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CALIFORNIA WATER NEWS

TURLOCK IRRIGATION DISTRICT LAUNCHES AQUIFER RECHARGE PROJECT AS WINTER STORMS BATTER CALIFORNIA

In recent years, Californians have seen precipitation patterns become more and more sporadic, with much of the year's rainfall coming in just a few big storms rather than consistent showers. Dry periods are lasting longer and rain storms are becoming more intense while occurring fewer days of the year. With the implementation of its new FloodMAR pilot program (Flood Managed Aquifer Recharge), the Turlock Irrigation District (TID) will look to increase its response to the boom and bust of California's rainfall.

Flood Managed Aquifer Recharge (FloodMAR)

Because of this boom-and-bust cycle, water managers in much of the state are in a constant battle of having to manage excessive floodwaters while storing enough water for the dry season. The recent storms in December 2022 and January 2023 are a perfect example of this constant dilemma, bringing much needed water into California's major reservoirs but creating hazardous conditions all over the state.

On the positive side of this, large storm events benefit the state's water supply by helping to fill rivers, lakes, and storage reservoirs, bringing up the ground saturation, and building up as snowpack in the Sierra Nevada and elsewhere—snowpack that is used to meet roughly a third of the state's water demands. Thanks to the recent storms, statewide snowpack is sitting at just under 250 percent as of late January.

Part of the dilemma water managers face with the boom-and-bust cycle is having to maintain enough capacity in storage reservoirs to take in all the snowmelt. This becomes even more complex when storm cycles, like the recent ones, start bringing inflows this early in the year. The arrival of this water is great, but some of it needs to be released to make sure there is enough capacity to hold all that snow.

On the negative side, more intense atmospheric rivers can bring in too much rain and accompanying runoff, causing flooding to many communities. Water needs to be released from reservoirs and the rivers just can't hold all that is coming down. Capturing all the extra water has been a major focus of the state, and the state's dwindling groundwater reserves are where many are looking to put that extra water.

Groundwater Recharging

Looking to better utilize these storm waters in their area, TID is partnering with California nonprofit, Sustainable Conservation, to pilot its new groundwater recharge program, FloodMAR. The pilot program will take place on the parcels of two Ballico area almond growers.

The concept of the program is that excess storm water will be released from local canals and used to flood irrigate the identified parcels. This water then percolates into the ground to help replenish the underlying aquifers. The parcels participating in the pilot currently use sprinkler systems, but have kept their original flood lines and valves in place despite not having been flood irrigated in many years.

Initially tested during the December 9 through 11 storm, TID Water Distribution Staff coordinated with participating landowners to deliver the flood irrigation water and collect volumetric data from TID's Rubicon Meters. In summary, the initial application resulted in seven inches of water applied over the entirety of the 18-acre parcel during a 21-hour period and 15 inches applied over 13 acres of the 37 acre parcel in a 13-hour period.

Conclusion and Implications

More data will be collected over the course of the wet season, and given how the rains have fallen this year it seems likely the project will face favorable conditions for implementing such a concept. If and when we see flows that are high enough, and assuming the weather conditions are safe enough to permit FloodMAR's implementation, TID can then release some of this water onto the nearby properties and continue to gather data on the effectiveness of this new project.

Climate change is undoubtedly affecting the severity and frequency of storm runoff in California. Our annual precipitation is coming in fewer and more intense storms rather than prolonged rain throughout the winter and into spring. The inverse of this is how the dry season is becoming drier and lasting longer than it has in the past. Having a place to store these flows in reservoirs and now underground in aquifers is more important than ever. TID's FloodMAR project is expected to gather valuable information that will allow water managers statewide to help properly manage storm events when they arrive, ideally leading to improved water supply resilience and flood safety in the future.
(Wesley A. Miliband, Kristopher T. Strouse)

GOLDEN STATE WIND SECURES LEASE FOR OFFSHORE FLOATING WIND FARM ALONG CALIFORNIA'S CENTRAL COAST

A new joint venture from Ocean Winds (OW) and Canada Pension Plan Investment Board (CPP Investment), called Golden State Wind, has been awarded an 80,000-acre lease by the United States Office of Ocean Energy Management (OEM) in the Morro Bay area off California's Central Coast for the development of an offshore wind project. The lease area awarded by OEM is one of just five areas located off the California coast that OEM has offered as the subject of recent auctions. This auction stands out from the rest, however, as it is the first floating offshore wind lease sale in the country and the first offshore wind lease sale of any type on the West Coast.

Floating Offshore Renewable Energy Comes to California

California has long had the goal of reaching 100 percent renewable energy, and to do so the state will need to have a diverse portfolio of sources. One of the newest areas of renewable energy development has come in the form of floating offshore wind energy.

In early December, the Golden State Wind joint venture put up $150.3-million to secure a lease for oceanic management rights, with OW and CPP Investment each maintaining a 50 percent investment in the project. The site of the lease, OCS-P 0564, covers over 80,000 acres of deep ocean waters and is located about 20 miles off the coasts of Morro Bay. Although the project is still years away from being realized, when it is fully built out and operational the lease area could accommodate roughly two gigawatts of offshore wind energy facilities. That amount of power would provide electricity equal to about 900,000 homes and make a sizeable impact on California's renewable energy portfolio.

Offshore wind energy production is still a relatively new idea as a whole, but the floating variant of wind technology that Golden State Wind is bringing to California is as promising as it is complex. With floating offshore wind, the facilities involve wind turbines as tall as 120 meters fixed to floating platforms, which in turn are anchored by cables to the sea bed hundreds of meters below. The technology required for these floating farms to generate clean power is still advancing and getting cheaper, but at the end of the day floating offshore is fairly novel compared to other renewable sources, such as traditional wind and solar, and is years away from becoming a popular option.

Floating offshore wind projects have been implemented elsewhere, such as the Windfloat Atlantic project of the coast of Portugal, but Golden State Wind's project is notable as being part of the first floating offshore lease sale in the United States, and one of the first offshore wind leases of any kind awarded on the West Coast. Importantly, projects such as this fit right into California's plan to generate 140 gigawatts of renewable energy by 2045, including 10 gigawatts from offshore wind. The rest of this total is expected to come from a wide array of renewable energy sources, although it seems the bulk of these sources could include solar power complemented by long-duration energy storage and traditional wind energy.

Interest in floating wind farms has been growing in countries such as Britain, France and Japan. While conventional offshore wind is limited to shallow waters with sea beds suitable to installing turbines, floating platforms open the door to moving the turbines much farther offshore, where winds are higher and

more consistent, and the environmental effect could be lower.

The duo working together on the Golden State Wind project both stand out in the arena of renewable energy development. OW has expertise spanning over a decade in offshore wind, including its role in the above mentioned Windfloat Atlantic project near Portugal. CPP Investment also comes into the project with familiarity in the world of renewables and power generation, having significant investments in Calpine Energy Solutions, a producer of gas and geothermal energy, and in Pattern Energy Group LP, specializing in wind and solar energy.

Conclusion and Implications

Obtaining the lease area itself was a major step towards floating offshore coming to California, but there are still significant hurdles that stand in the way of Golden State Wind's success. On the technological side of things, developing floating platforms capable of supporting turbines and distributing their weight in the water comes as an obvious challenge. Coming as a bigger challenge, however, is the development of floating substations at sea that can be used to gather power from offshore turbines and transport that power back to shore.

In addition to the technological challenges the project will have to overcome, there are also hurdles in the form of regulatory approvals and permits to transfer the power onshore and connect it with California's energy grid, not to mention the process of arranging power purchase agreements with local utilities. Furthermore, the project will undoubtedly need to prepare for environmental challenges along the way as some environmental groups have already raised concerns about the effect the cables and turbines might have on oceanic life.

Despite the challenges the future has in store for the Golden State Wind project, the securing of the lease area represents a huge step forward in California as it means a new technology has found its way to the state. In order for California to build an energy grid fueled by renewables that is sufficiently stable, the state will have to become host to many different kinds of renewable energy-based projects, and Golden State Wind's new project is certainly one to keep an eye on as it comes to fruition. For more information on the project, *see:* https://www.oceanwinds.com/news/uncategorized/golden-state-wind-a-joint-venture-of-ocean-winds-and-cpp-investments-wins-2-gw-california-wind-energy-lease/.
(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

BIDEN ADMINISTRATION FINALIZES PART 1 OF NEW 'WATERS OF THE UNITED STATES' RULE

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army, Army Corps of Engineers (Corps) (collectively: Agencies) published the final Revised Definition of Waters of the United States (WOTUS) rule (2023 WOTUS Rule) that sets forth a new definition of WOTUS. (Revised Definition of Waters of the United States, 88 Fed. Reg. 3004 – 3144 (Jan. 18, 2023).) The rule is expected to take effect on March 20, 2023 based on a January 18, 2023 publication date in the Federal Register.

The 2023 WOTUS Rule relies on the earlier 1986 WOTUS regulatory framework and associated caselaw, while simultaneously reinvigorating the "significant nexus" standard enunciated by Justice Kennedy in the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) and the "relatively permanent" standard concurrently articulated by the plurality of the Justices in *Rapanos*. The Agencies assert the 2023 WOTUS Rule is to "effectively and durably" protect the quality of the nation's waters while balancing the needs of water users, *e.g.*, farmers, ranchers, and industry. (88 Fed. Reg. at 3020.)

Relevant Background Information

The federal Clean Water Act (CWA) prohibits the discharge of pollutants from a point source into "navigable waters" unless otherwise authorized under the CWA. (33 U.S.C. §§1311 and 1362(12).) Navigable waters are defined in the CWA as "the waters of the United States, including territorial seas," but WOTUS is not further defined by statute. (33 U.S.C. §1362(7).) Federal programs protecting water quality under the CWA—*e.g.*, National Pollutant Discharge Elimination Systems (NPDES) permits under CWA section 402 and dredge and fill permits under CWA section 404—rely on the term "navigable waters" in establishing their program scope and applicability.

The Agencies have separate regulations defining WOTUS, but their interpretations have been similar and remained largely unchanged from 1977 to 2015 (referred to in the 2023 WOTUS Rule as the 1986 regulations). Since 2015, however, the Agencies have revised the WOTUS definitions via two rule changes under separate political administrations (2015 Clean Water Rule, 80 FR 37054 (June 29, 2015); 2020 Navigable Waters Protection Rule, 85 FR 22250 (April 21, 2020)).

Then, on January 20, 2021, President Biden signed Executive Order 13990, directing all executive departments and agencies to review and, as appropriate, take action to address Federal regulations in order to improve public health, protect the environment, and ensure access to clean air and water. (Exec. No. 13990, 87 Fed. Reg. 23453 (Jan. 20, 2021).) On June 9, 2021, after reviewing the Trump administration's 2020 Navigable Waters Protection Rule and its administrative record, the Agencies announced their intent to revise or replace that rule with a new and "durable" WOTUS definition. The 2020 WOTUS Rule was subsequently vacated by two District Courts. (*See*, *Pascua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949 (D. Ariz. 2021); *see also*, *Navajo Nation v. Regan*, 563 F.Supp.3d 1164 (D. New Mex. 2021).)

Jurisdictional Waters of the United States

The 2023 WOTUS Rule provides jurisdiction over waterbodies that include traditional navigable waters (*e.g.*, rivers and lakes), territorial seas, and interstate waters as WOTUS. (*See*, 33 C.F.R. § 238.3, (a)(1); 40 C.F.R. § 120.2, (1)(i).) Specifically, the Agencies interpret WOTUS to further include:

• Impoundments of WOTUS;

• Tributaries to WOTUS or impoundments when the tributaries meet either the "relatively

• Permanent" standard or the "significant nexus" standard;

• Wetlands adjacent to WOTUS, wetlands adja-

cent to and with a continuous surface connection to "relatively permanent" impoundments, wetlands adjacent to tributaries that meet the "relatively permanent" standard, and wetlands adjacent impoundments or jurisdictional tributaries when the wetlands meet the "significant nexus" standard; and intrastate lakes and ponds, streams, or wetlands not identified above that meet either the "relatively permanent" standard or the "significant nexus" standard.

To determine jurisdiction for tributaries, adjacent wetlands, and additional waters, the 2023 WOTUS Rule applies two standards—waters are jurisdictional if they meet either the "relatively permanent" standard or "significant nexus" standard as noted below.

The "relatively permanent" standard provides that waterbodies must be relatively permanent, standing, or continuously flowing waters connected to (a)(1) waters or waters with a continuous surface connection to such relatively permanent waters or to (a)(1) waters. (88 Fed. Reg. at 3006.) The "significant nexus" standard considers waters such as tributaries and wetlands jurisdictional based on their connection to, and effect on, larger downstream waters that Congress fundamentally sought to protect. A "significant nexus" exists if the waterbody (alone or in combination) *significantly affects* the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. (*Id.*)

Adjacent Wetlands

Where a wetland is adjacent to a traditional navigable water, the territorial seas, or an interstate water, no further inquiry is required—the wetland is jurisdictional. (88 Fed. Reg. at 3006.) The 2023 WOTUS Rule does not specify a particular distance when defining "adjacent" but, rather, considers wetlands "adjacent" if one of three criteria is satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close such that adjacent wetlands have significant effects on water quality and the aquatic ecosystem. (88 Fed. Reg. at 3089.)

Where a wetland is adjacent to a covered water that is not a traditional navigable water, the territorial seas, or an interstate water, such as a tributary, the 2023 WOTUS Rule requires an additional showing for that adjacent wetland to be considered jurisdictional; in that case, the wetland must satisfy either the "relatively permanent" standard or the "significant nexus" standard. (*Id.* at 3006.) According to the Agencies, that inquiry fundamentally concerns the adjacent wetland's relationship to the relevant (a)(1) water and not the relationship between the adjacent wetland and the covered water to which it is adjacent. The adjacent wetland must have a continuous surface connection to a relatively permanent, standing, or continuously flowing water connected to an (a)(1) water *or* must either alone, or in combination with similarly situated waters, significantly affect the chemical, physical or biological integrity of an (a)(1) water. (*Ibid.*)

Thus, to be jurisdictional under the 2023 WOTUS Rule, wetlands must meet both the definition of adjacent *and* either be adjacent to a traditional navigable water, the territorial seas, or an interstate water, *or* be adjacent to a covered water *and* meet either the "relatively permanent" or "significant nexus" standard as to a traditional navigable water.

Exclusions

The Agencies' 2023 WOTUS Rule does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act. Additionally, the final rule codifies eight exclusions from the definition of WOTUS in the regulatory text to provide consistency to a broad range of stakeholders. However, the 2023 WOTUS Rule exclusions do not apply to paragraph (a)(1) waters, and therefore, a traditional navigable water, the territorial seas, or an interstate water cannot be excluded under the 2023 WOTUS Rule, even if the water would otherwise meet the criteria for an exclusion. (88 Fed. Reg. at 3067.) The codified exclusions are:

- Prior converted cropland;

- Waste treatment systems;

- Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water;

- Artificially irrigated areas that would revert to dry land if the irrigation ceased;

- Artificial lakes or ponds;

- Artificial reflecting pools or swimming pools;

- Waterfilled depressions; and

- Swales and erosional features that are characterized by low volume, infrequent, or short duration flow.

Some exclusions that appeared in prior iterations of WOTUS rules, or were accepted practice, have not been codified in the 2023 WOTUS Rule (*e.g.*, stormwater control features and groundwater recharge, water reuse, and wastewater recycling structures). The Agencies will now assess jurisdiction for these features on a case-specific basis. (88 Fed. Reg. at 3104.)

Implementation of 2023 WOTUS Rule in CWA Section 404 Permitting Process and Approved Jurisdictional Determinations

As part of the regulatory process of implementing the 2023 WOTUS Rule, the Agencies sought to clarify how the rule will affect the regulated public who may be in the process of securing an approved jurisdictional determination (AJD) or implementing a project that has received an AJD, and has dedicated a webpage to the "Current Implementation of WOTUS" to provide guidance. (*Current Implementation of Waters of the United States*, United States Environmental Protection Agency (January 18, 2023) https://www.epa.gov/wotus/current-implementation-waters-united states.) The Agencies note that actions are governed by the definition of WOTUS that is *in effect at the time the Corps completes an AJD*, not by the date of the request for an AJD. Further, the Corps clarifies it will make new permit decisions pursuant to the currently applicable regulatory regime (*i.e.*, the 2023 WOTUS Rule) irrespective of the date of an AJD.

Conclusion and Implications

The U.S. Supreme Court is expected to soon issue a ruling in *Sackett v. EPA*, 142 S. Ct. 896 (2022); an issue in that case is the legal sufficiency of the "significant nexus" test for purposes of determining WOTUS, a critical component of the 2023 WOTUS Rule as discussed further below. The 2023 WOTUS Rule may require further revision or interpretation if the Court modifies the scope of the "significant nexus" test. The Biden administration also plans to consider further refinements to its 2023 WOTUS Rule in the form of a second rule, taking into account "additional stakeholder engagement and implementation considerations, scientific developments, litigation and environmental justice values." (Executive Office of the President, Regulatory Affairs Agenda (December 2022) RIN 2040-AG13, www.reginfo.gov/public/do/eAgendaViewRule?) No date has been provided for this secondary action.
(Nicole E. Granquist, Jaycee L. Dean, Sam Bivens)

DEPARTMENT OF THE INTERIOR ANNOUNCES $85 MILLION FOR WESTERN DROUGHT RESILIENCE PROJECTS

On December 22, 2022, the U.S. Department of the Interior announced an investment of $84.7 million to help 36 communities in the western United States prepare for and respond to the challenges of drought, including for projects such as groundwater recharge, rainwater harvesting, aquifer recharge, water reuse, and other methods to maximize existing water supplies. More than $36 million will go to 17 projects in California.

Background

The Department of the Interior (Interior) conducts water-related infrastructure projects in the West through the U.S. Bureau of Reclamation (Bureau). The Bureau was established in 1902 and develops and manages water resources in the western United States and is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million

acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial use. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

Under the Bipartisan Infrastructure Law of 2021 (Infrastructure Law), the Interior is set to receive $30.6 billion over five years. The Infrastructure Law allocated $8.3 billion of this $30.6 billion for the Bureau water infrastructure projects, to be provided in equal increments over five years to advance drought resilience and expand access to clean water for domestic, agricultural, and environmental uses. The Bureau has developed a spending plan (Plan) under the Infrastructure Law that includes four key priorities: increase water reliability and resilience; support racial and economic equity; modernize infrastructure; and enhance water conservation, ecosystem, and climate resilience. Under the Plan, the Bureau considers a potential projects' ability to effectively address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate environmental impacts of projects. Accordingly, the Bureau generally gives priority to projects that complete or advance infrastructure development, make significant progress toward species recovery and protection, maximize and stabilize the water supply benefits to a given basin, and enhance regional and local economic development as well as advance tribal settlements. The $85 million announced by Interior is part of the funding allocated under the Infrastructure Law.

Plan Funding

The Bureau's Plan for 2022 provided for significant investment in water and groundwater storage and conveyance projects. The purpose of these projects is to increase water supply, and the Plan allocates funding across a broad range of project types related to construction of water storage or conveyance infrastructure or by providing technical assistance to non-federal entities: ($1.05 billion); aging infrastructure to support, among other things, developing and resolving significant reserved and transferred works failures that prevented delivery of water for irrigation ($3.1 billion); rural water projects, including developing municipal and industrial water supply projects ($1.0 billion); water recycling and reuse projects ($550.0 million) and "large scale" water recycling and reuse projects ($450.0 million) to promote greater water reliability and contribute to the resiliency of water supply issues; water desalination ($250.0 million); safety of dams to ensure Bureau dams do not present unacceptable risk to people, property, and the environment ($500.0 million); WaterSMART grants to provide adequate and safe water supplies that are fundamental to the health, economy, and security of the country ($300.0 million); watershed management projects ($100.0 million); aquatic ecosystem restoration and protection ($250.0 million); multi-benefit watershed health improvement ($100.0 million); and endangered species recovery and conservation programs in the Colorado River Basin ($50.0 million).

WaterSMART Program

Specifically, the funding announcement of $85 million is part of the Bureau's WaterSMART program, which supports states, tribes, and local entities plan for and implement actions to increase water supply through investments to modernize existing infrastructure and avoid potential water conflicts. Under that program, the Bureau provides financial assistance to water managers for projects that seek to conserve and use water more efficiently, implement renewable energy, investigate and develop water marketing strategies, mitigate conflict risk in areas at a high risk of future conflict, and accomplish other benefits that contribute to the sustainability of the western United States. The Bureau had selected 255 projects across the western states since January 2021 to be funded with $93 million in WaterSMART funding and $314.3 million in non-Federal funding, with a total of $1 billion provided for WaterSMART grants in 2022. In addition to advancing the WaterSMART program, the $85 million investment will help repair aging water delivery systems, secure dams, complete rural water projects, and protect aquatic ecosystems.

Projects in California

There are 17 projects in California that will receive funding from Interior's $85 million investment. There are a number of different entities and project types represented across the 17 funded projects. For instance, a number of public agencies will receive funding related to the development of conjunctive use modeling (*e.g.*, using groundwater instead of surface water to meet demand), recycled water reuse

projects, water treatments projects including for per- and poly-fluoroalkyl (PFAS), groundwater recharge projects, pipeline conveyance projects, and aquifer storage and recovery. Other projects include drought resiliency projects for state parks—also referred to as "mitigation actions" in drought contingency planning documents that provide for fish and wildlife benefits—and rural water supply planning for smaller communities in northern California. A number of municipal projects include treatment and pipeline projects.

Conclusion and Implications

The drought resilience funding announced by Interior is part of an overarching and substantial investment in Western water planning efforts by the Bureau, local entities, tribes, and others. While it remains to be seen to what extent the funded projects will achieve their objectives, particularly as water tensions in the West appear to be increasing, the funding is a step forward in federal and non-federal efforts to address ongoing drought impacts. For more information, *see: Biden-Harris Administration Invests More Than $84 million in 36 Drought Resiliency Projects* (Dec. 22, 2022), https://www.usbr.gov/newsroom/news-release/4395.
(Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES EXPANDS ACCESS TO GROUNDWATER ACCOUNTING DATABASE

The California Department of Water Resources (DWR) has partnered with state, federal and private organizations to develop tools for groundwater agencies to manage data for water management. DWR describes the Groundwater Accounting Platform (Platform) as a robust state-supported data tool that will enable Groundwater Sustainability Agencies (GSAs) across California to track water availability and use. Recently, DWR announced its ongoing commitment to and expansion of the Groundwater Accounting Program.

Background

Under the Sustainable Groundwater Management Act (SGMA), local agencies are required to track and account for the groundwater in their basins. The Groundwater Accounting Platform was co-developed by the Rosedale-Rio Bravo Water Storage District, the California Water Data Consortium (Consortium), the Environmental Defense Fund (EDF) and other entities to facilitate groundwater management in Kern County. Last year, the EDF and the Consortium announced a new partnership to expand access to the Platform to groundwater agencies throughout the California.

The Groundwater Accounting Platform

The Platform is an open-source code that allows water managers to track and budget water supplies. The Platform aims to support more informed decisions regarding groundwater. As described by EDF, "you can't manage what you don't measure." As a result, the Platform was launched to provide water managers aN affordable way to meet their obligations under SGMA and provide for more efficient management of groundwater. Currently, the Platform, allows managers to access parcel-level water use estimates, create water budgets, facilitate allocation transfers, and evaluate scenarios based on historic demand in their basin. The Platform is designed to be compatible with state online portals allowing agencies to submit this data directly to DWR.

New Partnerships

Additional partnerships with DWR, the State Water Resources Control Board, the Consortium and EDF have helped scale the Platform along with funding and support from the U.S. Bureau of Reclamation. Through these efforts, the Platform is now available to more local agencies including the launch of three new pilot projects with Merced Irrigation-Urban GSA, Pajaro Valley Water Management

Agency, and Yolo County Flood Control and Water Conservation District. Through these pilot-programs, participants aim to further expand access and solicit feedback on the Platform.

Continued Expansion of the Platform

Through the next phases of improvements on the Platform will allow users to run modeling scenarios to address the future impacts of pumping, transfers of rights within the basin, recharge, and alternative management scenarios. The individual user dashboard for the Platform will be expanded to include increased customization options including additional data types and customized date ranges. The EDF and its partners say that the Platform will continuous be refined based on feedback and suggestions from its users. Additionally, a public workshop is planned for the Spring of 2023 to provide local agencies and water managers with information on how they can implement and use this tool.

Conclusion and Implications

The open-source nature of this Platform provides water managers with a potentially cost-effective tool use in groundwater management. As the Platform continues to scale, it may draw increased interest from local water agencies and managers. With better tracking and accounting, local groundwater agencies may have access to more real-time and predictive data to make more informed water-management decisions. From a stakeholder perspective, increased transparency and access to tools used by water management agencies could potentially increase collaboration and bring greater accountability to the development and implementation of GSPs, projects and management actions.
(Scott Cooper, Derek Hoffman)

STATE WATER RESOURCES CONTROL BOARD EXTENDS EMERGENCY WATER CONSERVATION REGULATIONS

The California State Water Resources Control Board (State Water Board) recently extended emergency water conservation regulations originally adopted in January 2022, which will now remain in place through December 2023. Additional water conservation regulations adopted in May 2022 remain in effect through June 2023.

Background

The State Water Board's stated mission is to preserve, enhance and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper resource allocation and efficient use for the benefit of present and future generations. Despite sporadic, intense wet months, California has generally been experiencing one of the most severe droughts in its recorded history. In response, the State Water Board adopted two sets of emergency water conservation regulations. The regulations implement directives contained in drought emergency declarations and executive orders issued by Governor Gavin Newsom.

Emergency Drought Proclamations

Throughout the Summer of 2021, Governor Newsom issued evolving proclamations declaring drought states of emergency for a total of 50 counties and directing state agencies to take immediate action to preserve critical water supplies, to mitigate the effects of drought and to ensure the protection of health, safety, and the environment. In late Fall 2021, Governor Newsom issued a further proclamation extending the drought emergency declaration to the remainder of the state and urging Californians to reduce water use.

Emergency Regulations

The State Water Board implemented two sets of emergency regulations in response to Governor Newsom's directives.

First Water Conservation Emergency Regulation

The first set of water conservation emergency regulations were adopted and took effect in January 2022.

These regulations prohibit: (1) application of potable water to outdoor landscapes in a way that causes more than incidental runoff; (2) the use of a water hose to wash a motor vehicle, unless it has a shut-off nozzle; (3) use of potable water for washing sidewalks, driveways, buildings, structures, or other hard surfaces; (4) the use of potable water for street cleaning or construction site preparation purposes; (5) the application of water to irrigate turf and ornamental landscapes during and within 48 hours after measurable rainfall of at least one fourth of one inch of rain. The regulations also prohibit cities and homeowners associations from preventing homeowners from replacing their lawns with drought-tolerant vegetation.

Second Water Conservation Emergency Regulation

The State Water Board's second set of water conservation regulations took effect in May 2022. These regulations build upon the first set of regulations and further prohibit the watering of non-functional turf at commercial, industrial, and institutional properties. The ban does not apply to watering grass that is used for recreation or other community activities. The regulation also requires urban water suppliers to implement all demand-reduction actions under Level 2 of their Water Shortage Contingency Plans, which are actions meant to address a 10 percent to 20 percent water shortage. Level 2 actions may vary with each water supplier, but they often include things such as: (1) increasing communication about the importance of water conservation; (2) limiting outdoor irrigation to certain days or hours, and (3) increasing patrolling to identify water waste.

Additionally, the second set of emergency regulations requires suppliers who do not have drought plans to take conservation actions. These actions may include conducting outreach to customers about conservation and limiting outdoor irrigation to two days a week. Water suppliers are also required to communicate with their customers about the requirements of the emergency regulation. Violations of the non-functional turf irrigation provision are subject to enforcement through fines of up to $500.

Readoption of Wasteful Water Ban

The State Water Board recently extended the first set of water conservation regulations that were originally adopted in January 2022. Those regulations will remain in place through December 2023. The regulation applies to water suppliers and individual water users. Violations may be subject to enforcement through warning letters, water audits or fines.

State Water Board officials have indicated that the extension of the emergency regulation is intended not only bolster the state's conservation efforts, but to also further efforts to make water conservation a daily habit and way of life for Californians.

Conclusion and Implications

The State Water Resources Control Board continues to adopt, extend and implement emergency regulations in response to severe drought conditions. The current water year has experienced unprecedented storm events and is seeing improvements in snowpack and surface water reservoir levels; however, California has seen similar patterns in recent years erode to hot, dry conditions accelerating runoff and limiting long-term supplies. The State Water Board's extension of the emergency regulations reflect the possibility of another dry year. In the meantime, may Californians would likely urge pursuit of more stabilizing, long-term water supply solutions that could minimize the need to operate in seemingly perpetual emergency conditions. Information on the latest updates to the Water Conservation Emergency Regulations can be found on the State Water Board website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html. (Christina Suarez, Derek Hoffman)

LAWSUITS FILED OR PENDING

CALIFORNIA TRIBES AND ENVIRONMENTAL ORGANIZATIONS FILE CIVIL RIGHTS COMPLAINT AND PETITION FOR RULEMAKING WITH EPA FOR BAY-DELTA WATER QUALITY STANDARDS

A coalition of California Tribes and environmental justice organizations, including Save California Salmon, Restore the Delta, Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and Little Manila Rising (collectively: Coalition), filed a civil rights complaint and petition for rulemaking (Complaint) with the U.S. Environmental Protection Agency (EPA). The Coalition's Complaint urges the EPA investigate the State Water Resources Control Board's (State Water Board) alleged civil rights violations and initiate rulemaking to adopt federal Clean Water Act-compliant water quality standards for the San Francisco Bay/Sacramento-San Joaquin Bay-Delta Estuary (Bay-Delta). [*Title Vi Complaint and Rulemaking* (ERA)]

Background

The State Water Board is responsible for implementing the federal Clean Water Act and the California Porter-Cologne Water Quality Act. (Wat. Code §§ 13141, 13160.) Pursuant to this authority, the State Water Board adopted the first Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Estuary (Bay-Delta Plan) in 1978. (Complaint, at p. 26.) The Bay-Delta Plan designates beneficial uses for the Bay-Delta, establishes water quality objectives for those uses, and sets forth an implementation program to achieve those objectives. (Bay-Delta Plan (2006) at p. 26.) As part of the State Water Board's duties under Porter Cologne, it must periodically review the Bay-Delta Plan. (Wat. Code § 13240.) The State Water Board has conducted three full reviews of the Bay-Delta Plan since its initial adoption—1991, 1995, and 2006. (Complaint, at pp. 26–27.)

After its most recent review in 2006, the State Water Board began the review process again in 2008 via a bifurcated process. (Resolution No. 2008-0056 (2008) State Water Board.) First, the State Water Board would review and update the salinity and flow objectives for the southern Delta and San Joaquin River in Phase I. (*Id.*) Then, in Phase II, the State Water Board would review and update standards to protect native fish and wildlife in the Sacramento River, Delta, and associated tributaries. (*Id.*) The State Water Board adopted amendments relevant to the Phase I update of the Bay-Delta Plan in December, 2018. (*Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Dec. 12, 2018) State Water Resources Control Board, Resolution 2018-0059.) The State Water Board is currently in the process of conducting Phase II, which includes consideration of voluntary agreements in which water users would agree to limit surface water diversions to attain water quality standards. (*See, Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreements for the Sacramento River, Delta, and Tributaries Update to the San Francisco Bay/Sacramento-San Joaquin Delta Water Quality Control Plan* (2023) State Water Board.)

Civil Rights Complaint and Petition For Rulemaking

The Coalition's Complaint is the latest in a series of actions over the past year regarding updates to the Bay-Delta water quality control plan. On May 22, 2022, the Coalition filed a petition for rulemaking before the State Water Board. (Complaint, at p. 31.) The Board rejected the petition on June 24, and then denied a request for reconsideration on September 21, 2022. (*Id.*) Then, on December 16, 2022, the Coalition submitted its Complaint pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Administrative Procedures Act (5 U.S.C. § 551 *et seq*) before the U.S. EPA. (Complaint, at p. 2.)

Civil Rights Act Allegations

Under Title VI of the Civil Rights Act, federal

agencies are authorized and directed to adopt rules and regulations implementing the act. (42 U.S.C. § 2000d-1.) Accordingly, the EPA promulgated regulations prohibiting entities or programs that receive EPA assistance from discriminating on the "basis of race, color, national origin or . . . sex." (40 C.F.R. § 7.35.) Individuals who believe their civil rights were violated by an entity that receives funding from the EPA can submit a complaint to the EPA's External Civil Rights Compliance Office, which will then investigate and resolve the complaint. (*External Civil Rights Compliance Office Compliance Toolkit* 8 (2017) U.S. EPA.).

The Coalition alleges the State Water Board is violating Title VI of the Civil Rights Act by failing to update the Bay-Delta Plan. (Complaint, at p. 33.) According to the Coalition, the EPA External Civil Rights Compliance Office should investigate the Complaint because the State Water Board's failure to update the Bay-Delta Plan's water quality standards disproportionately impacts Native American Tribes and communities of color in the Bay-Delta watershed. (*Id.*) Specifically, the Coalition alleges that the State Water Board is violating native tribes' civil rights by failing to maintain water quality standards that result in impaired tribal access to fish, riparian resources, and waterways. (*Id.*) Additionally, the Coalition argues the same failures resulted in outsized impacts from harmful algae blooms to communities of color. (*Id.*) Finally, the Complaint alleges that the State Water Board's purportedly preferred approach to Phase II—the consideration of voluntary agreements—has excluded communities of color and tribes from the decision making process. (*Id.*) The Coalition seeks an investigation into the Complaint's allegations, and remedies such as withholding or terminating State Water Board funding, and withholding approvals for permits for Delta Conveyance Project and for water quality standards that result from the Voluntary Agreements. (*Id.* at p. 55.)

Seeking Promulgation of Water Quality Standards

In addition to alleging civil rights violations, the Coalition asks the EPA to promulgate water quality standards for the Bay-Delta under the Administrative Procedure Act and its discretionary oversight authority to promulgate federal water quality standards. (Complaint, at p. 47; 33 U.S.C. § 1313(c)(4)(B).) The Coalition asks that the EPA designate Tribal Beneficial uses and adopt flow-based and temperature water quality criteria, including criteria for cyanotoxins to address harmful algal blooms. (*Id.* at p. 55.)

Conclusion and Implications

As of this writing, the U.S. Environmental Protection Agency has not publicly commented on the complaint or petition for rulemaking. The EPA's External Civil Rights Compliance Office's website further states the Coalition's complaint is pending under jurisdictional review.
(Nico Chapman, Sam Bivins)

PLACER COUNTY WATER AGENCY SUES PG&E FOR DAMAGES SUSTAINED FROM THE MOSQUITO FIRE

In December 2022, Placer County Water Agency (PCWA) filed suit against the Pacific Gas and Electric Company and its parent corporation (collectively: PG&E) related to the Mosquito Fire of 2022. PCWA alleges ten causes of action, including for negligence, inverse condemnation, and statutory violations related to monetary and operational damages to PCWA facilities such as the Middle Fork American River Project (MFP). [*Placer County. Water Agency v. Pacific Gas & Electric Company, et. al.*, Case No. S-CV-0049591, *filed Dec. 20, 2022* (Placer County Super Ct.).]

Background

According to the California Department of Forestry and Fire Protection (Cal Fire) and the United States Forest Service (USFS), on September 6, 2022, a wildfire known as the Mosquito fire ignited near OxBow Reservoir in Placer County, California. The

fire burned east of Foresthill, California, predominantly on the Tahoe and Eldorado National Forests in Placer and El Dorado counties. The fire was fully contained on October 27, 2022. According to USFS, the fire had consumed 76,781 acres, destroyed 78 structures, and damaged 13 structures. The incident update did not indicate that injuries or fatalities had occurred in connection with the fire.

On September 24, 2022, USFS indicated to PG&E that it would undertake an initial assessment regarding whether the fire started in the area of PG&E's power line on National Forest System lands, and that the USFS would be performing a criminal investigation into the fire. That same day, the USFS removed and took possession of one of PG&E's transmission poles and attached equipment. The investigation is ongoing.

The Complaint

In its complaint, PCWA alleges that it is the primary water resource agency for Placer County and operates the Middle Fork American River Project (MFP). According to PCWA, the MFP is a hydroelectric power project encompassing several dams and powerhouses in Placer and El Dorado counties which generate approximately 1,039,078 MWh annually, and is the eighth largest public power project in California. PCWA alleges that operations of the MFP were interrupted by the Mosquito Fire, which also resulted in the evacuation of PCWA employees as well as damage or destruction to other PCWA structures. PCWA alleges that it has since incurred recovery costs in the aftermath of the fire.

According to PCWA's complaint, the MFP is located on the Middle Fork of the American River, the Rubicon River, Duncan Creek, and the North and South Fork Long Canyon creeks. It includes seven dams and five powerhouses. The MFP seasonally stores and releases water to meet consumptive demands within western Placer County and to generate power. Water for consumptive purposes is released from the MFP and re-diverted at two locations: (1) the American River Pump Station, located on the North Fork of the American River near the City of Auburn; and (2) Folsom Reservoir. 24. PCWA alleges that, for over 50 years, it has operated the MFP as a multi-purpose project pursuant to four objectives: (1) to meet Federal Energy Regulatory Commission (FERC) license requirements that protect environmental resources and provide for recreation; (2) to meet the consumptive water demands of western Placer County; (3) to generate power to help meet California's energy demand and provide valuable support services required to maintain the overall quality and reliability of the state's electrical supply system; and (4) to maintain project facilities to ensure their continued availability and reliability. According to PCWA, all electricity generated by the MFP is delivered to the California Independent System Operator (CAISO) balancing authority area through PG&E's transmission system at switchyards and substations, typically located near the powerhouses. PG&E's transmission system is not part of the MFP. PCWA generates hydro-electric power but requires electrical interconnections with transmission lines via interconnection agreements with PG&E and the CAISO.

PCWA alleges that the Mosquito Fire damaged it a variety of ways, including additional costs and damages to property and facilities. In particular, PCWA alleges that it incurred costs associated with operation of maintenance performed during and in the aftermath of the fire, from the loss of its power systems workforce (which had been evacuated) while they could not access the project facilities during closures resulting from the Mosquito Fire, and for watershed, waterway, and water body management and protection. PCWA also alleges that it incurred damages related to delayed FERC license implementation and capital projects, lost access to facilities to perform operations and maintenance, emergency inspection and evacuation costs, and damages related to water debris and turbidity loading.

Ten Causes of Action

PCWA's complaint against PG&E contains ten causes of action, including negligence, public and private nuisance, inverse condemnation, premises liability, trespass, and the alleged violation of various statutes under the Public Utilities Code and Health and Safety Code of California. However, PCWA's complaint focuses on theories of negligence. PCWA alleges that PG&E was solely responsible for ensuring its electrical equipment was properly maintained and in safe, working condition and operated by properly trained and supervised personnel. In support of that argument, PCWA references a 2014 resolution and various General Orders issued by the California Public Utilities Commission, all of which directed utili-

ties' to reduce the risk of wildfires caused by utility facilities. Further, the complaint includes references regulations and statutes that govern the construction, installation, operation, and maintenance of electrical utility equipment. PCWA also alleges that PG&E had actual knowledge about the risk of wildfire from its electrical equipment, and cites a host of past instances of wildfires allegedly sparked by PG&E's electrical equipment. Despite that knowledge, according to the complaint, PG&E failed to properly maintain their electrical equipment, including the surrounding vegetation, and allegedly caused the Mosquito Fire and the resulting damages to PCWA.

PCWA's complaint also includes a cause of action for inverse condemnation. PCWA alleges that the law requiring compensation when private property is appropriated for public use applies to investor-owned utilities such as PG&E. The complaint reiterates the claim that PG&E was solely responsible for the safe and reliable operation of its electrical equipment and its alleged failure to do so directly resulted in damage to PCWA's property. PCWA claims that, because supplying electricity is in furtherance of a public objective, the damage to PCWA's property constitutes a taking by PG&E, thus requiring compensation.

Damages Sought

PCWA is suing for damages resulting from the Mosquito Fire, including damages to real and personal property, damages to land, increased expenses incurred in the aftermath of the Mosquito Fire, and all applicable legal fees. Moreover, PCWA is seeking punitive and exemplary damages against PG&E for what they describe as "despicable conduct" and "conscious disregard" for the safety of the community. In addition to damages, PCWA is seeking a permanent injunction against PG&E to cease their alleged violations of various statutes and regulations governing the safety and condition of their electrical equipment.

Conclusion and Implications

PCWA's suit is the latest in a series of lawsuit against PG&E alleging that the company's infrastructure, and their failure to properly maintain or operate it, caused the Mosquito Fire. Neither Cal Fire nor the U.S. Forest Service have reached a final determination regarding the cause of the fire. The complaint is available online at: https://docs.pcwa.net/mosquito-fire-complaint.
(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT VACATES HYDROELECTRIC DAM LICENSE OVER DEFICIENCIES WITH THE CLEAN WATER ACT WATER QUALITY CERTIFICATION

Waterkeepers Chesapeake v. Federal Energy Regulatory Commission, 56 F.4th 45 (D.C. Cir. Dec. 20, 2022).

The United States Circuit Court of Appeals for the District of Columbia recently determined that the State of Maryland could not retroactively waive its previously-issued water quality certification for a license for a hydroelectric dam. The license was vacated and remanded to the Federal Energy Regulatory Commission (FERC).

Background

Constellation Energy Generation, LLC is the operator of Conowingo Dam, a hydroelectric dam on the Susquehanna River in Maryland. In 2014, Constellation Energy submitted a request for a water quality certification under Section 401 of the Clean Water Act to Maryland's Department of the Environment. After years of negotiation, public notice, commenting, and a public hearing, Maryland issued a section 401(a)(1) water quality certification in 2018.

The water quality certification required Constellation to develop a plan to reduce the amount of nitrogen and phosphorus in the dam's discharge, improve fish and eel passage, make changes to the dam's flow regime, control trash and debris, provide for monitoring, and undertake other measures for aquatic resource and habitat protection. Constellation challenged the certification and its conditions, calling the conditions unprecedented and extraordinary.

As part of settling Constellation's challenge to the water quality certification, Maryland and Constellation agreed to submit a series of proposed license articles to FERC for incorporation into the dam's license. If those articles were incorporated into the license, Maryland agreed to conditionally waive any and all rights it had to issue a water quality certification. FERC issued a 50-year license that included the proposed license articles.

Several environmental groups, collectively referred to as "Waterkeepers," filed a petition for rehearing with FERC. They argued that Maryland had no authority to retroactively waive its 2018 water quality certification and that FERC therefore exceeded its authority under the federal Clean Water Act by issuing a license that failed to incorporate the conditions of that certification. FERC rejected Waterkeepers' argument and denied the petition. Waterkeepers petitioned for review.

The D.C. Circuit's Decision

Retroactive Waiver Argument

The court first considered Waterkeepers' argument that the Clean Water Act does not allow a retroactive waiver of the kind Maryland has attempted. In opposition, FERC argued that Section 401 of the Clean Water Act does not prevent a state from affirmatively waiving its authority to issue a water quality certification. The court rejected FERC's argument, reasoning that the Clean Water Act provides two routes for a state to waive a water quality certification: failure or refusal to act on a request for certification, within a reasonable period of time. If a state has not granted a certification or has not failed or refused to act on a certification request, section 401(a)(1) prohibits FERC from issuing a license. Because the state acted when it issued the water quality certification in 2018, the subsequent backtracking of that issuance through a settlement agreement was not a failure or refusal to act. In the end, the court agreed with Waterkeepers.

Remedy

The court next considered what the appropriate remedy should be. FERC argued that the appropriate remedy would be to remand the license back to FERC without vacating the license. This would allow the license to remain in place while a new permit was issued and would avoid disruptive consequences that

result from vacating a license with environmental protections in place. The decision whether to vacate depends on the seriousness of the license's deficiencies and the disruptive consequences of an interim change that may itself be changed.

The court determined *vacatur* was appropriate. First, the license had serious deficiencies because FERC issued it without statutory authority. Second, disruptions to the environmental protections can be avoided through issuance of interim, annual licenses until a permanent license can be issued. Further, Waterkeepers' brought the action for the very purpose of strengthening the environmental protections, and Waterkeepers agreed with vacatur. Finally, vacating the license would allow the administrative and judicial review to be completed after being interrupted by the settlement agreement.

Conclusion and Implications

This decision is another case reminding states and project proponents to proceed with caution when attempting to resolve disputes surrounding Section 401 water quality certifications. Under the Clean Water Act. The court's opinion is available online here: https://www.cadc.uscourts.gov/internet/opinions.nsf/3A0ACFE0A2A87BFE8525891E00572389/$file/21-1139-1978279.pdf.
(Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FIFTH DISTRICT COURT UPHOLDS RULING THAT PLAINTIFFS WERE UNLIKELY TO ESTABLISH THAT ZOOM® LIMITATION ON NUMBER OF PARTICIPANTS WAS A VIOLATION OF THE BROWN ACT

Padilla v. City of McFarland, Unpub., Case No. F082320 (5th Dist. Dec. 9, 2022).

Members of the public (plaintiffs) brought an action against the City of McFarland (City), claiming the City violated the Ralph M. Brown Act (Brown Act) because a City Council meeting conducted (at the onset of the COVID-19 pandemic) on the Zoom® videoconferencing platform (Zoom) limited access to 100 people. The trial court denied a motion for a preliminary injunction on alternative grounds, including that plaintiffs were unlikely to prevail on the merits of its Brown Act claim and that the balance of harms weighed in the City's favor. Plaintiffs' appealed the determination on the preliminary injunction and the Court of Appeal affirmed the trial court in an *unpublished* opinion.

Factual and Procedural Background

In January 2020, a private prison company requested that the City of McFarland Planning Commission (PC) modify Conditional Use Permits (CUPs) to allow the opening of two immigration detention facilities in the City. The PC held public meetings in January 2020 and February 2020 to consider the modifications. Both meetings were open to and well attended by the public, including some of the plaintiffs (as further defined below). The PC decision on the CUPs modifications were appealed to the City Council in February 2020.

In March 2020, in response to the threat of COVID-19, the Governor declared a state of emergency in California. Governor Newsom issued an executive order suspending and waiving the Brown Act provisions requiring in-person meeting attendance, which was superseded five days later by another executive order suspending strict compliance with certain Brown Act provisions and authorizing local bodies to hold meetings via videoconference.

In April 2020, after receiving written comments, the City Council held a meeting to discuss and vote on the modifications to the CUPs. The meeting was held virtually due to the pandemic and the Zoom license the City used had limited access to 100 people. Certain interested parties (plaintiffs) attempted to access the meeting using Zoom, but due to the limitation on participants, could not access the meeting. After the City Council voted to approve the modifications to the CUPs, plaintiffs delivered a letter to the City demanding that it "cease and desist/cure or correct" its Brown Act violation. When the City failed to respond to the letter, plaintiffs sued the City alleging a violation of the Brown Act (and the California Constitution) and requesting that the City's actions on the modifications to the CUPs should be declared null and void.

Plaintiffs moved for a preliminary injunction to enjoin the City from generally giving effect to or relying on the modified CUPs. The trial court denied the motion, finding injunctive relief was procedurally improper because the City Council vote was a completed act that had no threat of recurring and, alternatively, plaintiffs had not demonstrated a likelihood of success on the merits or that the balance of harms weighed in plaintiffs' favor. Plaintiffs' appealed the trial court's denial of injunctive relief.

The Court of Appeal's Decision

The Court of Appeal reviewed the grounds on which the trial court denied the preliminary injunction. The Court of Appeal, first, reviewed the trial court's denial of the preliminary injunction on the ground the City's approval of the modified CUPs was a completed act that had no threat of recurring. The court found that the trial court was unjustified in denying injunctive relief under the completed act principle. The court reasoned that the alleged harm plaintiffs sought to prevent—namely, the City continuing to give effect to the modified CUPs which the

City Council approved without providing plaintiffs access to the meeting—was not completed; and as such the harm could be prevented by ceasing to give effect to the CUPs. The Court of Appeal, therefore, found that the trial court erred to the extent it denied injunctive on the ground that the City's approval was a completed act that had no threat of recurring.

Probability of Success on the Merits

The court, next, reviewed the trial court's denial based on its finding plaintiffs failed to meet their burden of proving a reasonable probability of success on the merits. The Court of Appeal, here, agreed with the trial court. Plaintiffs contended a violation of Brown Act § 54953—calling for legislative body meetings to be open and public and providing that all persons shall be permitted to attend any such meeting—given that attendance was limited to 100 participants. Recognizing that the Brown Act provides that an act taken in violation of § 54953 shall not be determined to be null and void if the action was taken in substantial compliance with that section, the court held that the City's action should not be nullified if the City's reasonably effective efforts to provide public access to the City Council meeting served the statutory objective of ensuring actions taken and deliberations made at such meetings are open to the public. The Court of Appeal, then, held that the trial court reasonably could find the City substantially complied with the Brown Act's public access requirement—because, given the pandemic, legislative bodies such as the City had to quickly adjust to the use of technology to provide the public with access; and the difficulties of strictly complying with the Brown Act were inherently recognized by the Governor's executive orders. Based on the record before it, the court found that even though in hindsight the City could have done more to provide greater public access to the meeting, the City acted in a manner that is consistent with the open meeting objectives of the Brown Act and thereby substantially complied with the Brown Act.

Potential Prejudice

The Court, further, held, that in any event, plaintiffs were not prejudiced (which is required for a court to set aside an agency action) because plaintiffs' positions were adequately represented and plaintiffs still could have provided written comments to the City Council.

Balancing of Harms

The Court of Appeal also upheld the trial court's determination that the balance of harms weighed in the City's favor. Plaintiffs argued the denial of their constitutional and statutory rights to participate in the City's decision-making process established irreparable harm absent a preliminary injunction. Plaintiffs further argued they and others were likely to suffer irreparable harm because of the high potential for community spread of COVID-19 from the detention facilities. The City argued that if the preliminary injunction was granted, among other things, it would threaten the continued delivery of essential public services by depriving the City of revenue it was set to receive under the modified CUPs, which revenue accounted for 20 percent of the City's annual budget. The Court of Appeal found that the trial court could reasonably find the City's economic harm outweighed any deprivation of plaintiffs' constitutional and statutory rights, including in light of the court's earlier finding that the City substantially complied with the Brown Act. As such, the Court of Appeal held there was no abuse of discretion in the trial court denying the preliminary injunction because the balance of the harms weighed in the City's favor.

Conclusion and Implications

The case is significant because it contains a unique fact pattern (introduced by the COVID-19 pandemic) for alleged violations of the public participation provisions of the Brown Act. The *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/F082320.PDF.
(Eric Cohn)

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