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FEATURE ARTICLES

NINTH CIRCUIT FINDS NO WAIVER OF STATE WATER BOARD'S SECTION 401 CERTIFICATION AUTHORITY— THE LATEST IN THE BATTLE OF AUTHORITY TO REGULATE FEDERAL HYDROPOWER PROJECTS

By Brian E. Hamilton and Holly Tokar

In passing the federal Clean Water Act in 1972, Congress contemplated a system of cooperative federalism, whereby states would be essential partners in protecting water quality. Toward that end, federal licenses for activities resulting in discharges into navigable waters require a water quality certification from the affected state, including licenses from the Federal Energy Regulatory Commission (FERC) to operate hydropower projects. The inconsistent priorities of state governments, the federal government, project proponents, and other stake-holders guarantees tension in this process. In the hydropower licensing context, tension over the application of the one-year deadline for states to make a decision on a water quality certification has boiled over into litigation and a string of federal appellate cases throughout the United States.

Most recently, on August 4, 2022, a panel of the Ninth Circuit Court of Appeals issued a decision concluding that California did not waive its authority under the Clean Water Act to issue water quality certifications to parties applying to FERC for licenses to operate three dam projects. [*California State Water Resources Control Board v. FERC*, 43 F.4th 920 (9th Cir. 2022).]

This case is only the latest in a series of cases concerning FERC's position on state authority to regulate water quality standards as part of the federal hydropower licensing regime that FERC administers. The Clean Water Act allows up to one-year deadline for state certification, but this deadline can be infeasible due to state environmental review requirements. In these circumstances, parties have avoided the one-year deadline for certification by withdrawing and resubmitting applications. FERC attempted to limit this practice by deeming California to have waived its authority by coordinating with the three applicants to withdraw and resubmit. The Ninth Circuit vacated FERC's waiver order because evidence in the record did not support a conclusion that the California State Water Resources Control Board (State Water Board) formally coordinated with applicants and because such a waiver could result in the issuance of licenses with 40-year terms without adequate environmental review.

Summary of State Water Quality Certification under Section 401 of the Clean Water Act

FERC administers the licensing of hydropower projects on the nation's navigable waters. FERC's authority stems from the Commerce Clause, which gives the federal government authority to regulate the construction and operation of hydropower projects located on the nation's navigable waters.

Section 401 of the Clean Water Act requires that an applicant for a license to operate a hydropower project obtain state water quality certification wherever there is a potential for discharge, including release of water from hydroelectric turbines into a river. 33 U.S.C § 1341; *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 386-387 (2006). States are the "prime bulwark in the effort to abate water pollution." *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).

> The certification authority granted States is '[o]ne of the primary mechanisms' through which

> they may exercise this role, as it provides them with 'the power to block, for environmental reasons, local water projects that might otherwise win federal approval.' *Id.* (citing *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991)).

Because states may have water quality laws that are more stringent than federal law, Section 401 allows states to impose conditions on licenses to ensure compliance with applicable state water quality standards. 33 U.S.C. § 1341(a)(1). However, to prevent a state from "indefinitely delaying" federal licensing proceedings, Section 401 provides that if the state:

> . . .fails or refuses to act on a request for certification, within a *reasonable period of time* (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection *shall be waived* with respect to such Federal application. *Id.* (emphasis added).

FERC, through regulations governing hydropower licensing and agency adjudications, has interpreted Section 401 to allow states one year to act on an application. 19 C.F.R. §§ 4.34(b)(5)(iii), 5.23(b)(2); Const. Pipeline Co., 162 FERC ¶ 61,014, at P 16 (Jan. 11, 2018). Because federal licenses for hydropower projects can last up to 50 years, a state's failure to act within one year and consequent waiver of authority can result in projects operating out of compliance with state water quality laws for decades.

The State Water Board has jurisdiction over water quality certifications in California. However, California's criteria for granting water quality certifications often make it impracticable for certification to occur within one year. The California Environmental Quality Act (CEQA), for instance, requires that the State Water Board receive and consider an analysis of the project's environmental impact before granting Section 401 certification. Because of the time required to comply with the state environmental review process, a practice has developed—both in California and in other states—whereby project applicants withdraw their certification request before the end of the one-year review period and resubmit it as a new request. This "withdrawal-and-resubmission" practice re-starts the one-year clock, affording the project applicant more time to comply with the procedural and substantive prerequisites to certification. California regulations actually contemplate this scheme, providing that an application for certification will be denied without prejudice if CEQA review cannot be completed within one year "unless the applicant in writing withdraws the request for certification." Cal. Code Regs. tit. 23, § 3836(c).

Hoopa Valley and FERC's Efforts to Restrict State Authority

FERC accepted the withdrawal-and-resubmission practice for many years until the D.C. Circuit held, in 2019, that California and Oregon engaged in a "coordinated withdrawal-and-resubmission scheme" with certain project applicants and waived Section 401 certification authority. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 650 (2019). In 2019 the D.C. Circuit Court of Appeals concluded that California and Oregon waived their certification authority for certain hydroelectric projects on the Klamath River. There, California and Oregon had entered into a formal written agreement with an applicant whereby the applicant would withdraw its certification requests annually to avoid a waiver of the state's licensing authority. The D.C. Circuit characterized this agreement as a "coordinated withdrawal-and-resubmission scheme" that was a "failure" or "refusal" to exercise its certification authority under section 401 of the Clean Water Act. *Id.* at 1104-04.

Following the *Hoopa Valley* decision, FERC changed its standard for waiver. FERC drew a line between an applicant's "unilateral" decision to withdraw-and-resubmit—which would not trigger waiver—and a state's "coordinated" scheme with a project applicant aimed at affording itself more time to act on a certification request—which would trigger waiver.

The Fourth Circuit Pushes Back, and the Ninth Circuit Comes Along

Following the D.C. Circuit's decision, FERC found waivers in a number of cases. The Fourth Circuit Court of Appeals addressed one instance in *North Carolina Department of Environmental Quality v. FERC*, 3 F.4th 655 (4th Cir. 2021). In 2017, the operator of a dam and hydropower project located in

North Carolina applied to relicense the project. Pursuant to Section 401, the operator also sought a water quality certification from the North Carolina Department of Environmental Quality (NCDEQ) in April 2017. *Id.* at 662. By December 2017, FERC had still not completed its Environmental Assessment (EA) pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. *Id.* To avoid the one-year deadline for making a decision on the water quality certification, NCDEQ emailed the operator and recommended that the operator withdraw and resubmit its application, which the operator did in February 2018. FERC completed its EA in October 2018. *Id.* NCDEQ informed the operator that although it received the EA from FERC, state law notice and comment requirements would prevent NCDEQ from approving the application before the expiration of the one-year deadline. *Id.* at 662-63. The operator again withdrew and resubmitted its application. *Id.* The following year, in September 2019, NCDEQ issued a certification that included conditions for compliance with state water quality standards. On the same day, FERC issued a license. *Id.* at 663. But FERC's license order stated that NCDEQ had waived its certification authority and did not include NCDEQ's conditions in the license. *Id.* Relying on *Hoopa Valley*, FERC concluded that the "one-year clock" on the water quality application commenced when the original application was filed in April 2017 and never restarted when the operator withdrew and resubmitted its application in February 2018 and again in October 2018. *Id.* The Fourth Circuit disagreed, holding that "FERC's key factual findings underpinning its waiver determination are not supported by substantial evidence." *Id.* at 671. The Fourth Circuit found that no evidence in the record that NCDEQ initiated or directed the applicant's withdrawal-and-resubmissions. *Id.* at 673-75 ("it must take more than routine informational emails to show coordination.").

Most recently in *State Water Resources Control Board v. FERC*, 43 F.4th 920 (9th Cir. 2022) (hereinafter *SWRCB v. FERC*), FERC again found waiver of state water quality certification, this time by California. FERC determined that California (through the State Water Board) waived its Section 401 certification authority for three dam relicensing applications: (1) the Yuba-Bear Project operated by Nevada Irrigation District; (2) the Yuba River Project operated by the Yuba County Water Agency; and (3) the Merced River and Merced Falls Projects operated by the Merced Irrigation District. In each case, the applicants had withdrawn and resubmitted numerous applications. For each waiver determination, FERC held that the State Water Board engaged in "coordinated" schemes with the project applicants to avoid the one-year deadline.

FERC's primary evidence of coordination were State Water Board comments—on CEQA documents or in email exchanges—predicting that project applicants would withdraw-and-resubmit their water quality certification requests, and indicating that the State Water Board would deny each application without prejudice if the applicants failed to withdraw-and-resubmit their applications. FERC also pointed to the applicants' serial withdrawals-and-resubmissions and California regulations recognizing the practice. *SWRCB v. FERC*, 43 F.4th 920, 935 (9th Cir. 2022) (citing Cal. Code Regs. tit. 23, § 3836(c)).

The Ninth Circuit found this evidence insufficient to support a finding that the State Water Board engaged in a coordinated scheme to avoid the one-year deadline. The Ninth Circuit disagreed that the circumstances identified by FERC established coordination in the same manner as the contractual arrangement in *Hoopa Valley*. *See id.* at 935-36. Instead, the informal communications from State Water Board staff were merely in anticipation of what was, prior to *Hoopa Valley*, "a standard practice employed by project applicants who had not yet complied with CEQA." *Id.* at 934. In each case, the State Water Board indicated that, had the applications not been withdrawn, the State Water Board would have denied the applications without prejudice. *Id.* at 935.

Important to the court's analysis were the consequences of waiver. The term for a federal license for a hydropower project can be up to 50 years, and most licenses are for 40 years. *See id.* at 924. The Ninth Circuit expressed concern that a project could receive a 40- or 50-year license without proper environmental review or appropriate water quality license conditions being imposed, all based on an informal email from staff regarding upcoming deadlines in anticipation of applicants' withdrawal-and-resubmission action that, at the time, was a "common and long-accepted" practice. *Id.* at 935-36.

For these reasons, the court found that FERC's finding of waiver was not supported by substantial

evidence. *Id.* According to the court, "a state's mere acceptance of a withdrawal-and-resubmission is not enough to show that the state engaged in a coordinated scheme to avoid its statutory deadline for action. Accordingly, FERC's orders cannot stand." *Id.* at 936. The Ninth Circuit vacated the orders and remanded for further proceedings. *Id.*

Application of *Hoopa Valley* in Other Cases

FERC and the State Water Board have not been at odds regarding state water quality certification authority in all instances. In *Turlock Irrigation District v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022), Turlock and Modesto Irrigation Districts sought water quality certifications from the State Water Board in January 2018. Just two days before the one-year deadline, the State Water Board denied the requests "without prejudice" because FERC had not completed its NEPA analysis for the projects and the districts had not begun the CEQA process. *Turlock Irrigation District v. FERC*, 36 F.4th 1179, 1181 (D.C. Cir. 2022), *reh'g en banc denied*, No. 21-1120, 2022 WL 4086378 (D.C. Cir. Sep. 6, 2022). The districts filed a second request for water quality certification in April 2019, and the State Water Board repeated this process and denied the second request also without prejudice on the eve of the one-year deadline. *Id.* The districts submitted a third request in July 2020 and, less than three months later, filed a petition to FERC for a declaratory order asserting that the State Water Board waived its Section 401 certification authority. *Id.* at 1182. The districts argued that the State Water Board's denials were "invalid" as a matter of federal law because they were on non-substantive grounds rather than on the technical merits of the certification requests. *Id.* at 1182-83. FERC denied the petition for declaratory order, reasoning that Section 401 requires only "action" within a year to avoid waiver, and the State Water Board "acted on" the petitions by denying the applications without prejudice. *Id.* The D.C. Circuit agreed, holding that FERC's ruling is not contrary to *Hoopa Valley* wherein the state agencies took "*no action at all*" on the certification requests. *Id.* at 1183 (emphasis in original). The court also agreed with FERC that, if denial had to be "on the merits" to qualify as "action" under Section 401, the state would be forced to either (a) grant certification without the necessary information, or (b) waive its power to decide. *Id.* at 1184. Holding that FERC's judgment was rational, the D.C. Circuit rejected the irrigation districts' petitions for judicial review. *Id.*

Actions by California and the Federal Environmental Protection Agency to Bolster State Control

The United States Environmental Protection Agency (EPA) is in the rulemaking process to clarify when waivers occur in light of *Hoopa Valley* and subsequent cases. As the Ninth Circuit noted in *SWRCB v. FERC*, the EPA is charged with administering the Clean Water Act, including Section 401, so the EPA's interpretations—rather than FERC's—are entitled to deference. *SWRCB v. FERC*, 43 F.4th 920, 932 n.11 (9th Cir. 2022) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The EPA promulgated a final rule in 2020 interpreting the Section 401 waiver provision, and the EPA has proposed a new rule on June 9, 2022 that would revise and replace the 2020 rule. *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35318.

The EPA's 2020 rule (85 Fed. Reg. 42210) prohibited state and tribal certifying authorities from *requesting* that project applicants withdraw and resubmit a certification request. 40 CFR 121.6(e). In the proposed 2022 rule, the EPA will not take a position on the legality of withdrawal-and-resubmission of certification requests. 87 Fed. Reg. 35318, 35342. The EPA explained that neither the text of Section 401 nor *Hoopa Valley* categorically precludes withdrawal-and-resubmission, and that there might be factual situations that justify such action. *Id.* Because the EPA is not confident it can create regulatory "bright lines" to address all factual scenarios, the proposed 2022 rule would allow the courts and state and tribal certifying authorities to make case-specific decisions or issue their own regulations on the withdrawal-and-resubmission practice. *Id.*

California has also responded to this issue of Section 401 waiver. In 2020, the California Legislature enacted California Water Code § 13160, which provides that the State Water Board can issue a water quality certification prior to completing CEQA review where "there is a substantial risk of waiver of the state board's certification authority." Cal. Wat. Code § 13160(b)(2); *see also* 2020 Stat. Ch. 18 (AB 92) (enacting Cal. Wat. Code § 13160). Such a certification under § 13160 must also include a condi-

tion that the State Water Board retains the authority to reopen and revise the certification, if necessary, on completion of CEQA review. California Water Code § 13160 was enacted after the withdrawal-and-resubmission events underlying the Ninth Circuit's decision in *SWRCB v. FERC*, and therefore it did not impact the court's analysis in that case. Going forward, this statutory provision gives the State Water Board flexibility to comply with the one-year deadline while environmental review remains pending. It remains to be seen whether federal authorities such as FERC and EPA will allow the State to retain authority to revise a certification after a federal license is issued and whether project proponents will challenge such actions.

Conclusion and Implications

The decisions in *Hoopa Valley*, *North Carolina Department of Environmental Quality*, *Turlock Irrigation District v. FERC* and *California State Water Resources Control Board* can be read in harmony inasmuch as the respective facts of each case provide the boundaries of what actions by a state regulatory authority constitute impermissible coordination such that it has waived certification authority under the Clean Water Act. However, there remains some distance between the approach of the D.C. Circuit in *Hoopa Valley* decision where a coordinated scheme resulted in waiver and the approaches of the subsequent Courts of Appeals where the facts were not found to rise to the level of such a scheme. Although the Supreme Court of the United States declined to review *Hoopa Valley* at the time it was decided in 2019, the parties in either *Turlock Irrigation District v. FERC* or *California State Water Resources Control Board* may still decide to seek review from the Supreme Court.

At the state level, California's enactment of Water Code § 13160 will allow quick certification by the State Water Board while preserving the state's ability to regulate water quality, consistent with the letter of the one-year deadline. Such actions may help California steer clear of the specific issues raised in *Hoopa Valley*, but will likely only increase the tension between California's exercise of authority under Section 401 and FERC's efforts to exert greater control and streamline the licensing process. The regulated operators of hydropower projects will also surely seek to limit efforts by states to extend their regulatory authority beyond a limited and narrow one-year certification window, if not seeking outright waivers of states' authority.

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CALIFORNIA WATER NEWS

GOVERNOR NEWSOM RELEASES CALIFORNIA'S WATER SUPPLY STRATEGY

As the summer of 2022 has now passed, Governor Gavin Newsom has unveiled a new strategic plan titled California's Water Supply Strategy. The nearly 20-page document contains a surprisingly concise walkthrough of the pressing issues the state faces on the water supply side of things and outlines California's strategy and priority actions to adapt and protect water supplies in an "era of rising temperatures." With a heavy emphasis on enhancing resiliency in the future to withstand the impacts of climate change—thus the subtitle Adapting to a Hotter, Drier Future—the Water Supply Strategy showcases recent highlights in improving the state's water infrastructure and sets a series of goals and milestones for the state in the years to come and how we can work towards them.

Developing New Water Supplies

The first milestone addressed in the Water Supply Strategy focuses on increased utilization of wastewater recycling and desalination as well as increased stormwater capture and conservation, generally. Specifically, this section proposes two main goals moving forward.

First, the Water Supply Strategy sets a short-term goal to increase recycled water use that would utilize at least 800,000 acre-feet (AF) of recycled water annually by 2030. Currently, recycled water offsets about 9 percent of the state's water demand, right around 728,000 AF annually, and with over $1.8 billion invested in recycled water projects statewide over the last five years, the state has already laid the groundwork for reaching this goal as those projects are expected to generate an additional 124,000 AF of new water supply. To meet the proposed long-term goal, however, the state will need to redouble its efforts as the goal more than doubles that 800,000 figure, jumping to a whopping 1.8 million AF annually in recycled water use throughout the state.

The second specific goal discussed in this section is two-part in nature, focusing on an increase in yield and in the efficiency of doing so. To meet this second goal, the state would expand brackish groundwater desalination production by 28,000 AF per year by 2030 and 84,000 AF per year by 2040. The kicker to this goal comes in its second part, however, as the state will also work to help guide the placement of seawater desalination projects where they are cost effective and environmentally appropriate, an issue that has stood in the way of many proposals.

Expanding Water Storage Capacity

While admitting that creating more space to store water in reservoirs and aquifers does not create more precipitation, the Water Supply Strategy addresses expanding the water supply storage side of things, looking at efforts both above ground and below.

Above ground, the strategic plan highlights seven locally-driven projects supported by Proposition 1 that would create an additional 2.77 million AF of water storage statewide. Also discussed is the opportunity—or even need—to improve water storage infrastructure throughout the state by rehabilitating dams in need to regain storage capacity and even expanding the San Luis Reservoir by 135,000 AF.

Below ground, the strategic plan endeavors to expand annual groundwater recharge by at least 500,000 AF. Local efforts have been a huge part of the increased utilization of groundwater reservoirs, and by the end of next year the state will have invested around $350 million in local assistance for recharge projects. To help bolster these local efforts, the Water Supply Strategy proposes a coordinated, state-level approach to provide for orderly, efficient disbursement of rights to high winter flows by providing incentives to local agencies emphasizing such projects and by streamlining regulatory roadblocks and speedbumps that may be hindering the expansion of such projects.

Reducing Demand

At this point, many Californians are tired of hearing the "C" word—conservation. But reducing demand has simply become a continuing effort of the

state and conservation efforts won't be slacking up any time soon. Without beating the dead horse for too long, the Water Supply Strategy reiterates the importance, and importantly the success, of our conservation efforts statewide, especially with a potential fourth dry-year on the horizon.

Improving Conveyance Systems and Modernizing Water Rights

The final section of the Water Supply Strategy tackles two distinct auxiliary issues relating to water supply management: the movement of water throughout the state and the management of water rights.

California depends upon—to an undesirable extent—aging, damaged, or increasingly risk-prone infrastructure to transport water between different areas of the state. It comes as no surprise then that the strategic plan discusses plans to both repair damaged facilities in the San Joaquin Valley—specifically those of the federal and state water projects—and modernize existing conveyance facilities by getting the ball rolling with respect to the Delta Conveyance Project.

Closing out the final section, the strategic plan expresses the state's desire "to make a century-old water rights system work in this new era" of aridification in the west. Calling out how other western states such as Washington, Oregon, Nevada, and Idaho manage water diversions much more "nimbly" than California, the strategic plan looks at what it can do to get the California State Water Resources Control Board more accurate and timely data, modern data infrastructure, and increased capacity to halt water diversions when the flows in streams diminish.

Conclusion and Implications

The Water Supply Strategy covers a lot of forward-facing information—far too much to cover this concisely. Many of the issues and proposed solutions addressed are the same we see broadcasted on an almost daily basis—aging infrastructure, the need for increased storage capacity, heightened conservation efforts—but other areas stand out and illicit a closer look into the topic—such as the how part in how the state plans to modernize its Gold Rush era water rights system. With the main topics noted herein, and with the full publication being a comparatively short read for a statewide strategic plan, the Water Supply Strategy may not be the most revolutionary publication the state has released, but it at least provides Californians with a bit of transparency as to the pet projects the state will focus on in the years to come. For more information, *see:* https://www.gov.ca.gov/2022/08/11/governor-newsom-announces-water-strategy-for-a-hotter-drier-california/
(Wesley A. Miliband, Kristopher T. Strouse)

TURLOCK IRRIGATION DISTRICT LAUNCHES PILOT PROGRAM INSTALLING SOLAR PANELS OVER CANALS TO TEST WATER SAVINGS AND ENERGY BENEFITS

The Turlock Irrigation District, in partnership with a private developer and supported by state funding, will be launching a first-in-the nation experiment in California installing solar panels over its irrigation canals (Pilot Project). The Pilot Project will serve as a proof of concept and further study of the hypothesized water and energy saving benefits of locating solar panels over canals.

Background

California's water systems have been under significant strain from ongoing droughts. At the same time, California policies seek to move energy systems towards renewable sources at an ambitious pace. Governor Newsom has called for 60 percent of the state's electricity to come from renewable sources by 2030. The confluence of these forces is important because water and energy systems are closely linked. Water can be used to produce hydropower energy, but water systems also account for 12 percent of the State's electricity use, largely for pumping, treatment, and heating.

Likewise, many energy systems require high quantities of water for use in extracting and processing fuels, cooling and related processes. Moreover, both water and energy are primary inputs into California's agricultural economy, which is a critical source of food

for the nation and the world. Pilot Program supports assert that addressing the nexus between California's water and energy systems has the potential to reduce stresses on water availability in California, advance the State's energy portfolio goals, and stabilize the food systems of the State and the nation.

The UC Merced Study

In 2021, a group of researchers based at the University of California, Merced, conducted a theoretical study of the costs and benefits of installing solar panels over all 6,350 km (~3,950 miles) of California's network of canals. The study showed that the shade and reduction of wind caused by over-canal solar could reduce evaporation from the canals by an average of 39 +/- 12 thousand m^3 per kilometer per year (about 63 billion gallons, or 193,000 acre-feet) of water annually if all canals were covered. Additionally, the study found that the cooler microclimate created by the water in the canal would permit solar panels to function more efficiently, and that solar panels might reduce the growth of aquatic plants in the canals thereby maintaining higher water quality and reducing treatment requirements.

The researchers considered two different designs for suspending the solar panels over the canals and determined that a tensioned-cable system would be more economically efficient. The study concluded that although installing the solar panels over the canals has a higher construction cost than installations on land, the net present value of over-canal tensioned-cable solar panels could be 20 percent to 50 percent higher than installations over land due to projected economic impacts of water conservation, efficiencies in electricity production, avoided land costs, and reduced aquatic weed management costs.

The Pilot Program

The Pilot Program was announced earlier this year to field test the conclusions of the UC Merced theoretical study. The Pilot Program, called "Project Nexus," will be a partnership between Turlock Irrigation District, Solar AquaGrid (the development firm which first commissioned the theoretical study), the California Department of Water Resources, and UC Merced.

Through Project Nexus, an estimated 8,500 feet of solar panels will be installed over Turlock Irrigation District canals in Central California, beginning in 2023. Installation is expected to be complete by 2024. The State is putting $20 million into the Pilot Project. If the average water savings projected by the theoretical study are borne out in the field, the Pilot Project alone could save about 81.9 acre-feet (about 26.7 million gallons) annually.

Conclusion and Implications

Given the vital importance of both water and energy—not least to California's irrigated agriculture and, therefore, the nation's food supply—the results of the Project Nexus pilot will be of great interest. If the Pilot Project is successful in demonstrating water savings, more efficient operation of the solar panels, and sufficient net benefits to justify the costs of installation, California's many miles of canals could be the future location of energy production in addition to water transportation.

(Jaclyn Kawagoe, Derek Hoffman)

LAS VIRGENES MUNICIPAL WATER DISTRICT INTRODUCES NEW WATER FLOW RESTRICTOR DEVICES AS WATER USERS FAIL TO MEET CONSERVATION DEMANDS

In an aggressive measure to curb excessive water users, Las Virgenes Municipl Water District (LVMWD or District) is now installing custom built metal disks, roughly the size of a silver dollar, at the main shutoff valve of such water users which reduce the flow of water into the household from around 30 gallons per minute to a mere one gallon per minute. An issue that water suppliers have seen in wealthier enclaves, such as areas like Calabasas, is the ability of affluent customers to significantly exceed their water budgets consistently since monetary deterrents typically fail to make an impact in these areas. Accordingly, while the restriction of water deliveries has historically been reserved for customers that fail to pay their bills, these physical water restrictions will now be implemented by the District in an unprecedented move.

Water Restrictions Set for Excessive Water Users

Stemming from the historically severe drought currently hitting the state, the LV-MWD first began implementation of its Water-shortage Contingency Plan back in June of 2021 and is now in Stage 3 which requires a 50 percent mandatory water use reduction for all customers. At the state level, the conversation target is about 55 gallons of water per person per day for domestic water users. LV-MWD's algorithm for its customers under its water-shortage contingency plan is to take that figure of 55 gallons per person per day and multiply it by the number of people living in each household. Then, the combined household allocation is multiplied by the number of days in the month to provide the customer with their indoor water use budget. Outdoor water budgets vary based on the amount of land the customer's property sits on. Another determining factor involves how large the irrigable areas on the property are, what type of foliage is present on the property, whether animals are being provided for, and, importantly, the average predicted temperature of the month which correlates with the evaporation rate.

Creating rules and enforcing them are two entirely different tasks, each with their own distinct problems. The enforcement side of things has proven particularly difficult in LV-MWD's service area as the district is one of the top water users in the state. Illustrating this problem is how LV-MWD customers averaged 205 gallons per person per day in 2021. While LV-MWD has expressed its intent to correct this issue, the District has also made clear that it principally desires to help its customers do the right thing in conserving water rather than enact punitive measures. With that said, correcting behavioral patterns is a task humans have never been able to perfect.

Currently, LV-MWD has a list of 1,610 accounts, out of its near 22,000 in total, that are slated to have these new flow restriction devices installed on their water mains. Despite this running tally, LV-MWD does not anticipate that it will need to install that many flow restrictors. Customers marked for possible flow restriction were asked to either sign commitment forms or face possible installation of the flow restrictors. The commitment forms provided include measures such as permitting MWD staff to direct the consumer on how to save water, installing weather-based irrigation control devices, and having the customer acknowledge the drought and water supply conditions. Most notably, the commitment forms also give the customer four additional monthly exceedance warnings prior to the installation of a flow restrictor, giving them a sort of ramp down period during which the customers may strive to reduce their water use to below-water budget figures. The flow restrictors are a short-term solution to a long-term problem that requires community education as people's relationship with water must change for the district to be successful.

With the recent release of several celebrities' water use figures, these public figures have found themselves in the crosshairs of many fervent water savers across the state. According to June 2022 records, for example, reality TV-star Kourtney Kardashian at her 1.86-acre property in Calabasas exceeded her monthly water budget for June by 101,000 gallons. Comedian Kevin Hart exceeded his June water budget by 117,000 gallons. Other celebrities exceeding their water budgets include NBA All-Star Dwayne Wade by 90,000 gallons, and actor Sylvester Stallone exceeded his water budget at his 2.26-acre Hidden Hills property by more than 230,000 gallons.

Conclusion and Implications

Although the water use figures of the select few above represent the extreme end of the spectrum, they do help illustrate the fact that even domestic water users can have a significant impact during times of drought. All too often is it heard that the state's water supply issues lie predominantly on agricultural water users, but blame shifting will not benefit Californians in the State's effort to perfect its water supply management and drought resiliency. With the introduction of LV-MWD's new flow restrictors, Californians are now seeing the stick brought to the table for domestic water conservation efforts in areas where the carrot has not been able to accomplish the same ends. Looking forward, there will likely be significant pushback to LV-MWD's implementation of these devices, but other water suppliers will likely have their eyes trained on such a battle as well, as these flow restrictors, when properly implemented, could certainly serve as a useful tool for water suppliers all throughout the state.

(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

INFLATION REDUCTION ACT PROVIDES ADDITIONAL FUNDING FOR DROUGHT RELIEF EFFORTS

In August, President Biden signed the Inflation Reduction Act that included $4 billion for the United States Bureau of Reclamation (Bureau) to mitigate the impacts of drought in the western United States, with priority given to the Colorado River Basin and others experiencing similar levels of drought. The funds are available to public entities and Indian tribes until 2026.

Background

The Bureau of Reclamation was established in 1902 and manages and develops water resources in the western United States. The Bureau is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial uses. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

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

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

> California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In 2019, lower basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. However, in August of this year, the Bureau announced additional reductions in releases from Lake Mead for 2023 following first-ever cutbacks in Colorado River allocations to Arizona and Nevada this year. The cutbacks were necessary despite significant investment in western water infrastructure beginning last year.

Under the Bipartisan Infrastructure Law of 2021, the Bureau became eligible to receive roughly $30.6 billion over five years. The 2021 law provided a total of $8.3 billion for Western programs and activities, with an initial $1.66 billion allocated to the Bureau in fiscal year 2022. Funding included $250 million for implementation of the DCP and could be used for projects to establish or conserve recurring Colorado River water that contributed to supplies in Lake Mead and other Colorado River water reservoirs in the Lower Colorado River Basin, or to improve the long-term efficiency of operations in the Lower Colorado River Basin. Despite these investments, Congress recently determined that additional drought

funding relief was necessary in the form of the Inflation Reduction Act (Act).

The Inflation Reduction Act

The Act appropriates $4 billion for the Bureau to make available to public entities and Indian tribes until September 30, 2026. Funding is available via grants, contracts, and other financial assistance agreements. Eligible States include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

There are a variety of drought mitigation activities for which funding is available. These activities include temporary or multiyear voluntary reduction in diversion of water or consumptive water use, voluntary system conservation projects that achieve verifiable reductions in use of or demand for water supplies or provide environmental benefits in the Lower Basin or Upper Basin of the Colorado River, and ecosystem and habitat restoration projects to address issues directly caused by drought in a river basin or inland water body. Regarding the Colorado River, the Act provides temporary financial assistance to farmers who voluntarily fallow their lands to adjust to reduced levels of river flow, coupled with funding for water conservation and efficiency projects intended to keep more water in the river system. Efficiency projects for which funding is available could include turf and lawn removal and replacement, and funding for drought-resilient landscaping programs.

The Act also provides $12.5 million in emergency drought relief for tribes. Funding is intended for near-term drought relief actions to mitigate drought impacts for tribes that are impacted by Bureau water projects, including direct financial assistance for drinking water shortages and the loss of tribal trust resources held on behalf of tribes by the federal government. Recently, the Bureau awarded $10.3 million to 26 tribes for drought response water projects in various Colorado River Basin states including Arizona, California, Colorado, Nevada, and Utah.

The Act also provides $550 million for disadvantaged western communities to fund up to 100 percent of the cost of planning, designing, or constructing water project the primary purpose of which is to provide domestic water supplies to communities or households that do not have reliable access to domestic water supplies.

Finally, the Act provides for up to $25 million for the design, study, and implementation of projects to cover water conveyance facilities with solar panels to generate renewable energy, including those that increase water efficiency and assist in implementing clean energy goals.

Conclusion and Implications

The Inflation Reduction Act is another substantial effort to provide adequate funding to redress drought impacts. However, as drought conditions in the west worsen, it is unclear if funding for drought mitigation activities will offset ongoing drought impacts. Moreover, it is not clear if funding is available for the development of alternative water supplies, like desalination. The Inflation Reduction Act, P.L. 117-169 is available online at https://www.congress.gov/bill/117th-congress/house-bill/5376/text
(Miles B. H. Krieger, Steve Anderson)

CALIFORNIA LAWMAKERS APPROVE BILL TO PROVIDE LOW-INCOME RESIDENTS WITH ASSISTANCE PAYING WATER AND WASTEWATER BILLS

The California legislature recently passed Senate Bill 222 (SB 222 or Bill) to establish a "Water Rate Assistance Program." The Bill now heads to Governor Newsom, and if signed, would provide low-income Californians assistance with paying their water and wastewater bills.

Background

Across the state, Californians are struggling to pay rising utility bills, including water bills. SB 222 sponsors report that as of September 2021, more than 650,000 residential and 46,000 business accounts accounted for a collective $315 million in unpaid water

and wastewater bills. Introduced by Senator Dodd, SB 222 aims to provide direct financial assistance to Californians struggling to pay their water and sewer bills.

Who Would be Eligible for Assistance?

SB 222 would establish a Water Rate Assistance Fund under the State Treasury to provide direct financial assistance to low-income ratepayers in an eligible system. Rate payers qualify as low-income if their household income is no greater than 200 percent of the federal poverty guideline and consistent with the guidelines established for the California Alternative Rates for Energy program. Eligible systems are defined as a community water system, wastewater system or a participating tribal water or wastewater system. The minimum requirements for an eligible system to receive funding include: (1) participation in the statewide program; and (2) the ability to confirm eligibility for enrollment through a request for selfcertification of eligibility.

Households already receiving benefits for CalWORKs, CalFresh, general assistance, Medi-Cal, Supplemental Security Income or the State Supplementary Payment Program, California Special Supplemental Nutrition Program for Women, Infants, and Children, or enrolled in the California Alternative Rates for Energy program will be automatically enrolled in Water Rate Assistance Program.

What Is in the Bill?

SB 222 does not contain many details regarding the actual administration and eligibility for the program. Instead, the State Water Resources Control Board (State Water Board) would be charged with developing the regulations and guidelines for determining the eligibility of potential recipients as well as additional requirements for eligible systems. In developing these regulations, the State Water Board is required to consult with an advisory group comprising community water and wastewater systems, technical assistance providers that support exiting energy and water assistance programs, local agencies and organizations serving low-income residents, and representatives of the public.

Funding would be available to residential ratepayers served by eligible water systems and the Bill directs 80 percent of the fund's total expenditures to be directly applied to ratepayer accounts.

Administration Oversight

The State Water Board would be required to prepare an annual report documenting the program's performance for each year including: (1) a report of expenditures; (2) an estimate of the number of eligible households; (3) an evaluation of ongoing water affordability issues; (4) methods to include public participation and to bolster enrollment in the program; and (5) anticipated funding needs for the next fiscal year. The State Water Board is also charged with developing an audit system to monitor eligible systems receiving funds under the program. Finally, households applying for assistance under the program will be required to certify their eligibility under penalty of perjury.

Additional Barriers

Notably, the provisions of SB 222 will not become effective until it receives an appropriation in in California's annual Budget Act. As of the writing of this article, no money has been allocated for the program as budget negotiations continue. Until the money has been budgeted for the program, it is unclear when the program will begin and how much assistance ratepayers can expect to receive.

Conclusion and Implications

If signed by the Governor and funded by the California Legislature, the California Water Assistance Program would help low-income Californians maintain access to drinking water and wastewater services. While the Bill itself is short on details, it will be important to watch for the regulations and guidelines promulgated by the State Water Board detailing the administration of this new fund. Water and wastewater systems should follow the Bill and its implementation and provide input on how it may affect their ability to continue to provide these essential services to their customers. For the full text of the Bill, *see:* https://openstates.org/ca/bills/20212022/SB222/
(Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

EPA PROPOSES DESIGNATING PFOA AND PFOS AS HAZARDOUS SUBSTANCES UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

On September 6, 2022, the U.S. Environmental Protection Agency (EPA) published a proposed rule designating perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This proposal is part of the EPA's plan to address per- and polyfluoroalkyl substances, which are emerging contaminants of concern in water sources, and contaminated soils and dusts.

Background

PFAS is a class of manufactured chemicals that can be found in items such as non-stick cookware, clothing, carpeting, cosmetics, electronics, food packaging, and firefighting foam. Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS), National Institute of Environmental Health Sciences, https://www.niehs.nih.gov/health/topics/agents/pfc/index.cfm (last visited: Sept. 24, 2022). PFAS are known as "forever chemicals" due to their resistance to environmental decomposition and ability to build up within the human body, animals, and the environment. *See* PFAS – the 'Forever Chemicals', CHEM-Trust, https://chemtrust.org/pfas/ (last visited: Sept. 18, 2022); Our Current Understanding of the Human Health and Environmental Risks of PFAS, U.S. Environmental Protection Agency, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last updated March 16, 2022). Scientific studies have shown that exposure to some PFAS substances in the environment may be linked to harmful health effects in humans and animals. *See, e.g.*, Agency for Toxic Substances and Disease Registry, An Overview of the Science and Guidance for Clinicians on Per- and Polyfluoroalkyl Substances (PFAS) (Dec. 6, 2019), https://www.atsdr.cdc.gov/pfas/docs/clinical-guidance-12-20-2019.pdf (last visited: Sept. 24, 2022).

In Fall 2021, EPA announced an updated plan to strategically tackle the growing concerns regarding PFAS. PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024, U.S. Environmental Protection Agency (Oct. 18, 2021), https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf (hereinafter PFAS Roadmap). This multi-year plan sets forth the agency's proposal to address PFAS through a three-pronged approach of: research, restrict, and remediate. By reviewing the evolving research explaining the impacts of PFAS on human and environmental health, the EPA hopes to stop persistent issues before they can begin. EPA is also moving to crack down on the production and use of PFAS to prevent further harms to human health and the environment. EPA is also working to identify and remediate sources of human PFAS exposure. One of the actions that EPA proposed in the PFAS Roadmap is to designate different chains of PFAS as hazardous substances under CERCLA, beginning with PFOA and PFOS.

Proposal to Designate PFOA and PFOS as Hazardous Substances under CERCLA

On September 6, 2022, EPA published for public comment a proposed rule designating PFOA, PFOS, and their salts and structural isomers as hazardous substances under CERCLA (Proposed Rule). Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54415, 54417 (Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302 (Proposed Rule). Although EPA has regulated additional hazardous substances under CERCLA after they have been designated as hazardous under other environmental statutes such as the Resource Conservation and Recovery Act or the Clean Water Act, this Proposed Rule is the first time EPA is exercising its authority to designate a substance as hazardous under CERCLA § 102(a). 42 U.S.C. § 9602(a), see also Proposed Rule at 54,421.

In the Proposed Rule, EPA states that PFOA and PFOS are found throughout the environment, including in water samples from rivers, lakes, and streams; surface and subsurface soils; groundwater wells; and drinking water systems. Proposed CERCLA Rule at 54,417. Environmental PFOA and PFOS originated from industrial processes and from materials produced and imported into the United States and by the use of everyday items by consumers. Id. at 54,418. Like other PFAS, PFOA and PFOS are found in everyday items and are considered "forever chemicals." Id. at 54,418-19.

EPA identifies five broad categories of entities it believes will be impacted by this designation:

> (1) PFOA and/or PFOS manufacturers (including importers); (2) PFOA and/or PFOS processors; (3) Manufacturers of products containing PFOA and/or PFOS; (4) Downstream product manufacturers and users of PFOA and/or PFOS products; and (5) Waste management and wastewater treatment facilities. Id. at 54,416. There are many other groups that will be impacted by this designation, including municipalities, fire departments, and airports. Id.

Reportable Quantity Required Under CERCLA

CERCLA requires EPA to establish a reportable quantity for each substance for which it requires releases to be reported under CERCLA. 42 U.S.C. § 9602(a). The reportable quantity is the amount at which a report is required to be made as soon as knowledge of a release of a hazardous substance occurs. 42 U.S.C. §§ 9602(b), 9603(a). EPA is proposing the reportable quantity of each PFOA and PFOS to be set at the default quantity of one pound or more in a 24-hour period. Proposed Rule at 54,418-19.

Cost Analysis of Designation

The White House Office of Management and Budget designated this Proposed Rule as economically significant. OIRA Conclusion of EO 12866 Regulatory Review, Office of Information and Regulatory Affairs – Office of Management and Budget, https://www.reginfo.gov/public/do/eoDetails?rrid=218011 (last visited Sept. 23, 2022). EPA published the Proposed Rule without a traditional Regulatory Impact Analysis that are generally require for economically significant rules. See Executive Order 12866, Regulatory Planning and Review §§ 3(f), 6(a)(3)(C) (Sept. 30, 1993), https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf; OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf. Instead, EPA issued an Economic Assessment that repeatedly refers to itself as a Regulatory Impact Analysis. See EPA, Economic Assessment of the Potential Costs and Other Impacts of the Proposed Rulemaking to Designate Perfluorooctanoic Acid and Perfluorooctanesulfonic Acid as Hazardous Substances (August 2022), https://www.regulations.gov/document/EPA-HQ-OLEM-2019-0341-0035. In response to questions about the need for a Regulatory Impact Analysis, EPA stated that CERCLA does not require the Administrator to consider cost when designating a hazardous substance. Proposed CERCLA Rule at 54,421. EPA stated that the reporting requirements are the only direct effect of this Proposed Rule, and that any cleanups and reduction in human and environmental exposure to PFOA and PFOS are indirect costs and benefits. Id.at 54,418-20. EPA also stated that the indirect costs were "impractical to quantify" as there is a substantial amount of uncertainty about them. Id. 54,423.

The costs of the designation include significant legal costs during lengthy processes of determining required cleanup actions and financial liability of any potentially responsible parties. CERCLA was intended to make polluters pay for the cleanup of contaminated sites and throughout the Proposed Rule, EPA affirms its desire to ensure taxpayers are not paying costs that should be imposed on polluters and other potentially responsible parties. Id. at 54,418. However, EPA does not fully evaluate the potential legal and cleanup costs that may be imposed on ratepayers of public water agencies or municipalities who did not create or use PFOA or PFOS, but who now have PFAS-contaminated water and biosolids.

Implications of CERCLA and Additional Implications of the Proposed Rule

Additional Information is Needed before Designation

Further research and development is required before the full impact of the Proposed Rule could be understood. The proposal to designate PFOA and PFOS

as hazardous substances is coming before the technology to perform cleanup is fully developed. There is also uncertainty regarding the disposal of cleaned-up PFOA and PFOS as hazardous substances.

Additionally, EPA relies on updated health advisories throughout the Proposed Rule and when setting cleanup standards. See Proposed Rule at 54,430. These new health advisories for PFOA and PFOS are problematic because:

> . . .[t]he updated advisory levels, which are based on new science and consider lifetime exposure, indicate that some negative health effects may occur with concentrations of PFOA or PFOS in water that are near zero and below EPA's ability to detect at this time. [EPA Announces New Drinking Water Health Advisories for PFAS Chemicals, $1 Billion in Bipartisan Infrastructure Law Funding to Strengthen Health Protections, U.S. Environmental Protection Agency, (June 15, 2022) https://www.epa.gov/newsreleases/epa-announces-new-drinking-water-health-advisories-pfas-chemicals-1-billion-bipartisan.]

Although EPA's proposed rule does not include cleanup levels for PFOA or PFOS, that analysis and decision usually begin with the health advisories. As those levels are below the limit of detection, the cleanup levels for sites contaminated with PFOA or PFOS are likely to become very low.

Potential Legal Costs and Financial Responsibility

CERCLA is a unique law in that it can be applied retroactively, it has a strict liability standard, so negligence is not required for liability, and the liability of any Responsible Party is joint and several. 42 U.S.C. § 9607. With joint and several liability, EPA and others seeking cleanup are not required to identify all potentially responsible parties, meaning that one party can initially be liable for the full cost. Id. In an attempt to address concerns raised by water and wastewater districts and municipalities, EPA stated that it did not have the authority to address liability or exemptions but would try to do so through administrative means including: issuance of new policy documents such as an enforcement discretion policy; entry into settlement agreements; resolution on a site-specific basis; and addressing liability with equitable considerations. U.S. Environmental Protection Agency, Notice of Proposed Rulemaking Designation of PFOA and PFOS as CERCLA Hazardous Substances at 6 (Aug. 2022) https://www.epa.gov/system/files/documents/2022-09/Overview%20Presentation_NPRM%20Designation%20of%20PFOA%20and%20PFOS%20as%20CERCLA%20Hazardous%20Substances.pdf.

While EPA intends to address potential liability through these measures, these actions are unlikely to prevent citizen groups, states, or identified potentially responsible parties from bringing local public agencies into lengthy and expensive cleanup negotiations and litigation, and the equitable considerations that EPA mentioned generally are only helpful at the end of that long process.

Conclusion and Implications

In recent years, the amount and health effects of PFAS in our country contaminating our environment has become a growing concern. However, the designation of PFOA and PFOS as hazardous substances before the health standards are finalized, technology and cleanup methods are known, and questions and concerns about legal costs and financial liability are determined is likely to result in very significant unintended consequences and expenses for public agencies and the ratepayers and taxpayers they serve. CERCLA has broad implications that can impact potentially responsible parties for many years. These two designations are just the first of many that EPA has said it plans undertake to address PFAS. It would be helpful the nation's ratepayers and taxpayers for EPA to more fully consider and address these concerns before finalizing the proposed designation and setting the precedent for future designations. *See:* Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022) (to be codified at 40 C.F.R. pt. 302). At the time this article was published, comments from the public were due by November 7, 2022.
(Ana D. Schwab, Steve Anderson)

REVERSAL OF CRITICAL HABITAT EXCLUSION REGULATION UNDER ENDANGERED SPECIES ACT BECOMES FINAL

The U.S. Fish & Wildlife Service (FWS or Service), on July 21, issued a final rule rescinding a rule previously adopted in December 2020 that changed the process for excluding areas from critical habitat designations under the federal Endangered Species Act (ESA). (87 Fed. Reg. 43,433.) Under the final rule, the Service will resume its previous approach to exclusions. The final rule became effective on August 22.

Background

When a species is listed under the ESA, Section 4(b)(2) requires that the Service designate critical habitat for the species. Critical habitat designations identify areas that are essential to the conservation of the species. The FWS may also exclude areas from designation based on a variety of factors. Critical habitat designations affect federal agency actions or federally funded or permitted activities. Federal agencies must ensure that actions they fund, permit, or conduct do not destroy or adversely modify designated critical habitat.

When designating critical habitat, the FWS considers physical and biological features that the species needs for life processes and successful reproduction, including, but not limited to: cover or shelter, food, water, air, light, minerals or other nutrients, and sites for breeding. The Service must also take into account several practical considerations, including the economic impact, the impact on national security, and any other relevant impacts. Section 4(b)(2) further provides that the Service may exclude areas from critical habitat if the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," provided that exclusion will not result in the extinction of the species concerned.

2020 Critical Habitat Exclusions Rule

In September 2020, under the previous administration, the FWS proposed "Regulations for Designating Critical Habitat," which provided a process for critical habitat exclusions partially in response to the U.S. Supreme Court's opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* (2018) 139 S. Ct. 361. In *Weyerhaeuser*, the Court held that the Service's decision to exclude areas from critical habitat is subject to judicial review under the arbitrary and capricious standard.

The 2020 rule was meant to provide guidelines for the FWS in weighing the impacts and benefits of critical habitat exclusions, with the aim of providing transparency in the process. (85 Fed. Reg. 82,376.) The rule provided a non-exhaustive list of impacts that can be considered "economic," including the economy of a particular area, productivity, jobs, opportunity costs arising from critical habitat designation, or possible benefits and transfers, such as outdoor recreation and ecosystem services. The rule further provided a non-exhaustive list of "other impacts" the Service may consider, including impacts to tribes, states, and local governments, public health and safety, community interests, the environment, federal lands, and conservation plans, agreements, or partnerships.

The 2020 rule provided a process for how exclusion determinations under section 4(b)(2) were to be made. If an exclusion analysis was conducted, the rule explained how the information was to be weighed and assessed. The Service's judgement controlled when evaluating impacts that fell within the agency's scope of expertise, such as species biology. With respect to evaluating impacts that fell outside of the Service's expertise, outside experts' judgment controlled.

Rescission of 2020 Critical Habitat Exclusions Rule

In a July 2022 press release the Service announced it was rescinding the 2020 critical habitat exclusion rule "to better fulfill the conservation purposes" of the ESA. [https://www.fws.gov/press-release/2022-07/service-rescinds-endangered-species-act-critical-habitat-exclusion]

This decision was in accordance with Executive Order 13990, which directed all federal agencies to review and address agency actions to ensure consistency with the current administration's objectives.

The final rule, gives three main points of rationale supporting the rescission. First, the 2020 rule potentially undermined the Service's role as the

expert agency responsible for administering the ESA by giving undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Second, the rule employed a set process in all situations, regardless of the specific facts, as to when and how the Secretary would exercise the discretion to exclude areas from critical habitat designations. Finally, the rule was inconsistent with National Marine Fisheries Service's critical habitat exclusion process and standards, which could confuse other federal agencies, tribes, states, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations.

Conclusion and Implications

Effective August 22, the Service will resume its previous approach to exclusions of critical habitat under regulations at 50 C.F.R. § 424.19 and a joint 2016 Policy with the National Marine Fisheries Service. [https://www.federalregister.gov/documents/2016/02/11/2016-02677/policy-regarding-implementation-of-section-4b2-of-the-endangered-species-act]

The Service decided to rescind the critical habitat exclusions rule because it found the rule unnecessary and confusing. Now, the Service will resume its previous approach to exclusions. Although rescinding the critical habitat exclusions rule, the Service recognizes the impact of the *Weyerhaeuser* holding and reiterated a commitment to explaining its decisions regarding critical habitat exclusions in the final rule. The Final Rule is available online at: https://www.federalregister.gov/documents/2022/07/21/2022-15495/endangered-and-threatened-wildlife-and-plants-regulations-for-designating-critical-habitat
(Breana Inoshita, Darrin Gambelin)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS FAILURE TO JOIN KLAMATH TRIBES IN SUIT AGAINST THE BUREAU OF RECLAMATION FATAL TO LAWSUIT

Klamath Irrigation District v. United States Bureau of Reclamation, ___F.4th___, Case No. 20-36009 (9th Cir. 2022).

The United States Court of Appeals for the Ninth Circuit affirmed that the failure by the Klamath Basin irrigation districts (Districts) to join the Hoopa and Klamath tribes (Tribes) in their suit against the United States Bureau of Reclamation (Bureau) constituted grounds for dismissal. The court reasoned that the tribes were required parties to the suit and that tribal sovereign immunity prevented the Tribes from joined. Accordingly, dismissal was appropriate.

Background and General Information

This case revolves around the operations and water levels of the Klamath Lake and the flows of the Klamath River in southern Oregon and northern California. The plaintiff Districts in this case are irrigation companies or districts that divert project water from the Klamath project, specifically the Upper Klamath Lake (UKL). UKL is controlled and operated by the Bureau, which has adopted operations plans to manage the water resources of UKL and the Klamath River to meet a wide variety of needs and interests. However, the Bureau has a "nearly impossible" task in managing its responsibilities, particularly in times of shortage. 2022 WL 4101175, at 4.

"Reclamation maintains contracts with individual irrigators and the irrigation districts that represent them, under which the United States has agreed to supply water from the Klamath Project to the irrigators, "subject to the availability of water." *Id.* Additionally, as a federal agency, "the Bureau also responsible for managing the Klamath Project in a manner consistent with its obligations under the ESA." *Id.* Since the early 2000s, the Bureau has incorporated operating conditions developed through consultation with federal fish and wildlife agencies to ensure that its operations do not jeopardize the existence of fish species protected by the federal Endangered Species Act (ESA)These conditions require the Bureau to balance the maintenance of minimum lake levels in UKL and minimum stream flows in the Klamath River downstream from the lake to benefit the fish. *Id.* Finally, the Bureau must operate the Project consistent with the federal reserved water and fishing rights of the Klamath, Hoopa Valley, and Yurok Tribes that predated the Project and any resulting Project rights. *Id.*

In 2018 and 2019 the Bureau issued (and amended) Biological Assessments following consultation with the Fish and Wildlife Service and the National Marine Fisheries Service pursuant to section 7(c) of the ESA:

> In the [2019] Amended Proposed Action, [the Bureau] confirmed that it would continue using the water in UKL for instream purposes, including to fulfill its obligations under the ESA and to the Tribes, necessarily limiting the amount of water available to other water users who hold junior rights to the Klamath Basin's waters. *Id.* at 5.

On March 27, 2019, or soon thereafter, the Districts and other water users filed this action for declaratory and injunctive relief against the Bureau and its officials:

> The [Districts] sought a declaration that [the Bureau's] operation of the Klamath Project pursuant to the 2019 Amended Proposed Action based on the Services' biological assessments was unlawful under the Administrative Procedure Act (APA). *Id.*

The Districts also sought to enjoin the Bureau from using water from UKL for instream purposes and limiting the amount of water available to the irrigation districts. The Tribes successfully moved to intervene as of right, arguing that they were required parties to the suit. The Districts then filed Second Amended Complaints (SACs) seeking declaratory relief only.

The Districts asked the court to "[d]eclare Defendants [sic] actions under the APA unlawful" and

> . . .for declaratory relief setting forth the rights of the parties' rights [sic] under the [administrative findings in the ongoing Klamath Basin Adjudication known as the ACFFOD], the Bureau Act and the Fifth Amendment. . . *Id.*

Specifically, the Districts' alleged that the Bureau's 2019 Amended Proposed Action was improper because the Bureau intended to use water stored in UKL for its own instream purposes without a water right or other authority under the laws of the State of Oregon, in violation of the APA and Section 8 of the Bureau Act. *Id.*

> The Districts also alleged that the Bureau's actions violated the APA and Section 7 of the Reclamation Act, which requires the Bureau to acquire property rights, such as the right to use water under Oregon law, through Oregon's appropriation process or 'by purchase or condemnation under judicial process,' using the procedure set out by Oregon law. . . .Although the Districts' claims are framed as procedural challenges, their underlying challenge is to the Bureau's authority and obligations to provide water instream to comply with the ESA, an obligation that is coextensive with the Tribes' time immemorial treaty water and fishing rights. *Id.*

The Tribes moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party under Federal Rule of Civil Procedure 19, arguing that tribal sovereign immunity barred their joinder. In a well-reasoned opinion, the magistrate judge recommended that the district court grant the Tribes' motions and dismiss this case, and on September 25, 2020, the district court adopted the magistrate's decision in full. This timely appeal followed.

The Ninth Circuit's Decision

Failure to join a party that is required under Federal Rule of Civil Procedure 19 is a defense that may result in dismissal under Federal Rule of Civil Procedure 12(b)(7). This is a three-part inquiry. We first examine whether the absent party must be joined under Rule 19(a). It must be determined whether joinder of that party is feasible. Finally, if joinder is infeasible, it must be desermined "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

A party is a "required party" and must be joined under Federal Rule of Civil Procedure 19 if:

> (A) in that [party's] absence, the court cannot accord complete relief among existing parties; or (B) that [party] claims an interest relating to the subject of the action and. . .disposing of the action in [their] absence may: (i) as a practical matter impair or impede the person's ability to protect the interest ... or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. Fed. R. Civ. P. 19(a)(1). . . .Although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted.

The Districts advanced several arguments that the Tribes were not required parties. First, the Districts argued that:

> Reclamation has neither a right nor any other legal authorization to use water stored in the UKL reservoir for instream purposes, a claim that, 'as a practical matter,' would impair the Bureau's ability to comply with its ESA and tribal obligations. *Id.* at 6.

The court noted that its case law establishes that the Tribes' water rights are "at a minimum coextensive with the Bureau's obligations to provide water for instream purposes under the ESA." *Id.* Thus, it held a suit, like this one, that seeks to amend, clarify, reprioritize, or otherwise alter the Bureau's ability or duty to fulfill the requirements of the ESA implicates the Tribes' long-established reserved water rights. Accordingly, the Districts' invocation of the APA does not alone render this suit merely procedural. Put

simply, if the Districts are successful in their suit, the Tribes' water rights could be impaired, so the Tribes are required parties under Federal Rule of Civil Procedure 19(a)(1)(B)(i). *Id.*

Second, the Districts asserted that the Bureau adequately represented the Tribes interests in this matter. Whether an existing party may adequately represent an absent required party's interests depends on three factors: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments;" and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id*, *citing Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs*., 932 F.3d 843, 852 (9th Cir. 2019), *cert. denied*, ___U.S.___, 141 S. Ct. 161, 207 L. Ed. 2d 1098 (2020).

Analysis under the *Dine Citizens* Decision

In *Dine Citizens*, this court previously held that:

> . . .although an absent party has no legally protected interest at stake in a suit seeking only to enforce compliance with administrative procedures, our case law makes clear that an absent party may have a legally protected interest at stake in procedural claims where the effect of a plaintiff's successful suit would be to impair a right already granted. *Dine Citizens*. at 852.

The court ultimately concluded in *Dine Citizens* that:

> . . .[a]lthough Federal Defendants ha[d] an interest in defending their decisions, their overriding interest ... must be in complying with environmental laws such as ... the ESA. This interest differs in a meaningful sense from [the tribe's] sovereign interest in ensuring [continued access to natural resources]. Id. at 855.

The court also explained why it distinguished *Dine Citizens* from *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), which held that the Bureau adequately represented the tribes. That court reasoned that:

> . . .while Federal Defendants [in Dine Citizens had] an interest in defending their own analyses that formed the basis of the approvals at issue, [ ] they [did] not share an interest in the outcome of the approvals. *Dine Citizens*, 932 F.3d at 855 (emphasis omitted).

The court held that the present action is analogous to that in *Dine Citizens*, explanting that:

> . . .while Reclamation has an interest in defending its interpretations of its obligations under the ESA in the wake of the ACFFOD, it does not share the same interest in the water that is at issue here. 2022 WL 4101175, at 8.

Finally, the Districts argue that the Bureau is an adequate representative of the Tribes arising from the relationship of the federal government as a trustee for the federal reserved water and fishing rights of Native American tribes. Thus, the Districts contend that this relationship results in a "unity of interest" sufficient to allow the Bureau to adequately represent the Tribes' interests. However, a unity of some interests does not equal a unity of all interests. In this matter the Bureau and the Tribes share an interest in the ultimate outcome of this case for very different reasons. Further, case law has firmly rejected the notion that a trustee-trustor relationship alone is sufficient to create adequate representation. *Id.*

The McCarran Amendment

Alternatively, the the Districts argue that even if the Tribes are required parties under Rule 19, the suit should proceed because the McCarran Amendment waives the Tribes' sovereign immunity. The McCarran Amendment waives the United States' sovereign immunity in suits:

(1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

Id. at 9, *citing* 43 U.S.C. § 666(a).

While the McCarran Amendment clearly "reach[es] federal water rights reserved on behalf of Indians," (*see*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811–12, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)), the Amendment only controls in cases "adjudicati[ng]" or "administ[ering]" water rights. 43 U.S.C. § 666(a). The court held that "even assuming the McCarran Amendment's waiver of sovereign immunity extends to tribes as parties the Amendment does not waive sovereign immunity in every case that implicates water rights." *Id.* at 9.

An "administration" of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a "prior adjudication of relative general stream water rights." *See, South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985). However, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment. *Id.*

In this case the parties disagreed as to whether this case is an administration of that general stream adjudication within the meaning of the McCarran Amendment. The Districts argued that this case is an enforcement action to ensure that the Bureau complies with the terms of the ACFFOD. The Bureau argues this suit is not an administration because the Klamath Basin Adjudication is ongoing and the present suit is not one to administer rights that were provisionally determined in the administrative phase of that adjudication. The court agreed with the Bureau and held that that this lawsuit is not an administration of previously determined rights but is instead an APA challenge to federal agency action. Thus, the Tribes sovereign immunity has not been waived.

Finally, the Districts argued that despite the foregoing conclusions, the case should proceed without the required parties. To determine if the case can proceed in equity and good conscience the court evaluated the (i) potential prejudice, (ii) possibility to reduce prejudice, (iii) adequacy of a judgment without the required party, and (iv) adequacy of a remedy with dismissal. Fed. R. Civ. P. 19(b). *Id.* at 10. The court cited a "a wall of circuit authority" requiring dismissal when a Native American tribe cannot be joined due to its assertion of tribal sovereign immunity and affirmed the decision to dismiss the case.

Conclusion and Implications

This decision severely limits the ability of the Districts to see APA review of the Bureau of Reclamation's final orders. In holding that the Tribes are a required party, but that sovereign immunity is not waived, the Districts cannot challenge the Bureau operating/action plans absent the Tribes consent. A copy of the Ninth Circuit's opinion may be found at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/08/20-36009.pdf
(Jonathan Clyde)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT AFFIRMS TRIAL COURT DECISION DENYING CHALLENGE TO FLOOD CONTROL PROJECT PROGRAMMATIC EIR RANGE OF ALTERNATIVES

Joshua v. San Francisquito Creek Joint Powers Authority, Unpub., Case No. A163294 (1st Dist. Aug. 23, 2022).

The First District Court of Appeal in *Joshua v. San Francisquito Creek Joint Powers Authority* affirmed in an *unpublished* opinion the trial court's decision that a flood control project programmatic Environmental Impact Report (EIR), pursuant to the California Environmental Quality Act (CEQA), considered a reasonable range of alternatives and that the EIR appropriately found that the alternatives were not feasible in support of a statement of overriding considerations.

Factual and Procedural Background

This case pertains to the San Francisquito Creek Flood Protection, Ecosystem Restoration, and Recreation Project Upstream of Highway 101 (project).

San Francisquito Creek originates in the eastern foothills of the Santa Cruz Mountains and drains a watershed that is approximately 45 square miles in size, from Skyline Boulevard to San Francisco Bay. The creek flows through Stanford University and the communities of Menlo Park, Palo Alto, and East Palo Alto to San Francisco Bay. The watershed's five-square-mile floodplain is located primarily within these cities.

A Program EIR was prepared for the project pertaining to reaches 2 and 3 of the San Francisquito Creek. Reach 1 extends from San Francisco Bay to the upstream side of U.S. Highway 101. The San Francisquito Creek Joint Powers Agency (JPA), which prepared the Program EIR, previously completed construction of improvements in Reach 1 following the completion of CEQA documentation in 2012.

Flooding from the creek is a common occurrence, including twice within the past decade. The largest recorded flooding occurred in February 1998, when the creek overtopped its banks in several areas, affecting approximately 1,700 properties.

The EIR described the JPA specific objectives of the project: (1) Protect life, property, and infrastructure from floodwaters exiting the creek; (2) Enhance habitat within the project area; (3) Create new recreational opportunities; (4) Minimize operational and maintenance requirements; and (5) Not preclude future actions to bring cumulative flood protection up to a 100-year flow event.

The JPA began with a list of 17 potential projects and three fundamental approaches to providing flood protection—contain, detain, or bypass: (a) Removing constrictions or raising the height of the creek bank in the floodplain: (b) Temporarily detain or store portions of high flows during storms through one or more floodwater detention facilities in Reach 3; and/or (c) Remove a portion of the high flows immediately upstream of Reach 2, route that portion of the flow through the flood-prone area in an underground bypass channel, and deposit this water at a location in the creek that can safely convey it to San Francisco Bay.

The JPA then screened the alternatives first for their ability to meet the project objectives and second for their cost, logistical and technical feasibility.

Three alternatives survived the screening process: Alternative 2: Replace the Pope-Chaucer Bridge and Widen Channel Downstream; Alternative 3: Construct One or More Detention Basins; Alternative 5: Replace the Pope-Chaucer Bridge and Construct Floodwalls Downstream. The alternatives were grouped according to the reaches in which the primarily occur, with Alternatives 2 and 5 occurring in Reach 2, and Alternative 3 occurring in Reach 3.

The EIR went to fully analyze 5 potential projects: the statutorily-required "No-Project" alternative, the Channel Widening Alternative, the Floodwalls Alternative, and two detention basin alternatives: the Former Nursery Detention Basin Alternative and the Webb Ranch Detention Basin Alternative.

Deep Widening Alternative as Preferred Project

Based on its analysis, the EIR deemed the Channel Widening Alternative the "Preferred Project," and adopted four separate and independent statements of overriding considerations to override the unavoidable noise and cumulative air quality impacts associated with the Preferred Project's construction:

1. The proposed project would restore San Francisquito Creek to its natural capacity throughout the project reach; this improved hydrologic functioning provides long-term benefits to aquatic species.

2. The proposed project would restore aquatic habitat by installing permanent woody debris, boulders, pools, and other features to approximately 1,800 linear feet of the channel at widening sites and the Pope-Chaucer Bridge. These elements, together with the improvements in hydrologic function in the project reach, will provide long-term benefits to salmonids and other aquatic species.

3. The proposed project will provide flood protection benefits to over 4,000 homes, businesses, and schools in the San Francisquito Creek floodplain. Although implementation of this project by itself will not completely remove the affected area from the FEMA 100-year flood zone, it will protect life, property, and infrastructure from the largest recorded flood flow and reduce damages during higher flows. Thus, it is a key piece of SFCJPA's long-term comprehensive flood protection strategy.

4. The proposed project will create recreational opportunities by connecting the new features to existing bike and pedestrian corridors and potentially constructing two creekside parks.

The JPA certified the EIR, adopted the statement of overriding considerations, and approved the project. Petitioner filed a petition for writ of mandamus alleging violations of CEQA. The trial court denied the petition in its entirety.

The Court of Appeal's Decision

The First District Court of Appeal, using the substantial evidence standard of review with a presumption of correctness of the JPA's findings, affirmed the trial court determination that the EIR contained a reasonable range of alternatives and that it appropriately found the alternatives were infeasible in support of a statement of overriding considerations.

Alternatives Review under CEQA

The range of alternatives included in an EIR must be potential feasible alternatives that will foster informed decision making and public participation. An EIR should describe a range of reasonable alternatives to the project which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

However, the statutory requirements for consideration of alternatives must be judged against a rule of reason. Courts uphold an agency's selection of alternatives unless it is manifested unreasonable or inclusion of an alternative does not contribute to a reasonable range of alternatives. The rule of reason requires the EIR to set forth only those alternatives necessary to permit a reasoned choice and to examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.

The Alternatives Analysis

Petitioner argued that the detention basins were not true alternatives because they would complement or supplement Reach 2 channel projects. However, the evidence showed that the detention basins were considered as standalone alternatives that would provide real flood protection, either separately or following the Reach 2 channel projects.

Petitioner argued that the floodwalls alternative for Reach 2 should not have been considered as an alternative because it does not lessen the environmental impact of the project. However, Petitioner failed to exhaust his administrative remedy in making that argument to the JPA, and thus was barred from raising that argument at trial and on appeal.

Petitioner argued that there was no express finding of infeasibility of the project alternatives sufficient to allow the statement of overriding considerations. An agency may not approve a project that will have significant environmental effects if there are feasible alternatives of feasible mitigation measures that would substantially lessen those effects. An agency may find, however, that particular economic, social, or other considerations make the alternatives and mitigation measures infeasible and that particular project benefits outweigh the adverse environmental effects.

The Court of Appeal held that an express finding of infeasibility is not required as long as the EIR contains the factual information showing that the alternatives were infeasible. In the EIR, the detention basins were found to offer environmentally superior alternatives, but would not have achieved half of the perk flow reduction of the approved project, and the detention basins would not achieve the same level of benefit as the project in terms of habitat enhancement.

Conclusion and Implications

This opinion by the First District Court of Appeal illustrates the deferential review that courts typically apply to an EIR alternatives analysis that appropriately considers both project objectives and well-documented feasibility determinations. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A163294.PDF (Boyd Hill)

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