Volume 33, Number 4
January 2023

CALIFORNIA WATER™
LAW & POLICY Reporter

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Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135; Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

CALIFORNIA WATER NEWS

FEDERAL GOVERNMENT TO PROVIDE $250 MILLION IN FUNDING TO LOCAL AGENCIES FOR SALTON SEA RESTORATION PROJECTS

In late November, southern California's Imperial Irrigation District (IID) officially announced that they would be partnering with the U.S. Department of the Interior, the California Natural Resources Agency, and the Coachella Valley Water District in an effort to clean up the dilapidated Salton Sea (Sea).

The Sea has been hit particularly hard by the effects of climate change and persistent drought, so much so that the nearby communities have even experienced health problems caused by algae blooms and dust storms due to wins kicking up drying sediment along the Sea's widening shores. The new partnership plans to alleviate some of these problems with $250 million in funding from the federal government. These funds will go towards environmental restoration projects, including air quality improvements, public health programs, and ecosystem restoration projects, with the local agencies providing the land necessary for the implementation of such projects and the California Natural Resources Agency assisting in the permitting processes.

The State of the Salton Sea

Occupying nearly 350 square miles of southern California's Riverside and Imperial counties, the Salton Sea is California's largest lake by surface area, dwarfing even Lake Tahoe—California's largest *fresh water* lake—which has a surface area just under 200 square miles. The Sea's formation is also an anomaly itself, as it was originally formed over an old and empty lakebed in 1905 when Colorado River floodwaters breached an irrigation canal being constructed in the Imperial Valley. This flooding filled the area then known as the Salton Sink, and the Sea has since been maintained by irrigation runoff from the Imperial and Coachella valleys—largely fueled by Colorado River water—and local rivers.

As the Salton Sea is a terminal lake, meaning there are no outflows from the lake, the Sea has faced increasing salinity and other water quality issues, including temperature extremes, eutrophication, and related anoxia and algal productivity. Salinity levels in the Sea have reached such high levels that they exceed those of the Pacific Ocean by 50 percent. In fact, salt levels are so high that the Sea's sole native fish is the desert pupfish, a fish known for its capacity to resist the changing salinity levels in the Salton Sea and now classified as a federally endangered species.

Furthermore, climate change, water-conservation measures, and water transfer agreements shifting the use of Colorado River water have all led to a decrease in irrigation runoff that previously fed the Sea. With less irrigation runoff, the Salton Sea has experienced increased evaporation, exposing dry lakebed saturated in contaminants such as pesticides and farming byproducts. These contaminants are then kicked up into the air as toxic dust clouds and the communities surrounding the Sea have suffered disproportionately from negative health effects as result, including asthma and other respiratory conditions, allergies and nosebleeds.

Funding for Restoration Projects

The multi-agency partnership will take aim at addressing these concerns and will also focus on meeting the contingency placed on the funding—namely that the state must conserve 400,000 acre-feet of Colorado River water each year starting in 2023.

The first $22 million will be provided by the Department of the Interior's Bureau of Reclamation between now and the end of the summer of 2023 for restoration projects around the Salton Sea, research on current and future cleanup projects, and to hire two representatives from the Torres Martinez Desert Cahuilla Indian Tribe to help implement those projects. The rest of the funding, $228 million in total, will be contingent on the state following its commitment to conserve 400,000 acre-feet of Colorado River water annually. Per the terms of the partnership's agreement, this will require IID to conserve 250,000 acre-feet of Colorado River water per year as part of the state's larger goal.

Conserving that much water, however, will only exacerbate the problems the partnership seeks to

remediate. An IID projection shows that by 2027, the required conservation measures will expose an additional 8,100 acres of dry shoreline. It is the aim of the partnership, however, for the additional $228 million in funding to not only mitigate these impacts, but to help restore the Salton Sea beyond any mitigation efforts. The agreement involves expanding and expediting existing projects that will flood portions of the lakebed to protect human health by limiting dust emissions while also providing increased aquatic habitat.

Additionally, the California Natural Resources Agency agreed to accelerate any permitting processes. Although most lakes fall under the jurisdiction of their state, the Salton Sea's lakebed is broken up into a large puzzle of separate landowners, creating the need for expedited land access as land access issues have historically popped up as an obstacle in the way of restoration efforts. To this end, both IID and Coachella Valley Water District have also pledged that they would provide expedited land access for the projects.

Conclusion and Implication

The Salton Sea's condition has grown worse and worse over the past decade and is well on its way to becoming nothing more than a toxic cesspool of agricultural waste. Furthermore, the state's persistent drought is accelerating that process, making it all the more important to get these restoration projects going in any fashion. Even if more can be done—or needs to be done—to keep the Salton Sea from becoming a wasteland, the efforts undertaken by the Department of the Interior, Imperial Irrigation District, Coachella Valley Water District, and the California Natural Resources Agency in this agreement put pen to paper and creatively combine two of the region's major efforts in one agreement: water conservation efforts and restoration projects in and around the Salton Sea. Although most of the funding is conditioned on IID's conservation of 250,000 acre-feet of water each year, assuming this goal is met and the funding is provided, the partnership's efforts could result in impactful projects to clean up the Salton Sea and at least slow the decline of the health of both the lake and its surround communities.
(Wesley A. Miliband, Kristopher T. Strouse)

L.A. CITY COUNCIL GREEN LIGHTS INVESTIGATION INTO INSTALLATION OF SOLAR CANOPIES OVER THE LOS ANGELES AQUEDUCT

In early February of 2022, the Turlock Irrigation District (TID) was awarded $20 million by the Department of Water Resources to initiate its pilot program, Project Nexus, that was designed to test the feasibility of installing solar panels over their irrigation canals. Now that Project Nexus is well on its way, others are starting to look at installing these solar canopies on their own facilities, and the Los Angeles City Council voted last month to start looking into implementing a pilot program of its own.

Following Turlock Irrigation District's Lead

While TID's Project Nexus is set to break ground once it receives the necessary equipment in early 2023, the idea really took hold after researchers at the University of California (U.C.), Merced and Santa Cruz, released a study analyzing the potential benefits of covering California's canals with canopies of solar generating equipment. The U.C. study showed that covering all of California's roughly 4,000 miles of public water delivery system infrastructure with solar panels would have significant water, energy and cost savings for the state.

More specifically, the study showed a water savings of up to 63 billion gallons per year (about 232,000 acre-feet), enough water to meet the residential water needs of about 2 million people or irrigate 50,000 acres of farmland. The study also showed that a statewide solar canopy system would generate 13 gigawatts of solar power. While it may be a pipe dream to line all of California's canals with solar canopies, 13 gigawatts of energy would be an enormous boost to California's energy grid, equaling about one sixth of the state's current installed capacity and would itself

supply about half of the capacity needed by 2030 to meet the state's goals for its renewable energy portfolio.

In addition to the water and energy benefits, putting new solar panels over water can help cool the panels, making them operate more efficiently than solar generation facilities installed on the land itself. Because solar cells become less efficient as they heat up, the water's cooling effect can increase their conversion ability. Putting solar panels over canals rather than on dry land can also save money and time spent on permitting processes and allows operators to double up on the use of the land already occupied by canals by combining infrastructure for electrical energy generation with preexisting water conveyance systems.

Additionally, by covering otherwise exposed waterways from direct sunlight, the panels can not only reduce evaporation of water transported through the canals, but can also work as a preventative measure against the growth of aquatic weeds, further reducing maintenance cost. TID, for example, explained that they already spend over $1 million a year to clean their canal system of weeds and overgrowth to make sure no drops or side gates are blocked by the growth.

Covering the LA Aqueduct

Many of the benefits of solar lined canals have already been heavily theorized over the last few years, particularly between the UC study and the initiation of TID's Project Nexus, and the newest troupe to follow suit will be the City of Los Angeles as its city council voted to investigate the installation of such facilities over its very own LA Aqueduct.

The LA Aqueduct runs from the Owens Valley in the Eastern Sierra all the way to Los Angeles, stretching a whopping 370 miles. According to the city's committee on energy, climate change, and environment justice, the city loses about 10 percent of its water supply to evaporation. Looking at these two statistics together, it seemed it was only a matter of time before the City of Los Angeles looked into creating its own Project Nexus. By covering the LA Aqueduct, the city could save enough water otherwise lost to evaporation to satisfy the needs of roughly 4,000 homes. Furthermore, installing solar panels along the aqueduct could generate up to 100 megawatts of solar power, enough to power tens of thousands of homes.

Challenges Ahead

Although the benefits of these solar lined canals look great in concept, the city's investigation will be looking at the difficulties in implementing such a program. According to the L.A. Department of Water and Power (LADWP), for example, the installation costs for placing solar panels over a canal system would run the city about five to six times more than they would if they were to install them in the traditional over-land fashion. But while these heightened costs would typically be passed on to ratepayers, the Biden administration has actually set aside funds for these types of infrastructure programs which could potentially offset much of, if not all of, the increased costs. Another problem addressed by LADWP in lining the LA Aqueduct with solar canopies is the aqueduct's location. Transmitting energy such great distances can result in drastic energy losses, especially when working with lower voltages, but LADWP has also noted that this problem could be mitigated by supplying the energy to communities near the canals so the electricity is not traveling as far.

Conclusion and Implications

Less than a year after TID's commencement of Project Nexus, the City of Los Angeles is following suit in bringing this innovative idea to the LA Aqueduct. Given the state's nearly 4,000 miles of public water delivery system infrastructure, it seems inevitable that even more agencies will begin their own investigations into the installation of solar canopies over their own canal systems.

No clear timeline has been established for when solar panels will be brought to the LA Aqueduct, but the city appears optimistic that such a project is more than just hopes and dreams at this point. The city is currently on track to meets its goal of having 100 percent renewable energy by 2045, but realizing a solar lined canal project such as TID's Project Nexus would certainly provide a boost for the city in reaching this goal.

(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

IN A MAJOR REGULATORY STEP, FERC APPROVES REMOVAL OF FOUR DAMS ON THE KLAMATH RIVER

On November 17, 2022, the Federal Energy Regulatory Commission (FERC) issued an order approving the surrender of license and removal of project facilities for four dams on the Klamath River. The four dams—the J.C. Boyle Dam, Copco Dam No. 1, Copco Dam No. 2 and Iron Gate Dam—restrain the lower reaches of the Klamath River. Owned and operated by PacifiCorp, a subsidiary utility company of Berkshire Hathaway Energy, the dams were built to provide hydroelectric power to customers in California and Oregon. Stakeholders in the effort to remove the dams include PacifiCorp, the states of California and Oregon, and the Yurok and Karuk tribes, and a number of environmental interest groups, including American Rivers, California Trout, Northern California Council Federation of Fly Fishers, Salmon River Restoration Council, Sustainable Northwest, Trout Unlimited, and Pacific Coast Federation of Fishermen's Association.

Background

The Klamath River runs through southern Oregon and northern California before emptying into the Pacific Ocean near the town of Klamath, California. Prior to the arrival of European settlers during the California Gold Rush in the 1840s and the construction of the dams in the following century, the Yurok and Karuk tribes populated the region and fished the Klamath River. The salmon from the Klamath River was a primary food source for the Tribes and holds great cultural significance. Between 1903 and 1964, a number of dams were built on the Klamath River as part of the Klamath River Hydroelectric Project (Klamath Project). Both Tribes—already decimated and displaced by European settlement—were severely impacted by the damming of the Klamath River. In addition to blocking the passage of anadromous fish to the upper reaches of the Klamath River, the dams slow the flow of the river, which results in higher water temperatures that increase the mortality of fish eggs and the growth of toxic algae blooms. A massive die-off of salmon in the lower reaches of the Klamath River in 2002 has been attributed to these effects.

FERC Relicensing Leads to Decision to Allow Removal of Klamath Dams

FERC has responsibility for licensing and inspecting hydroelectric projects such as the Klamath Project. FERC issued the original license for the Klamath Project in 1954, and the license expired in 2006. PacifiCorp has been operating the Klamath Project under an annual license since that time. In 2004, PacifiCorp filed an application to relicense the Klamath Project. The final Environmental Impact Statement (EIS) for the relicensing of the Klamath Project issued in 2007. The EIS recommended issuing a new license, but recommended that the new license include mandatory conditions from the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to mitigate environmental impacts. PacifiCorp determined that the costs of complying with such conditions would be cost-prohibitive. PacifiCorp thereafter asked FERC to put the relicensing application in abeyance and commenced negotiations with federal, state, and tribal authorities to consider alternatives to relicensing the four lower dams of the Klamath Project.

A number of parties reached an agreement to remove the four dams in February 2010. In April 2016, the states of California and Oregon, the U.S. Department of the Interior, PacifiCorp, NMFS, and the Yurok and Karuk Tribes entered an amended settlement agreement whereby PacifiCorp would seek permission from FERC to transfer the four dams to a new entity called the Klamath River Renewal Corporation (Renewal Corporation), a nonprofit established to oversee dam removal and river restoration. The Renewal Corporation is funded by contributions from the states of California and Oregon, as well as rate surcharges on PacifiCorp customers. The Renewal Corporation's board of directors are appointed by various stakeholders, including the states of Califor-

nia and Oregon, the Karuk and Yurok Tribes, and a number of environmental interest groups.

FERC required PacifiCorp to remain a co-licensee to assure sufficient funding and responsibility for the surrender and removal process and any impacts therefrom. PacifiCorp resisted this requirement, fearing the effect of such continued, open-ended involvement on its rate-payers. Following further negotiations, the states of California and Oregon agreed to step in as the co-licensee with the Renewal Corporation in place of PacifiCorp. While the parties negotiated the co-licensee issue, PacifiCorp and the Renewal Corporation submitted a new application to surrender the license.

FERC approval of the license surrender has involved a litany of approvals from and coordination with other federal and state regulators. FERC prepared an EIS with cooperation from the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency. The final EIS was issued on August 26, 2022. In consultation with FWS and NMFS, FERC prepared a Biological Assessment pursuant to Section 7 of the federal Endangered Species Act. FERC also engaged in consultation with NMFS to review adverse effects on Essential Fish Habitat under Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act. The Renewal Corporation received water quality certifications from the Oregon Department of Environmental Quality and the California State Water Resources Control Board pursuant to the federal Clean Water Act (CWA). In February 2022, the California Coastal Commission has determined that the dam removal would not have a substantial effect on California's coastal zone. The National Park Service, U.S. Forest Service, and the U.S. Bureau of Land Management determined that dam removal was consistent with Section 7 of the Wild and Scenic Rivers Act. The Renewal Corporation has also applied to the Corps for a dredge-and-fill permit pursuant to Section 404 of the CWA. That application remains under consideration.

Based on these regulatory actions, as well as review and analysis of other federal, state, and local requirements, FERC found that dam removal is in the public interest. FERC granted the license surrender application and approved the removal of the four dams. Although the Section 404 permit application remains under consideration with the Corps, dam removal is expected to start in summer 2023, with Copco Dam No. 2 the first dam scheduled to be razed. Renewal Corporation expects the removal of all four dams to be completed by the end of 2024.

Opposition to the Projects

Removal of the dams is not without opposition. Farmers and municipalities that rely on the Klamath River for irrigation and drinking water expressed concerns about the effect of dam removal on water deliveries. Others have expressed concern with the loss of flood control and fire protection, the release of downstream sediments and toxic material as a result of the removals (including potential Clean Water Act violations), the impacts on recreation, and the potential destruction of wildlife habitat.

On December 3, 2022, the Siskiyou County Water Users Association (SCWUA) filed a complaint in the Siskiyou County Superior Court seeking an injunction against the State of California to stop the dam removal project on the basis that removal will result in sedimentation and channel modifications in violation of the federal Wild and Scenic River Act. At this early stage of the litigation, it is unclear what effect it may have on the removal effort.

Conclusion and Implications

The removal of the four dams on the lower reach of the Klamath River is seen by many as an important and long-sought victory for salmon and the Tribes that depend on them. Others remain skeptical about the consequences of removing the dams. A few hurdles remain, including local permitting, the pending Section 404 application, and a pending lawsuit. But many view FERC approval of the license surrender application as the final significant regulatory obstacle before dam removal can proceed.
(Brian E. Hamilton, Meredith Nikkel)

U.S. BUREAU OF RECLAMATION UTILIZES HYDROLOGIC SCENARIOS TO PREDICT INFLOW AT LAKE POWELL AND LAKE MEAD

In November 2022, the U.S. Bureau of Reclamation (Bureau) conducted an analysis to determine a possible range of reservoir elevations at Lake Mead and Lake Powell on the Colorado River. The Bureau predicted a significant drop in surface water elevation from the October 2022 reports to the November 2022 reports, suggesting potentially unprecedented low surface water elevations.

Background

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. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet.

The Bureau periodically models lake elevations at Lake Mead and Lake Powell to facilitate water management activities on the river. To predict the potential impact that reducing the Glen Canyon Dam annual releases will have on Lake Mead and Lake Powell, the Bureau created three hypothetical hydrologic scenarios through model runs. The model runs consisted of the October 2022 24-Month Study Probable Maximum inflow and the November 2022 24-Month Study Probable Minimum inflow. An additional model run was conducted in November to determine a possible range of reservoir elevations.

The Probable Minimum inflow scenario reflects a dry hydrologic condition which statistically would be exceeded 90 percent of the time. The Most Probable inflow scenario reflects a median hydrologic condition which statistically would be exceeded 50 percent of the time. The Probable Maximum inflow scenario reflects a wet hydrologic condition which statistically would be exceeded 10 percent of the time. It is approximately 80 percent likely that future elevations will fall within the range of the predicted minimum and maximum inflow scenarios.

The Department of the Interior implemented an action plan pursuant to the 2007 Interim Guidelines reducing the Glen Canyon Dam annual releases. The reduction of releases from Lake Powell resulted in a reduced released volume that would normally have been released from Glen Canyon Dam to Lake Mead consistent with routine operations under the 2007 Interim Guidelines. The reduction of releases from Glen Canyon resulted in increased storage in Lake Powell and did not affect the operating determina-

tions for 2023 and was accounted for as if the volume of water had been delivered to Lake Mead for operating condition purposes.

More on the Predictive Modelling

The hydrologic scenarios reflect the projected physical elevations at each reservoir after implementing the above action plans. The November 2022 Probable Minimum 24-Month Study's water year (WY) 2023 unregulated inflow into Lake Powell in the Probable Minimum inflow scenario is 51 percent of average. Under the Probable Minimum scenario, Lake Powell's physical elevation is projected to be 3,489.33 feet on December 31, 2023. Including intervening flows between Lake Powell and Lake Mead, Lake Mead's physical elevation is projected to be 1,018.12 feet on December 31, 2023.

Under the November 2022 Most Probable 24-Month Study, the WY 2023 unregulated inflow into Lake Powell in the Most Probable inflow scenario is 83 percent of average. Under the Most Probable scenario, Lake Powell's physical elevation is projected to be 3,529.49 feet on December 31, 2023. Including intervening flows from Lake Powell and Lake Mead, Lake Mead's physical elevation is projected to be 1,021.77 feet on December 31, 2023.

Lastly, the October 2022 Probably Maximum 24-Month Study indicates that the WY 2023 unregulated inflow into Lake Powell is 161 percent of average. Under the Probable Maximum scenario, Lake Powell's physical elevation is projected to be 3,581.67 feet on December 31, 2023. Including intervening flows between Lake Powell and Lake mead, Lake Mead's physical elevation is projected to be 1,062.28 feet on December 31, 2023.

Conclusion and Implications

The prediction models created by the Bureau of Reclamation shows what can be expected months or even years ahead. After a historic drop of water levels which have steadily been declining, the Bureau has identified a possible solution which may maintain and restore a consistent surface water elevation in Lake Mead and Lake Powell. For more information, *see:* U.S. Bureau of Reclamation, *November 2022 24-Month Study Projections Lake Powell and Lake Mead: End of Month Elevation Charts*, https://www.usbr.gov/lc/region/g4000/24mo/2022/November-Chart.pdf.

(Miles Krieger, Steve Anderson)

THE STATE WATER PROJECT AND CENTRAL VALLEY PROJECT PREPARE FOR ANOTHER POTENTIALLY DRY-SEASON

On December 1, 2022, the California Department of Water Resources (DWR) released initial State Water Project (SWP) allocations of just 5 percent based on available water storage and projected water supply and demands. The U.S. Bureau of Reclamation (Bureau) also released updates regarding the Central Valley Project (CVP) water supplies, warning contractors to prepare for another dry year. As is the case every year, DWR and the Bureau are both monitoring conditions through the wet season and will update projections and allocations as warranted.

Background

The State Water Project is a massive water management and delivery system that collects water from northern California to supply drinking water for 23 million people and irrigation for 750,000 acres of farmland throughout the state. The SWP delivers an average of 2.4 million acrefeet of water per year to contracting agencies through a system of storage facilities, pumping plants, canals, tunnels, and pipelines. DWR annually reports an initial SWP allocation based on early season water system data.

The federal Central Valley Project is a similarly immense water management and delivery system operated primarily by the Bureau. The CVP is the largest of the Bureau's 17 reservoir system and water delivery projects in the United States. The CVP delivers an average of 7 million acre-feet of water per year to irrigate 3 million acres, which is approximately one-third of California's irrigated lands. It also provides drinking water for about 1 million house-

holds, as well as hydroelectric power, flood protection, recreation, and provides water for California's wildlife refuges.

Initial SWP Allocations

Initial SWP allocation decisions are released annually on December 1. DWR subsequently updates allocation projections monthly until a final allocation is determined in May or June. The lowest initial SWP allocation was recorded in December 2021 at 0 percent. Last year's final allocation was just 5 percent plus minimum amounts to satisfy health and safety requirements.

Central Valley Project Anticipated Projections

The Bureau will not provide its initial water supply allocations until February 2023. However, the Bureau is already taking steps in anticipation of another dry year. The Bureau recently notified CVP contractors water to begin planning for another dry season and for potentially extremely limited water supply in 2023. Despite the current early storms in Northern California, the Bureau observes continuing drought conditions.

Water Storage Levels

DWR is monitoring water levels and weather conditions to forecast water levels next year. DWR is also preparing for the possibility of another dry season. Current data shows that, although some water levels at SWP reservoirs are increasing, reserve levels are still well below reservoir capacities and below average levels for this time of year.

Water levels at Lake Oroville, the SWP's largest reservoir, provide a critical marker for SWP projections. At the conclusion of the most recent water year, water storage levels at Lake Oroville were up by approximately 400,0000 acre-feet. That, however, was an increase from the prior year's lowest storage level on record. As of the date of this writing, water storage at Lake Oroville measured just 61 percent of average.

Water levels for CVP reservoirs are similarly low. Shasta Reservoir is the largest CVP reservoir in California, and is considered a cornerstone of the CVP. As of the date of this writing, water storage at Shasta measured at only 32 percent of its capacity, and 55 percent of average.

According to State Water Resources Control Board reports, fewer than half of selected key reservoirs in the state are at or above 60 percent of their capacity. At this early point in the wet season, many surface water reservoirs have a long way to go to reach averages and even longer to reach capacity.

Continued Monitoring

DWR is taking additional steps in preparation for another dry year. For example, DWR is broadening the development and use of more sophisticated technologies, including aerial snow surveys, to improve forecasts of spring runoff into reservoirs. If the dry conditions persist, DWR may also consider pursuing Temporary Urgency Change Petitions (TUCP) s. DWR and the Bureau have used TUCPs to request changes to water rights requirements in State Water Board Decision 1641 to allow management of reservoir SWP and CVP releases on a pattern that conserves upstream water storage for fish and wildlife control and for Delta salinity control. DWR may also pursue the re-installation of the West False River Emergency Drought Salinity Barrier in the Sacramento-San Joaquin Delta.

The Bureau also continues to monitor weather conditions and hydrologic conditions and will continue to provide regular updates in the coming months.

Conclusion and Implications

This year's State Water Project initial allocation of just 5 percent reflects continuing dry conditions. Although the Bureau has not yet posted its initial allocations for this water year, it also preparing contractors for another dry season. December 2022 delivered significant atmospheric river events that could potentially influence SWP and CVP allocation updates. DWR and the Bureau will continue to monitor water levels and weather conditions. Final allocations will require careful balancing, including determining whether extra precautions must be taken in the event of another dry season.

(Christina Suarez, Derek Hoffman)

CALIFORNIA COASTAL COMMISSION APPROVES SUBSTANTIAL DESALINATION PROJECT

The California Coastal Commission (Commission) recently approved a consolidated Coastal Development Permit (CDP) to support the construction of a desalination plant in Marina, California and its source water wells located beneath the Monterey Bay seafloor. Approval of the permit was conditioned on limiting the harm to dunes and wetlands, groundwater stores and local communities.

Background

Western states continue to face an extended period of drought conditions, which increasingly impacts available drinking water supplies. For the past three years, California has faced some of the driest years on record with another dry year currently anticipated in 2023. In an effort to bolster local drinking water supplies, water suppliers and stakeholders continue to explore and advance construction of desalination plants. There are currently just four desalination facilities providing drinking water in the state.

Two proposed plants recently received Commission approval. One of the facilities is the California-American Water Company (Cal-Am) development located in Marina, California. Cal-Am intends to use this plant to bolster local supplies following recent directives from the California State Water Resources Control Board to cease diverting excess water from the Carmel River.

The Project Summary

Cal-Am proposes to construct and operate desalination components of its overall Monterey Peninsula Water Supply Project that would consist of a desalination facility, a well field, water transmission pipelines, pump station and other related infrastructure. The desalination facility will be located inland in the City of Marina with slant wells located partially in the CEMEX sand mining facility and produce initially about 4.8 million gallons of water per day (mgd). At full scale, the facility would produce 6.8 mgd. The intake wells will be located beneath the Monterey Bay seafloor. The brine will be discharged through an existing outfall after modification. Ratepayers in the Monterey Peninsula (Carmel-by-the-Sea, Pacific Grove and Pebble Beach) and the City of Castroville would receive the desalinated water.

Discussion and Differing Views

Elected officials, state agencies and local businesses have expressed support the approval of the desalination facility in order to develop drought-resistant water supplies. The Monterey Peninsula relies exclusively on groundwater, the Carmel River, and highly treated wastewater for its supplies. Additionally, regulators believe the new source will assist with easing housing shortages in the region. Because of the area's limited water supply, parts of the peninsula have been under a moratorium for new water connections for over a decade.

While the project aims to resolve water security issues, project opponents have voiced concerns. First, opponents assert the project raises environmental justice issues for designated disadvantaged neighborhoods within the City of Marina and that city residence should receive water from the facility. Opponents also assert that construction and operation of the facility may cause environmental impacts including to sensitive species, wetlands and vernal pools, and that the intake wells could degrade groundwater supplies and cause saltwater intrusion into the aquifer.

Project estimates peg the cost of the desalinated water supplies to be approximately $6,000 per acre-foot. Project proponents point to the reliability of and need for these additional supplies. Opponents assert that additional recycled water should instead be pursued.

Coastal Commission Approval

Commission staff (Staff) recommended approval of the permit based on the addition of 20 special conditions. Staff found that uncertainty surrounding the groundwater, environmental and environmental justices concerns can be addressed through a number of prior-to-issuance conditions. To address the sensitive species concerns, Staff required closure of areas during certain periods of the year, biological and habitat monitoring, compensatory mitigation for habitat, and establishment of conservation easements for dune habitat. Regarding protection of water resources, Staff required the production of a groundwater monitoring plan and a wetlands and vernal pool adaptive

management plan. Staff further required Cal-Am to annually produce an environmental justice report providing the status of project-related measures to reduce costs to low income-ratepayers and a community engagement plan for the residents and representatives of the City of Marina.

During the public hearing for consideration and approval of the permit, the Commissioners modified some of the conditions and imposed additional obligations. Per the Commission, Cal-Am must update plans for assisting low-income ratepayers and cap monthly water rate increases for eligible customers. Additionally, the Commission requires Cal-Am to pay $3 million to the City of Marina and fund employment of persons to oversee a public access and amenities plan.

Conclusion and Implications

Cal-Am originally proposed a larger desalination plant in 2020. At the time, Coastal Commision Staff recommended denial of the permit for the larger facility as Staff had identified the expansion of the water recycling facility as a feasible alternative. However, three years later, Staff have found that updated supply and demand models reasonably demonstrate the need to supplement existing supplies in the current 20-year planning period, with desalination comprising an integral component.

As drought conditions continue in California, it is likely that additional coastal cities will reevaluate their existing demand and supply models. While water recycling is an alternative, it is often inextricably linked to surface water supplies that vary from year to year. Cities facing water supply constraints will likely look to the development of new sources such as desalination. The Commission will continue to face complex environmental, resource, and environmental justice issues as demand for desalination likely increases. Future developers can glean some insight from the Cal-Am permit process as to what the Commission will require for the construction of additional desalination facilities.
(Christina Jovanovic, Derek Hoffman)

LAWSUITS FILED OR PENDING

ENVIRONMENTAL GROUPS SUE THE CITY OF BAKERSFIELD TO ADD FLOWS TO THE KERN RIVER

In late November, conservation groups filed a complaint in Kern County Superior Court against the City of Bakersfield (City), alleging that by regularly diverting water from the Kern River, the City harms public and environmental interests in the river. Plaintiffs also allege that by dewatering the river, the City jeopardizes the survival and recovery of certain protected fish species. Accordingly, the lawsuit seeks to enjoin the City from activities that allegedly dewater the river. [*Bring Back the Kern, et al. v. The City of Bakersfield, et al.* (Kern Super. Ct.).]

Background

Interest groups Bring Back the Kern, The Kern River Parkway Foundation, Water Audit California, Kern Audubon Society, Sierra Club, and the Center for Biological Diversity filed the lawsuit seeking more water in the Kern River for public and environmental purposes. The lawsuit alleges that by regularly diverting water from the Kern River, the City is regularly harming the community, wildlife, and its resources. The complaint alleges that the city failed to properly address environmental harms created by the water diversions despite its legal obligation to do so.

Plaintiffs make a number of background and historical factual allegations. For instance, according to the complaint, the Kern River's watershed includes approximately 3,612 square miles and runs approximately 165 miles to Bakersfield and beyond. Plaintiffs allege that the Kern River watershed cultivates a Mediterranean climate hosting warm dry summers and cool moist winters. During the 1850s, the Kern River flowed south into what is now Bakersfield until a flood in 1867 rerouted the Kern River into what is now known as the "New River." The Kern River filled two large and shallow lakes, Kern Lake and Buena Vista Lake, which during wet years could overflow into Tulare Lake, which then could overflow to the San Joaquin River. These lakes and interlocking wetlands were home to an abundance of fish which served to support large herds of antelope, elk, and thousands of grizzlies. Additionally, the lakes and wetlands served as a critical overwintering stopover of the Pacific Flyway, hosting millions of waterfowl each winter.

The complaint further alleges that since the 1850s and 1860s, settlers caused the vast wetlands of the San Joaquin Valley to dry up when they began diverting flows from the Kern River. Those who reclaimed wetlands or irrigated desert land for agricultural use could take title to the land under state law. In 1877, expansion in the amount of irrigated acreage and diversion canals contributed to the drying up of the lower Kern River. This initiated a dispute where the California Supreme Court held in 1886 that both prior appropriations and downstream riparian land holders' rights to the Kern River were valid. (*Lux v. Haggin* (1886) 69 Cal. 255.)

Analysis of the Complaint

The complaint alleges that the City diverts Kern River water on behalf of area water districts and on its own behalf. Most of the water diverted by the City is delivered for agricultural purposes to water districts who hold either water rights to this water or have a contract with the City for delivery of water of which the city holds the rights. The diversion structures contribute to the reduction of the surface flows in the Kern River to the point where the river rarely flows through the city.

According to the complaint, the City acknowledges that the dewatering of reaches of the Kern River, along with increased groundwater pumping in the vicinity of the river by various water districts, has depleted water levels in the groundwater basin. The complaint also alleges that the City recognizes that the loss of the river has severely diminished and threatened the City's surface and groundwater supply, resulting in damage and threats to the quality of the river ecosystem and the local environment, including vegetation and fish and wildlife in and around the river, aesthetic and recreational opportunities in and around the river, and air quality in the surrounding area. Accordingly to the complaint, if adequate

surface flows were maintained within the Kern River and connected to freshwater marsh habitat on the valley floor, fish species could be reintroduced, and the fishery potentially restored.

Five Causes of Action

Plaintiffs assert five causes of action. The first cause of action is for violation of California's Public Trust Doctrine, which sets forth the legal principle that requires government agencies to protect certain natural resources which must be preserved for the public. (Compl. ¶ 64-75.) The public trust doctrine holds that the state, as trustee, must not unreasonably waste or harm the publics shared natural resources. (Compl. ¶ 71.)

The second cause of action asserts violations of Article X, § 2 of the California Constitution, alleging that the City has a clear and mandatory duty to not waste or unreasonably use waters of the Kern River or to utilize an unreasonable method of use or method of use of diversion of the waters of the Kern River. (Compl. ¶ 76-82.)

The third cause of action asserts violations of the Fish and Game Code, which allegedly prohibits the City from constructing or maintaining in any stream any device or contrivance which prevents or impedes the passing of fish up and down stream. (Compl. ¶ 87) The complaint alleges that the City has failed to allow sufficient water to pass diversion structures on the river to allow fish to pass freely downstream or upstream of the structures. (Compl. ¶ 87-89.)

The fourth cause of action alleged a breach of fiduciary duty related to the public trust doctrine. Under the public trust doctrine, the people of California are the beneficiaries of public trust resources held in trust by the state. This allegedly creates a fiduciary duty between the state and the people. (Compl. ¶ 91-92.) The complaint alleges that the state, as trustee, failed to timely disclose information as is required procedurally before taking action that allegedly harms public trust resources. (Compl. ¶ 97.)

The fifth cause of action arises as a Public Nuisance, arguing that the City has created a public nuisance by diverting water and drying up the river without any analysis of the impacts on public trust uses and resources. (Compl. ¶ 110-113.)

Conclusion and Implications

Because Plaintiffs filed their case only recently, the City has not yet responded. It is not clear whether the City will respond with a demurrer (akin to a motion to dismiss) or will answer the complaint. If it answers the complaint, it is not clear what allegations the City will admit or deny.

The plaintiffs are requesting that the City be prohibited from diverting water at the diversion structures identified in the complaint in a manner which results in the dewatering of the Kern River through the City of Bakersfield, which in turn harms and jeopardizes the survival and recovery of fish species in the Kern River. The outcome of the lawsuit could affect City water supply and diversion operations if plaintiffs prevail. The pleadings are available at: https://www.biologicaldiversity.org/programs/urban/pdfs/2022-11-30-Bring-Back-the-Kern-Complaint.pdf.

(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

GEORGIA MUNICIPAL IMMUNITY DOES NOT SHIELD WASTEWATER TREATMENT UTILITY FROM PFAS LIABILITY

Johnson v. 3M Company, ___F.4th___, Case No. 21-13663 (11th Cir. Dec. 21, 2022).

As the vast wave of "forever chemical" litigation breaks across state and federal courts, ensnaring wastewater treatment and disposal utilities, the precise contours of state and municipal liability are coming under scrutiny. In this case, the Eleventh Circuit Court of Appeals considered whether Georgia municipal immunity shielded a wastewater treatment utility from personal injury nuisance liability and abatement relief.

Background

Per- and polyfluoroalkyl substances (PFAS) have made multiple appearances in these pages in the context of litigation targeting manufacturers, distributors and retailers of these remarkably useful, and equally persistent, industrial chemicals. Claims alleging liability for drinking water contamination are inevitably also being brought against utilities responsible for treating, disposing of, and/or distributing wastewater and drinking water.

"[M]ore than ninety percent of the world's carpet comes from manufacturers in and around Dalton, [Georgia.]" PFAS are used in carpet manufacture for their oil and water repellent properties that render carpets stain resistant. As alleged by the plaintiff in this case, the resulting process wastewater "containing dangerously high levels of the chemicals" is discharged "directly into Dalton's wastewater treatment system." Following treatment (that does not remove PFAS), the wastewater is discharged via spraying onto the surface of the land at the Dalton Utilities' "Land Application System." The accumulation of PFAS in the Land Application System flows:

> . . .into the neighboring Conasauga River and its tributaries. After that, they travel downstream to the Oostanaula River, the primary source of Rome, Georgia's drinking water, exposing its residents to 'dangerously high levels' of the chemicals.

In 2016, the City of Rome (City) installed an emergency filtration process to remove some PFAS from tis water supply. To cover the cost of this emergency filtration system and to pay for a new, permanent one, the City imposed a surcharge the price of water for all ratepayers. The City estimates that the rate will increase by at least 2.5 percent each year for the foreseeable future.

Plaintiff Johnson is a resident of Rome and is the name plaintiff in a class action suit. He stated claims against a variety of defendants, including Dalton Utilities for nuisance, alleging personal injury and seeking abatement.

The litigation was removed to federal court under the Class Action Fairness Act. Dalton Utilities sought to dismiss the nuisance claims on that basis of municipal immunity. The district court denied the motion, and Dalton Utilities brought this interlocutory appeal.

The Eleventh Circuit's Decision

The Eleventh Circuit concluded it had jurisdiction over the appeal under the collateral order doctrine:

> Under the collateral order doctrine, an order denying state sovereign immunity 'is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability.' [*Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1367 (11th Cir. 2016).] Under Georgia law state sovereign immunity is immunity from suit, and an order denying state sovereign immunity is immediately appealable. *Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992).

Here, because like Georgia state sovereign immunity, Georgia municipal immunity is immunity from suit, the collateral order doctrine applies 'even though a reviewing court must consider the plaintiff's

factual allegations in resolving the immunity issue.' *Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985). (Parallel citations omitted.)

Municipal Immunity and Georgia Common Law

Turning to the issue of municipal immunity, Dalton Utilities argued that the exception to municipal immunity under Georgia law is limited to nuisance claims alleging a taking of property seeking monetary damages, so that Johnson's personal injury-based nuisance claim seeking abatement is barred.

The Court of Appeals analysis focused on the development of Georgia's common law prior to a 1974 amendment to the state constitution "to constitutionalize the common law doctrine of sovereign immunity and the decisions involving it" while removing from the judiciary the "authority to expand (or contract) the sovereign immunity doctrine's scope in the future, effectively freezing in place Georgia sovereign immunity law."

Thus:

> . . .while a municipality's nuisance liability was traditionally limited to injuries to the physical condition of the plaintiff's property or his use and enjoyment of it, the Georgia Supreme Court abandoned that limitation in 1968 in *Town of Fort Oglethorpe v. Phillips*, 224 Ga. 834, 165 S.E.2d 141 (1968).

Phillips allowed a nuisance claim "against a city for its failure to fix a faulty traffic light, which caused the plaintiff's injuries." *Phillips* represents the common law state of play when Georgia's constitution was amended to halt common law evolution of municipal immunity.

Dalton Utilities relied on *Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014), as limiting the holding in *Phillips* by disallowing any judicially-created "exception" to state sovereign immunity. *Sustainable Coast* observed that the:

> . . .longstanding principle that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property … [is] not an exception at all, but instead, a proper recognition that the [Georgia] Constitution itself requires just compensation for takings and cannot, therefore, be understood to afford immunity in such cases.

Subsequent to *Sustainable Coast*, however, Georgia's Supreme Court issued *Gatto v. City of Statesboro*, 312 Ga. 164, 860 S.E.2d 713 (2021), recasting the "nuisance exception" as the "nuisance doctrine." Reviewing the history of the doctrine, the *Gatto* opinion affirmed that in *Phillips* it had "abandoned" the limitation on municipal liability "to injuries to the physical condition of the plaintiff's property or his use and enjoyment of it." Characterizing *Gatto* as "the latest word" on municipal immunity, the court denied the appeal.

Conclusion and Implications

This case illustrates the piecemeal, case-by-case litigation that, in the absence of a highly unlikely universal federal legislative disposition, will keep issues of utility liability for PFAS claims in a state of high-stakes uncertainty for many years to come. The Eleventh Circuit's opinion is available online at: https://media.ca11.uscourts.gov/opinions/pub/files/202113663.pdf.

(Deborah Quick)

DISTRICT COURT FINDS COLORADO MINE VIOLATED THE CLEAN WATER ACT

Stone v. High Mountain Mining Company, LLC, et. al., ___F.Supp.4th___, Case No. 19-CV-1246 (D. Colo. 2022).

The United States District Court for the District of Colorado recently ruled against High Mountain Mining Company, LLC (High Mountain) in a challenge pursuant to the citizen suit provision of the federal Clean Water Act.

Factual and Procedural Background

High Mountain owns and operates the Alma Pacer Mine (Mine), which is an active mining site directly adjacent to a stretch of the South Platte River, called the Middle Fork. The mining process begins with digging a hole and transporting the material to the processing plant where it is sifted out by size and weight. The materials not sifted out are discharged into four settling ponds. The ponds are designed to allow water to leak out, so as to prevent a significant water problem on site. The Mine did not utilize the industry standard or typical methods for preventing pond leakage, such as a synthetic or clay liner. As a result, water was allowed to seep into the ground and travel through groundwater into the Middle Fork.

Plaintiffs Pamela Stone, M. Jamie Morrow, and Doris LeDue, all residents of towns near the river, alleged that High Mountain and James Murray, one of five managing members of the Mine, violated the Clean Water Act by discharging pollutants from the Mine into the Middle Fork without the proper NPDES permit. Plaintiffs requested that the defendants receive a civil penalty of one million dollars and that the court issue a permanent injunction prohibiting defendants from operating the Mine in violation of the Clean Water Act.

The District Court's Decision

High Mountain conceded that they did not have an NPDES permit or the state equivalent, and that the Middle Fork is a navigable water of the United States. The threshold issue, therefore, was whether the Mine was discharging a pollutant from a point source.

The Settling Ponds

First, the court determined the settling ponds were point sources under the Clean Water Act. A point source is "any discernible, confined and discrete conveyance…from which pollutants are or may be discharged. The court reasoned that the settling ponds were "discrete conveyances" that collected and channeled pollutants into the Middle Fork through groundwater. The court further reasoned that liquid escaped from a supposedly confined system. Thus, the settling ponds were point sources.

Next, the court determined the material discharged into the Middle Fork was a pollutant under the act. A pollutant is "…industrial, municipal, and agricultural waste discharged into water." The court reasoned that the water in the settling ponds was a byproduct of the mining process and therefore considered industrial waste. The water in ponds 3 and 4 also contained high concentrations of calcium, potassium, magnesium, and sodium than the water in the Middle Fork. Thus, the material discharged into the Middle Fork was a pollutant.

Last, the court determined the Settling Ponds discharged the polluted water, even though the water was carried to the Middle Fork through groundwater, a nonpoint source. To determine whether a discharge to groundwater is the functional equivalent of a direct discharge, the court considered the factors articulated by the U.S. Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution has maintained its specific identity. Time and distance are the most important factors in most cases.

The court found that the 'distance traveled' factor weighed heavily in favor of the plaintiffs because the ponds were not much farther than 100 feet from the Middle Fork. This distance is remarkably shorter than the 50 miles that the *Maui* court gave as dicta for when the Act would not apply. The court also found that the 'transit time' factor weighed heavily in favor of the plaintiffs. The court contrasted the finding in *Maui* where a transit time of "many years" would weigh against applying the Act, and reasoned that a transit time of two days in this case, even if miscalculated by a factor of ten, is "but a tiny fraction of 'many years.'" The court gave little to no weight to the remaining *Maui* factors because neither party presented sufficient evidence. Thus, leaks from the settling ponds were the functional equivalent of a direct discharge and the court found in favor of the plaintiffs on their claim against High Mountain with respect to the settling ponds.

Personal Liability and Relief

The court went on to find that plaintiffs waived their claim against James Murray when they failed to present any argument in support. However, he would not have been found personally liable under the Clean Water Act because he did not have the final say on important decisions at the Mine, did not manage day-to-day operations, and plaintiffs failed to establish that he acted knowingly.

The court calculated the civil penalty against High Mountain using the "bottom-up" method where the court first determines the economic benefit the defendant realized by failing to comply with the act and adjusts the penalty upward or downward based on various factors. Based on reliable expert testimony, High Mountain avoided paying roughly $500,000 to install competent liners in the ponds. After a brief analysis of various factors, the $500,000 penalty was imposed on High Mountain. Plaintiffs' request for injunctive relief was denied because they failed to offer any meaningful arguments in support.

Conclusion and Implications

This case provides an example of the *Maui* factors in action and may be a trend towards encompassing more activities as violations of the Clean Water Act. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-cod-1_19-cv-01246/pdf/USCOURTS-cod-1_19-cv-01246-6.pdf.
(Christina Lee, Rebecca Andrews)

Editors' Note: On Friday 30 December, the U.S. Environmental Protection Agency released its latest definition of the Clean Water Act—the timing of which is of note as the U.S. Supreme Court may be close to a decision which would likely establish a test to be used to determine the "reach" of the act.

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS REGIONAL WATER BOARD'S CLEANUP ORDER THAT DIRECTED REMEDIATION OF HAZARDOUS WASTE ASSOCIATED WITH AN ABANDONED MINE

Atlantic Richfield Co. v. California Regional Water Quality Control Bd., 85 Cal.App.5th 338 (3rd Dist. 2022).

The California Regional Water Quality Control Board, Central Valley Region (Regional Board) issued a cleanup order (Cleanup Order), under Water Code § 13304, directing Atlantic Richfield Company (ARCO) to remediate hazardous waste associated with a now abandoned mine, which was owned by a subsidiary of ARCO's predecessors in interest (Subsidiary). Following remand from the Court of Appeal on a case involving the same Cleanup Order directing the trial court to apply the proper test on a parent's derivative liability for a subsidiary's hazardous waste, the trial court entered judgment in favor of the Regional Board finding that ARCO as a parent company was liable for the pollution of the Subsidiary. ARCO appealed on several grounds and the Court of Appeal affirmed the trial court's judgment.

Factual and Procedural Background

In March 2014, the Regional Board issued the Cleanup Order that sought to impose liability on ARCO for remediation of hazardous waste from a now abandoned mine, the owner of which was the Subsidiary. In June 2014, Arco petitioned the trial court to overturn the Cleanup Order. In January 2018, the trial court granted ARCO's petition. The Regional Board appealed contending that the trial court applied the wrong legal standard to determine a parent's derivative liability for a subsidiary's hazardous waste. In September 2019, the Court of Appeal—in *Atlantic Richfield Co. v. Central Valley Regional Water Quality Control Bd.* 41 Cal.App.5th 91 (2019)—reversed the trial court finding that the trial court employed too restrictive a standard, and therefore remanded the matter to the trial court for reconsideration under the proper standard for a parent's derivative liability articulated in *United States v. Bestfoods*, 524 U.S. 51 (1998) (*Bestfoods*)—that of a parent company having eccentric control over any category of mining activity resulting in hazardous waste discharge.

On remand, the trial court entered judgment in favor of the Regional Board concluding the record supports a determination of the ARCO predecessors' eccentric control of mining operations resulting in the discharge of hazardous waste. ARCO's appeal then followed.

The Court of Appeal's Decision

On appeal, ARCO contended that: (1) the trial court improperly applied *Bestfoods* to the facts of this case, resulting in a finding of liability that is unsupported by substantial evidence; (2) the Regional Board abused its discretion by failing to exclude certain expert testimony as speculative; (3) the Regional Board's actual financial bias in this matter requires invalidation of the Cleanup Order for violation of due process; and (4) the Cleanup Order erroneously imposed joint and several liability on ARCO. Furthermore, in arguing the finding of liability was unsupported by substantial evidence, ARCO contended that the trial court erroneously denied its request for a statement of decision.

Substantial Evidence Supported ARCO's Derivative Liability

The Court of Appeal first addressed ARCO's claim that the trial court erred because substantial evidence did not support its finding of liability under *Bestfoods*. The Court of Appeal disagreed, finding that there was substantial evidence to support the trial court's conclusion that ARCO's predecessors directed operations at the mine specifically related to pollution, so as to subject ARCO to direct liability under *Bestfoods*.

ARCO contended that the evidence presented merely established a typical parent-subsidiary relationship of advice, consultation, and financial

oversight that could not constitute eccentric control under *Bestfoods*. However, the Court of Appeal disagreed, finding that correspondence between ARCO's predecessors and the Subsidiary made clear that mining activity was being done at the active direction of the agents of ARCO's predecessors, which was precisely the sort of eccentric control that was at issue in *Bestfoods*, and which went beyond the activities typical of a parent-subsidiary relationship (*e.g.*, providing administrative assistance, offering financial and legal advice, and monitoring the activities of their investment).

ARCO further contended that even if its predecessors directed operations at the mine, the mining activities directed did not result in pollution, which would preclude liability under *Bestfoods*. Again, the Court of Appeal disagreed, finding that the activities directed by ARCO's predecessors were specifically related to the causes of pollution at issue in the Cleanup Order.

Request for Statement of Decision was Untimely

In arguing that there was no substantial evidence to support derivative liability, ARCO contended that the trial court erroneously denied its request for a statement of decision, which, pursuant to Code of Civil Procedure § 634, would not allow the Court of Appeal to imply any findings of the trial court in favor of the Regional Board. The Court of Appeal disagreed, holding that ARCO did not carry its appellate burden to demonstrate its request for a statement of decision was timely.

ARCO contended that its request was timely because under *Bevli v. Brisco,* 165 Cal.App.3d 812 (1985) (*Bevli*) the time the trial court spent reviewing the administrative record was included in trial time for purposes of making the threshold of determination of when the request for a statement of decision needed to be made under Code of Civil Procedure § 632. The Court of Appeal analyzed amendments made to Code of Civil Procedure § 632 after *Bevli* was decided and case law discussing same, and then called into question the continuing validity of *Bevli* and in turn ARCO's reliance on it. The Court of Appeal further found, that even assuming *Bevli* remains good law, ARCO did not carry its appellate burden to sufficiently demonstrate on the evidence presented that its request for a statement of decision was timely.

Expert Testimony Before the Regional Board was Properly Admitted

The Court of Appeal next addressed ARCO's claim that the Regional Board abused its discretion by failing to exclude certain expert testimony and that therefore such could not support the trial court's liability finding. The Court of Appeal first explained that even without this challenged opinion testimony, the evidence was sufficient to support the trial court's finding of liability under *Bestfoods*, and accordingly was only addressing this contention solely as a claim of evidentiary error. This would only warrant reversal if there was an abuse of discretion in admitting the challenged evidence and a corresponding reasonable probability of a more favorable outcome had the evidence not been considered by the trier of fact.

The Court of Appeal stated its narrow role in deciding admissibility of expert testimony—which "[i]n short, [] 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field'"—and on that basis then factually determined that there was no abuse of discretion by the Regional Board in allowing the admission of the challenged expert testimony.

No Due Process Violation Because Regional Board Did Not Have Financial Bias

The Court of Appeal next addressed ARCO's argument that the Regional Board's actual financial bias in this matter requires invalidation of the Cleanup Order for violation of due process. The Court of Appeal disagreed. After analyzing the applicable case law on due process claims against adjudicators with financial interests in the outcome of a proceeding, the Court of Appeal found that here the asserted financial bias does not stem from the Regional Board imposing fines or penalties to fund its own executive functions (because the Cleanup Order did not impose a fine or penalty but rather only ordered remediation) and as such did not amount to a violation of due process.

ARCO also contended that because the State Water Resources Control Board (State Water Board) had been funding—from the State Water Pollution Cleanup and Abatement Account in the State Water Quality Control Fund (Fund)—the remediation ac-

tivities at the mine in question that requiring ARCO to remediate provided the Regional Board with a strong financial incentive to issue the Cleanup Order. The Court of Appeal again disagreed, finding that the Fund was not controlled by the Regional Board and that there was no evidence the Cleanup Order benefits any fund or budget over which the Regional Board exercises any amount of discretion. Accordingly, ARCO's assertion of a due process violation from financial bias based on State Water Board funding (and the Fund) also failed.

Cleanup Order's Imposition of Joint and Several Liability was Appropriate

Finally, the Court of Appeal addressed ARCO's contention that the Cleanup Order erroneously imposed joint and several liability. ARCO argued that Water Code § 13304(a), which statutorily authorized the Cleanup Order, did not authorize making one party jointly and severally liable for all liabilities of all potentially responsible parties. The Court of Appeal found that nowhere in the statutory language does § 13304 say the polluting entity must clean up or abate only its proportionate contribution to the hazardous waste. Accordingly, the Court of Appeal held that the Regional Board was authorized to impose joint and several liability on ARCO in the Cleanup Order (but that to the extent ARCO cleans up more than its proportionate share of hazardous waste, ARCO can seek contribution from other parties it believes also contributed to the pollution).

Conclusion and Implications

The case is significant because it contains substantive discussion of a parent's derivative liability for a subsidiary's hazardous waste as well as of financial bias in the due process context and holds that imposition of joint and several liability on one party in a cleanup order issued under Water Code section 13304 is permissible. The case also calls into question prior case law on timeliness of requesting a statement of decision from the trial court. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C093124.PDF.
(Eric Cohn)

STANISLAUS COUNTY SUPERIOR COURT ORDERS WATER DISTRICT TO VACATE APPROVAL OF THE DEL PUERTO CANYON RESERVOIR PROJECT PENDING COMPLIANCE WITH CEQA

Friant Water Supply Protection Association v. Del Puerto Water District, et al., Case No. CV-20-5164 (Stanislaus Super. Ct.); *Sierra Club, et al. v. Del Puerto Water District, et al.*, Case No. CV-20-5193 (Stanislaus Super. Ct.).

On October 31, 2022, the Stanislaus County Superior Court ordered that Del Puerto Canyon Water District (District) decertify its Final Environmental Impact Report (Final EIR) for the Del Puerto Canyon Reservoir Project (Project) and vacate approval of the Project because the Final EIR failed to adequately address the planned relocation of Del Puerto Canyon Road. The court dismissed a host of other environmental challenges against the Project, as well as concerns brought by the Friant Water Supply Protection Association. The court's ruling addressed two non-consolidated cases challenging the District's approval of the Project: *Friant Water Supply Protection Association v. Del Puerto Water District, et al.*, Stanislaus County Superior Court, No. CV-20-5164 and *Sierra Club, et al. v. Del Puerto Water District, et al.*, Stanislaus County Superior Court, No. CV-20-5193.

Factual Background

The Del Puerto Canyon Reservoir Project is a joint project between the District and the San Joaquin River Exchange Contractors Water Authority (Exchange Contractors) to increase water storage capacity in California's Central Valley. (Del Puerto Canyon Reservoir Final EIR, Executive Summary (Oct. 2020).) The proposed Project is located in

Stanislaus County just west of the City of Patterson and south of the Sacramento-San Joaquin Delta. It involves construction and operation of a reservoir on Del Puerto Creek to provide approximately 82,000 acre-feet of new off-stream storage to the Central Valley Project (CVP). Project components include the reservoir (including the main dam and three saddle dams), conveyance facilities to transport water to and from the Delta-Mendota Canal (DMC), electrical facilities, relocation of Del Puerto Canyon Road, and relocation of existing and proposed utilities within the project area.

The proposed Project would divert water from the DMC to the new Del Puerto Canyon Reservoir. Water would be diverted in wetter years, stored in the reservoir, and returned to the DMC in drier years. The water stored in the reservoir would primarily be water obtained pursuant to the District's and Exchange Contractor's existing CVP contract entitlements, with a small amount of water sourced from Del Puerto Creek.

The District issued a Draft EIR for the Project on December 11, 2019 and a Final EIR on October 9, 2020. The Final EIR consists of three volumes and over 1,500 pages. Friant Water Supply Protection Association (Friant) submitted comments on the Final EIR on October 20, 2020. The District approved the Final EIR on October 21, 2020.

On November 19, 2020, Friant filed a petition for writ of mandate challenging the District's certification of the Final EIR and approval of the Project under the California Environmental Quality Act (CEQA). Friant's contentions included that the District and Exchange Contractors (1) failed to analyze whether they have sufficient legal rights to construct a new turnout from the DMC and use it to divert CVP water; (2) in fact have no rights or permits to conduct the proposed activities, which are subject to the discretion of the State Water Resources Control Board (State Water Board) and the U.S. Bureau of Reclamation (Bureau); (3) failed to sufficiently discuss the effects of the Project on other water users, including the Friant users; and (4) failed to properly identify the State Water Board as a responsible agency.

Petition for Writ of Mandate

On November 20, 2020, a coalition of environmental groups including the Sierra Club, California Native Plant Society, Center for Biological Diversity, and Friends of the River (collectively: Environmental Petitioners) filed a separate petition for writ of mandate challenging the District's certification of the Final EIR and approval of the Project under CEQA. Environmental Petitioners argued, among other things, that the Final EIR failed to provide an adequate project description, analysis of environmental impacts, and outline of mitigation measures.

The Superior Court's Decision

The court's October 31, 2022 ruling addressed the claims of both Friant and Environmental Petitioners. In describing the basic rules of CEQA, the court explained that the EIR is the "heart of CEQA," and an EIR "must present facts and analysis; not conclusions or opinions of the agency." (Ruling, p. 5.) An EIR is "presumed legally adequate" and the "writ petitioner bears the burden of providing legal inadequacy and abuse of discretion." (*Id.*)

The court denied Friant's writ petition in full. The court found that Friant's concern that diversion of water to the Del Puerto Canyon Reservoir would substantially affect its water supply was "entirely unsupported by the record." (*Id.* at 7.) The court also refused to determine the contractual water rights of the parties, explaining that the court's remedy "is necessarily limited to decertification rather than contractual interpretation or enforcement of water rights." (*Id.* at 8.) The court found that both the Draft and Final EIR provided a sufficient description of the water use issues present in the project, and that Friant's remaining factual claims and contentions were either incorrect or did not rise to the level of decertifying the EIR. (*Id.* at 8-9.)

The court denied each of Environmental Petitioners' contentions, with one exception. The court held that the Final EIR's project description failed to adequately describe the relocation of Del Puerto Canyon Road. The court reasoned that complete relocation of Del Puerto Canyon Road is a "key element" of the Project, and that the Final EIR's failure to define a feasible road realignment "is no nit." (*Id.* at 9-10.) The court held that it was not enough to say relocation "has been discussed at a conceptual level." (*Id.*) The court therefore ordered that the District decertify the Final EIR and vacate approval of the Project until the Final EIR adequately described the relocation of

Del Puerto Canyon Road consistent with the requirements of CEQA.

Conclusion and Implications

As a result of the court's ruling, the District's approval of the Project is vacated and the Final EIR decertified. The District may proceed with the Project after further compliance with CEQA, including addressing the concerns raised by the court about relocation of Del Puerto Canyon Road and recirculating the EIR for further public comment.
(Holly E. Tokar, Meredith Nikkel)

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