Volume 33, Number 7
April 2023

CALIFORNIA WATER™
LAW & POLICY Reporter

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

RECENT CALIFORNIA DECISIONS

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

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

ARGENT COMMUNICATIONS GROUP HOSTS 37TH ANNUAL CALIFORNIA WATER LAW & POLICY MCLE CONFERENCE—IN PERSON

We are pleased to invite you to join us at Argent Communications Group's 2023 annual California Water Law & Policy Conference—in-person this year at the Hilton Santa Barbara Beachfront Resort, June 8-9, 2023. This year's theme is "California Water Law, Policy, and Management in This Time of Extremes." Our Conference Co-Chairs, Steven Anderson, Esq. of Best, Best & Krieger and Sam Bivins, Esq. of Downey Brand have assembled for you a comprehensive and practical 1.5-day Conference focusing on developments in water supply, rights, management, and regulation.

Conference Highlights

This year's conference is designed to hone in on the issues that will most impact your water-related practice and the governance of water in the state. As an attendee, you will gain practical knowledge on the legal, policy, and regulatory sides of the issues, including:

- Water Supply in the Era of Climate Change
- Water Management Planning for Extremes
- The Colorado River Runs (Nearly) Dry—What's the Next Step?
- Desalination to the Rescue?
- Tribal Water Rights at the U.S. Supreme Court
- The Clean Water Act—Scope of §404 and the US. Supreme Court Decision
- Water/Land Use Connection Updates
- Pending Major Water Rights Proceedings—How Is the AHO Working Out?
- Changes to the Authority of the SWRCB?—• Pending Water Rights Legislation to Implement Changes from the PCL Report
- The Delta—Update on the Various Litigation Matters

… And a full half-day on Sustainable Groundwater Management Act (SGMA) Updates.

Our expert faculty of over 20 speakers consists of representatives of federal and state regulatory agencies, local agencies, consultants, the academic community, and top water attorneys from throughout the state—and includes a Keynote Presentation from Ernest Conant, Regional Director of the Mid-Pacific Region of the U.S. Bureau of Reclamation, "Doing Multipurpose Water Project Management in This Time of Extremes."

You'll also have plenty of invaluable networking opportunities with the faculty and your colleagues, including a conference reception following the presentations on Day 1.

Conference Registration

Conference tuition of $995 includes participation in all sessions, continental breakfasts, refreshment breaks, hosted conference networking reception, as well as all program materials prepared by the Faculty. Discounts apply for individuals from government agencies, public interest groups, or academia, or when you register two or more attendees from the same firm or organization.

Hotel Registration

Book your room at the Hilton Santa Barbara Beachfront Resort early to take advantage of our special negotiated rate of $319 per night (single or double occupancy). To reserve your room and get the discounted room rate, simply go to the hotel booking available on the Conference Webpage, below. Or call 805-564-4333 and ask for the "California Water Law Conference" discount. The number of rooms at this rate is limited, so make your reservations early.

For full program and registration details, visit the Conference Website at: https://argentco.com/2023cwlconference

We look forward to seeing you in-person in Santa Barbara, June 8-9!

CALIFORNIA DEPARTMENT OF WATER RESOURCES HOSTS PUBLIC SCOPING MEETINGS, ACCEPTS PUBLIC COMMENTS FOR SEARSVILLE WATERSHED RESTORATION PROJECT

On February 14, the California Department of Water Resources (DWR) released a Notice of Preparation for the Searsville Watershed Restoration Project (SWRP or Project), a multi-component project that proposes to address water supply, flood risk, and environmental issues associated with the Searsville Dam, Felt Dam and existing San Francisquito Creek pump station diversion facilities. The Project is proposed on property owned by Stanford University and has now been in development for over a decade. With a pair of public scoping meetings hosted on February 28 and a public comment period that was extended through April 7, DWR will be moving forward as lead agency for the Project for purposes of the California Environmental Quality Act (CEQA) with the U.S. Army Corps of Engineers (Corps) acting as the lead federal agency under the National Environmental Policy Act (NEPA).

Project Background

The need for the proposed Project arose in large part due to the degradation, and more specifically the sedimentation, of Searsville Reservoir. Stanford originally purchased the dam and its associated water rights as a water supply for the University campus. Since the Reservoir's purchase nearly 130 years ago, however, naturally occurring sediment has piled up behind the dam in huge amounts. Where the Reservoir once held as much as 1,200 acre-feet in water storage capacity, that figure has now been reduced to roughly 100 acre-feet. It is estimated that 2.7 million cubic yards of coarse and fine sediment have built up behind Searsville Dam causing this drastic reduction in storage capacity. The Searsville Dam and Reservoir has also caused dramatic transformations to its upstream areas, turning a confluence valley with mostly free-flowing streams into a mix of open water surrounded by floodplain and wetland delta.

Planning for the proposed Project began back in 2011 when Stanford created a Steering Committee and Working Group to develop a recommended course of action for the Searsville Dam and Reservoir. In addition to the Steering Committee, Stanford also invited input from public agency representatives, non-government organizations and community members in the form of a Searsville Advisory Group. The Advisory Group provided input and recommendations for consideration to the Steering Committee and the groups ultimately agreed that the primary components of a future restoration project needed to focus on several major areas including the restoration of natural downstream sediment and creek flows, the restoration of natural fish passage past the Searsville dam, and flood protections downstream from Searsville. The work performed by these groups ultimately led to the development the SWRP as proposed.

Project Components

The proposed SWRP includes several major components, with the first such component involving modifications to Searsville Dam. Under the proposed SWRP, Stanford would construct a tunnel at the base of Searsville Dam to flush trapped sediment, restore natural sediment transport, reestablish fish passage conditions beyond the dam, and otherwise improve ecosystem function. During the flushing process, a gate would be utilized to control flows through the tunnel and would then be operated adaptively for up to eight years to flush sediment out of the reservoir. After this process, the gate would be held partly open to help with peak flood flows by keeping excess floodwaters behind the Dam. While an exact estimate has not been provided Stanford's target volume of sediment to be flushed ranges from 900,000 cubic yards to 1.5 million cubic yards, with the low end of the range being the figure needed to provide sufficient capacity to store floodwaters behind the Dam during peak storm events to prevent an increase in downstream flooding.

The Searsville component of the proposed Project also aims to restore the confluence valley between Searsville Dam and the areas just upstream along the Corte Madera and Sausal Alambique Creeks. This process would involve the clearing and grubbing of the upstream areas and excavation of pilot channels to concentrate flows. This restoration effort in combination with the introduction of the tunnel design at Searsville Dam is intended to reintroduce fish spe-

cies to natural habitat upstream from the Dam. With the tunnel in place, various native species, including California Central Coast steelhead, Sacramento suckers, California roach, three-spined sticklebacks, and other native aquatic and amphibian species are expected to have renewed access to the upper watershed above the dam.

The second major component for the SWRP involves upgrading the San Francisquito Creek Pump Station. The Pump Station is currently used to meet Stanford's direct non-potable system demands or is pumped to Felt Reservoir for storage. The proposed Project includes modifications to the Pump Station that would compensate for the loss of water diversion at Searsville Reservoir in part by enabling the existing surface water diversions from Searsville Reservoir to be relocated to the Pump Station and stored behind an expanded Felt Reservoir.

As mentioned above, another major component of the SWRP would involve the replacement and expansion of Felt Dam. Water stored in Felt Reservoir is supplied from the Los Trancos Creek, the San Francisquito Creek Pump Station, and surface water diversions from the Searsville Reservoir. Although the Felt Reservoir is designed to have a maximum capacity of 1,024 acre-feet and remains up to date with the Division of Safety of Dam's Inspection and Reevaluation Protocols for existing dams, Stanford has been voluntarily restricting the maximum amount of water stored in the Reservoir to just 200 acre-feet as a precautionary measure for the aging facility. The Felt Dam component of the Project would see the replacement and enlargement of the Dam to enable expansion of Felt Reservoir and to improve the seismic stability of the dam. The expanded Felt Reservoir would be utilized as a replacement for the storage capacity lost at Searsville Reservoir and would help increase water supply reliability during droughts.

Three Phase Process

While the SWRP is still in a very early stage, Stanford has envisioned a three-phase process for implementing the Project over time. Phase 1 of the Project would include the initial construction efforts in creating access improvements, the tunnel through Searsville Dam, sediment traps downstream from the Dam, and upstream pilot channels for the Corte Madera and Sausal Alambique creeks. Phase 2 would primarily focus on the process of flushing sediment from Searsville Reservoir detailed above. Lastly, phase 3 would emphasize habitat restoration efforts including any final upstream confluence valley grading, refinement of a fish passage through tunnel, and channel restoration and planting for the Corte Madera and Sausal Alambique creeks

Conclusion and Implications

Searsville Reservoir exists in a sorry state and has been in desperate need of an overhaul for some time now. On top of the massive losses to storage capacity, the almost complete sedimentation of the Reservoir has contributed to increased flooding events upstream which have threatened to shift the course of the Corte Madera Creek. The Project's focus on a restored Corte Madera and Sausal Alambique confluence would not only create renewed upstream access and habitat for native fish and aquatic species, but could also serve to greatly reduce flood risks both upstream and downstream if implemented properly. Although the Project's timeline remains uncertain, especially with it still in the planning phases, DWR's Notice of Preparation and subsequent actions signify a start to a watershed restoration project that has the potential to reduce flood risks, restore natural habitat, and increase water supply resilience in the San Francisquito Creek watershed.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

BILL INTRODUCED IN THE CALIFORNIA SENATE SEEKS TO MODERNIZE STATE'S NETWORK FOR COLLECTING AND MEASURING SURFACE WATER FLOWS

On February 8, 2023, Senator Bill Dodd (D-Napa) introduced Senate Bill (SB) 361 to add §§ 145, 145.1, and 145.2 to the Californian Water Code. If enacted, the bill would require the California Department of Public Resources (DWR), the State Water Resources Control Board (SWRCB), and other state agencies to modernize the state's network for collecting water and ecological data, specifically focusing on the state's network of stream gages for measuring surface water flows. This bill builds off the 2019 Open and Transparent Water Data Act, which directed state agencies to inventory and prioritize California's steam gage network.

Current Monitoring Efforts under Existing Law

A stream gage is an instrument that measures the elevation, or "stage," of a water surface. Stream gages typically measure the stage every fifteen minutes, but the intervals may be shorter when higher rainfall or runoff are expected. A stream gage transmits the data it collects on a regular interval, typically by satellite. When combined with detailed hydrologic information about the dimensions of the streambed, continuous stage data over time can be used to infer streamflow.

Federal, state, and local agencies rely on this streamflow data to manage water rights, water supplies, water quality, flood risk, and ecosystems on both long-term and short-term horizons. The range of uses for streamflow data is varied. The data may be used by the SWRCB to determine the amount of water available to water-right holders as a result of long-term climate trends or by local emergency responders to monitor river flood stages in almost-real time during intense rainfall events. As a further example, streamflow data in the Sacramento-San Joaquin River Delta is essential for determining whether water can be extracted from the Delta for export throughout California while protecting the Delta from seawater intrusion and ensuring sufficient flows for ecosystems, species, and use by water rights holders in the Delta.

Various agencies operate networks of stream gages throughout California. There are approximately 1000 stream gages in California that report public data. Of these, approximately 60 percent are operated by the United States Geological Survey. The remaining gages are operated by state or local agencies. In addition, there are numerous privately operated stream gages that do not publicly report their data on state-wide databases or do not report sufficiently reliable data.

Experts have identified significant gaps in the number, location, and condition of California's stream gages. Over 70 percent of California's 4,500 sub-watersheds have no publicly reported stream gage data. Among historically gaged watersheds, half do not have currently active, publicly reported data.

OTWDA Requires DWR and the State Water Board to Develop a Network of Gages

The Open and Transparent Water Data Act, encoded in Water Code § 144 and enacted in 2019, requires the DWR and SWRCB to develop a plan to deploy a network of stream gages. DWR and SWRCB are required to consult with the California Department of Fish and Wildlife, California Department of Conservation, the Central Valley Flood Protection Board, and other interested stakeholders.

Executive Order N-10-19 and the Water Resilience Portfolio

Shortly after coming into office in 2019, Governor Gavin Newsom issued Executive Order N-10-19, which directed state agencies to prepare a portfolio approach to water resilience in California. The following year, the Newsom Administration released the final Water Resilience Portfolio. Among other actions, the Water Resilience Portfolio includes a recommendation to "[m]odernize water data systems to inform real-time water management decisions and long-term planning." As part of this effort, the Water Resilience Portfolio recommended assessment of California's statewide stream gage network, consistent with the Open and Transparent Water Data Act.

Stream Gaging Prioritization Plan

Since 2020, DWR, SWRCB and other California agencies have prepared a California Stream Gaging Prioritization Plan pursuant to Water Code § 144 and the Governor's Water Resilience Portfolio. Each annual plan inventories and analyzes the current state of stream gages, recommends the prioritization of the stream gage modernization efforts, and addresses the funding, operation, and management of California's stream gage network.

SB 361 Seeks to Expand Current Monitoring Efforts

Senator Dodd introduced SB 361 on February 8, 2023. SB 361 is intended to advance the efforts initiated by Water Code § 144, the Water Resilience Portfolio, and the California Stream Gaging Prioritization Plans. SB 361 itself is not an appropriations bill. If enacted, and upon an appropriation of funds, SB 361 would direct DWR and SWRCB to undertake a number of actions set forth in the 2022 California Stream Gaging Prioritization Plan. This would include requirements to reactivate a number of historical gaging sites, upgrade existing gaging sites, and install new gaging sites. DWR and SWRCB would further be required to develop a plan for the long-term operation of the stream gage sites. Beyond stream gages, SB 361 would require DWR and SWRCB to identify gaps in other weather- and water-data-collecting infrastructure.

The day after introducing SB 361, Senator Dodd issued a press release, stating:

> Water is the lifeblood of California and we must ensure it is managed correctly . . . . Unfortunately, you can't manage what you don't measure, and our stream monitoring systems need help. My bill would help upgrade our equipment, improving our ability to track where our water is going as we deal with the continuing effects of climate.The bill has been referred to the Senate Natural Resources Committee, which held its first hearing on SB 361 on March 28, 2023.

Conclusion and Implications

Experts and relevant agencies agree that robust, statewide stream gage monitoring is an essential component of water management in a time of climate change and increasing weather variability. The proponents of SB 361 seek to improve the availability and quality of California's stream gage network in support of those efforts. SB 361 is still early in the legislative process. The bill's final form—and the consequences of its enactment—remain to be seen. For more information on Senate Bill 361, *see:* https://sd03.senate.ca.gov/news/20230209-sen-dodd-bill-would-improve-california-stream-management
(Brian E. Hamilton, Sam Bivins)

REGULATORY DEVELOPMENTS

DEPARTMENT OF WATER RESOURCES ADDRESSES 12 CENTRAL CALIFORNIA GROUNDWATER SUSTAINABILITY PLANS

In early March, the California Department of Water Resources (DWR) announced its decisions for Groundwater Sustainability Plans (GSPs) for 12 critically overdrafted groundwater basins in central California under the Sustainable Groundwater Management Act (SGMA). DWR recommended approval of GSPs for six basins but include recommended corrective actions so those GSPs retain their approval status when they are evaluated again in a few years. The GSPs for the remaining six basins were deemed inadequate, thus subjecting them to oversight by the State Water Resources Control Board (State Water Board).

Background

In 2014, then-Governor Jerry Brown signed SGMA into law. SGMA requires local Groundwater Sustainability Agencies (GSAs) in medium- and high-priority groundwater basins, which includes 21 critically overdrafted basins, to develop and implement groundwater sustainability plans (GSPs). GSPs are intended to provide a roadmap for reaching the long-term sustainability of a groundwater basin, which includes near-term actions like expanding monitoring programs, reporting annually on groundwater conditions, implementing groundwater recharge projects and designing allocation programs. GSPs are intended to achieve sustainability in overdrafted groundwater basins within a 20-year time horizon. Each GSP has its own goals specific to the covered groundwater basin and must be accomplished within the 20-year period. To achieve the sustainability goal for the basin, the GSP must demonstrate that implementation of the GSP will lead to sustainable groundwater management, which means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results, such as subsidence, water quality degradation, and lowering of groundwater levels. Undesirable results must be defined quantitatively by the GSAs.

24 Basin Determinations

Out of 94 groundwater basins required to submit plans under SGMA, DWR has provided determinations for 24 basins and anticipates issuing determinations for the remaining basins throughout 2023. DWR's review considers whether there is a reasonable relationship between the information provided and the assumptions and conclusions made by the GSA, including whether the interests of the beneficial uses and users of groundwater in the Subbasin have been considered; whether sustainable management criteria and projects and management actions described in the GSP are commensurate with the level of understanding of the Subbasin setting; and whether those projects and management actions are feasible and likely to prevent undesirable results. To the extent overdraft is present in a subbasin, DWR evaluates whether a GSP provides a reasonable assessment of the overdraft and includes reasonable means to mitigate the overdraft. DWR also considers whether a GSP provides reasonable measures and schedules to eliminate identified data gaps. DWR is also required to evaluate whether the GSP will adversely affect the ability of an adjacent basin to implement its GSP or achieve its sustainability goal.

GSAs are required to evaluate their GSPs at least every five years and whenever a GSP is amended, and to provide a written assessment to DWR. Accordingly, DWR will evaluate approved GSPs and issue an assessment at least every five years. In January 2022, after performing what it termed a "technical evaluation," DWR determined that the GSPs for the 12 critically overdrafted basins were incomplete and thus could not be approved. Under SGMA, the GSAs had 180 days to correct the deficiencies and resubmit the GSPs to DWR for re-evaluation.

DWR Basin Approvals

DWR recommended approval of GSPs for the following Central California basins: (1) the Cuyama Basin; (2) Paso Robles Subbasin; (3) Eastern San Joaquin Subbasin; (4) Merced Subbasin; (5) West-

side Subbasin; and (6) Kings Subbasin. According to DWR, the GSAs whose plans were recommended for approval conducted sufficiently detailed analyses of groundwater levels, water quality and inter-connected surface waters to develop and refine sustainable groundwater management criteria. While DWR recommended additional analytical work be conducted during implementation, DWR nonetheless deemed the framework for groundwater management legally sufficient.

GSPs Deemed Inadequate

DWR deemed inadequate the GSPs submitted for the Chowchilla Subbasin, Delta-Mendota Subbasin, Kaweah Subbasin, Tule Subbasin, Tulare Lake Subbasin, and Kern Subbasin, all in central California. According to DWR, the basins deemed inadequate did not sufficiently address deficiencies in how GSAs structured their sustainable management criteria. In particular, DWR described that the management criteria set forth in the GSPs as providing an "operating range" for how groundwater levels would prevent undesirable effects such as overdraft, land subsidence and groundwater levels that may impact drinking water wells, within the applicable 20-year time horizon. However, DWR determined that the management criteria did not adequately explain what DWR concluded were continued groundwater level declines and land subsidence. Moreover, DWR viewed the management criteria of the GSPs to be sufficiently unclear such that the criteria did not demonstrate it would prevent undesired effects on groundwater users in the basins or critical infrastructure.

According to DWR, DWR will continue to work with GSAs in the basins for which DWR approved the applicable GSPs, because those GSPs will be reviewed again in the coming years. For the basins the GSPs for which were rejected, the State Water Board will review each basin to determine whether to put the basin in probationary status after providing public notice and holding a public hearing. Under SGMA, a probationary designation will provide for the identification of the deficiencies that led to State Water Board intervention and potential actions to remedy the identified deficiencies. According to DWR, the ultimate goal of State Water Board intervention is to have every basin returned to local management to achieve sustainability within 20 years of the original GSP submittal.

Conclusion and Implications

DWR is currently reviewing GSPs for 61 basins throughout California. It remains to be seen how many more GSPs DWR will reject. For rejected basins, including those whose rejections were announced in March 2023, it is not clear how the State Water Resources Control Board will effectuate a sustainability management plan for each basin. The challenges this may present will likely be compounded by the unique nature of the groundwater basins themselves, as well as the dynamic relationships between local agencies who rely on the groundwater to supply beneficial uses within their respective boundaries.
(Miles Krieger, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S NEW SANITARY SEWER SYSTEMS WASTE DISCHARGE REQUIREMENTS TO TAKE EFFECT THIS SUMMER

Late in 2022, the California State Water Resources Control Board (State Water Board) unanimously adopted and reissued a revamped version of its Sanitary Sewer Systems General Waste Discharge Requirements Order (SSS WDR), which takes effect on June 5, 2023. (State Water Board Order No. 2022-0103-DWQ.) The SSS WDR regulates sanitary sewer systems designed to convey sewage longer than one mile in length, and sets forth related reporting and response requirements for sanitary sewer overflows (SSOs). The new SSS WDR contains several immediate and long-term compliance requirements, and public agencies subject to the SSS WDR are highly encouraged to start preparing for the new requirements as soon as possible.

Background

The State Water Board adopted its original SSS WDR General Order in 2006. (State Water Board Order No. 2006-0003-DWQ.) The State Water Board's intent with the SSS General Order was to provide a consistent, statewide regulatory approach to address SSOs. All public agencies that own or operate a sanitary sewer system that is longer than one mile in length and conveys wastewater to a publicly owned treatment works facility must apply for coverage under the SSS General Order. In general, the SSS General Order also requires public agencies subject to the Order to develop and implement sewer system management plans (or SSMPs) and report all SSOs to the State Water Board's online sanitary sewer overflow database.

The State Water Board began public outreach for the reissuance process in 2018, and issued an informal Draft Order in February 2021. The original draft outlined several more prescriptive requirements than what appeared in the prior permit. Significant concerns from the regulated community largely regarding feasibility and cost of compliance were expressed to State Water Board staff, which necessitated further input from stakeholders before additional revisions were released in October 2022.

After nearly four years of negotiations between State Water Board staff, members of the public, and key stakeholders, on December 6, 2022, the State Water Board considered and unanimously adopted the new SSS WDR. Continued public comment and guidance from stakeholders also resulted in the release of two "change sheets" at the State Water Board's adoption hearing, as well as a third change sheet, which incorporated changes to mitigate concerns raised in oral comments. The revised version of the SSS WDR will become effective on June 5, 2023, and will serve as the new regulatory mandate for operation and maintenance of sanitary sewer systems, superseding the State Water Board's previous SSS WDR General Order, State Water Board Order No. 2006-0003-DWQ.

New Key Requirements

There are several new immediate and long-term compliance requirements adopted in the SSS WDR, which public agencies should know about and take steps to review and implement as soon as possible. Immediate compliance requirements include uploading any existing SSMP to the State Water Board's California Integrated Water Quality Systems (CIWQS) database, updating and ensuring compliance with revised Legally Responsible Official eligibility requirements, and updating the enrollee's Spill Emergency Response Plan to reflect several changes and updates including different spill categories for SSOs. The SSS WDR also revises water body sampling requirements for 50,000+ gallon spills to surface waters. Such samples should be conducted no later than 18 hours after the enrollee's knowledge of a potential discharge to a surface water.

Long-term compliance requirements include submitting an updated and fully revised SSMP to CIWQS, which must include several key elements in order to provide a plan and schedule to: (1) properly manage, operate, and maintain all parts of the enrollee's sanitary sewer system(s); (2) reduce and prevent sewer spills; and (3) contain and mitigate spills that do occur.

Finally, the SSS WDR expands existing regulation to protect "Waters of the State" (*e.g.*, expanding the prohibition on discharge from a sanitary system to

include Waters of the State and requiring SSMPs to identify deficiencies in addressing spills to Waters of the State). Specifically, any discharge from a sanitary sewer system, discharged directly or indirectly through a drainage conveyance system or other route, to waters of the state is prohibited. Waters of the State means any surface waters or groundwater within boundaries of the state as defined in California Water Code § 13050(e), in which the State Water Board and Regional Water Boards have authority to protect beneficial uses. Per the SSS WDR, Waters of the State include, but are not limited to, groundwater aquifers, surface waters, saline waters, natural washes and pools, wetlands, sloughs, and estuaries, regardless of flow or whether water exists during dry conditions. Waters of the State also include Waters of the United States.

Conclusion and Implications

The SSS WDR will become effective on June 5, 2023. Those public agencies regulated by the SSS WDR should carefully review the revised permit to begin undertaking appropriate action to ensure compliance with new or revised terms. Attending regulatory training or trade association workshops also is highly recommended given the detailed changes in the new revised version of the SSS WDR. For more information, *see:* https://www.waterboards.ca.gov/water_issues/programs/sso/
(Patrick Veasy, Hina Gupta)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT RULES 2020 EPA RULE ON SECTION 401 CERTIFICATION TO REMAIN IN EFFECT DURING AGENCY RECONSIDERATION

In re Clean Water Act Rulemaking, ___F.4th___,
Case Nos. 21-16958, 21-16960, 21-16961 (9th Cir. Feb. 21, 2023).

The Ninth Circuit has overruled a U.S. District Court order that set aside a Trump-era U.S. Environmental Protection Agency (EPA) rule that severely limited state's authority in the Section 401 water quality certification process, and required states to take final action on certification requests no later than one year from the initial application.

Background

The federal Clean Water Act (33 U.S.C. § 1251 *et seq*., CWA) delegates to the states the duty to set their own water quality standards and requires state certification, known as Section 401 certification, that the applicable standards have been complied with prior to issuance of "a Federal license or permit to conduct any activity … which may result in any discharge to into the navigable waters" of the United States. 33 U.S.C. § 1341(a)(1). States are required to act on certification requests "within a reasonable period of time (which shall not exceed one year) after the receipt of such request" then "the certification requirements … shall be waived." *Ibid.*

The certification process can be complex. In order to allow state regulators sufficient time to complete the certification process, a practice had developed in which states would request that applicants withdraw and resubmit their applications in order to extend the one-year deadline to act on an application.

In 2020, EPA promulgated the Clean Water Act Section 401 Certification Rule (85 Fed. Reg. 42210 (July 13, 2020), 40 C.F.R. pt. 121 (2021), the 2020 Rule). The 2020 Rule narrowed the substantive scope of Section 401 certification by providing that:

> . . .certification is 'limited to assuring that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements [as defined in the 2020 Rule.'(Emphasis in opinion.)

This change was intended "to focus the certification on 'discharges' affecting water quality, not 'activities' that affect water quality more generally." With respect to the timing of the Section 401 certification process, the 2020 Rule provided that:

> . . .a state 'is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time' beyond one year from the date of receipt.

Several states, environmental groups and tribes challenged the 2020 Rule; other states and energy industry groups intervened to defend the Rule. Before the district court could decide any dispositive motions, newly-elected President Biden directed federal agencies to review regulations concerning the protection of public health and the environment that were enacted under the previous Administration. EPA first asked the district court to stay the litigation, and then announced its intent to revised the 2020 Rule. It then moved for remand of the 2020 Rule for agency reconsideration, requesting that the court leave the Rule in effect during the pendency of the remand. The plaintiff-challengers asked that the court either deny remand and decide the merits of their challenge, or, if remand were granted, vacate the 2020 Rule, arguing that:

> . . .keeping the 2020 Rule in place during a potentially lengthy remand would severely harm water quality by frustrating states' efforts to limit the adverse water quality impacts of federally licensed projects.

The District Court remanded and vacated the 2020 Rule.

The intervenors obtained a stay of the vacatur rule from the Supreme Court pending this appeal.

The Ninth Circuit's Decision

At issue in this appeal is whether the District Court has authority under the Administrative Procedure Act (5 U.S.C. § 561 *et seq*., the APA) to vacate a rule on remand without having decided on the merits of the challenge to the rule.

The APA:

> . . .instructs courts to 'set aside' (*i.e*., to vacate) agency actions held to be unlawful. 5 U.S.C § 706(2) (instructing courts to 'set aside' those actions 'found to be,' for example, 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.')

The Court of Appeals applied the:

> . . .basic canon of construction establishing that an 'explicit listing' of some things 'should be understood as an *exclusion of others*' not listed—even when a statute 'does not expressly say that *only*' the listed things are included.

Under this interpretative rubric, courts are authorized to vacate only those agency actions held to be unlawful.

The court relied as well on the APA's definition of "rulemaking"—the "agency process for formulating, amending or *repealing* a rule" (5 U.S.C. § 551(5)), held to require that "agencies use the same procedures within they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

Endorsing the practice of voluntary-remand-with-*vacatur* where there is no merits ruling would essentially turn courts into the accomplices of agencies seeking to avoid this statutory requirement, as it would allow agencies to repeal a rule merely by requesting a remand with *vacatur* in court. Because Congress set forth in the APA a detailed process for repealing rules, we cannot endorse a judicial practice that would help agencies circumvent that process.

The court rejected various equitable and policy arguments urged by the plaintiffs, holding that federal courts' equitable powers can only be exercised against "*illegal* executive action," and that neither equitable nor policy considerations cannot "trump the best interpretation of the statutory text." *Patel v. Garland*, 142 S.Ct. 1614, 1627 (2022).

Conclusion and Implications

In light of the Supreme Court's stay of the *vacatur* order, plaintiffs would be unwise to seek *certiorari* and provide the Court with an opportunity to definitively foreclose consideration of their equitable and policy arguments in a different factual context. The new Section 401 rule is anticipated to be released in Spring 2023.

(Deborah Quick)

SEVENTH CIRCUIT ALLOWS SUBPOENA SEEKING VIDEO FOOTAGE OF SEARCH DURING CLEAN WATER ACT CRIMINAL INVESTIGATION

United States v. Doe Corporation, 59 F.4th 301 (7th Cir. 2023).

The United States Court of Appeals for the Seventh Circuit recently reversed a U.S. District court's decision to quash a subpoena issued by a federal grand jury that was investigating an alleged violated of the Clean Water Act by the Doe Corporation. The Seventh Circuit held that there was a "reasonable possibility" that the corporation's video footage showing law enforcement officers conducting a search of the corporation's headquarters was relevant to the grand jury's task of deciding whether to issue an indictment in the case, and that a request for such information was neither unreasonable nor oppressive.

Factual and Procedural Background

In this case a federal grand jury was investigating suspected criminal violations of toxic and pretreatment effluent standards under the federal Clean Water Act by the Doe Corporation. Under the CWA, any person who "knowingly violates" certain sections of the Act could be held criminally liable and punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or by both. The government sent federal law enforcement agents to search the corporation's headquarters. During the course of the search, the agents requested that the corporation turn off their security cameras.

At the District Court

After the search was completed, the corporation accused the agents of conducting the search "in a dangerous and threatening manner in violation of the corporation's Fourth Amendment rights," and filed a motion to unseal the affidavit that had been used by the federal government to obtain the search warrant. Along with that motion, the corporation filed images taken from video footage captured during the search which appeared to show the law enforcement agents pointing their guns at the corporation's employees. After the corporation refused the government's request for the video footage, the grand jury issued a subpoena seeking the video footage.

The corporation moved to quash the grand jury's subpoena. The District Court granted the motion to quash, finding that the video was not relevant to the grand jury investigation because (1) even if the government conducted an illegal or unfair search, that would not affect whether the corporation should be indicted; and (2) the court did not believe that the agents would have ordered the security cameras to be turned off if the footage was important or relevant to the investigation. The government appealed the district court's order, and the seventh circuit granted review.

The Seventh Circuit's Decision

The court first noted that federal grand juries are vested with broad investigatory powers so that they can investigate potential crimes and return indictments if wrongdoing is uncovered. One of the grand jury's tools is the subpoena, which can help the grand jury uncover information relevant to its investigation. However, if a subpoena is too broad in scope such that it is unreasonable or oppressive, the Federal Rules of Criminal Procedure provide that a trial court may quash the subpoena. The court further noted that it can be difficult to determine before trial whether information will be relevant or admissible, and so a trial court only grants a motion to quash a subpoena if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation.

The court then addressed the issue of whether there was any reasonable possibility that the subpoena in this case, which sought video footage of the law enforcement officer's search, was "relevant to the general subject of the grand jury's investigation," and held that it was "well within the legitimate purview of the grand jury to inquire about the manner in which evidence was collected, including whether any government misconduct occurred in the process." The court noted that the grand jury possessed broad discretion in determining whether to indict the subject of the investigation and what degree of offense

to charge, and that there was a reasonable possibility that the video footage could be related to the grand jury's decision, especially if the government misconduct was as serious as the corporation alleged. If the government misconduct was "so outrageous that the grand jury [was] convinced that the government harbor[ed] improper animus against the target of the investigation," that might factor into the grand jury's decision as to issue an indictment.

Conclusion and Implications

The Seventh Circuit's decision in this case demonstrates the broad discretion afforded to federal grand juries tasked with investigating crimes under the Clean Water Act, and the seriousness of allegations involving government misconduct. The court's decision clarified that searches conducted during Clean Water Act criminal investigations will be deemed relevant in determining whether an indictment should be issued, and that a request for such information is neither unreasonable nor oppressive. The court's order is available online at: https://casetext.com/case/united-states-v-doe-corp
(Caroline Martin, Rebecca Andrews)

DISTRICT COURT EXTENDS INTERIM PLAN WHILE FEDERAL GOVERNMENT REVISES PLAN TO MANAGE SACRAMENTO RIVER FLOWS

California Natural Resources Agency v. Raimondo, ___F.Supp.4th___, Case No. 1:20-cv-00426 (E.D. Cal. Feb. 24, 2023); *Pacific Coast Federation of Fishermen's Associations v. Raimondo*, ___F.Supp.4th___, Case No. 1:20-cv-00431 (E.D. Cal. Feb. 24, 2023).

U.S. District Court Judge Jennifer Thurston has upheld a motion extending an interim operations plan for the Central Valley Project (CVP) and the State Water Project (SWP) while the federal government finishes its revisions to the challenged 2019 Biological Opinions by early 2024. The court rejected arguments that additional protections for special status species were warranted and instead permitted the plan to remain in place until 2023.

Background

The Central Valley Project and the State Water Project are the largest water projects in California and among the most important water projects in the United States. *Id.* at 7. Operated by the U.S. Bureau of Reclamation (Bureau) and the State of California through the Department of Water Resources (DWR), respectively, these combined projects supply water to more than 25 million Californian's and hundreds of thousands of acres of farmland in central and southern California. *Id.* In general, water is released from large reservoirs upstream of the Sacramento-San Joaquin River Delta (Delta) as part of CVP and SWP operations—Lake Shasta and Lake Oroville, respectively. Pumping stations then pump water on the south side of the Delta for use elsewhere in the state. Special status species that use Delta water for migration, forage, or spawning habitat include Chinook salmon, steelhead trout, delta smelt, and longfin smelt, that are considered threatened or endangered under either the federal Endangered Species Act (ESA) or the California Endangered Species Act (CESA). *Id.* at 2. The collection of dams and reservoirs that comprise the CVP and SWP block access to colder water from upstream that is used by migratory fish species, such as the chinook salmon, for their spawning and rearing habitats. *Id.* at 7. Pursuant to the ESA, U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have undertaken rounds of review of the CVP and SWP, resulting in the issuance of Biological Opinions over the years that impose regulatory constraints on these projects' operations in order to mitigate impacts to threatened or endangered species. *Id.* at 8.

In October 2019, the NMFS and FWS issued a pair of Biological Opinions that addressed the long-term operations of the CVP and SWP. The opinions found that the Bureau and the California Department of

Water Resources' new plan for operating the water projects was not likely to jeopardize the existence of the impacted fish species. *Id.* at 13.

In December 2021, a coalition environmental and fishing industry groups (collectively: Pacific Coast Federation of Fishermen's Associations, or PCFFA) as well as the State of California (State Plaintiffs) filed challenges to the pair of Biological Opinions *Id.* at 2. Assigned to U.S. District Judge Dale A. Drozd, the Bureau, NMFS, and FWS (Federal Defendants) requested from the court a voluntary remand of the Biological Opinions without vacatur as well as a stipulated interim injunctive relief package. *Id.* at 3. The State Plaintiffs supported the motion for voluntary remand without vacatur and separately requested the interim injunctive relief package. PCFFA, however, filed a cross-motion requesting a competing package of interim injunctive measures. *Id.*

On March 11, 2022, Judge Drozd granted the motion for voluntary remand without vacating the challenged opinions, approved the stipulated interim injunctive relief package, denied the competing relief requests by PCFFA, and stayed the case through September 30, 2022. *Id.* The interim injunctive relief package (referred to as the "2022 Interim Operation Plan" (IOP) allows the 2019 Biological Opinions to remain in effect over the next three years, but adds conditions to the operation of the water projects through the end of the 2022 "Water Year" (WY) while the federal agencies redo the challenged opinions. Most relevantly, the IOP instituted temperature management operations to keep water cold enough for salmon eggs as well as water storage planning for future water year temperature management needs. *Id.* at 17.

In recognition that the remand and revisions to the 2019 Biological Opinions are not expected to be completed until early 2024, the Federal Defendants and State Plaintiffs returned to the court to request extending the IOP through December 31, 2023. PCFFA, however, objected to the extension of the IOP through 2023 without revisions. Specifically, changes that lower temperature targets and increase water storage goals. Several parties have intervened on behalf of the defendant, including: Contra Costa Water District, City of Roseville, City of Folsom, San Luis & Delta Mendota Water Authority, Westlands Water District, and the State Water Contractors. *Id.* at 21.

The District Court's Decision

Both plaintiffs agree on the underlying claims that the 2019 Biological Opinions violate the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA) by concluding that the new operating plan for the CVP and SWP would not jeopardize the existence or habitat of the fish species protected by the ESA. Furthermore, the plaintiffs claim that the Bureau failed to comply with the CESA, which is substantially identical to the ESA. *Id.* at 76. Where the State Plaintiffs and the PCFFA differ is whether the 2022 IOP ought to be revised in order to be extended through the end of 2023.

In support of their motion to institute revisions to the IOP, PCFFA have repeated many of the arguments that were raised when the IOP was first approved. *Id.* at 21. They request the court to impose lower water temperature targets and require higher carryover storage goals in order to protect salmon incubation and juvenile migration. They point to the high mortality rates of winter-run Chinook salmon in the Upper Sacramento River in 2022 as evidence of the shortcomings of the IOP and the need for revisions.

In assessing their argument, U.S. District Judge Jennifer Thurston found that the Federal Defendants have provided limited factual evidence with which to evaluate the performance of the 2022 IOP. *Id.* at 32. That limited evidence purportedly made it difficult for the court to assess the performance of the 2022 IOP. *Id.* Ultimately, the court approved the extension of the 2022 IOP while rejecting the motion for revisions by PCFFA. In pointing out that this IOP is but a "temporary settlement of a highly complex lawsuit," Judge Thurston rejected the argument that the plan did more harm than good. *Id.* at 34.

Specifically, the court found that the IOP corrects mis-alignment in the export constraints between the CVP and the SWP, prevents further litigation and use of court resources while the Federal Defendants finish revising the Biological Opinions and provides the most reasonable approach presented to water supply considerations. *Id.* The IOP contains provisions that trigger when the water year is classified as "Below Normal" or worse, which will change the goals the Bureau sets for water storage volumes. The court-based part of its decision on the most recent atmospheric river storms that have greatly improved 2023's outlook for California's water supply, thus lessening

the impetus to revise the IOP for 2023.

Finally, the court stayed this case until December 31, 2023.

Conclusion and Implications

It remains to be seen how the 2019 Biological Opinions will be revised, but in the meantime the existing 2022 IOP will remain in place for the protection of special status species. It also remains to be seen how a higher level of precipitation in 2023 will affect fish and wildlife that use the Delta and the Delta's watershed, and how such precipitation may factor into the revisions currently due in 2024. The court's order is available online at: https://www.courthousenews.com/wp-content/uploads/2023/02/Pacific-coast-operations-ruling.pdf
(Miles Krieger, Steve Anderson)

DISTRICT COURT FINDS FEDERAL ENDANGERED SPECIES ACT PREEMPTS STATE AGENCY ORDER ON KLAMATH PROJECT OPERATIONS

Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al., ___F.Supp.4th___, Case No. 19-cv-04405-WHO, (N.D. Cal. Feb 6, 2023).

The U.S. District Court for the Northern District of California has issued a decision in *Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al.*, (*Yurok Tribe*) finding that the federal Endangered Species Act (ESA) preempted an order from the Oregon Water Resources Department (OWRD) prohibiting the U.S. Bureau of Reclamation (Bureau) from releasing water from Upper Klamath Lake except for irrigation purposes. The District Court found that the OWRD order presented an obstacle to the Bureau's compliance with the ESA and therefore could not be enforced. The ruling resolved four motions for summary judgment in favor of the United States, as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources.

Factual Background

The Klamath River originates in the high desert of Oregon, flowing southwest into California and eventually the Pacific Ocean. The Klamath River drains into the Klamath Basin, where its waters are relied on by numerous stakeholders including Native American tribes, fish and wildlife, and irrigators.

The Reclamation Act of 1902 (43 U.S.C. § 391 *et seq.*) authorized the Secretary of the Interior to construct and operate works for the storage, diversion, and development of water in the western United States. In 1905, the Secretary of the Interior authorized the Klamath Project (Project) pursuant to the Reclamation Act. Today the Project consists of an extensive series of canals, pumps, diversion structures, and dams capable of routing water to approximately 230,000 acres of irrigable land in the upper Klamath River Basin.

The Bureau is in charge of operating the Project, which includes managing water levels and distribution from Upper Klamath Lake. Upper Klamath Lake is the Project's primary storage facility with a capacity to store approximately 562,000 acre-feet of water. The Bureau's operations of Upper Klamath Lake are influenced by Oregon state law, Tribal water rights, and the federal ESA.

Litigation involving the Klamath Project has a long and complex history. Although the case as a whole originated as a challenge to 2019 biological opinion for the Project, this ruling stems from the Bureau's management of Upper Klamath Lake amid severe drought conditions in 2020. In 2020, the Bureau did not fully allocate Project water to irrigators. But the Bureau continued to release water from the Upper Klamath Lake pursuant to the ESA, which requires that federal agencies ensure their actions are "not likely to jeopardize" the continued existence of a listed species or destroy or modify its habitat. (16 U.S.C. § 1536(a)(2) ("ESA Section 7(a)(2)").) On April 6, 2021, the OWRD issued an order that the Bureau "immediately preclude or stop the distribution, use or release of stored water from the UKL" except for water that would be used by irrigators. The United States then filed a crossclaim against OWRD and the Klamath Water Users Association seeking to overturn the OWRD order.

The District Court's Decision

In its February 6, 2023 order in *Yurok Tribe*, the court granted summary judgment in favor of the United States as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources. The court denied summary judgment motions filed by OWRD, Klamath Water Users Association, and Klamath Irrigation District. The central issue in the case was whether the ESA preempted the OWRD order, making it invalid in violation of the Supremacy Clause.

The Bureau and the ESA

The court first addressed the threshold question of whether the Bureau must comply with the ESA in operating the Project. Section 7(a)(2) of the ESA only applies to discretionary agency actions, and does not apply to actions that "an agency is required by statute to undertake once certain specified triggering events have occurred." (*National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007).) The court held that here "Congress gave [the Bureau] a broad mandate in carrying out the Reclamation Act, meaning it has discretion in deciding how to do so." Therefore, section 7(a)(2) applies and the Bureau must comply with the ESA when releasing stored water from Upper Klamath Lake.

Federal Preemption

Finding that the ESA applies to the Project, the court then addressed the issue of preemption. The Supremacy Clause of the U.S. Constitution grants Congress "the power to preempt state law." (*Arizona v. United States*, 567 U.S. 387, 399 (2012).) One form of preemption occurs where a state law "stands as an obstacle to the accomplishment and execution" of the federal law. (*Id.* at 399-400.) This is referred to as "obstacle preemption." (*United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019).)

The court found that the OWRD order stood as an obstacle to the accomplishment and execution of Congress' intent in enacting the ESA to "halt and reverse the trend toward species extinction, whatever the cost." The OWRD order prohibited the Bureau from releasing water from Upper Klamath Lake except for irrigation purposes, which prevented release of water to avoid jeopardizing endangered species. The District Court granted summary judgment in favor of the United States on preemption grounds, concluding that the OWRD is preempted by the ESA and therefore invalid.

Conclusion and Implications

The court declined to opine on other arguments related to the OWRD order, including an argument based on the doctrine of intergovernmental immunity. At the time of this writing, it remains unclear whether any parties will appeal the court's ruling. The court's ruling highlights the ongoing challenges associated with balancing the needs of different stakeholders in times of drought.
(Holly E. Tokar, Sam Bivins)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT HOLDS REASONABLE USE FINDING NOT REQUIRED FOR WASTEWATER DISCHARGE PERMITS

Los Angeles Waterkeeper v. State Water Resources Control Board, ___Cal.App.5th___, Case No. B309151 (2nd Dist. Feb 27, 2023).

The Second District Court of Appeal released its opinion in *Los Angeles Waterkeeper v. State Water Resources Control Board*, deciding the question of whether the State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Boards) have a duty to review the reasonableness of wastewater discharge permits prior to their approval. The trial court initially ruled that the State Water Resources Control Board did have a duty to review these permits to determine whether the amount of wastewater being discharged was reasonable before the permits could be issued. Conversely, the trial court held that the Regional Water Quality Control Board of Los Angeles did *not* have such a duty. In reaching this conclusion, the trial court explained that the assessment of whether the permitted use is reasonable occurs at the state level whereas the Regional Water Board is limited to assessing water quality.

On appeal, the Second District Court *reversed* the trial court's judgment as to the State Water Board, however, concluding that they did *not* have a duty to assess the reasonableness of the discharges. Neither court held that review under the California Environmental Quality Act (CEQA) was triggered by the issuance of the permits since wastewater permits are exempted from CEQA review in the Water Code.

The Court of Appeal's Decision

No Duty to Assess Reasonableness of Wastewater Discharges

In its analysis of the issue, the court determined at the outset that the LA Waterkeeper failed to adequately plead entitlement to *mandamus* against the State Water Board, so the trial court should have sustained the State Water Board's demurrer in the first place.

Turning to the question of reasonable use, the court wrote that, even assuming a duty to prevent unreasonable use of water exists, such a duty is:

> . . .highly discretionary, and nothing in article X, section 2 or the Water Code requires the State Board to take action against any particular instance of unreasonable use or category of unreasonable use.

The opinion also notes that the trial court correctly explained how mandamus cannot compel an agency to exercise its discretion in a particular way but then criticizes the trial court's inconsistency in ordering the State Water Board to investigate particular instances of unreasonable use, as identified by the LA Waterkeeper. The trial court justified its decision on the basis that the discharges from the publicly-owned treatment works in question were "unique," but the Second District rejected this justification, explaining that this was not based on a workable legal standard nor was it supported by the language of the Constitution or the Water Code.

Ultimately, the court of appeal concluded this part of its discussion by writing that the:

> Legislature has opted not to include a reasonable use assessment as part of the wastewater discharge permitting process, and we will not override that determination.

Wastewater Discharge Permitting Process Exempt from CEQA Procedures

The court also briefly addressed CEQA claims brought by the LA Waterkeeper with respect to the issuance of wastewater discharge permits. The court declined to decide broadly whether Water Code § 13389 fully exempts the Regional Water Board from

CEQA review when issuing wastewater discharge permits. Instead, the court held that Public Resources Code section 21002, the specific provision pleaded by the LA Waterkeeper, does not impose any environmental review requirements and only states a general policy in implementing CEQA's environmental review procedures:

> Because Water Code section 13389 exempts the wastewater discharge permitting process from those CEQA procedures," the court wrote, "Public Resources Code section 21002 is inapplicable, and the trial court properly sustained the demurrer to the CEQA causes of action.

Conclusion and Implications

Los Angeles Waterkeeper v. State Water Resources Control Board affirms that regional water boards have no duty to assess the reasonableness of wastewater discharge permits, and while the State Water Board does have a duty to avoid wasteful uses of water where possible, the opinion makes clear that the State Water Board still maintains a high level of discretion in exercising that duty. As for the California Environmental Quality Act issues addressed in the opinion, the court explains that Public Resources Code § 21002 is exempted by Water Code § 13389, but the court refused to discuss the full extent to which the regional boards are exempted from CEQA review when issuing wastewater discharge permits.

This opinion helps to clarify the State and Regional Water Boards' respective roles in assessing reasonable uses of water, particularly in that this assessment is not meant to occur when reviewing wastewater discharge. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309151.PDF

(Wesley A. Miliband, Kristopher T. Strouse)

SECOND DISTRICT COURT REVERSES JUDGMENT ON THE PLEADINGS, FINDING ALLEGATIONS SUFFICIENT UNDER COASTAL ACT THAT CITY ALLOWED PRIVATE STRUCTURE

Spencer v. City of Palos Verdes Estates, ___Cal.App.5th___, Case No. B309225 (2nd Dist. February 27, 2023).

The Second District Court of Appeal in *Spencer v. City of Palos Verdes Estates* reversed the trial court's decision granting a motion for judgment on the pleadings, holding that plaintiffs' allegations that the City of Palos Verdes Estates (City) allowed local residents to build a structure on City property at the beach and to harass non-locals were sufficient allegations of violation of the California Coastal Act (Coastal Act).

Factual and Procedural Background

Lunada Bay is a premier surf spot owned by the City. Plaintiffs are two non-locals and a non-profit seeking to preserve coastal access. Plaintiffs allege that City residents and officials are not welcoming to outsiders and are sometimes openly hostile towards them.

The Lunada Bay Boys (Bay Boys) are an alleged group of young and middle-aged men, local to the City, who consider themselves to be the self-appointed guardians of Lunada Bay. One of their tenets is to keep outsiders away from the surf location. They accomplish this through threats and violence. Plaintiffs brought suit against the Bay Boys, some of its individual members, and the City itself, for conspiracy to deny access under the California Coastal Act.

Plaintiffs allege that the City conspired with the Bay Boys essentially to privatize Lunada Bay, depriving nonlocals of access, in at least two ways: (1) by allowing the Bay Boys to build on City property a masonry and wood structure, known as the Rock Fort, which the Bay Boys used as their hangout; and (2) with knowledge of the Bay Boys' conduct, being complicit in the Bay Boys' harassing activities and tacitly approving them.

According to the complaint, those two activities involved "development" under the Coastal Act, requiring a permit. The Coastal Act defines "development" broadly, and includes, a:

> . . .change in the intensity of use of water, or of access thereto; construction, reconstruction,

> demolition, or alteration of the size of any structure . . . . (Public Resources Code, § 30106)

The construction of the Rock Fort is alleged to be construction of a structure and the harassment conducted by the Bay Boys is alleged to be an activity resulting in change in the use of water or of access thereto.

Plaintiffs allege the City violated the Coastal Act by not obtaining a Coastal Development Permit for these two "development activities" occurring on its property at Lunada Bay. Plaintiffs allege these Coastal Act violations entitle plaintiffs to declaratory and injunctive relief, and render the City liable for civil and daily fines payable to the State.

As to the Rock Fort, plaintiffs allege the Bay Boys built and maintained the illegal Rock Fort. The City was long aware of it and only removed the structure in late 2016, after Plaintiffs brought attention in their federal lawsuit. With City knowledge, the Bay Boys have since undertaken efforts to rebuild a structure in its place on City property. Plaintiffs allege that the Rock Fort serves as the headquarters for the Bay Boys to harass visitors.

As to the harassment, plaintiffs allege the Bay Boys have intentionally and maliciously blocked public access to the beach at Lunada Bay for over 40 years. In what is a multi-generational practice of extreme 'localism,' the Bay Boys use physical violence, threats of bodily harm, vandalism to vehicles, verbal harassment and intimidation to prevent access to the public beach. The City has long been aware of the unlawful exclusion of outsiders and has conspired with the Bay Boys to 'protect' Lunada Bay.

Specifically, plaintiffs allege that, with City knowledge and complicity, the individual defendant members of the Bay Boys conspire to keep the public away by: (1) physically obstructing outsiders' access to the beach trails; (2) throwing rocks; (3) running people over with surfboards in the water; (4) punching outsiders; (5) stealing outsiders' wallets, wetsuits, and surfboards; (6) vandalizing vehicles, slashing tires, and waxing pejorative slurs onto vehicle windows; (7) levying threats; and (8) intimidating outsiders with pejorative and other verbal insults, gestures, and threats of serious injury.

Plaintiffs allege that in response to the Bay Boys' acts of exclusion, the City hired Jeff Kepley as its new chief of police. Kepley was quoted in the *Los Angeles Times* as saying he was going to mix up the status quo and make an example of anyone who behaves criminally at Lunada Bay. City residents, including members of the Bay Boys, criticized this plan and Chief Kepley "backtracked." In response, rather than hold the Bay Boys accountable, the City opted for a 'community policing' approach to develop an even cozier relationship with the Bay Boys.

The operative complaint alleged that the City was liable for Coastal Act violations, in that both the Rock Fort and the harassing conduct constituted "development activity" for which a Coastal Development Permit was required. On February 14, 2020, the City moved for judgment on the pleadings on the basis that neither the Rock Fort nor the harassment constituted "development" within the meaning of the Coastal Act.

At the Trial Court

The trial court granted the motion for judgment on the pleadings. The court stated that the Coastal Act creates liability only against a developer who fails to comply with the permitting process, not a city on whose land the development sits. As to the Rock Fort, the court held that there were no allegations that the City built or agreed to build it. As to harassment, the court concluded that development under the Coastal Act related to the use of buildings, structures and land as between competing uses, and not interpersonal conduct.

The Court of Appeal's Decision

The Court of Appeal reversed the trial court's judgment on the pleadings, holding that the complaint sufficiently alleged violations of the Coastal Act both as to allowing the Rock Fort on City property and as to aiding and abetting harassment.

Coastal Act Principles

The Coastal Act has six purposes, which are the basic goals of the state for the coastal zone. These include:

> Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resource conservation principles and constitution-

ally protected rights of private property owners. (Public Resources Code, § 30001.5, subd. (c).)

The Coastal Act purposes are implemented pursuant to local government agency local coastal programs and coastal development permits under those programs. Coastal development permits must insure that:

> Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation. (Public Resources Code, § 30211.)

Case authority confirms the importance of preserving public access to the coast:

> [T]he concerns placed before the Legislature in 1976 were more broad-based than direct physical impedance of access. For this reason, we conclude the public access and recreational policies of the Coastal Act should be broadly construed to encompass all impediments to access, whether direct or indirect, physical or nonphysical. (*Surfrider Foundation v. California Coastal Com.*, 26 Cal.App.4th 151, 158 (1994).)

"Development" for which a coastal development permit is required is thus broadly defined to include "change in the intensity of use of water, or of access thereto" and is not restricted to activities that physically alter the land or water. (Public Resources Code, § 30106)

The Rock Fort

As an undisputed structure, the Rock Fort was a development requiring a permit under the Coastal Act. But the Act requires a permit be obtained only by the person wishing to perform or undertake that development. (Public Resources Code, § 30600, subd. (a).)

The trial court concluded that, since it was not alleged that the City undertook the construction of the Rock Fort, the City was not required to obtain a permit. However, a recent Court of Appeal decision applying common law nuisance principles holds that an owner who maintains a development on his or property 'undertakes activity' that requires a permit, regardless of whether he or she constructed the development (*Lent v. California Coastal Com.* (2021) 62 Cal.App.5th 812, 832 (*Lent*).)

Bad Boys Harassment

The Court of Appeal also concluded that a change in the access to water brought about by an organized scheme of harassment of, or similar impediment imposed on, those seeking access may be just as much a change in access to water as one brought about by a physical impediment. The harassment and other conduct alleged directly interferes with, and sometimes precludes, access to the Pacific Ocean.

Given that plaintiffs sufficiently alleged an unpermitted "development" in the Bay Boys' denial of access to the beach, the Court of Appeal examined whether plaintiffs sufficiently alleged City liability for this conduct. Plaintiffs alleged the City was liable because it conspired with the Bay Boys.

Conspiracy liability may occur if defendants may engage in conduct that violates a duty imposed by statute. Conspiracies are typically proved by circumstantial evidence because such participation, cooperation or unity of action is difficult to prove by direct evidence. Conspiracy can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.

Plaintiffs alleged sufficient circumstances for a conspiracy: Bay Boys had a decades-long practice of blocking access to Lunada Bay, both by words and acts; the City was aware of this conduct and complicit in it; the former police chief agreed to look into the situation and then "backed off"; the City had a cozy relationship with the Bay Boys; the City did not enforce its laws against the Bay Boys; instead, the City itself acted to exclude outsiders from the beach by targeting them with traffic citations, parking tickets, and towing.

Conclusion and Implications

This opinion by the Second District Court of Appeal emphasizes the broad scope of "development" under the California Coastal Act to include a right of access and to prevent collusive conduct that would impede such access. Whether the conspiracy and

other unpermitted actions can be proven at trial will remain to be seen. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309225.PDF
(Boyd Hill)

THIRD DISTRICT COURT GRANTS ANTI-SLAPP MOTION TO STRIKE MALICIOUS PROSECUTION ACTION IN WATER RIGHTS QUIET TITLE CASE

Water for Citizens of Weed California v. Churchwell White LLP, ___Cal.App.5th___, Case No. C093421 (3rd Dist. Feb. 9, 2023).

The Third District Court of Appeal in *Water for Citizens of Weed California v. Churchwell* granted defendant law firm Churchwell White's anti-SLAPP motion to strike a complaint and "SLAPPback" motion filed by Water for Citizens of Weed California in an action to quite title to water rights. The Third District Court of Appeal held that Citizens failed to show Churchwell White lacked probable cause or acted out of malice in naming the group in the quiet title action, and therefore did not establish a probability of prevailing on their claim.

Factual and Procedural Background

In 2017, law firm Churchwell White LLP represented Roseburg Forest Products Company in an action to quite title to water rights. Roseburg alleged it owned appropriative rights to 4.07 cubic feet/second (cfs) of water from the Beaughan Creek and Spring in Siskiyou County.

In 1966, Roseburg's predecessor, International Paper, entered into an agreement that guaranteed the City of Weed (City) rights to 2.0 cfs of Beaughan Springs water for 50 years at a cost of $1/year. In 2016, Roseburg and the City entered into a ten-year lease under which Roseburg would provide the City with 1.5 cfs of water for $97,500 a year, and which required the City to identify an alternative source of water within two years and to completely cease its use of the Springs water after ten years.

In their operative complaint, Water for Citizens of Weed California alleged that after the City entered into the ten-year lease, the group discovered documents which purportedly established that Roseburg had no right to appropriate the City's water source for its own private gain. The group subsequently circulated flyers disputing Roseburg's claim of exclusive rights to the City's historic allocation of 2.0 cfs and seeking citizens' attendance at a public meeting regarding the lease. In disputing the claimed right, Citizens alleged that a 1932 judicial decree indicated the water was intended for the City's various uses, whereas no court had ever ruled on Roseburg's claim of ownership. Citizens further claimed that when International Paper subdivided land and sold houses to the public those homes came with a guarantee of water. Finally, Citizens maintained that International Paper sold the City its water and sewer infrastructure in 1966, but in 1982 after closing its mill, gave the City its rights to domestic and municipal water.

In March 2017, Citizens asked the Scott Valley and Shasta Valley Watermaster District to determine that the City had a right to 2.0 cfs of Beaughan Springs water. Citizens presented the Watermaster with a letter from 1982 that showed International Paper transferred its right to 2.0 cfs to the City, which the Department of Water Resources (DWR) corroborated in writing. However, in 1996, DWR changed ownership from the City to Roseburg when the 1982 letter could not be found. Citizens therefore asked the watermaster to reconsider this decision in light of the uncovered 1982 letter, stating that the City has always been and should continue to be the rightful claimant to the 2.0 cfs of Beaughan Springs water.

In May 2017, Citizens ask the City to join their request to the watermaster at a City Council meeting, to which the City agreed. At that meeting, the City adopted a resolution requesting the State Water Resources Control Board correct its records to recognize the City's ownership of the 2.0 cfs of water.

Roseburg's Complaint and Citizens' Anti-SLAPP Motion

The day after the City Council meeting, Roseburg (represented by Churchwell White) sued Citizens and

the City based on the defendants' efforts to transfer or take a portion of Roseburg's water rights. The complaint pleaded causes of action for: quite title and adverse possession of 4.07 cfs of Beaughan Springs water. The complaint also sought declaratory relief regarding the contested water rights, particularly given that the uncertainty over which party had the right to exclusively use the 4.07 cfs of water clouded Roseburg's title thereto and prevented its ability to sell or encumber its right.

Citizens filed an anti-SLAPP motion to strike Roseburg's complaint, which was accompanied by declarations stating the individual plaintiffs did not and had never claimed any right, title, estate, lien, or interest in the 2.0 cfs at issue. The trial court granted the anti-SLAPP motion, finding that Citizens were named solely because they exercised their constitutional rights to free speech and none had claimed a private interest in the water.

Roseburg appealed, which the Third District Court dismissed after the parties reached a settlement. As part of their settlement, Roseburg and the City stipulated that Roseburg owns the exclusive right to divert and use 4.07 cfs of Beaughan Springs water, that the City has no ownership interest in that water, and that the City has a leasehold interest in 1.5 cfs of those rights.

Citizens' SLAPPback Action

Citizens filed the underlying "SLAPPback" action against Churchwell White for malicious prosecution for suing them on behalf of Roseburg in the quiet title action. Citizens alleged Churchwell had no probable cause to name them in the underlying complaint, and that Churchwell named them only to silence and chill their exercise of free speech.

Churchwell filed an anti-SLAPP motion against the complaint, which the trial court granted. The trial court held that the complaint arose from Churchwell's exercise of its constitutional rights. The court found that Citizens did not demonstrate a probability of prevailing on the merits because they failed to establish a *prima facie* case of malicious prosecution—*i.e.*, that Churchwell lacked probable cause in naming them in the underlying action and that Churchwell acted out of malice. Citizens appealed.

The Court of Appeal's Decision

Under a *de novo* standard of review, the Third District Court of Appeal considered whether Churchwell established that Citizens' claim of malicious prosecution arose from its attorney's actions in furtherance of their constitutional right of petition or free speech. If Churchwell satisfied that burden, then Citizens bore the burden of establishing a probability of prevailing on their malicious prosecution claim. To do so, Citizens needed show that Churchwell's protected activity is legally sufficient and factually substantiated, such that it would sustain a favorable judgment. Thus, Citizens had to establish that Churchwell's quiet title action was: (1) commenced by or at the direction of Churchwell and was pursed to a legal termination favorable to Citizens; (2) initiated or maintained without probable cause; and (3) initiated and maintained with malice.

On appeal, Citizens challenged only the trial court's determination that Citizens failed to establish a probability of success as to the third and second elements of their malicious prosecution claim.

Probable Cause

As to the second element, Citizens alleged Churchwell had no probable cause to name them in the quiet title action because none of the individual plaintiffs had a claim or interest in the contested water rights. Instead, each of Churchwell's causes of action were based on the theory that Citizen's actions had created a cloud on Roseburg's title—an untenable theory because their actions did not and could not cloud title or result in an adverse claim to the water rights.

For these reasons, Citizens maintained that the only reason Churchwell sued was to silence them, and that no reasonable attorney would believe that the group's statements constituted a cloud on title. More specifically, Citizens argued that Churchwell's theory means that any person who makes a statement regarding the disposition of property clouds that property's title, even if the person has no personal interest in said property.

The court disagreed with Citizens. Based on the facts and circumstances, the court could not "hold that any reasonable attorney would conclude Roseburg's quiet title action was totally and completely

without merit." Rather, a reasonable attorney could conclude that Churchwell had probable cause to determine that Citizen's conduct exceeded the bounds of protected speech and created an adverse claim against Roseburg's titles because Citizens' publications did precisely that—*i.e.*, they claimed Roseburg did not own the water rights, that California owned the water as part of the public trust, and that the City owned the rights after it had long been declared a public resource. Moreover, Citizens formally asked the watermaster to determine who owned the 2.0 cfs of water, and requested that the City join that request (which it did). And if the watermaster did not determine the City owned the water, Citizens threatened legal action to protect what they claimed was the public's right to the water.

Taken together, Citizens' actions constitute more than "mere verbal assertions of ownership." This is because the purpose of a quiet title action is to establish title against any adverse claims to property or any interest therein. Therefore, a quiet title action lies to address "every description of a claim" and any adverse claim that might reduce the value of the owner's property, that inconveniences the owner, or that damages the owner's assertion of title. Accordingly, a reasonable attorney could believe that Citizens' actions, particularly in seeking relief from the watermaster, created an adverse claim to Roseburg's title by depreciating its value and reducing its marketability. A third party, for example, might think twice about acquiring the water rights from Roseburg knowing Citizens had formally requested a public agency to determine whether the rights exist.

Citizens' threat of legal action also was not without impact. Even if Citizens' members did not have an individual interest in the underlying property rights or public trust resources, they nevertheless have standing to bring an action on behalf of the public to enforce a public trust asset or defend a quiet title action on behalf of the public by asserting a public right to use private property. If the watermaster were have to found the City did not have an interest in the 2.0 cfs, Citizens' threat of subsequent legal action could also affect a third person's understanding of the value and marketability of Roseburg's water rights. Accordingly, a reasonable attorney could conclude that a claim of probable cause to bring a quiet title action against Citizens was not totally and completely without merit.

Chilling Protected Speech as to Public Resources—Water

Finally, the court disagreed with Citizens' overarching argument that Churchwell's theory of probable cause will chill protected speech. Citizens reasoned that the theory puts citizens at risk of being sued merely because they publicly expressed opinions regarding the disposition of ostensibly public resources, such as water. *Amicus curiae* agreed, noting that environmental advocates often assert that the public has an interest in water where appropriations are disputed, particularly in cases involving public trust lands and waters. But the court explained that the action would not endanger the public trust doctrine, as there is no evidence any of the water Roseburg owned was owned in trust for the public. Moreover, and as previously established, while mere verbal assertions of ownership do not create a cloud on title, Citizens' specific threats of legal action created such a cloud on the marketability of those rights. Accordingly, the court could not:

> . . .say that any reasonable attorney, understanding the actions Citizens took against Roseburg's title purportedly on behalf of the public, would conclude that a claim of probable cause to bring a quiet title action against Citizens was completely and totally without merit.

Conclusion and Implications

The Third District Court's opinion offers a straightforward anti-SLAPP analysis of an otherwise nuanced fact pattern involving tangled instances of free speech. The court's opinion illustrates the bounds to which free speech is protected against malicious prosecution. Here, while Citizens' speech against a corporation's right to water would traditionally be protected, it was the group's subsequent concerted actions—*i.e.*, seeking the watermaster's determination and threatening legal action—that transformed their speech into a class that could be regarded as "clouding" the marketability to those contested water rights. For these reasons, a reasonable attorney could find that there was probable cause to bring a quiet title action that sough to establish title against those adverse claims. In sum, the opinion highlights the nuances and bounds of free speech when measured against the

requisite reasonability standard for defending against an anti-SLAPP motion. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093421.PDF
(Bridget McDonald)

CALIFORNIA WATER™
LAW & POLICY Reporter

California Water Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108