Volume 32, Number 5
February 2022

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LAW & POLICY Reporter

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Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135; Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

CALIFORNIA SUPREME COURT ADDRESS 'ISSUE EXHAUSTION' FINDING IT IS NOT ALWAYS A PREREQUISITE TO SEEKING JUDICIAL REVIEW UNDER PROPOSITION 218

By Bridget McDonald

The California Supreme Court in *Hill RHF Housing Partners, L.P. v. City of Los Angeles* reversed the Second District Court of Appeal's denial of writ challenges to a business improvement district (BID) assessment scheme on grounds that the petitioner-property-owners failed to exhaust their objections in underlying public hearings. The Supreme Court unanimously held that, under Proposition 218, the opportunity to protest the validity of a proposed BID assessment is not a remedy that must be exhausted as a prerequisite to filing suit because it does not involve the type of "clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties."

Water law practitioners should find this case instructive. The issue of exhaustion of administrative remedies in challenging assessments under Proposition 218 is familiar to water practitioners. Although in this case, challenge was made within the context of business improvement district assessments—the general issue was significant enough to prompt many *amicus* briefs on appeal—including briefing submitted by the Association of California Water Agencies (ACWA). [*Hill RHF Housing Partners, L.P. v. City of Los Angeles*, 12 Cal.5th 458 (Dec. 20, 2021).]

Proposition 218

Proposition 218—the "Right to Vote on Taxes Act"—was approved by voters in 1996 as part of a series of voter initiatives that sought to restrict the ability of state and local governments to impose taxes and fees. Adopted in 1978, Proposition 13 was the first of those measures and prohibited counties, cities, and special districts from imposing special taxes without a two-third vote of the electorate. Prop 218 was subsequently passed to address increased circumvention of Prop 13, wherein municipalities would raise service rates without voter approval by labelling them "fees, charges or assessments," rather than "special taxes." Prop 218 supplemented Prop 13 by adding Articles XIII C and XIII D to the California Constitution, which placed similar restrictions on assessments and property-related taxes.

Section 4 of Article XIII D (Section 4) sets forth substantive and procedural ramifications to limit local governments' ability to impose assessments on properties. For example, the section requires agencies to provide written notice to affected property owners regarding the amount, duration, and basis of the proposed charges, along with the date, time, and location of a public hearing on the assessment. At that hearing, the agency must consider all protests against the proposed assessment and tabulate ballots for or against it. The agency shall not impose the assessment if, at the close of the hearing, ballots submitted in opposition exceed those submitted in favor. The section's judicial review scheme places the burden on agencies to demonstrate that the underlying property receives a special benefit over and above the benefits conferred on the public at large, and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property.

The Property and Business Improvement District Law

The Property and Business Improvement District (PBID) Law (Sts. & Hy. Code, § 36600 *et seq.*) provides a framework for establishing and operating busi-

ness improvement districts (BID) in the state. A BID is a local business district that funds business-related improvements and activities by levying assessments on businesses or other real property that benefit from those improvements. The Law sets forth the process for creating a BID, which begins with a written petition signed by property owners in the proposed district that details the proposed BID boundaries, proposed service expenses, method and basis for levying assessments, and the calculated assessment amount.

Upon receipt of this petition, the respective city council may adopt a resolution expressing an intent to form the proposed BID. The resolution must provide notice of a public hearing and contain information that is sufficient to enable an affected property owner to discern of the nature and extent of the proposed improvements, maintenance, activities, and charges levied. At the conclusion of the hearing, the city council may resolve to adopt, revise, or change the proposed assessment, so long as the revisions only reduce the proposed assessment. The council must also render a determination on any protests and shall not establish the BID or levy assessments if a majority protest was received.

Factual and Procedural Background

The San Pedro and Downtown Center BIDs

Petitioners Mesa RHF Partners, L.P. (Mesa), Hill RHF Housing Partners, L.P. (Hill), and Olive RHF Housing Partners, L.P. (Olive) provide housing and services to low-income seniors. Mesa owns the Harbor Tower in San Pedro (City), which is within the boundaries of the San Pedro Historic Waterfront Property and Business Improvement District (San Pedro BID). Hill owns the Angelus Plaza and Olive owns the Angelus Plaza North in Downtown Los Angeles, both of which fall within the Downtown Center Business Improvement District (Downtown Center BID). Shortly after both BIDs were created in 2012, petitioners brought legal challenges against them. Petitioners and the City ultimately settled the dispute, wherein the City agreed to reimburse petitioners for their BID assessment payments.

In 2017, both BIDs were proposed for ten-year term renewals. Pursuant to the PBID Law, Prop 218, and the Prop 218 Omnibus Implementation Act, the City Council adopted two ordinances that expressed an intent to establish the BIDs and provided requisite details on the assessments, notices of the public hearings, and voting ballots. The City Council held hearings on the Downtown Center and San Pedro BIDs three weeks apart. On the day of the San Pedro BID, a City representative advised petitioners' counsel that the previously-negotiated settlement agreements would no longer be in effect due to differences between the former and renewed BIDs. An authorized representative for petitioners voted against both BIDs at each hearing, however, neither the representative nor any other commenter raised specific challenges or legal arguments. At the conclusion of both hearings, there was no majority protest against either BID, thus prompting the City Council to adopt the ordinances to reestablish each BID.

At the Trial Court

Petitioners initiated two actions against the City, alleging each BID violated Prop 218. Petitioners contended that the BIDs were premised on an incorrect and inadequately supported understanding of the "special" vs. "general" benefits of each activity, and that the assessments imposed on petitioners would exceed the reasonable cost of the proportional specifical benefits conferred on their parcels. Each complaint alleged petitioners exhausted their administrative remedies. The City disagreed. The Los Angeles Superior Court ultimately determined that petitioners had sufficiently exhausted their objections to the assessments through their act of casting ballots against the BIDs, but nevertheless, denied the petitions on merits.

At the Second District Court of Appeal

Division One for the Second District Court of Appeal upheld the trial court's denial but declined to reach the merits of petitioners' claims on grounds that petitioners failed to adequately exhaust their administrative remedies. The court observed that the BID Law's:

> . . .detailed administrative procedural requirements provide affirmative indications of the [California] Legislature's desire that agencies be allowed to consider in the first instance issues raised during the BID approval process.

As such, exhaustion under the BID Law requires:

> . . .nothing more of a property owner than submitting a ballot opposing the assessment *and* presenting to the agency at the designated public hearing the specific reasons for its objection to the establishment of a BID in a manner the agency can consider and either incorporate into its decision or decline to act on.

Because petitioners only submitted ballots opposing the BIDs, but failed to present their specific objections during the public hearings, they failed to adequately exhaust their administrative remedies.

The California Supreme Court's Decision

The California Supreme Court granted petitioners' petition for review to consider whether a party must present their specific objections to BID assessments at the appropriate Prop 218 public hearing for those arguments to later be heard on the merits in court. The Court held that the:

> . . .opportunity to comment on a proposed BID does not involve the sort of 'clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties' that has allowed [the Court] to infer an exhaustion requirement in other contexts.

Proposition 218 and PBID Law

The Court first concluded that the legislative intent of Prop 218 indicated that its provisions shall be liberally construed to effectuate its purpose of limiting local government revenue and enhancing taxpayer consent. Thus, instead of employing a deferential standard of review, courts should exercise their independent review in determining whether an assessment violates Prop 218. Similarly, the PBID Law elaborates upon Prop 218's specifications, including the requirement that affected property owners be individually noticed of the assessment's information and accompanying ballot.

Exhaustion of Remedies

The exhaustion doctrine generally requires a party to raise their specific contentions during administrative proceedings before resorting to the courts. While some statutes expressly require exhaustion, courts may also infer an exhaustion requirement in statutory and regulatory schemes that do not contain an explicit command. In deciding whether to draw such an inference, courts give due consideration to the extra judicial procedures involved and to whether an exhaustion requirement would comport with, and advance the general purposes of, the statutory scheme.

Nevertheless, there are limits to the doctrine. Courts will not impose an exhaustion requirement when the administrative remedy "did not incorporate 'clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties.'" In other words:

> . . .unless there is clear legislative direction to the contrary, a process proffered as an administrative remedy does not have to be exhausted when its dispute resolution procedures are so meager that it cannot be fairly regarded as a remedy at all. When the relevant extra judicial procedures are so clearly wanting, the exhaustion rule does not come into play because it has been determined there is no genuine remedy to exhaust.

There are also exceptions to exhaustion, such as when the claimed remedy might involve a clearly defined process for aggrieved parties to submit at least *some* of their complaints.

The 'Issue Exhaustion' Does Not Apply

The Supreme Court held that the doctrine of "issue exhaustion" did not apply to petitioners' judicial claims against the BID assessments. The Court observed that, unlike other statutes, the relevant portions of Prop 218 do not explicitly limit judicial actions to issues that were previously presented to an agency. Thus, inferring an exhaustion requirement would not comport with the proposition's statutory scheme.

The Court disagreed with the Second District Court of Appeal's determination that Prop 218 provided petitioners with an opportunity to participate in a public comment session, which necessarily conveyed an implied intent that objections must be presented to the City before being raised in court. The Supreme Court reasoned that the "machinery" associated with Prop 218's public comment process

is not as suggestive of a scheme designed for "the submission, evaluation, and resolution of complaints." The Court elaborated that "a public comment session concerning a proposed legislative act, without more, is not obviously geared toward the 'resolution' of objections," such as those raised by petitioners.

While the Court agreed with the City's interpretation of Section 4 as requiring agencies to consider protest votes and oral/written objections, the provision did not resolve whether the process had to be exhausted through presentation of specific objections at public hearings. The Court found it significant that Section 4 only requires the City to "*consider*" specific objections—it does not impose a legal obligation on agencies to "*respond*" to such comments. It therefore followed that lawmakers did not intend for this public comment process to carry "a preclusive edge" that must "be fully exploited in order to preserve objections for a later lawsuit."

Policy Rationales—Not Requiring Exhaustion Comports with Prop 218

While exhaustion traditionally supports the development of a record suitable for judicial review, Prop 218 and the PBID Law require preparation of documents that may, by themselves, provide a sufficiently substantial record. Because neither law legally requires agencies to actually respond to public objections, the effectiveness of comments as a vehicle for resolving disputes short of judicial involvement is likely reduced. Other provisions also militate against imposing an exhaustion requirement, such as PBID Law's 30-day deadline for filing suit or courts' application of the independent standard of review under Prop 218.

For these reasons, the Supreme Court resolved that:

> . . .a rule requiring the presentation of specific objections regarding a BID to an agency at the appropriate public hearing certainly would have no value whatsoever as applied to disputes such as those at bar.

While exhaustion could amend or explain the contested assessment, the doctrine:

> . . .does not apply in every situation in which an abstract possibility exists that an objection lodged through some channel will alter or otherwise affect an agency action.

Moreover, the inapplicability of issue exhaustion is in sync with the Court's previously articulated understanding of Prop 218:

> With the initiative having the goal of facilitating challenges to assessments, this would be odd terrain in which to expand the exhaustion doctrine by regarding a public comment process such as the one before [the Court] as an adequate remedy that must be exhausted prior to suit, especially when there are no especially compelling policy justifications for doing so.

Amici Curiae Arguments Do Not Justify Exhaustion Requirement

Arguments raised by the League of California Cities, the Association of California Water Agencies (ACWA), the California State Association of Counties, and the California Special Districts Association in *amici curiae* briefs were similarly unpersuasive. The Court rejected their assertion that not imposing an exhaustion requirement "would give short shrift to the provisions" of Prop 218 because objectors "could just ignore the hearing and proceed directly to the court if the BID is approved." The Court explained that there are:

> . . .good reasons why property owners might raise their complaints at the appropriate hearings, and why agencies are bound to consider these objections when made, even if the articulation of issues at these forums is not an absolute prerequisite for their subsequent presentation in court.

The Court also rejected the notion that a party's ability to sue upon unexhausted objections to an assessment would require litigants to rely on facts outside the administrative record to develop their claims, thereby thwart traditional principles of judicial review in mandate proceedings. The Court explained that, under the circumstances here, "there is no necessary congruence between *issue* exhaustion and a rule limiting judicial review to *evidence* in the administrative record." Because Prop 218 places the

burden on agencies to demonstrate that an assessment conforms to the law, and courts exercise their independent judgment in determining whether this demonstration has been made, the "interest in extending due deference to agency determinations… does not carry the same weight" as claims raised under the traditional substantial evidence standard.

Conclusion and Implications

The California Supreme Court's holding advances a significant procedural interpretation of Prop 218. In sum: a petitioner need not articulate their specific objections to a BID assessment scheme at the corresponding public hearing to subsequently present those arguments in court. While petitioner-side practitioners no longer need to worry about the specificity of their public hearing comments, their clients should still adhere to Prop 218's other procedural requirements, such as casting their ballots in opposition to the proposed scheme, before bringing a legal challenge. While practitioners representing public agencies may find the Court's decision unfavorable, the opinion does concede that Prop 218 does not legally obligate agencies to specifically respond to assessment objections. Therefore, agencies should focus their efforts on producing detailed copies of all documents required by the statute to ensure the administrative record is sufficiently adequate. A copy of the Supreme Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S263734.PDF.

Bridget McDonald is an associate attorney in the Sacramento-based law firm of Remy Moose Manley, LLP, which specializes in environmental law, land use and planning, water law, initiatives and referenda, and administrative law generally. Bridget joined the firm in 2019.

Bridget's practice focuses on land use and environmental law, handling all phases of the land use entitlement and permitting processes, including administrative approvals and litigation. Her practice includes the California Environmental Quality Act, the National Environmental Policy Act, the State Planning and Zoning Law, natural resources, endangered species, air and water quality, and other land use environmental statutes. Bridget serves on the Editorial Board of the *California Land Use Law & Policy Reporter*.

CALIFORNIA WATER NEWS

ARIZONA TAKES STEPS UNDER COLORADO RIVER PLAN TO SUPPORT LAKE MEAD LEVELS

In December 2021, water agencies from California, Arizona, and Nevada, as well as the U.S. Bureau of Reclamation, executed a memorandum of understanding (MOU) to increase the amount of water stored in Lake Mead on the Colorado River by 500,00 acre-feet in both 2022 and 2023. In support of the so-called "500 + Plan," the MOU provides for a funding commitment from non-federal and federal parties totaling $200 million to participate in additional water projects that will result in a minimum of 1,000,000 acre-feet of water in Lake Mead by 2023. (*See:* 32 *Cal Water L & P'lcy* Rptr 88 (Jan. 2021).) The MOU contemplates semi-annual consultations among the parties to consider changing hydrological conditions within the Colorado River Basin. Arizona recently took initial steps to meet target reductions in consumptive use through compensated conservation agreements with several tribal and irrigation district entities.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau of Reclamation (Bureau). The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River Basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In response, the Bureau, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

In 2014, to support maintaining the elevation of Lake Mead, the Bureau and certain other lower and upper basin state participants funded a pilot system conservation program to reduce diversions from the Colorado River system through the voluntary, compensated, and temporary use reductions. Also that year, lower basin parties agreed to generate protection volumes through conservation measures to support Lake Mead elevations.

In 2019, the parties entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and Reclamation must consult and determine what additional measures will be taken by the Bureau of Reclamation and the lower basin states if lake levels are forecast to be at or below 1,030 feet during the

succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. the Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau of Reclamation releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

As a result of the programs and agreements between the various parties, approximately 4.0 million acre-feet has been added to Lake Mead over the years, resulting in a 50-foot increase in Lake Mead's elevation at the end of 2020 than would have otherwise occurred. Despite the substantial efforts of the parties, Lake Mead levels are projected to continue to decline. Reclamation's August 2021 24-Month Study projected Lake Mead's elevation would be below 1,075 feet on January 1, 2022, and as provided for in the 2007 Interim Guidelines, a shortage declaration limiting deliveries of Colorado River water to Arizona and Nevada is in effect for 2022. In addition, the August 2021 24-Month Study projected Lake Mead would fall below 1,030 feet in July of 2023—a projection that remained unchanged in the September and October 2021 24-Month studies using the minimum probable inflow. Accordingly, the parties entered into discussions and formed technical working groups to determine how to protect against lake level declines to 1,020 feet or below, arriving at the conclusion that a minimum of 500,000 acre-feet would need to be conserved each year to support lake levels from dropping to 1,020 feet. This amount was memorialized in the MOU.

Memorandum of Understanding

At its core, the MOU provides that the parties will work together to establish appropriate means and methods to identify, consider, select, fund, administer, and validate additional water projects, with the key considerations being the total quantity of additional water that can be created in support of Lake Mead elevations, the cost of such water quantities, and the timing of implementation of any projects for additional water. The MOU defines "additional water" to mean water remaining in Lake Mead that is either 1) not attributable to shortage volumes under the 2007 Guidelines or any DCP contributions required in the LBOps; or 2) a net positive change in Intentionally Created Surplus (ICS) behavior assumed in the Bureau of Reclamation's June 2021, 24-month study Most Probable projection. ICS water is water that is made available by extraordinary conservation efforts, such as land fallowing. In short, "additional water" is water that is not the result of existing efforts or requirements under the 2007 Guidelines, the DCP, or the LBOps, The MOU expressly does not obligate any party to any specific contribution of funds or otherwise support any particular additional water project.

In the MOU, the parties agreed to fund participation in additional water projects up to $100 million. Additionally, target amounts of conserved water from the parties to meet the 500,000 acre-foot minimum in 2022 are as follows: 223,000 acre-feet from Arizona, 215,000 acre-feet from California, and 62,000 acre-feet from the Bureau of Reclamation. According to the Central Arizona Water Conservation District (CAWCD), which operates the Central Arizona Project (CAP) that diverts Colorado River water for delivery to urban and agricultural users in the center and south of the state, 193,000 acre-feet of Arizona's 223,000 acre-foot target would come from CAP users, and the remaining 93,000 would come from on-river users, including tribal entities.

Arizona Takes Initial Step

Arizona recently took the initial step of issuing letters of intent to negotiate compensated conservation agreements with various tribes and irrigation districts located along the Colorado River, including the Colorado River Indian Tribes, Mohave Valley Irrigation and Drainage District, Wellton Mohawk Irrigation and Drainage District, and Yuma Mesa Irrigation and Drainage District. These agreements would, in effect, compensate on-river and Central Arizona Project users for reducing the amount of water each entity consumptively uses, as well as reduce historical consumptive use, totaling between 50,000 and 60,000 acre-feet. According to CAWCD, key terms of the agreements would provide that the agreements are voluntary and temporary, compensated (at $261.60 per acre foot in 2022 and $268.80 per acre-foot in 2023), and reductions in water use must be made against recent historical consumptive use. To date, agreements have not yet been reached.

Conclusion and Implications

The 500 + Plan is designed to achieve the short-term objective of keeping Lake Mead levels above 1,020 feet. It remains to be seen whether the plan will achieve that goal, and whether such efforts will be renewed in the future or if additional measures become necessary to support Lake Mead elevation levels. The Central Arizona Water Conservation District, Agenda Item 7a, 7b, is available *at*: https://civicclerk.blob.core.windows.net/stream/CAPAZ/c2a2d547-e73b-4001-b2df-62bd75d6b649.pdf?sv=2015-12-11&sr=b&sig=bqUiOGCSYyyEfctONWK7rHRPdZB%2F8c3T8S0yupenb54%3D&st=2022-01-19T22%3A28%3A27Z&se=2023-01-19T22%3A33%3A27Z&sp=r&rscc=no-cache&rsct=application%2Fpdf.
(Miles Krieger, Steve Anderson)

SITES PROJECT AUTHORITY AND U.S. BUREAU OF RECLAMATION ISSUE REVISED ENVIRONMENTAL DOCUMENTS FOR THE SITES RESERVOIR PROJECT

On November 12, 2021, the Sites Project Authority (Authority) and the U.S. Bureau of Reclamation (Bureau) issued a Revised Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) analyzing the environmental impacts of the Sites Reservoir Project under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The RDEIR/SDEIS identifies a range of significant impacts and adverse environmental effects to water quality, vegetation resources, special status species, geologic resources, prime farmland, air quality, and other resources.

Background

The Sites Reservoir Project (Project) calls for the construction of an off-stream reservoir that would capture and store excess water from the Sacramento River for use in dry periods. (RDEIR/SDEIS at ES-1.) The Project was first proposed as a potential project in 2000, and has since been awarded over $800 million in Proposition 1 and WIIN Act funds. (*Id.* at ES-1—ES-2.)

The Bureau is the lead agency for the Project under NEPA and the Authority is the lead agency under CEQA. The Bureau and the Authority issued a Public Draft EIR/EIS for the Project in 2017 that evaluated four project alternatives, all of which included a reservoir sized between 1.3 and 1.5 million acre-feet ("MAF") that would use existing Sacramento River diversion facilities and a Delevan Pipeline on the Sacramento River to allow for release of flows into the river. (*Id.* at ES-2.) In October 2019, however, the Authority initiated a new value planning process to consider additional project alternatives that could make the Project more affordable while also addressing comments on the 2017 Draft EIR/EIS. (*Id.*)

The Authority and the Bureau prepared the RDEIR/SDEIS to evaluate the new project alternatives developed in conjunction with the Authority's value planning process. (*Id.* at ES-3.) The Project's objectives include, but are not limited to, improving water supply reliability and resiliency, increasing the operational flexibility of the federal Central Valley Project (CVP), and enhancing the Delta Ecosystem. (*Id.* at ES-6.)

Summary of the RDEIR/SDEIS

The RDEIR/SDEIS identifies four project alternatives: a no project alternative and three action alternatives identified as Alternatives 1, 2, and 3. Alternatives 1 and 3 both call for a reservoir size of 1.5 MAF and share many other similarities, while Alternative 2 calls for a slightly smaller reservoir of 1.3 MAF. (*Id.* at 2-5.) All three action alternatives would involve the use and improvement of existing Sacramento River diversion facilities, the construction of two main dams to impound water from Funks Creek and Stone Corral Creek, construction of the Dunnigan Pipeline to convey water from the reservoir to the Colusa Basin Drain and the Sacramento River, and the construction of new recreational facilities and roads. (*Id.* at 2-8—2-28.)

The three action alternatives also share several common operational features. The Project could divert Sacramento River water between September

1 and June 15 and hold that water in storage until requested for release, with releases typically occurring between May and November. (*Id.* at 2-29.) Released water could be used along the Tehama-Colusa Canal and the Glenn-Colusa Irrigation District Main Canal, or transported through the new Dunnigan Pipeline for conveyance through the Sacramento River or Yolo Bypass to locations both in the Delta and south of the Delta. (*Id.*) The Project could also facilitate exchanges of water with the Central Valley Project and State Water Project. (*Id.* at 1-36—2-37.) Additionally, releases of stored water would be used for hydropower generation. (*Id.* at 2-40.) The Authority's preferred alternative—and the proposed project under CEQA—is Alternative 1. (*Id.* at 2-56.) In addition to a 1.5 MAF reservoir capacity, Alternative 1 differs from the other two action alternatives because it proposes a bridge across the reservoir and would limit Reclamation's financial involvements to a 7 percent investment. (*Id.* at 2-57.)

Although CEQA and NEPA use different terminology to refer to the environmental analysis the Authority and Reclamation have undertaken in the RDEIR/SDEIS, they both essentially require the identification of both the environmental impacts of each project alternative and potential mitigation measures. (*Id.* at 3-5—3-7.) CEQA, however, requires that the RDEIR/SDEIS either implement feasible mitigation measures that would reduce significant environmental impacts to a less-than-significant level or make a finding that no feasible mitigation exists such that a specific impact is determined to be significant and unavoidable. *Id.* at 3-8.

In general, the RDEIR/SDEIS has identified similar environmental impacts under CEQA and environmental effects under NEPA for all three alternatives. (*See id.* ES-16—ES-43.) The RDEIR/SDEIS has also identified feasible mitigation measures for several significant impacts to vegetation resources, wildlife resources, aquatic biological resources, geology and soils, and greenhouse gas emissions that would reduce those impacts to less-than-significant. (*Id.*) Still, there remain a variety of impacts that the RDEIR/SDEIS has determined are significant and unavoidable under CEQA, either because there are no feasible mitigation measures or because the mitigation measures proposed would not reduce the impacts to a less than significant level. These impacts include water quality impacts, impacts to golden eagles, and impacts to land uses, among others. (*See id.*)

Conclusion and Implications

Although comments on the RDEIR/SDEIS were originally due on January 11, 2022, the public comment period was since extended to January 28, 2022. The next step for the Bureau of Reclamation and the Sites Project Authority will be to consider any comments received and issue a Final EIR/EIS. Although the Bureau and the Authority must consider the Final EIR/EIS in deciding whether to approve the Project, the California Water Commission will also consider it in determining whether the Project remains eligible for Proposition 1 funding and in approving its final funding award.
(Sam Bivins, Meredith Nikkel)

CAUSES OF LOW WINTER-RUN CHINOOK EGG SURVIVAL RATE DEBATED BY EXPERTS

In December 2021, a technical team formed under the California Interagency Ecological Program issued a draft letter to the California Department of Fish and Wildlife and the National Marine Fisheries Service suggesting that in 2021, only 2.6 percent of Sacramento River winter-run chinook salmon eggs successfully hatched due in part to the effects of higher water temperature and thiamine deficiency. The technical team's finding could have operational implications for the California State Water Project (SWP) and federal Central Valley Project (CVP). However, certain parties in ongoing litigation in federal court related to the impacts of SWP and CVP operations on listed species recently filed expert analyses of the technical team's egg survival finding, expressing differing views on the accuracy and causes of the low egg-to-fry survival rate. In particular, the parties disagree about the role played by higher water temperatures and thiamine levels on egg to fry life stages.

Background

The Interagency Ecological Program (IEP) was formed more than 50 years ago to provide and integrate ecological information for the management of the Sacramento-San Joaquin Delta (Delta) ecosystem and the water flowing through it. The IEP addresses high priority management and policy science needs to meet the purposes and fulfill responsibilities under state and federal regulatory requirements, including the California Endangered Species Act (CESA) and the federal Endangered Species Act (ESA).

Within the IEP, Project Work Teams that focus on specific areas are formed to organize new studies, review study plans and proposals, write scientific papers and reports, and promote collaboration among different groups working in a topic of interest. In particular, a Winter-Run Chinook Salmon PWT (Winter-Run PWT or PWT) coordinates research, monitoring, and management activities for the state and federally-listed endangered Sacramento River winter-run chinook salmon. A specific objective of the PWT is to develop and submit an annual recommendation letter to the National Marine Fisheries Service (NMFS) for the calculation of winter-run juvenile salmon production and the number of winter-run chinook that might be "taken" by the operations of the CVP and SWP for purposes of setting compliance parameters under CESA and the ESA. The PWT is composed of staff from the California Departments of Fish and Wildlife and Water Resources, Metropolitan Water District, National Marine Fisheries Service, U.S. Bureau of Reclamation, and the U.S. Fish and Wildlife Service, and other stakeholders.

The Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) operate two of the nation's largest water projects—the CVP and SWP, respectively. Together, these projects deliver millions of acre-feet of water to agricultural, municipal, and industrial water users throughout California. The CVP and SWP take water from the Sacramento and San Joaquin River systems, and the Delta that empties into San Francisco Bay. The river systems and Delta are migration, spawning, and critical habitat for several endangered and threatened fish species, including winter-run chinook salmon.

The federal ESA imposes requirements for the protection of listed endangered and threatened species and their ecosystems. In 2008 and 2009, the U.S. Fish & Wildlife Service (FWS) and NMFS determined, in documents called Biological Opinions (BiOps) issued under the ESA, that the continued long-term operation of the CVP and SWP would jeopardize certain endangered or threatened species. The FWS and NMFS' BiOps included alternative project operations that effectively compelled the Bureau and DWR to operate many aspects of the CVP and SWP according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR.

On October 21, 2019, FWS and NMFS each issued new BiOps that found proposed CVP and SWP long-term operations through 2030 would not jeopardize federally listed threatened or endangered species, including winter-run chinook, nor would such operations adversely modify designated critical habitats, including those in the Sacramento-San Joaquin River Delta and in upstream tributaries. The Bureau of Reclamation's proposed action includes significant investment in protection of endangered fish, more robust hatchery operations, changes to cold water pool operations and other actions at Lake Shasta, and increased management oversight in the Delta. Various parties have sued to keep the 2019 biological opinions from becoming effective. In the meantime, the Bureau and DWR have proposed an interim operating plan for 2022 (2022 IOP) that pertains to, among other things, temperature management and water export constraints from Lake Shasta. Compliance with the 2022 IOP could provide legal protection for incidentally taking listed species, including winter-run chinook, under incidental take authorization issued for the SWP and CVP under CESA.

The Winter-Run PWT's letter estimating juvenile winter-run chinook production in 2021 could implicate how the SWP and CVP are operated in the near future to comply with incidental take limitations. The PWT estimated the number of winter-run chinook fry (newly hatched fish less than a year old) produced in 2021 to be 761,839. According to biologists, this is a relatively low number, although not as low as have occurred in prior years.

Recommendations and Debates

The PWT's draft letter to NMFS recommends that NMFS use a "juvenile production index" (JPI) in calculating the production of juvenile winter-run chinook in 2021 (JPE). The JPI is based on the number of fry equivalents passing the Red Bluff Diversion

Dam (RDBB) on the Sacramento River, and is used to estimate the total number of juvenile winter-run chinook that survive each year to pass the RDBB trapping location. The JPI is also used to set take limits under the ESA for the SWP and CVP.

According to the Winter-Run PWT, the JPI best represents the response of fish to annual environmental conditions during spawning, egg incubation, and outmigration, as compared to the long-term average egg-to-fry survival rate, which was used in the JPE prior to 2014. The Winter-Run PWT notes in its letter that using the JPI is particularly important for 2021 because it accounts, in part, for lower-than-average egg-to-fry survival in naturally spawned winter-run chinook salmon due to thiamine deficiency in spawners and temperature-related mortality during egg incubation.

The PWT's draft letter recognizes that both water temperature and thiamine deficiency played a role in low egg-to-fry (ETF) survival. However, the primary dispute among the parties to the federal litigation relates to the respective role played by each of those factors. Some plaintiffs suggest that low ETF was due primarily to increased water temperatures in the Sacramento River, which has deleterious effects on salmon eggs and thus may result in egg mortality and lower juvenile salmon counts. Some defendants, on the other hand, suggest that thiamine deficiency played a large role in the ETF survival rate. For instance, thiamine changes may occur in returning female spawners due to foraging habits in the marine environment prior to immigration to spawning grounds. Thiamine deficiency reduces egg viability and fry survival, and leads to reduced JPI compared to what would have been observed absent thiamine deficiency impacts. Those defendants also point out that elevated water temperatures were not pervasive for the egg incubation period, and instead were only elevated above thresholds for egg viability after roughly half of the incubating eggs in the river hatched. In addition, defendants identify additional sources of uncertainty in the 2021 JPI and ETF survival due to trapping changes for juvenile chinook at RBDD and the non-operation of the traps during two days of high flows following significant weather events in the Sacramento River watershed during which tens of thousands of juvenile chinook may have out-migrated but were uncounted by the traps. Thus, according to certain defendants, temperature impacts were unlikely to be the primary cause of reduced ETF production in 2021.

The outcome of this debate is important because it implicates how the "cold pool" in Lake Shasta—the cold water diverted to the upper Sacramento River from the bottom of a lake—is managed, which in turn implicates the availability of water for release for non-environmental, *e.g.* agricultural, purposes. Cold water releases during warm months when spawning and egg incubation occurs are important in keeping water temperatures in the river below the threshold at which incubating eggs could potentially be harmed (56 degrees Fahrenheit). Plaintiffs generally contend that water exports from Lake Shasta for agricultural purposes have compromised the availability of cold pool water for release during the hot months when salmon spawn and eggs are incubating, hence the low ETF survival rate. However, if water temperature was not a primary culprit in the low ETF survival rate (assuming it is accurate, which certain defendants argue it may not be), and if water releases for non-environmental purposes are not the primary reason for the lower ETF survival rate, then operational changes to the SWP and CVP under the incidental take authorization for the projects may not be warranted.

Conclusion and Implications

The Winter-Run PWT has yet to issue a final letter, and a final calculation of the juvenile production of winter-run chinook in 2021 has not yet been made. Thus, it remains to be seen whether operational changes to the SWP and CVP will be recommended for purposes of state and federal environmental law compliance. The Juvenile Production Estimate Letters are available at: https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/california-central-valley-water-operations-biological#juvenile-production-estimates-(jpe)-for-sacramento-river-winter-run-chinook-salmon.
(Miles Krieger, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA TO RECEIVE EXTENSIVE BENEFITS FROM FEDERAL INFRASTRUCTURE INVESTMENT AND JOBS ACT

With the United States as a whole still looking for ways to springboard out of the COVID era, Congress was able to assemble and pass a once-in-a-generation bipartisan infrastructure bill. Aptly named the Infrastructure Investment and Jobs Act [HR 3684], the bill was signed into law on November 15. The $1.2 trillion bill puts into motion historic federal investments for the nation's physical and cybersecurity infrastructure and aspires to create 2 million jobs per year over the course of a decade in doing so.

The need for such improvement in California is clear and the Infrastructure Investment and Jobs Act could address many problems throughout the Golden State. Infrastructure in California has suffered from a systemic lack of investment. Moreover, the state was recently given a grade of C- on its infrastructure report card, according to the American Society of Civil Engineers:

> The state has made progress in recent years to close the infrastructure investment gap, but much work remains to prepare the infrastructure to support the state's economy and preserve Californians quality of life. . . . Much of California's infrastructure needs significant investments to reverse the decades of underinvestment and help the built systems withstand climate change. Ports, for example, are presently in satisfactory condition, but require approximately $10.7 billion over the next 10 years to protect themselves against the impacts of earthquakes and sea-level rise. Dams and levees are increasingly providing protection against extreme precipitation whiplash, but many of these structures are aging and past their design lives. (*See:* https://infrastructurereportcard.org/asce-gives-california-infrastructure-a-c/)

While many sections of the new legislation simply authorize Congress to appropriate funding for fiscal years 2022 through 2026 for both current and newly created programs, other sections of the bill provide supplemental appropriations over that time period for many of the programs in the bill, above and beyond funding normally provided to such programs in Congress's annual spending bills.

An Upgrade to California's Water Resilience

With historic drought conditions ravaging the state over the last decade, the Infrastructure Investment and Jobs Act prioritizes water resilience for California.

In terms of water storage improvements, California will receive more than $1.5 billion in funding. Of this, over $1 billion will be utilized to improve water storage in California, potentially benefitting storage enhancement projects such as the B.F. Sisk Dam, Sites Reservoir, Los Vaqueros Reservoir, and Del Puerto Canyon Reservoir expansions. As for the remainder, an additional $500 million has been appropriated for repairs to aging dams, such as the San Luis Reservoir.

In furtherance of increasing California's water supply sustainability and resilience is an additional $250 million in funding, which will be directed to the state to bolster water desalination, a critical innovation needed to increase our supply as California deals with cycles of drought.

Among the chief concerns addressed in the bill's appropriations, there is also heavy investment in drinking water infrastructure. In response to the nationwide crisis regarding the lack of safe drinking water, California can expect to receive $3.5 billion over the next five years to improve its water infrastructure across the state and to ensure that clean, safe drinking water is available in all Californian communities.

Federal Level Appropriations

At the federal level, several other major appropriations are laid out in the Infrastructure Improvement and Jobs Act. Notably, $1.15 billion has been appropriated for surface and groundwater storage, and water conveyance projects, with $100 million reserved

for small surface and groundwater storage projects. Another $1 billion has also been appropriated for Water Recycling including $450 million for a new large water recycling project grant program authorized via the act. On the Colorado River side of the state, the federal appropriations have also included $300 million for the implementation of the Colorado River Drought Contingency Plan, as well as an additional $50 million for Colorado River Endangered Species Recovery and Conservation Programs.

Conclusion and Implications

With the new year well under way, the provision of funds has already begun and will continue over the course of the next five years. With the proper utilization of these funds, Californians can look forward to seeing advances in the state's water resilience in addition to other critical management areas of the state as a whole such as air quality, transportation, and wildfire management. While achieving the goal of modernizing the state's infrastructure has been a slow and ongoing process, the Infrastructure Investment and Jobs Act will provide an opportunity to boost this effort and bring statewide infrastructure up to twenty-first century standards. The Infrastructure Investment and Jobs Act's full text and history is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684.
(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS REISSUES AND MODIFIES NEW CLEAN WATER ACT SECTION 404 NATIONWIDE PERMITS

On December 27, 2021, the United States Army Corps of Engineers (Corps) finalized 40 nationwide permits and issued a new nationwide permit for water reclamation and reuse facilities. The 40 newly finalized nationwide permits follow 12 that were reissued and four new nationwide permits that were finalized in January 2021. The nationwide permits will go into effect on February 25, 2022 and all of the current nationwide permits will expire March 14, 2026. [U.S. Army Corps of Engineers, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73,522 (December 27, 2021).]

Factual and Procedural Background

Nationwide permits are general permits under Section 404 of the federal Clean Water Act authorizing placement of dredge or fill material into waters of the United States for recurring types of projects that have only minimal individual and cumulative adverse environmental effects. They also authorize activities that require Corps permits under Section 10 of the Rivers and Harbors Act of 1899, which regulates the placement of any structure in or over a navigable "water of the United States." Section 404(e) of the Clean Water Act authorizes the Corps to issue nationwide or regional general permits for up to five years for activities that are similar in nature and have minimal individual and cumulative adverse environmental effects. The Corps has issued nationwide permits at regular intervals since 1977.

Nationwide Permits expedite permitting and reviews for the projects that they cover by allowing an applicant to avoid the requirement for an individual Section 404 or Section 10 permit and the associated reviews under the National Environmental Policy Act (NEPA). Nationwide permits are used to authorize approximately 70,000 projects in a typical year. The Corps stated that the newly finalized Nationwide Permits support effective implementation of the recently passed bipartisan Infrastructure Investment and Jobs Act by providing infrastructure permit decisions with minimal delay and paperwork.

More on the Army Corps' Recent Actions

The Corps released a proposed rule in September 2020 to reissue the nationwide permits issued in 2017. In January 2021, the Corps published a final rule which reissued 12 nationwide permits, finalized four new nationwide permits, and made some adjustments to the general conditions and definitions for the nationwide permit program.

Reissuance of the 2017 Nationwide Permits

During the process of reissuance, the Corps made a relatively small number of changes to the 2017 permits. One of the most significant changes, which drew criticism from environmental groups, removed a 300-linear-foot limit for losses of streambed from ten nationwide permits that were finalized in January 2021, during the closing days of the Trump administration:

- Nationwide Permit 21, Surface Coal Mining; Nationwide Permit 29, Residential Developments; Nationwide Permit 39, Commercial and Institutional Developments;

- Nationwide Permit 40, Agricultural Activities; Nationwide Permit 42, Recreational Facilities;

- Nationwide Permit 43, Stormwater Management Facilities; Nationwide Permit 44, Mining Activities;

- Nationwide Permit 50, Underground Coal Mining; Nationwide Permit 51, Land Based Renewable Energy Generation Facilities; and Nationwide Permit 52, Water-Based Renewable Energy Generation Pilot Projects.

The Corps also took steps to expand three additional 2017 permits:

- Nationwide *Permit 27*, Aquatic restoration,

enhancement, and establishment activities: The Corps added "releasing sediment from reservoirs to restore or sustain downstream habitat" and "coral restoration or relocation" to the list of examples of activities authorized by the permit;

•Nationwide Permit 41, Reshaping existing drainage ditches: The Corps expanded the nationwide permit to include reshaping of existing irrigation districts;

•Nationwide Permit 48, Commercial shellfish mariculture activities: The new permit changes its name from "aquaculture" to "mariculture" to more precisely reflect that it permits activities in coastal waters. It also removes a prior prohibition against new commercial shellfish mariculture activities directly affecting more than 1/2-acre of submerged aquatic vegetation.

New Nationwide Permits Issued in January 2021

In January 2021, the Corps also promulgated four new nationwide permits, described below:

•Nationwide Permit 55, Seaweed mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of seaweed mariculture activities and also allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•Nationwide Permit 56, Finfish mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of finfish mariculture activities. Similar to Nationwide Permit 55, this permit allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•Nationwide Permit 57, Electric utility line and telecommunications activities: this new permit allows activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States. These activities were previously covered by Nationwide Permit 12, which also permits oil and natural gas pipelines, but which was enjoined from use for a period in 2020 in litigation challenging the Keystone XL pipeline. By creating a separate nationwide permit for electric utility lines and telecommunications lines, the Corps will allow these projects to avoid oil and gas pipeline litigation impacts;

•Nationwide Permit 58, Utility lines for water and other non-hydrocarbon substances: this new permit allows activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. The new permit also allows associated utility line facilities, such as substations, access roads, and foundations for above-ground utility lines, in waters of the United States. These activities were previously covered by Nationwide Permit 12. Creating a separate nationwide permit for water utility activities avoids potential impacts from challenges to oil and gas pipelines, and also removes conditions that were focused on other types of pipelines or utilities.

New Nationwide Permit Issued in December 2021

In December 2021, the Corps reissued the remaining 40 nationwide permits and finalized a fifth new nationwide permit:

•Nationwide Permit 59, Water reclamation and reuse facilities: this new nationwide permit will help expedite and provide clarity for smaller water recycling, reuse, and groundwater recharge projects. The Corps limited its scope to projects that impact less than one half of an acre of waters, which will preclude its use for medium or large scale water recycling or recharge projects.

In its discussion of the new Nationwide Permit, the Corps cited the climate resilience and conservation benefits of water reclamation and reuse projects:

Water reclamation and reuse facilities can be

an important tool for adapting to the effects of climate change, such as changes in precipitation patterns that may affect water availability in areas of the country. Water reclamation and reuse facilities help conserve water, which may be beneficial as water availability changes or increases in water demand occur.

In response to comments filed by public water agencies and their representatives, the final rule's preamble includes language stating that the Corps will not consider the source of water when applying nationwide permits to water reclamation or reuse projects. It states:

> For water reclamation and reuse facilities, the Corps regulates discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of those facilities. In general, the Corps does not have the authority to regulate the operation of these facilities after they are constructed, expanded, or maintained through discharges of dredged or fill material into waters of the United States authorized by this nationwide permit. The Corps does not have the authority to regulate releases of water to recharge or replenish groundwater, to regulate the mixing of water from various sources, or to regulate the movement of water between watersheds.

This language clarifies that the Corps does not plan to withhold or condition this new nationwide permit in response to concerns about the water that will be used for the project – such as imported or recycled water.

Conclusion and Implications

The U.S. Army Corps of Engineers' new nationwide permit for water reclamation and reuse projects will expedite groundwater recharge projects that impact less than one-half an acre of waters or wetlands. The new permit and its discussion also demonstrate that the Biden administration views water recharge, reuse, and recycling as important tools for increasing water reliability and adapting to the impacts of climate change. The reissuance of existing nationwide permits provides continuity until March 2026 for a program that expedites permitting for infrastructure and other projects that have minor impacts on waters and wetlands regulated under the Clean Water Act. For more information on the general permits, *see:* https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits.
(Lowry Crook, Ana Schwab, Rebecca Andrews)

U.S. BUREAU OF RECLAMATION AND DWR WITHDRAW TEMPORARY URGENCY CHANGE PETITION TO MODIFY DELTA FLOW AND WATER QUALITY REQUIREMENTS

On December 1, 2021, the U.S. Bureau of Reclamation (Bureau) and California Department of Water Resources (DWR) filed a Temporary Urgency Change Petition (TUCP) with the State Water Resources Control Board (SWRCB or State Board). An order approving the TUCP would have modified certain terms and conditions of the federal Central Valley Project (CVP) and State Water Project (SWP) water rights permits and licenses, effective from February 1 through April 30, 2022. However, due to improved storage conditions over the past several weeks, the Bureau and DWR withdrew the TUCP on January 18, 2022.

Background

Water Right Decision 1641 (D-1641) was issued by the SWRCB on December 29, 1999 and amended March 15, 2000. D-1641 amended the water right licenses and permits for the SWP and CVP (collectively: Projects), to require them to meet specified water quality objectives set forth in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). DWR (which operates the SWP) and the Bureau (which operates the CVP) work in coordination to operate the projects to meet the terms in D-1641.

California experienced extremely dry conditions for two consecutive years from 2020 to 2021. On May 10, 2021, Governor Newsom issued an emergency proclamation based on drought conditions in the Bay-Delta and other watersheds, stating that the continuation of extremely dry conditions had resulted in scarce water supply. The emergency proclamation included a directive that:

> . . .[t]o ensure adequate, minimal water supplies. . .[the State Board]. . .shall consider modifying requirements for reservoir releases or diversion limitations—including where existing requirements were established to implement a water quality control plan—to conserve water upstream[.]

On May 17, 2021, the Bureau and DWR submitted a Temporary Urgency Change Petition to the SWRCB requesting modification of certain requirements of D-1641. In general, temporary urgency change orders issued by the SWRCB enable water right holders to temporarily deviate from the terms of their existing water rights in order to provide relief from drought conditions. Temporary urgency change orders last up to 180 days and are renewable. On June 1, 2021, the State Board conditionally approved the TUCP for the period of June 1, 2021 through August 15, 2021.

Throughout the spring, summer, and fall of 2021, warm and dry conditions persisted and DWR and the Bureau continued to take actions to conserve water and to reduce impacts to fish and wildlife and other instream uses. Nonetheless, on October 1, 2021, the CVP and SWP began Water Year 2022 with a combined carryover storage of about 2.0 million acre-feet (MAF)—less than half of the combined storage at the beginning of Water Year 2021.

The 2022 Temporary Urgency Change Petition

On December 1, 2021, the Bureau and DWR jointly submitted a TUCP for February 1 through April 30, 2022. The TUCP requested that the State Board modify certain requirements set forth in D-1641, because the continuation of extremely dry conditions in the Delta and other watersheds had left the Projects in a "precarious state" and modifications were needed to conserve upstream storage at all CVP and SWP reservoirs should dry conditions persist into 2022. Approval of the TUCP would have relaxed certain water quality standards set forth under D-1641, specifically: 1) required Delta outflow levels depending on conditions and forecasts; 2) allowable exports when unmodified D-1641 Delta outflow requirements are not met; 3) required San Joaquin River flow requirements; and (4) required Delta Cross Channel Gate closure requirements.

In support of the TUCP, the Bureau and DWR prepared a Biological Review in compliance with the Porter-Cologne Water Quality Control Act (Division 7 of the California Water Code). The Bureau and DWR also met with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the California Department of Fish and Wildlife, and the SWRCB, to discuss the TUCP Biological Review outline and analyses methodology. In early January, the SWRCB accepted public comments on the TUCP and held a workshop to receive additional oral public comments.

On January 18, 2022, the Bureau and DWR formally withdrew the TUCP. In a letter to the Executive Director of the SWRCB, the Bureau and DWR state that October and December hydrology showed a marked improvement from 2021 conditions, and storage conditions improved at Oroville and Folsom reservoirs. Indeed, the Bureau reported that Folsom Reservoir is currently in flood operation status. Although Shasta and Trinity reservoirs continue to be relatively low, forecasted conditions for 2022 do not suggest that the TUCP would benefit storage at Shasta or Trinity. Using conservative hydrologic assumptions from the January runoff forecast, the Bureau and DWR do not expect that Shasta and Trinity reservoirs will be relied upon for meeting Delta outflow and/or salinity requirements in the February through April period due to the expected higher releases from Folsom and Oroville reservoirs and/or additional statewide runoff in general. Accordingly, the Bureau and DWR no longer believe there is an urgent need for the modifications requested in the TUCP for February through April 2022.

Conclusion and Implications

The Bureau of Reclamation and Department of Water Resources continue to conduct operational studies and plan for the resumption of dry conditions. If dry conditions occur, modifications may be necessary to protect upstream storage levels and a separate

petition will be filed at that time. The full text of the December 1, 2021 TUCP can be found at: Temporary Urgency Change Petition Regarding Delta Water Quality (December 1, 2021) (ca.gov). The full text of the January 18, 2022 Withdrawal Letter can be found at: 20220118_dwr-usbr-letter_tucp-withdrawal.pdf (ca.gov).
(Holly E. Tokar, Meredith Nikkel)

CALIFORNIA STATE WATER BOARD AND DWR RELEASE REPORT OUTLINING NEW GROUNDWATER MANAGEMENT PRINCIPLES AND STRATEGIES FOR DRINKING WATER

The California Department of Water Resources (DWR), in coordination with the State Water Resources Control Board (SWRCB), recently released a plan (Plan) detailing new management principles and strategies for state action in supporting communities and individuals that depend on groundwater wells for drinking water.

Background

As California continues to grapple with frequent and intensifying droughts, groundwater becomes ever more important to supplement less-predictable supplies from precipitation, snowpack, and other surface water. The Plan reports that in some areas, domestic and community drinking water wells are particularly at risk of going dry during droughts due to overdraft and because many domestic wells tend to be relatively shallow. The Plan estimates that during the 2012 to 2016 drought, more than 3,500 domestic wells went dry, and that another 900 wells were similarly impacted from January to October 2021. The management principles published by the State of California in the Plan are intended to increase water supply reliability for those dependent on groundwater for domestic uses.

Groundwater Management Principles and Strategies

The state's Plan is organized into six overall principles, each of which is supported by several specific strategies. The principles are: 1) achieve drinking water resilience; 2) integrate principles of equity; 3) address underlying challenges; 4) lead with the best available data; 5) build trusted relationships; and, 6) implement lasting solutions.

Principle 1: Drinking Water Resilience

The first principle is focused on pre-drought planning and preparedness and post-drought emergency response. This principle focuses on coordination with other agencies, from federal emergency response agencies, to counties and water systems developing drought contingency plans, to local and regional agencies, tribes, and non-governmental organizations (NGOs) that engage directly with drinking water well users. Another focus is implementing the Sustainable Groundwater Management Act (SGMA) in a way that helps minimize the impacts of future droughts on drinking water well users. The Plan calls for establishing a standing inter-agency task force to lead a proactive approach to implement this principle.

Principle 2: Equity

According to the Plan, the state recognizes that integrating principles of "equity" in drinking water management must be both practical in providing access to drought assistance, and procedural in maximizing participation in drought-related planning processes to inform positive outcomes. The strategies to implement this principle include outreach, education, and translation goals; guidance to consider impacts on water users before "red-tagging" homes for water quality or quantity issues; flexibility for groundwater trading; application of the "polluter pays" principle, to the extent possible and appropriate, so that the costs of solutions to benefit domestic well users are not borne by those users but by those who caused the issues; and aligning various state and local funding sources to maximize support for domestic well users.

Principle 3: Address Underlying Challenges

This principle provides guidance related to a wide range of matters that could potentially impact drinking water well users, including: best practices in well permitting; crop conversion, farming and land practices; energy impacts of time-of-use pumping practices; and local and regional land use planning. It also encourages counties to regulate and enforce efficient and appropriate water use during droughts. This principle further addresses certain financial impacts on domestic well users, and aims to improve contracting and procurement processes related to repair and rehabilitation of wells as well as providing assistance for capacity building where there are economic impacts on communities or domestic well users related to changes in groundwater conditions.

Principle 4: Best Available Data

To improve the "best available" data, the state focuses on improving both the data collected and access to that data. The state plans to improve its own monitoring of groundwater level, subsidence, and water quality; encourage others to increase their frequency of monitoring; promote metering of wells and collection of evapotranspiration data to capture groundwater use; and encourage Groundwater Sustainability Agencies (GSAs) and counties to collect data from drinking water well users. The state also plans to develop an information management system and to increase access to existing data platforms most relevant to drinking water well users, as well as working with local entities to publicly disclose well and water quality information, including during real estate transfers.

Principle 5: Relationship Building

The state recognizes benefits of effective coordination, communication, and decision-making and the free flow of knowledge and skills between groups. The state plans to engage drinking water well users in the development of solutions in the local communities, and, in turn, the state plans to offer training resources on testing water quantity and quality and to help connect users with local emergency services for drought response. The state also plans to engage government-to-government with tribes and with the federal Indian Health Services to develop drought preparedness and response plans and assist drinking water well users.

Principle 6: Lasting Solutions

The final principle in the Plan is based on a recognition that no single solution will address every drinking water well challenge and that to be lasting, solutions need to be specific, effective, and supported with local engagement. The state proposes using funding incentives to encourage mitigation of water quality issues; encouraging regionalization and consolidation of drinking water systems; piloting alternative water supply projects, such as source cleanup or recycled water; and incentivizing recharge projects, among other things. The state also plans to report on progress made under existing regulatory state and federal water quality management programs

Conclusion and Implications

The principles and strategies outlined in the Plan encompass a wide variety of action items, require coordination with a number of agencies beyond DWR and SWRCB, and build on a number of existing programs. As a result, they may impact water users beyond those dependent on drinking water wells. The Plan's principles and strategies will be further developed and implemented in the coming months and years. For the complete Plan document, including an implementation matrix, *see:* https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/DrinkingWater/Files/Final-Principles-and-Strategies-with-the-Implementation-Matrix.pdf.
(Jaclyn Kawagoe, Derek Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT GRANTS CLEAN WATER ACT PETITION FOR REVIEW AND REMANDS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

Food & Water Watch v. U.S. Environmental Protection Agency, 20 F.4th 506 (9th Cir. 2021).

The U.S. Court of Appeals for the Ninth Circuit recently granted a petition to review a National Pollutant Discharge Elimination System (NPDES) permit (Permit) issued by the U.S. Environmental Protection Agency (EPA) to govern Concentrated Animal Feeding Operations (CAFOs) in Idaho under the federal Clean Water Act (CWA). The Court of Appeals determined the Permit was arbitrary, capricious, and in violation of the law, and remanded the Permit to the EPA.

Factual and Procedural Background

On May 13, 2020, EPA issued a general NPDES permit for CAFOs in Idaho, with an effective date of June 15, 2020. The Permit was based on findings that improper management of CAFO waste had resulted in serious water quality issues in Idaho. The Permit prohibited discharges from production areas unless they were designed, constructed, operated and maintained to contain all manure, litter, process wastewater and the runoff and direct precipitation from the 25-year, 24-hour storm event for the location of the CAFO. It required CAFOs to perform daily inspections of the production areas. The Permit also prohibited all discharges from land application areas during dry weather. Dry weather discharges from land application areas were known to occur during irrigation of fertilized CAFO fields. The Permit, however, contained no monitoring provisions for dry weather discharges from land-application areas.

Petitioners Food & Water Watch and Snake River Waterkeeper argued that issuance of the Permit was arbitrary, capricious, and in violation of the law because it did not require monitoring that would ensure detection of unpermitted discharges, and thus lacked sufficient monitoring provisions necessary to ensure compliance with its discharge limitations. EPA argued the monitoring provisions were sufficient, and that the petition was untimely.

The Court of Appeals' Decision

Timeliness

The court first considered and rejected EPA's argument that the petition was untimely. EPA argued the petition was untimely because the Permit and incorporated existing regulations adopted in 2003, and thus the petition needed to be brought within 120 days of that rule's issuance. The court disagreed, holding that the petitioners were challenging the monitoring requirements of the Permit itself, and not any provision of the 2003 rule. The petition was determined to be timely.

Production Areas

The court next considered whether the Permit contained sufficient monitoring provisions for discharges from production areas. Permits must assure compliance with permit limitations by including requirements to monitor the:

> . . .mass (or other measurement specified in the permit) for each pollutant limited in the permit, the volume of effluent discharged from each outfall, and other measurements as appropriate.

EPA argued the Permit contained sufficient monitoring requirements to ensure compliance, and that the court must defer to its expertise.

The court reasoned that the Permit's inspections requirements were sufficient to ensure compliance with the limitation on above-ground discharges from production areas. However, the court found that the Permit contained no monitoring provisions for underground discharges from production areas, despite the record before the EPA showing that leaky containment structures are sources of groundwater pollution

and groundwater flow from agriculture is a primary contributor of nitrate in surface water. The court noted that the EPA had rejected a proposal to include a requirement to monitor underground discharges in the 2003 rule because it believed that site-specific variables meant that requirements in local permits, rather than uniform national requirements, were the best means to address underground discharges. The court concluded there was no way to ensure that production areas complied with the Permit's prohibition on underground discharges because the Permit failed to include a requirement that CAFOs monitor waste containment structures for underground discharges. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they were in compliance with the Permit.

Land-Application Areas

Finally, the court considered whether the Permit contained sufficient monitoring provisions for land application areas. The record before EPA showed that such discharges can occur during irrigation of fertilized CAFO fields. The court noted that the Permit assumed irrigation-produced runoff of pollutants would never occur from land application areas because the Permit required CAFOs to implement a nutrient management plan providing for the application of manure, litter, and process wastewater at agronomic rates. The court found that the record did not support this assumption, and concluded that, without monitoring, there was no way to ensure a CAFO complied with the Permit's dry weather zero-discharge requirement for land application areas. Thus, the court held that the Permit failed to ensure that its permittees monitored discharges in a manner sufficient to determine whether they are in compliance with the Permit.

Conclusion and Implications

The Ninth Circuit Court of Appeals granted the petition and remanded the Permit to the EPA for further proceedings, holding that the issuance of the Permit was arbitrary, capricious, and a violation of law because the Permit did not require monitoring of underground discharges from production areas and dry weather discharges from land-application areas that would ensure compliance with its effluent limitations. This case demonstrates that NPDES permits must contain monitoring provisions sufficient to ensure compliance with their terms. Where a permit contains no requirements to monitor discharges expressly prohibited by the permit, and the record before the EPA shows that such discharges occur and cause pollutants to enter waters of the United States, the issuance of the permit will likely be found to be arbitrary, capricious, and in violation of law. The court's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/12/16/20-71554.pdf. (David Lloyd, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT HOLDS SWRCB PROCESS OF GRANTING DOMESTIC USE REGISTRATIONS ARE 'MINISTERIAL' AND EXEMPT FROM CEQA

Mission Peak Conservancy v. State Water Resources Control Board, 72 Cal.App.5th 873 (1st Dist. 2021).

Under the recent case of *Mission Peak Conservancy v. State Water Resources Control Board*, the California Court of Appeal for the First Judicial District was able to take up the question of whether the State Water Resources Control Board's (SWRCB or State Board) approval of small domestic use registrations without first conducting environmental review under the California Environmental Quality Act (CEQA). After review, the Court of Appeal concluded that such an action by the State Board—approving small domestic use registrations—is exempt from CEQA as a "ministerial" action.

Background

The Water Rights Permitting Reform Act of 1988 provides a streamlined process for eligible persons to acquire a right to appropriate less than ten acre-feet of water per year for domestic and other specified purposes. A person obtains the right under this registration by first registering with the SWRCB, paying the associated fee, and putting the water to beneficial use.

When the State Board approved the small domestic use registration for the real parties in interest in *Mission Peak*, plaintiff-petitioners Mission Peak Conservancy brought their case alleging a single cause of action for CEQA violations. In their petition, Mission Peak argued that the registration process is discretionary, not ministerial, and therefore not exempt from CEQA and sought a writ of mandate revoking the small domestic use registration and mandating that the board conduct an environmental review of the project at issue.

The Court of Appeal's Decision

Generally speaking, CEQA requires public agencies to analyze the effects of a project on the environment and to mitigate or avoid significant impacts when feasible. These environmental review requirements, however, are only applicable to discretionary projects to be approved by a public agency. A project is "discretionary" when the reviewing agency is required to exercise judgment or deliberation when deciding whether to approve the project. Conversely, ministerial projects—projects that require little or no personal judgment by the approving agency—are exempt from CEQA.

The main point of discussion in the court's review turned on whether the SWRCB's approval of the small domestic use registration was discretionary or ministerial in nature. The test for this is whether the agency's decision to approve the project gives it authority to require changes to the project that would lessen its impacts on the environment.

In this case, the only conditions the SWRCB could place on the project were conditions applicable to all small domestic registrations. Upon approval, the registration is automatically deemed complete and the registrant obtains the right to use the specified amount of water when the State Board receives a substantially completed registration form and the associated fee. Accordingly, the court determined this process to be ministerial in nature.

Addressing Mission Peaks Primary Arguments

After reaching this ultimate conclusion on the matter, the court more specifically addressed each of Mission Peak's three primary arguments. First among these was Mission Peak's assertion that because the state Department of Fish and Wildlife has discretion to impose conditions on small domestic use registrations the action should be considered discretionary. This potential imposition of conditions by Fish and Wildlife, however, occurred prior to the SWRCB's approval of the registrations. Because of this, the court concluded that Fish and Wildlife discretion could not be imputed to the SWRCB as it was only

another box to be checked in the process of approval.

Mission Peak next contended that the SWRCB had discretion to deny the registration at issue—in the colloquial sense—because the registrants had misrepresented facts in the registration. This argument, however, was dismissed by the court as missing the point. Here, Mission Peak argued that the State Water Board misapplied a fixed criteria to the facts and made an erroneous ministerial decision, but as the court wrote, "CEQA does not regulate ministerial decisions—full stop."

Finally, Mission Peak last argued that even if the approval of the small domestic use registration at issue was a ministerial action, the action nonetheless is a violation of CEQA because the project did not meet the requirements for a small domestic use. As with the second argument, however, the court simply pointed out that such an argument is not a proper basis for a CEQA claim.

Conclusion and Implications

While the issue regarding the truth, or rather the falsehood, of the facts stated in the underlying small domestic use registration might have made an interesting point of discussion in this case, the Court of Appeal's opinion here lays things out in a simplistic manner and provides us with another bit of case law in interpreting the requirements of CEQA. It may not be among the most glamorous or groundbreaking of CEQA cases that the state has seen, but it nonetheless provides a succinct reiteration of guiding principles on the matter and further clarification towards drawing the line between what actions are discretionary in nature and what actions are ministerial. The court's opinion[s] are available online at: https://www.courts.ca.gov/opinions/documents/A162564.PDF; and at https://www.courts.ca.gov/opinions/documents/A162564M.PDF.

(Wesley A. Miliband, Kristopher T. Strouse)

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