

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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CALIFORNIA WATER NEWS

GOVERNOR NEWSOM'S DROUGHT EXECUTIVE ORDER AIMS TO INCREASE REGIONAL WATER CONSERVATION EFFORTS

California Governor Gavin Newsom's recently issued Executive Order N-7-22 (Executive Order) which targets efforts to increase water conservation and bolster regional responses to the state's ongoing drought conditions.

Background

The Executive Order is the latest in a series of executive orders designed to reduce the impact of drought conditions in the state. Citing record-setting dry months in January and February, and third straight year of drought conditions, the Executive Order sets out a variety of new measures aimed at increasing conservation and drought resiliency throughout the state.

Water Shortage Contingency Plans

Governor Newsom directed the State Water Resources Control Board (State Board) to consider adopting emergency regulations related to urban water suppliers by May 25, 2022. For urban water suppliers that have submitted a water shortage contingency plan, these regulations would require suppliers to implement Level 2 response actions, which generally include actions responsive to water supply conditions being reduced by 20 percent. For suppliers that have not submitted a water shortage contingency plan, the State Board would establish Level 2 contingency plans based upon water shortage contingency plans submitted by other similar suppliers. The Executive Order also indicates that more stringent requirements should be expected if drought conditions persist throughout and beyond this year.

Non-Functional Turf

The Executive Order further directs the State Board to consider adopting regulations defining and banning irrigation of "non-functional turf." The Executive Order clarifies that these regulations would be aimed at decorative grass and would not apply to school fields, sports fields, and parks. The Governor's

Office estimates that these regulations will result in annual water savings of several hundred thousand acre-feet.

Limitations on Certain New and Replacement Groundwater Wells

The Executive Order also seeks to limit the construction of new groundwater wells and the expansion of existing wells. Prior to issuing a permit for a new well or for alteration of an existing well, the responsible agency must determine that: 1) the proposal is not likely to interfere with existing wells nearby; and, 2) the proposal is not likely to adversely impact or damage nearby infrastructure. Additionally, the Executive Order imposes additional requirements for new or altered wells in a basin classified as medium- or high-priority under the Sustainable Groundwater Management Act (SGMA). Permits for new or altered wells in these areas will need to be accompanied by a written verification from the local Groundwater Sustainability Agency certifying that the proposed well would not be inconsistent with any applicable Groundwater Sustainability Plan (GSP) and would not decrease the likelihood of reaching a sustainability goal for the area covered by a GSP.

These limitations do not apply to permits issued to individual domestic users with wells that provide less than two acre-feet of groundwater per year, or to wells that will exclusively provide groundwater to public water supply systems as defined in § 116275 of the Health and Safety Code.

Other Directives

The Executive Order also directs the California Department of Water Resources to take a number of steps to combat the impact of sustained drought. These include: 1) consulting with commercial, industrial, and institutional sectors to develop strategies for improving water conservation, including direct technical assistance, financial assistance, and other approaches; 2) working with state agencies to address

drinking water shortages in households or small communities where groundwater wells have failed due to drought conditions; and, 3) preparing for implementation of a pilot project to obtain and transfer water from other sources and transfer it to high need areas. The Governor also directs the State Board to increase investigations in to illegal diversions and wasteful or unreasonable use of water and bring applicable enforcement actions.

The Executive Order rolls back regulations that limit the transportation of water outside its basin of origin and encourages agencies to prioritize petitions and approvals for projects that improve conditions for anadromous fish or incorporate capturing high precipitation events for local storage or recharge.

The Governor directed all state agencies to submit proposals to mitigate the effects of severe drought by

April 15, 2022. Agency responses to that directive were in process at the time of this writing.

Conclusion and Implications

The Executive Order, though broad, is less aggressive in implementing conservation measures than prior orders during the 2012-2016 drought period. It focuses primarily on urban water suppliers and regulations to be implemented at regional and local levels. Though it does not include mandatory individual water use restrictions on California residents, the Governor signaled to Californians that unless conditions dramatically improve, such restrictions can be expected in the future. The Executive Order is available online at: <https://www.gov.ca.gov/wp-content/uploads/2022/03/March-2022-Drought-EO.pdf>. (Scott Cooper, Derek Hoffman)

STATE AND FEDERAL WATER USERS TAKE STEP TOWARD VOLUNTARY AGREEMENTS FOR BAY-DELTA PLAN UPDATE

In late March 2022, the State of California and various state and federal water users finalized the terms of a Memorandum of Understanding (MOU) related to water flows and habitat in the Sacramento-San Joaquin River Delta watershed. The MOU is not itself binding on the signatories but lays the groundwork for final, enforceable voluntary agreements related to water quality objectives and implementation measures the State Water Resources Control Board could otherwise impose on Delta water users. The MOU outlines the terms for a comprehensive approach to managing habitat, flow, and other factors to protect native fish and wildlife species while concurrently protecting water supply reliability.

Background

The State Water Resources Control Board (State Board) and the nine Regional Water Quality Control Boards (Regional Boards) administer the Porter-Cologne Water Quality Control Act to achieve an effective water quality control program for the state. The State Board and the Regional Boards are also responsible for regulating activities affecting the quality of the waters of the state. Accordingly, the State Board

is authorized to adopt a water quality control plan, which it has done for the Sacramento-San Joaquin Delta beginning in 1978 (Bay-Delta Plan). The State Board subsequently amended the Plan in 1995, 2006, and, most recently, in 2018.

The Bay-Delta Plan designates beneficial uses of the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta watershed), establishes water quality objectives for the protection of those beneficial uses, and establishes a program to implement those objectives. In 2008, the State Board initiated proceedings to update the current Bay-Delta Plan.

In May 2017, the governor issued a “Principles for Voluntary Agreements,” prompting interested parties—including state and federal agencies, municipal and agricultural water suppliers, and others—to begin negotiations related to voluntary agreements to update and implement the Bay-Delta Plan (Voluntary Agreements).

On December 12, 2018, the State Board adopted a resolution to update the 2006 Bay-Delta Plan. Specifically, the State Board amended the water quality objectives for the protection of fish and wildlife beneficial uses in the Lower San Joaquin River

(LSJR) and its three eastside tributaries, the Stanislaus, Tuolumne, and Merced Rivers, and agricultural beneficial uses in the southern Delta. It also amended the program of implementation for those objectives and approved and adopted underlying environmental documentation for the Lower San Joaquin River.

On March 1, 2019, the Directors of California Fish and Wildlife and the California Department of Water Resources entered into a:

Planning Agreement Proposing Project Description and Procedures for the Finalization of the Voluntary Agreements to Update and Implement the Bay-Delta Water Quality Control Plan.

The parties to the MOU subsequently developed a term sheet containing the essential terms that the parties would use to finalize the Voluntary Agreements.

The MOU

As a threshold matter, the MOU does not bind the signatories to the terms set forth in the term sheet undergirding the future Voluntary Agreements. Each party instead reserved judgment as to whether it would sign or otherwise support the Voluntary Agreements. By signing the MOU, no party committed to any action set forth in the term sheet and reserved the right not to proceed with any aspect of the flow or non-flow measures described in the MOU or term sheet.

The Voluntary Agreements would consist of three types of agreements: a global agreement, implementing agreements, and certain agreements under the California Government Code. The global agreement would describe the structure and funding of the Voluntary Agreements, as well as provide a “science program” and “governance program” that would evaluate the efficacy of the Voluntary Agreements and direct management of the Voluntary Agreement program, respectively. The second type of agreement—implementing agreements—would detail measures for the assignment of a tributary, the Sacramento River mainstem, or the Delta (as applicable) to be signed by those parties with responsibility for implementing that agreement. Finally, the Government Code agreements would identify the specific obligations of the parties to the Voluntary Agreements responsible

for implementation of an implementing agreement, as well as regulatory enforcement mechanisms related to flows and habitat restoration.

The Voluntary Agreements

With respect to the Voluntary Agreements themselves, the parties to the MOU propose numerous essential terms related to the update and implementation of the Bay-Delta Plan. Broadly, the Voluntary Agreements would incorporate flow measures, including reservoir refill criteria and other accounting provisions, habitat restoration measures, funding, and expected outcomes and metrics. In particular, the Voluntary Agreements will identify actions necessary to implement two water quality objectives in the Bay-Delta Plan related to the protection of native fish species.

The Narrative Salmon Objective and Narrative Viability Objective

These objectives pertain to the water quality conditions necessary to achieve a doubling of a certain salmon population (called the Narrative Salmon Objective) and the viability of native fish populations (called the Narrative Viability Objective). The Narrative Viability Objective would maintain water quality conditions, including flow conditions such as duration, timing, and temperature, in and from tributaries and into the Delta that are sufficient to support and maintain the natural production of viable fish populations and enhance spawning, rearing, growth, and migration of those populations. Flows prescribed by the Voluntary Agreements would be additive to Delta outflows required by the water rights for the State Water Project and Central Valley Project, as well as federal biological opinions, as modified.

An additional pathway to implement the Narrative Salmon Objective and Narrative Viability Objective would apply to tributaries, persons, or entities not covered by the Voluntary Agreements. In that scenario, the State Board would use its legal authority and public process to set conditions requiring flows and other measures for persons or entities not covered by the Voluntary Agreements to provide reasonable protection for beneficial uses associated with the two objectives. However, the State Board could allow, pending final adoption of the Voluntary Agreement program, for water rights holders who are not covered

by the Voluntary Agreements to contribute to achieving the objectives under the Voluntary Agreements.

Conclusion and Implications

The MOU sets forth the important terms on which Voluntary Agreements could be developed. It remains to be seen whether the signatories, or even non-signatories, to the MOU will eventually execute a Volun-

tary Agreement with the state. However, the MOU is generally perceived to be an important step toward addressing environmental and water supply reliability concerns associated with the Delta. The Voluntary Agreement Package is available at: https://resources.ca.gov/-/media/CNRA-Website/Files/NewsRoom/Voluntary-Agreement-Package-March-29-2022.pdf?utm_medium=email&utm_source=govdelivery. (Jeremy Holm, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL PUTS PRESSURE ON STATE WATER RESOURCES CONTROL BOARD TO COMPLETE THE BAY-DELTA WATER QUALITY CONTROL PLAN UPDATE

Although the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay Delta) Water Quality Control Plan (Bay Delta Plan or Plan) saw some minor revisions in 2006, the Bay Delta Plan has not undergone a significant update since 1995. The current process to update the Bay Delta Plan began back in 2009, and while there has been significant progress since then it still seems as though no completion date is in date. Assembly Bill 2639 would establish a deadline for the State Water Resources Control Board (State Board) to wrap things up and have the Bay Delta Plan update completed by December 31, 2023.

Background

Under the California Water Code, the Regional Water Quality Control Boards and/or State Board is required under specific circumstances to formulate and adopt water quality control plans that protect beneficial uses of water and meet water quality objectives plans for areas within each region of the state. These water quality control plans are required to include objectives that will ensure the reasonable protection of all beneficial uses and water quality while considering factors such as past, present and probable future beneficial uses of water, environmental characteristics, regional economics, the need to develop housing, and the need to expand and use recycled water. The Water Code further requires that these plans be periodically reviewed and updated.

The State Board first adopted the Bay Delta Plan (Plan) in 1978 under authority granted to it by the Porter-Cologne Water Quality Control Act and federal Clean Water Act. The State Board later adopted minor revisions to the Plan in 1991 followed by a significant update in 1995. The most recent update came in the form of minor revisions to the Plan which were adopted in 2006. The 2006 update to the Bay Delta Plan identified several new issues in need of additional action, including problems with San Joaquin River flows and Delta salinity warranting a

more comprehensive update of the Bay Delta Plan.

The process for the current update commenced in 2009. Thirteen years later, that process is still ongoing.

The 2018 Framework

In 2018, the State Board released the “July 2018 Framework for the Sacramento/Delta Update to the Bay Delta Plan” (July 2018 Framework), which outlined the background of Plan and the need for a major update, comprehensive objectives, and potential options for implementation of the update. The July 2018 Framework indicated that the next step would be for the State Board to draft proposed changes to the Bay Delta Plan with a supporting Staff Report by the end of 2018. While neither of those documents have been completed, now almost 4 years later, this delay has allowed the many interested parties to work on negotiations towards a Voluntary Agreement.

Assembly Bill 2639

In its current state, AB 2639 (Bill) would require the State Board to adopt a final update of the Bay Delta Plan by December 31, 2023, and to implement the amendments to the Bay Delta Plan adopted in Resolution No. 2018-0059 on December 12, 2018. Most notably, the Bill would enforce this deadline by prohibiting the State Board after January 1, 2024 from approving any new water right permits or extensions of time for any existing permits that would result in new or increased diversions to surface water storage from the Sacramento River and San Joaquin River watersheds until and unless the State Board has taken the required actions.

Conclusion and Implications

The deadline set by Assembly Bill 2639 to adopt a final update to the Bay Delta Plan is clearly one of great ambition. With the Bill still working its way through the state legislature, a deadline for adoption

a mere year and a half out seems like a pipe dream. While not a total impossibility, if the last 13 years are any indication of how quickly this process can move along, then the deadline certainly seems optimistic at best, and unrealistic at worst.

If the deadline alone wasn't enough to raise a brow, the enforcement mechanism will surely be one to catch the attention of agencies and other interested persons throughout the state. By establishing a blanket prohibition on new water right permits if an update is not adopted by 2024, the Bill may come with several unintended consequences. One such

example, included in the Assembly Committee on Water, Parks, and Wildlife's report on the Bill, is how temporary water right permits to divert flood flows to underground storage for recharge projects might not be permitted under the Bill if the deadline is not met.

Although AB 2639 is still in the works, its general concept is enough to warrant close attention by any interested persons or agencies. The full text of the Bill can be found here: https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2639.

(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

STATE WATER RESOURCES CONTROL BOARD APPROVES TEMPORARY URGENCY CHANGE PETITION FOR STATE WATER PROJECT AND CENTRAL VALLEY PROJECT

On March 18, 2022, the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) jointly filed a Temporary Urgency Change Petition (TUCP), seeking temporary modifications to water right permit and license terms for the State Water Project (SWP) and federal Central Valley Project (CVP) from April 1 to June 30 because of prolonged drought conditions. The Executive Director for the State Water Resources Control Board (State Board) conditionally approved the TUCP on April 4, 2022, easing Sacramento-San Joaquin Delta outflow criteria and agricultural salinity requirements imposed by the State Board in Water Rights Decision 1641 (D-1641) for the requested period.

Background

Together, the SWP and CVP provide water for over 25 million Californians by storing and delivering water supplies to agricultural and municipal users across the state. Given California's highly variable hydrology and frequent dry periods, the projects are subject to regulatory constraints to meet water quality and species protection laws. Under D-1641, project operations are required to meet specified Delta outflow and 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.

On May 10, 2021, Governor Newsom proclaimed a drought emergency in California because of extraordinarily dry conditions in the 2020 and 2021 water years, which constituted the second driest two-year period in the state's records. DWR and the Bureau submitted an urgency change petition on December 1, 2021 for the February through April 2022 period, but withdrew it after heavier-than-expected October and December rains improved overall water supply conditions. However, record dry conditions in Janu-

ary, February, and March of 2022 and low projected inflows to Lake Oroville and Lake Folsom prompted DWR and the Bureau to submit the current TUCP.

Specifically, the TUCP requests that D-1641 be modified as follows: 1) for the month of April, reduce the minimum Delta outflow requirement from a minimum of 7,100 cubic feet per second (cfs) on a three-day average to 4,000 cfs on a 14-day average; 2) allow a 4,000 cfs minimum outflow from May 1 through June 30, even if forecasted flows in the Sacramento are greater than the 90 percent exceedance level of 8.1 million acre-feet (MAF); 3) move the Western Delta agricultural salinity compliance station upstream from Emmaton to Threemile Slough; 4) limit the projects' maximum export rate to 1,500 cfs if the unmodified D-1641 is not being met; and 5) reduce the minimum monthly flow requirement on the San Joaquin River to 710 cfs. As described in the TUCP, the requested changes would allow DWR and the Bureau to manage reservoir releases in a manner that conserves upstream storage for later use to meet critical water supply needs for human health and safety, salinity control, and fish and wildlife, while allowing some exports to continue. The TUCP predicted that the proposed changes would conserve over 500 thousand acre-feet (TAF) of water stored in the Oroville and Folsom reservoirs.

The Temporary Urgency Change Order

Water Code § 1435 authorizes the Board to grant a temporary change order for a water right permit or license so long as it finds: 1) the petitioner has an urgent need for the proposed change; 2) the proposed change can be made without injury to other lawful users of water; 3) the proposed change can be made without unreasonably affecting fish and wildlife; and 4) the proposed change is in the public interest.

Here, the State Board issued an order approving the TUCP (TUCP Order) finding that injury to other lawful users of water would be avoided because water

right holders below project reservoirs are entitled only to natural flows, not water released from upstream storage beyond what would exist under natural conditions. Additionally, operation of the CVP and SWP remain subject to the priority of senior water right holders and any independent contractual obligations DWR and the Bureau may have. As for fish and wildlife, the TUCP Order finds the changes would have a potential negative impact, but that impact is not unreasonable since maintaining D-1641 requirements could be more deleterious in the long-term if reservoirs are overtaxed. Lastly, the TUCP Order found that the TUCP is in the public interest because the proposed changes are needed to conserve stored water to protect fish and meet minimum health and safety needs through a prolonged drought.

The TUCP Order includes a set of limitations and conditions to support its findings. For example, to protect against injury to other lawful water users, the agricultural salinity compliance station must remain downstream at Emmaton as long as the projects are directly diverting or storing water and not supplementing flows to meet water quality or flow objectives. Additionally, DWR and the Bureau must provide an accounting of water transfers utilizing project water to the State Board to support that transfers will not cause injury to other legal users or unreasonably affect fish, wildlife, or other beneficial instream uses. Exports and deliveries other than for human health and safety purposes are limited to what they would have been absent the TUCP approval. DWR and the Bureau must also consult the State Board and fisheries agencies on a regular basis to ensure operations and conduct modeling, monitoring, and analyses to inform operational decisions.

While the State Board is ordinarily required to comply with applicable requirements of the California Environmental Quality Act prior to the issuance of any temporary urgency change orders, Governor Newsom's May 10, 2021 Drought Proclamation and Executive Order waived CEQA and its regulations for the State's drought mitigation actions. The Governor also suspended Water Code 13247, allowing the Board to approve the TUCP without ensuring full attainment of Bay-Delta Plan water quality objectives.

Conclusion and Implications

The TUCP Order conditionally approves the TUCP for the period of April 4 through June 30, finding that the requested changes to Delta outflow, salinity, and San Joaquin River flow requirements are necessary to allow Department of Water Resources and the U.S. Bureau of Reclamation to continue to meet minimum health and safety demands and preserve enough upstream storage for summer-time temperature and saltwater intrusion controls. While a string of storms brought much-needed precipitation in late-April, snowpack is reportedly still 30 percent of normal. DWR and the Bureau have stated that they would re-evaluate the observed and forecasted precipitation and inflows in May 2022 to determine if a subsequent TUCP for the summer months is needed. The TUCP is available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/transfers_tu_notices/2022/20220318_tucp.pdf. The Order approving the TUCP is available online at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/docs/2022/20220404_tuco_swrcb.pdf. (Austin C. Cho, Meredith Nikkel)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD WARNS SURFACE WATER RIGHTS HOLDERS TO EXPECT CURTAILMENTS

The California State Water Resources Control Board (State Board or SWRCB) recently warned thousands of surface water rights holders that their use may be restricted or completely cut off in 2022 due to limited water supplies affected by the ongoing drought.

Background

The State Board manages surface water rights in California. In addition to issuing and enforcing permits for surface water rights, the SWRCB has authority to restrict water use during times of limited supply and drought. January and February 2022 were the

driest on record for most of California, as the state enters a third consecutive year of drought.

State Board Issues ‘Dry Year Letter’ in March 2022

On March 21, 2022, the State Board issued a “Dry Year Letter” to approximately 20,000 water rights holders in the Sacramento River and San Joaquin River watersheds—the two largest rivers in the state—in addition to the watersheds of the Russian River, Scott River, Shasta River, Mill Creek and Deer Creek. These water rights holders include a vast spectrum of users, including cities, industrial users and farmers. The Dry Year Letter warned water rights holders to expect partial or total curtailments to their water rights this water year. It also reminded water rights holders of the requirement to timely report their water use. The Dry Year Letter states that in addition to fulfilling water rights holders’ legal obligations to report, the information provided by the reports provides the SWRCB with the data it relies upon to manage water supplies, tailor anticipated curtailment orders and more precisely manage needs of water users and the environment.

Curtailment of Water Rights

The Dry Year Letter indicates that when curtailment orders are issued, curtailments would begin with most junior water rights holders, namely appropriators with most recently issued diversion permits. The SWRCB indicates that if necessary, even senior water rights holders—those with pre-1914 appropriative rights and riparian rights—could see their use curtailed, and that curtailment orders may also be tailored to the needs and supplies of each water system, meaning the timing and extent of the curtailment may vary from watershed to watershed.

In 2021, the SWRCB ordered curtailment of water use in the late summer month of August; whereas, the recent Dry Year Letter warned water rights holders to expect curtailment even earlier in 2022. Prior to 2021, broad curtailment orders were issued during

2014-2016, 1987-88, and 1976-77. Certain regions have seen more frequent curtailments. The SWRCB’s anticipation of a second year of curtailments beginning even earlier in the year reflects the severity of the threat to this year’s water supplies.

Limitations on Other Water Sources

Water rights holders experiencing surface water curtailments may have difficulty supplementing from other sources. The Central Valley Project announced in February that due to shortage of supplies, it anticipated delivering zero percent of the contracted water supplies to most contractors this year. On April 1, 2022, the Central Valley Project reduced allocations to only that necessary for “public health and safety” for those municipal and industrial contractors who had previously been excepted from the zero percent allocation. Similarly, California’s State Water Project recently announced reductions its initial allocations down to just 5 percent of contracted supplies.

In prior years, surface water users have often relied more heavily on groundwater supplies during drought years. However, as the Sustainable Groundwater Management Act (SGMA) moves deeper into implementation, supplementing with groundwater may become more difficult. Groundwater basins subject to SGMA have now adopted Groundwater Sustainability Plans (GSPs) and begun regulating groundwater use in their areas including through pumping restrictions, allocations and volumetric pumping fees.

Conclusion and Implications

Ongoing drought conditions have yet again prompted anticipated and extensive SWRCB surface water curtailments and restrictions. As water users seek out alternative supplies, these conditions will likely result in an early test of SGMA implementation during a drought year and how local agencies will respond to urgent water needs while also staying on course to achieve long-term groundwater sustainability.

(Jaclyn Kawagoe, Derek Hoffman)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ANNOUNCES NEW PROPOSED STANDARD FOR HEXAVALENT CHROMIUM

After years of waiting following the invalidation of California's previous standard for Hexavalent Chromium in drinking water, the State Water Resources Control Board (State Board) has finally announced a new standard that could take effect as early as 2024. As made famous by Julia Roberts in Erin Brockovich, the cancer-causing contaminant known as Hexavalent Chromium, or Chromium-6, is found in the drinking water of millions of Californians. With the new standard announced by the State Board, which would be the first standard nationwide targeting specifically hexavalent chromium, the state will finally have an enforceable standard for hexavalent chromium on the books.

The Proposed Standard

Back in 2011, a public health goal was set for hexavalent chromium at a mere 0.02 parts per billion. At this concentration, California scientists were able to say that it poses a negligible, one-in-a-million lifetime risk of cancer. Under the State Board's proposal, the Maximum Contaminant Level (MCL) would be set at 10 parts per billion—500 times the public health goal for negligible cancer risks. But while it's easy to say a more stringent standard should be adopted, the State Board has already had a previous MCL standard for hexavalent chromium overturned by California courts.

In July of 2014, an MCL standard of 10 parts per billion for hexavalent chromium was approved by the Office of Administrative Law. In 2017, however, the Superior Court of Sacramento County issued a judgment invalidating the MCL standard because the California Department of Public Health had failed to consider the economic feasibility for water suppliers to comply with the standard. Now five years later, the State Board has come back with the standard of 10 parts per billion, only this time with the accompanying feasibility analysis.

Among the findings of the State Board's look into the economic feasibility of implementing this standard, it was obvious that such water treatment standards would not be cheap. Rates for small water systems with fewer than 100 connections could see

costs increase by around \$38 per month if suppliers install Point-of-Use treatment technologies in households. Larger systems with 100 to 200 connections could see even higher increases ranging from \$44 to \$167 per month, based on installing reverse osmosis or other costly treatment systems, according to the State Board's estimates. The largest water providers would be much more capable of diffusing the costs across all customers, but even these large systems could see monthly rate increases up to \$45.

Compliance Period

As a way to help alleviate some of these costs, the State Board is planning to provide up to four years for water providers to comply with the new standard should it be adopted. Under the current proposal, systems with more than 10,000 service connections would be required to comply with the standard within two years of adoption, systems with 1,000 to 10,000 would be required to comply within three years of adoption, and systems with less than 1,000 service connections would be given the most time, being required to reach compliance within 4 years of adoption.

Technologically and Economically Feasibility

In concluding its Staff Report on the proposed standard, the State Board emphasized that the Health and Safety Code § 116365 requires that to the extent technologically and economically feasible the MCL be set at a level that is not only as close to the public health goal as feasible, but also avoids any significant risk to public health.

Comparing the California Standard

This new standard is expected to reduce the number of cancer and kidney toxicity cases, but at the proposed MCL of 10 parts per billion, the cancer risk is still 500 times greater than at the public health goal. This equates to a lifetime risk for individuals that 1 person out of 2,000 exposed to drinking water at 10 parts per billion for 70 years might experience cancer—a far cry from the goal of one-in-a-million,

but admittedly much better than no standard at all. Comparing this standard to the 69 MCLs currently adopted in California, the proposed MCL standard for hexavalent chromium of 10 parts per billion would place it as the seventh least protective MCL, with 63 current MCL standards more protective of human health.

Conclusion and Implications

Throughout California, 331 community water wells exceed the proposed hexavalent chromium limit of 10 parts per billion over a ten-year average. The highest levels throughout the state were reported in parts of Ventura, Los Angeles, Yolo, Merced and Riverside counties with some areas like Los Banos showing up to three times the proposed standard. Alarming, the highest level reported by the state

was in Ventura County, where one drinking water well reported 173 parts per billion.

The current proposal is only an administrative draft at this time. Before the new standard can be implemented, the MCL must be considered for final adoption by the State Water Resources Control Board after a period for public comment and after any recommended changes have been considered. In any case, the proposal is still a huge step towards the establishment of an MCL standard for hexavalent chromium. For more information on the State Water Resources Control Board's proposed hexavalent chromium standard see: https://www.waterboards.ca.gov/press_room/press_releases/2022/pr03212022-hexavalent-chromium.pdf and https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/Chromium6.html.

(Wesley A. Miliband, Kristopher T. Strouse)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES \$29.8 MILLION IN FUNDING FOR FRIANT-KERN CANAL REPAIR PROJECT

On March 24, 2022, the California Department of Water Resources (DWR) released \$29.8 million in funding for repairs to the Friant-Kern Canal. The Friant-Kern Canal, owned by the U.S. Bureau of Reclamation (Bureau), but operated by the Friant Water Authority, has faced significant water delivery capacity issues caused by subsidence in certain portions of the canal. This DWR funding seeks to jump start the repair project and marks just one of many water-infrastructure projects that seek to address water capacity issues currently facing the State of California.

Background

The federal Central Valley Project is a power and water management project in California under the supervision of the Bureau. The Central Valley Project was created in 1933 in order to provide irrigation and municipal water to much of California's Central Valley region, by regulating and storing water in reservoirs in the northern half of the state and transporting it to the San Joaquin Valley by means of a series of canals, aqueducts, and pump plants. In more recent years, the movement of water throughout California has faced significant challenges caused by the increas-

ing need for water and the high prevalence of drought periods. These current conditions have also had dramatic impacts on water infrastructure within the state, requiring collaboration between state, federal, and local governments to address severe issues with California's water infrastructure. One such collaboration effort seeks to restore the capacity of the Friant-Kern Canal.

Completed in 1951, the 152-mile Friant-Kern Canal was designed to augment water delivery capacity in Fresno, Tulare, and Kern counties. The canal, part of the Central Valley Project's Friant Division, is owned by the federal government; however, the Friant Water Authority operates and maintains it under contract with the Bureau. The Friant-Kern Canal begins at Friant Dam and conveys water from Millerton Lake, a reservoir on the San Joaquin River, south to the Kern River in Bakersfield. The Friant-Kern Canal currently delivers water to about one million acres of farmland and provides drinking water to thousands of San Joaquin Valley residents.

The Friant-Kern Canal was built in both concrete-lined and unlined earth sections and was designed as a gravity-fed facility to not rely on pumps to move water. At the time of its completion, the Friant-Kern

Canal was constructed to have a capacity of 5,000 cubic feet per second (cfs) that gradually decreases to 2,000 cfs at its endpoint. However, the canal has lost more than sixty (60 percent) of its original conveyance capacity in its middle section. Subsidence in the area, caused by pumping excess groundwater faster than it can be recharged, has caused parts of the canal to sink. Given that the canal was designed as a gravity-fed facility, this subsidence has significantly reduced the canal's delivery capacity, resulting in up to 300,000 acre-feet of reduced water deliveries in certain water years.

The Correction Project

To address the canal's capacity loss, the Bureau and the Friant Water Authority are implementing the Friant-Kern Canal Middle Reach Capacity Correction Project (Correction Project). The Correction Project is currently estimated to cost around \$500 million, with Phase 1 estimated to carry a cost of around \$292 million. The Correction Project is currently funded by a mixture of federal, state, and local funds. On March 24, 2022, the DWR released \$29.8 million in funding to the Friant Water Authority to assist with initial funding for the Correction Project. This DWR funding allowed construction on Phase 1 to begin in January 2022. The Friant-Kern Canal is just one of four projects that will receive funds as part of a \$100 million initiative in the California Budget Act of 2021 to improve water conveyance systems in the San Joaquin Valley. DWR is also working on similar projects on the Delta-Mendota Canal, San Luis Canal, and California Aqueduct.

Overall, the Correction Project seeks to restore capacity in the 33-mile section of the middle reach where subsidence has had the most impact on the

canal's delivery capacity. Construction on Phase 1 of the Correction Project started in January 2022. Phase 1 includes the construction of ten miles of new concrete-lined canal to replace one of the worst pinch points in the subsiding canal sections. Phase 1 is anticipated to be completed and fully operational by January 2024. When the multi-phased project is complete, the canal's conveyance capacity will be restored from the current 1,600 cfs to its original capacity of 4,000 cfs, which should provide much needed relief to ongoing capacity issues in the San Joaquin Valley.

Conclusion and Implications

The Department of Water Resources funding for the Correction Project marks the initial step of funding for what is an overall significant investment in California's water infrastructure through strategic partnerships with other governmental agencies. It remains to be seen how the remainder of the Friant-Kern Canal will be funded, but with the beginning of construction on Phase 1 of the Correction Project, it appears that this project remains a priority on the federal, state, and local level. So long as Phase 1 is completed on schedule, the Correction Project may be able to provide some significant relief to California's current water infrastructure woes. With additional funding being provided for other water projects, it appears that California has committed to a significant level of investment in water infrastructure. For more information, see: *DWR Releases Funds for Repairs of the Friant-Kern Canal*, California Department of Water Resources (Mar. 24, 2022), <https://water.ca.gov/News/News-Releases/2022/March-22/Repairs-Friant-Kern-Canal>. (Jeremy Holm, Steve Anderson)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL INTEREST GROUPS CHALLENGE GROUNDWATER SUSTAINABILITY PLANS FOR THE BUTTE, COLUSA, AND VINA SUBBASINS

In February 2022, AquAlliance, California Water Impact Network, and California Sportfishing Protection Alliance (AquAlliance, CWIN, and CSPA, respectively, and collectively: AquAlliance) filed reverse validation actions challenging the approvals of Groundwater Sustainability Plans (GSPs) for the Butte, Colusa, and Vina subbasins. The lawsuits seek orders declaring that the GSPs are invalid, as well as attorneys' fees and costs.

Background

The Sustainable Groundwater Management Act (SGMA) broadly requires that local agencies bring California's groundwater basins under sustainable management over the long term. It does so by requiring Groundwater Sustainability Agencies (GSAs) to manage each groundwater basin designated by the California Department of Water Resources (DWR) as high or medium priority. (Water Code § 10727.) GSAs are then required to develop and approve GSPs that serve as detailed roadmaps for how groundwater basins will achieve long-term sustainability by providing for the management and use of groundwater without causing undesirable results. (See *id.* at §§ 10721(v); 10727.)

The Butte, Colusa, and Vina subbasins are all located in northern California within the larger Sacramento Valley Groundwater Basin. (See, Vina Groundwater Subbasin GSP, ES-4 (Dec. 15, 2021.) The Colusa and Vina subbasins were designated by DWR as high priority subbasins and GSPs for those subbasins were approved by their various GSAs in December 2021. (*AquAlliance, et al. v. Colusa Groundwater Authority, et al.*, Complaint in Validation (Colusa Complaint), ¶¶ 3-5 (Colusa Super. Ct., Feb. 10, 2022); *AquAlliance, et al. v. Vina Groundwater Sustainability Agency, et al.*, Case No. 22CV00321, Complaint in Validation (Vina Complaint), ¶¶ 3-5. The Butte subbasin was designated as a medium priority subbasin by DWR, and its GSA approved a GSP

for the subbasin in December 2021. (*AquAlliance, et al. v. Biggs-West Gridley Water Dist., et al.*, Case No. 22CV00347, Complaint in Validation (Butte Complaint), ¶¶ 3-5 (Butte Super. Ct.).)

The Lawsuits

The AquAlliance plaintiffs are various environmental interest organizations broadly interested in the protection of water resources. (See, Vina Complaint at ¶¶ 8-10.) The named defendants to each of the validation actions are public agencies designated as groundwater sustainability agencies that approved the challenged GSPs. (See *e.g.*, Butte Complaint at ¶¶ 11-21.)

All three of the AquAlliance validation complaints broadly allege that the challenged GSPs fail to achieve sustainable groundwater management. (See *e.g., id.* at ¶ 34.) The alleged specifics of each of the challenged GSPs' failures to achieve sustainable management, however, differ from subbasin to subbasin. For example, AquAlliance alleges that the Butte Subbasin GSP improperly accepts the failure of at least 7 percent of domestic wells and streamflow losses of between 90 and 277 percent due to increased groundwater pumping. (*Id.* at ¶¶ 36-37.) With respect to the Vina subbasin, AquAlliance alleges that the GSP improperly accepts minimum thresholds that are approximately 200 percent below normal operating ranges, and that the GSP fails to provide sufficient information about accepted domestic well failures. (Vina Complaint at ¶¶ 27-28.) Allegations specific to the Colusa Subbasin GSP include the GSP's acceptance of almost 1,000,000 acre feet of groundwater storage by 2070 and the improperly accepted failure of 20 percent of domestic wells within the Colusa Subbasin. (Colusa Complaint at ¶¶ 26-27.)

The bulk of AquAlliance's allegations of inadequacy are common to all three GSPs. For example, AquAlliance asserts that all three GSPs fail to "identify feasible projects and management actions that are

likely to prevent undesirable results” and improperly accept “unreasonable and undesirable amounts of land subsidence.” (E.g., Colusa Complaint at ¶¶ 27-28.) AquAlliance also alleges that the GSAs did not “adequately engage the public in planning and adopting” each of the three GSPs. (E.g., Butte Complaint at ¶ 52.) To rectify each of these alleged errors, AquAlliance asks the courts to issue orders declaring the adoptions of the GSPs—and the GSPs themselves—invalid. (E.g., Vina Complaint at Prayer for Relief, ¶ 1.)

Conclusion and Implications

As of the date of this writing, the challenge to the Vina Subbasin GSP has been assigned to Judge

Tamara L. Mosbarger of the Butte County Superior Court, but no party has yet filed a responsive pleading. It is unclear whether any party has responded to the lawsuits challenging the Butte and Colusa Subbasin GSPs or whether the lawsuits will be coordinated in any fashion as they proceed. As validation actions, the lawsuits have statutory preference for trial setting so that the validity of the GSPs can be “speedily heard and determined.” (Cal. Code Civ. Proc. § 867.) The actions are also filed against “all persons interested” in the validity of the GSPs and it remains to be seen whether any such interested persons will answer the complaint in defense of the GSPs.
(Sam Bivins, Meredith Nikkel)

RECENT FEDERAL DECISIONS

DISTRICT COURT REJECTS PRELIMINARY INJUNCTION AGAINST HYDROELECTRIC DAMS UNDER THE FEDERAL ENDANGERED SPECIES ACT

Atlantic Salmon Federation U.S., et al. v. Merimil Limited Partnership, et al., ___F.Supp.4th___, Case No. 21-CV-00257-JDL (D. Me. Feb. 24, 2022).

The U.S. District Court for the District of Maine recently denied a request for preliminary injunction by conservation groups seeking to require operators of hydroelectric dams on Maine’s Kennebec River to make seasonal changes to dam operations to reduce unauthorized take of endangered Atlantic salmon.

Factual and Procedural Background

The National Marine Fisheries Service (NMFS) has designated as endangered the Gulf of Maine Distinct Population Segment of salmon (Maine Salmon) under the federal Endangered Species Act. The Endangered Species Act makes it unlawful to “take” species or distinct population segments of a species that are listed as endangered without authorization, such as by harming the protected fish or wildlife. Harm is defined as:

. . .an act which actually kills or injures fish or wildlife. . .[and]. . .may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Conservation groups, Atlantic Salmon Federation U.S., Conservation Law Foundation, Maine Rivers, and the Natural Resources Council of Maine, commenced a citizen suit against the licensees of four hydroelectric dams on the Kennebec River, alleging unauthorized take of endangered Maine Salmon by the dam operators and licensees: Merimil Limited Partnership, Hydro-Kennebec LLC, Brookfield White Pine Hydro LLC, Brookfield Power US Asset Management LLC, and Brookfield Renewable US (Dam Operators). Plaintiffs alleged that the Dam Operators’

incidental take authorization had expired such that the continued take of juvenile and adult salmon migrating upstream and downstream on the Kennebec River—and passing through the Lockwood, Hydro-Kennebec, Shawmut, and Weston hydroelectric facilities—violated the Endangered Species Act.

Plaintiffs requested a preliminary injunction mandating certain changes to dam operations for the purpose of increasing the number of Maine Salmon surviving migration on the Kennebec River. Plaintiffs requested that Dam Operators be required to increase water flows at certain facilities during particular seasons for Maine Salmon migration by running gates and spillways at maximum discharge and turning certain turbines off at specified intervals to allow for safe passage. After evaluating the parties’ competing evidence, the court denied the plaintiffs’ request for preliminary injunction principally because of insufficient evidence showing how the proposed operations changes would benefit Maine Salmon as an endangered population.

The District Court’s Decision

In deciding whether to grant the plaintiffs’ requested preliminary injunction to stop the unlawful taking of endangered Maine Salmon, the District Court considered the following four elements: 1) likelihood of success on the merits; 2) irreparable harm in the absence of a preliminary injunction; 3) that the balance of equities tips in favor of the requester; and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

First, the court evaluated the plaintiffs’ likelihood of success on a theory of unlawful harm under the Endangered Species Act. In doing so, the court emphasized the need for evidence showing not just a prob-

ability of harm but actual injury to the endangered species or population segment. The court analyzed expert testimony and concluded there was sufficient evidence that the hydroelectric dams caused actual harm, and not just a probability of harm. Although the parties' experts reached different conclusions as to the precise mortality rate of Maine Salmon passing through each dam, the court found that the hydroelectric dams caused actual harm to Maine Salmon because even Dam Operators' expert concluded as many as 17 percent of juvenile salmon some adult salmon did not survive passage through the dams. Based on this evidence of mortality and the expiration of Dam Operators' incidental take authorization, the court held that the plaintiffs were likely to succeed on their claim that Dam Operators violated the Endangered Species Act by taking endangered Maine Salmon without authorization.

Irreparable Harm

Next, the court considered whether there would be irreparable harm in the absence of a preliminary injunction. The court applied the rule that irreparable harm is not synonymous with harm to an individual and is something more than negligible harm to the species or population segment as a whole. In turn, the court considered whether the proposed injunction would prevent irreparable harm to Maine Salmon as an endangered population segment. The court acknowledged the plaintiffs presented some evidence showing that modifying dam operations would reduce the unauthorized take of Maine Salmon passing through the dams, *i.e.* would reduce harm to individuals within the Maine Salmon population. But the court critiqued the plaintiffs' evidence as lacking specificity about how a reduction in take at the four dams would provide a benefit to Maine Salmon as a whole, including data and a rationale supporting each expert's interpretation of the data. Additionally, the court found the evidence insufficient to establish the efficacy of the proposed operational changes.

Balancing of Equities and the Public Interest

Finally, the court considered the third and fourth factors: the balance of equities and the public interest. The court observed that due to the very enactment of the Endangered Species Act, the balance of equities and public interest will often weigh heavily in favor of an injunction protecting a listed endangered species. Despite this observation, the court determined that the evidence was insufficient to support a conclusion that the preliminary injunction would benefit the public interest. The court reasoned that because it could not determine that the preliminary injunction would benefit Maine Salmon as a whole for the purpose of the irreparable harm inquiry, it similarly could not conclude without speculation that the injunction would be in the public interest.

Conclusion and Implications

The court denied the plaintiffs' request for preliminary injunction. Although the court evaluated four criteria in reaching this decision, the dispositive issue common to several of the criteria was the lack of detailed evidence showing the proposed changes to dam operations would effectively prevent irreparable harm to Maine Salmon as a whole population segment.

This case highlights the importance of presenting detailed and specific expert testimony on the population-level impacts of proposed injunctive relief in a citizen suit under the Endangered Species Act. Courts may not view the particular harm or cause of mortality to an individual member of the species or population as identical to the cumulative harm to the endangered species or population as a whole. The court's ruling is available online at: https://casetext.com/case/atl-salmon-fedn-us-v-merimil-ltd-pship?q=1:21-CV-00257&PHONE_NUMBER_GROUP=P&sort=relevance&p=1&type=case.

(Megan Beshai, Rebecca Andrews)

DISTRICT COURT FINDS CLEAN WATER ACT'S PARTIAL WAIVER OF SOVEREIGN IMMUNITY DID NOT IMPLIEDLY REPEAL DISTRICT COURT'S JURISDICTION OVER ENFORCEMENT ACTIONS

United States v. Bayley, ___F.Supp.4th___, Case No. 3:20-cv-05867-DGE (W.D. Wash. Mar. 14, 2022).

The U.S. District Court for the Western District of Washington State has held that by enacting a partial waiver of sovereign immunity as an amendment to the federal Clean Water Act (CWA), Congress did not impliedly repeal the general jurisdictional statute that allows the Department of Justice to bring enforcement actions in U.S. District court. That partial waiver also did not require the Department of Justice to participate in local permitting procedures in order to establish standing to bring a Clean Water Act § 404 enforcement action on the basis of the permitted activity.

Background

Philip Bayley obtained a permit from Mason County, Washington, for a “bulkhead construction project,” but neglected to obtain a Section 404 permit pursuant to the Clean Water Act. The Department of Justice pursued an enforcement action against Bayley in District Court. Bayley sought to have the enforcement action dismissed on the basis, *inter alia*, that the federal government lacks jurisdiction to bring an enforcement action in District Court under the Act, and when dismissal was denied sought reconsideration of the jurisdictional issue.

Enforcement Actions by the DOJ

When it brings enforcement actions against private parties under the Clean Water Act, the Department of Justice relies on 28 U.S.C. § 1345 to establish jurisdiction in federal District court:

Except as otherwise provided by Act of Congress, the District Courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

When enforcement is sought against a federal agency, though, reliance on this generally-applicable

jurisdictional provision runs up against the doctrine of sovereign immunity, which provides that:

...where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free from regulation. *Hancock v. Train*, 426 U.S. 167, 179 (1979).

Thus, in *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 227 (1976), the U.S. Supreme Court:

...held that federal facilities were not subject to the permitting requirements under the Federal Water Pollution Control Act Amendments of 1972.

Congress promptly amended the Clean Water Act to add 33 U.S.C. § 1323(a), entitled “Compliance with pollution control requirements by Federal entities”:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants ... shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution ... to the same extent as any nongovernmental entity[.]

Section 1323(a) acts as a limited waiver of sovereign immunity, subjecting federal agencies to enforcement for violations of the Clean Water Act, whether the act is being implemented by federal, state or local agencies.

The District Court's Decision

Argument of 'Implied' Repeal of 28 U.S.C. Section 1345's Conferral of Jurisdiction

Bayley argued that by requiring federal agencies to "adhere" to state and local requirements, § 1323(a) "impliedly" repeals 28 U.S.C. § 1345's conferral of jurisdiction over enforcement action on federal District Court. Citing *United States v. Com. of Puerto Rico*, 721 F.2d 832, 840 (1st Cir. 1983), the District Court rejected this argument.

Argument of DOJ's 'Assumption of Jurisdiction' by Alleging Discharges in WOTUS

The court further rejected Bayley's related argument that the Department of Justice:

...assumed jurisdiction over [Bayley's] private property by alleging that the discharges at issue occurred in the waters of the United States [WOTUS] and because the U.S. Army Corps of Engineers issued a stop work order to [Bayley].

This argument was made apparently in support of an argument that the Department of Justice was

required to participate in the local Mason County permitting process and:

Plaintiff to have objected to Mason County's determination that Mr. Bayley's proposed bulk-head repair did not have a probable significant adverse impact on the environment.

The court held that § 1323(a) or any other provision in the CWA "impose[s] limits or contingencies on [the Department of Justice's] standing to bring an action against" Bayley in District Court.

Conclusion and Implications

Congress' dedication to cooperative federalism resulted in the Clean Water Act complex architecture by which significant implementation responsibilities are devolved to state, regional and local authorities. Section 1323(a) preserved the integrity of this system even as applied to federal agencies. However, it did not displace the generally-applicable grant of jurisdiction to federal District Courts to hear enforcement actions brought by the federal government. (Deborah Quick)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS EIR FOR EL DORADO IRRIGATION DISTRICT'S 'UPPER MAIN DITCH' WATER TRANSMISSION PIPELINE PROJECT

Save the El Dorado Canal v. El Dorado Irrigation District,
___Cal.App.5th___, Case No. C092086 (3rd Dist. Feb. 16, 2022).

The Third District Court of Appeal in *Save the El Dorado Canal v. El Dorado Irrigation District* rejected a challenge under the California Environmental Quality Act (CEQA) to the El Dorado Irrigation District's (District) approval of the Upper Main Ditch piping project and Blair Road Alternative, finding that substantial evidence supported the District's determination that the project and approved alternative would have less than significant impacts. The court rejected petitioner's claims that the Environmental Impact Report's (EIR) project description and analyses of hydrological, biological, and wildfire impacts were insufficient.

Factual and Procedural Background

The El Dorado Irrigation District operates a primarily surface-water system in El Dorado County to meet the region's potable water demands. The system contains more than 1,250 miles of pipe and 27 miles of earthen ditches that connect the system's facilities and treatment plants. The Upper Main Ditch (UMD) is the system's main conveyance feature and is comprised of a three-mile open and unlined ditch that connects the system's Forebay Reservoir to the Reservoir 1 Water Treatment Plant (WTP).

The Upper Main Ditch Conversion Project

In June 2015, the District issued an initial study and notice of preparation for a proposed project that would convert the UMD in to a buried 42-inch pipeline that spanned the length of the existing ditch. The upstream end of the new pipeline would connect to the Forebay Reservoir and the downstream end would connect to a new metering and inlet structure at the Reservoir 1 WTP. After placing the pipeline, the District would backfill the pipe and reshape the ditch to allow for the passage of stormwater flows up

to the current ten year storm event capacity. Ultimately, the project would improve water conservation by reducing the amount of water currently lost to seepage and evaporation (approximately 11-33 percent), as well as water quality by reducing infiltration of contaminants that subsequently overburdened the system's water treatment plants.

The Blair Road Alternative

In addition to the proposed project, the District considered three alternatives. The Blair Road Alternative would also convert the UMD into a buried 42-inch pipeline, but instead of running the pipe along the existing ditch, the pipe would be placed across approximately 400 feet of District-owned property from the Forebay Reservoir to Blair Road, continue along the road until it reached the UMD crossing, then travel across private property to the Reservoir 1 WTP. The upstream and downstream connections would remain the same and the alternative would construct the project in the same manner.

The CEQA Process and Litigation

Between June 2015 and June 2018, the District engaged in an extensive public engagement process to seek comments and feedback on the scope of the project and EIR. In June 2018, the District circulated a draft EIR. The DEIR's project description described the location of the UMD and the setting's history of storm flows and drainage. The DEIR also described the Blair Road Alternative's setting and noted that, should it be adopted, the District would no longer use the existing ditch—instead reverting the land back to private landowners.

After an extended public comment period, the District issued the final EIR in January 2019. In April 2019, the District's board of directors (Board) adopted

a resolution approving the Blair Road Alternative, certified the FEIR, and adopted a mitigation monitoring and reporting program. While the Board found that the initial project would achieve the project's objectives, the original project would have greater potential impacts to residents along the ditch from the resulting construction and eminent domain proceedings. The Board thus concluded the Blair Road Alternative would be feasible under CEQA because it would involve less construction activity near residents, require the removal of fewer trees, and reduce the number of easements across private property.

In May 2019, petitioner, Save the El Dorado Canal, filed a petition for writ of mandate alleging the project violated CEQA. The trial court denied each of petitioner's ten contentions. Petitioner timely appealed.

The Court of Appeal's Decision

On appeal, petitioner re-alleged that the project violated CEQA because the EIR contained an inaccurate project description and failed to adequately analyze potential impacts to hydrology, biological resources, and wildfire hazards. Under an abuse of discretion standard, the Third District Court of Appeal rejected each claim, finding that substantial evidence supported the District's determination and petitioner failed to demonstrate otherwise.

Adequacy of Project Description

Petitioner alleged the EIR failed to adequately describe the project by omitting the "crucial fact" that the ditch that would soon be abandoned was the "only drainage system" for the watershed. In advancing this argument, petitioner's briefing not only alleged deficiencies with the project's description, but also the EIR's environmental setting and impact analyses. The court of appeal noted that compounding these arguments under one heading was "problematic" and needed to be under a "separate heading" in order to properly raise these issues.

Notwithstanding this, the Third District Court considered whether the EIR provided an "accurate, stable, and finite" description of the project's location, boundaries, objectives, and technical, economic, and environmental characteristics. In so doing, the court rejected petitioner's assertion that the EIR "failed to disclose the true nature of the Upper Main

Ditch." Rather, the EIR provided a detailed description of the UMD's size, history, and location, and explained how the UMD passively intercepts stormwater runoff that would otherwise naturally flow down slope. With respect to the Blair Road Alternative, the EIR explained that the ditch would continue to passively receive and convey stormwater flows during storm events, even after the District abandoned its maintenance easement over it. The court concluded this evidenced an adequate, complete, and good faith effort at full disclosure about the Main Ditch and its relationship to the watershed's drainage system, as well as the District's intent to abandon the ditch should it adopt the Blair Road Alternative.

Impacts to Hydrology

Petitioner claimed the EIR inappropriately concluded that the Blair Road Alternative would not significantly impact watershed drainage because abandonment would permit "the underlying property owners to do with [the ditch] as they please." Citing a comment letter submitted by the County of El Dorado, petitioner claimed the EIR failed to mitigate foreseeable impacts to watershed drainage that will result when the abandoned ditch becomes clogged with vegetation and debris.

The court disagreed, citing the FEIR's response to the County's comment letter, which explained that private action or inaction will ensure the abandoned ditch retains its current capacity to convey stormwater across their property thereby reducing any risk of significant flooding. Moreover, unlike the District, the County can regulate private fill activities via administrative and civil penalties to ensure such activities do not yield significant environmental effects. For these reasons, it would be too speculative to predict landowners' particular actions or inactions and the ensuing potential effects to the ditch's stormwater conveyance capacity. Petitioner failed to point to any substantial evidence in the record to suggest otherwise to explain how the EIR's drainage analysis is inadequate.

Impacts to Biological Resources

Petitioner also alleged the EIR inadequately analyzed the project's potential impacts to biological resources by failing to mitigate impacts to riparian habitats and sensitive natural communities, and by

conflicting with local policies and ordinances that protect such resources. The court noted that the EIR found the Blair Road Alternative would result in less potential biological impacts because it would be located within an existing road corridor devoid of riparian habitat and require less trees to be removed. As with the initial project, any impacts to vegetation communities—including those resulting from tree removal—would be mitigated to less than significant levels through permit acquisition and compliance. In turn, the Alternative would be consistent with the General Plan’s biological resources management plan, the County’s tree mortality removal plan, and CALFIRE’s tree removal procedures. And, contrary to petitioner’s assertion, compliance with these plans via mitigation measures would not increase the spread of bark beetle populations, thereby resulting in significant impacts.

The court also rejected petitioner’s assertion that the County ignored comments submitted by the California Department of Fish and Wildlife (CDFW). Petitioner claimed CDFW’s comment directed the County to obtain a streambed alteration agreement and consult with the U.S. Army Corps of Engineers, should construction implicate Waters of the United States (WOTUS). The County’s response noted that the project and Alternative were specifically designed to avoid WOTUS, but nevertheless would be required to mitigate any such impacts. The EIR explained that the riparian habitat affected by the project is not a naturally occurring waterbody, thus, plant and wildlife species are not dependent on water in the ditch. The court concluded this response was more than adequate to address CDFW’s comment.

Finally, the court was not swayed by petitioner’s claim that the EIR failed to adequately analyze and mitigate impacts to tree mortality. The court pointed to the EIR’s explanation that trees surrounding the project site are not native riparian species, and thus, are not dependent on water conveyed through the ditch. To the contrary, most of the adjacent tree species are stress-tolerant and can withstand climatic variation and changes in water seepage. Thus, the

EIR provided facts, reasonable assumptions, and expert opinion to satisfy the District’s substantial evidence burden.

Wildfire Hazards Analysis

The Third District Court rejected petitioner’s final contention that the EIR failed to adequately consider the entirety of the project’s fire risks, and instead only considering construction-related impacts. Petitioner asserted the project would have potentially significant impacts by removing a water source that could be used as a firefighting tool. The court disagreed by noting that the EIR specifically debunked petitioner’s claim—water in the ditch is intended as a drinking water supply and does not supply water for firefighting. Contrary to petitioner’s claim and related comment letter, water from the ditch had never been used to fight prior fires and the CALFIRE Strategic Fire Plan did not include the UMD as a potential firefighting resource. Absent substantial evidence to the contrary, petitioner had not carried its burden of demonstrating the EIR’s analysis was unsupported.

Conclusion and Implications

The Third District Court of Appeal’s opinion offers a straightforward analysis of well-established CEQA tenants that govern a legally sufficient EIR and project alternatives. The court reiterated that CEQA does not mandate perfection, but rather a good faith effort at full disclosure of the project’s description and impact analysis. To this end, an EIR may make some assumptions about future scenarios, but need not consider indirect impacts that are too speculative to predict. Finally, the opinion underscores the procedural and evidentiary burdens a CEQA challenger must satisfy to avoid forfeiting their arguments: a brief must raise separate and distinct issues under separate headings, and must lay out substantial evidence favorable to the agency and explain why it is lacking. The court’s opinion is available at: <https://www.courts.ca.gov/opinions/documents/C092086.PDF>. (Bridget McDonald)

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