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CALIFORNIA WATER™
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RECENT CALIFORNIA DECISIONS

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CALIFORNIA WATER NEWS

CALIFORNIA SET TO OPEN NEW STATE PARK FOR FIRST TIME IN OVER A DECADE AT THE CONFLUENCE OF THE TUOLUMNE AND SAN JOAQUIN RIVERS

Thanks to the hard work of the Chico-based conservation group River Partners, Californians in the San Joaquin Valley and its surrounding areas will soon be able to enjoy the great outdoors in a new, uniquely situated California State Park. The new site will be located at the Dos Rios Ranch property, also referred to as "Twin Rivers," and sits along the confluence of the Tuolumne and San Joaquin rivers, about ten miles west of downtown Modesto. The 2,500-acre property was once used for dairy pastures and almond orchards, but with the efforts of River Partners to restore the area to its former glory as a riparian woodland, the Dos Rios Ranch property is now set to join the California State Parks system as California's 280th state park. Once the deal has been finalized between River Partners and the state, Dos Rios Ranch will be the first new state park to open since Fort Ord Dunes opened outside Monterey in 2009.

Ten-Years in the Making

Since acquiring the property back in 2012, River Partners and its partners—an alliance of dedicated public, private, and nonprofit organizations—have put in substantial efforts towards restoring the property.

A major part of the Dos Rios Ranch project involved restoring the property's riparian woodland by planting native trees, brush, and grass on fields that used to grow dairy feed and other crops. More specifically, the partnership's Dos Rios Ranch project has culminated in the planting of more than 350,000 native trees and vegetation along nearly eight miles of riparian corridors around the confluence of the San Joaquin and Tuolumne Rivers.

Another key component of the Dos Rios Ranch project was the restoration of former flood plains that had been blocked by a system of flood-control berms. Inside the Dos Rios Ranch property, there used to be an area roughly 1,500 acres in size that served as a floodplain for the nearby Tuolumne River. During the property's development, however, a levee system was built so that farmers could grow crops there and the crops would be protected from floods. By knocking down the flood-control berms along the rivers, the project has been able to reconnect the historic floodplains on the property with the Tuolumne River, allowing the floodwater spread out, slow down, and sink underground.

While the flood control benefits of the project are obvious, another hugely important benefit is how the restored floodplains will help recharge local aquifers in the critically-overdrafted Delta-Mendota groundwater basin as well as the Modesto and Turlock groundwater basins of the San Joaquin Valley—regions that often rely on groundwater sources for domestic and agricultural use during dry years.

In addition to these major benefits, River Partners has also reported great success in that the restoration of riparian habitat throughout the property has reverted the site to a thriving ecosystem for many species including brush rabbits, woodrats, hawks, Central Valley chinook salmon, steelhead trout, yellow warblers, sandhill cranes, and neotropical migratory songbirds.

This effort was made possible thanks to the cooperation of both public and private funding partners at the local, state, and national levels. In total, more than $45 million in funding was secured for the Dos Rios Ranch project, including funding from the California Department of Fish and Wildlife, Department of Water Resources, and Natural Resources Agency, the National Fish and Wildlife Foundation, the Natural Resources Conservation Service, Pacific Gas & Electric, the San Francisco Public Utilities Commission, Stanislaus County's Public Works Department, the Tuolumne River Trust, the Wildlife Conservation Board, the U.S. Bureau of Reclamation and Fish and Wildlife Service, and even received funding from New Belgium Brewing and Sierra Nevada Brewing.

What's In Store for the Park's Future

While the state had allocated $5 million to be put towards the purchase price of the park, River Partners has offered instead to donate the property to the state, rather than selling it, so that the earmarked funds for the park can be used for amenities. As of now, the state expects the new park to open sometime in 2023.

Before the park's opening, however, the state plans on engaging the public for input on what the vision for the park should be. For starters, the state has already expressed that the park will be named through a participatory process with the public and the California State Parks Commission. Additionally, the state has also noted that it will decide what services the park will offer in collaboration with the general public. Currently, it looks like Dos Rios is likely to see walking trails, picnic areas, restrooms and other basic services as well as opportunities for swimming and fishing on the San Joaquin and Tuolumne Rivers. The State Parks Department has expressed optimism that these features could be established within five years of the park's opening, with campgrounds being another possibility sometime in the future thereafter.

Conclusion and Implications

Despite the unique setting of the new state park at the confluence of two major rivers, the property is located just twenty minutes west of downtown Modesto, serving an area that has been in need of new parks as the San Joaquin Valley has the fewest state parks and least open space per capita in the entire state. Other notable areas nearby include Stockton and Pleasanton, both about half an hour from the new park, and even residents of San Jose and San Francisco will be able to reach the park in just over an hour.

The new park at Dos Rios Ranch presents the state with a diverse array of benefits, ranging from habitat restoration and flood control to increased drought resilience and even benefits as simple, yet vitally important, as increased outdoor space for recreation. The work put in by River Partners and the many cooperation organizations may serve as model moving forward for how multi-benefit projects can serve Californians' needs while simultaneously protecting the environmental attributes.
(Wesley A. Miliband, Kristopher T. Strouse)

SAN DIEGO COUNTY WATER AUTHORITY RECEIVES PATENT FOR NEW PIPELINE INSPECTION SYSTEM

Utility pipelines are present all throughout the state and have historically been inspected physically by a person. These types of inspections, however, are costly, time consuming, and can present safety issues depending on the terrain through which the pipelines run. Now, in an innovative move to help make the inspection of such utility pipelines more efficient, cost effective, and safer, the San Diego County Water Authority (Water Authority) has been awarded a utility patent for a new autonomous pipeline inspection system.

The Water Authority operates and maintains a vast system of water conveyance facilities that includes about 310 miles of pipelines, capable of delivering water in excess of 900 million gallons per day. The Water Authority's water conveyance system also includes roughly 1,600 aqueduct-related structures and 100 metering and flow control facilities, a water treatment plant, hydroelectric facilities, pump stations, flow regulating structures, and water storage reservoirs.

The Water Authority particularly prides itself in its Asset Management Program, which includes proactive searches for any weaknesses present in pipelines that are intended to identify any potential issues before they become larger, more costly problems. In furtherance of this program, the Water Authority's Operations and Maintenance Manager, Martin Coghill, designed the newly patented inspection system to help save time, reduce costs and improve safety during inspections.

The Pipeline Inspection System

The Water Authority applied for the patent on June 13, 2019, and for almost three years the Water Authority worked towards completing the complex

process before the U.S. Patent and Trademark Office finally awarded the patent on April 5, 2022. The patented pipeline inspection system, which comprises a body, cameras, support members and light sources to capture high-resolution images of pipeline walls, was primarily designed in response to the Water Authority's need to improve safety while inspecting steeper portions of its aqueduct.

According to the patent document:

> . . .the pipeline inspection may comprise a body, one or more cameras, one or more support members, one or more light sources, and/or other components.

The patent also includes similar but varying iterations of this description.

How the System Functions

More specifically, the patent describes how the system comes together to function. The cameras are first attached to the central body of the system and directed in such a way so as to capture imaging information relating to the interior surfaces of the pipe. The support members extend outwards from the body, similarly to how spokes on a wheel extend outward from the hub, and contact the inner surface of the pipe with wheels at the end to facilitate movement through the pipe and support the main body. Lastly, the light sources are positioned along the outer ends of the support members in a way that adequately illuminates the interior surface of the pipe. According to the patent documents, this body and spoke system utilizes a "leading" end—comprising the body outfitted with cameras—and a "trailing" end—utilized for added support and oriented in a way that ends up looking like a vehicle axle designed to move through the pipe long-ways, or parallel, to the pipe.

Ultimately, the system comes together to create a dual-bodied vehicle of sorts, outfitted with cameras and lights, that is capable of moving through pipes four to nine feet in diameter and capturing images of a pipe's interior surfaces. The system allows for high-resolution imaging of much higher quality than traditional closed-circuit television system, and the system's unique design keeps the cameras properly oriented while moving through the pipe. The camera array also provides operators with the ability to stitch the imaging files together and create a 360-degree virtual view of the interior sections of the pipe.

Conclusion and Implications

California is home to a monolithic network of utility pipelines that help deliver vital resources to homes and business all across the state. As these networks grow larger and larger, it will only become more difficult to timely and efficiently maintain the many thousands of miles of pipelines that weave their way throughout the state. Innovative developments like San Diego County Water Authority's newly patented pipeline inspection system are thus becoming all the more necessary in maintaining the infrastructure required to fuel Californians while keeping costs to ratepayers reasonable. Systems like this help utilities like the Water Authority stay on top of the problems associated with aging infrastructure and it is always refreshing to see new ideas brought to the table on how we can more efficiently manage our state's water supply systems.

(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

U.S. SENATORS INTRODUCE FINANCIAL ASSISTANCE BILL TO PROVIDE ADDITIONAL FUNDING FOR WATER PROJECTS IN THE WEST

In May 2022, U.S. Senators Feinstein (D-CA), Kelly (D-AZ), and Sinema (D-AZ) introduced Senate Bill 4231, the Support to Rehydrate the Environment, Agriculture, and Municipalities Act or *STREAM Act*. The bill's purpose is to increase water supply and update water infrastructure in the West by providing funding for new water projects.

Background

California and the West have been dealing with years of unprecedented drought. The *STREAM Act* attempts to address the issues of historic drought, climate change, and aging water infrastructure by providing financial assistance to new water projects that improve water resiliency in the West. (*See,* Press Release, Dianne Feinstein, United States Senator for California, Feinstein, Kelly, Sinema Introduce Bill to Increase, Modernize Water Supply (May 18, 2022), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=1783E95E-F02C-4CFC-9E81-AEFF7AAAC3AF#:~:text=yesterday%20introduced%20S.,California%20and%20throughout%20the%20West.

In introducing the bill, Senator Feinstein expressed concern about the ongoing drought by stating that "… the past two years have painfully demonstrated, severe and prolonged drought exacerbated by climate change is the stark reality for the West." (*Id.*) She also said:

> . . .if we don't take action now to improve our drought resilience, it's only going to get worse. We need an 'all-of-the-above' strategy to meet this challenge, including increasing our water supply, incentivizing projects that provide environmental benefits and drinking water for disadvantaged communities, and investing in environmental restoration efforts. (*Id.*)

The introduction of the *STREAM Act* is also part of an ongoing effort to provide financing for future infrastructure projects in the West. Senator Kelly said:

> As Arizona continues to navigate this historic drought, it's more important than ever to build infrastructure that promotes a secure water future. Combined with the investments made in the bipartisan infrastructure law, this legislation will help Arizona and the West expand drought resiliency projects, increase groundwater storage, and better manage and conserve our water resources. (*Id.*)

The Bill's Proposed Funding and Appropriations

The *STREAM Act* provides funding for water storage, water recycling, and water desalination projects. (Support to Rehydrate the Environment, Agriculture and Municipalities Act, S 4231, 117th Cong. (2022).) The bill also provides financial incentives for storage and conveyance projects that enhance environmental benefits and expand drinking water access to disadvantaged communities.

The *STREAM Act's* largest appropriation would provide $750 million for the Secretary of the Interior to spend on eligible water storage and conveyance projects from 2024 to 2028. Section 103 of the bill establishes a competitive grant program for non-federal projects. Entities eligible to obtain grant funding include any state, political subdivision of a state, public agency, Indian tribe, water users' association, agency established by an interstate compact, and an agency established under a state's joint exercise of powers law.

To qualify for grant funds, a project proposed by an eligible entity must involve either a surface or groundwater storage project, a facility that conveys water to or from surface or groundwater storage, or a natural water retention and release project as defined by the proposed law. Other requirements include that the federal cost-share cannot exceed $250 million,

the project must be in a U.S. Bureau of Reclamation state, the eligible entity must construct, operate, and maintain the project, and there must be a federal benefit.

A federal benefit is defined as public benefits provided directly by a project. These public benefits can be fish and wildlife benefits that provide excess water to environmental mitigation or compliance efforts, flood control benefits, recreational benefits, or water quality benefits.

The Secretary of the Interior may provide a grant to an eligible entity for an eligible project under the program "for the study of the eligible project… or for the construction of a non-federal storage project that is not a natural water retention project." (*Id.*) However, for the Secretary to provide a grant for the construction of a non-federal storage project, the eligible entity must conduct a feasibility study, and the Secretary must concur that the eligible project is technically and financially feasible, provides a federal benefit, and is consistent with applicable federal and state laws. The Secretary must also determine that the eligible entity has sufficient non-federal funding to complete the project and is financially solvent. Lastly, the governor, a member of the cabinet of the governor, or the head of a department in a Bureau of Reclamation state where the proposed project is located must support the project or federal funding of the project.

Prioritizing Projects

The *STREAM Act* would prioritize funding projects that meet two or more of the following criteria: 1) provides multiples benefits, such as water reliability for states and communities that are frequently drought-stricken, fish and wildlife benefits, and water quality improvements; 2) reduces impacts on environmental resources from water projects owned and operated by federal or state agencies; 3) advances water management plans across a multi-state area; 4) is collaboratively developed or supported by multiple stakeholders; 5) the project is within a watershed where there is a comprehensive watershed management plan that enhances the resilience of ecosystems, agricultural operations, and communities.

Conclusion and Implications

Senator Feinstein introduced the STREAM Act in the Senate on May 17, 2022, and the bill was referred to the Senate Committee on Energy and Natural Resources. On May 25, 2022, before the Senate Committee on Energy and Natural Resources Subcommittee on Water and Power, Senator Feinstein testified in support of the bill and introduced letters supporting the bill. Supporters of the bill in its current form include the Association of California Water Agencies and the Nature Conservancy. The Committee of Energy and Natural Resources will consider the bill in its current form and make changes it deems necessary before deciding whether to release the bill to the Senate floor. To track updates and changes to the bill, *see:* https://www.congress.gov/bill/117th-congress/senate-bill/4231.

(Jake Voorhees; Meredith E. Nikkel)

CALIFORNIA SENATE BUDGET PROPOSAL INCLUDES $2 BILLION TO ACQUIRE AND MANAGE WATER RIGHTS AND SUPPLIES

The California Senate Committee on Budget and Fiscal Review recently considered the proposed Senate Climate Budget Plan (Climate Budget). Included in the Climate Budget is a proposal to allocate $2 billion for projects intended to reduce water demand, mitigate the impacts of drought, and enhance stream and river conditions. The primary implementing program would be the use of funds for the state to acquire senior water rights from willing sellers.

Background

California—like much of the American West—is again experiencing significant drought conditions. Drought inevitably leads to stress on water systems, and often most acutely on water users who hold lowest priority water rights and on the environment. The Climate Budget proposal asserts that:

> . . .[t]he state needs to recognize that climate change has permanently altered our water sup-

ply [and that] diversion of flow for agricultural and urban uses has outstripped what the ecosystem can handle.

In light of these premises, the Climate Budget proposes a new approach to the state's water management beyond the current regulation of surface water and groundwater use: purchase of rights by the state.

Senate Climate Plan Aims to Reduce Water Demand

The Climate Budget proposes to allocate $1.5 billion to a new California Water Trust to acquire water rights from senior rights holders, with an emphasis on rights that can be permanently acquired through the purchase of land. These lands would be converted to low-water uses to advance a goal of reducing water demand. The Climate Budget also contemplates purchasing easements to convert lands to low-water uses or purchasing water rights outright.

Further, the Climate Budget proposes to allocate $500 million to reduce groundwater demand by acquiring and repurposing land. These funds would be in addition to the existing Department of Conservation Multibenefit Land Repurposing Program which focuses on groundwater sustainability by reducing use, retiring land from irrigated agriculture and providing wildlife habitat.

Purchased Water Rights to Be Repurposed

Water rights acquired by the state would be directed to other activities including additional flows to enhance habitat, floodplain restoration, sustainable groundwater management, groundwater recharge, and creation of wetland habitat. These activities would initially occur in coastal watersheds, the Sacramento-San Joaquin Delta, and in the watersheds of the Sacramento and San Joaquin rivers and their tributaries.

The Climate Budget also contemplates acquiring clean drinking water for disadvantaged communities. A portion of the funds would also go towards mitigating the impacts of the program on local communities, an acknowledgement that repurposing the use of water previously used by local water rights holders will impact jobs and local economies.

Finally, a portion of the funding would go to monitoring stream flows and improving water management science and agency coordination.

Responses

The proposal has received mixed-reactions. Some view voluntary sales of water rights as a way to avoid conflict and expedite necessary climate action, as opposed to taking a route of contentious regulations which often become mired in years of litigation. They believe there will be sufficient interest by farmers, for example, to voluntarily sell their rights similar to active markets in which farmers sell rights to water districts and other agencies.

Others believe this aspect of the Climate Budget is unlikely to pass. They criticize the current draft for lacking specificity about the process by which the state would acquire water rights. The Climate Budget focuses primarily on water rights tied to land, but due to the complexities of California's hybrid system of water rights, critics assert that many water rights cannot necessarily be acquired in that way.

Still others are skeptical of how "voluntary" the purchase of water rights would be. They assert that recent implementation of the Sustainable Groundwater Management Act (SGMA) has increased uncertainty around permissible groundwater usage and may cause landowners to perceive they have no option but to sell. Skeptics of the proposal also emphasize the importance of California agriculture to the state, to the nation, and to the world, and question whether the goals of the Climate Budget would justify losses in production in one of the world's primary food-producing regions.

Conclusion and Implications

The Climate Budget's proposal for the state to purchase senior water rights comes at a time when California has a budget surplus and is looking for ways to advance certain water management goals by means other than prescriptive regulation. At the time of this writing, the Legislature's overall budget proposal—viewed by most as a tentative first draft—is under review by the Governor, so it remains to be seen whether the Climate Budget will be adopted. (Jaclyn Kawagoe, Derek Hoffman)

CALIFORNIA STATE SENATORS REQUEST FEDERAL PROBE INTO HEDGE FUNDS' PURCHASE OF WATER RIGHTS

California State Senators Melissa Hurtado and Dave Cortese recently sent a letter to U.S. Attorney General Merrick Garland requesting the United States Department of Justice (DOJ) initiate an investigation into what they describe as potential anti-competitive practices involving purchasing water rights and potential "drought profiteering" in the West.

Background

Senators Hurtado and Cortese seek to draw attention to a trending increase in acquisitions of water rights in Western States by hedge funds during extreme drought conditions. While the Senators stop short of calling for a nationalization of water policy, they urge the DOJ to evaluate and investigate these patterns under antitrust laws.

Allegations

While water rights and water law are traditionally considered matters of state law, the Senators assert that water is now often traded as an interstate commodity, bringing it into federal jurisdiction. In light of increased hedge fund participation in water trade, the Senators claim that water rights in the West are being consolidated "in the hands of the few" and that do not:

> . . .honor beneficial use doctrines which have historically tied water use to riparian and overlying property owners here in the West.

The Senators assert that market-based control of water rights could a potentially devastate local communities who rely on the exercise of those water rights for daily needs.

Concerns Over Water Speculation

The Senators point to the most recent drought as a driving force behind increased private investment in water rights in the West, citing that certain farmers were willing to pay up to ten times the average price for water. The Senators argue this fueled interest and speculation in water as a profitable commodity. They indicate that hedge funds have acquired significant amounts of land and water rights in Western States since 2015 and express concern that institutional investors could potentially refuse to supply these resources as they increase in value during a crisis.

Other Implications

The Senators also raise concerns over the state's ability to track the ultimate purchasers of water rights. They argue that through levels of subsidiaries, institutional investors may have the ability to disguise who the ultimate purchaser of the water is, and for what purpose the water will be used. Specifically, they are concerned over ongoing extensive theft of water to support illegal marijuana operations. The Senators point to recent investigations that have identified complex illicit marijuana growing operations involving the purchase and leasing of land and water rights.

Proponents of Market-Based Solutions

By contrast, many institutional investors assert that participation in water markets and the development of market-based solutions can improve water supply reliability and result in better distribution of water throughout different regions. Proponents assert that where water is underpriced it will be overused and that a market-based system would discourage wasteful and low-value water uses. They contend that these markets provide a fast and flexible way to distribute water to where it is most needed—a scenario that has not always been the result under current water management regimes.

Proposed Solutions

In addition to their request to open an investigation, the Senators assert that a tool similar to the Farmer Fairness program could be helpful to combat what they allege to be "monopolistic" practices. The Farmer Fairness program is a joint program between the DOJ's Antitrust Division and the U.S. Department of Agriculture (USDA) to combat anti-competitive practices in the livestock business. The program is designed to promote fair and competitive livestock markets by "examining the financial integrity, and the

trade and competitive practices of regulated entities." Complaints of anti-competitive practices submitted to the Farmer Fairness program are investigated and, if warranted, prosecuted.

Conclusion and Implications

As of the writing of this article, there has been no indication whether the DOJ will act on the Senators' request. As drought conditions evolve and possibly worsen, water markets can provide important tools to manage invaluable water supplies. If supplies become further constrained, questions surrounding ownership and trading of water rights may receive increased scrutiny in response to the Senators' statements. Proponents and participants in water markets should also be prepared to clearly voice their perspectives. For more information, *see*: https://sd14.senate.ca.gov/sites/sd14.senate.ca.gov/files/pdf/request%20to%20AG%20to%20%20investigate%20anti-competitive%20practices.pdf.
(Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

CALIFORNIA TRIBES AND ENVIRONMENTAL JUSTICE ORGANIZATIONS SUBMIT PETITION TO THE STATE WATER BOARD FOR RULEMAKING REVIEW OF BAY-DELTA WATER QUALITY CONTROL PLAN

On May 24, 2022, a coalition of California tribes and Delta-based environmental justice organizations, including Save California Salmon, Restore the Delta, Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and Little Manila Rising (collectively: Coalition), submitted a Petition for Rulemaking Review (Petition) to the State Water Resources Control Board (State Water Board). The Coalition's Petition seeks that the State Water Board update and enforce the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Estuary (Bay-Delta Plan).

Background

The State Water Board is responsible for implementing the federal Clean Water Act and the California Porter-Cologne Water Quality Act. Pursuant to this authority, the State Water Board adopted the first Bay-Delta Plan in 1978. The Bay-Delta Plan designates beneficial uses for the Bay-Delta, establishes water quality objectives for those uses, and sets forth an implementation program to achieve those objectives. As part of the State Water Board's duties under Porter Cologne, it must periodically review the basin plan. (Wat. Code § 13240.) The State Water Board has conducted three full reviews of the Bay-Delta Plan since its initial adoption—1991, 1995, and 2006. In the 1995 version of the Bay-Delta Plan, the board stated its intent that water quality standards be implemented "by assigning responsibilities to water rights holders because the factors to be controlled are primarily related to flows and diversions." (*Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (May 1995) State Water Resources Control Board, p. 4.)

As a result of the 1995 Bay-Delta Plan came the State Water Board's Water Rights Decision 1641, implementing water quality objectives by conditioning water rights within the Bay-Delta. Primary responsibility for meeting the Bay-Delta Plan's flow requirements fell upon the United States Bureau of Reclamation and the California Department of Water Resources' water rights permits and licenses for the Federal Central Valley Project and State Water Project, respectively.

The State Water Board revised the Bay-Delta Plan in 2006, and then began the review process again in 2008. In undertaking this most recent review, the State Water Board bifurcated its process. First, the State Water Board would review and update the salinity and flow objectives for the southern Delta and San Joaquin River in Phase I. Then, in Phase II, the State Water Board would review and update standards to protect native fish and wildlife in the Sacramento River, Delta, and associated tributaries. The State Water Board adopted amendments relevant to the Phase I update of the Bay-Delta Plan in December, 2018. (*Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Dec. 12, 2018) State Water Resources Control Board, Resolution 2018-0059.)

Regarding Phase II, the State Water Board indicated in its December 8, 2021 board meeting it:

> . . .is preparing to move forward with updating and implementing the Bay-Delta Plan . . . and completing the Sacramento/Delta update to the Bay-Delta Plan, including consideration of voluntary agreements." (*Board Meeting Agenda Item 13* (Dec. 8, 2021) State Water Resources Control Board.)

Petition for Rulemaking

The Coalition brought the Petition under the Petition Clause of the First Amendment to the U.S. Constitution, Article I, § 3 of the California Constitution, California Government Code § 11340.6,

and California Water Code § 13320. According to the Coalition, the State Water Board is not meeting its statutory mandate, under the federal Clean Water Act and State Porter-Cologne, to conduct triennial reviews of the Bay-Delta Plan; and further, the Bay-Delta Plan's current water quality objectives are insufficient to protect the Plan's beneficial uses. The Coalition also alleges the voluntary agreements will not sufficiently protect beneficial uses, and instead requests that the State Water Board pursue an alternative means to update and implement the Bay-Delta Plan. Specifically, the Petition requests that the State Water Board:

> (1) immediately undertake and timely complete review of water quality standards in the Bay-Delta Plan;
>
> (2) engage in meaningful government-to-government consultation with affected tribes and center opportunities for meaningful public participation by other impacted Delta communities in the review and revision process;
>
> (3) revise beneficial uses in the Bay-Delta Plan to incorporate tribal beneficial uses and non-tribal subsistence fishing beneficial uses;
>
> (4) issue new and revised water quality standards adequate to protect the full range of beneficial uses and public trust interests; and
>
> (5) initiate a rulemaking to regulate all recognized rights to Bay-Delta water—including pre-1914 appropriative rights—and limit water diversions and exports to levels consistent with the revised water quality standards.
> (Petition, p. 56.)

Conclusion and Implications

At a press conference held on May 24, 2022, the Coalition indicated they filed the Petition order to exhaust their legal remedies. Applicable law states the State Water Board "shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of [the APA]." (Gov. Code, § 11340.7.) The State Water Board has not yet responded publically to the Petition at the time of this writing.
(Nico Chapman, Meredith Nikkel)

CALIFORNIA COASTAL COMMISSION DENIES PERMIT TO BUILD DESALINATION PLANT IN HUNTINGTON BEACH DUE TO ENVIRONMENTAL RISKS

At the May 2022 meeting of the California Coastal Commission, the Commission denied Poseidon Water's application for a Coastal Development Permit (CDP) to build and operate a desalination plant in Huntington Beach (City), California. The proposed project would draw in up to 106.7 million gallons per day of seawater and produce up to 50 mgd of potable water, with the remaining high-salinity brine discharged back into the ocean. Commission staff found there were significant issues related to protecting marine life, water quality, environmentally sensitive habitat areas, naturally occurring hazards, and environmental justice considerations. The Commission followed staff's recommendation and denied Poseidon the permit, officially rejecting the project.

Background

Poseidon first proposed to build a desalination plant in both Huntington Beach and Carlsbad in 1998. The Carlsbad desalination plant was ultimately approved and began operating in 2016. The City of Huntington Beach (City) ultimately approved Poseidon's Coastal Development Permit in 2010, which was appealed to the Commission. The Commission heard the appeal in 2013, and staff recommended approving the project with conditions, including conditions to mitigate the project's impact on adjacent wetlands as well as address seismic, flooding, and other hazards. However, Poseidon withdrew its application before the vote for further study. Since

Poseidon withdrew its application, the appeal has been held in abeyance as Poseidon obtained permits from the State Lands Commission and the Regional Water Quality Control Board (Regional Board).

Poseidon's proposed desalination facility would have drawn in up to 106.7 million gallons per day (mgd) of seawater and produce up to 50 mgd of potable water, with the remaining 57 mgd of high-salinity brine discharged back into the ocean. Poseidon planned to operate the facility for 50-60 years. The facility would have operated on 12 acres in the 54-acre site of the Huntington Beach Generating Station, a power plant located in the City. The facility would be nestled in a low-lying area of Huntington Beach in a seismically active region within the Newport-Inglewood Fault Zone. In order to construct the facility, Poseidon would have needed to demolish and remove the infrastructure no longer used by the power plant, clean up soil and groundwater contamination, and construct a water supply reservoir in addition to the desalination facility in order to provide an emergency water supply.

After 2013—the last time the Commission reviewed Poseidon's proposed desalination facility—the State Water Resources Control Board amended its water quality control plan for marine waters (Ocean Plan), which included limitations on the site, design, and technology available for use by desalination facilities, as well requiring new mitigation requirements to protect marine life. In response to those changed circumstances, Poseidon revised its proposal to address the amended Ocean Plan and the City's Local Coastal Program (LCP)—a basic planning tool used by the City, in partnership with the Commission, to guide development in a coastal zone.

Issues Impacting the Denial

In denying Poseidon's proposed desalination facility, the Commission upheld staff's concerns with the project as defined by three main categories: 1) conflicts with the Coastal Act (enforced by the Commission) and LCP; 2) potential harm to marine life and water; and 3) extent of the burden on environmental justice communities.

LCP and Coastal Act Issues

For Coastal Act and LCP issues, staff identified certain issues related to the proposed location of the project, where new research estimated an increase in the severity and frequency of coastal hazard events. This research is reflected in the current Coastal Act and LCP policies regarding sea level-rise adaptation and risk-avoidance planning. Staff concluded that Poseidon's chosen location has

> . . .little to no adaptive capacity to address increased hazards. . .[and could]. . .limit the City's ability to upgrade the adjacent flood control panel or otherwise adapt this portion of the City to rising sea levels.

Thus, staff found the project conflicted with the LCP and Coastal Act.

Marine Life and Water Quality

Second, staff made findings that Poseidon's proposed facility would harm marine life and water quality. Staff found that the discharge of approximately 57 million gallons per day of high-salinity brine would need to be diffused so as not to concentrate and create a "dead zone," yet the diffusion process discharges brine with enough velocity to kill marine life in about 100 billion gallons of seawater annually. The Regional Water Quality Control Board estimated the impact to marine life would be equal to a loss of productivity from 423 acres of nearshore and estuarine waters each year. Commission staff noted that such substantial losses to the marine ecosystem would require significant mitigation but determined that Poseidon's proposed mitigation was substantially less than needed to conform to Coastal Act provisions. Staff further found that, because most of the proposed mitigation would not be implemented before the facility starts operating, a mitigation deficit would be created that could to grow to more than four square miles of lost ocean productivity within the first ten or 15 years of facility operations. Staff further recommended against imposing additional mitigation measures as inappropriate, as the scale of the project's impact would be so large that few mitigation options existed to offset the impacts of the project.

Additionally, staff found that the planning, permitting, and construction of the large-scale restoration projects necessary to mitigate project impacts would add complexity and time to the overall project timeline. Staff found the scale of risk of harm to marine life and water quality needed a "well defined

and thoroughly evaluated mitigation in place" that was reasonably timed with the start of the facility's operations. Staff concluded that Poseidon's proposed mitigations did not meet that standard.

Inconsistency with Environmental Justice Policy

Finally, staff determined that Poseidon's proposed facility was inconsistent with the Commission's Environmental Justice Policy. Adopted in March 2019, the Environmental Justice Policy created a framework to include underserved communities, including the households that have often been burdened by industrial development. In addition to the environmental risks of the proposed facility's location, there are environmental justice issues raised by the desalination facility being built in an area with concentrated industrial development. Currently, the site was proximate to "a nearby wastewater treatment plant, power plant, partially remediated Superfund site, former oil tank farm, and former dump." Moreover, staff determined that the costs for Poseidon's water would be higher than other current and planned sources of water. Staff highlighted multiple studies that concluded Poseidon's water would result in higher system rates. Although Poseidon had not secured a buyer and therefore it was unknown to which communities in the Orange County Water District (OCWD) the water would be delivered, staff found that such rate hikes would disproportionately impact low-income residents in OCWD's service area. Therefore, staff found such a project to raise environmental justice issues.

The Option to Override Issues with the Coastal Act and LCP Provisions

Commission staff noted that the Commission could approve a coastal dependent industrial facility despite its purported inconsistencies with Coastal Act and LCP provisions. Coastal Act § 30260 puts forth a three-part test to determine if the Commission should exercise its option to override the issues with LCP or Coastal Act policies and approve the project: 1) alternative locations are infeasible or more environmentally damaging; 2) denial of the permit would adversely affect the public welfare; and 3) the project's effects are mitigated to the maximum extent feasible.

The staff report indicated, however, that under the LCP, the Commission's override would not apply to the land-based portion of the desalination plant, which is within the City's permit jurisdiction. In any event, Commission staff did not agree that Poseidon's project met the three-part test. Staff stated that due to a lack of a near-term need for the project, the likelihood that other water projects would be more reliable and cost-effective, the variety of uncertainties associated with the project, the project's unmitigated harms to marine resources and sensitive habitat, and its siting in a hazardous location, denial would actually serve, not harm, the public interest. Staff could not reach a decision as to the other two tests as there was insufficient information to determine whether an alternative location would be infeasible or more environmentally damaging, or whether the project's adverse effects have been mitigated as much as is feasible.

Conclusion and Implications

The Coastal Commission's denial of Poseidon's proposed desalination facility reflects the complicated regulatory environment governing desalination projects. It remains to be seen whether future desalination projects will win Commission approval. The Coastal Commission Staff Report for Poseidon Water is available online at: https://documents.coastal.ca.gov/reports/2022/5/Th9a10a/Th9a10a-5-2022-staffreport.pdf.

(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

TENTH CIRCUIT DETERMINES POINT SOURCE'S STATUTE OF LIMITATIONS APPLIES TO STATE CLAIMS IN FEDERAL COURT DIVERSITY ACTIONS UNDER THE CLEAN WATER ACT

Allen, Jr., et al. v. U.S. Environmental Restoration, 32 F.4th 1239 (10th Cir. 2022).

The U.S. Court of Appeals for the Tenth Circuit, on May 3, 2022, held that a point source's state statute of limitations applies to state-law claims preserved under the federal Clean Water Act (CWA).

Factual and Procedural Background

On August 5, 2015, while excavating the Colorado Gold King Mine, the U.S. Environmental Protection Agency (EPA) triggered the release of over three million gallons of contaminated water into Cement Creek, the Animas River and San Juan River. Affected states, New Mexico and Utah, and the Navajo Nation separately sued the EPA, mine owners, and EPA contractors for violation of the Clean Water Act. In the suits, each plaintiff filed civil actions against the defendants and the cases were transferred to New Mexico as requested by EPA clean-up contractor, Environmental Restoration LLC. After the suits were transferred to New Mexico, individual farmers along the Animas and San Juan ivers (Allen plaintiffs) filed state law claims of negligence against the defendants in New Mexico. These cases were added to the larger multidistrict lawsuit.

The CWA preserved state law claims against illegal dischargers, and made it clear that the substantive law of an affected state, including the forum, is subordinate to the point source. However, the CWA did not clearly distinguish whose procedural law would apply to state law claims.

Environmental Restoration LLC, moved to dismiss the Allen plaintiffs' complaint, arguing the Allen plaintiffs did not file their complaint within Colorado's two-year statute of limitations and therefore they failed to state a claim. The Allen plaintiffs argued their complaint was timely under New Mexico's three-year statute of limitations.

The U.S. District Court denied the motion to dismiss, reasoning that New Mexico's longer statute of limitations applied.

Environmental Restoration LLC, filed an interlocutory appeal of the District Court's decision, arguing that Colorado's procedural laws applied to the Allen plaintiffs' state law claims because the point source at issue was located in Colorado. The Tenth Circuit accepted the interlocutory appeal to determine what statute of limitations applies to state law claims preserved under the CWA.

The Tenth Circuit's Decision

The Court of Appeals first noted that the U.S. Supreme Court has already determined that a point source's state substantive law applies to state actions preserved under the CWA. The court then considered and rejected the Allen plaintiffs' argument that the forum state's statute of limitations applies, even though the forum state's procedural laws typically apply in diversity cases where plaintiffs and defendants reside in different states.

The court rejected the general rule for three reasons. First, the court reasoned that application of general rule (application of the forum state's statute of limitations) would result in different statutes of limitations being applied to state laws claims emanating from a single water-polluting event, depending on where the case was filed. This result would be inconsistent with Congress's purposes and objectives in passing the CWA—those being efficiency, predictability, and certainty in determining liability for discharging pollutants into an interstate body of water.

Second, the court noted that without a uniform statute of limitations, a defendant could be exposed to lawsuits indefinitely. Statutes of limitations encourage prompt filing of claims and remove uncertainty about legal liabilities. The Allen plaintiffs' argument would allow a forum state law to govern procedural issues and point source state law to govern substantive issues, which would lead to little uniformity and less predictability for the same polluting event. Thus frus-

trating the purpose of the CWA's regulatory scheme and overall purpose.

Third, the court considered and rejected the Allen plaintiffs' alternative argument that the five-year federal "catch all" statute of limitations should apply to the state law claims. The court noted that the catch all statute of limitations applies only to claims arising under the CWA and not to state law claims preserved by the CWA.

Ultimately, the court reversed the District Court's holding, ruling that the point source state's law applies to procedural and substantive matters.

Conclusion and Implications

The Allen plaintiffs' petition for *en banc* rehearing was recently denied, which will leave this decision in place. Contrary to the rule governing most diversity cases in federal court, the Tenth Circuit Court of Appeals determined that a point source state's procedural law applies to state law claim preserved under the CWA. By relying on U.S. Supreme Court precedent the court implies that its reasoning could be followed nationally. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca10/19-2197/19-2197-2022-05-03.html.
(Elleasse Taylor, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT FINDS BUMBLE BEES MAY BE CLASSIFIED AS 'FISH' UNDER THE CALIFORNIA ENDANGERED SPECIES ACT

Almond Alliance of California v. Fish & Game Commission,
___Cal.App.5th___, Case No. C093542 (3rd Dist. May 31, 2022).

In May, the Court of Appeal for the Third District of California held that the meaning of "fish" under the California Endangered Species Act (CESA) extends to terrestrial invertebrates, such as certain species of bumble bee, and thus are eligible for listing as endangered or threatened under the CESA. The Court of Appeal also affirmed a prior holding that the general definition of "fish" in the California Fish and Game Code supplies the meaning of that term in the CESA, despite invertebrates not being specifically listed in the act.

Background

The California Endangered Species Act is intended to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. (Fish & Game Code, § 2052.) Threatened or endangered species under the CESA include a "bird, mammal, fish, amphibian, reptile, or plant." The CESA became law in 1984 and is codified in Fish and Game Code § 2050 *et seq*. The Fish and Game Code provides general definitions for terms used within the code, including "fish" as set forth in § 45. Prior to 1969, § 45 defined fish as "wild fish, mollusks, or crustaceans, including any part, spawn or ova thereof." In 1969, the California Legislature amended § 45 to add invertebrates and amphibia to the definition of fish. The definition remained unchanged until 2015, when the Legislature made stylistic changes to the definition to read "a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." (Stats. 2015, ch. 154, § 5.)

Prior to the CESA, the Fish and Game Commission (Commission) had listed several species of invertebrates as endangered or rare under existing state law that prohibited the importation, possession, or sale of "any endangered or rare bird, mammal, fish, amphibian, or reptile." While the Office of Administrative Law had previously rejected the Commission's attempt to codify certain snails and butterflies (terrestrial invertebrates) as endangered because it did not view terrestrial invertebrates as fish—a position the Attorney General agreed with regarding inspects in an opinion in 1998—certain of those species and other vertebrates were subsequently listed as endangered or rare.

The CESA repealed and replaced existing state law related to endangered or rare animals. Specific inclusion of "invertebrates" in the act's legislation had been proposed but subsequently eliminated from the text of the bill. Nonetheless, in support of the CESA, the Department of Fish and Wildlife (Department—the bureaucratic parent of the Commission), submitted a bill analysis indicating that the inclusion of the term "invertebrate" in the act was unnecessary. The Department reasoned that the definition of "fish" in the Fish and Game Code already includes the term "invertebrates," and thus including the term "invertebrates" in the CESA could create confusion by necessitating amending other provisions of the Fish and Game Code to include that class of animal, where necessary. The Department noted that it had already included invertebrates to be endangered or rare prior to the CESA.

Listing Endangered and Threatened Species

The CESA directs the Fish and Game Commission to establish a list of endangered and threatened species, and to add or remove species from either list if it finds, upon receipt of sufficient scientific information, that the action is warranted.

Under the act, any interested person may petition the Commission to add a species to, or to remove a species from, the Commission's lists. A multi-step process applies to such petitions. First, the Department evaluates a petition on its face and in relation

to other relevant information the Department possesses or receives, and prepares a written evaluation report that includes a recommendation as to whether the Commission should reject the petition or accept and consider it, depending on whether there is sufficient information to indicate that the petitioned action may be warranted. During this evaluation, any person may submit information to the Department relating to the petitioned species.

Second, the Commission, after considering the petition, the Department's written report, and written comments received, determines whether the petition provides sufficient information to indicate that the petitioned action may be warranted. Upon finding that the petition does not provide such information, the Commission rejects it. Upon finding that the petition does provide such information, the Commission accepts it for consideration.

Third, as to an accepted petition, the Department then conducts a more comprehensive review of the status of the petitioned species and produces a written report, based upon the best scientific information available to the Department, which indicates whether the petitioned action is warranted. Finally, after receiving the Department's report, the Commission determines whether the petitioned action is warranted or is not warranted.

2018 Petition to List Four Species of Bumble Bee

In 2018, several public interest groups petitioned the Commission to list the Crotch bumble bee, the Franklin bumble bee, the Suckley cuckoo bumble bee, and the Western bumble bee as endangered species under the act. The Commission ultimately determined that the four species of bumble bee qualified as candidate species for listing purposes.

In 2019, various agricultural associations and interest groups (petitioners) challenged the Commission's decision by filing a writ of administrative mandate, which the trial court granted. The trial court determined that the word "invertebrates" in § 45's definition of "fish" extended only to aquatic invertebrates, and that the legislative history of the Act supported its conclusion that the legislature did not intend to protect invertebrates categorically. The Court of Appeal reviewed the trial court's ruling *de novo*.

The Court of Appeal's Decision

On appeal, petitioners argued that the definition of "fish" in § 45 of the Fish and Game Code does not supply the meaning of that term in the CESA because the language of the act indicates the legislature intentionally included amphibians but did not include invertebrates. Including invertebrates within the purview of the act would, according to petitioners, render the inclusion of amphibians and other specified types of animals meaningless, which is disfavored by the rule of statutory construction against surplusage.

The Court of Appeal rejected petitioners' argument in part because the court had previously ruled in an earlier case that § 45's definition of fish supplies the meaning of that term within the act, and the court did not deem it necessary to depart from that prior decision. The court also reasoned that the Legislature amended § 45 of the CESA in 2015 and took no action in changing the statute, meaning that § 45 of the act expressly included invertebrates within the definition of "fish."

The court also rejected the petitioners' argument that legislative history of the CESA supports the exclusion of invertebrates. According to the court, the legislature could have disagreed with the Department's bill analysis that the Department had authority to list invertebrates under the act but instead took no action against that position. As the court explained, the legislature believed that invertebrates were already included in the definition of "fish" by application of § 45 and did not feel the need to have the Department report on including invertebrates. The court concluded that the balance of the CESA's legislative history did not indicate the legislature intended to exclude invertebrates from coverage under the act. The court also determined that the Attorney General opinion of 1998 was not persuasive since it was issued after the CESA was adopted, made no mention of § 45, and did not recognize that the Commission had already listed several species of invertebrates before 1984.

The court also held that terrestrial invertebrates may be listed as an endangered or threated species under the CESA, thus rejecting the trial court's conclusion that the definition of "fish" under § 45 only extended to aquatic invertebrates. The Court of Appeal determined that a liberal, *i.e.* more expan-

sive, interpretation of the CESA was appropriate; the legislative history and prior listings by the Commission supported including terrestrial species under the purview of the act; and the express language in § 2067 supported a determination that the term "fish" is not limited to solely aquatic species. Instead, the court concluded that as a term of art—as opposed to common parlance—a terrestrial invertebrate may be considered as an endangered or threatened species under the CESA. Thus, the Court of Appeal held that the four bumble bee species are considered to be fish and thus capable of being protected under the CESA.

Conclusion and Implications

Under this decision, invertebrates like the species of bumble bee at issue in the case are eligible to be listed as endangered or threatened under the California Endangered Species Act. Presumably, additional petitions for listing other species of terrestrial invertebrates will be submitted to the Commission for potential protection under the CESA, although it is not clear whether any of the petitioned species will ultimately be listed. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093542.PDF.
(Miles B. H. Krieger, Steve Anderson)

SECOND DISTRICT COURT HOLDS CITY'S BAN ON SHORT-TERM RENTALS IN COASTAL ZONE CONSTITUTED AN AMENDMENT REQUIRING COASTAL COMMISSION APPROVAL

Keen v. City of Manhattan Beach, 77 Cal.App.5th 142 (2nd Dist. 2022).

In an April 6, 2022 published decision, the Second District Court of Appeal upheld a trial court order enjoining the City of Manhattan Beach (City) from enforcing two ordinances that banned short-term rentals in the City's coastal zone. The Court of Appeal held that the City's existing zoning code authorized short-term rentals, therefore any such ban constituted an amendment to the code that required approval from the California Coastal Commission (Commission).

Background

The City's Coastal Zoning Ordinances

The Coastal Act requires coastal governments to develop a Local Coastal Program (LCP). The LCP must contain two parts: 1) a land use plan and 2) a local implementing program. The implementing program consists of zoning ordinances, maps, and other actions. The Commission must review the program and if it finds the program conforms to Coastal Act policies, it will approve it. Once approved, the local government may amend the program, but only if it submits any amendments to the Commission for subsequent approval. Absent Commission approval, program amendments have no force.

The Commission certified the City of Manhattan Beach's land use plan in 1981, and the local implementing program and underlying zoning ordinances in 1994. In the decades that followed, people rented residential units in the City on both long- and short-term bases. The City knew about this practice but only rarely received complaints about those properties.

The City's Short-Term Rental Ban Ordinances

In 2015, following the advent and popularity of online platforms such as AirBnB® and VRBO®, the City's short-term rental landscape began to noticeably change. Though the City had not received a "tremendous" number of complaints, it still sought to take an active stance on the number of short-term rentals. The City claimed its current zoning ordinances—including those enacted with the LCP in 1994—implicitly prohibited short-term rentals. The City Council thus passed two ordinances that reiterated the City's supposedly existing ban on short-term rentals (2015 ordinances).

The resolved to submit the ordinance that affected the coastal zone to the Coastal Commission for

certification. The City met with Commission staff, who recommended that the City allow some short-term rentals to facilitate visitor access to the coastal zone. Shortly thereafter, the Commission wrote to all coastal cities, stating any municipal regulation of short-term rentals in the coastal zone required cooperation with the Commission. The Commission's 2016 letter explained that short-term rentals facilitate the Coastal Act's coastal access goals by providing an important source of visitor accommodations. The City subsequently withdrew its 2015 request for approval, stating that the ordinance worked no change in the existing law.

In 2019, the City Council adopted an ordinance that created an enforcement mechanism for its short-term rental ban (2019 ordinance). The ordinance required online short-term rental platforms to inform the City of "who was renting out what," and prohibited the platforms from collecting booking fees. Shortly thereafter, short-term rentals in the City markedly dropped from 250 to 50 units.

At the Trial Court

Petitioner, Darby Keen, owned property in the City's coastal zone that he rented on a short-term basis. In July 2019, the City sent Keen a Notice of Violation of the City's short-term rental ban ordinances. In response, Keen petitioned for a writ of mandate seeking to enjoin the City from enforcing the 2015 and 2019 ordinances. At the trial court, the City conceded that any new prohibition on short-term rentals would require Commission approval, but nevertheless maintained that its 2015 ordinances merely reiterated what the Commission had approved in 1994.

The trial court disagreed, finding that neither the history or text of the ordinance, nor the record, supported the City's position that it had always banned short-term (*i.e.*, fewer than 30 days) rentals. The court thus held that the City's ban functioned as a "new amendment" under the Coastal Act that required Commission approval, for which it did not have. The court enjoined enforcement of the ban on short-term rentals pending Commission approval. The City appealed.

The Court of Appeal's Decision

The City's Ordinance Has Always Allowed Short-Term Rentals

Under an independent standard of review, the Second District Court of Appeal agreed with the trial court and held that the plain language of the City's ordinance had always allowed short-term (and long-term) residential rentals. The City's ban on short-term rentals via the 2015 ordinances amended the status quo, thereby requiring Commission approval, which the City never got. For these reasons, the City's ban was invalid.

The only issue the court considered was whether the City's 1994 ordinances permitted short-term rentals. The statutory history of the ordinances demonstrated that they did. The court noted that the City had always permitted renters, regardless of whether they rented on a "long-term" vs. "short-term" basis. Absent some legal distinction, the law must treat long-term rentals as short-term rentals—*i.e.*, if long-term rentals are legal, so too are short-term rentals.

Because the ordinances offered no textual basis for temporally distinguishing between rental duration, the court held the City could not credibly insist that those ordinances have "always" banned short-term rentals. The court found support in the text of the ordinance, which authorized construction and habitation of "Single-Family Residential" and "Multi-Family Residential" buildings in residential zones. The ordinance's use of the word "residence" did not imply a minimum length of occupancy—likely because it is possible to reside somewhere for a night, week, or lifetime. The City failed to point to a legally precedented way to draw a line between the number of days that makes a building a "residence" vs. a non-residence. For these reasons, and in accord with common experience, the City's zoning code permits individuals to rent a house or apartment, regardless of length of stay.

The court also found the City's proposed distinction of short-term rentals as "Hotels, Motels, and Time-Share Facilities" unavailing. The ordinance defined such facilities as those that offer lodging on a weekly-or-less basis and as having kitchens in no more than 60 percent of the units. Here, on the other hand, the short-term rentals that the City sought to prohibit included single- and multi-family residences,

which conventionally have kitchens. Earlier ordinances that pre-dated the 1994 ordinance did not change this distinction, nor were they relevant.

For these reasons, the court held the Commission-certified ordinances expressly authorized rentals of single- and multi-family residences in residential zones for any duration, including short-term rentals of the AirBnB variety. The City's new ban on those rentals constituted an amendment thus requiring Commission approval.

The City's Remaining Arguments Lack Merit

The court also rejected the City's four other outstanding arguments. First, as to the City's argument that the court's statutory interpretation would be an affront to the doctrine of "permissive zoning"—*i.e.*, zoning ordinances prohibit any use they do not permit—the court held that the City's ordinances *do* permit short-term rentals in residential zones, and thus did not run afoul of the doctrine.

Second, the court was not persuaded by the claim that the City's interpretation of its own ordinance was owed deference. Here, deference was not an issue—the court gave "simple words their obvious meaning" and the City's "contrary interpretations" were "unreasonable." Third, the court debunked the City's reliance on recent state statutes, which characterized short-term rentals as commercial uses. The court explained that those statutes dealt with different issues than the municipal ordinances here, and thus not germane to the court's interpretation

Finally, the court rejected the City's contention that the trial court interpreted the Coastal Act as to require the City to provide short-term rentals in residential areas. Here, the issue centered on the Commission's approval of amended laws within the coastal zone—not whether the Commission has required the City to allow short-term rentals. As evidenced by the record, the Commission did not review the City's ban on short-term rentals because the City had incorrectly maintained that the ban was "nothing new." Because the ban is new, it requires Commission approval. Thus, there was nothing erroneous about the trial court's interpretation of the Coastal Act.

Conclusion and Implications

The Second District Court of Appeal's opinion offers a direct interpretation of a zoning ordinance that has plainly and historically allowed such uses. The court's pointed analysis cuts through layers of nuanced arguments to find that that the City of Manhattan Beach's new ban on short-term rentals within the coastal zone required Coastal Commission approval. The court's reasoning hinged on the existing ordinances' silence on "length of stay"—a term that would otherwise distinguish a banned "short-term" rental from an authorized "long-term" rental. The court's decision follows other recent opinions that have been apprehensive to entertain outright bans on short-term rentals, particularly when such bans lack any basis in the underlying zoning code. (*See, e.g., Protect Our Neighborhoods v. City of Palm Springs*, 73 Cal.App.5th 667 (2022); *People v. Venice Suites, LLC*, 71 Cal.App.5th 715 (2021).)

A copy of the Second District's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B307538.PDF.

(Bridget McDonald)

SECOND DISTRICT COURT FINDS COASTAL COMMISSION PROPERLY DENIED PERMIT FOR FAMILY RESIDENCE SEEKING WATER SERVICE CONNECTION AND WATER TANK FOR FIRE SUPPRESSION

McCarthy v. California Coastal Commission, *Unpub.*, Case No. B309078 (2nd Dist. June 1, 2022).

In an *unpublished* decision filed on June 1, 2022, the Second District Court of Appeal affirmed a trial court judgment finding that the Coastal Commission (Commission) properly denied a Coastal Development Permit for a proposed single family residence on a prominent hillside outside of Pismo Beach. After finding that the Commission properly did not make procedural errors, the court upheld the Commission's

findings that the project violated various provisions of San Luis Obispo County's Local Coastal Program (LCP). The decision provides a helpful illustration of the procedural and substantive rules that govern local agency, Coastal Commission, and judicial review of Coastal Development Permit applications.

Factual and Procedural Background

In 2010, the applicant applied to San Luis Obispo County (County) for a Coastal Development Permit to construct a 5,500 square-foot single family residence and a 1,000 square foot secondary residence above a 1,000 square foot garage. Project improvements proposed grading and paving of an access road, a 10,000-gallon water tank for fire suppression, and extension of a water line to connect the proposed residence to water service from the County. The project was proposed within the boundaries of the coastal zone thus requiring a coastal development permit.

In July 2011, the County approved the applicant's permit application subject to conditions. The permit allowed extension of water lines for public water service to the project.

Two planning commissioners appealed the county's permit approval to the Coastal Commission. The appeal alleged that the permit violated County's LCP provisions regarding: 1) visual and scenic standards, 2) archeological resource standards, 3) geologic hazard standards, and 4) environmentally sensitive habitat standards. The commissioners also alleged that the project violated the Coastal Act's public access provisions.

In response, the applicants filed a claim with the Coastal Commission alleging they had vested rights for public water service at the site that predates the Coastal Act and that the Coastal Development Permit was properly issued. The Coastal Commission agreed to hear the vested rights claim and permit appeal at the same hearing.

Before the hearing, Coastal Commission staff recommended that the Commission deny the applicant's vested rights claims because the applicants did not undertake substantial work and incur substantial liability in reliance on governmental permits prior to adoption of the Coastal Act. However, staff recommended that the Commission approve the development permit subject to conditions, including a condition that water be provided to the residence by an on-site well, and not the County service area.

After a hearing, the Commission voted to deny the applicant's claim for vested rights and their application for a coastal development permit. The Commission adopted the following findings: 1) the project has no water supply and the reliability of the on-site water well has not been established; and 2) the visual impact of the project on public places violates LCP visual and scenic resources policies.

The applicant timely filed a writ petition and complaint. The petition sough a writ of administrative *mandamus* to overturn the Commission's decision to deny the applicant's coastal development permit. The Superior Court denied the writ, finding that the Commission's determination that the project violated the LCP's public works and visual and scenic resources policies was supported by substantial evidence. The court also found that the Commission's finding that the project's proposed on-site water well was unsuitable was not supported by substantial evidence.

The Court of Appeal's Decision

The Court of Appeal began by setting out the procedural rules governing appeals of local agency decisions on coastal development permits. Such decisions may be appealed to the Coastal Commission, but the grounds for such appeal are limited to whether the proposed development conforms with the applicable LCP and the Coastal Act's public access provisions. Judicial review of the Commission's decision is limited to whether the Commission proceeded in excess of its jurisdiction and whether it abused its discretion.

Ultimately the Court would reject each of petitioner's claims.

Coastal Commission Timely Acted on the Project

Petitioner first claimed that it's project was approved by operation of law because the Commission "failed to act on the project within 21 days as required by Public Resources Code [§§] 30622 and 30625, subdivision (a)."

Per the Public Resources Code, the Commission hears a project application *de novo*, as if no local government was previously involved. Therefore the 21 day period in question began running from the date that the Commission held its hearing on the project. Here, the Commission acted well before this 21 day period had run.

Findings Adopted By the Commission Were Adequate

The Court of Appeal also rejected petitioner's arguments that findings adopted by the Commission were unlawful for "fail[ing] to reflect the grounds for denial of the permit."

Here, the Commission's findings were accurate and there was more than sufficient evidence in the record upon which the findings could be based. The applicable test is "whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." This test was met here. The court petitioner's claim that the findings included misstatements, the petitioner failed to cite any place in the record where such misstatement can be found.

Commission's Findings that the Project Would Have Visual Impacts In Violation of the LCP Were Supported By Substantial Evidence

The Court of Appeal went on to reject petitioner's various claims that the Commission incorrectly found that the project would result in adverse visual impacts to LCP-protected viewsheds. In each instance the court found that substantial evidence supported the Commission's findings that the project would in fact violate various policies set forth in the County's LCP. Here, the project would be located on a prominent hillside that would be visible from both Avila Beach and Pismo Beach and substantial evidence supported the Commission's decision that the project would negatively impact public views and the rural character of the area.

Commission Findings that On-Site Water Well Was Inadequate Were Supported By Substantial Evidence

As part of the writ proceedings, the Coastal Commission also contended that the trial court erred in determining that the Commission's finding relating to the suitability of the on-site water well was not supported by substantial evidence. Here the Court of Appeal rejected the trial court's finding. Instead the court found that the record showed that "the Commission could not have reasonably reached any conclusion" regarding the suitability of the on-site water well to serve the water well for the life of the project. Although petitioners alleged that the water well would produce 20 gallons per minute, they produce no evidence or "recovery data" to verify these results.

Conclusion and Implications

The *McCarthy* decision provides a helpful discussion of the various procedural and substantive provisions involved when Coastal Commission decisions regarding the issuance of a Coastal Development Permit are challenged in writ proceedings. The decision highlights the steep hurdles applicants face when trying to develop in sensitive location in coastal zones, this is especially true in prominent areas visible from multiple locations.

The Court of Appeal's *unpublished* decision can be found here: https://www.courts.ca.gov/opinions/nonpub/B309078.PDF.

(Travis Brooks)

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