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LEGISLATIVE DEVELOPMENTS

CALIFORNIA ASSEMBLY BILL WOULD REQUIRE GROUNDWATER SUSTAINABILITY AGENCY INVOLVEMENT IN LOCAL AGENCY WELL APPROVAL PROCESS

On March 28, 2022, Governor Gavin Newsom signed Executive Order N-7-22, prescribing emergency actions to address California's ongoing drought conditions. Among other things, N-7-22 prohibits cities, counties, and other public agencies from approving the construction or alteration of a groundwater well that is subject to the Sustainable Groundwater Management Act (SGMA) (Wat. Code, § 10720 *et seq.*) without written verification from their local Groundwater Sustainability Agency (GSA) that extraction from the proposed well would not be inconsistent with the basin's Groundwater Sustainability Plan (GSP). Citing a need for longer-term protection of communities that depend on groundwater, Assembly Bill (AB) 2201 would make the GSA verification process for new well applications permanent, require each well applicant to supply an engineer's report on the risk of interference with other wells, and create a 30-day public comment period before an application can be approved.

Background

In 1968, the California Department of Water Resources (DWR) adopted statewide minimum technical standards for the construction, alteration, and removal of groundwater wells in Bulletin 74 (last updated in 1991), to protect against contamination of nearby water resources. Since then, counties, cities, and other local permitting authorities have frequently approved well applications upon a ministerial finding of compliance with Bulletin 74's construction standards, without analyzing the impact extractions from the proposed wells may have on groundwater levels or other users within the basin.

When the Legislature enacted SGMA in 2014, it called for the creation of local GSAs to oversee and regulate groundwater extraction through the development and implementation of GSPs, as a means to improve statewide groundwater sustainability and avoid undesirable results such as overdraft, seawater intrusion, and land subsidence. GSPs are required for all medium- and high-priority basins in California, which account for approximately 96 percent of the state's groundwater use and about 88 percent of the population served by groundwater. A GSA has the authority to regulate various aspects of groundwater extraction within its jurisdiction, including certain requirements on new groundwater wells. (Water Code, § 10726.4(a)(1).) However, the approval of construction and modification of wells has remained within the existing purview of counties and other permitting authorities. (Wat. Code, § 10726.4(b).)

Under the Governor's Executive Order, a local permitting authority may not approve an application to construct or alter a groundwater well before obtaining written verification from the local GSA that extraction from the proposed well would not be inconsistent with the basin's GSP and would not decrease the likelihood of achieving identified sustainability goals, for as long as the drought state of emergency remains in place. (Executive Order N-7-22, ¶ 9(a).) The permitting authority must separately find that extraction from the well would not interfere with existing wells or cause subsidence that would damage nearby infrastructure. (*Id.* at subd.(b).)

Assembly Bill 2201

AB 2201 seeks to extend the permitting provisions of the Executive Order indefinitely by amending SGMA to require that every well application be forwarded to the GSA for review and written verification before a well permit is issued. When it was introduced, AB 2201 also mandated that every well permit application be supplemented with a written report by a licensed professional that "concludes that the extraction by the proposed well is not likely to interfere" with nearby wells or cause damaging subsidence. That provision has been revised in the course of legislative committee amendments so that the report need only "indicate" that well pumping is unlikely to

cause a substantial water level decline in a localized area. Lastly, the permitting agency must post the well application on its internet website for at least 30 days and consider public comments before it can issue a permit.

Similar to Executive Order N-7-22, AB 2201 provides exceptions for wells that provide less than two acre-feet of water annually for domestic use, or for wells used by a public water supply system or state small water system. AB 2201 would also not apply to permits for wells within adjudicated basins, which are generally excluded from SGMA requirements.

Conclusion and Implications

Several months after the issuance of Executive Order N-7-22, many local permitting authorities and GSAs are still in the process of developing and implementing procedures and funding mechanisms for consistency verification of well applications. While AB 2201 partially mirrors the current requirements of the Executive Order, its applicability beyond the current drought emergency would be a significant change to well permitting in California. Supporters argue the bill is necessary to link SGMA's statewide sustainability concepts to local approvals, while others warn that the public comment process and potential for triggering review under the California Environmental Quality Act could result in infeasible costs and delays.

The text and current status of AB 2201 are online available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2201. (Austin C. Cho, Meredith Nikkel)

Editor's Note: As this article went to press, we learned that AB 2021 did not survive the end of the legislative session at the California Assembly.

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES PUBLIC COMMENT PERIOD OPENS FOR RESUBMITTED GROUNDWATER SUSTAINABILITY PLANS DEEMED INCOMPLETE

In January 2022, the California Department of Water Resources (DWR) completed its review of the first wave of Groundwater Sustainability Plans (GSP) submitted by local Groundwater Sustainability Agencies (GSAs). Under the Sustainable Groundwater Management Act (SGMA), DWR is required to evaluate whether each GSP substantially complies with that law and the DWR GSP emergency regulations to achieve the GSP's sustainability goal for the basin. DWR deemed nearly all submitted GSPs to be incomplete and requiring immediate corrections. Those GSAs were required to submit revised GSPs to DWR by July 2022. The revised GSPs are now available for review and public comment, prior to DWR making final determinations of GSP adequacy and completeness.

Background

GSPs deemed "incomplete" were required to be corrected and resubmitted to DWR within 180 days. In late July 2022, eight GSPs were resubmitted for review. The 60-day public comment period for resubmitted GSPs ends September 30, 2022. Once DWR reviews the resubmitted GSPs, it will issue final determinations for each GSP finding them either "complete" or "inadequate." If a GSP receives an "inadequate" determination, the California State Water Resources Control Board (SWRCB) may intervene and impose an interim plan to directly manage the basin, including imposing substantial fees.

Incomplete Determinations

The summary below identifies the eight basins that received an incomplete designation and summarizes DWR's primary basis for that determination:

•Eastern San Joaquin
Insufficiently defined sustainable management criteria ("SMC") for the chronic lowering of groundwater levels.
Insufficient information to support the use of the chronic lowering of groundwater level SMCs and representative monitoring network as a proxy for land subsidence.

•Merced
Insufficient justification for identifying undesirable results for chronic lowering of groundwater levels, subsidence, and depletion of interconnected surface waters only occurring in consecutive non-dry water year types.
Insufficiently defined SMC for chronic lowering of groundwater levels.
Insufficiently defined SMC for land subsidence.

•Chowchilla
Insufficiently defined SMC
Insufficiently demonstrated that interconnected surface water or undesirable results related to depletions of interconnected surface water are not present and are not likely to occur in the Subbasin.

•Kings
Insufficient SMC for chronic lowering of groundwater levels.
Insufficient minimum thresholds and measurable objectives for land subsidence.
Inconsistently identified interconnected surface water systems, and insufficiently identified the location, quantity, and timing of depletions of those systems due to groundwater use.
Insufficiently defined SMC for the depletions of interconnected surface water.
Insufficient information to support the selection of degraded water quality SMC.

•Kaweah
Insufficiently defined SMC for chronic lowering of groundwater levels.
Insufficiently defined SMC, including undesirable results, minimum thresholds, and measurable

objectives, for land subsidence.
Insufficiently and inconsistently characterized interconnected surface water and insufficiently defined SMC for the depletion of those interconnected surface waters.

•Tulare Lake
Insufficiently defined undesirable results or SMC for groundwater levels.
Insufficiently defined undesirable results or SMC for subsidence.
Insufficiently identified SMC for degraded water quality.

•Tule
Insufficiently defined undesirable results or unsatisfactory minimum thresholds and measurable objectives for groundwater levels
Insufficiently defined undesirable results or unsatisfactory minimum thresholds and measurable objectives for land subsidence.
Insufficient information to justify the proposed SMC for degraded water quality.

•Kern County
Inconsistent undesirable results for the entire basin.
Unsatisfactory SMC for the basin's chronic lowering of groundwater levels.
Unsatisfactory land subsidence SMC.

Trends

As described above, many of the deficiencies centered on a failure to sufficiently identify, define and justify sustainable management criteria. SGMA allows GSPs to identify data gaps and identify a plan to fill them. However, the establishment of SMCs is considered foundational to defining and managing local groundwater basins. Resubmitted GSPs are required to address the SMC issues and other deficiencies, which could result in the introduction of new or different GSA projects and management actions.

Public Comment

The revised GSPs are now posted on the DWR SGMA Portal for public review and comment. While DWR will not respond to public comments directly, it will consider those comments during its evaluation of the resubmitted GSPs. Public comments are submitted via the SGMA portal at https://sgma.water.ca.gov/portal/gsp/all. A SGMA Portal account is not required to submit public comments.

Conclusion and Implications

To date, the Department of Water Resources has only deemed a handful of GSPs complete: Santa Cruz Mid-County, North Yuba, South Yuba, Indian Wells Valley, 180/400 Foot Aquifer, Oxnard, Pleasant Valley, and Las Posas. Even for most of those GSPs deemed complete, DWR identified important issues to be addressed in the GSP five-year updates, or sooner. DWR's timeline to review the revised GSPs and make its final determinations is not defined by SGMA, and DWR has not indicated a projected timeframe. SGMA does, however, authorize GSAs to implement their GSPs pending DWR review, which can complicate basin management in basins where significant or controversial projects and management actions are proposed.
(Byrin Romney, Derek Hoffman)

LAWSUITS FILED OR PENDING

D.C. CIRCUIT DISMISSES ENVIRONMENTAL INTEREST GROUPS' LAWSUIT CHALLENGING U.S. EPA'S APPROVAL OF OKLAHOMA'S COAL ASH PLAN UNDER RCRA

On July 26, 2022, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit dismissed plaintiffs'—Waterkeeper Alliance, Local Environmental Action Demanded Agency, and Sierra Club—lawsuit challenging the U.S. Environmental Protection Agency (EPA)'s approval of Oklahoma's permitting program for coal ash facilities finding plaintiffs lacked standing. *Waterkeeper Alliance, Inc. et al., v. Regan*, 41 F.4th 654 (D.C. Cir. 2022).

Background

The Resource Conservation and Recovery Act (RCRA, 42 U.S.C. § 6901 *et seq.*), is the federal environmental law that creates a framework for managing hazardous and non-hazardous solid waste. Subtitle D of RCRA contains the provisions for non-hazardous waste requirements. In 2015, under the authority of Subtitle D, EPA adopted a rule for regulation of coal ash as non-hazardous waste (2015 Rule). The 2015 Rule established guidelines for building, maintaining, and monitoring coal ash disposal sites. By a statutory amendment, one year later, Congress passed the Water Infrastructure Improvements for the Nation Act (Improvements Act), which amended RCRA to specifically address coal ash disposal units and incorporated the 2015 Rule by reference. (*See,* 42 U.S.C. § 6945(d).) Under the amended Subtitle D, individual states can choose to develop their own permitting programs for in-state coal ash disposal units within their borders or submit to federal regulation. (*Id.* At § 6945(d)(1), (d)(2).) If a state chooses to develop and implement its own program, the program must be equal to or more stringent than the federal standards, and approved by the EPA Administrator. (*See id.* at § 6945(d)(1).)

Notably, RCRA also contains a provision requiring EPA to provide for public participation in the development, revision, implementation, and enforcement of RCRA programs. (*Id.* at § 6974(b).) RCRA also provides a citizen suit provision, allowing any person to commence a civil suit for violations of RCRA as well as the EPA Administrator for failure to perform a nondiscretionary duty imposed by RCRA. (*Id.* at § 6972(a)(2).)

Oklahoma's Coal Ash Disposal Unit Permitting Program

Shortly after Subtitle D was amended by Congress, Oklahoma submitted a coal ash disposal unit permitting program (Oklahoma Program) to EPA for approval. Pertinently, the Oklahoma Program created a tiered system of actions, which allows for varying levels of public participation. For example, actions in the lowest tier (Tier I) provide for the fewest or no opportunities for public comment, whereas those in the highest tier (Tier III) afford the greatest opportunities for public participation, such as public meeting and comment and for administrative hearings.

A second aspect of the Oklahoma Program is the permitting scheme grants permits for the "life" of a unit, or until the facility stops operations. The "life" permits are required to comply with state laws and rules as existing on the date of the permit application, or as afterwards changed. Practically, this means that a permit may need to be modified or re-issued if the state laws or rules change, but the Oklahoma Program is not tied to changes in federal standards.

In January 2018, EPA provided notice of intent to approve the Oklahoma Program. Plaintiffs submitted comments opposing the approval. As relevant here, the comments focused on: (1) that EPA must fulfill its obligation under RCRA's public participation provision before approving the Oklahoma Program; (2) that the Oklahoma Program did not provide sufficient opportunities for public participation in Tier I actions; and (3) that the "life" permits were not at least as protective as federal standards. Despite the comments, EPA approved the Oklahoma Program in June 2018, and Oklahoma passed its own regulations to begin implementing the Oklahoma Program under the state law.

Plaintiffs Suit Against EPA

After EPA approved the Oklahoma Program, plaintiffs sued the EPA Administrator in the U.S. District Court for the D.C. District, alleging seven claims—six of which were before the D.C. Circuit on appeal. The District Court analyzed each of those six claims. The first cause of action (Citizen Suit Claim) alleged that RCRA's public participation provision imposed a nondiscretionary duty on the EPA Administration to regulate public participation in state coal ash programs.

The remaining causes of action were based on the Administrative Procedure Act (APA). The second cause of action (Guidelines Claim) similarly alleged that EPA's approval was premature since public participation guidelines for state permitting programs were not yet promulgated. The third cause of action (Tier I Claim) challenged the Oklahoma Program's Tier I public participation opportunities. The fourth cause of action (Lifetime Permits Claim) alleged that lifetimes permits do not allow for compliance with standards at least as protective as the federal 2015 Rule. The sixth and seventh causes of action (Comment Claims) related to allegations that EPA failed to adequately respond to plaintiffs' comments.

The D.C. Circuit's Decision

Plaintiffs' Failed to Demonstrate Standing for any Cause of Action Raised on Appeal

Ultimately, the D.C. Circuit did not reach the merits of any of plaintiffs' six causes of action on appeal because the court found that plaintiffs lacked standing for each claim. While EPA did not challenge plaintiffs' standing, the D.C. Circuit characterized the analysis as "an independent obligation to assure ourselves of jurisdiction." Plaintiffs bear the burden of establishing the elements of standing— injury, causation, and redressability—in addition to the elements of organizational standing: (a) members having standing to sue in their own right; (b) the interests seeking protection are germane to the organization's purpose; and (c) neither the claim asserted nor relief requested requires individual member participation.

The D.C. Circuit analyzed each of the six causes of action on appeal for standing. With respect to the Citizen Suit Claim, the court compared plaintiffs' alleged injuries—*i.e.* lack of participation in the Oklahoma Program—to the requested relief—*i.e.* an order to direct the EPA Administrator to issue minimum guidelines for public participation in state permitting programs. The court reasoned that even if such an order was granted, there is no RCRA provision that would in fact bring about change in the Oklahoma Program, rather the agency would have to issue guidelines that may or may not cease the alleged injurious conduct. Plaintiffs thus failed to meet the redressability element of standing on the Citizen Suit Claim.

The Guidelines and Tier 1 Claims also failed on redressability grounds. The relief requested with respect to those claims was an order of vacatur of EPA's approval of the Oklahoma Program. The Court could not reconcile the effect of such vacatur with plaintiffs' alleged injuries. Even if the D.C. Circuit vacated EPA's approval of the Oklahoma Program, the default regulatory regime that Oklahoma would revert to is the federal 2015 Rule, as EPA had not adopted a federal permitting program for nonparticipating states as of the date of this opinion. It was undisputed that the 2015 Rule afforded even fewer opportunities for public participation than the Oklahoma Program. Thus, if plaintiffs' injury is limited participation, an order vacating approval of the Oklahoma Program, which would in effect submit Oklahoma to the federal regulatory oversight would not redress the injury of participatory opportunity.

Lifetime Claims

With respect to the Lifetime Permits Claim, the D.C. Circuit concluded that plaintiffs failed to demonstrate an imminent injury. Instead of being premised on a present injury, Plaintiffs' claim relied on the threat of a future injury and if the federal standards become stricter than the Oklahoma Program's standards. The D.C. Circuit reasoned that without concrete plans or any additional specification of when the injury might occur, plaintiffs did not establish standing.

Permit Claims

Finally, for the Comment Claims, the D.C. Circuit described the two causal chain "links" that must be alleged to bring a claim on a procedural right. The first link is between the procedural misstep and the agency action that invaded plaintiffs' concrete interest. The second link connects the particularized

injury plaintiffs suffered to the agency action that implicated the procedural requirement in question. Here, plaintiffs failed to establish the second link because the comments regarding public participation were not traceable to EPA's approval of the Oklahoma Program and the comments regarding lifetime permits were not imminent.

Conclusion and Implications

The entire basis for the D.C. Circuit Court of Appeals' decision was the analysis of the elements of standing. It is significant that neither EPA nor the Intervenors contested standing on appeal and yet this was the crucial reasoning for the opinion. Thus, *Waterkeeper Alliance* reminds litigants on both sides that the threshold elements of standing are critical. (Alexandra Lizano and Hina Gupta)

ENVIRONMENTAL ORGANIZATIONS FILE LAWSUIT CHALLENGING THE NATIONAL MARINE FISHERIES SERVICE'S APPROVALS OF ENHANCEMENT OF SURVIVAL PERMITS FOR SHASTA RIVER LANDOWNERS

On June 15, 2022, the Environmental Protection Information Center and Friends of Shasta River (collectively: plaintiffs) filed a complaint alleging that the National Marine Fisheries Service (NMFS) unlawfully issued four categories of documents related to the Shasta River and the Southern Oregon and Northern California Coast (SONCC) coho salmon:

> (1) 14 Enhancement of Survival Permits (ESPs); (2) a Biological Opinion; (3) an incidental take statement; and (3) an Environmental Assessment. (*Environmental Protection Information Ctr., et al. v. van Atta, et al.*, Case No. 3:22-cv-03520-JSC, N.D. Cal. [complaint].)

In the documents, NMFS analyzed the issuance of the ESPs, which allow for incidental take of the SONCC coho salmon during specified conservation and agricultural activities. NMFS concluded that the actions would not jeopardize the species or adversely impact its habitat. Plaintiffs disagree.

Background

Shasta River flows for 58 miles in Siskiyou County, California, before it meets the Klamath River. The Shasta River Basin is spawning ground for the SONCC coho salmon. The SONCC coho salmon are federally-protected as threatened with extinction under the Endangered Species Act (ESA). The SONCC coho salmon require sufficient cold water to support spawning and passage back to the ocean. The agricultural activities of landowners on the Shasta River involve diversion of water that contributes to the SONCC coho salmon habitat.

Under Section 10 of the ESA, NMFS may issue an ESP to non-federal landowners who participate in voluntary agreements to take actions to benefit species and in exchange receive assurances that the landowners will not be subject to additional regulatory restrictions as a result of their conservation actions. NMFS may issue such permits only after finding that each permit was applied for in good faith, that granting the permit would not be to the disadvantage of the listed species, that the proposed activities would benefit the recovery or the enhancement of survival of the species, and that the terms and conditions of the permits are consistent with the purposes and policy set forth in the ESA. (ESA § 10(a)(1)(A); 50 C.F.R. § 222.308.)

In 2019, NOAA proposed a Template Safe Harbor Agreement (Agreement) and Site Plan Agreements for 14 landowners in the Shasta Valley. The Agreement:

> . . .establishes the general requirements for [NMFS] . . . to issue [ESPs] to non-federal landowners in the Shasta River Basin.

The Agreement allows the recipients of the ESPs to incidentally take listed species via land and

water management activities meant to conserve the SONCC coho salmon, enhance their survival, and assist in their recovery.

On July 28, 2020, NMFS initiated intra-agency consultation to assess the potential effects of entering into the Agreement and Site Plan Agreements, and issuing the ESPs. NMFS issued a Memorandum, which included a Biological Opinion and an Incidental Take Assessment evaluating those effects. The Biological Opinion analyses of critical habitat include in the baseline current diversions and inputs. In stream flow, for example, the baseline includes the operation of the Dwinnell Dam and diversions and spring inputs. The Biological Opinion defines the relevant action area as consisting of:

> . . .[t]he Enrolled Properties . . . adjacent to the Shasta River, Parks Creek, or Big Springs Creek, and primarily managed for agricultural production and rural residences.

The Memorandum found that the proposed actions would neither jeopardize the SONCC coho salmon nor result in adverse impacts to their habitat.

Similarly, in its Environmental Assessment, NMFS reviewed a no action alternative to issuing the ESPs. NMFS concluded that issuing the ESPs would:

> . . .protect and enhance aquatic and riparian habitat through implementation of [the Agreement's Beneficial Management Activities], including barrier removals, instream flow enhancement strategies, and physical habitat enhancements for the conservation of the SONCC coho salmon in the Covered Area.

Therefore, NMFS made a finding of no significant impact for approval of the ESPs.

On August 10, 2021, NMFS issued the 14 ESPs, each with 20-year terms, subject to the conditions of the Agreement, NOAA's Safe Harbor Policy, and the Permittees' relevant Site Plan Agreements. The ESPs exempted the Permittees' activities from the "take" provisions of Section 9 of the ESA, including the "routine agricultural activities."

On June 15, 2022, plaintiffs sued NMFS and other federal defendants (Federal Defendants) in the U.S. District Court, San Francisco Division of the Northern District of California alleging violations of the ESA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).

The Claims

In the complaint, plaintiffs argue that the Biological Opinion is unlawful under the ESA for multiple reasons: (1) the environmental baseline improperly "includes the permittees' existing and ongoing water diversions and deliveries"; (2) the action area is improperly limited to the Shasta River Basin's area "at the farthest downstream portion of the "properties"; (3) the Biological Opinion does not use the best available science related to, among other matters, river flows; (4) the Biological Opinion relies on improper and uncertain mitigation measures to make a no-jeopardy determination; and (5) the Biological Opinion incorrectly—as a factual and a legal matter—concludes that the routine agricultural activities will not jeopardize the continued existence of the SONCC coho salmon, or destroy or adversely modify their habitat. (Complaint at ¶¶ 113-118 .)

Plaintiffs also argue that NMFS violated NEPA for a number of reasons. First, plaintiffs assert that NMFS' Environmental Assessment "fails to include 'high quality' information and '[a]ccurate scientific analysis' as required by NEPA[,] 40 C.F.R. § 15001, subd. (b)," and fails to take the required "hard look" at the effects of NMFS' approvals of the landowner activities. (Complaint at ¶ 125.) Plaintiffs also contend that NMFS violated NEPA by not analyzing an alternative involving issuance of an incidental take permit instead of an ESP and by preparing a "Finding of No Significant Impact." (*Id.* at ¶¶ 125, 126.) Finally, plaintiffs argue that NMFS' approvals are arbitrary and capricious and an abuse of discretion in violation of the APA, 5 U.S.C. §§ 704, 706, subd. (2)(A).

Conclusion and Implications

Plaintiffs request rescission of the Biological Opinion and the Environmental Assessment, and ask the court to require NMFS to prepare an adequate environmental impact statement under NEPA. It remains to be seen how the Federal Defendants will respond to the complaint as no responsive pleading had been filed as of August 25, 2022.

(Tiffanie A. Ellis, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT UPHOLDS EIS AND COMPREHENSIVE CONSERVATION PLAN FOR TWO NATIONAL WILDLIFE REFUGES

Audubon Society of Portland v. Haaland, 40 F.4th 917 (9th Cir. 2022).

The Audubon Society of Portland sued the U.S. Fish and Wildlife Service (FWS or Service), alleging the service's Record of Decision (ROD) adopting a combined Environmental Impact Statement (EIS) and Comprehensive Conservation Plan for two national wildlife refuges violated the Kuchel Act, National Wildlife Refuge System Improvement Act, Administrative Procedure Act, National Environmental Policy Act, and the Clean Water Act. The U.S. District Court, adopting the report and recommendation of the Magistrate Judge, granted summary judgment in favor of the FWS, and the Audubon Society appealed. The Ninth Circuit Court of Appeals in turn affirmed, finding that the FWS had not violated any of the various statutory regimes.

Factual and Procedural Background

In January 2017, the Service issued a ROD adopting a combined EIS and Comprehensive Conservation Plan (EIS/CCP) for five of the six refuges in the Klamath Basin National Wildlife Refuge Complex in southern Oregon and northern California. In its combined EIS/CCP, the Service considered three agricultural habitat management alternatives for the Tule Lake Refuge and four alternatives for the Lower Klamath Refuge. In both instances, the FWS adopted what was analyzed as "Alternative C," which in each case continued many of the agricultural management strategies that already were in place, with some attendant changes.

This case was one of four consolidated appeals from a U.S. District Court decision that rejected various challenges. Here, the Audubon Society of Portland claimed the EIS/CCP violated the Kuchel Act of 1964, the National Wildlife Refuge System Improvement Act as amended by the Refuge Improvement Act (Refuge Act), the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) with respect to the Tule Lake and Lower Klamath Refuges. Briefly, it claimed the EIS/CCP: violated the Refuge Act because it failed to provide sufficient water for the Lower Klamath Refuge; violated the Kuchel Act, the Refuge Act, and the APA because it did not prioritize the preservation of wildlife habitat over agricultural uses of leased agricultural land in the refuges; violated the Refuge Act because it delegated day-to-day administrative responsibilities to the Bureau of Reclamation; and violated NEPA because it did not adequately evaluate an alternative that would reduce the acreage of lease land in the Tule Lake and Lower Klamath Refuges

The U.S. District Court, adopting the report and recommendation of the Magistrate Judge, granted summary judgment to the Service. The Audubon Society in turn appealed.

The Ninth Circuit's Decision

On appeal, the Audubon Society did not pursue its argument that the EIS/CCP violated the CWA, however, it continued to pursue its other claims. The Ninth Circuit addressed each.

Failure to Provide Sufficient Water for the Lower Klamath Refuge

The Ninth Circuit first considered the claim that the FWS failed to provide sufficient water for habitat needs in the Lower Klamath Refuge, in violation of the Refuge Act. While the Ninth Circuit sympathized with Audubon Society's concerns that the water available for the Lower Klamath Refuge was inadequate to serve the habitat purposes of the Refuge, the Ninth Circuit ultimately was satisfied on the record (particularly given the constraints on the Service, whose ability to provide water was severely limited) that the EIS/CCP fulfilled the Service's obligations under the Refuge Act to:

> . . .assist in the maintenance of adequate water quantity . . . to fulfill the mission of the [Refuge]

> System and the purposes of each refuge. . .[and to]. . .acquire, under State law, water rights that are needed for refuge purposes.

Continuation of Present Pattern of Agricultural Leasing in the Tule Lake and Lower Klamath Refuges

The Ninth Circuit next considered the argument that the EIS/CCP's continuation of the present pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges violated the Kuchel Act and the Refuge Act and was arbitrary and capricious in violation of the APA. The primary contention was that the EIS/CCP authorized an improper mix of agricultural land and natural habitat land and, effectively, prioritized commercial agricultural crops over natural foods and wetland habitats. The Ninth Circuit found the FWS had considered these arguments and that, as the reviewing court, nothing authorized it to make different choices. The Ninth Circuit concluded that the balance struck by the EIS/CCP was consistent with the various statutes.

Delegation to the U.S. Bureau of Reclamation

The Ninth Circuit next addressed the claim that the EIS/CCP improperly authorized the Bureau of Reclamation to administer lease land in the Tule Lake and Lower Klamath Refuges in violation of the Refuge Act. The Ninth Circuit disagreed, finding the U.S. Bureau of Reclamation's responsibilities under the EIS/CCP were not "administration" within the meaning of the Refuge Act's anti-delegation provision. Here, the Bureau was assigned specified management functions and was, in all respects, subject to the supervision and approval of the Service.

Failure to Consider a Reduced-Agriculture Alternative

Finally, the Ninth Circuit considered the claim that the lack of a reduced-agriculture alternative violated NEPA. The Ninth Circuit again disagreed, finding the Service sufficiently considered whether to reduce the acreage devoted to lease-land farming and explained why it did not list such reduction as an alternative in the EIS/CCP. The Ninth Circuit also found that, to the extent the current pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges was consistent with proper waterfowl management in those refuges, the Kuchel and Refuge Acts directed the FWS to continue that pattern of leasing. The Ninth Circuit generally recognized the constraints on the Service and deferred to the Ninth Circuit's reasoned explanations.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding various statutory regimes regarding the management of National Wildlife Refuges. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/18/20-35508.pdf.
(James Purvis)

NINTH CIRCUIT REVISITS THE MEANING OF 'TRANSPORTATION' UNDER THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT

California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. July 1, 2022).

On July 1, 2022, the Ninth Circuit Court of Appeal filed a new, superseding opinion in the case of *California River Watch v. City of Vacaville*, revisiting its prior opinion from September of 2021 where the Court of Appeals previously held that the City of Vacaville (City) could potentially be held liable for transporting hexavalent chromium through its water supply due to the contaminant's presence in the City's groundwater source. With this newly filed opinion, however, the Ninth Circuit took the opportunity to reconsider the meaning of "transportation" for liability purposes under the federal Resource Conservation and Recovery Act (RCRA) and provide closure on the ultimate question of whether the City could be

liable for transporting solid wastes incidental to its delivery of drinking water.

Background: *Vacaville I*

In the original complaint, California River Watch (River Watch) claimed that the City's water wells were contaminated with hexavalent chromium (also known as Chrom-6), a carcinogen known to cause significant health risks. The complaint further alleged that the City's delivery of such waters contaminated with Chrom-6 created an imminent and substantial endangerment to human health and the environment in violation of RCRA. The district court ultimately granted summary judgment in favor of the City, stating that the City's water deliveries did not qualify as discarding solid waste under RCRA. On appeal, however, the Ninth Circuit shifted the debate to focus on another question – whether the City's water deliveries constituted "transportation" under RCRA.

The Ninth Circuit's Decision

Reconsidering the meaning of 'Transportation:' *Vacaville II*

With the appeal shifting focus to consider whether the City's water deliveries constituted "transportation" under RCRA, the panel for the Ninth Circuit first discussed that in order to establish liability under RCRA, three elements must be satisfied: (1) that the defendant has contributed to the past or is contributing to the present handling, treatment, transportation, or disposal of certain material; (2) that this material constitutes "solid waste" under RCRA; and (3) that the solid waste may present an imminent and substantial endangerment to health or the environment. Although the district court ruled in favor of the City on the grounds that RCRA's "fundamental requirement that the contaminant be 'discarded'" was not satisfied, the panel for the Ninth Circuit held that River Watch did in fact create a triable issue on whether the Chrom-6 constitutes "discarded material" and therefore meeting RCRA's definition of "solid waste."

River Watch further argued that the City should be liable because it physically moved the waste—that waste being the water contaminated with Chrom-6—by pumping it through its water supply system. On this point, however, the panel for the Ninth Circuit concluded that:

> RCRA's context makes clear that mere conveyance of hazardous waste cannot constitute 'transportation' under the endangerment provision [of RCRA].

Citing to numerous examples of how the term "transport" is used throughout the text of RCRA, the panel for the Ninth Circuit explained that "transportation refers to the specific task of moving waste in connection with the waste disposal process." The panel further explained that the court has previously held that "disposal" as used in the endangerment provisions for citizen suits requires a defendant to be actively involved in the waste disposal process to be liable under RCRA. Accordingly, the panel concluded that the best reading of RCRA is that the term "transportation" must also have a direct connection to the waste disposal process such as through the shipping of waste to hazardous waste treatment, storage, or disposal facilities.

Ultimately, the panel for the Ninth Circuit concluded that the City did not have the direct connection to the waste disposal process that it determined is necessary to be held liable for "transportation" under RCRA and affirmed the district court's grant of summary judgment for the City.

Conclusion and Implications

When the original complaint was filed, the potential for the case to have significant impact on water suppliers throughout the state was huge. With the final opinion coming down in early July, that was certainly proven to be true. Although the inverse of this story might have proven to be more groundbreaking news, the Ninth Circuit's opinion in *California River Watch v. City of Vacaville* provided clarification of the term "transportation" as used in RCRA that will almost certainly restrict citizen suits to some extent moving forward. By limiting the use of transportation to a specific process—*i.e.* the waste disposal process—the Court of Appeals has pulled back the reins on the liberal (even if laymen) interpretation of the term that River Watch had fought for in this case. The Ninth Circuit's 2022 opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/01/20-16605.pdf.
(Wesley A. Miliband, Kristopher T. Strouse)

FIFTH CIRCUIT RULES OIL POLLUTION ACT CLAIMS MERIT A JURY TRIAL

United States v. ERR, LLC, et al., ___F.4th___, Case No. 21-30028 (5th Cir. 2022).

A wastewater treatment facility on the bank of the Mississippi River in Louisiana took on oil for treatment from a barge. Soon thereafter there were reports of oils slicks in the river, and a Coast Guard investigation eventually pointed to the facility itself as being the party at fault. The facility (ERR) hired a cleanup contractor that spent days performing a cleanup and producing a bill for services exceeding $900,000.00. ERR declined to pay, and the cleanup contractor filed for reimbursement from the Fund set up under the Oil Pollution Act (Act). The contractor was paid about $630,000 by the government. The United States then proceeded to file a claim for restitution against ERR.

The Oil Pollution Act

The Act became law in 1990, in great part in response to the Exxon Valdez calamity. It establishes the Oil Spill Liability Trust Fund, a governmental fund gathered from certain taxes and penalties that can reimburse people who incur expense but did not cause a spill. In turn, the government succeeds to all claims of the reimbursed party. See generally 33 U.S.C.A. §§ 2712, 2713; Exec. Order No. 12,777, § 7, 56 Fed. Reg. 54,757, 54,766-68 (Oct. 18, 1991)

At the U.S. District Court

The defendant ERR demanded a jury trial for the government claim, but the trial court denied the request. In the ensuing U.S. District Court bench trial the court's ruling went against ERR. The trial judge ruled not only that ERR was the responsible party for the oil spill, but also that the nature of the remedy under the Act sounded in equity, warranting no jury trial right to be recognized. The trial court cited to cases and law indicating that restitution was historically regarded as an equitable remedy available from courts, but without juries hearing facts. Thus, the demand for jury trial that ERR had made at the outset was stricken on motions prior to the bench trial.

The trial court stated in its opinion that its decision on whether the right to jury trial existed on the facts and law before it was a close call.

The Fifth Circuit's Decision

The Fifth Circuit opinion by Judge Andrew S. Oldham explains at some length and in an interesting historical review why the Fifth Circuit reversed the lower court decision and decided that the right to jury trial should have been afforded ERR.

The opinion notes that the right to a trial by jury was one of the rights and liberties not originally contained in the U. S. Constitution. It further delves into the debates on how to word the granting of that right, which some patriots, including Alexander Hamilton, saying it should be up to the will of Congress on a law-by-law basis. In the end, the issue was resolved by adopting the following language as part of the Bill of Rights, specifically the 7th Amendment:

In claims at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

The opinion goes on at some length to emphasize that while the remedy of restitution was originally a court invented and applied action, the federal test in the United States turns on two factors.

First, the courts compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, they examine the remedy sought and determine whether it is legal or equitable in nature. The second factor is more important.

The opinion then analyzes the nature of the claim against ERR. The recoupment of funds sought here, it notes, is based on the concept of a tort being at the origin of the claim. It cites Supreme Court's discussion of restitution in *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Instead of recovering money or unique property that once belonged to plaintiff and can be "restored," the court observes that the claim in question against ERR is really in the nature of a tort claim for damages, because ERR must be shown to be responsible for the oil spill in order to

have liability. The fact that the device of subrogation of claims is being used to get the government into the case does not alter the basic nature of the claim itself.

Conclusion and Implications

The government sought to rely on cases from the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that have concluded no jury trial right should exist there. That argument made little impression on the Fifth Circuit, which considered the U.S. Supreme Court's decision in *Knudson* definitive. Whether those CERCLA cases are apposite or whether there is a conflict of the Circuits on the jury right is beyond the scope of this article. The court's opinion is available here: https://fingfx.thomsonreuters.com/gfx/legaldocs/zjpqkgoyw-px/USA%20v%20ERR%20LLC%205th%20Cir%20OPA.pdf.
(Harvey Sheldon)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT HOLDS CEQA NOT CATEGORICALLY PREEMPTED BY FEDERAL POWER ACT

County of Butte v. Department of Water Resources, et al., ___Cal.5th___, Case No. S258574 (Cal. Aug. 25, 2022).

On August 1 [published August 25], the California Supreme Court held that the Federal Power Act preempted the California Environmental Quality Act (CEQA) challenges to a settlement agreement between the California Department of Water Resources (DWR) and the Federal Energy Regulatory Commission (FERC) developed in response to DWR's application to renew its license to operate Oroville Dam facilities. However, the Court remanded for further proceedings questions of the sufficiency of DWR's environmental review that were not within the purview of FERC's licensing jurisdiction.

Background

The Federal Energy Regulatory Commission is responsible for licensing the operations of dams, reservoirs, and hydroelectric power plants. The California Department of Water Resources obtained a license to operate facilities related to the Oroville Dam (Facilities) in 1957 for a 50-year period. DWR has operated the Facilities under an annual, interim license since 2007, when its 50-year license expired. California requires public entities seeking licensing of state-owned and state-operated hydroelectric projects to conduct environmental review under CEQA.

For purposes of DWR's relicensing process, FERC regulations provided two options: the traditional licensing process or an alternative licensing process. FERC approved DWR's request to use the alternative process in 2001. The alterative process is a voluntary procedure designed to achieve consensus among interested parties on the terms of the FERC license before the licensing application is submitted. The ALP involves a series of hearings, consultations, and negotiations to identify areas of concern and disagreement among the stakeholders regarding the license terms and to resolve those differences. In effect, the alternative process combines the traditional licensing procedure with the environmental review process under the National Environmental Policy Act (NEPA), procedures required under the federal Clean Water Act, and other statutes. The goal of the alternative process is for the participants to develop and execute a settlement agreement that reflects the terms of a proposed license that becomes the core of the license application.

DWR and other interested parties, including petitioners Butte and Plumas counties, engaged in hearings and consultations over a three year period and began negotiating an agreement in 2004. However, the Counties refused to sign the settlement agreement. DWR submitted the settlement agreement and a draft preliminary environmental assessment required under NEPA as its license renewal application. FERC prepared an environmental impact statement (EIS) under NEPA based in part on DWR's draft environmental assessment for the renewal. DWR also prepared various documents and submissions following its renewal application.

In 2005, DWR submitted a certificate from the State Water Resources Control Board (Water Board) that the Facilities would comply with state and federal water quality laws. In 2007, DWR issued an Environmental Impact Report (EIR) under CEQA. The EIR characterized the project under CEQA review as implementation of the settlement agreement, which would allow "the continued operation and maintenance of the Oroville Facilities for electric power generation." According to the EIR, DWR undertook CEQA procedures because: (1) the Water Board required preparation and certification of an EIR as part of DWR's application for certification under the Clean Water Act and (2) the CEQA process could inform DWR's decision whether to accept the license containing the terms of either the settlement agreement or the alternative proposed by FERC staff, both of which were analyzed in the EIR.

After receiving and responding to public comment on the draft EIR, DWR finalized the EIR and issued a notice of determination in July 2008. The notice

contained findings that the adoption of mitigation measures was required for approval of the project but that the project, so mitigated, would not have a significant effect on the environment. Consequently, "as conditions of project approval," DWR adopted a six-page slate of mitigation measures "that will be implemented by DWR" and a mitigation monitoring program to ensure that implementation. The mitigation measures adopted by DWR addressed the Facilities' impacts on wildlife resources, botanical resources, noise, air quality, public health and safety, and geology, soils, and paleontological resources. In general terms, the mitigation measures require DWR to operate the Facilities and to conduct any construction activities associated with the Facilities in a safe and environmentally sensitive manner.

The Counties filed petitions for writ of mandate challenging DWR's compliance with CEQA regarding the relicensing, and the cases were consolidated. The California Court of Appeal held that the Counties' actions were preempted to the extent they challenged the settlement agreement over which FERC has exclusive jurisdiction and were premature to the extent they challenged the Water Board's certification, which had not issued at the time the actions were filed. The Court directed the Court of Appeal to reconsider its decision in light of a recent case, Eel River, and the Court of Appeal reached the same conclusions on remand. The Counties petitioned for a writ of certiorari.

The Supreme Court's Decision

The Court considered a single question on review: Whether the FPA preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in pursuing relicensing of a hydroelectric dam. Under federal law, there are three types of preemption: field preemption, conflict preemption, and express preemption. Generally, a state law is preempted when it conflicts with a federal law regardless of the type of preemption at issue.

Here, the Court held that the Counties' CEQA challenges were barred by the preemption doctrine to the extent they sought to unwind the terms of the settlement agreement DWR and other interested parties reached with FERC under the alternative process—an outcome the Counties acknowledged was appropriate. However, the Court also held that the FPA did not preempt CEQA's application to DWR's implementation of the settlement agreement, for which DWR prepared an EIR and which the Counties challenged.

In reaching its decision, the Court reasoned that CEQA was not preempted by the FPA because an EIR prepared under CEQA could inform the state agency concerning actions that do not encroach on FERC's federal jurisdiction. For instance, according to the Court, DWR could conduct CEQA review to "assess its options going forward," which the Court determined were not incompatible with federal authority in part because DWR was not obligated to accept the terms of a license based on the settlement agreement. DWR could also implement mitigation measures the Court surmised were outside FERC's jurisdiction. In other words, the Court reasoned that CEQA could "inform the public entity's decision-making without encroaching on FERC's ultimate licensing authority."

The Court also reasoned that the savings clause in the FPA is not limited to state-based water rights. The FPA's savings clause, Section 27, provides as follows:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The Court reasoned that the FPA does not say that only state water rights are reserved from federal jurisdiction, i.e. remain subject to state jurisdiction, and thus it is not "unmistakably clear" that Congress intended to preempt a state's environmental review of its own project.

Analysis under the *Eel River* Decision

The Court relied on its prior ruling in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, where it found an explicit and broad preemption clause "insufficiently clear" to overcome the presumption that Congress did not intend to preempt the state's internal decision-making under CEQA.

The Dissent

Justice Cantil-Sakauye filed a dissenting opinion. She opined that the FPA preempts application of CEQA because: (1) the doctrine of preemption is considerably broader than applied by the majority and grants only a the narrow exception for state regulation via the FPA's savings provision for state-based water rights; (2) DWR's CEQA analysis duplicates that of the EIS prepared by FERC regarding the settlement agreement and the draft environmental assessment DWR was required to submit with its renewal application; and (3) CEQA imposes a mandatory mitigation measure and mitigation measure compliance program that obstructs FERC's regulatory authority over hydropower. Taken together, Justice Cantil-Sakauye opined that CEQA was preempted by the FPA.

Conclusion and Implications

The Supreme Court's holding suggests that CEQA may apply in instances deemed to fall outside the purview of a federal hydropower license and the FPA. As indicated in the dissenting opinion, additional CEQA analysis pertaining to the effects of FERC-issued licenses may delay hydropower projects for many years, although it remains to be seen whether the decision will have that consequence. The Court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/S258574.PDF (Miles Krieger, Steve Anderson)

THIRD DISTRICT COURT DECLARES TERRESTRIAL INVERTEBRATES ELIGIBLE FOR LISTING UNDER CALIFORNIA ENDANGERED SPECIES ACT

Almond Alliance of California v. Fish & Game Commission, 79 Cal.App.5th 337 (3rd Dist. 2022).

In *Almond Alliance of California v. Fish & Game Commission* the Third District Court of Appeal answered the question of whether terrestrial invertebrate species can be protected under the California Endangered Species Act (CESA), holding that four bumble bee species were eligible for listing under the CESA under the definition of "fish." In coming to this conclusion, the Court of Appeal took a deep dive into how the CESA defines fish and reasoned that the term is defined broadly enough to allow for the inclusion of the four bumble bee species despite the surface level confusion such a reading might cause.

Background

In October of 2018, several public interest groups petitioned the Fish and Game Commission (Commission) to list four species of bumble bee as endangered species under the CESA. The Commission accepted the petition for consideration in June of 2019 and ultimately provided notice that the four species were to be listed as candidate species as defined by Section 2068 of the CESA. Following this notice, several agricultural industry associations filed a petition for a writ of administrative mandate challenging the decision to list the four species as candidates. The Superior Court for Sacramento County granted the petition and the public interest groups, as intervenors, appealed. The issue to be heard on appeal was whether the bumble bees, as terrestrial invertebrates, fall under the definition of fish as that term is used in §§ 2062, 2067, and 2068 of the CESA.

The Court of Appeal's Decision

Section 45 of the Fish and Game Code defines the term "fish" broadly to include any "wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." In the Court of Appeal's opinion in the case of *California Forestry Association v. California Fish and Game Commission*, 156 Cal.App.4th 1535 (2007), the court explained that:

> . . .while the definition of threatened species and endangered species in the CESA includes 'native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant,' the Legislature has narrowed the definition of 'fish' to mean that which falls within the definition of section 45.

Looking to Legislation and the *California Forestry Association* Decision

Looking at the CESA's legislative history, the court found it significant that the legislature was aware of this broad definition of fish—which included invertebrates—when the CESA was adopted. In supporting this finding, the Court of Appeal pointed that the Department of Fish and Game and Natural Resources Agency had issued an analysis of the proposed legislation in which the two agencies explicitly stated that the Commission's listing authority extended to invertebrates such as insects. Accordingly, with all that in mind, the court reached its first conclusion, finding it abundantly clear that the definition of fish included the term invertebrate—a term which the four bumble species fell under—and that the Commission therefore has the authority to list invertebrates as endangered or threatened species.

As for the terrestrial portion of the term "terrestrial invertebrate," the court cited to the listing of the threatened trinity bristle snail. Originally listed under the 1970 endangered and rare animals legislation, the trinity bristle snail was expressly grandfathered into CESA as a threatened species when the CESA was adopted. The Legislature therefore, according to the court, approved of the Commission's decision to list a terrestrial mollusk and invertebrate as a rare animal under the 1970 legislation. In other words, the Legislature approved of the Commission's interpretation that § 45 of the Fish and Game Code gave it the authority to list a terrestrial invertebrate under the definition of fish.

In reaching its second and ultimate conclusion, the Court of Appeal reaffirmed and expanded upon its conclusion in *California Forestry* that Section 45 defines "fish" as the term is used in sections 2062, 2067, and 2068 of the CESA, and further concluded that the Commission has the authority to list *any* invertebrate as an endangered, threatened, or candidate species, so long as it meets the requirements in those definitions of the CESA.

Conclusion and Implications

Through the court's vast discussion on the subject and examination of the legislative history behind the CESA, the court made clear that the inclusion of invertebrates—*all* invertebrates—was deliberate and cannot be written off as an unintended consequence of the wordsmithing of the CESA. This opens up a vast host of opportunities for the inclusion of many other species that fall under the newly clarified category of species that are ripe for official listing under the CESA, including species such as the monarch butterfly which has been at the forefront of conservation efforts for some time now. Looking forward, this case will undoubtedly embolden many public interest groups to come forward and file new petitions for CESA protection in light of the court's decision. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093542.PDF. (Wesley A. Miliband, Kristopher T. Strouse)

CITY OF LOS ANGELES PREVAILS IN WATER DISPUTE WITH MONO COUNTY

County of Mono v. City of Los Angeles,
___Cal.App.5th___ Case No. A162590 (1st Dist, June 30, 2022, *Ordered Published* July 26, 2022).

In late June, the Court of Appeal reversed a trial court's ruling in favor of the County of Mono and the Sierra Club, holding that a California Environmental Quality Act (CEQA) challenge to the City of Los Angeles (City) leases of certain property in Mono County was barred by the statute of limitations. The Court of Appeal determined that because leases issued in 2010 contained provisions allowing the City to reduce or terminate water to the leased lands, plaintiffs could not bring a CEQA challenge in 2018 when the City proposed new leases with similar provisions.

Background

In 2010, the City approved a set of three substantively identical leases for roughly 6,100 acres of land the City owns in Mono County (County). The leases contained various provision concerning water, including that the leases were subject to the paramount rights of the City with to respect to all water rights and use. Under the leases, the availability and use of water on the leased premises were conditioned upon the quantity of supply available each year, as determined by the City. The leases also divided the acreage into dry lease and irrigated lease categories, and provided water deliveries to the irrigated lease lands in an amount not to exceed five acre-feet per acre. However, these deliveries were not guaranteed, as delivered water supply was dependent upon water availability and weather conditions. The leases also permitted the City to reclassify property as dry, in the City's discretion. In 2010, the City found approval of these leases to be exempt under CEQA Class 1 categorical exemption for the use of existing structures or facilities with no or negligible expansion of use.

In 2018, the City submitted a new form of proposed lease for some of the 6,100 acres classified as dry providing that the City would not provide any irrigation water to these lands, though the City might direct its lessees to spread excess water to these properties based on City operational needs. The City also informed the lessees it would undertake environmental review of the new proposed leases. Mono County objected that the City should in fact provide more irrigation water to these lands. In response to adoption of the new proposed leases, the County filed suit against the City for its reduction or elimination of water deliveries to the subject lands. The County also contended that the City's decision to reduce water deliveries was a new "project" under CEQA that contained new environmental impacts, such as impacts to sage grouse and their habitat. The trial court ruled in the County's favor and the City appealed.

The Court of Appeal's Decision

The First District Court of Appeal first addressed whether the trial court improperly relied on extra-record evidence. The trial court had issued a tentative ruling on the County's petition; but, prior to the merits hearing, the City submitted a declaration regarding water diversions which the trial court relied on when calculating the baseline for purposes of fashioning a remedy. The appellate court ruled that the declaration was admissible extra-record evidence as it served as a basis for informal or ministerial administrative action. Under these circumstances, the extra-record evidence was properly considered.

'Project'

Turning to the case's merits, the appellate court addressed the central question of whether the City's adoption of the new proposed leases was a separate "project" requiring CEQA review. Since the material facts of the case were undisputed, the court treated this as a question of law.

Through a contractual analysis, the court evaluated whether the City was entitled to reduce its water allocations to the subject lands under the previous leases. The previous leases stated in pertinent part:

> . . .any supply of water to the leased premises by [the City] is subject to the paramount rights of [the City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [the City] and its inhabitants.

Based on the language of the previous leases, the court concluded the City was in fact entitled to end water deliveries. In turn, the court held that the reduced water allocations in the new proposed leases was based on a continuation and implementation of the terms of the previous leases, and not part of a new project. While a total elimination of water allocations as proposed in the new leases would be new and distinct from the previous leases, the court accepted the City's representation that such was not being implementing under the previous leases. Review of the history of allocations under the previous lease supported this conclusion, according to the Court of Appeal. Lastly, the court held that the temporal relationship between the reduced allocation of water and the new leases did not create or implement a new policy or new project. Thus, the new leases did not require CEQA review and were deemed part of the 2010 leases.

Time Barred Claim

Because the Court determined the 2018 water allocations were part of the leases issued in 2010, and

Mono County only brought its writ petition in 2018 during implementation of the project, the challenge was time-barred. According to the court, the 2018 water allocation was a subsequent discretionary decision or approval of an activity under the 2010 leases, which did not remove that approval from the ambit of the 2010 leases and thus did not restart the limitations period. In effect, the court determined that for Mono County to timely challenge a future water reduction allowed under provisions of the original leases, the County needed to challenge the original leases when the City approved them in 2010.

Conclusion and Implications

The *County of Mono* decision serves as an important reminder of the distinction between project approval and project implementation which governs how CEQA claims will be analyzed in the context of projects arising from government agreements including leases. *Mono* also addressed the likelihood of litigation in contexts where reliance on certain water allocations has grown but the water supply available for future use is either uncertain or simply unavailable. The court's decision was ordered published in July and is available online at: https://www.courts.ca.gov/opinions/documents/A162590.PDF.
(Megan Kilmer, Steve Anderson)

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