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CALIFORNIA WATER™
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CALIFORNIA WATER NEWS

CALIFORNIA WATER SUPPLIERS RAMP UP WATER CONSERVATION REQUIREMENTS AS THE STATE IS ABOUT TO ENTER TOUGH SUMMER MONTHS

The summer months are nearly here, and like clockwork drought regulations are kicking back into high gear. In southern California, the Metropolitan Water District (MWD or Met), for example, took action heading into the summer by declaring a water shortage emergency and implementing an emergency water conservation program in its service area. Likewise in northern California, the East Bay Municipal Utility District (East Bay MUD) took action by implementing numerous heightened drought response actions as the dry months roll in, ranging from the implementation of a drought surcharge to the establishment of excessive use penalties for wasteful water users.

Metropolitan Water District Initiates Emergency Water Conservation Program

On April 26, 2022, Met's board declared a water shortage emergency for its areas dependent on State Water Prject water. These areas include: Calleguas Municipal Water District, Inland Empire Utilities Agency, Las Virgenes Municipal Water District, Los Angeles Department of Water and Power, Three Valleys Municipal Water District, and Upper San Gabriel Valley Municipal Water District.

The board further adopted an emergency water conservation Program that requires member agencies dependent onpState Water Project water deliveries to cut water use by implementing certain water use restrictions or comply with monthly allocation limits set by Met. Specifically, the framework adopted by Met provides member agencies with one of two approaches for obtaining compliance with the new emergency water conservation program.

The first option under this framework allows member agencies to restrict outdoor irrigation to one day per week, or its equivalent, beginning June 1, 2022. This restriction, however, is subject to modification and could be heightened to include a ban on all non-essential outdoor irrigation or the enforcement of volumetric limits should conditions warrant as we get further into the year.

The second option under the framework allows member agencies to comply with monthly allocation limits directly. The specific limit for each agency is based on an allocated share of the human health and safety water provided by the Department of Water Resources and of additional State Water Project supplies that are delivered through the State Water Project's system.

Member agencies that either document their enforcement of the policies under the first option or that meet the prescribed limits of the second option are deemed compliant with the emergency water conservation program. Agencies that are deemed non-compliant, however, will face volumetric penalties of $2,000 per acre-foot of any water supplied by Met from the State Water Project in excess of specified monthly allocation limits.

Unless extended by Met's board, the emergency water conservation program is set to last through June 30, 2023.

East Bay Municipal Utility District Cracks Down on Wasteful Water Users

Moving north to the San Francisco Bay Area, the East Bay MUD customers will also face new water use restrictions this summer. At its April 26, 2022 meeting, the board of directors for East Bay MUD voted 6-1 to elevate its drought response to Stage 2 and implement certain water use restrictions. Notably of these restrictions was the mandatory 10 percent water use reduction district-wide as compared to 2020 with a plan to review progress towards achieving this goal in November.

On top of the mandatory 10 percent water use reduction, East Bay MUD also instated an excessive use penalty, subjecting households that use more than 1,646 gallons per day to fines.

As part of the water use restrictions adopted at the April 26 board meeting, East Bay MUD further

updated outdoor water use restrictions including limiting outdoor watering to three times a week, prohibiting the washing of sidewalks and driveways, and requiring restaurants and cafes to only provide water upon request, among other provisions.

Following the adoption of these water use restrictions, on May 10, 2022, East Bay MUD's board of directors approved a drought surcharge of 8 percent to recover a portion of the expenses associated with purchasing supplemental water supplies and other drought costs. The surcharge will only apply to customers' water use charges, however, not their entire water bill. East Bay MUD estimates that its average household, using 200 gallons per day, would see an increase of approximately 10 cents per day to water bills with the addition of the 8 percent surcharge, translating to about $6 per two-month billing cycle.

Conclusion and Implications

While nearly 8 million Californians will be impacted by MWD and East Bay MUD's new drought restrictions alone, there is no doubt that other entities across the state have already or will be implementing drought restrictions of their own, and certainly so following Governor Gavin Newsom's Executive Order N-7-22 and its follow-up emergency conservation regulation. The dynamic discussed above, however, showcases just some of the many drought response actions Californians will be seeing in enduring the drought year—and possibly still drought years—ahead of us at both the wholesaler and urban supplier levels.

While some individual efforts may be seen as pushing conservation too far for some water users, others will no doubt be seen as not strong enough. The challenge water suppliers throughout the state are facing is one that requires a wide array of drought response actions and as we get further into the dry season, the cumulative impacts of these restrictions on Californians' everyday water use will likely be felt soon enough if they haven't already.
(Wesley A. Miliband, Kristopher T. Strouse)

UTAH GOVERNOR ISSUES DROUGHT DECLARATION

On April 22, 2022, based upon a recommendation from the Drought Review and Reporting Committee, Governor Spencer Cox issued a drought declaration (Declaration) for the entirety of the State of Utah. The executive order (2022-4) declared a state of emergency due to extensive and wide-reaching drought. The Declaration officially makes additional aid, assistance and relief available from State resources.

Background and General Information:

Utah has experienced extreme drought in eight of the last ten years and statewide snowpack going into this summer is 25 percent below normal. Water levels at a number of critical reservoirs are also historically low. These conditions, coupled with declared shortages on the Colorado River mean that water supply conditions are at record lows. The Declaration notes that nearly 100 percent of Utah is presently in severe drought, or worse. Likewise, the United States Department of Agriculture has listed all 29 counties under the Secretarial Disaster Designation for drought.

The Drought Declaration

Given the foregoing conditions, the Governor has declared a state of emergency in Utah for the second consecutive year. Governor Cox stated:

> We've had a very volatile water year, and unfortunately, recent spring storms are not enough to make up the shortage in our snowpack. . . .Once again, I call on all Utahns—households, farmers, businesses, governments and other groups—to carefully consider their needs and reduce their water use. We saved billions of gallons last year and we can do it again.

The Declaration by its own terms is set to expire after 30 days unless the state of emergency is extended by the Legislature. The Declaration triggers the activation of the Drought Response Committee, which includes representatives from the Governor's offices of Management and Budget and Economic Development; the departments of Environmental Quality, Agriculture and Food, and Community and

Economic Development; and the divisions of Water Resources, Emergency Management; Forestry, Fire and State Lands; and Wildlife Resources.

The Utah Code contains several provisions allowing State resources to be reallocated during times of emergency (the Disaster Response and Recovery Act (Act). Specifically, Utah Code § 53-2a-204(1)(a) authorizes the Governor to utilize all available resources of state government as reasonably necessary to cope with a state of emergency. Likewise, Utah Code § 53-2a-204(1)(b) authorizes the Governor to employ measures for the purpose of securing compliance with orders made pursuant to the Act; and give direction to state and local officers and agencies that are reasonable and necessary for the purpose of securing compliance with the provisions of the Code and with orders, rules and regulations made pursuant to the Act.

The Drought Response Committee is charged with implementing the state's Drought Response Plan, which requires the state to prepare for, respond to and recover from emergencies or disasters, with the primary objectives to save lives and protect public health and property.

More Details

This declaration activates the Drought Response Committee and triggers increased monitoring and reporting. It also allows drought-affected communities, agricultural producers and others to report unmet needs and work toward solutions. It also triggers implementation of the State's Drought Response Plan. The Drought Response Plan, adopted in 1993 and most recently revised in 2013, establishes the procedures for dealing with a drought. These procedures include evaluation of the risks, establishment of six separate task forces and requires a recommendation to the Governor. The six task forces are charged with examining the actual and potential impacts in six different areas: 1) Municipal Water and Sewer Systems; 2) Agriculture; 3) Commerce and Tourism; 4) Wildfire; 5) Wildlife; and 6) Economic. Additionally, other task forces may be organized as needed (*e.g.*, health or energy).

The task force's report to the Drought Response Committee, which determines which needs can be met by reallocation of existing resources. Those needs which cannot be met will be identified and sent to the Governor with recommendations. At that point the Governor will typically request federal assistance. These actions are coordinated through the Director of Natural Resources, who serves as the State Drought Coordinator. Ultimately, the purpose of the Declaration and the Drought Response Committee is to trigger enhanced coordination and focus on the issues arising from the drought.

Conclusion and Implications

The first efforts of the Drought Response Committee are being compiled and will likely be presented to the Governor soon. The Utah Legislature has not yet extended the drought declaration, but an extension is anticipated for the duration of the water year, which ends on September 31.

Utah and the West are facing unprecedented drought conditions this summer and conditions do not seem likely to improve in the near term. Utah's Drought Response has been swift and comprehensive. However, as drought conditions become more persistent additional steps may become necessary to ensure the impacts are mitigated. The Utah Legislature passed a record number of water related bills during the 2022 General Session and that is likely to be a trend that continues in the coming years.

A copy of this Declaration may be found at: https://drive.google.com/file/d/17RTW8PJ5HFTv3DA27j7PXGAA4hIc_Cbz/view. A copy of Utah's Drought Response Plan may be found at: https://water.utah.gov/wp-content/uploads/2020/04/Drought-Response-Plan.pdf. (Jonathan Clyde)

LEGISLATIVE DEVELOPMENTS

PROPOSED CALIFORNIA BILL AIMS TO SUPPORT FARMWORKERS IMPACTED BY DROUGHT

California proposed Senate Bill 1066 (SB 1066) seeks to provide economic aid to communities hit hardest by drought. It would allocate $20 million to create and fund a California Farmworkers Drought Resilience Pilot Project. If the bill passes as introduced, eligible farmworkers could receive $1,000 monthly cash payments.

Background

SB 1066 finds that ongoing drought conditions and water allocation cutbacks forced California farmers to fallow hundreds of thousands of acres of farmland in 2021, resulting in more than 8,000 lost jobs in the California agriculture industry. The bill is State Senator Melissa Hurtado's second attempt to provide funding to farmworkers after proposals last year to prioritize farmworkers were not included in the State's guaranteed basic income pilot program.

Senate Bill 1066

SB 1066 is designed to help sustain agricultural workers in impacted communities so they can remain in their communities and return to the fields if conditions improve. If passed, SB 1066 would establish a California Farmworkers Drought Resilience Pilot Project. It would direct the state Department of Social Services to provide cash assistance to eligible households to help meet their basic needs. The pilot project would commence on January 1, 2023 and continue for a period of three years. Households that meet specific criteria could receive supplemental payments of $1,000 per month for three years.

Additionally, the supplemental payments would not be considered income for the purposes of determining eligibility to receive benefits for CAlWORKS, CalFresh, the California Earned Income Tax Credit, Medi-Cal, or state and federal financial aid and college support programs. This means that receipt of supplemental payments would not impact a recipient's ability to qualify for other financial support programs.

Finally, the California Department of Social Services would be directed to conduct a longitudinal study of the pilot project to determine outcomes and evaluate whether the pilot project was successful in achieving its intended outcomes.

Program Eligibility

Only qualifying farmworker households would be eligible to receive the $1,000 monthly payments. To qualify, a household must meet the following criteria: 1) at least one member of the household is a California resident; 2) at least one member of the household worked as a farmworker for the entire period of March 11, 2020 to January 1, 2022; 3) at least one member of the household is a farmworker at the time of consideration for, and throughout the duration of, the project; and 4) the household received benefits under either the CalFresh or California Food Assistance Programs for the entire period of March 11, 2020 to January 1, 2022, or would have been eligible for these benefits, but for the immigration status of one or more members of the household. The bill allows for brief periods of unemployment during the pilot project without losing eligibility if the unemployment is due to circumstances beyond the farmworker's control. Notably, SB 1066 would open up aid to all eligible farmworkers regardless of immigration status. Proponents of the bill assert that this is an important aspect to protect vulnerable agricultural workers who are integral to the industry.

Industry Support and Legislative Next Steps

SB 1066 has received support from certain industry groups, including the California Fresh Fruit Association. The bill recently passed out of the Senate Committee on Appropriations by a vote of five to two, after previously passing the Senate Committee on Human Services. As of the date of this writing, the bill awaited consideration and approval of the full Senate and Assembly before heading to Governor Newsom's desk for approval.

Conclusion and Implications

While SB 1066 will not solve California's ongoing drought, it acknowledges certain economic impacts and hardships caused by the drought. If passed in its current form, SB 1066 could provide economic support to the frontline farmworkers who have lost employment as fields lay fallow. However, no one can predict how long the drought will last, and some assert that available funding should be prioritized for water transfer, storage and infrastructure projects to address long-term water supply needs. The bill is still in the early stages of the legislative process and additional amendments could change its ultimate impact. The bill can be tracked for progress and text changes here: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1066. (Scott Cooper, Derek Hoffman)

CALIFORNIA SENATE BILL REVIVES EFFORTS TO REDUCE URBAN WATER USE OBJECTIVES FOR INDOOR RESIDENTIAL WATER USE

On February 17, 2022 State Senator Hertzberg introduced "An act to amend Section 1069.4 of the Water Code relating to water." Distilled to its essence the bill would eliminate the option of using the greater of 52.5 gallons per capital daily and the greater of 50 gallons per capita daily but would instead require that from January 25, 2025 to January 1, 2030, that standard for indoor residential use be lowered. On May 5th the bill was referred to the Assembly Committee on Water, Parks and Wildlife.

Background

Section 10609 of the California Water Code establishes a method to estimate the aggregate amount of water that would have been delivered in the previous year by an urban retail water supplier if all water actually used had been used efficiently. In order to calculate this figure, Urban Water Use Objectives for several use types were created, including standards for Indoor and Outdoor Residential water uses. These Urban Water Use Objectives do not set any hard-limits on the amount of water urban retail water suppliers may actually provide. Instead, by comparing the amount of water actually used in the previous year with the urban water use objective, the goal is that local urban water suppliers will be in a better position to cut back on unnecessary or wasteful uses of water.

For Indoor Residential Water Use, the standard set by the Urban Water Use Objectives is currently 55 gallons per day per capita. This standard is set to last through January 1, 2025 where the standard will then be lowered to 52.5 gallons per day per capita, then lowered again to 50 gallons per day per capita on January 1, 2030.

What the Bill Seeks to Change

Last year, the California Legislature had before it AB 1434, which sought to effectuate more or less the same changes that SB 1157 now seeks: to have the Indoor Residential Water Use standards reduced to reflect the recommendations of the Department of Water Resources and the State Water Resources Control Board. Former AB 1434, however, never made it past the Assembly. This time around, SB 1157 has now made its way through the California Senate and back to the assembly.

SB 1157 does not plan on making any radical changes to Urban Water Use Objectives as a general scheme. With that said, the proposed reduction for Indoor Residential Water Use may very well be a drastic enough change.

Prior to AB 1434's defeat in the assembly, the predecessor bill sought to drop the Indoor Residential Water Use standards by 20 percent and implement a more staggered timeline for reducing the water use standard. The first change under AB 1434 would have almost been upon us, beginning on January 1, 2023, where the Indoor Residential Water Use standard would have been dropped to 48 gallons per day per capita. In 2025, this standard would have dropped again to 44 gallons per day per capita and by 2030 the standard would have dropped again to a mere 40 gallons per day per capita.

This time around, SB 1157 takes a more conservative approach to the lowering of Indoor Residential Water Use standards. The first major change comes in the form of the total removal of a 2023 reduction. Rather, the first reduction for Indoor Residential Water Use standards would not come until the next reduction under the current scheme, set for January 1, 2025. At that time, SB 1157 would have the Indoor Residential Water Use standard drop from the current standard of 55 gallons per day per capita down to 47 gallons per day per capita. For reference, the current schedule is only set to have the standard reduced to 52.5 gallons per day per capita as of 2025. As for the final reduction date, set to come on January 1, 2030, SB 1157 would seek to set the standard at just 42 gallons per day per capita, down from the currently scheduled standard of 50 gallons per day per capita come 2030.

Conclusion and Implications

Although the drop from 55 to 47 gallons per day per capita may seem significant at a glance, the current median water use throughout the State is already as low as 48 gallons per day per capita, so this reduction does not set an unreasonable goal. Instead, the more realistic concern comes from the reduction of the 2030 Indoor Residential Water Use standard from 50 gallons per day per capita down to just 42 gallons per day per capita. Indoor residential water use has already seen a significant drop, particularly following the major drought years lasting through 2014-2015, so a question that really needs to be considered prior to implementing any significant rampdowns to Indoor Residential Water Use standards is where the point of diminishing returns lies with respect to indoor residential water conservation.

With that said, and as noted above, these Urban Water Use Objectives do not set absolute limits on urban retail water suppliers when it comes to providing water for indoor residential water uses. What it does do, however, is ensure that discussions can continue between urban retail water suppliers and their customers with respect to how these water use standards can be achieved.

The Legislature has maintained that Local urban retail water suppliers should have primary responsibility for meeting standards-based water use targets, and that they are to retain the flexibility to develop their water supply portfolios, design and implement water conservation strategies, educate their customers, and enforce their rules. SB 1157 continues to place the burden of urban water conservation on urban retail water suppliers along with the responsibility of engaging the community and encouraging conservation on a more personal household level.

Last year, AB 1434 was defeated, at least in part, because it sought to drastically cut Indoor Residential Water Use standards with only a 10-year planning horizon. With SB 1157 coming up so soon after AB 1434's defeat, the question now is whether the changes made herein to the predecessor bill will be enough to push SB 1157 past the finish line. To track the status of SB 1157 *see:* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1157.
(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION TO PROVIDE $100 MILLION FOR B.F. SISK DAM

In April 2022, the U.S. Bureau of Reclamation (Bureau) announced $100 million in modification funding for the B.F. Sisk Dam, which impounds San Luis Reservoir, a supplemental storage reservoir for the Central Valley Project and State Water Project. The funds were authorized by the Bipartisan Infrastructure Law and will be used to reduce risk to the dam posed by seismic activity.

Background

B.F. Sisk Dam is a 382-foot-tall earth-filled embankment located near Los Banos, California, in the Central Valley. The dam was completed in 1967 and provides supplemental irrigation storage for the federally owned Central Valley Project and municipal and industrial water for the California State Water Project. The dam impounds San Luis Reservoir and is commonly referred to as San Luis Dam (Dam). The reservoir has a total capacity of 2 million acre-feet and is a joint-use facility with the California Department of Water Resources (DWR) and the Bureau. Reservoir storage space is allocated 55 percent to the state and 45 percent to the federal government.

The Bureau operates in five regions in 17 western states. The Bureau is responsible for approximately 370 storage dams and dikes that form a significant part of the water resources infrastructure in the Western United States, including B.F. Sisk Dam. These dams are included in the Bureau's safety of dams program (SOD Program). The SOD Program was established to ensure Bureau dams do not present unacceptable risks to people, property, and the environment.

The Bipartisan Infrastructure Law (BIL) of 2021 provides a total of $8.3 billion related to Western water infrastructure for the Bureau and twelve programs and activities authorized by the BIL, including the SOD Program. The Bureau submitted an initial spending plan for fiscal year 2022 that allocates $500 million to the SOD Program, with an initial allocation of $100 million in 2022 and $400 million after 2023. Several dam safety modification projects pertain to dams deemed to exceed federal guidelines for dam safety, including the B.F. Sisk Dam.

Safety of Dams Analysis for Need for Modifications

To determine whether a dam needs modification, the Bureau employs a "Safety of Dams Process" that involves four phases.

In the first phase, the Bureau conducts a "comprehensive review" every eight years, with a periodic facility review performed halfway through the comprehensive review cycle. In this way, substantive reviews are conducted every four years. Annual reviews are conducted in the remaining years. A comprehensive review examines a dam itself as well as construction reports, existing documentation, and observations that are compared with new information, new technology, and current dam engineering practices.

In the second phase, the Bureau conducts additional studies stemming from any recommendations made during the comprehensive review process. These studies include evaluations of foundation deposits for liquefaction (where the strength and stiff of soil is reduced due to seismic shaking during earthquakes), evaluation of structural components to withstand earthquakes, evaluation of new hydrologic information, and changes in the understanding of loading conditions (the overarching effects of seismic shaking during an earthquake).

Depending on its findings in the first and second phases, the Bureau may perform a corrective action study to explore ways to reduce risks to federally acceptable levels, including operational changes and modifications, with reference to existing constraints on the environmental and economic levels, among others. Alternatives may also be examined during this phase.

Finally, if necessary, modifications are designed to reduce the risk posed by a dam, including design data collection and evaluation of materials within the

dam, foundation, and materials to be imported during construction. The modification is then bid-out and the contractor is overseen by the Bureau during the modification process.

In 2003, a Bureau facility review of the Dam identified seismic risks exceeding public safety guidelines. Following more than a decade of subsequent study and evaluation, DWR and the Bureau determined that modification of the Dam was necessary to remedy risks posed by the potential failure of the Dam due to an earthquake. Specifically, the Bureau found that there was an increase in the estimates of both the severity of ground shaking due to nearby earthquake faults, primarily the Ortigalita fault which crosses San Luis Reservoir, and the probability of a large event on that fault.

The Bureau also determined that modifications were necessary in light of new understandings regarding the properties of the Dam's foundation materials and their ability to resist deformation when subjected to severe shaking. Similarly, advances in computer-based analysis methods more precisely demonstrated Dam behavior under seismic loading, *i.e.* the effects of seismic shaking on the Dam's structure. As a result of its findings, the Bureau proposed raising the Dam crest by 12 feet and adding certain infrastructural features at the Dam itself and downstream, *e.g.*, stability berms, that would significantly reduce the risk to the Dam. The Bureau's proposal followed extensive analysis in prior years related to potential modifications of the Dam. In 2019, DWR and the Bureau elected to proceed with the $1.1 billion seismic upgrade. Capital costs include costs for facility studies and reviews, environmental and cultural evaluations and mitigation, design, contract procurement, and construction and construction oversight.

In addition to the safety of dams process for the B.F. Sisk Dam, the Bureau conducted environmental review of the proposed modifications and determined that dam improvements would not significantly affect public health or safety, would not violate federal, state, tribal, or local laws protecting the environment; would not affect Indian trust assets; would not disproportionately affect minorities or low-income populations and communities; and would not limit access to, and ceremonial uses of, Indian sacred sites on federal lands or significantly adversely affect the physical integrity of such sacred sites.

Conclusion and Implications

The Bureau's announcement that $100 million would be available for modifications of the B.F. Sisk Dam is an important step in securing reliable water supplies for municipal, industrial, and irrigation purposes, as well as protecting public health. It remains to be seen whether additional funding will be necessary and made available for the Dam moving forward. For more information see the Department of Interior's Press Release, "Interior Department Invests $100 Million in First Dam Safety Project Through President Biden's Bipartisan Infrastructure Law," https://www.doi.gov/pressreleases/interior-department-invests-100-million-first-dam-safety-project-through-president.

(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS EMERGENCY DROUGHT REGULATIONS PURSUANT TO EXECUTIVE ORDER

California continues to battle worsening drought conditions through regulations designed to reduce water use throughout the state. On May 24, 2022, the California State Water Resources Control Board (SWRCB) adopted emergency regulations to increase water conservation, ban wasteful water uses and prohibit the use of potable water to irrigate certain non-functional turf.

Background

The SWRCB recently published that in March 2022, urban retail water suppliers reported an average statewide water use that was nearly 19 percent *greater* than in March 2020, notwithstanding significant drought conditions. On March 28, 2022, California Governor Newsom signed Executive Order N-7-22 (Order). The Order directed the SWRCB to consider

adopting an emergency regulation for urban water conservation by May 25th. The SWRCB proposed an emergency regulation in early May, and adopted the regulation on May 24th (Regulation).

Addition of Preliminary Water Supply and Demand Assessment

Pursuant to California Water Code § 10632.1, urban water suppliers must conduct an annual water supply and demand assessment and submit an annual water shortage assessment report to the California Department of Water Resources (DWR) by July 1st. The Regulation further requires urban water suppliers to submit a *preliminary* annual water supply and demand assessment to DWR by no later than June 1, 2022. DWR issued guidance and provided public workshops to assist urban water suppliers in meeting the preliminary and annual reporting requirements.

Demand Reduction Actions

As a part of their water shortage contingency plans (WSCP), urban water suppliers must identify demand reduction actions they will take in the event of a water shortage emergency. Demand reduction actions generally correspond to six standard water shortage levels outlined by the state and become increasingly restrictive at each level. Level 2 actions are meant to address up to a 20 percent shortage of water supplies and often include measures such as limiting outdoor irrigation to certain days or hours, increasing patrolling to identify water waste, enforcing water-use prohibitions, and increasing communication about the importance of water conservation. The Regulation requires that all urban water suppliers that have submitted a WSCP to DWR to implement, at a minimum, their Level 2 demand reduction actions by June 10, 2022. The Regulation expressly states that it does not require urban water suppliers to implement moratoria on new residential water service connections.

Urban water suppliers that have not submitted a WSCP must, at a minimum, initiate a public outreach campaign for water conservation, adopt an ordinance limiting landscape irrigation to no more than two days per week, and adopt an ordinance banning wasteful and unreasonable water uses prohibited by California Code of Regulations Title 23 § 995. Section 995 defines wasteful and unreasonable water uses to include:

- Using potable water to irrigate outdoor landscapes in a manner causes water to flow onto adjacent property, non-irrigated areas, walkways, roadway, and parking lots;

- Using a hose to wash a vehicle without equipping the hose with a shut-off nozzle;

- Using potable water for washing hard surfaces such as sidewalks, driveways, buildings, structures, patios, and parking lots;

- Using potable water for street cleaning or construction site preparation purposes;

- Using potable water for decorative fountains or to fill decorative lakes and ponds;

- Watering turf or ornamental landscapes during and within 48 hours after measurable rainfall of at least one-fourth of an inch; and

- Using potable water to irrigate ornamental turf on public street medians.

Violation of these prohibitions is punishable by a fine of up to $500 per day.

Prohibition of Irrigation of Certain Non-Functional Turf

California regulations define turf as a ground cover surface of mowed grass. The Regulation prohibits use of potable water for irrigation of "non-functional turf" at commercial, industrial, and institutional sites. It defines non-functional turf as "turf that is solely ornamental and not regularly used for human recreational purposes or for civic or community events." It clarifies that non-functional turf does not include "sports fields and turf that is regularly used for human recreational purposes or for civic or community events." The Regulation further clarifies that it does not prohibit use of potable water to the extent necessary to ensure the health of trees and other perennial non-turf plantings or to the extent necessary to address an immediate health and safety need. Violations of this Regulation could result in fines of up to $500 per day, in addition to other potential civil or criminal penalties.

Implementation of Regulation

Some urban water suppliers had already imposed new restrictions on customers' water use prior to the adoption of the Regulation. The SWRCB reported that as of May 24th, approximately half of the state's 436 water suppliers (both urban water retailers and wholesalers) had not yet activated Level 2 actions, and 36 had not submitted drought plans to DWR. As of the date of this writing, the Regulation remained subject to approval of the California Office of Administrative Law (OAL), which typically occurs within ten calendar days of submission by the SWRCB. The Regulation provides that the ban on non-functional turf becomes effective upon OAL approval and proposes that Level 2 requirements for urban water suppliers take effect on June 10, 2022.

Conclusion and Implications

The Regulation responds to worsening drought conditions ahead of another hot, dry California summer. The Regulation builds upon prior drought regulations and is more specifically directed at urban water suppliers and prohibiting irrigation of non-functional turf. The required preliminary supply and demand assessment signals the importance of tracking and reporting water use and projected use. The Regulation also increases reporting pressure on urban water suppliers that have not yet submitted drought plans to DWR. Information on the Regulation can be found on the SWRCB website at: https://www.wa-

STATE WATER RESOURCES CONTROL BOARD PROPOSES EMERGENCY REGULATIONS FOR RUSSIAN RIVER WATERSHED

In May 2002, the State Water Resources Control Board (State Water Board) readopted emergency regulations authorizing the board to curtail diversions in Sonoma and Mendocino counties to protect drinking water supplies and migrating fish in the Russian River watershed. The State Water Board subsequently provided notice of its proposed rulemaking for the revised emergency regulations, which the board submitted to the Office of Administrative Law on May 18th.

Background

The Russian River begins in Mendocino County and flows south over one hundred miles into Sonoma County before emptying into the Pacific Ocean. Water stored in Lake Mendocino is released to maintain flows in the upper section of the Russian River. Supplemental water from the lake is used for the benefit of municipal, agricultural, and environmental uses.

In April 2021, Governor Gavin Newsom issued a drought state of emergency and recommended modifications to reservoir releases and limitations and curtailments of diversions within the Russian River watershed to redress acute drought impacts and to protect the availability of drinking water. The 2021 proclamation directed the State Water Board to consider adopting:

> . . .emergency regulations to curtail water diversions when water is not available at water rights holder's priority of right or to protect releases of stored water.

Accordingly, the State Water Board adopted emergency regulations on June 15, 2021, which are set to expire on July 12, 2022.

The 2022 Russian River drought emergency regulations seek to renew the State Water Board's emergency authority related to the 2021 regulations. However, the 2022 regulations make novel amendments to the 2021 regulations.

Emergency Conditions in the Russian River Watershed

In proposing to adopt the 2022 regulations, the State Water Board found that an emergency continues in the Russian River watershed due to the third consecutive year of severe drought conditions. The State Water Board determined that it was unable to address the situation through non-emergency

immediately necessary to reassert the board's authority to prevent the unreasonable use of water in the Russian River watershed in light of "severely limited water availability." According to the regulations, the State Water Board has regulatory jurisdiction over permitted water rights issued after 1914, but also has jurisdiction to regulate the reasonable uses of water regardless of the basis of right, including riparian and pre-1914 water rights.

Curtailment of Water Diversions

The primary objective of the State Water Board's emergency regulations is to authorize curtailment of water diversions due to decreased natural flows so water will be available for: 1) senior water right users; 2) minimum flow requirements for fish and wildlife; and 3) minimum human health and safety needs. The 2022 emergency regulations apply to the entire Russian River watershed, as opposed to the Lower Russian River watershed as occurred in the 2021 regulations. The regulations authorize the State Water Board to issue curtailment orders to water rights holders requiring the limitation or cessation of water diversion.

New in the 2022 regulations is a "curtailment status list." Specifically, the State Water Board will publish and regularly update a curtailment status list showing all water rights for which diversions are required to cease or be reduced due either to insufficient flows in the Russian River watershed or to diversions unreasonably interfering with augmented stream flows or releases made in certain Russian River tributaries. Notably, updates to the curtailment status list constitute binding orders from the State Water Board to cease or limit diversions. Such orders are effective the day after they are posted. In other words, water rights holders are responsible for checking the curtailment status list daily in order to avoid potentially violating a curtailment order should their water right or rights be included in the curtailment list the day before.

In updating the curtailment status list, the State Water Board is required to consider the priority date of a water right, monthly water demand projections, water availability projections, and any other pertinent information. To that end, the regulations provide for the use of a Water Rights Allocation Tool, which automates calculations of water availability at certain points along the Russian River via mathematical formulation of sub-watershed supplies; user demands and dates of priority; and maximization of water allocation in accordance with the formulations document for the Water Rights Allocation Tool dated January 2022. The State Water Board would also continue to send curtailment orders to each water right holder, claimant, or agent of record on file with the board.

Riparian rights users are also subject to curtailment orders by the State Water Board if their use of water is deemed unreasonable. Specifically, "uncoordinated diversions" of surface water under riparian claims constitute an unreasonable use of water. The regulations do not specify what constitutes "uncoordinated" diversions. However, diversions pursuant to riparian rights are required by the regulations to be incorporated into the water availability analysis described above. Riparian users who disagree with an assigned water budget based on the water availability analysis and associated curtailment orders have 14 days to inform the State Water Board of their actual planned diversion and use under the riparian claim, and must include information estimating planned diversion quantities by month over the following 12 months, a summary of water uses, and previous water usage data. Riparian users who previously failed to inform the State Water Board of their planned uses, and who also failed to report diversions and use for the 2017 through 2019 period, are treated as having junior-most priority for the duration of the emergency regulations' effect.

Finally, the emergency regulations allow for voluntary water sharing agreements in lieu of a curtailment order. Specifically, water rights holders in the Russian River watershed may propose a voluntary water sharing agreement that authorizes an exception to curtailment and would thus allow a water rights holder whose water right is listed in the curtailment list to continue diverting water under the terms of the sharing agreement. The State Water Board must approve the agreement, which requires that the board find the agreement will not adversely affect the availability of water for non-signatories in Mendocino and Sonoma counties. Water made available by a signatory to a water sharing agreement is not available to non-signatories to the agreement and is treated as a prohibited unreasonable use of water.

Conclusion and Implications

The State Water Resources Control Board's Russian River emergency regulations employ new data analytics to determine water availability, maintain a list of water rights subject to curtailment, but allow for voluntary agreements that allow listed water rights holders to continue diverting under the terms of the agreement. Specifically, riparian rights holders might be best positioned to continue diverting under the curtailment orders if they can coordinate water diversions through voluntary agreements. Water rights management in the drought-stricken Russian River watershed appears to be increasingly automated yet offers the prospect of flexibility based on the negotiating acumen of individual water rights holders. The Revised Notice of Proposed Rulemaking is available at: https://www.waterboards.ca.gov/drought/russian_river/docs/2022/russian-river-revised-notice-proposed-rulemaking.pdf.
(Miles Krieger, Steve Anderson)

STATE WATER RESOURCES CONTROL BOARD CONDUCTS PUBLIC WORKSHOP ON POTENTIAL IMPACTS OF FORTHCOMING EFFICIENCY STANDARDS ON LOCAL WASTEWATER MANAGEMENT

On May 11, 2022, State Water Resources Control Board (State Water Board) staff hosted a virtual public workshop entitled *Making Conservation a California Way of Life: How Forthcoming Efficiency Standards May Impact Local Wastewater Management*. This was the State Water Board's second public workshop on forthcoming water use efficiency standards and their potential effects on local wastewater management.

Background

In 2018, the California Legislature enacted two bills—Assembly Bill 1668 (AB 1668) and Senate Bill 606 (SB 606)—collectively referred to as the "2018 Water Conservation Legislation." The 2018 Water Conservation Legislation revised the California Water Code, setting forth measures for long-term efficient water use in California. The legislation applies to actions of the Department of Water Resources (DWR), the State Water Board, and California water suppliers. It does not set any rules or standards enforceable against individual water users.

Among other things, the 2018 Water Conservation Legislation directed the State Water Board to adopt long-term standards for the efficient use of water for 2020 and beyond. This includes standards for indoor residential water use, outdoor residential water use, commercial, industrial, and institutional (CII) water use for landscape irrigation with dedicated meters, and water loss. Based on the standards set by the State Water Board, urban water suppliers will be required to calculate and adhere to an urban water use objective.

Under Water Code § 10609.2, subdivision (c), the State Water Board is required to identify and consider the possible effects of the proposed standards on local wastewater management, developed and natural parklands, and urban tree health. The legislation set May 30, 2022 as the deadline for the State Water Board to identify such proposed standards and potential effects. The legislation also requires that the State Water Board allow for public comment on the potential effects of the proposed standards.

Pursuant to the legislation, the State Water Board adopted Resolution 2019-0029 in 2019 authorizing execution of a contract to analyze the potential effects of proposed efficiency standards. The resulting contract, Contract 19-058-240, designated California State University (CSU) Sacramento to lead work to generate water use scenarios given varying and reasonably foreseeable climatic and economic conditions. Teams at the University of California (UC) Los Angeles, UC Davis, CSU Sacramento, and CSU Humboldt were designated to carry out environmental and economic impact analyses.

In early December of 2021, State Water Board staff held its first public workshop on the effects of the proposed water efficiency standards, focusing on the methods used to evaluate potential effects on local wastewater management, parklands, and urban tree

a draft report, referred to as the draft "Task 5" report under Contract 19-058-240, that evaluates the effects of proposed efficiency standards on local wastewater management.

The Public Workshop

On May 11, 2022, State Water Board staff hosted a virtual public workshop entitled *Making Conservation a California Way of Life: How Forthcoming Efficiency Standards May Impact Local Wastewater Management*. The workshop provided an opportunity for the public to learn about the Board's analysis of the proposed standards' effects on local wastewater management, as well as to comment and ask questions.

The workshop was divided into four presentations. It began with a recap of the "Results of the Indoor Residential Water Use Study," which was a report submitted by the Department of Water Resources to the Legislature in late 2021.

In the report, DWR and the State Water Board made a joint recommendation on residential indoor water use standards based on best practices. The recommended standards are as follows: 55 gallons per capita per day (gpcd) starting in 2020; 47 gpcd starting in 2025; and 42 gpcd starting in 2030.

Next, State Water Board staff and representatives from the CSU Sacramento Office of Water Programs presented an overview of the potential impacts of the proposed efficiency standards on local wastewater management, as informed by the draft Task 5 report. The presentation included a discussion of how the efficiency standards may affect local wastewater management under three future scenarios; a description of regional and statewide urban water use and wastewater influent trends; and preliminary estimates of how much the implementation of AB 1668 and SB 606 may cost the wastewater sector. The draft Task 5 report was made available as material for the workshop.

The third presentation included a panel discussion on the impacts of conservation on wastewater treatment. This included a discussion of the major challenges facing the wastewater treatment sector, foreseeable problems in the future, and strategies to deal with those challenges. Finally, the workshop closed with a presentation by the State Water Board, Division of Financial Assistance, on several funding opportunities and financial assistance programs aimed to help preserve, enhance, and restore California's water resources.

Conclusion and Implications

In the draft preface to the Task 5 report, State Water Resources Control Board staff indicate that water efficiency standards will be set by late 2023 and that there will be additional opportunities for public comment during the formal rulemaking process. More information regarding the implementation of the 2018 Water Efficiency Legislation, including materials from the Board's workshops, can be found at: Rulemaking to implement 2018 Water Efficiency Legislation | California State Water Resources Control Board. The Webinar Recording from the May 11, 2022 workshop can be found at: ORPP Wastewater Workshop - May 11, 2022 - YouTube.
(Holly E. Tokar, Meredith Nikkel)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES DRAFT UPDATE CENTRAL VALLEY FLOOD PROTECTION PLAN

On April 21, 2022, the California Department of Water Resources (DWR) released for public comment the Draft Update Central Valley Flood Protection Plan (Draft Update). The Draft Update sets forth DWR's and the Central Valley Flood Protection Board's (Board) approach to manage flood risk in the Central Valley over the next five years. The Central Valley Flood Protection Board held three public hearings in May 2022. The public comment period ended on June 6, 2022.

Background of the Central Valley Flood Protection Act

The Central Valley is characterized by the risk of significant flooding, and the history of managing that flood risk is at least as long as the history of European settlement of the Central Valley. In 1911, the California Legislature created the State Reclamation Board, the predecessor to the Central Valley Flood Protection Board, to manage and implement flood

protection measures in the Central Valley. The mission of the Board is "to reduce the risk of catastrophic flooding to people and property within the California central valley."

The Central Valley Flood Protection Act of 2008 (Act) was part of a legislative package following Hurricane Katrina that addressed the significant vulnerability of the Central Valley to catastrophic flooding. The legislative package addressed planning and funding for a substantial effort to address concerns about flood risks, including tying land use approvals to minimum flood protection levels in urban areas. The Act was intended to address the planning side of the equation, and accordingly requires DWR to prepare a plan for managing flood risk in the Central Valley. (Wat. Code, § 9600, *et seq*.) While DWR is tasked with preparing an initial plan and updating that plan every five years, the Board is tasked with adopting the plan and its five-year updates. The Board adopted the first plan in 2012 and the first update in 2017. The Act details the specific elements required in the plan, including means for improving the performance of flood control infrastructure. The original plan and both updates have been drafted in coordination with local and regional flood management agencies.

Details of the Draft Update Central Valley Flood Protection Plan

DWR acknowledges in the Draft Update the Central Valley's ongoing risk to high floods and identifies notable events that have affected flood risk since the last update in 2017. These events include high-flow events in 2017, 2019, and 2021, ongoing drought, increased wildfire impacts, the COVID-19 pandemic, and a renewed focus on social justice issues. Framed by those events, the Draft Update addresses how climate change has increased the risk and unpredictability of major flooding. The Draft Update notes that research "suggests socially vulnerable communities face some of the highest flood risks, especially in the San Joaquin Valley," and addresses the impact of increased flood risk on vulnerable communities.

An important function of the Draft Update is to facilitate the development, operation, and maintenance of flood control infrastructure. Toward that end, the Draft Update includes an update to the State Systemwide Investment Approach (SSIA). The updated SSIA estimates the annual costs of ongoing investments—including operation and maintenance costs—to range between $315 million and $384 million. The Draft Update estimates capital investments costs of $19 to $23 billion over the next thirty years, and notes that the traditional source of funding for flood management projects has historically been general obligation bonds. The Draft Update acknowledges that reliance on bonds has had the effect of displacing general fund contributions. In light of the effect of inconsistent general fund contributions on the ability of state and local entities to consistently manage flood risk and fund operations and maintenance, the 2017 update recognizes the need for more consistent general fund appropriations. The SSIA component of the Draft Update continues that reliance on increased general fund appropriations, but also identifies a number of other funding sources, including federal programs, local matches for capital investments, and local assessments for operations and maintenance costs. The Draft Update encourages the development of new funding sources, such as formation of a Sacramento/San Joaquin Drainage District, adoption of a contemplated State River Basin Assessment or tax, and development of a State Flood Insurance Program to address the high costs of insurance premiums under the National Flood Insurance Program.

DWR issued the Draft Update on April 21, 2022. The Board thereafter scheduled three public hearings on the Draft Update. The Board accepted public comments until June 6, 2022. No timeline for release of a final draft has been announced, but the Act requires the Board to adopt an updated plan in 2022.

Board President Issues Statement on the Draft Update

Jane Dolan, president of the Board, stated the following about the Draft Update:

> It's been a decade since the Board adopted the first Central Valley Flood Protection Plan. Since 2007, California has invested $3.6 billion in managing floods, with another $500 million recently committed. We've reduced flood risk, but we must double down. It's not a matter of 'if' but 'when' we experience extreme flood, just as climate change has pushed us beyond the historical record on drought.

Conclusion and Implications

Through the Draft Update, the Department of Water Resources and the Central Valley Flood Protection Board acknowledge the increased risk posed by climate change and the state's policy of climate change resilience, and attempt to reconcile the particular risks of flood on vulnerable communities in the Central Valley. The final shape of those efforts remains pending, and the Board has until the end of this year to adopt an updated plan.
(Brian Hamilton, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT RULES CLEAN WATER ACT WATER QUALITY OBJECTIVES ARE NOT DIRECTLY APPLICABLE TO NONPOINT SOURCE DISCHARGERS

Central Sierra Environmental Resource Center v. Stanislaus National Forest, 30 F.4th 929 (9th Cir. 2022).

The U.S. Court of Appeals for the Ninth Circuit recently granted a summary judgment affirming that the government had not been shown to have violated the permitting requirements or water quality objectives of the federal Clean Water Act (CWA).

Background

As an "authorized state," California implements the state Porter-Cologne Water Quality Control Act (Porter-Cologne) in lieu of the CWA. The state acts through the State Water Resources Control Board (State Water Board) and its nine Regional Water Quality Control Boards (Regional Boards) to issue permits, called Waste Discharge Requirements (WDRs) or waivers from the permitting requirements. In 1981, the State Water Board signed a Management Agency Agreement (MAA) with the United States Forest Service (Forest Service). The MAA formally recognized the state's designation of the Forest Service, pursuant to § 208(c) of the Clean Water Act, as the management agency for all activities on National Forest System lands, with responsibility to implement provisions of water quality management plans. In the MAA, the State Water Board agreed that the practices and procedures set forth in the Forest Service 208 Report constitute sound water quality protection and improvement on Forest Service lands, except with respect to certain enumerated issues. As to the enumerated issues, additional "Best Management Practices" (BMPs) were needed.

The Forest Service has issued permits allowing livestock grazing in three allotments within the Stanislaus National Forest that are at issue here—the Bell Meadow, Eagle Meadow, and Herring Creek Allotments (collectively: BEH Allotments). In March 2017, two environmental plaintiffs sued the Stanislaus National Forest, the Forest Service, and the then-Forest Service Supervisor in her official capacity (together: Government), claiming that the Government violated the CWA in two respects. First, plaintiffs alleged that the Government made new or modified discharges of waste without obtaining WDRs or a waiver of the WDR requirement. Second, plaintiffs alleged the Government's permits for livestock grazing on the BEH Allotments caused violations of state water quality standards for fecal coliform bacteria.

Plaintiffs' suit sought injunctive relief modifying the grazing arrangements in the BEH Allotments. As a result, the district court allowed the holders of the relevant grazing permits, together with several interested organizations to intervene as defendants. After the parties filed cross-motions for summary judgment, the district court granted summary judgment to the Government. After entry of final judgment, plaintiffs timely appealed.

The Ninth Circuit's Decision

The issue presented on appeal was whether the Government violated the CWA by discharging waste without first obtaining either WDRs or a waiver. The court noted that the 1981 MAA specifically addressed the obligation to obtain WDRs or a waiver. The 1981 MAA provided that implementation of BMPs constituted compliance with the requirement to apply for and obtain WDRs. Thus, the court found the MAA to clearly establish that in lieu of filing reports and obtaining WDRs, the Forest Service can implement agreed-upon BMPs and the provisions of the MAA.

Plaintiffs asserted, however, that the State Water Board superseded the 1981 MAA in 2004, when it adopted the *Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (2004 NPS Policy). The 2004 NPS Policy provided that all current and proposed nonpoint source discharges, such as discharges from grazing operations, must be

regulated under WDRs, waivers of WDRs, or some combination of administrative tools. The court did not find the argument compelling as the 2004 NPS Policy expressly acknowledged management agency agreements, such as the MAA, as operative. Because of this, the court concluded that the plaintiffs failed to show that the Government violated the permitting requirements of the CWA and affirmed the district court's grant of summary judgment on this issue.

The court next considered and rejected plaintiffs' argument that the Government violated the CWA by authorizing livestock grazing which caused runoff leading to fecal coliform levels in local waterways in excess of the relevant water quality objectives. The court found this argument failed because water quality objectives do not directly apply to individual dischargers. Instead, these objectives reflect standards that regulators must take into account in fashioning the requirements that do apply to dischargers, such as WDRs and waivers. The court noted that the plaintiffs had not cited any law that makes a discharger directly liable for violating a water quality objective that is not contained in applicable WDRs, waivers, or other regulatory tool.

For the foregoing reasons, the court found the Government had not been shown to have violated the CWA, and that the plaintiffs failed to contend that the Government violated any prohibition contained within a regulatory mechanism. The court affirmed the district court's grant of summary judgment to the Government.

Conclusion and Implications

This case highlights the challenges to bringing a successful citizen suit against a nonpoint source discharger. It also serves as a reminder that water quality objectives are not directly applicable to dischargers without an additional regulatory mechanism to implement the objective. The Ninth Circuit's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/08/19-16711.pdf.
(Helen Byrens, Rebecca Andrews)

ELEVENTH CIRCUIT CLARIFIES PLEADING STANDARD FOR AESTHETIC INJURY UNDER THE CLEAN WATER ACT

Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, 26 F.4th1235 (11th Cir. 2022).

The U.S. Court of Appeals for the Eleventh Circuit recently vacated a lower court's ruling denying standing to an environmental group petitioner. The court held that the petitioner's allegations were sufficient to establish and injury in fact and confer Article III standing.

Factual and Procedural Background

Sea Island Acquisition owns a half-acre parcel of land near Dunbar Creek in Glynn County, Georgia. The parcel is considered a wetland under the federal Clean Water Act (CWA). When Sea Island sought to fill that parcel with outside materials, the CWA required a Section 401 water quality certification from the State of Georgia and a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps).

In 2012, the Georgia Environmental Protection Division issued a conditional Section 401 water quality certification for all projects authorized by Nationwide Permit 39—the general permit that was issued to Sea Island for its project. On January 10, 2013, Sea Island submitted a pre-construction notification to the Corps for its plan to fill the wetland for the purpose of constructing a commercial building. On February 20, 2013, the Corps issued a preliminary jurisdictional determination determined that the parcel might be a wetland, and the Corps "verified authorization" of the proposed project for two years or until Nationwide Permit 39 was modified, reissued, or revoked.

Sea Island filled the wetland between February 20, 2013, and March 27, 2013, but did not erect or intend to erect any buildings or structures on the wetland. Sea Island led the Corps to believe it was constructing a commercial building on its wetlands when it only intended to landscape over the wetland with fill material.

Two environmental organizations, and Jane Fraser, sued Sea Island. The organizations are Georgia nonprofit corporations. Some of their members, including Fraser, reside in Glynn County near the wetland. Fraser was a 20-year resident of Glynn County who loved to the area because of the unique ecology and native habitat, wildlife, and vegetation. Fraser alleged that the fill of the wetland was the partial cause of a noticeable deterioration of the natural aesthetic beauty, water quality, and habitat of the area.

Sea Island moved to dismiss the amended complaint for lack of standing and for failure to state a claim upon which relief could be granted. Sea Island argued that the allegations did not establish that any of the parties had suffered an injury in fact. The U.S. District Court dismissed the complaint for lack of standing on the ground that the plaintiffs failed to allege an injury in fact.

The Eleventh Circuit's Decision

The threshold issue is whether plaintiffs suffered an injury in fact to confer standing under Article III of the U.S. Constitution. At the motion-to-dismiss stage, a court evaluates standing by determining whether the complaint clearly alleges facts demonstrating each element. An individual suffers an aesthetic injury when the person uses the affected area and is a person for whom the aesthetic value of the area will be lessened by the challenged activity. An individual can meet the burden of establishing that injury at the pleading stage by attesting to use of the area affected by the alleged violations and that the person's aesthetic interests in the area have been harmed.

Sea Island put forward three arguments in defense of the dismissal. First, it argued that the District Court properly concluded Fraser did not allege that she visited the wetlands before the fill, only that she enjoyed the aesthetics of the wetland. Second, it argued that Fraser must have entered the wetland to have an aesthetic interest in it. Third, it argued that there is no interest in a wetland that is private property.

The court first noted that Fraser did specifically allege that she derived aesthetic pleasure from the wetland before the fill, and concluded that Fraser did not need to visit the wetland to derive the pleasure.

Second, the court noted that Fraser need not physically step foot on the wetland to have an aesthetic pleasure from it. Finally, the court held that even if the wetland was private property, Fraser alleged an aesthetic injury from the fill. Therefore, Fraser adequately alleged that an injury to aesthetic interests in the wetland from viewing the wetland, deriving aesthetic pleasure from its natural habitat and vegetation, and now deriving less pleasure from the fill of the wetland.

Injury

In analyzing whether plaintiffs' met their burden of establishing an injury, the court noted that Fraser "plausibly and clearly alleged a concrete injury" to aesthetic interest. The court highlighted the fact that Fraser gains aesthetic pleasure from viewing wetlands in their natural habitat. Fraser regularly visited the area to see the wetland. After the wetland was replaced with sodding, Fraser derived less pleasure from the wetland because the habitat and vegetation were unnatural. Thus, Fraser's injuries were sufficient at the pleading stage.

Conclusion and Implications

This case highlights the pleading requirements for environmental plaintiffs alleging an injury to aesthetic interests. It highlights that an individual member of an environmental organization alleges sufficient facts to withstand a motion to dismiss by alleging the individual viewed the wetland, derived aesthetic pleasure from its natural habitat and vegetation, and derives less pleasure from the altered site: https://scholar.google.com/scholar_case?case=10481156572434704205&hl=en&as_sdt=6&as_vis=1&oi=scholarr. (Marco Ornelas Lopez, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT HOLDS RESPONSIBLE AGENCY MUST MAKE CEQA FINDINGS FOR SIGNIFICANT EFFECTS BEFORE ISSUING WASTEWATER PERMIT

We Advocate Through Environmental Review v. City of Mt. Shasta, ___Cal.App.5th___, Case No. C091012 (3rd Dist. May 11, 2022).

In an opinion certified for publication on May 11, 2022, the Third District Court of Appeal found that the City of Mt. Shasta (City), as a responsible agency, violated the California Environmental Quality Act (CEQA) by failing to issue findings for impacts associated with a wastewater permit it approved for a water bottling facility in Siskiyou County (County). The court held the City failed to proceed in a manner required by law when it issued a "blanket finding" of no unmitigated adverse impacts, even though the underlying EIR found the permitted activities would have potentially significant effects.

Factual and Procedural Background

The Crystal Geyser Water Bottling Facility

From 2001 to 2010, a water bottling company operated a groundwater extraction and bottling plant in Siskiyou County. A few years after the plant closed, Crystal Geyser Water Co. bought and sought to revive the defunct facility. Crystal Geyser requested various approvals from the County, which served as the lead agency in evaluating the facility's potential environmental impacts. The County prepared a draft Environmental Impact Report (EIR), which explained that the project would entail renovations to the former plant to ultimately produce sparkling and flavored water, juice beverages, and teas. To facilitate the Project, the DEIR noted that Crystal Geyser would need to obtain permits from several public agencies, including a permit from the County to construct a caretaker's residence for the plant and a permit from the adjacent City of Mt. Shasta to allow the plant to discharge wastewater into the City's sewer system.

In its limited role as a responsible agency, the City shared a draft of the Project's wastewater permit with the County for inclusion and discussion in the EIR. The draft permit purported to authorize Crystal Geyser to discharge process, non-process, and sanitary wastewater into the City's sewer system. The permit noted the wastewater would be "high-strength" from spilled produce, internal and external cleaning, sanitizing chemicals, flavor-change rinse water, and final rinse water from produce lines and tanks. The permit's final draft further added that the wastewater would also include condensate, boiler blowdown water, and cooling tower blowdown water.

After the County certified the EIR, the City moved to finalize the terms of the permit by stating that it had considered the County's EIR and found no unmitigated adverse environmental impacts related to the alternate waste discharge disposal methods authorized by the permit.

At the Trial Court

Following the County's and City's approvals, two suits arose alleging CEQA violations. In the first action, Petitioners We Advocate Through Environmental Review (WATER) and the Winnehem Wintu Tribe alleged the County's environmental review of the facility was inadequate. In the second suit (the opinion at bar), Petitioners alleged the City, functioning as a responsible agency, violated CEQA by issuing the wastewater permit in reliance on the County's improper environmental review of the facility. Petitioners specifically alleged the City failed to comply with its obligations as a responsible agency because it: 1) failed to make requisite CEQA findings under Public Resources Code § 21081 before issuing the permit; 2) should have adopted the EIR's mitigation measures to address some of the facility's impacts; and 3) should have performed additional environmental review after it made late revisions to

the permit. Petitioners also sought judicial notice of two letters that were inadvertently left out of the administrative record.

The trial court rejected each of petitioners' claims. As to the first, the trial court held that a responsible agency is not required to make written findings if it determines there are no unmitigated significant impacts to the environment. As to the second, the court found that the City did adopt mitigation measures by way of permit conditions for those parts of the Project over which the City had authority. As to petitioners' third claim, the court concluded the City did not need to perform additional environmental review because the City had determined the final permit revision would not add significant new impacts. Finally, the court rejected petitioners' request for judicial notice because the documents were not helpful to rendering a decision and contained confidential information.

Petitioners timely appealed and re-raised the same four claims.

The Court of Appeal's Decision

The Court of Appeal partially reversed the trial court's denial of the entire petition, finding that the City should have made certain findings under CEQA before issuing the wastewater permit. Because the County found several potentially significant impacts related to the permit, the City needed to make findings for each significant impact, accompanied by a brief explanation and rationale. The court denied petitioners' three other remaining claims.

The Trial Court did not Commit Reversible Error in Denying Petitioners' Request for Judicial Notice

Petitioners claimed the trial court erred in denying their request for judicial notice of two comment letters that were inadvertently omitted from the administrative record. Petitioners requested judicial notice of those letters, arguing their inclusion was required under Public Resources Code § 21167.6, subdivision (e)(6).

The appellate court held that, even if the letters should have been included in the record, petitioners failed to establish that their omission was prejudicial. The court noted that petitioners did not even dispute the City's claim that the letters were irrelevant to disposing the issues at bar. For these reasons, the court declined to find that the trial court's denial of petitioners' request constituted reversible error.

The City, as Responsible Agency, Failed to Make Requisite CEQA Findings

Petitioners argued that the City, as responsible agency, failed to comply with basic CEQA requirements. The Third District agreed. Under CEQA, a lead agency is charged with considering all environmental impacts of a project before approving it. A responsible agency, however, need only consider the direct or indirect environmental effects of those parts of the project that it decides to carry out or approve. (Pub. Resources Code, § 21002.1, subd. (d).) Although distinct in this regard, both agencies must make certain findings before approving a project for which an EIR identifies significant effects. Those findings must briefly explain whether the impact had been mitigated or avoided, whether the measures necessary for mitigation were within the responsibility and jurisdiction of another agency, or whether there were specific economic, legal, or other considerations that would make mitigation infeasible. (Pub. Resources Code, § 21081; CEQA Guidelines, § 15091.)

Here, the EIR identified several potentially significant impacts associated with Crystal Geyser's proposed discharge of wastewater into the City's sewer system. For example, the EIR noted the Project's discharge could potentially exceed the capacity of the City's wastewater treatment plant. The EIR also noted that the Project may require installation of additional pipelines to discharge wastewater, which could result in significant impacts to fishery resources, endangered species, and cultural resources. Nevertheless, the City's resolution approving the permit only stated that it had:

> . . .considered the [EIR] prepared by the County…for the [Project] and [found] no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods.

The court reasoned that the City's "blanket finding"—*i.e.*, that a project includes "no unmitigated adverse environmental impacts"—did not satisfy CEQA's findings requirement. Instead, the City was required to make at least one of the findings listed under Public Resources Code § 21081 for each sig-

nificant impact identified in the EIR. This omission was compounded by the City's failure to acknowledge that the EIR identified several potentially significant effects associated with portions of the Project in the City's jurisdiction. Finally, the City did not provide the requisite "'brief explanation of the rationale' for its nonexistent findings."

These shortcomings amounted to a procedural violation—one that could not be salvaged by the trial court's reasoning. The appellate court was not persuaded by the rationale that an agency need only make findings when the EIR identifies a significant environmental impact that will not be mitigated. To the contrary, an agency simply cannot forego written findings when an EIR explains that a project will have significant effects but adopted mitigation measures would reduce those effects to insignificant levels. Rather, such a determination simply forms the basis for a finding that "changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects." Because the City failed to provide anything along these lines, the appellate court held that the City violated CEQA's procedural requirements.

Petitioners Failed to Establish the City was Required to Adopt an MMRP

Petitioners claimed the City should have adopted the EIR's sewer improvement mitigation measures as part of a Mitigation, Monitoring, and Reporting Plan (MMRP) because the County, as the lead monitoring agency, lacked a clear ability to enforce most measures. Petitioners reasoned that the County's enforcement authority was conditioned on building the plant's caretaker residence—a structure petitioners deemed "unnecessary." The court rejected petitioners' claim because petitioners provided no legal or evidentiary authority to support their assertion that the residence was "unnecessary" and thus deprived the County of its mitigation enforcement authority.

On Remand, the City Should Consider Whether Project Changes Fall Within Another Agency's Jurisdiction

Petitioners further contended the City should have at least found that the sewer improvement mitigation measures would be within the responsibility of another agency. The court generally agreed and explained that should the City decide to re-approve the Project on remand, it will need to consider whether the EIR's mitigation measures fall within another agency's jurisdiction. While the Court of Appeal conceded that the parties may dispute what transpires on remand, it would be premature for the trial court to entertain those issues at this stage. Instead, the trial court simply noted that the City may disclaim the responsibility to mitigate environmental effects only when the other agency said to have responsibility "has exclusive responsibility."

Petitioners Failed to Carry Their Burden of Establishing that the City was Required to Conduct Additional Environmental Review

Lastly, petitioners argued that the City should have performed additional environmental review and provided an opportunity for public comment before approving the revised version of the wastewater permit. Of the permit's three additions—condensate, boiler blowdown water, and cooling tower blowdown water—petitioners alleged the latter two would contain anti-scaling chemicals that were admittedly toxic and should not be discharged into lakes, streams, or public waters. Because this information was disclosed in the chemicals' safety data sheets, petitioners contended the City should have disclosed and adequately reviewed those changes before approving the permit. The City refuted this, noting that the EIR analyzed earlier but equivalent versions of the cited chemicals, and found no detrimental effects would occur.

The court rejected petitioners' overstated characterization of the facts and misapplication of the law. Though petitioners' concern regarding the lack of CEQA findings was relevant to their earlier claims, it carried no relevance to this issue. Moreover, the merits of the EIR were not at issue here—and to the extent petitioners sought to challenge the EIR's adequacy, this suit against the City was not the appropriate forum for doing so. Rather, lawsuits brought against a responsible agency are limited to those actions the agency took in approving the project; they do not extend to the adequacy of the lead agency's CEQA review.

Conclusion and Implications

The Third District of Appeal's relatively brief opinion offers a helpful reminder to agencies that

serve in lead and responsible capacities. As the court reiterated: where an EIR identifies a potentially significant environmental effect—regardless of whether that effect will be mitigated to less-than-significant levels—responsible agencies must make at least one of the CEQA findings prescribed by Public Resources Code § 21081. Those findings must also include a brief explanation and rationale for the agency's determination—"blanket findings" may be insufficient. Responsible and lead agencies are thus encouraged to communicate about the scope and extent of any impacts that fall within their respective jurisdictions to ensure both sets of findings adequately encompass any and all identified effects.

The Third District's opinion is available at: https://www.courts.ca.gov/opinions/documents/C091012.PDF.
(Bridget McDonald)

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