleged. With regard declarations filed by Plaintiffs in support of their motion, the court charged that the first of these:

> . . .provides no specific evidence of a causal link between the pumping and damage, or of the similarity of the past pumping to the current program.

The court continued that "[p]laintiffs further allege in conclusory terms that groundwater-dependent ecosystems and endangered species are 'likely to be harmed,'" and that the other declaration submitted by plaintiffs "provides no basis to anticipate any specific harm that may occur to these ecosystems."

As for the harm alleged by plaintiffs, the court contended that:

> Plaintiffs are complaining of a harm that is already occurring in the program's absence. . .[and that]. . .because the funding will not cover the entirety of the cost groundwater users will incur, it is unclear to what extent Reclamation's incentivization efforts will be successful, making the program's impact speculative at this stage.

The District Court could have concluded its analysis here, noting that plaintiffs failed to show irreparable harm in the absence of injunction. Instead, the court took the occasion to also discuss plaintiffs' likelihood of success on the merits and the balance of equities and public interest. Going through each one-by-one, the court rebutted plaintiffs' positions and concluded the order by stating that "plaintiffs have not met their burden on any of the *Winter* injunctive relief factors."

Conclusion and Implications

As the U.S. District Court wrote in its order, "it is anticipated that the case will be finally submitted to the court for decision on the merits … sometime before the December holidays." Despite this, the Program's time frame was only slated to run from August through October, and even this short time frame was effectively shortened to only commence in September. With the plaintiffs unable to successfully halt the Program this year, it may nonetheless be worth following the case to see how it proceeds once the Program officially ends. The District Court's order is available online at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210914_docket-221-cv-01533_order.pdf.

(Wesley A. Miliband, Kristopher T. Strouse)

DISTRICT COURT DENIES ALL BUT ONE MOTION IN REVIEW OF ACTIVITIES REQUIRING A GENERAL PERMIT UNDER THE CLEAN WATER ACT

Eden Environmental. Citizen's Group v. California Cascade Building Materials, Inc. et. al, ___F.Supp.4th___, Case No. 2:19-cv-01936 (E.D. Cal. Sept. 20, 2021).

The U.S. District Court for the Eastern District of California recently ruled on a number of motions and defenses associated with a federal Clean Water Act (CWA) citizen suit against a wood product plant for discharging pollutants without an industrial permit. The District Court interpreted use of the Standard Industrial Classification (SIC) Codes to identify facilities subject to permit requirements under the CWA.

Factual and Procedural Background

California Cascade Building Materials (Cascade) is a 20-acre wood products manufacturing and distribution plant. Using on-site equipment, Cascade saws, cuts, trims, planes, molds, and treats raw wood and timber into various end products it sells to retail lumber companies and businesses. Cascade also operates an interstate trucking operation for the transport of logs, poles, beams, lumber, and building materials. It is licensed under the U.S. Department of Transportation and provides on-site maintenance and repair for its trucks.

The California State Water Resources Control Board (State Water Board or SWRCB) issues statewide General Permits for industrial activities pursuant to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) (General Permit). Facilities that either discharge or have the potential to discharge storm water associated with industrial activity and have not obtained a NPDES permit must apply for coverage under the General Permit. The General Permit identifies facilities required to enroll by reference to a list of Standard Industrial Classification (SIC) Codes.

On July 7, 2015, Cascade obtained coverage under the General Permit believing SIC Code 2499 (wood products, not elsewhere classified) applied. Subsequently, Cascade changed its position and determined that SIC Code 5031 (warehousing and wholesale distribution lumber) applied, which does not require coverage. On August 1, 2019, Cascade filed paperwork with the SWRCB to terminate its General Permit coverage.

On September 23, 2019, Eden Environmental Citizen's Group (Eden), an environmental organization, filed a citizen suit against Cascade and its officers alleging six violations of the General Permit and one violation of the CWA for failure to obtain coverage under the General Permit. As to the last claim, Eden asserted that Cascade engages in at least three distinct and separate economic activities, two of which require coverage under the General Permit: (a) warehousing and wholesale distribution of lumber and construction building materials under SIC Code 5031; (b) wood products manufacturing under SIC Codes 2421, 2431, 2491, and 2499; and (c) local trucking operations with on-site maintenance and fueling under SIC Codes 4213 and 7538. Cascade filed a motion to dismiss and in the alternative a motion for summary judgment, arguing that all of Eden's claims fail to the extent they are premised on violations of the General Permit Order. Eden's Officers also filed a motion to dismiss on the grounds that the fiduciary shield doctrine means the court did not have personal jurisdiction.

The District Court's Decision

Cascade's Motion to Dismiss

The court first considered and rejected Cascade's arguments that all claims premised on the violations of the General Permit should be dismissed because Eden failed to allege that: 1) the primary industrial activity at the facility had an SIC Code that requires General Permit coverage, or 2) the Facility had activities sufficiently economically separate and distinct to be considered separate "establishments" thereby requiring the application of multiple SIC Codes. The court noted that Eden alleged the facility caused the mechanical transformation of materials into new products, which met the definition of "manufactur-

ing" facility under the SIC manual and with respect to local trucking operations. The also court noted that Eden alleged Cascade operated an interstate trucking operation as evidenced by the number of truck drivers (16) and total traveled mileage in 2018 (754,156 miles). The court then examined the facilities covered by the General Permit and found that Eden adequately alleged sufficient facts to establish Cascade's wood products manufacturing and local trucking operations should be treated as separate establishments and distinct and separate economic activities from warehousing and wholesaling under SIC Code 5031. The court denied Cascade's motion to dismiss.

Cascade's Motion for Summary Judgment

The court next considered Cascade's motion for summary judgement, made on essentially the same grounds as its motion to dismiss, but emphasized that this motion was brought pursuant to the voluntary, self-imposed deadline in the parties' Joint Status Report. Cascade responded, in part, by requesting that the court defer its ruling on the motion, contending it needed additional discovery material to oppose the motion— specifically, evidence relevant to the SIC manual, such as Cascade's reports on employment, as well as sales and receipts. The court determined Eden was sufficiently diligent in pursuing discovery, which was still on going, and that the discovery sought was relevant to the matters at issue in the motion. The court denied Cascade's motion for summary judgment.

Cascade Officer's Motion to Dismiss

The court next considered Cascade's officers' argument that they were not subject to personal jurisdiction in California because their employment affiliations as the CEO and CFO were insufficient to create jurisdiction. They contended the ninth circuit, in applying in the fiduciary shield doctrine:

> . . .limit[s] personal jurisdiction to only those instances in which the individual defendant is the alter ego of the corporation or the individual's own activity in the state constitutes sufficient 'minimum contacts.'

Eden argued that the court had personal jurisdiction over Cascade's officers because the fiduciary shield doctrine does not apply to actions brought to enforce the CWA against responsible officers in their individual capacities, and that Eden's officers had the authority to exercise control over Eden's activities violating the CWA. In ruling on the officers' motion, the court noted that Eden failed to identify any affirmative action taken by the officers establishing alter ego liability or make specific arguments establishing the officers' control of and direct participation in the activities at issue. The court granted Cascade's officers' motion to dismiss for lack of personal jurisdiction.

Conclusion and Implications

This case provides additional insight as to the use of SIC codes to identify facilities subject to a General Permit for industrial activities. Specifically, this case is a useful tool for analyzing whether and when undertakings potentially under the umbrella of the CWA should be treated as separate establishments and distinct and separate economic activities. The case opinion is available online at: https://casetext.com/case/eden-envtl-citizens-grp-v-cal-cascade-bldg-materials-inc.
(McKenzie Schnell, Rebecca Andrews)

DISTRICT COURT DECLINES TO DISMISS ENDANGERED SPECIES ACT 'TAKE' CLAIM—FINDS CASE NOT BARRED BY THE DOCTRINE OF 'PRIMARY JURISDICTION' OR STATUTE OF LIMITATIONS

Waterwatch of Oregon v. Winchester Water Control District, ___F.Supp.4th___, Case no 3:20-cv-01927-IM (D. Or. Sept. 22, 2021).

The U.S. District Court for the District of Oregon denied defendant Winchester Water Control District's (District) motion to dismiss environmental groups' claim that the District's Winchester Dam is resulting in illegal "take" of threatened Oregon Coast coho salmon in violation of the federal Endangered Species Act (ESA), rejecting arguments that the claim is barred both by the doctrine of "primary jurisdiction" because Oregon agencies possess primary regulatory authority over the core resource issues underlying the claim as well as by the applicable limitations period.

Background

Defendant Winchester Water Control District (WWCD or District) owns and operates the Winchester Dam (Dam) that was originally constructed in 1890 and completely spans the North Umpqua River near Roseburg, Oregon. Originally constructed to provide power for potential industrial development in the area and sometime later to also supply drinking water to Roseburg, the Dam eventually was purchased by a series of utilities, and it was during this time that a fish ladder was added in 1945. The last utility to own the Dam, Pacific Power & Light, ultimately abandoned it as a source of power generation in the mid-1960s due to its relatively low output and in 1969 transferred ownership to the District, which area property owners had formed primarily to utilize the Dam's reservoir for recreational purposes. In the mid-1980s, however, WWCD shortly recommenced use of the Dam for power generation that led it to make a series of improvements to the Dam, including its fish ladder, which remains the only means for migrating fish to pass over it.

Pursuant to the federal Endangered Species Act, the National Marine Fisheries Service (NMFS) has designated the portion of the North Umpqua River that runs over the Dam as critical habitat of the Oregon Coast coho salmon (OCC), which is listed as a threatened species under the Act.

Plaintiffs' Complaint and WWCD's Ensuing Motion to Dismiss

In November 2020, plaintiff Waterwatch of Oregon and three other organizations dedicated to fish conservation filed a citizen suit against WWCD under the ESA, alleging that the District's ongoing operation of the Dam violates the prohibition against "take" of listed threatened species in the ESA and NFMS' implementing regulations set forth in 16 U.S.C. § 1538(a)(1) and 50 C.F.R. § 223.203. The ESA defines the actions that constitute a prohibited "take" under its terms as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct," 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 222.102 (NMFS' regulation offering a more specific definition of "harm" for purposes of an ESA take).

In this context, plaintiffs more specifically allege in their complaint that WWCD has caused, and is continuing to cause, take of OCC salmon:

> . . .by failing to remove the Dam or provide adequate fish passage at the Dam as required by Oregon law, which failure has caused and continues to cause harm, harassment, injury and death [to the species].

In support of their allegations that the Dam violates state law, plaintiffs assert that the Dam's fish ladder does not meet the direction to provide adequate safe, timely, and efficient fish passage set forth in applicable regulations of the Oregon Department of Fish and Wildlife (ODFW), OAR 635-412-005 *et seq.*, and that WWCD does not hold a valid storage water right for the Dam's reservoir that is recognized or certificated by the Oregon Water Resources Department (OWRD). To remedy these alleged takes, plaintiffs requested that the District Court issue a declaratory judgment to that effect and to enjoin operation of the Dam in a manner that that will preclude any future takes by requiring either its removal

or retrofitting it to provide adequate fish passage and thereby prevent further harm to OCC salmon.

In response to the complaint, WWCD filed a motion to dismiss plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that the Court lacks subject-matter jurisdiction over it. More specifically, the District set forth two grounds in support of its motion. First, WWCD contended that the court should dismiss plaintiffs' take claim under the doctrine of "primary jurisdiction" because it is heavily predicated on alleged violations of state law within the exclusive provinces of ODFW, as the agency charged with regulating fish passage, and OWRD, as the agency charged with regulation of water rights and non-federal dams in Oregon. Second, WWCD contended that the claim should also be dismissed because plaintiffs brought their take claim well after the period prescribed by the applicable statute of limitations. More specifically, the District argued that the claim accrued in 1997, when OCC salmon was listed as threatened under the ESA and thus, any take of the species caused by operation of the Dam about which plaintiffs are concerned was triggered, or no later than 2006 when ODFW last updated its fish passage criteria.

The District Court's Decision

Primary Jurisdiction

In ruling on WWCD's motion to dismiss, the U.S. District Court first clarified that the "primary jurisdiction" doctrine, notwithstanding its title, does not actually go to the issue of whether federal courts have subject matter jurisdiction. *Waterwatch of Oregon v. Winchester Water Control Dist.*, Case No 3:20-cv-01927-IM, 2021 WL 4317150, at *5 (D. Or. Sept. 22, 2021). Rather, it explained, the doctrine is a prudential one designed to promote efficiency whereby courts can determine that an otherwise cognizable claim:

> . . .'implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch' *Id.* (quoting *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 910 (9th Cir. 2019)).

Thus, if a court determines the doctrine's use appropriate in a given situation, it may exercise its discretion to either stay proceedings or dismiss the complaint without prejudice pending resolution of the issues it finds fall within the special competence of an administrative agency. *Id.*

The Take Claim and Issue of Dismissal

In applying the doctrine to plaintiffs' take claim in light of this clarification, the court found that the core issue on which it turns, whether WWCD has violated or is violating the ESA's take prohibition, "does not raise any technical or particularly complicated issues outside of this court's competency and experience," and indeed, was expressly anticipated by the Congress to be resolved by the judiciary under that statute's citizen-suit provision. *Id.* Moreover, the court explained, given the standard of review appropriate for a 12(b)(1) motion to dismiss, it could not determine that no set of alleged facts in the complaint could be proved that would be able to establish an ESA take wholly irrespective of its assertions of state law violations and thereby avoid implicating the doctrine altogether. *Id.* at *6. The court therefore ruled it would not dismiss or stay the case based on the "primary jurisdiction" doctrine, at least at that stage of the proceedings. *Id.* at *7.

The Statute of Limitations Claim

Turning to WWCD's statute-of-limitations argument, the Disrict Court initially explained that it would utilize the general six-year limitations period applicable to civil actions in federal court for which a more specific period is not prescribed in 28 U.S.C. § 2401(a). *Id.* In also rejecting this argument, the court relied heavily on its previous opinion in Institute for *Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, Case No. 07-cv-358-PK (D. Or. Nov. 16, 2007). Determining that case to be largely synonymous with plaintiffs', the court first found that, even if plaintiffs were relying on a "continuing violation" theory, salient factors pointed against finding their claim barred by the statute of limitations, including a lack of concern over potential "staleness" of the claim given allegations that WWCD is continuing to engage in prohibited ESA take; the fact that a judgment on the claim would serve the interest in finality by resolving questions about whether ongoing Dam operations

are causing such take; and the complaint's focus on what WWCD has yet to do to avoid such take from occurring in the future. *Id.* at *8. The court went on to conclude that plaintiffs' claim was not barred by the limitations period even absent reliance on a "continuing violations" theory given that the ESA prohibits each discrete take of a listed species. *Id.*

Conclusion and Implications

The District Court's opinion means that plaintiffs will likely continue to be able to rely on the ESA citizen-suit provision to bring claims alleging take of listed species even if they substantially rely on or involve actions that are directly regulated by state agencies, at least in the District of Oregon. Moreover, given the reasoning on which the court relied to turn back WWCD's statute-of-limitations argument (and the fact that it doubled down on the reasoning in one of its previous cases), the opinion also means that it will likely be extremely difficult to ever get an ESA take claim dismissed as being outside the applicable statute of limitations, at least where the complaint plausibly alleges that such takes have not ceased at some definite point in the past and are ongoing. The next step in the case itself, of course, will be to see if plaintiffs can prove the allegations of ESA take in their complaint at either summary judgment or, potentially, a trial on the merits.

The District Court's opinion is available at the following link: https://ecf.ord.uscourts.gov/doc1/15118169389 (PACER registration required). (Stephen J. Odell)

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