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CALIFORNIA WATER™

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CONTENTS

Continued on next page

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CALIFORNIA WATER™ LAW & POLICY Reporter

RECENT FEDERAL DECISIONS

RECENT CALIFORNIA DECISIONS

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CALIFORNIA WATER NEWS

NEW TECHNICAL STUDY ASSESSES COSTS AND PRACTICAL CONSIDERATIONS IN MOVING WATER FROM THE MISSISSIPPI TO FUEL THE COLORADO RIVER BASIN

The concept of shipping Mississippi River water to dry western states has been in drought discussions for many years now. Despite the popularity of this idea, there has been a surprising lack of information available to the public to weigh the practical aspects of such a proposal. In response to this, and specifically in response to the recent discussion on the subject in the Arizona state legislature, a trio of researchers led by environmental scientist and professor at Western Illinois University Roger Viadero took a deeper look at the costs associated with such a project. The resulting technical report covers some of the major constraints that such a project would face, including the how and how much for moving water from the Mississippi to refill Lake Powell and Lake Mead.

A Look into How Much Water is Available

Using data from the US Geological Survey (USGS), the researchers started the report with some preliminary problems pervasive in any proposal to move water westward. The USGS has collected water level and flowrate data at a gage station in Lees Ferry, Arizona, dating back to 1921. From 1921 to August 2022, the average measured flowrate at Lees Ferry was 14,457cfs, or 10.5 Million Acre-Feet per year (MAF/yr). The U.S. Bureau of Reclamation, however, reported the average annual natural flowrate in the same timeframe as 14.2 MAF/yr. The report does note that this discrepancy is largely the result of differences in terminology and data reduction methods, but regardless of the of the different measurements the main takeaway from this was that neither number is sufficient to satisfy the 15 MAF annual allocation assigned to the Upper and Lower Colorado River Basins.

Despite the differences in data noted above, the report takes specific aim at the assertion that roughly 4.5 million gallons per second flow past the Old River Control Structure (ORCS) on the Mississippi. To assess this number, the report looked at the low, average, and high water discharge data for the Mississippi River just above the ORCS from 2002 to 2022. Over the two decades reviewed, however, the 4.5 million gallons per second was never even hit – the highest flowrate over the 20-year period occurred in 2019 where it reached 4,488,000 gallons per second. Furthermore, the average flowrate over that period was just 3.2 million gallons per second.

Now with the total flowrate of the Mississippi River in mind, the report next moved on to assess the proposed diversion rate of 250,000 gallons per second to refill Lake Powell and Lake Mead. When comparing this figure to the flowrate of the Mississippi, this proposed diversion is just under 8 percent of the total average flow. While this figure may seem relatively small, in dryer years the 250,000 gallons per second figure occupies nearly 17 percent of the river's total flow—a not insignificant amount of water. To put this figure into perspective, the Colorado River will soon face a 21 percent reduction in diversions as a result of a Tier 2 water shortage.

The Absolute Scale of Moving So Much Water to the West

Even assuming the Mississippi River could withstand the withdrawal of 250,000 gallons per second, the researchers expressed serious skepticism as to the feasibility of transporting so much water. In moving water, the flowrate directly relates to the velocity of the water as well as the cross-sectional area of the diversion facilities used to move the water. Water conveyance systems can typically move water at a rate of three to eight feet per second while operating pumps at reasonable efficiencies and minimizing mechanical wear. Taking the median of this range, the researchers assumed that in this case a cross-sectional area of roughly 6,100 feet would be needed to meet the proposed flow requirement of 250,000 gallons per second.

For an open channel conveyance system, the researchers explained that this would necessitate a channel that is 100 feet wide and 61 feet deep, or

1,000 feet wide and 6.1 feet deep. By comparison, the State Water Project's California Aqueduct varies from 12 to 85 feet in width and averages 30 feet in depth. Using this average depth, the proposed flowrate of 250,000 gallons per second would still necessitate a channel that is 200 feet wide and 30.5 feet in depth—a channel that would be twice the size of California's own monumental conveyance system. Furthermore, in digging such a channel, over 1.9 billion cubic yards of excavated material would be created in the process.

Using a pipeline to move the water isn't much better an idea either. The piping required to move the proposed flowrate would need to be around 88 feet in diameter—or about the same height as a seven-story building.

The cross-sectional area alone creates a significant barrier for the conveyance by itself, but two other factors pose major roadblocks as well: distance and elevation. The shortest distance between the Mississippi and the Colorado spans a little less than 1,200 miles, but a straight shot from river-to-river is a pipe dream at best. A more realistic route running along established highways and interstates would run nearly 1,600 miles. The vertical distance would also be immense. Looking at the direct route from the ORCS to Lake Powell, the maximum elevation would reach just over 11,000 feet outside Santa Fe, New Mexico. In any case, the water would need to move from the ORCS with an elevation of about 30 feet, all the way up to Lake Powell which sits at an elevation of 4,620 feet. The California Aqueduct, by comparison, traverses the relatively flat Central Valley before being lift over the Tehachapi Mountains where 14 pumps lift water about 1,900 feet—less than half of the elevation difference between the ORCS and Lake Powell.

Conclusion and Implications

The idea of moving water from the relatively wet eastern side of the United States to the arid west has always been a tempting proposition. Tempting as it is, however, it is simply too large an undertaking to be feasibly accomplished. In the words of the researchers, "time, space, ecology, finances, and politics aren't on the side of this proposal." The researchers even assessed this massive project at a mere $0.01 per gallon of water moved, but even at this cost the researchers concluded it would cost at least $135 billion to refill Lakes Powell and Mead. Furthermore, even when looking beyond the sheer scale of the project and its associated cost, the diversion would likely require the coordination and cooperation of a dozen-or-so states. Despite the pessimistic view of such a proposal, the researchers' report did not purport to dissuade readers from the idea of moving water westward, it served to inform readers that no one solution exists that can save western states from persistent drought. Instead, these states will need to continue to implement smaller scale projects while improving conservation efforts in order to maintain adequate water supply through this and future drought. For more information on the study, *see:* https://www.researchgate.net/publication/364353761_Meeting_the_Need_for_Water_in_the_Lower_Colorado_River_by_Diverting_Water_from_the_Mississippi_River_-A_Practical_Assessment_of_a_Popular_Proposal
(Wesley A. Miliband, Kristopher T. Strouse)

NEW GROUNDWATER SUSTAINABILITY AGENCIES FORMED TO MANAGE KERN SUBBASIN, INCREASE LOCAL CONTROL OF GROUNDWATER MANAGEMENT

One of California's largest and administratively most complex groundwater basins is currently experiencing significant changes in its management structure. Following a recent determination by the California Department of Water Resources (DWR) that certain Groundwater Sustainability Plans (GSPs) for the basin were incomplete, eight local water agencies have formed themselves as new Groundwater Sustainability Agencies (GSAs). Some observers contend this signals an intention to pursue greater control over groundwater management within their areas, and possibly in an effort to avoid intervention by the State Water Resources Control Board (SWRCB) that could result from a potential probationary basin designation.

Background

The Kern County Subbasin (DWR Basin No. 5-022.14) (Subbasin) is the largest subbasin in the State of California. The Subbasin is designated by DWR as a high-priority basin that is subject to conditions of critical overdraft. The Subbasin is bounded by the Kern County line to the north, the Temblor Mountains to the west, the San Emigdio Mountains, the White Wolf Subbasin and the Tejon Hills to the south, and the Greenhorn Mountains to the east.

Water resources within the Subbasin are utilized and managed by many water districts, water storage districts, irrigation districts, and municipalities. In accordance with the requirements of California's Sustainable Groundwater Management Act (SGMA), those agencies collectively organized themselves into 17 distinct GSAs. The GSAs submitted a total of six GSPs to manage the Subbasin, which are subject to a single Coordination Agreement and an agreement to submit consolidated, comprehensive Annual Reports.

Early Changes to Kern Groundwater Authority Membership

The Kern Groundwater Authority (KGA) comprises the largest GSA in the Subbasin. KGA submitted its GSP to DWR in January 2020. At that time, the KGA consisted of 16 member agencies. In January 2022, DWR determined the KGA GSP and all other Subbasin GSPs were incomplete, and required the GSPs to be revised and resubmitted within six months.

During that six-month timeframe, several KGA member agencies withdrew or otherwise limited their involvement with KGA. In April 2022, four KGA member agencies (Arvin-Edison Water Storage District, Wheeler Ridge-Maricopa Water Storage District, Tejon-Castac Water District and Arvin Community Services District) withdrew from the KGA and formed a new South of Kern River Districts GSA and submitted a new and separate GSP to DWR. In June 2022, the Westside District Water Authority, (which includes Belridge Water Storage District, Lost Hills Water District and the Berrenda Mesa Water District) formed its own GSA but remained a member of KGA.

Recent Changes to KGA Membership

Most recently, in October 2022, two more KGA members—Shafter-Wasco Irrigation District and North Kern Water Storage District—announced that they will form their own GSAs while remaining KGA membership. Simultaneously, the City of Shafter announced intentions to withdraw from the KGA and maintain representation of its interests through the water districts whose boundaries cover the Shafter city limits.

Subbasin Management

California Water Code § 10735.2(e) states that the SWRCB:

> . . .shall exclude from probationary status any portion of a basin for which a groundwater sustainability agency demonstrates compliance with the sustainability goal.

Some observers have asserted that the recent changes in GSA formation have arisen with an intention to avoid probationary status that, if triggered, could potentially include their geographical areas of management. They further state that inconsistency or lack of sufficiently stringent minimum thresholds in some areas of the Subbasin could negatively impact the status of other large portions of the Subbasin and possibly the entire Subbasin. The formation of new distinct GSAs and submission of new GSPs may be perceived as an avenue to avoid those circumstances through California Water Code § 10735.2(e).

Conclusion and Implications

SGMA implementation was never going to be easy. The Kern Subbasin is undoubtedly one of the more complex and challenging basins under management. Recent changes in the GSA management structure for the Subbasin indicate the path forward will continue to be long and arduous.
(Byrin Romney, Derek Hoffman)

REGULATORY DEVELOPMENTS

U.S. DEPARTMENT OF THE INTERIOR ANNOUNCES $210 MILLION FOR DROUGHT RESILIENCE PROJECTS IN THE WEST

On October 17, 2022, the U.S. Department of the Interior announced that $210 million from President Biden's Bipartisan Infrastructure Law will be allocated to drought resilience projects in the West. The funding is aimed at bringing clean drinking water to western communities through various water storage and conveyance projects. These projects are anticipated to add 1.7 million acre-feet of storage capacity to the West, which can support around 6.8 million people for an entire year. In addition to these projects, the allocation will fund two feasibility studies on advancing more water storage capacities.

Background

On November 15, 2021, President Joe Biden signed the Bipartisan Infrastructure Law, also known as the Bipartisan Infrastructure Investment and Jobs Act, into law. This is a different funding source for drought resilience projects than the Inflation Reduction Act that President Biden signed into law in August 2022. The overall focus of the Bipartisan Infrastructure Law is to rebuild the country's infrastructure, create good jobs, and grow the economy. There are six main priorities guiding the law's implementation: (1) investing public funds efficiently with measurable outcomes in mind; (2) buy American and increase the economy's competitiveness; (3) create job opportunities for millions of people; (4) invest public dollars equitably; (5) build infrastructure that withstands climate change impacts; and (6) coordinate with state, local, tribal, and territorial governments to implement these investments.

President Biden's Executive Order for the Bipartisan Infrastructure Law also established a Task Force to help coordinate its effective implementation. Members of the Task Force include the following agencies: Department of the Interior; Department of Transportation; Department of Commerce; Department of Energy; Department of Agriculture; Department of Labor; Environmental Protection Agency; and the Office of Personnel Management. The Office of Management and Budget, Climate Policy Office, and Domestic Policy Council in the White House are also on the Task Force.

For its part under the Bipartisan Infrastructure Law, the Bureau of Indian Affairs, U.S. Geological Survey, Bureau of Reclamation (Bureau), Office of Wildland Fire, U.S. Fish and Wildlife Service, and the Office of Surface Mining Reclamation and Enforcement submitted spend plans to Congress detailing how the funds, in creating new programs and expending existing ones, will meet the Bipartisan Infastructure Law's overall goals and priorities. The Department of the Interior also submitted a spend plan outlining how it would restore ecosystems, protect habitats, and plug and reclaim orphaned gas and oil wells.

The Bureau's spending plan outlined in detail what programs the Bipartisan Infrastructure Law will fund. This includes $8.3 billion set aside for water and drought resilience across the country. The water and drought resilience programs are aimed at protecting water supplies for both the natural environment and people. The funds will support water recycling and efficiency programs, rural water projects, dam safety, and WaterSMART grants.

The Bureau's spend plan also provide $1.5 billion for wildfire resilience, with investments aimed at federal firefighters, forest restoration, hazardous fuels management, and various post-wildfire restoration activities. Further, the spend plan outlines a $1.4 billion investment in ecosystem restoration and resilience, with funding allocated to stewardship contracts, invasive species detection and prevention, ecosystem restoration projects, and native vegetation restoration efforts.

Finally, the spend plan allocates $466 million to tribal climate resilience and infrastructure. This includes investment in community-led transitions for tribal communities, such as capacity building and adaptation planning. The funds will also help the construction, repair, improvement, and maintenance of irrigation systems.

Drought Resilience Projects in the West

The Bipartisan Infrastructure Law's allocation of $8.3 billion to drought resilience will help important water infrastructure projects across the United States. Of the $8.3 billion, $210 million is set aside for projects in the West. The money will support various groundwater storage, water storage, and conveyance projects. In particular, it will help secure dams, finalize rural water projects, repair water delivery systems, and protect aquatic ecosystems. The selected projects in the West are scattered throughout Arizona, California, Colorado, Montana, and Washington. The projects receiving funding in California include the B.F. Sisk Dam Raise and Reservoir Expansion Project; the Sites Reservoir Project; and Phase II of the Los Vaqueros Reservoir Expansion Project.

$25 million is allocated to the San Luis and Delta Mendota Authority to pursue the B.F. Sisk Dam Raise and Reservoir Expansion project. The project would add an additional ten feet of dam embankment across the entire B.F. Sisk Dam crest to increase the storage capacity of the San Luis Reservoir. It is estimated that this project will create around 130,000 acre-feet of additional water storage.

The Sites Reservoir Project will receive $30 million for its off-stream reservoir project on the Sacramento River system, just west of Maxwell, California. This project is capable of storing 1.5 million acre-feet of water. The reservoir uses existing and new facilities to pump water into and out of the reservoir, with ultimate water releases into the Sacramento River system through a new pipeline near Dunnigan, existing canals, and the Colusa Basin Drain.

Finally, the Bipartisan Infrastructure Law allocates $82 million to the Los Vaqueros Reservoir Expansion Phase II, which will add roughly 115,000 acre-feet of additional water storage. The Los Vaqueros Reservoir, located in Contra Costa County, will expand from 160,000 acre-feet to 275,000 acre-feet. Increased capacity in the Los Vaqueros Reservoir will help improve Bay Area water supply and quality, increase water supplies for the Central Valley Project Improvement Act refuges, add flood control benefits, increase recreational opportunities, and provide additional Central Valley Project operational flexibility.

Conclusion and Implications

The Biden administration's Bipartisan Infrastructure Law will allocate much needed funds to important water infrastructure projects throughout the West, especially in California. However, similar to the Inflation Reduction Act, it is unclear whether this funding will offset any current drought impacts. The Bipartisan Infrastructure Law, P.L. 117-58 is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text.
(Taylor Davies, Meredith Nikkel)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS WATER CONSERVATION STANDARDS FOR URBAN SUPPLIERS

On October 19, 2022, the State Water Resources Control Board (State Water Board) adopted new regulations (Cal. Code Regs., tit. 23, §§ 980-986) that establish water loss performance and monitoring standards for urban retail water suppliers (Urban Suppliers), as part of California's conservation efforts amid ongoing drought. Urban Suppliers that are unable to demonstrate minimal system losses by July 1, 2023 will need to provide information to a statewide leak registry, and starting January 1, 2028, comply with volumetric real water loss standards.

Background

Urban Suppliers—defined as entities that serve more than 3,000 service connections or 3,000 acre-feet of potable water per year—supply water for approximately 90 percent of California's population. Improved monitoring and reduced urban water system leaks have been targeted by the Legislature and the State Water Board as means to improve the state's water resiliency. Since October 2017, Urban Suppliers have submitted annual water loss audits to the Department of Water Resources (DWR). That data showed some Urban Suppliers in 2019 losing over 100 gallons per connection, per day, and annual statewide water losses of 261,000 acre-feet. Sections 10608.34 and 10609.12 of the Water Code direct the State Water Board to develop and adopt regulations that will reduce water loss in urban water systems and achieve more efficient water use in California.

New Regulatory Requirements for Water Loss Performance

The regulations address the state's need for comprehensive information on water losses in individual systems by requiring Urban Suppliers to supply information on metering practices, pressure management, infrastructure failures and repairs, and costs for reducing water losses. (Cal. Code Regs., tit. 23, § 983.) That information is to be used to determine each Urban Supplier's water loss baseline and volumetric water loss standard, which caps the amount of water that may be lost through leaks, metering gaps, or other forms of waste. By monitoring and reducing leaks in their distribution systems, the State Water Board anticipates Urban Suppliers can collectively save 88,000 acre-feet per year, or enough water to meet the needs of more than 260,000 additional households.

Under § 982(d) of the regulations, Urban Suppliers with highly efficient systems may provide documentation by July 1, 2023 that sufficiently demonstrates their systems lose a baseline of 16 gallons per connection per day or less. If consistent low water loss can be established through high quality metering and measurement data, then the 16 gallons per connection per day standard will apply, and the utility will not be subject to the additional questionnaires and reporting required by § 983. If low water loss cannot be demonstrated, or if the data is found by the State Water Board to be deficient, the Urban Supplier must respond to a number of questionnaires that will be used to develop an appropriate volumetric "real water loss standard." (Id. at § 983.) Responses regarding water loss data quality are due on July 1, 2023, while responses regarding pressure management, systematic management, and supplier costs that affect real loss reduction are due on July 1, 2024. All questionnaires must be updated three years after the initial deadline.

A utility's real water loss standard is calculated as the "sum of annual reported leakage plus annual background leakage plus unreported leakage over 2027." (Id. at § 982(b)(1).) Section 981 of the regulations provides that by January 1, 2028, each Urban Supplier shall reduce its system losses to comply with its applicable real water loss standard and, thereafter, standards are assessed every third year based on average real losses reported in the Urban Supplier's annual audits. A utility's failure to meet a real water loss standard may prompt the State Water Board's executive director to issue conservation orders that mandate certain actions to bring the supplier into compliance, or require additional information for an enforceable conservation agreement. (Id. at § 986.)

Recognizing a need for flexibility, the regulations contemplate several variances and exceptions for unexpected adverse circumstances, and for suppliers that serve disadvantaged communities. Section 984 provides that an Urban Supplier may submit a request to the State Water Board to adjust its real water loss standard based on conditions that affect its operations or system. Any request submitted after July 1, 2023, however, must be supported by an explanation that the supplier did not have access to necessary measurement data prior to that date. Variances from real water loss standards are available under Section 985, for Urban Suppliers who have encountered unexpected adverse conditions out of their control, such as physical damage to infrastructure or significant changes to the utility's financial situation, though drought conditions, on their own, are inadequate justification. For the first compliance period, Urban Suppliers will not be considered out of compliance if their water loss audits show progress from their baseline, and they have submitted a request for an exception by January 1, 2028. (Id. at § 981(i).) Finally, Urban Suppliers that serve disadvantaged communities with median household incomes below 80 percent of the state's median have until January 1, 2031 to comply with their real water loss standards. (Id. at § 981(h).)

Conclusion and Implications

With increasingly unreliable precipitation patterns, and an expected 10-percent reduction of traditional water supplies due to climate change, water conservation remains a core component of Governor Newsom's "all of the above" Water Resilience Portfolio. The State Water Board's water loss performance standards go into effect on April 1, 2023, giving Urban Suppliers a small window of time before the July 1, 2023 deadline to respond to questionnaires on the quality of their water loss data.

Information on the regulations and the state's water conservation efforts is available at: https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/rulemaking.html.

(Austin Cho, Meredith Nikkel)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TEMPORARILY SUSPENDS SOME CURTAILMENTS IN DELTA WATERSHED

In early November 2002, the California State Water Resources Control Board (State Water Board) temporarily suspended curtailments for certain water rights in the Sacramento-San Joaquin Delta watershed due to projected increases in precipitation. Nonetheless, water rights and claims in several Sacramento and San Joaquin River tributaries remain curtailed, and the State Water Board indicated some unavailability of water for the State Water Project and federally owned Central Valley Project.

Background

The State Water Board is responsible for administering and regulating state-based water rights subject to the State Water Board's permitting authority and for ensuring water is used reasonably and beneficially as required by the state constitution. On May 10, 2021, Governor Newsom issued a proclamation of a state of emergency due to drought in 41 counties, including those in the Sacramento-San Joaquin Delta (Delta) watershed. The Delta, where the Sacramento, San Joaquin, and other rivers converge, is the source of water supply for over 25 million Californians and more than 1 million acres of farmland. In particular, the Delta is a major conveyance point for the California State Water Project (SWP) and the federally owned Central Valley Project (CVP). Those projects are jointly operated under a coordinated operations agreement that includes provisions for the sharing of project water supplies among project rights holders.

The May 10 proclamation required the State Water Board to consider adopting emergency regulations to curtail water diversions in the Delta watershed when water is not available at the water right holders' priority of right and to protect release of previously stored water. Previously stored water refers to water lawfully diverted by CVP and SWP dams upstream of the Delta. This water is then released, conveyed through the Delta and used to satisfy water quality standards and/or rediverted in the south Delta by CVP and SWP pumping plants.

On July 8, 2021, the Governor's proclamation was expanded to include nine additional counties and proclaimed the need for the public to voluntarily reduce water use by 15 percent compared to the same period in 2020.

On June 15, 2021, the State Water Board notified all water right holders in the Delta watershed of the unavailability of water. Specifically, the State Water Board alerted post-1914 appropriative water right holders that water was not available to serve their priorities. The State Water Board also warned pre-1914 appropriative and riparian water right claimants in the Delta watershed of impending water unavailability based on worsening drought conditions and the resulting likelihood of a potential emergency regulation to curtail water use throughout the Delta watershed. The State Water Board subsequently adopted emergency regulations authorizing curtailment of water rights and claims on August 3, 2021 and issued initial orders imposing curtailment and reporting requirements to all water rights holders and claimants in the Delta watershed later that month.

On July 20, 2022, the State Water Board revised and readopted the emergency curtailment and reporting regulations for the Delta adopted the prior year due to exceptionally low precipitation from January 2022 onward. In relevant part, the revisions the State Water Board made to the prior year's regulations encompassed expanding potential use of self-reported diversions to include the 2021 water year and adding a new provision protecting water unused by water contractors on the Sacramento and Feather Rivers under an operations plan for the State Water Project and Central Valley Project. This plan was intended to conserve stored water supplies for certain fish species and other water quality and supply objectives. The State Water Board's previously issued curtailment orders remained in effect under the newly adopted regulations came into effect.

In addition to the emergency regulations, the State Water Board published weekly notices identifying water rights and claims that were subject to curtailment and the expected duration of such curtailments. The State Water Board imposes and modifies curtailments based on reports from the Water Unavailability Methodology for the Delta and the California Nevada River Forecast Center (CNRFC) on precipitation levels, hydrologic conditions, and general

agricultural needs.

Gathering Exceedance and Demand Data and the Issue of Curtailments

According to the State Water Board, water supply data and forecasts from the CNRFC justified using a 50 percent exceedance water supply forecast to determine curtailments as of November 4. The State Water Board used demand data based on reported diversions from 2018 and projected diversions reported under the enhanced reporting requirements of the emergency regulations to determine water unavailability.

The emergency regulations adopted in 2021 curtailed water rights and claims in both the Sacramento and San Joaquin Rivers for pre- and pre-1914 water rights holders and certain SWP and CVP related rights to waters flowing through the Sacramento River and the Delta. However, based on its most recent data modeling, the State Water Board determined that curtailments were not supported for Delta water rights holders or for project-based rights subject to sharing requirements under the coordinated operations agreement. A 2019 amendment to the agreement precluded application of curtailments to project-based rights that were subject to project-supply sharing requirements, provided that water remained available to at least some project-based rights. Previously, when no water was available to any project-based rights due to water shortages in the Delta, the curtailment requirements applied.

Despite temporarily suspending curtailment requirements on Delta water rights holders, the State Water Board left other curtailment orders in place. Specifically, the State Water Board limited curtailments to specific areas within the following rivers and creeks of the Delta watershed: Stony, Cache, Bear, and Putah Creeks, as well as the Yuba, Fresno and Chowchilla Rivers. In addition, certain Delta-related water rights contain a specific term (Term 91) that requires the water rights holder to cease diverting water when the State Water Board gives notice that water is not available for use under those rights. Specifically, Term 91 forbids diversion of water when the SWP and CVP are releasing previously stored water to meet water quality and flow requirements in the Delta to maintain a balanced condition. The State Water Board's temporary suspension of water curtailments does not apply to water rights containing Term 91.

Conclusion and Implications

Consistent with the Governor's proclamation to voluntarily conserve water, the state, federal agencies, local agencies, and water rights holders and interests are working on voluntary solutions to water supply restraints. Such efforts are ongoing despite changes in precipitation forecasts in the immediate future.

While the State Water Resources Control Board's temporary suspension of curtailments on Delta water rights holders is a reprieve from persistent water supply restrictions, it is uncertain what future hydrology and modeling will indicate for water supply availability. Thus, additional curtailments could be deemed necessary or, if hydrological conditions improve, additional curtailment suspensions could be warranted. Nonetheless, voluntary solutions to water supply constraints are ongoing. The Delta Watershed Curtailment Weekly Update, available at: https://www.waterboards.ca.gov/drought/delta/docs/2022/110422-update.pdf
(Elleasse Taylor, Steve Anderson)

CALIFORNIA WATER STORAGE INVESTMENT PROGRAM UPDATES

California Water Commission (Commission) staff recently briefed the Commission regarding updates to the Water Storage Investment Program (WSIP). The WSIP is a vehicle utilized by the Commission to allocate funds for investment in water storage projects public benefit.

Background

In November 2014, California passed Proposition 1, the Water Quality, Supply and Infrastructure Improvement Act. The $7.5 billion water bond allocated $2.7 billion for investment in water storage projects for public benefit. The Commission is designated as the agency responsible for allocating

and managing those funds, including the through its administration of the WSIP.

The Water Storage Investment Program

The Commission selected the seven projects to be developed through the WSIP—three surface storage projects and four groundwater storage projects. Following project selection, the Commission determines the amount of funding to be awarded for each project based upon criteria evaluating the projected public benefits of each project and related factors. Prior to funding, selected projects must complete several steps.

Frist, project applicants must finalize a contract with the Commission and have all third-party agreements parties in place. Draft contracts must be presented to the Commission and available to for public review. The final contracts become part of the WSIP funding agreement and must be executed before the final award hearing.

Second, projects must satisfy the remaining Proposition 1 requirements, such as finalizing contracts for the administration of public benefits, completing final permits and environmental documentation. As projects progress through the permitting and environmental review process, it is possible that the benefits to the public will change. Consequently, the WSIP requires that the administering agencies confirm that the public benefits meet the WSIP's requirements before final funding is awarded. Throughout the process, the Commission works with and meets with the project applicants to review the status of each project.

Third, upon completing Proposition 1 requirements, the project applicant requests a final award hearing before the Commission. The WSIP generally cannot award funding to a project until the project is ready to begin construction.

Water Storage Investment Program Updates

In its recent presentation to the Commission, staff presented several WSIP updates. A primary issue raised by staff was the difficulties arising from long-term project monitoring. Staff observed that while WSIP regulations require a data management plan to identify funding for monitoring, it is not always clear as to the source of that funding. Commission staff asserted a need to develop a more robust approach to monitoring projects to ensure public benefits requirements are satisfied in the long term.

Commission staff also addressed the possibility and possible remedies when a project's anticipated public benefits do not ultimately materialize. Commission staff noted that WSIP standard contracts should be modified to address this issue. The Commission observed that high standards and criteria should be maintained for project awards, and expressed concern that baseline targets for certain projects could potentially shift over time in response to additional pressures and needs of particular water systems. No specific substantive policy was established by the Commission at the meeting; however, Commissioners requested that final contract hearings should include a discussion of possible remedies if the anticipated public benefits do not materialize.

Conclusion and Implications

Obtaining WSIP funding requires compliance with extensive program regulations and public process. Relatively few projects are selected from among initial applications. A primary aspect of funded projects is that they must provide public benefits. The implementation and administration of such awards and projects requires monitoring over time, during which project needs and benefits might evolve. As the Commission grapples with the mechanics of ensuring WSIP funded projects satisfy program requirements, two realities remain clear: (1) California needs more water storage projects; and (2) those projects need to be developed sooner rather than later.
(Christina Suarez, Derek Hoffman)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT TO ADDRESS COLORADO RIVER WATER RIGHTS FOR THE NAVAJO NATION

In November, the United States Supreme Court granted petitions for *certiorari* by the United States Department of the Interior and the States of Arizona, Nevada, and Colorado to review the Navajo Nation's (Nation) claim that the federal government breached its fiduciary duty to the Nation by failing to provide an adequate water supply for the Nation from the Colorado River. The U.S. District Court hearing the matter had dismissed the claim but the Ninth Circuit reversed. The Department of the Interior and states appealed the Ninth Circuit's decision to the Supreme Court for review. [*Arizona v. Navajo Nation*, No. 21-1484 (U.S. Nov. 4, 2022).]

Background

The Navajo Nation was established under the terms of an 1868 Treaty between the United States and the Navajo Tribe. Treaty with the Navajo, 188, June 1, 1868, 15 Stat. 667. The terms of the treaty contemplated an agricultural purpose for the reservation. The he reservation's boundaries expanded significantly over time, and the Colorado River forms a significant segment of the reservation's western boundary. *Id.*; *Navajo Nation v. U.S. Dep't of the Interior*, 26 F.4th 794, 809-10 (9th Cir. 2022).

During the 1950s, the federal government asserted claims to various water sources on behalf of multiple tribes. *Id.* at 800. However, the government did not assert claims to mainstream Colorado River water for the Nation. Currently, the Nation has water rights to two tributaries of the Colorado River, but does not have judicially adjudicated rights to the mainstream of the Colorado River.

In 2003, the Nation sued the federal government for failing to assert water rights for the Nation to the mainstream of the Colorado River. The Nation's claims were based on the National Environmental Policy Act (NEPA) and the federal government's alleged fiduciary duty to the Nation, the water rights for which are held by the federal government in trust for the Nation. The Nation argued that the Department of the Interior was obligated to develop a plan to provide an adequate water supply for the Nation in the event the Nation's existing rights to the Colorado River tributaries were not sufficient to meet the needs of the Nation.

After ten years of unsuccessful settlement negotiation during which the case was stayed, the case was tried in the U.S. District Court in Arizona in 2014. Arizona, Nevada, and other water and agricultural interests intervened in the case to protect their water rights. *Id.* at 799. The District Court dismissed both claims, finding that the Nation lacked standing for its NEPA claim and that the government had sovereign immunity regarding its alleged fiduciary duties to determine the Nation's quantity of water rights. *Id.* at 804. The Ninth Circuit partially reversed, holding that a breach-of-trust claim was not barred by sovereign immunity. *Id.* On remand, the District Court dismissed the Nation's claim for lack of jurisdiction because the "Supreme Court reserved jurisdiction over allocation of rights to the Colorado River." (*Navajo Nation v. U.S. Dep't of Interior*, 996 F.3d 623, 628 (9th Cir. 2021). The Nation appealed, and the Ninth Circuit decided the case on February 17, 2022.

The Issues at Hand

The Ninth Circuit again reversed the District Court's decision, allowing the breach of trust claim to proceed. Specifically, the court held that there was (1) jurisdiction over the breach of trust claim, (2) that the claim was not barred by res judicata, and (3) that the claim was adequately stated.

Jurisdictional Question

Regarding the jurisdictional question, the Ninth Circuit held that the Nation was not seeking a judicial quantification of water rights to the Colorado River and thus the Supreme Court's exclusive jurisdiction over Colorado River water rights under *State of Arizona v. State of California*, 376 U.S. 340, 353 (1964) (Arizona Decree) did not bar the Nation's breach of trust claim. The Ninth Circuit distin-

guished a judicial quantification of water rights from the Nation's request for an injunction for the federal government to "develop a plan to secure the water needed" to address the Nation's needs. *Navajo Nation*, *supra*, 26 F.4th at 806.

The Ninth Circuit also rejected the intervenors' *res judicata* argument for similar reasons. The states of Nevada, Arizona, and Colorado, as well as a number of agricultural and water districts intervened in support of the government, arguing that the Nation was seeking additional water rights. The intervenors argued that the federal government had asserted the tribes' water rights, including for the Nation, in the Arizona Decree, and thus the Nation could not relitigate its rights to the Colorado River on *res judicata* grounds. *Id.* at 807. Similar to its reasoning regarding the jurisdictional question, the Ninth Circuit held that the Nation's breach of trust claim was distinct from a claim for a judicial determination of the Nation's water rights and therefore was not barred by res judicata. The court reasoned that the Nation was not seeking a different amount of water rights previously adjudicated but instead sought a determination that the federal government had a fiduciary duty to provide an adequate water supply for the Nation. *Id.* In sum, according to the Ninth Circuit, the issue of the appropriate quantity of water, as opposed to the government's alleged fiduciary duty to provide an adequate supply of water, was not the object of the Nation's breach of trust claim and therefore was not barred by res judicata under the Arizona Decree.

Leave to Amend to Assert Breach of Trust Claims

Similarly, the Ninth Circuit reversed the District Court's ruling that the Nation's motion for leave to amend its complaint to assert a breach of trust claim was not "futile." *Id.* The District Court had previously rejected the Nation's motion to amend and dismissed its claim, finding that the Nation did not point to a specific treaty, statute, or regulation that could impose an enforceable fiduciary duty on the federal government. In reversing the District Court's ruling, the Ninth Circuit relied on the *Winters* doctrine, which holds that the federal government impliedly reserved an amount of water sufficient to satisfy the purpose of a reservation when the reservation was created, whether by treaty as in the case of the Nation, executive order, or by legislation. The Ninth Circuit reasoned that the federal government, as trustee of the reservation and related rights on behalf of the Nation, is charged with ensuring that reservation lands remain livable. The Ninth Circuit also determined that the federal government exercised "pervasive control" over the Colorado River under the Bolder Canyon Project Act and other laws regulating the river, thus providing additional statutory bases for amending the complaint to assert a breach of trust claim. *Navajo Nation*, *supra*, 26 F.4th at 812. According to the Ninth Circuit, the combination of these factors gave rise to a cognizable claim that the federal government had a fiduciary duty to the Nation to provide an adequate water supply to the reservation, which it could breach by failing to assert rights to the mainstream of the Colorado River on behalf of the Nation.

Conclusion and Implications

On November 4, 2022, the Supreme Court granted the petitions for *certiorari* and will review the Ninth Circuit's decision.

The Supreme Court's ruling on whether the Navajo Nation can assert a claim for breach of trust against the federal government for failure to provide an adequate water supply for the Nation, including from the mainstream of the Colorado River, will have important consequences for the allocation of Colorado River water and other waters in the western United States. If the Court affirms the Ninth Circuit's decision, it could open the door for judicial actions asserting breach of trust claims that could result in the reallocation of water supplies to tribes to satisfy the federal government's trust obligations. Whether such reallocations would lead to takings or other claims by existing water rights holders remains to be seen.

(Miles Krieger, Steve Anderson)

HOOPA VALLEY TRIBE BRINGS LAWSUIT AGAINST FEDERAL GOVERNMENT SEEKING $340 MILLION IN UNPAID HABITAT RESTORATION PAYMENTS FROM WATER CONTRACTORS

In its lawsuit filed on October 29, 2022, the Hoopa Valley Tribe is alleging that the U.S. Department of the Interior is failing to collect moneys from California farms that receive federally supplied water and in the process is violating the Tribe's sovereignty. Specifically, the lawsuit is claiming that the federal government has failed to follow laws which require contractors using federally supplied water to pay for habitat restoration projects. Accordingly, the lawsuit is claiming that those contractors owe $340 million for habitat restoration projects along the Trinity River and other areas harmed by the federal government's water diversions. In addition to the claims that the federal government has failed to collect moneys owed by its water contractors, the lawsuit is also alleging that the federal government has failed to appropriately consult with the tribe on other matters impacting the Trinity River.

Background

The Hoopa Valley Tribe's reservation is located in California's North Coast region inland from Eureka and Redwood National Park and just south of the confluence of the Trinity River and Klamath River. The Trinity River runs directly through the center of the reservation and with it having been the centerpiece of the reservation the Hoopa Valley Tribe relies on it for food and cultural purposes. Because of decades of water diversions, and particularly the diversions by the federal government as described in the lawsuit, however, the Hoopa Valley Tribe has experienced a sharp decline to the health of the Trinity River.

Since the 1950s, the Trinity River has been a major source of water for the federally operated Central Valley Project, utilizing its system of dams, reservoirs and canals to send the water southward to farmers for use in growing popular crops such as fruits and nuts. Even more than the diverted water itself, the Trinity River is also host to various species of fish including the coho salmon, which is listed as an endangered species.

The Dispute

In 1992, Congress took aim at updating laws governing the Central Valley Project's operation. In doing so, Congress focused on giving the Tribe some power to participate and weigh in on changes to river flows, adding requirements for protecting fish species in the Trinity River, and even pronounced that any renewals of long-term water contracts would be subject to existing laws. Two decades letter, Congress then passed a law stating that any temporary federal contracts for water, which at the time needed to be reapproved on a regular basis, could be transitioned into permanent contracts if the contractors paid back the federal government for specified costs.

One example of this transition to a permanent water contract involved Westlands Water Dsitrict, the state's largest agricultural water district. While the permanent contract does not grant Westlands any additional amounts of water, or even that they will be able to reveive their full amount in dryer years, but it does extend the district's water contract in perpetuity without the need for continuing reapproval. Taking aim at this contract specifically, the Hoopa Valley Tribe's lawsuit alleges that this contract in particular fails to include requirements for habitat restoration payments.

Conclusion and Implications

The Hoopa Valley Tribe initially brought this lawsuit during the Trump administration but later decided to put it on hold with the prospect of settling with the incoming Biden administration, which seemed particularly hopeful with the current interior secretary Deb Haaland, a member of the Pueblo of Laguna Tribe and the first Native American to hold a cabinet position. Tribal officials chose to renew the lawsuit, however, because the Biden administration has yet to change its course. With the lawsuit brought anew, water contractors looking to transition to permanent contracts will certainly have an interest in the suit's ultimate resolution, and while the lawsuit has been brought on its own merit, it is entirely pos-

sible the suit acts as a motivator for the US Department of the Interior in working to settle the claims that the Hoopa Valley Tribe has been pressing since the Trump administration.
(Wesley A. Miliband, Kristopher T. Strouse)

CALIFORNIA'S PFAS LAWSUIT CASTS A WIDE NET

Beginning in the early 2010, state Attorneys General have filed a series of lawsuits based on damages allegedly caused by per- and polyfluoroalkyl substances, collectively known as "PFAS" aka "forever chemicals." Those suits originally focused on natural resource damages, like that filed by Minnesota, but have expanded in breadth to encompass claims of damage to residents' health. California's recently-filed litigation may be the broadest brought to date, potentially breaking new ground in this vast and complex litigation landscape. [*The People of the State of California, Ex Real. Rob Bonta v. 3M Company, et al.*, Case No. 22CV021745 (Superior Court for Alameda County).]

Background

On November 10, 2022, California's Attorney General Rob Bonta filed suit in Alameda Superior Court against 3M, Dupont and more than a dozen other manufacturers of PFAS. The suit alleges the defendants knew or should have known that PFAS are harmful to humans and the environment, nevertheless continued to manufacture, distribute and market PFAS while concealing from the public their harms.

PFAS are a class of chemicals developed post-World War II with heat, oil, and water resistant properties. For decades they were incorporated into a very wide array of industrial and consumer processes and products. The same attributes that make PFAS useful also mean that they take a long time to break down, so that they are very persistent in the environment and the human body. A common environmental pathway for human exposure is via drinking water.

Research has linked exposure to PFAS to, *e.g.*, diminished liver function, kidney and testicular cancer, elevated risk of cardiovascular disease, diminished antibody response to vaccines, various birth defects, developmental delays and elevated risk of miscarriage.

Several multi-district litigation actions in federal court are adjudicating or have adjudicated a very large number of claims against PFAS manufacturers, distributers and marketers by individuals, property owners and water providers, increasingly stringent regulatory proposals and final actions by the Environmental Protection Agency continue apace, and multi-district litigation regarding PFAS exposure linked to the use of fire-fighting foams on military bases continues. Beginning in the 2010s, state Attorneys General began to file suits alleging harms to their states' environment and, in later-filed suits, residents' health. Minnesota and Delaware have since settled their claims, while those of 13 other states remain pending.

The State's Claims

California's lawsuit states a wide array of claims and seeks broad remedies, pushing the envelope established in suits filed by other states' Attorneys General.

The suit identifies numerous sources of contamination beyond the typical industrial manufacturing and disposal sites, including wastewater treatment plants and landfills, alleging that PFAS have been detected in the blood of 99 percent of the California residents who have been tested, as well as being ubiquitous in the state's lakes, rivers, drinking water, and wildlife, including an allegation that PFAS have been detected in 146 public water systems serving 16 million residents of the state. This contamination is, the state asserts, due to the manufacture, distribution, marketing and disposal of PFAS by defendants. The state further alleges that its two-year investigation established that the manufacturers continued to produce, distribute and market PFAS within the state despite knowing or when they should have known of the chemicals' deleterious environmental and human health effects, and while failing to warn of those dangers.

The complaint states causes of action for public nuisance, strict product liability (failure to warn and defective/ultra-hazardous product), unlawful business practices, and negligence *per se*. The remedies sought are particularly broad and include funding for and equitable relief requiring abatement across the state by *e.g.*, the treatment of drinking water from private and public systems as well as wastewater treatment. Compensatory and restitution damages are also sought, including to fund mitigation efforts such as medical monitoring, public noticing, the provision of replacement water prior to the provision of treatment, and safe disposal and destruction.

Conclusion and Implications

The sweeping nature of the state's suit along with California's disproportionate population and economic importance makes its outcome particularly high stakes for the named defendants, and will impact as well as plaintiffs and defendants in other California state court PFAS cases. It remains to be seen whether the California courts' treatment of this case has a wider impact on the fate of PFAS litigation before the federal and other state courts.
(Deborah Quick)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT ISSUES EXTRAORDINARY WRIT RELIEF COMMANDING EPA TO COMPLY WITH ENDANGERED SPECIES ACT

In re: Center for Biological Diversity, ___F.4th___, Case No. 21-1270 (D.C. Cir. Nov. 22, 2022).

Taking unusually aggressive action under the All Writs Act, the D.C. Circuit Court of Appeals issued a writ of *mandamus* directing the U.S. Environmental Protection Agency (EPA) to complete an effects determination under the federal Endangered Species Act (ESA, 16 U.S.C. § 1531 *et seq.*) in connection with the agency's registration of a pesticide. The order was issued in the context of EPA's longtime, flagrant flouting of its clear statutory duties under the ESA, including in this case five solid years of failure to take any action in compliance with the Court of Appeals previous order regarding the pesticide registration at issue.

Background

In 2014, EPA registered cyantraniliprole, a pesticide that "provides protection from pests that feast on citrus trees and blueberry bushes," under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. § 136 *et seq.*). FIFRA provides that "[n]o pesticide may be sold in the United States unless it is first registered with EPA." 7 U.S.C. § 136a(a). The statutory standards for registration provide that "EPA must approve the application if it meets composition and labeling requirements" and will "perform its intended function without unreasonable adverse effects on the environment" if used in accordance with widespread practices. 7 U.S.C. § 136a(c)(5)."

EPA's Environmental Fate and Ecological Risk Assessment for the registration of the new chemical *Cyantraniliprole* at the time of registration:

> . . .indicate[d] that it is 'slightly to very highly toxic to freshwater invertebrates; moderately to highly toxic to estuarine/marine invertebrates[;] highly toxic to benthic invertebrates; [and] highly to very highly toxic to terrestrial insects.'. . . [Nonetheless]. . . EPA classified cyantranilipole as a 'Reduced Risk' pesticide, a special category for pesticides it determines have a lower risk to human health and many non-target organisms.

EPA did not, prior to the 2014 registration, carry out an initial review or make an effects determination of the registration, let alone consult with the National Marine Fisheries Service or the Fish and Wildlife Service, to "insure that [the registration] … is not likely to jeopardize the continued existence of any endangered or threatened species or result in [their habitat's] destruction," pursuant to the ESA. 16 U.S.C. § 1536(a)(2)).

The Center for Biological Diversity and the Center for Food Safety (Centers) in 2017 obtained from the D.C. Circuit Court an order remanding the registration to EPA with instructions:

> . . .to replace the registration order with. . .a new registration order signed after an effects determination and any required consultation.

In those initial proceedings, EPA freely admitted it had not complied with the ESA. In the ensuing five years:

> EPA made no progress toward completing cyantraniliprole's effects determination--that is, no progress until earlier this year. Only then did EPA schedule cyantraniliprole's effects determination, thought it took no steps to complete it.

The Centers therefore returned to the Circuit Court, seeking relief under the All Writs Act, 28 U.S.C. § 1651.

The D.C. Circuit's Decision

The bar petitioners must meet to obtain *mandamus* relief is set extremely high:

> A petitioner seeking *mandamus* must first establish that the agency has violated "a crystal-clear legal duty." *In re National Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022).

A *mandamus* petitioner must show that it "has no other adequate means to attain the relief it desires." *In re Core Communications*, 531 F.3d 849, 860 (D.C. Cir. 2008) (internal quotation marks and alteration omitted). Moreover, a court may grant *mandamus* relief only when it also "finds compelling equitable grounds." *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C. Cir. 2005) (internal quotation marks and alteration omitted). On the equities, the central question is "whether the agency's delay is so egregious as to warrant mandamus." *Core Communications*, 531 F.3d at 855 (internal quotation marks omitted).

The Circuit Court noted as well that:

> . . .this case arises from relatively unique circumstances that implicate two distinct sources of *mandamus* jurisdiction under the All Writs Act: our power to compel unreasonably delayed agency action and our power to require compliance with our previously issued orders.

Specifically with the respect to the latter issue:

> . . .[w]hen an agency ignores a court order. . .[i]t nullifie[s] [the court's] determination that its [action is] invalid and 'insulates its nullification of our decision from further review.'

In that circumstance, the equitable inquiry may be satisfied on a "lesser showing" by the petitioner.

Applying this test, the Court of Appeals easily found that EPA has a clear statutory duty to discharge its duties under the ESA prior to registering cyantraniliprole. EPA did not contest that the Centers have no adequate alternative remedy. Thus:

> . . .[t]he sole question, then, is whether EPA's delay in undertaking an effects determination is 'so egregious as to warrant mandamus.'

This equitable question is generally subject to analysis under the "'hexagonal *TRAC* factors" articulated in *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984):

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. (Internal quotation marks and citations omitted.)

Here, Congress has "set a plain deadline" (factor 2), and the Court found that the human health and welfare interests sought to be protected by the ESA (*e.g.*, "'it is in the best interests of mankind to minimize the losses of genetic variations.'") would prejudiced by further delay, satisfying factors 3 and 5.

Factors 1 and 4

Focusing on factors 1 and 4, the Court of Appeals examined EPA's "fraught relationship with the ESA," during which the agency "has made a habit of registering pesticides without making the required effects determination." "EPA has faced at least twenty lawsuits covering over 1,000 improperly registered pesticides," a failure to comply with statutory mandates so flagrant that since 2014 EPA and the U.S. Fish and Wildlife Service have been subject to regular Congressional committee reporting requirements. In that context, EPA's assurances to the Court in this case that it would proceed with the required effects determination by September 2023 rang hollow, particularly given those assurances were undermined by the agency's recent statement that until 2030 it will only make effects determinations for pesticide

registrations when subject to a court order requiring it to do so. Therefore, the Court of Appeals issued the requested relief, mandating that the effects determination and replacement of the registration order be completed by September 2023 and adding "bite" by retaining jurisdiction to monitor EPA's progress by requiring that progress reports be submitted by the agency every 60 days.

Conclusion and Implications

This case provides a useful illustration of the lengths to which an executive agency must go in defying Congressional and judicial commandments before a court will issue a writ of mandamus of this breadth. The court's retention of jurisdiction and interim progress report elements are particularly unusual. Nonetheless, in this polarized era examples of such stark executive defiance may well become more common.
(Deborah Quick)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT, APPLYING SEVERABILITY DOCTRINE, FINDS CHALLENGE TO USE-FEE PORTION OF SEWER CHARGE, AND NOT CAPACITIES FEE PORTION, DOESN'T CREATE THE SAME STATUTE OF LIMITATIONS

Raja Development Co., Inc. v. Napa Sanitary District,
___Cal.App.5th___, Case No. A162256 (1st Dist. Nov. 8, 2022).

Condominium owners brought an action for declaratory and injunctive relief against the Napa Sanitary District (District), claiming that the use-fee portion of a sewer service charge, which also included a capacity-fee portion, was an unlawful tax. The Superior Court sustained the District's demurrer on statute of limitations grounds. The Court of Appeal then reversed, finding that the inseverability of the ordinance authorizing the sewer charge did not make a challenge to the use-fee portion subject to the shorter limitations period for challenging capacity fees.

Factual and Procedural Background

The District operates a wastewater utility through which it provides wastewater collection and treatment services to residents. The plaintiffs are owners of condominium units located within the District's jurisdiction (collectively: plaintiffs). As alleged in plaintiffs' complaint, the District has imposed an annual sewer service charge on townhomes and condominiums within its jurisdiction since at least 1975, which is imposed by the District as a single collected charge.

Following various demurrers by the District, plaintiffs filed a third amended complaint alleging that the sewer service charge (although collected in a single charge) effectively consists of two components: (1) a "use fee" (for general operations, general revenue purposes, and other non-capacity related purposes); and (2) a "capacity fee" (for maintenance and improvement of capital facilities, among other things). Plaintiffs claimed that the use fee was an invalid tax because it exceeds the reasonable cost of providing the service for which it is charged, the District has not justified the fee with a nexus study, and the fee has not been approved by two-thirds of voters. Plaintiffs sought a declaration that the use-fee portion of the service charge is unconstitutional or otherwise illegal, as well as an injunction enjoining the District from imposing/collecting it.

The District again demurred, contending that the ordinances authorizing the service charge were inseverable, and that a court would have to invalidate the entire charge (*i.e.*, both the use-fee portion and the capacity-fee portion) were plaintiffs to prevail. Thus, the District reasoned, the plaintiffs' claim necessarily challenged the capacity fee, which was subject to a 120-day statute of limitations. That is, if the only available remedy would invalidate the capacity fee along with the use fee, the lawsuit was untimely even though it only purported to challenge the use fee.

At the Superior Court

The Superior Court sustained the demurrer without leave to amend, agreeing that the use-fee and capacity-fee components were inseverable, that the lawsuit would necessarily invalidate the entire sewer service charge (including the capacity fee), and that the 120-day limitations period to challenge the capacity fee thus barred plaintiffs' challenge. Plaintiffs in turn appealed.

The Court of Appeal's Decision

For purposes of appeal, the parties agreed in principle that different limitations periods applied to challenges to the capacity-fee and use-fee components of the sewer service charge, and that a challenge to the District's capacity fee would be time-barred under the applicable 120-day statute of limitations. The question, as the Court of Appeal framed it, was whether the purported inseverability of the ordinance autho-

rizing the charge altered the "gravamen" of the claim or the "nature of the right sued upon" so as to transform the claim (which only purported to challenge the use-fee portion of the charge) into one subject to the 120-day statute of limitations for the capacity fee. The Court of Appeal found the answer to be "no."

Severability Doctrine Determines the Scope of Remedy after Legal Flaw in an Ordinance Has Been Established—It Doesn't Alter the Nature of a Claim

Regardless of whether the ordinances authorizing the charge would be severable, the Court of Appeal found, the complaint did not allege any wrongful conduct by the District with respect to the capacity fee, the invasion of any right or interest plaintiffs possess related to the capacity fee, or any legal injury from the capacity fee.

The court found that the purpose of the severability doctrine, by contrast, is to determine the scope of the remedy after a legal infirmity in an ordinance has been established. Thus, a finding of inseverability would not alter the nature of plaintiffs' claim or the rights upon which they brought suit. Even if the District ultimately were correct that severability principles would require the invalidation of the entire sewer service charge, the Court of Appeal found that the District (rather than the plaintiffs) ultimately would bear the consequence of its decision to draft the ordinances in the manner that it had done. On this basis, the Court of Appeal reversed the Superior Court decision and remanded for further proceedings.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the severability doctrine in the context of public agency fees.The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A162256.PDF
(James Purvis)

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