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CALIFORNIA WATER™
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FEATURE ARTICLE

MISSISSIPPI V. TENNESSEE: U.S. SUPREME COURT HOLDS THAT GROUNDWATER IN INTERSTATE AQUIFER IS NOT OWNED BY STATES BUT IS EQUITABLY APPORTIONED AMONG THEM

By Roderick E. Walston

In *Mississippi v. Tennessee*, ___U.S.___, Case No. 143 Original (Nov. 22, 2021), the U.S. Supreme Court unanimously held that in a dispute among states over groundwater in an interstate aquifer, the U.S. Supreme Court must apportion the groundwater between the states under the Court's doctrine of equitable apportionment, and one state cannot claim an ownership interest in the groundwater that would impair the rights of other states. Therefore, Mississippi cannot sue Tennessee under a tort theory for damages and prospective relief for Tennessee's pumping of groundwater from an aquifer underlying both states, but must pursue its claim in an original Supreme Court action seeking equitable apportionment of the groundwater. The Supreme Court's decision is the first to hold that the doctrine of equitable apportionment that has often been applied to interstate disputes over surface waters also applies to interstate disputes over groundwater.

This article will describe the facts of *Mississippi v. Tennessee*; the Supreme Court's original jurisdiction over interstate water disputes; the doctrine of equitable apportionment that the Supreme Court has fashioned in resolving such disputes; the Court's decision and analysis in *Mississippi*; and will then provide a brief comment on state ownership of water.

Facts of the Case

In *Mississippi v. Tennessee*, the City of Memphis, a city in Tennessee located near Tennessee's border with Mississippi, pumped groundwater from a vast interstate aquifer, the Middle Claiborne Aquifer, that underlies both states. The aquifer underlies many other states in the Mississippi River Basin as well—Alabama, Arkansas, Illinois, Kentucky, Louisiana and Missouri. Although Memphis pumped the groundwater from wells located in Memphis, the pumping of the groundwater creates a "cone of depression," which is reduced water pressure at the site of the wells, and which has the effect of drawing groundwater from other locations, including from Mississippi. Thus, Memphis' pumping of groundwater from its wells causes groundwater in Mississippi to migrate to Memphis, reducing groundwater in Mississippi.

Mississippi filed a motion in the Supreme Court for leave to file a complaint against Tennessee and Memphis under the Court's original jurisdiction. Mississippi based its complaint on a tort theory. Specifically, Mississippi claimed that it "owned" the groundwater beneath its surface, and that Memphis' pumping of groundwater caused migration of Mississippi's groundwater to Tennessee, as a result of which Memphis was extracting hundreds of billions of groundwater "owned" by Mississippi. Mississippi sought at least $615 million in damages as well as declaratory and injunctive relief. Mississippi argued that the doctrine of equitable apportionment—which the Supreme Court traditionally applies in resolving interstate water disputes—did not apply because Mississippi "owned" the groundwater that was being taken by Memphis.

The Supreme Court's Original Jurisdiction

Under Article III of the U.S. Constitution, the Supreme Court has original jurisdiction over certain types of actions, meaning that such actions can be brought directly in the Supreme Court and need not be brought in the lower courts. U.S. Const., Art. III, § 2, Cl. 2. The Judiciary Act of 1789 (Act) imple-

ments Article III by specifically defining the Supreme Court's original jurisdiction. Under the Act, the Supreme Court has original jurisdiction over actions brought by the United States and a state against each other, and actions brought by a state against the citizen of another state. 28 U.S.C. § 1251(b).

In one important class of cases, however, the Supreme Court's jurisdiction is not only original but also exclusive, meaning that the Supreme Court alone can hear the dispute. Under the Judiciary Act of 1789, the Supreme Court has original and exclusive jurisdiction over disputes between states. 28 U.S.C. § 1251(a). Thus, a state can only bring an action against another state in the Supreme Court, and no other court has jurisdiction to hear the case. The Supreme Court's original and exclusive jurisdiction applies only to disputes between states, and not where a subdivision of a state, such as a city or county, attempts to bring an action on behalf of the state. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Although the Supreme Court has original and exclusive jurisdiction over interstate disputes, the Court does not necessarily hear a dispute simply because it is between states. Instead, the Court exercises its exclusive jurisdiction only if the states are asserting truly sovereign interests, and are not attempting to litigate private interests that might be litigated through the normal judicial process. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976). The Court's exclusive jurisdiction is reserved for disputes of "seriousness and dignity," and that might be a *casus belli* if the states were truly sovereign. *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). The Court exercises its exclusive jurisdiction only if it is "appropriate" to do so. *Ohio v. Wyandotte Corp.*, 401 U.S. 493 (1971). The Court's original jurisdiction does not allow it to be become enmeshed in "intramural disputes" between private citizens within the states, and is not a substitute for a class action, in which members of a class collectively join to protect their common interests. *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

Since the Supreme Court has discretion in deciding whether to hear an original jurisdiction action, the plaintiff—whether the United States or a state—cannot simply file a complaint in the Court, as in a U.S. District Court proceeding. Instead, the plaintiff must file a motion in the Supreme Court for leave to file a bill of complaint, and the Court then decides whether to grant the motion and hear the case. The Court may decline to hear a case if it does not truly involve a dispute between the states.

For example, in *United States v. Nevada and California*, 412 U.S. 534 (1973), the United States sought to file a complaint under the Supreme Court's original jurisdiction in what the United States described as a dispute among the United States, Nevada and California over water rights in the Truckee River, an interstate river that flows from California to Nevada and terminates at Pyramid Lake in Nevada. The United States' sought additional water rights for the Pyramid Lake Indian Tribe beyond those awarded to the Tribe in a 1944 judicial decree. The Supreme Court denied the United State' motion to file the complaint, ruling that the dispute was between the United States and Nevada over water rights in Nevada and did not involve California, and that the United States could bring an action against Nevada in a Nevada federal District Court in the normal judicial process. The United States then brought its action in the District Court, and the action ultimately reached the Supreme Court, which ruled that the United States was barred by *res judicata* from seeking additional water rights for the Tribe. *Nevada v. United States*, 463 U.S. 110 (1983).

The Supreme Court has great flexibility in fashioning rules governing original jurisdiction actions. The Court may consider the Federal Rules of Civil Procedure as a guide, but is not bound by the federal rules. Supreme Court Rule 17.2. In one notable case, California brought an original action in the Supreme Court against Texas and other states that had imposed an embargo on fruits and vegetables grown in California. (The states had imposed the embargo because of the Mediterranean fruit fly infestation in California.) California argued that the states' embargo imposed an unreasonable burden on interstate commerce and thus violated the Constitution's Commerce Clause. The Supreme Court issued a temporary restraining order (TRO) prohibiting the states from imposing their embargo, even though the Court does not have specific authority to issue a TRO and apparently had never issued a TRO before. *California v. Texas, et al.*, 450 U.S. 977 (1981).

The Supreme Court's original jurisdiction to resolve disagreements among states was considered one of the most innovative concepts of the American Constitution. Benjamin Franklin was the first to

propose—in 1775, before the Declaration of Independence was signed—that the federal government should have the power to resolve disputes among the colonies. Indeed, the Articles of Confederation, which preceded the Constitution, provided for the creation of a special court with power to resolve interstate disputes, and a special court resolved a boundary dispute between Pennsylvania and Connecticut, as a result of which the City of Scranton is located in Pennsylvania today.

The Doctrine of Equitable Apportionment

The Supreme Court reviews many kinds of interstate disputes under its original jurisdiction, such as disputes over interstate boundaries, *Oklahoma v. Texas*, 258 U.S. 574, 581, 598 (1922), interstate air and water pollution, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), and state tax or regulatory schemes that allegedly discriminate against citizens of other states, *Maryland v. Louisiana*, 451 U.S. 725 (1981). Probably the most significant interstate disputes that the Court reviews, however, are those over water rights in interstate waters. Under its original jurisdiction, the Supreme Court has resolved several interstate water rights disputes. *E.g., Colorado v. Kansas*, 320 U.S. 383 (1943) (Arkansas River); *New Jersey v. New York*, 283 U.S. 336 (1931) (Delaware River); *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (North Platte River).

In resolving interstate water rights disputes, the Supreme Court necessarily fashions federal common law, because federal statutes generally do not apply and the Court cannot properly apply the law of any state. Although the Supreme Court has expressed reluctance to fashion federal common law—stating that federal courts, unlike state courts, are not general common law courts—the Court has nonetheless held that federal courts may develop federal common law where "Congress has not spoken" or there is "significant conflict between some federal policy or interest and the use of state law." *Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981).

The federal common law that the Supreme Court has fashioned in resolving interstate water rights disputes is the doctrine of equitable apportionment. Under this doctrine, the Court considers all relevant facts and attempts to reach a result that is fair and equitable to all states. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *New Jersey v. New York*, 283 U.S. at 342-343; *Kansas v. Colorado*, 206 U.S. 46 (1907). The Court is not bound by the priority of water rights in the different states, although the Court may consider such priority of rights if the states recognize the same principles of water law, such as the doctrine of prior appropriation. *Nebraska*, 325 U.S. at 618. But the Court must consider other equitable factors as well, such as physical and climatic conditions, the extent of established uses, water uses and efficiencies, the availability of alternatives, return flows, availability of storage water, and the costs and benefits to the states. *Id.* at 618; *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).

The Supreme Court's equitable apportionment of interstate waters limits the amount of water available to water users within each state. The Court has held that the rights of all water users in a state cannot exceed the state's equitable apportionment. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). Thus, even though a water user may have a right to use water under state law, the water user may not have the right to use the water if this causes the state to exceed its equitable apportionment. As the Supreme Court has stated, equitable apportionment is not dependent on or bound by existing legal rights to the resource being apportioned. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

One of the most important interstate water dispute that the Supreme Court has addressed under its original jurisdiction—and certainly the most important to California—was the dispute between Arizona and California over the Colorado River. *Arizona v. California*, 373 U.S. 546 (1963). In the early twentieth century, southern California was taking increasing amounts of water from the Colorado River to meet its growing needs, and Arizona claimed that California was taking more than its fair share and depriving Arizona of water necessary to meet its anticipated future needs. Arizona brought an original action against California in the Supreme Court, and the Court, after a lengthy adjudication, issued a decree that apportioned Colorado River water among the Lower Basin states of Arizona, California and Nevada. More precisely, the Court did not apportion the water itself, but instead held that Congress—in passing the Boulder Canyon Project Act of 1928, which authorized construction of the Hoover Dam on the Colorado River—had effectively apportioned the water among

the states. Under the congressional apportionment, the Court ruled, California was entitled to 4.4 million acre-feet of Colorado River water each year, Arizona 2.8 million acre-feet, and Nevada 300,000 acre-feet. Although California received the largest share of water, California's share was less than it claimed, and the Supreme Court decree has generally been regarded as limiting California's right to take Colorado River water to meet its growth needs.

The Supreme Court's Decision in *Mississippi v. Tennessee*

In *Mississippi v. Tennessee*, the Supreme Court, in a unanimous decision written by Chief Justice John Roberts, rejected Mississippi's claim that it owned the groundwater in the portion of the interstate aquifer lying within its borders, and therefore could assert a tort claim against Tennessee for pumping groundwater from the aquifer, and held instead that the states' shares of the groundwater must be apportioned between the states under equitable apportionment principles established by the Court in resolving interstate water disputes.

As the Court noted, the Court first established the equitable apportionment doctrine in an interstate dispute between Kansas and Colorado over water rights in the Arkansas River. *Kansas v. Colorado*, 206 U.S. 46 (1907). In *Kansas*, the Court held that all states have equal sovereignty over their waters, with the right to determine their water laws. The Court also held, however, that when one state attempts to allocate an interstate water resource for its own benefit but to the detriment of other states, the laws of neither state can properly apply to the controversy, nor can the courts of either state properly adjudicate the controversy. Rather, the Court held, the Supreme Court has sole jurisdiction to adjudicate the controversy, and has fashioned a federal common law doctrine—the doctrine of equitable apportionment—that allocates a fair and equitable share of the waters to each state. The Court in *Mississippi* noted that it had applied equitable apportionment in resolving many interstate water disputes, such as *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Colorado v. New Mexico*, 459 U.S. 176 (1982), and *Wyoming v. Colorado*, 259 U.S. 419 (1922).

The *Mississippi* Court also noted that it applied equitable apportionment in resolving a dispute between Oregon and Idaho over anadromous fish in the Columbia-Snake River system. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1018-1019, 1024 (1983). Thus, while equitable apportionment generally applies to interstate disputes over water, the same principle also applies to interstate disputes over fishery resources in the water. And while equitable apportionment generally protects the right of a *downstream* state to a fair share of interstate waters, *Evans* held that equitable apportionment also protects the right of an *upstream* state to a fair share of a fishery resource in the waters (although *Evans* rejected Idaho's claim that it had been denied a fair share of the fishery resource under the facts of the case). Thus, equitable apportionment is a flexible doctrine that applies to any interstate water dispute, whether the dispute is over water rights or fish and whether the beneficiary is an upstream state or downstream state.

Applying Equitable Apportionment Doctrine to an Interstate Dispute over Groundwater

The *Mississippi* Court acknowledged, however, that the Court had never applied the equitable apportionment doctrine in resolving an interstate dispute over groundwater. Thus, the issue raised in *Mississippi* was one of first impression.

Resolving the dispute, the Court held that equitable apportionment applies to the Middle Claiborne Aquifer because the dispute over the aquifer is "sufficiently similar" to past interstate water disputes in which equitable apportionment has been applied. Slip Op. 7. The Court held that the Middle Claiborne Aquifer was of a "multistate character," in that the aquifer underlies both Mississippi and Tennessee and thus groundwater pumping in both states is from the "same aquifer." *Id.* at 8. The Court also held that water in the Middle Claiborne Aquifer "flows naturally" between the states, and that the Court's equitable apportionment decisions have concerned water that flows between the states. *Id.* Although acknowledging that the flow of the water within the aquifer may be "extremely slow"—as much as an inch or two per day—the Court held that the speed of the flow does not place the aquifer beyond equitable apportionment. *Id.* Most importantly, the Court held that pumping of groundwater from the aquifer in Tennessee affects groundwater in the aquifer in Mississippi, in that pumping in Tennessee creates a cone of depression that reduces groundwater storage and pressure in Mississippi. *Id.* The Court concluded that

the doctrine of equitable apportionment applies to the interstate aquifer.

The Court rejected Mississippi's claim that equitable apportionment does not apply because it owns all groundwater beneath its surface. *Id.* at 9. Although the Court acknowledged that a state has "full jurisdiction over the lands within its borders, including the beds of streams and other waters," the Court held that such jurisdiction does not confer "unfettered ownership or control of flowing interstate waters themselves." *Id.* (citations and internal quote marks omitted). When a water resource is shared between different states, the Court held, each state has "an interest which should be respected by the other." *Id.* at 9-10. As the Court stated, Mississippi's argument would allow an upstream state to completely cut off the flow of groundwater to a downstream state, contrary to the Court's equitable apportionment jurisprudence. *Id.* at 10.

The Court also rejected the Special Master's recommendation that the Court should allow Mississippi to amend its complaint to seek equitable apportionment, because, the Court stated, Mississippi has not sought to amend its complaint to seek equitable apportionment and the Court cannot assume that Mississippi would do so. Slip Op. 11. As the Court stated, Mississippi sought relief under tort principles, and it cannot be assumed that Mississippi would seek equitable apportionment, which would be based on a broader range of evidence and might require joinder of the other states that rely on the Middle Claiborne Aquifer. *Id.* The Court did not, however, specifically preclude Mississippi from filing a motion for leave to file a complaint seeking equitable apportionment. If Mississippi were to file such a motion, the Court presumably would consider the motion based on the Court's established equitable apportionment principles.

It is telling that the Court spoke unanimously in holding that Mississippi could not pursue its tort claim against Tennessee under the Court's original jurisdiction, and that there were no dissenting or even concurring opinions. Not a single justice supported Mississippi's ownership claim as applied to the interstate aquifer. Although the Court's decisions in the modern era are often fragmented and divided, it is salutary that at least with respect to an interstate dispute over an aquifer, the Court has spoken with one voice.

Conclusion and Implications: State Ownership of Water

Mississippi's claim that it "owns" the groundwater in its portion of the interstate aquifer—which was the predicate for its claim that Tennessee was liable in tort for taking groundwater from the aquifer—is not without foundation. The Supreme Court has long held that under the equal footing doctrine—which holds that all states are admitted to statehood on an equal footing with other states—the states acquire sovereign title and ownership of navigable waters and underlying lands upon their admission to statehood. *PPL Montana v. Montana*, 565 U.S. 576, 589-593 (2012); *Shively v. Bowlby*, 152 U.S. 1, 13, 14 (1894); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The Court relied on this principle in its seminal decision establishing the public trust doctrine, which held that the states, having acquired title and ownership of navigable waters and lands, hold the water and lands in trust for the public's common use. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892). The Court has also held that, under the Tenth Amendment of the Constitution, the states have the right to adopt laws governing water rights—such as the appropriation doctrine and the riparian doctrine—and that Congress cannot enforce either rule upon any state. *Kansas v. Colorado*, 206 U.S. 46, 93 (1907). Additionally, the Court has held that Congress has generally deferred to state water laws by enactments such as the Desert Land Act of 1877, which provides for disposition of the public lands in the western states, *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935), and the Reclamation Act of 1902, which authorizes federal water projects in the western states, *California v. United States*, 438 U.S. 645 (1978).

Thus, the states have sovereign ownership interests in their waters under both constitutional and statutory principles, with authority to regulate and control water rights in the waters. The states' sovereignty over water is a bedrock principle of the federalism that underlies our constitutional order. *PPL Montana*, 565 U.S. at 551. Since the states have ownership interests in their surface waters, they logically have the same interests in groundwater beneath the surface.

Under the Supremacy Clause of the Constitution, the states' sovereignty over water, however broad, is subject to Congress' paramount powers under the Constitution, particularly Congress' power to regulate

navigable waters under the Commerce Clause. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703 (1899); *Martin*, 41 U.S. at 410. Indeed, the states' sovereignty over water is subject is subject to Commerce Clause limitations even when Congress does not act; under the dormant Commerce Clause, a state cannot impose an unreasonable burden on interstate commerce even absent congressional action. *United States Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 337 (2007). In *Sporhase v. Nebraska*, 458 U.S. 941, 953-954 (1982), the Supreme Court applied the dormant Commerce Clause in holding that groundwater is an article of interstate commerce, and thus Nebraska could not impose an unreasonable burden on interstate commerce by preventing the transfer of groundwater from Nebraska to another state.

The states' sovereignty over water is also subject to a principle of federal common law—the doctrine of equitable apportionment—that applies to interstate disputes over interstate waters. As the Supreme Court has held, interstate waters are a common resource that must be shared equally by the states, and the states' shares of the waters must be apportioned under the Court's equitable principles. *Kansas v. Colorado*, 206 U.S. 46, 85-96 (1907); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922). Plainly the laws of a single state cannot properly apply to the controversy; otherwise, one state, such as an upstream state, could wholly allocate interstate waters for its own use and deprive other states, such as downstream states, of their own rights to use the waters. This equitable principle limits the state's authority to allocate interstate water to its own users, because the amount of water that the state allocates among its users cannot exceed the amount of the state's equitable share of the waters. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938).

The Supreme Court in *Mississippi* held that the doctrine of equitable apportionment that applies to interstate disputes over surface waters also applies to interstate disputes over groundwater. The states have common rights and interests in both types of waters, and thus the same principle of equity that applies to surface waters logically applies to groundwater. A contrary result would create an anomaly in federal law, in that a different rule would apply to disputes over surface water and groundwater, even though the states have common rights and interests in both types of water; federal law frowns on anomalies, particularly those created by the Supreme Court's own common law, which the Court itself can correct. Mississippi should have recognized the logic and force of equitable apportionment at the outset rather than pursuing an ill-conceived claim that it could assert a tort claim against Tennessee because it wholly owned the portion of an interstate aquifer located beneath its surface. Even so, the Supreme Court did not preclude Mississippi from pursuing equitable apportionment under the Court's original jurisdiction, and thus Mississippi presumably has the right to pursue such a claim if it decides to do so.

It is significant that the Supreme Court in *Mississippi* did not suggest that the states do *not* have ownership of water within their borders, and held instead that the states do not have "unfettered" and "exclusive" ownership of interstate waters that would preclude other states from having equitable shares of the waters. Slip Op. 9. Thus, the Court did not adopt the view, expressed in its earlier decision in *Sporhase v. Nebraska*, that the theory of state "ownership" of water is a "fiction." *Sporhase*, 458 U.S. at 951. Contrary to the *Sporhase* statement, the Supreme Court has long held that under the equal footing doctrine the states acquire sovereign "title" and "ownership" of navigable waters and lands upon their admission to statehood, a principle established under the Constitution itself and not Congress' statutes. *E.g., PPL Montana*, 565 U.S. at 589-593, 603. The Court applied this principle in establishing the public trust principle that the states hold the waters and lands in trust for the public's common use. *Illinois Central*, 146 U.S. at 435, 452. Thus, state ownership of water is not a "fiction." Rather, the states acquire an ownership interest in water under the equal footing doctrine, but, under the principle of federal supremacy, the states' ownership interest is subject to Congress' paramount power to regulate navigable waters under the Commerce Clause, and subject to the federal common law rule that interstate waters must be equitably apportioned among the states.

In sum, while *Mississippi* rejected Mississippi's claim that it owned the groundwater in an interstate aquifer and could assert a tort claim against Tennessee for pumping groundwater from the aquifer, *Mississippi* did not suggest that states do not have an owner-

ship interest in groundwater, or other waters, within their borders. Rather, *Mississippi* held that regardless of a state's ownership interest in groundwater, an interstate dispute over groundwater must be resolved under the principle of equitable apportionment that applies to other interstate disputes over water.

Roderick E. Walston, Esq. has litigated—and is litigating—many of the nation's most significant water rights cases, and has garnered impactful, precedent-setting victories at both the U.S. Supreme Court and the California Supreme Court. Rod is now of counsel in Best Best & Krieger, LLP's Environmental & Natural Resources practice group. During his career, Rod has litigated many of California's most important natural resources and environmental cases, particularly at the appellate level.

Rod has argued original jurisdiction cases in the Supreme Court, including some mentioned in this article. He has served as Deputy Solicitor and Acting Solicitor of the U.S. Department of the Interior, and as Chief Assistant Attorney General (and head of the Public Rights Division) and Deputy Attorney General of the State of California.

CALIFORNIA WATER NEWS

LOWER COLORADO RIVER BASIN WATER AGENCIES REACH AGREEMENT ON 500+ PLAN AS DROUGHT RESPONSE EFFORTS CONTINUE

Last month, at the December 15, 2021 Colorado River Water Users Association conference held in Las Vegas, Nevada, water agencies from across Lower Colorado River Basin states came together with the U.S. Bureau of Reclamation (Bureau) to craft a plan for conserving water resources in the Southwest. The result was an agreement between the Bureau and several major water agencies from California, Nevada, and Arizona that proposes voluntary water reductions in order to keep the water level of Lake Mead from continuing its freefall. This agreement comes at a time when urgency to negotiate new rules for managing the waning watershed, which serves more than 40 million people, is at its height, as current guidelines and an overlapping drought plan are set to expire in 2026.

The Setting

The two largest reservoirs in the Colorado River system, Lake Mead and Lake Powell, are well below their halfway point for water elevations. Looking at the two reservoirs together, the Bureau of Reclamation's Lower Colorado Water Supply Report from December shows that they sit at about 34 and 28 percent of their storage capacities, respectively, so low that the federal government declared the first ever water shortage on the river in the early summer of 2021, triggering cutbacks in Arizona and Nevada. Further stressing the dire nature of the situation, forecasts released at the conference show Lake Mead's water levels continuing to drop if no further action is taken.

The Plan

Enter the 500+ Plan. In addition to the Bureau, the water agencies taking part in the 500+ Plan include the Southern Nevada Water Authority, Arizona Department of Water Resources, Central Arizona Project, and southern California's Metropolitan Water District. Coming in the form of a Memorandum of Understanding signed during the Colorado River Water Users Association's annual conference, the water agencies involved agreed to work together to keep an additional 500,000 acre-feet of water in Lake Mead over the next two years (through 2023). The additional water saved by the plan, a half-a-million acre-feet, would be enough water to serve about 1.5 million households a year and would add about 16 feet total to the reservoir's level, which saw record low levels this past summer.

On top of the water savings discussed in the 500+ Plan, the MOU also calls for financial investment from parties involved—$40 million from the Arizona Department of Water Resources, and $20 million each from the Southern Nevada Water Authority, Metropolitan Water District, and the Central Arizona Project, which operates a canal system that delivers Colorado River water in Arizona. The Bureau is also slated to match the funding, for a total of $200 million. This spending is accordingly designed to be used to incentivize farmers, water agencies and tribes to reduce their total water use, freeing up more water for return into the reservoir.

Conclusion and Implications

Agencies throughout the Lower Colorado River Basin have been cooperating for some time now to help curb the effects of the seemingly decades-long drought the basin has experienced. As recently as 2019, for example, the Lower Basin Drought Contingency Plan was crafted and included a provision requiring the three lower-basin states to consult and agree to additional measures to stabilize Lake Mead, at least in the short term. Well the time for consulting came much sooner than anyone had hoped and the 500+ Plan serves as the additional measures contemplated.

The 500+ Plan is also a significant agreement in that it builds on the partnerships of major Colorado River water agencies that began to form while the Drought Contingency Plan was coming together.

Now, over the course of the 500+ Plan, and moreover the Drought Contingency Plan and other plans sure to follow, we will be able to witness the efficacy of an interstate drought response fueled by unprecedented emergency. If the desired outcomes of the 500+ Plan can be attained by the 2024 horizon it will surely be a step towards re-establishing stability, even if only a small one, for all who are fueled by the lower Colorado. A link to the 500+ Plan is available online at: https://library.cap-az.com/documents/departments/planning/colorado-river-programs/cap-500plus-plan.pdf.
(Wesley A. Miliband, Kristopher T. Strouse)

MARIN MUNICIPAL WATER DISTRICT WATER RULES GO INTO EFFECT

On December 1, 2021 a number of water restrictions went into effect within the Marin Municipal Water District in response to ongoing drought conditions. The restrictions, or water rules, prohibit outdoor irrigation and impose restrictions on water use in swimming pools, power washing, car washing, and other uses. The water rules are intended to assist the district to ensure it has an adequate supply of water for the coming year in the face of ongoing and potentially worsening drought and water supply conditions affecting the district.

Background

Beginning in April 2021, the Board of Directors of the Marin Municipal Water District (District) adopted a series of ordinances that declared a water shortage emergency and codified mandatory water conservation measures for all of the District's customers. In September, the District's Board of Directors (Board) adopted Ordinance No. 454 (Ordinance). The purpose of the Ordinance is to establish limits on residential and irrigation water use and impose penalties for water use in excess of new water use limits. The Board found that such additional measures were necessary to substantially reduce or eliminate water use for outdoor irrigation and preserve the remaining water supply given the uncertainty of future supply conditions caused by the ongoing drought. Water use limits set by the Ordinance became effective December 1, 2021.

Adopting Water Conservation Measures under the Water Code

In adopting its ordinances, the District relied on Water Code § 375, which allows a public entity supplying retail or wholesale water for the benefit of persons within its service area to adopt a water conservation program to reduce the quantity of water used for the purpose of conserving the water supplies of the public entity. Similarly, under Water Code §§ 350 and 353, a public agency may adopt emergency shortage regulations upon a finding that an emergency water shortage condition exists in its service area, provided it finds that the ordinary demands and requirements of water customers cannot be satisfied without depleting the water supply of the distributor to the extent that there would be insufficient water for human consumption, sanitation, and fire protection.

Findings

In adopting the Ordinance, the Board made a number of findings related to the water supply condition affecting the District. According to the Board, the District's water supply was limited to water captured in its seven reservoirs, which was roughly 36 percent (or approximately 28,000 acre-feet) of average for September; water transported from the Russian River via the North Marin aqueduct; and recycled water produced at the Las Gallinas Valley Sanitary District Plant (for a variety of non-potable uses). In addition, the Board found that 73 percent of the District's supply came from its reservoirs, 25 percent from the Russian River through the North Marin Aqueduct, and 2 percent from recycled water. Based on rainfall patterns in the District, little rain falls from May to October, yet the overall summer peak-demand period averages twice as much as winter use. The Board also found that, according to projections, another dry water year could result in reservoir storage levels as low as 10,0000 acre-feet in summer or fall of 2022.

Water Restrictions

In light of the dire water supply conditions facing the District, the District determined that restrictions, as well as penalties, were necessary to reduce excessive water use and preserve the District's existing water supply. The Ordinance adds several water use restrictions applicable to the "winter service period," defined as the months of December through May, and the "summer service period," defined as the months of June through November. Specifically, the Ordinance requires that all metered single-family residential water accounts limit water use to each bimonthly billing period to no more than 21 CCFs (a CCF is one-hundred cubic feet of water). For single-family residential irrigation water accounts, water use is restricted to zero percent of the account's current base line during the winter service period and to 50 percent of the current baseline during the summer service period. In other words, water use by residential irrigation water accounts was completely restricted during the winter period and was cut in half during the summer period. Similarly, commercial irrigation water accounts were reduced to zero percent of baseline during the winter service period and 85 percent of current baseline during the summer service period.

Penalties

The Ordinance imposes penalties for water use in excess of the restricted amounts described above. Charges for excess use by residential water accounts range from $5 to $15 per CCF during the winter service period and $10 to $15 per CCF during the summer service period. Penalties were the same for residential and commercial irrigation accounts, although "excess" was defined based on their percentage variation from baseline rather than a strict CCF overage for residential (non-irrigation) water accounts.

Previous Ordinances Imposing Water Use Restrictions

In addition to the restrictions and penalties in the Ordinance, the District had previously adopted a series of ordinances that impose a variety of water use restrictions for non-essential uses. For instance, the District prohibits the washing of sidewalks and other hard surfaced areas unless a regulatory exception applies, prohibits refilling completely drained swimming pools, requires covers for all pools, requires fixing leaks within 48 hours of being discovered, restricts golf course watering to greens and tee boxes, and prohibits refilling decorative fountains. These restrictions were adopted as part of the District's "comprehensive drought water conservation and enforcement measures."

Conclusion and Implications

Together, the District's water rules seek to preserve the District's declining water supply in the face of ongoing drought conditions. Many water districts have exercised their legal authority to adopt long-term conservation programs and, in some instances, emergency regulations to address significant drought conditions. Whether the District's water rules will help the District meet its water supply objectives remains to be seen as the winter months approach. Marin Municipal Water District's, Water Rules, available online at: https://www.marinwater.org/waterrules. (Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES IDENTIFIES PREFERRED DELTA TUNNEL ALIGNMENT IN AMENDED CLEAN WATER ACT SECTION 404 PERMIT APPLICATION

On November 22, 2021, the California Department of Water Resources (DWR) submitted an amended federal Clean Water Act, Section 404 permit application to the U.S. Army Corps of Engineers (Corps), indicating it has chosen a new preferred alignment alternative for its proposed 6,000 cubic feet per second (cfs) Delta Conveyance Project. As described in the amended application, the selected "Bethany Alternative" could result in fewer surface water impacts because water would be transported directly to the existing Bethany Reservoir rather than a newly constructed forebay at Clifton Court near the City of Tracy.

Background

The Delta Conveyance Project is a 6,000 cubic-feet per second (cfs) water infrastructure project and the latest iteration of a long-proposed plan to upgrade the conveyance systems used to move water from the Sacramento-San Joaquin River Delta to southern California and other regions throughout the state. In its operation of the State Water Project, DWR conveys water that originates in the Sierra Nevada Mountains through the Delta, and distributes it via an array of natural and manmade waterways to meet California's agricultural, industrial, and domestic demands.

A successor to past large-scale proposals like California WaterFix and the Bay Delta Conservation Plan, the Delta Conveyance Project aims to modernize the Delta's aging water infrastructure to protect the State Water Project's water supply reliability amid the threats of climate change, seismic activity, and sea level rise.

DWR's Revised Section 404 Application

Under the federal Clean Water Act, a Section 404 permit is required for construction activities that could result in the discharge of dredged or fill material into "waters of the United States" as defined under the act. The Corps is responsible for administering permit applications and enforcing Section 404 permit provisions. At its core, Section 404 prohibits the discharge of dredged or fill material if a practical alternative exists that is less damaging to the aquatic environment or if the nation's waters would be significantly degraded. As such, the DWR must obtain a Section 404 permit before it may begin construction of the proposed project facilities.

On January 15, 2020, DWR submitted its original permit application at the same time it issued a Notice of Preparation of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA). By its application, DWR initiated talks with the Corps to coordinate environmental review of the project under the parallel National Environmental Policy Act (NEPA) process. The original application presented the project as two potential corridor options—a central or an eastern tunnel alignment—which the Corps found to be incomplete. Six months later, DWR amended the application at the Corps' direction to identify the eastern alignment as its proposed project, while cautioning that the change was preliminary and not a final decision as to DWR's preferred project. DWR's adoption of a preferred alternative in this recent application amendment signifies further development of the project.

The proposed alternative known as the "Bethany Alternative" would utilize the same pair of 3,000 cfs water intake facilities constructed in the north Delta, and tunnel corridor running along the Interstate-5 Highway that were envisioned for the eastern alignment alternative. However, a new tunnel would move the water further south to a pumping plant at the existing Bethany Reservoir, rather than to a new forebay at Clifton Court. Without need for a forebay to regulate flows between two pumping plants to get water to the California Aqueduct, DWR estimates that the Bethany Alternative has the potential to significantly reduce certain impacts of the Delta Conveyance Project. Noting the importance of reducing

fill activities in "waters of the United States" for Section 404 permit approval, DWR has thus selected the Bethany Alternative as its preferred project.

Conclusion and Implications

Although it has chosen the Bethany Alternative as its preferred alignment for the Delta Conveyance Project, DWR has stated that the selection will not alter its evaluation of the full range of feasible tunnel alignments and construction options, and their potential environmental impacts under CEQA. The Draft EIR for the project is expected to be released in the summer of 2022 for public review and comment. In turn, the Corps' approval of the amended permit application will depend on a number of ongoing processes, including DWR's final project approval under CEQA, compliance with the federal Endangered Species Act and the National Historic Preservation Act, and a water quality certification by the State Water Resources Control Board under Section 401 of the Clean Water Act.

Additional information regarding the environmental planning and Section 404 permit application status for the Delta Conveyance Project can be found at https://water.ca.gov/Programs/State-Water-Project/Delta-Conveyance/Environmental-Planning.
(Austin Cho, Meredith Nikkel)

CALIFORNIA DEPARTMENT OF WATER RESOURCES INDICATES IT WILL NOT APPROVE SEVERAL SAN JOAQUIN VALLEY GROUNDWATER SUSTAINABILITY PLANS

The California Department of Water Resources (DWR) issued preliminary assessment letters to several San Joaquin Valley Groundwater Sustainability Agencies (GSAs) that their Groundwater Sustainability Plans (GSPs) contain several deficiencies that preclude DWR from approving the plans. The final DWR determination is anticipated mid- to late-January 2022.

Background

DWR must evaluate GSPs within two years of their submittal and issue a written assessment based on criteria outlined in the GSP Regulations, determining whether the GSPs comply with SGMA, substantially comply with the GSP Regulations, and whether implementation of the GSP is likely to achieve the sustainability goal for the basin.

There are a total of 515 groundwater basins in California. The DWR designated 21 of the 515 basins as high priority, in critical overdraft condition. Of those, 11 subbasins, which collectively constitute the larger San Joaquin Valley Groundwater Basin, are in the Central Valley, a globally significant agricultural area. In total, 36 GSPs were submitted in the San Joaquin Valley Groundwater Basin, as several of the subbasins are managed by multiple GSAs. These GSAs, either individually or jointly, prepared and submitted to DWR one or more GSP covering each subbasin.

The first set of GSPs subject to the statutory two-year DWR evaluation were submitted on or before January 31, 2020. In a letter dated November 18, 2021, DWR informed GSAs in four subbasins, the Eastern San Joaquin Valley, Merced, Chowchilla and Westside subbasins, that the four GSPs submitted for the subbasins contain deficiencies that, if not addressed, would preclude DWR from approving them in January 2022. On December 9, 2021, DWR issued letters for six other subbasins: Delta Mendota, Kings, Kaweah, Tulare Lake, Tule and Kern (28 GSPs in total). No letters have yet been issued for the four GSPs covering the Madera subbasin, informing them that deficiencies were identified in their GSPs like the ones identified in the other four San Joaquin Valley subbasins GSPs, and directing them to review the DWR letters sent in November for details.

Defining Sustainable Management Criteria

GSP Regulations require a GSP to define sustainable management criteria including undesirable results, minimum thresholds, and measurable objectives. These components of sustainable management criteria must be quantified so that GSAs, DWR, and other interested parties can consistently and objectively monitor progress towards the basin's sustain-

ability goals. Among other factors, defining the undesirable results and setting minimum thresholds and measurable objectives is based on local experience, public outreach, basin setting, current and historical groundwater conditions, and the water budget.

SGMA leaves the task of defining undesirable results and setting thresholds largely to the discretion of the GSAs, subject to DWR review. DWR must disapprove a GSP if, after consultation with the State Water Resources Control Board, DWR finds that the GSP is incomplete or inadequate. If DWR determines a GSP to be incomplete, the GSA must address the deficiencies within a period not to exceed 180 days from the DWR determination. The DWR could subsequently approve an incomplete GSP if the GSA has taken corrective actions to address the deficiencies within that probationary period. The DWR could also issue a determination of an inadequate or incomplete GSP if, after consultation with the State Board, the DWR determines the GSAs have not taken sufficient actions to correct the deficiencies identified by the DWR. Such a determination triggers a potential intervention by the SWRCB, whereby the board may develop and impose its own interim GSP to regulate extractions in the basin.

The November and December Letters

In its November and December 2021 letters, DWR informed the above-named GSAs that it cannot approve the GSPs unless certain identified deficiencies are remedied. The deficiencies identified by DWR center around the definition of undesirable results and the levels set in those GSPs for minimum thresholds and measurement objectives, impacts to shallow wells, impacts on water quality and whether the GSP's projects and management actions address impacts to drinking water and degradation of water quality. DWR also examined use of sustainable management criteria as proxy for undesirable results (rather than defining a minimum threshold for that undesirable result) without sufficient evidence to evaluate the correlation.

For example, for the eastern San Joaquin Valley, DWR stated in its November letter that the GSP does not include sufficient justification of the narrow definition of undesirable results related to chronic lowering of groundwater levels, subsidence, and depletion of interconnected surface waters, whereby an undesirable result can only occur in consecutive non-dry water year types and would not be considered an undesirable result unless groundwater levels do not rebound to above the thresholds following those two years. DWR further stated that the GSP does not provide an adequate justification considering that an undesirable result would only occur for groundwater levels when at least 25 percent of representative monitoring wells (five of 20 wells) fall below their minimum threshold value for two consecutive non-dry water years.

If a GSP did not include projects or management actions addressing impacts on drinking water and water quality degradation, DWR is requiring the subject GSP to be modified to include a thorough discussion, with supporting facts and rationale, explaining how and why each GSA properly determined not to include actions to address those impacts.

Finally, where a GSP used sustainable management criteria as a proxy to determine the occurrence of an undesirable result, the DWR recommended that the GSP be modified to include evidence based on the best available science to justify the correlation.

Conclusion and Implications

This first set of initial letters provide a preview of the areas that DWR considered most critical in their review of the GSPs submitted in 2020. Given the short amount of time between the date of the letters and the date that DWR would issue its final GSP determinations in January 2022, it will be challenging for any of the GSA's to remedy the deficiencies in time to avoid an incomplete determination. DWR's Letters to San Joaquin Valley GSAs, may be accessed through DWR's SGMA Portal at SGMA Groundwater Management (SGMA) Portal - Department of Water Resources (ca.gov).

(Maya Mouawad, Steve Anderson)

CONTINUING DROUGHT CONDITIONS PROMPT UNPRECEDENTED CALIFORNIA STATE WATER PROJECT INITIAL ZERO PERCENT ALLOCATIONS

On December 1, 2021, the California Department of Water Resources (DWR) announced that California water districts will receive zero percent of requested supplies from the State Water Project (SWP) for 2022, with the exception of minimal supplies that are needed for health and safety purposes. This decision represents the first zero percent allocation since January of 2014 and the only time DWR has opened the water year with a zero percent allocation.

Background

DWR provides its initial annual SWP allocation based on available water storage and projected water supply demands. DWR's announcement follows the driest two consecutive years in California since the mid-1970s. Unprecedented drought conditions have strained reservoirs and groundwater reserves in the state, forcing the state to look for additional ways to conserve water.

The State Water Project

The SWP is a complex system of canals, pipelines, reservoirs, and hydroelectric power facilities that delivers water to 27 million Californians and provides irrigation for approximately 750,000 acres of farmland. It delivers snowmelt and runoff from the northern Sierra mountains into Lake Oroville and down though the Sacramento-San Joaquin River Delta into the Los Angeles Basin. In normal years, the SWP will provide drinking water to up to two thirds of California residents.

What Districts Can Expect

The 29 water agencies that contract to receive SWP distributions were recently informed they would only receive allocations to support health and safety needs. Water officials can expect to receive only modest amounts of water for firefighting, hospitals, and limited indoor use, such as drinking water, toilets, showers, and clothes washing. DWR indicates that this means districts should not expect to receive water supplies for other purposes such as irrigation, landscaping or gardening. The SWP plans to deliver only approximately 340,000 acre-feet of water as part of such health and safety allocations, significantly less than 4.2 million acre-feet the districts have contracts for.

An Unprecedented Announcement

The December 1st announcement marks the first 0 percent initial allocation made by DWR in the SWP's 60-year history. Previously, the lowest initial SWP allocations were 5 percent in 2010 and 2014. Last year, during the second driest on record, SWP contractors received a 10 percent initial allocation in December that fell to 5 percent by March. The last 0 percent allocation came in the midst of the state's last drought in January of 2014, after DWR revised downward its initial December allocation of 5 percent.

Historically, water allocations increase during the winter months as the DWR updates its allocations monthly as snowpack and runoff information is assessed before issuing a final allocation amount in May or June. This means that heavy rain and snow throughout the winter could increase this allocation as snowpack conditions improve.

Recent significant atmospheric river events have temporarily improved snowpack conditions in parts of California. But at the time of this writing, those conditions had not altered DWR projections or SWP allocations; and, with last year's 5 percent decrease in allocations and the potential for continued drought conditions, an increase currently seems unlikely.

Dry Predictions

In fact, DWR anticipates a third dry year in a row as severe drought conditions recently pushed reservoirs to historic lows. According to DWR Director Karla Nemeth, DWR is predicting a below average water year for 2022, and is bracing for a potentially dry 2023 as well. DWR is expected to conserve as much water as possible in Lake Oroville in response to drought concerns. The health and safety demand for the majority of districts will be met with water from the Delta and the San Luis Reservoir. DWR indicated it intends to use Lake Oroville supplies to

maintain Delta water quality, protect endangered species, and meet senior water rights. Deliveries to districts south of the Delta are not expected unless conditions improve.

Conclusion and Implications

DWR's unprecedented decision to issue a 0 percent allocation this early in the water year reflects the severity of the ongoing drought conditions in California. While DWR has the ability to revisit its SWP allocations throughout the winter, it currently seems unlikely that contractors can expect much in the way of allocations for 2022, absent an extreme, sudden and sustained improvement to reservoir conditions. DWR instead appears focused on replenishing critical supplies in preparation for anticipated continuing drought conditions into 2023.

Without the SWP allocations, water contractors and retail water suppliers will increasingly look to other, local sources to meet their water supply needs, including local reservoirs, groundwater supplies, and purchases from senior water rights holders. Additionally, water suppliers with access to the Colorado River supply will likely place further demand on an already-strained Lake Mead. Of course, conservation and demand-management measures are already being implemented and will play a key role in effectively managing supplies through the water year. For more information, *see:* https://water.ca.gov/News/News-Releases/2021/Dec-21/SWP-December-Allocation. (Scott C. Cooper, Derek Hoffman)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD CONSIDERS IMPOSING MANDATORY WATER USE RESTRICTIONS STATEWIDE IN RESPONSE TO DROUGHT CONDITIONS

In response to worsening drought conditions, government officials and water suppliers in various places throughout California have begun taking emergency actions to reduce residential and commercial outdoor water use. Implementing Governor Newsom's executive orders, the State Water Resources Control Board (SWRCB) has now proposed statewide mandatory water use restrictions that will be considered for approval in early January.

Background

In April 2021, Governor Newsom issued the first of a series of drought emergency executive orders, starting with specific listed counties. In July 2021, Newsom signed Executive Order N10-21, calling on all Californians to voluntarily reduce water use by 15 percent as compared to 2020. Following reports that voluntary efforts achieved reductions of approximately just 5 percent, Newsom issued a proclamation in October 2021 declaring that drought conditions constituted a state of emergency throughout the entire state. The October proclamation authorized the SWRCB to use emergency regulations pursuant to Water Code § 1058.5 to restrict wasteful water practices. Accordingly, on November 30, 2021, the SWRCB published a Notice of Proposed Emergency Rulemaking along with proposed text for an emergency regulation. As of the date of this writing, the SWRCB was scheduled to vote upon a resolution adopting the emergency regulation on January 4, 2022.

California Drought Conditions

The SWRCB observes that drought is a recurring element of California's hydrology, but that drought conditions are reaching to further extremes. The western states experienced some of the hottest temperatures on record throughout the summer of 2021. As of early December 2021, approximately 92 percent of the State was experiencing severe, extreme, or exceptional drought, up from approximately 74 percent one year prior, according to the U.S. Drought Monitor. In addition, as represented more fully by the chart below, many of California's key lakes and reservoirs were falling well below their historical average seasonal capacity when the SWRCB issued the proposed regulation:

- Shasta Lake Reservoir—46 Percent [of Early December Percentage of Average]

- Lake Oroville Reservoir—63 Percent
- Trinity Lake Reservoir—49 Percent
- San Luis Reservoir—45 Percent
- New Melones Reservoir—67 Percent
- Don Pedro Reservoir—76 Percent
- Lake McClure Reservoir—48 Percent

Though California has recently experienced substantial increases in snowpack and precipitation from significant atmospheric river events, many forecasts still predict that California's drought conditions are likely to continue into 2022 and beyond, especially if increased temperatures result in earlier-than-normal snowmelt and runoff.

The Proposed Emergency Regulation

Under the SWRCB proposed regulation, the following are deemed wasteful and unreasonable water uses, and are prohibited:

- Incidental runoff of outdoor irrigation water.
- Vehicle washing with a hose that is not equipped with a shot-off nozzle.
- Washing hardscapes such as driveways, sidewalks, and asphalt with potable water.
- Using potable water for street cleaning or construction purposes.
- Using potable water to fill fountains and other decorative water fixtures (including lakes and ponds) except where recirculation pumps are used and refilling only replaces evaporative losses.
- Watering lawns and ornamental landscapes during and within 48 hours after measurable rainfall of at least a quarter-inch of rain.
- Using potable water for watering lawns on public street medians or landscaped areas between the street and sidewalk.

The regulation also prohibits homeowner associations, cities, and counties from impeding drought response actions taken by homeowners. Notably, violation of the regulation is punishable by a fine of up to $500 per day. If approved, the regulation will apply to all Californians and remain in effect for one year unless rescinded earlier or extended by the SWRCB.

At the time of this writing, the public comment period on the proposed emergency regulation was scheduled to run through December 23, 2021. The proposed emergency regulation and related materials are located on the SWRCB website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html.

SWRCB Anticipated Outcomes

The SWRCB estimates that the mandatory restrictions will result in statewide reductions of Californians' outdoor water use of up to 20 percent compared to 2020. The regulation is largely predicated upon the 2014-2015 mandatory water use restrictions implemented by former Governor Brown and the SWRCB during the 2012-2016 drought, which resulted in an approximately 25 percent statewide water use reduction.

Conclusion and Implications

Despite significant forecasted revenue reductions for water suppliers, the proposed emergency regulation seeks to preserve California's water supplies in anticipation of continued, potentially multi-year, drought conditions. Due to more frequent and severe drought conditions over the past several decades, and the commensurately increased responsive regulations, the SWRCB likely perceives that Californians are more accustomed now than ever to statewide permanent or periodic water restrictions. If enforcement is robust, and implemented in combination with public education and outreach, the regulation has the potential to successfully reduce statewide water use to stretch out currently available supplies. At the same time, many Californians may be understandably frustrated by a perceived inconsistent, "emergency-based" management approach from year to year.
(Byrin Romney, Derek Hoffman)

Editor's Note: Significant December rainfall has altered water levels at many of the state's reservoirs since this article went to "print."

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUP SUES MARIN MUNICIPAL WATER DISTRICT OVER EMERGENCY WATER PROJECT

On November 24, 2021, North Coast Rivers Alliance (North Coast) filed a lawsuit challenging Marin Municipal Water District's (Marin Municipal) approval of an Emergency Intertie Project on the Richmond-San Rafael Bridge (Project). The Project involves construction of a pipeline with pump stations and storage facilities that is capable of moving water between Marin County and Contra Costa County across the Richmond-San Rafael Bridge. The Project would extend roughly eight miles across the San Francisco Bay between the City of Richmond and the City of San Rafael and connect facilities operated by Marin Municipal and East Bay Municipal Utility District. Marin Municipal approved a Notice of Exemption (NOE) for the Project, finding that the Project is exempt from the California Environmental Quality Act (CEQA) to prevent or mitigate emergency drought conditions in Marin County. In its petition and complaint, North Coast alleges that Marin Municipal violated CEQA when it approved the Project without preparing an Environmental Impact Report (EIR). North Coast also alleges that the Project violates the Delta Reform Act and the public trust doctrine.

Background

CEQA defines "emergency" as a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of essential public services. (Cal. Pub. Res. Code § 21060.3.) On April 20, 2021, the Marin Municipal Board of Directors declared a "water shortage emergency" and on October 19, 2021, the Board approved the Project based on an NOE finding that the Project is necessary to prevent or mitigate the drought emergency and therefore exempt from further CEQA review.

According to Marin Municipal, it is experiencing an unprecedented drought and needs to supplement its water supply for its 191,000 customers or else risk running out of water as early as July 2022. As of September 12, 2021, Marin Municipal's reservoirs were at 36 percent of the average storage volume and are projected to have as little as 20,000 acre-feet in storage on December 2021, which is almost 9,000 acre-feet below average storage volume. The Project would take up to six months to construct and would allow for the short-term transfer of an estimated 15,000 acre-feet from East Bay Municipal Utility District to Marin Municipal.

North Coast's Lawsuit Challenging the Project

In its petition, North Coast asserts that the Project would transport water to Marin County that had been diverted from the Sacramento-San Joaquin Bay Delta would result in impacts to several endangered and threatened species that inhabit the Delta, including chinook salmon, Central Valley steelhead, and North American green sturgeon. North Coast also asserts that in the long-term the Project could be used to divert water from the Russian and Eel rivers north of Marin County and cause impacts to environmental resources in those watersheds as well. In addition, North Coast also claims that the long-term drought in Marin County is neither sudden nor unexpected and does not pose an immediate danger to essential public services. Therefore, North Coast argues that the Project is not exempt from CEQA's requirement to prepare an EIR to analyze the Project's potentially significant impacts. In its lawsuit, NCRA seeks a writ of mandate pursuant to California Code of Civil Procedure §§ 1085 and 1094.5 to set aside the Project approvals and to enjoin the Marin Municipal from permitting the Project without full compliance with CEQA.

Additionally, North Coast asserts that the Project is contrary to the Delta Reform Act. The Delta Reform Act establishes "coequal goals" for restoring and preserving the Delta's ecosystem. North Coast argues that the Project is a covered action under the Delta Plan requiring Marin Municipal to file a certificate of consistency with the Delta Stewardship Council, but that even if a certificate was filed, the Project does not conform with the goals of promoting statewide

water conservation and sustainable water use. North Coast also asserts that the Project violates the Public Trust Doctrine by failing to mitigate impacts to public trust resources.

Conclusion and Implications

North Coast claims that the ecological collapse of the Delta is a well-recognized and ongoing crisis, impacted both by unsustainable diversions as well as contamination from agricultural diverters in the area. One the other hand, Marin Municipal asserts that its aggressive conservation and water use restrictions alone are not enough to sustain water delivery to its residents given the 2020 and 2021 were the two successive driest winters in the 100-year hydrologic record. Based on these conditions, Marin Municipal proposes to move rapidly to have the Project online by summer of 2022 after construction taking approximately 3 months. At the time of the writing of this article, Marin Municipal has not responded to the North Coast petition. [*North Coast Rivers Alliance v. Marin Mun. Wat. Dist.*, Marin County Super. Ct.] (Madeline Weissman, Meredith Nikkel)

MADERA COUNTY GROUNDWATER SUSTAINABILITY AGENCY GROUNDWATER ALLOCATION ORDINANCE COMES UNDER FIRE IN LAWSUIT

Landowners in Madera County have filed a lawsuit against the Madera County Groundwater Sustainability Agency (Madera County GSA) after the GSA adopted a new groundwater allocation ordinance which aims at limiting the ability of overlying landowners in the region to pump groundwater. The Writ Petition, filed November 11, 2021, seeks to have the Madera County GSA vacate two resolutions adopted in 2021 which established the groundwater allocation ordinance at issue and to have the court declare these resolutions as violations of several Water Code provisions as well as the Takings provisions of both the federal and state constitutions, among other remedies sought.

The Groundwater Allocation Resolutions

Pursuant to the provisions of California's Sustainable Groundwater Management Act (SGMA), the Madera County GSA, along with the Madera Irrigation District GSA, the Madera Water District GSA, and the City of Madera GSA, adopted a Joint Groundwater Sustainability Plan (Joint Plan) on December 17, 2019 to govern all of their jurisdictions. Under this Joint Plan, the Madera County GSA would implement actions to gradually reduce groundwater pumping from 2020 to 2040, including a reduction in consumptive water use within the GSA area. The Joint Plan did not, however, specify what these actions might look like.

Come December of 2020, the GSA passed a resolution adopting an "allocation approach" for providing access to groundwater for users within the Subbasin. Under this allocation approach, demand would be split into two categories: sustainable yield and transitional water. Sustainable yield would refer to the amount of water that can safely extracted from the subbasin without causing undesirable results under SGMA while transitional water would refer to water extracted in excess of the sustainable yield. The focus of this approach was to allocate the sustainable yield and transitional water and reduce transitional water use until 2040 when it would be entirely eliminated.

In determining how sustainable yield and transitional water would be allocated, the GSA considered three main options. Option A sought to allocate sustainable yield on a pro-rata basis to all non-urban acres. Transitional water would then be allocated amongst landowners with actively irrigated lands in the Subbasin. Option B was mostly the same as Option A but provided an increased starting point for setting transitional water allocations.

The Madera County GSA ultimately went with the last option, Option C. This option differed vastly from Options A and B and allocated sustainable yield *only* to those who were allocated transitional water. This meant that a landowner would only receive a sustainable yield allocation if they had actively irrigated lands—*i.e.* if they had extracted

groundwater for use on their lands within the last five years—subject to a few exceptions. If a landowner owned acreage that had no history of groundwater use, for example, they could include that land in their sustainable yield determination only if it was deemed by the GSA to be a part of a "farm unit." If it was not deemed a farm unit, any land without historical groundwater use was not allocated any portion of the sustainable yield. Landowners not allocated a portion of the sustainable yield could submit a request to the GSA, but even if approved the landowner could only use their requested allocation on their existing land. These allocation rules were further tailored by the GSA in a later resolution, adopted August 17, 2021.

The Writ Petition

After detailing the resolutions at issue, the plaintiff landowners fire away their complaints with Madera County GSA's groundwater allocation scheme.

With the exception of land considered to be a part of a permitted farm animal operation or a farm unit, any other land not irrigated within the last five years would be allocated *zero* sustainable yield under the allocation scheme. Even if an owner of such land owned some land that was irrigated in addition to unirrigated land, that landowner would be prohibited from transferring extracted water to the non-irrigated parcel—or anywhere else for that matter.

As for landowners with dormant overlying rights, they would be required to apply to the Madera County GSA for specific approval of the landowner's proposed extraction source, volume, purpose, and use location. Moreover, if such extractions were approved prior to 2040 the landowner would be excluded from the benefit of obtaining any portion of the transitional water.

In total, the landowner group has alleged six causes of action against the Madera County GSA. Among these, the landowner group has sought a writ of mandate ordering the GSA to vacate its Resolutions No. 2021-069 and 2021-113 establishing the groundwater allocation scheme. The landowner group is further seeking, in the form of declaratory relief, a declaration from the court that the Resolutions violate §§ 10720.5(b) and 10726.4(a)(2) of the Water Code and a declaration that the GSA must implement all aspects of its demand management strategy as outline in the Joint Plan.

In addition to the writ of mandate and declaratory relief being sought, the landowner group has also brought two more actions alleging that the GSA has violated Article 10 § 2 of the California Constitution by perpetuating continued unreasonable uses of groundwater and that the allocation scheme constitutes a taking under both the California and federal constitutions.

Conclusion and Implications

With agencies across the state rushing to submit their Groundwater Sustainability Plans by SGMA's deadline at the end of January, 2022, this case will certainly present issues relevant to many of the plans submitted this round. SGMA has tasked agencies with crafting a solution that balances the continued health of the State's groundwater resources with the property rights of landowners throughout California. While perhaps not the most ideal method of establishing the outer boundaries forming such a balance, this case does provide the court with an opportunity to provide added guidance on what may or may not go too far in establishing a groundwater allocation scheme. [*Cardoza v. Madera County G.W. Sustainability Agency*, Case No. MCV086218, Madera County Super. Ct.]

(Wesley A. Miliband, Kristopher T. Strouse)

RECENT FEDERAL DECISIONS

DISTRICT COURT ADMITS EVIDENCE OVER OBJECTION IN CLEAN WATER ACT CRIMINAL PROSECUTION

United States v. Sanft, ___F.Supp.4th___, Case No. CR 19-00258 RAJ (W.D. Wash. Nov. 12, Nov. 16, 2021).

In a federal Clean Water Act criminal prosecution of a Seattle-based drum company, the U.S. District Court recently issued a series of evidentiary rulings. In these rulings, the court judicially noticed the fact that the U.S. Environmental Protection Agency (EPA) had approved a local pretreatment program regulating industrial waste discharges into the local sewer system. The court then determined that seven of nine statements made by a co-defendant were admissible, and did not raise Confrontation Clause issues.

Factual and Procedural Background

On December 17, 2019, a federal grand jury in Seattle, Washington charged the Seattle Barrel Company (Seattle Barrel), Louie Sanft, and John Sanft with conspiracy, violations of the federal Clean Water Act (CWA), and submission of false CWA certifications. Seattle Barrel is a Seattle-based company that collects, reconditions, and resells industrial and commercial drums. Louie Sanft owns and operates Seattle Barrel, and John Sanft is the plant manager. According to the indictment, the reconditioning process involves submerging the drums in a wash tank filled with a corrosive chemical solution. The tank was designed to discharge into the King County sewer system, which ultimately empties into the Puget Sound. The indictment alleged that the defendants carried out a ten-year scheme to illegally dump caustic waste into the King County sewer system.

The discharge of industrial waste to domestic sewer systems is regulated by the national pretreatment program under the CWA. The pretreatment program requires dischargers that introduce industrial and other nondomestic pollutants into a local sewer system to comply with pretreatment standards. Generally, local governments implement and enforce pretreatment programs, as approved by EPA. According to the indictment, King County has an approved pretreatment program that prohibits industrial users from discharging industrial waste into the local sewer system without a discharge permit. The indictment alleged that from at least 2009 through 2019, defendants secretly and regularly discharged caustic solution in violation of the discharge permit issued to it by King County. Further, defendants agreed to conceal this practice from regulators.

The U.S. District Court for the Western District of Washington recently issued a series of evidentiary rulings in the case. On November 12, 2021, the court granted the government's motion for judicial notice to establish the jurisdictional fact that the EPA approved King County's pretreatment program under the CWA. On November 16, 2021, the court granted in part and denied in part defendant Louie Sanft's motion to exclude certain testimonial statements made by co-defendant John Sanft during an EPA investigation.

The District Court's Decision

November 12, 2021 Ruling

Under Federal Rule of Evidence 201(b)(2), a court may judicially notice a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." The government moved the court to take judicial notice of the fact that King County's pretreatment program was approved by the EPA. The government based its motion on the following evidence: 1) a letter from the EPA to the Municipality of Metropolitan Seattle, King County's predecessor, approving the pretreatment program; 2) a Federal Register notice referencing the pretreatment programs previously approved by the EPA; and 3) information on websites maintained by King County and the Washington Department of Ecology, a state administrative agency.

The court found that taking judicial notice of publicly available information provided by a government

agency met the requirements for judicial notice under Rule 201(b)(2). The court cited to cases holding that facts contained in public records and government websites may be judicially noticed. The facts from these three sources of information could be accurately and readily determined, and the accuracy of the sources could not be reasonably questioned.

The court considered and rejected defendants' argument that the government may have failed to full its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), that is, to disclose materially exculpatory evidence. The court found defendants' *Brady* argument meritless, because there was no evidence or specific allegations showing the government failed to fulfill its *Brady* obligations.

The court then considered and denied defendants' request to attack the judicially noticed facts by offering substantive evidence and calling and cross-examining witnesses. The court observed the purpose of Rule 201(b) was to obviate the need for formal fact-finding for undisputed and easily verified facts. Because the publicly available information satisfied judicial notice requirements, there was no need to introduce substantive evidence and call witnesses.

Finally, as provided by Federal Rule of Evidence 201(f), the court acknowledged its obligation to instruct the jury that it may or may not accept noticed facts as conclusive.

November 16, 2021 Ruling

Defendant Louie Sanft moved the court to exclude nine potentially incriminating statements made by co-defendant John Sanft during interviews with EPA agents. Many of the statements related to Louie Sanft's responsibilities for and knowledge of tasks performed at Seattle Barrel. Defendant Louie Sanft argued that under *Crawford v. Washington*, 541 U.S. 36 (2004), introducing the statements would violate his rights under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, because Louie was unable to cross-examine John during the interrogation, and John would be absent during the trial for cross-examination. The government argued statements offered for their falsity were admissible, because *Crawford* does not exclude statements that are not offered for their truth. For statements offered for their truth, the government argued the statements were admissible under various other grounds.

The court held that John's false statements were admissible insofar as they are offered for their falsity. John's statements that were made against Seattle Barrel were admissible as party admissions. For the remaining statements, the court discussed whether the statements were sufficiently incriminating to be excluded under existing case law, which has held that "mildly incriminating" statements are not necessarily excluded. Statements made against Louie that were not "facially incriminating" were admissible. For example, statements regarding Louie's management and duties at Seattle Barrel were not facially incriminating without further evidence. However, two statements raised incrimination concerns: 1) "Louie knows exactly what [Dennis Leiva] does," and 2) Louie was personally responsible for hiring a contractor to fill in the "hidden" drain. The court found these statements provided sufficiently incriminating impact, that the statements should be excluded.

Conclusion and Implications

This series of evidentiary rulings in a Clean Water Act criminal prosecution serves as a reminder that publicly and readily available information may be introduced by judicial notice and defendants' statements made during an EPA investigation may be introduced as evidence against defendants on various grounds. The opinions are available online at: https://casetext.com/case/united-states-v-sanft-13; https://casetext.com/case/united-states-v-sanft-10?q=United%20States%20v.%20Sanft&PHONE_NUMBER_GROUP=P&sort=relevance&p=1&type=case&resultsNav=false.
(Julia Li, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS CITY OF SACRAMENTO'S EIR AND APPROVAL OF 'MCKINLEY WATER VAULT PROJECT'

Citizens for a Safe and Sewage Free McKinley Park v. City of Sacramento, Unpub., Case No. C090760 (3rd Dist. Nov. 24, 2021).

In a November 24, 2021 *unpublished* opinion, the Third District Court of Appeal in *Citizens for a Safe and Sewage Free McKinley Park v. City of Sacramento* upheld the denial of Citizens for a Safe and Sewage-Free McKinley Park's petition for writ of mandate that challenged the City of Sacramento's approval of the McKinley Water Vault Project. The appellate court rejected the group's claims that the city violated the California Environmental Quality Act (CEQA) by failing to adequately analyze environmental impacts and alternatives or recirculate the Environmental Impact Report (EIR) due to the addition of significant new information following the public review period.

Facts and Procedural Background:

The City of Sacramento (City) operates a combined sewer and stormwater system that serves over 200,000 residents in downtown and greater Sacramento, such as the McKinley Park area in East Sacramento. The combined system collects and conveys both wastewater and stormwater within the same pipe network to facilities for treatment and discharge. While the system's capacity is generally sufficient to withstand stormwater, outflows can occur during large storm events, thereby resulting in flooding and wastewater discharge onto local streets, including those in McKinley Park.

In 2015, an update to the City's Combined Sewer System Improvement Plan identified a project that would alleviate stresses on the combined sewer system by providing additional storage capacity that can be utilized when the system approaches maximum capacity during large storm events. The project would be located in McKinley Park, which is bounded by a 32-acre residential neighborhood. Over approximately two years, the project would require installation of a large concrete vault and related infrastructure and equipment underneath the existing baseball field at the park. After installation, the project would replant any removed trees, install new trees, and construct a new baseball field.

The City published the draft EIR for the project in April 2018, and later the final EIR (FEIR) in September 2018. The FEIR included updated information about the project's design based on newly completed renderings that showed the project's footprint would be smaller than originally contemplated. The City approved the project and certified in the EIR in October 2018.

In November 2018, Citizens for a Safe and Sewage-Free McKinley Park (Citizens) filed a petition for writ of mandate alleging the City violated CEQA because: 1) the EIR failed to adequately analyze the various environmental impacts; 2) the EIR failed to adequately analyze a reasonable range of alternatives; and 3) the City failed to recirculate the EIR after significant new information was added following the public comment period. The trial court denied the petition. Citizens timely appealed.

The Court of Appeal's Decision

The Third District Court of Appeal applied the substantial evidence standard to consider whether the City abused its discretion in approving the project and certifying the EIR. Under this standard, the court rejected each of Citizens' claims by concluding that Citizens failed to carry their burden of showing why the City's decision was unsupported.

Citizens argued that the EIR violated CEQA by failing to adequately analyze numerous environmental impacts of the project, including impacts to trees, historic resources, air quality, traffic and transportation, noise and vibration, geology and soils, and hazardous materials. The Third District rejected each claim, largely finding that Citizens had failed to carry

its burden of pointing to substantial evidence in the record and demonstrating why it did not support the EIR's conclusions.

Trees

Citizens asserted that the EIR was deficient because it failed to analyze how construction activities may damage or destroy dozens of trees at the project site. The DEIR explained that it surveyed approximately 129 trees within the project area and designed the project to avoid the removal of certain trees, to the extent feasible, through the assistance of an arborist and in accordance with the City's Tree Ordinance and mitigation measures. The FEIR reiterated the project's decreased footprint would further protect trees to the maximum extent feasible.

The Court of Appeal thus concluded that Citizens failed to carry their burden to show that the EIR's tree impact analysis was deficient. Contrary to Citizens' assertions, the court explained that there was nothing in the record that indicated excavation would take place within structural root zones or tree driplines that would result in significant impacts to the structural integrity of City trees.

Historic Resources

Citizens claimed the City violated CEQA by waiting until the release of the FEIR to analyze the impacts of the project on McKinley Park as a historic resource, and that substantial evidence did not support the FEIR's conclusion that the project would be consistent with the Secretary of the Interior's Standards for Rehabilitation.

The DEIR explained that McKinley Park was not a "historic resource" pursuant to CEQA Guidelines § 15064.5, because, although it had been nominated for inclusion in the National Register of Historic Places, it had yet to be listed in the Register. Nevertheless, the DEIR concluded that the project would not result in a substantial adverse change in the significance of the park because it would maintain its existing uses once construction was finished. The FEIR similarly provided an analysis of why the project would not adversely change the historic significance or integrity of the park, based on the Secretary of Interior's Standards for Rehabilitation. Because all aspects of the project would be reversible and no aspect of the essential form or integrity of the landscape would be impacted, the FEIR concluded that impacts would be less than significant.

The appellate court therefore concluded that Citizens failed to point to any evidence in the record showing that the Park's historical significance would be materially impaired by the project, thus rising to a significant impact under CEQA. To this end, the record reflected that the public was not deprived of a meaningful opportunity to comment on this issue—the FEIR's conclusions merely bolstered the analyses presented in the DEIR.

Air Quality

Citizens also claimed the EIR's analysis for the project's air quality impacts on sensitive receptors was deficient because it was based on flawed assumptions and failed to account for two-way hauling trips and idling times and use of a single access point to the project site. The court similarly rejected this claim, finding that Citizens failed to carry its burden to show that the EIR inadequately analyzed the project's air quality impacts with respect to construction related hauling trips. To the contrary, the EIR provided a robust air quality analysis that considered potential impacts on air quality related to construction activities, hauling and vehicle trips, and potential impacts to sensitive receptors. Similarly, the DEIR identified two proposed alternative access routes that would be utilized when feasible to mitigate impacts to trees. Though the FEIR later only identified one proposed alternative access route, Citizens still failed to carry its burden of showing that traffic would be divided between the two points or result in significant impacts.

Traffic and Transportation

The court also rejected Citizens' assertion that the EIR's traffic analysis relied on materially false assumptions and failed to consider traffic impacts to residents living on streets near the project site. The court pointed to the EIR's traffic analysis, which determined that construction of the project would not substantially alter existing traffic flows or levels of service on nearby roadways. Mitigation requiring a traffic control plan would further ensure that traffic impacts remained at less than significant levels and complied with the City's traffic code. In light of this substantial evidence, Citizens failed to point to any contrary evidence in the record to support their contention that the traffic analysis was deficient.

Noise and Vibration

As to noise impacts, the court rejected Citizens' claim that the EIR failed to analyze potential noise impacts to a nearby daycare. The EIR's noise impact analysis provided detailed standards and methodologies that relied on the Appendix G Environmental Checklist and a federal roadway construction noise model. Because sound levels would be limited to daytime hours and comply with the City's noise ordinance, the EIR concluded that sound level increases would not significantly impact the surrounding area. Contrary to Citizens' assertion, the EIR analyzed the project's potential noise and vibration impacts on nearby sensitive receptors, including the daycare. For these reasons, Citizens failed to carry its burden of showing that the EIR failed to evaluate the significance of impacts to sensitive receptors or that its analysis was deficient.

Geology and Soils

Citizens contended that the EIR was deficient because it failed to include a site-specific geotechnical report with the DEIR and its conclusions about liquefaction and landslide hazards was not supported by substantial evidence. Though the DEIR did not include the contested report, Citizens acknowledged that the report was attached to the FEIR. The court noted that the FEIR explained site-specific information regarding soils in the project area, including liquefaction impacts. The report concluded that the flat nature of the site would not lend itself to increase landslide risk. In light of this substantial evidence, the court concluded that Citizens had again failed to carry their burden of explaining how the EIR's analysis was deficient.

Hazardous Materials

Finally, Citizens contended that the EIR failed to evaluate the risks associated with storing sewage material beneath McKinley Park, including failing to analyze impacts from a leak or overflow after a large storm event. The DEIR reiterated that the purpose of the project was to alleviate existing stressors and flooding on the current system by providing additional underground storage that would only be used during large storm events. The project would be required to comply with federal and state building standards, be subject to maintenance and regular inspection. For these reasons, Citizens failed to carry their burden of showing how the hazards analysis was inadequate. Citizens did not point to any evidence to show that the EIR was deficient for failing to consider impacts from a leak in the vault or inlet pipe. Rather, Citizens only advanced conclusory statements regarding the potential hazardous emissions lacked merit, which the court ultimately rejected.

Adequacy of Project Alternatives Analysis

The Third District found no merit to Citizens' claim that the EIR's project alternatives would neither attain basic project objectives nor avoid or substantially lessen any of the project's significant environmental impacts. The DEIR analyzed one "no project" alternative and three project alternatives and discussed their ability to meet the project's seven enumerated objectives. In rejecting all three alternatives, the DEIR concluded that none of the alternatives would cause impacts less severe than the proposed project; rather, each alternative would cause more severe environmental impacts.

Citizens neither argued that the DEIR failed to include a potentially feasible alternative nor shown that the range of alternatives was unreasonable. Absent substantial evidence to the contrary, the appellate court concluded that the EIR's choice of alternatives was reasonable under CEQA Guidelines § 15126.6.

Recirculation of the EIR

The Third District rejected Citizens' final claim, which asserted that the City was required to recirculate the EIR due to the addition of significant new information following the public review period. The court explained that, under CEQA, the City's determination to not recirculate is given substantial deference and presumed correct, therefore, Citizens bears the burden of proving that the City's decision to not revise and recirculate the EIR is not supported by substantial evidence. Nevertheless, Citizens failed to carry this burden. Foremost, Citizens did not point to any substantial evidence in the record, apart from their own comment letter, to support their assertion that the FEIR proposed expanding the project by nearly 160,000 square feet. To the contrary, the EIR disclosed that the project's footprint would be reduced, with only the construction staging area remaining larger. For these reasons, Citizens "unde-

veloped argument" failed to show that the expansion of the staging area qualified as "significant" new information that would require further public comment and additional analysis.

The court also rejected Citizens' claim that recirculation was necessary because the City ultimately selected one access point, instead of two, for construction vehicles to enter the project site. Contrary to Citizens' assertion, the DEIR contemplated limited access routes when feasible—therefore, this was not significant new information requiring further analysis. Finally, recirculation was not necessary because the FEIR did not include significant new information regarding the historic status of McKinley Park. The FEIR reiterated the DEIR's initial determinations that the Park's historic integrity would not be impacted by construction. For these reasons, the record reflects that the public was not deprived a meaningful opportunity to comment.

Conclusion and Implications

The Third District Court of Appeal's *unpublished* opinion represents a straight-forward analysis and application of fundamental CEQA principles and the requirements for a legally sufficient EIR. While the underlying claims are ostensibly fact-specific, the overall theme of the court's opinion is straightforward: a CEQA petitioner who challenges the sufficiency of an EIR bears the burden of pointing to substantial evidence in the record and show why the agency's decision was lacking. Here, Citizens' failure to carry this requisite burden was ultimately fatal to their claims. As such, petitioner-side practitioners should exercise caution when presenting their arguments so as to avoid conclusory statements that do not rely on, or contradict, the evidence in the record. The court's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/C090760.PDF. (Bridget McDonald)

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