

CALIFORNIA WATERTM

L A W & P O L I C Y

Reporter

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CALIFORNIA WATER NEWS

**BIDEN ADMINISTRATION ANNOUNCES \$300 MILLION
IN BIPARTISAN INFRASTRUCTURE LAW SPENDING
TOWARDS CALIFORNIA WATER INFRASTRUCTURE**

Early last month, the Biden administration announced that nearly \$585 million from the Bipartisan Infrastructure Law—signed into law back in 2021—would be put towards infrastructure repairs on water delivery systems throughout the western United States. Specifically, the funding will be provided to 83 projects across 11 states with the stated purpose of improving water conveyance and storage, increasing safety, improving hydroelectric power generation, and providing water treatment.

The projects selected for funding are all located within major watersheds with ongoing U.S. Bureau of Reclamation (Bureau) operations, including the Colorado River Basin and the San Francisco Bay Delta watershed. Much of the funding will be provided to projects that seek to increase canal capacity, provide water treatment for tribal entities, replace equipment for hydroelectric power production, and provide maintenance to aging facilities. The list of western states benefitting from this allocation of funds includes California as well as Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington.

California’s Share of the Funds

Out of all the states receiving funding for water infrastructure improvements, perhaps it comes as no surprise that California is set to receive the largest share of the funding. With over \$300 million in funding provided to California projects alone, the Golden State will be getting a little over half of the \$585 million announced last month.

The long list of projects set to receive funding was broken up by project area in the Bureau’s description of the Fiscal Year 2023 Aging Infrastructure Projects. Among the project areas listed are the federal Central Valley Project, the Klamath Project, and the All-American Canal System, among other smaller project areas throughout the state.

The Central Valley Project

The vast majority of the funds will be dedicated to the maintenance and modernization of facilities in the Central Valley Project. Of California’s 24 projects that were allocated funds in the recent announcement, 12 of them are located along the Central Valley Project and will be receiving a whopping \$279 million out of the \$307 million allocated for California projects in total. These funds will predominantly be used for projects in the Shasta-Trinity area, which will see roughly \$133 million in total funding. On the Shasta side, the dam will receive \$25 million in funding for the refurbishment of tube valves and replacement of parts for the Shasta Dam Temperature Control Device.

The Trinity River

Along the Trinity River, two major projects will be funded by the recent allocation: the Trinity River Fish Hatchery and the Spring Creek Power Facility. The Trinity River Fish Hatchery will be getting a massive overhaul thanks to its \$65.9 million allocation. As part of this overhaul, the project will utilize the funds to install a Supervisory Control and Data Acquisition (SCADA) system, replace corroded and leaking pipes, install new filtration systems and incubation jars, implement sound dampening measures to reduce hazardous noise from hatchery operations, and replace deteriorated iron supports for 150 shallow troughs and 26 deep tanks. The Spring Creek Power Facility will likewise see a substantial injection of funds, totaling \$42.25 million, earmarked for the replacement of the transformers that provide power to pumps at the Spring Creek, J.F. Carr and Trinity pump generation units, all of which are used to move water from the Trinity River into the Sacramento River for using the Central Valley Project.

Folsom and Nimbus Reservoirs

Further south, the Folsom and Nimbus reservoirs will be receiving \$31 million in combined funding for refurbishment and upgrades to facilities as well as modernization of the Nimbus Fish Hatchery. The Jones Pumping Plant, which moves water from the Delta into the Delta-Mendota Canal, will be getting \$25 million worth of refurbishments while the Delta-Mendota and Friant-Kern canals will be getting nearly \$50 million to combat the impacts of land subsidence in the Central Valley. Lastly for the Central Valley Project, the Gianelli Power Plant at the San Luis Reservoir is set to receive \$43 million in funds for the refurbishment of the San Luis Unit 8 motor generator, turbine, and butterfly valve.

All-American Canal and Other Colorado River Project

Although the funding for the Central Valley Project overshadows the remaining project funds by a wide margin, the All-American Canal and other Colorado River facilities was allocated a healthy \$10 million in funding for the five projects named in that region. Among these projects, the announcement including funding for maintenance work along the Colorado River and its levee system in addition to allocations of \$5.67 million towards the replacement of the All-American Canal's Desilting Basin's Clarifier Arms and another \$2.57 million for necessary repairs at the Imperial Dam.

Klamath and Truckee River Areas

Other recipients of funding under the recent announcement included projects along the Klamath and Truckee rivers as well as projects located within

the Bureau of Reclamation's Yuma Project area. For the Klamath Project, \$8.75 million was dedicated to implementing upgrades on canal systems. Along the Truckee River, roughly \$3 million each was dedicated to maintenance at the Stampede Dam and for studying the benefits of replacing the Lake Tahoe Dam which helps regulate the flow of water from Lake Tahoe into the Truckee. As for the Yuma Project, a modest \$4.1 million will be provided for the refurbishment of the Laguna Dam gate, installation of governor controls at the Siphon Drop Power Plant, and to assist in the replacement of some 220 power pole structures for the Yuma County Water Users' Association.

Conclusion and Implications

The Bipartisan Infrastructure Law included \$8.3 billion for water infrastructure projects in fiscal years 2022-2026 to improve drought resilience and expand access to clean water. The Inflation Reduction Act brought another \$4.6 billion in funding to further address these issues. Together, the two initiatives represent the largest investment in climate resilience in the history of the United States. Building on the \$240 million allocated through the Bipartisan Infrastructure Law in fiscal year 2022, the \$585 million represents a significant ramp up in funding for much needed infrastructure repairs and improvements. The next application period for funds is expected to take place in October 2023, and given the significant jump from 2022 to 2023 and the pool of funds remaining it is not unlikely the total funding provided increases even more in 2024. For more information on the Bipartisan Infrastructure Law, see: <https://www.congress.gov/bill/117th-congress/house-bill/3684/text> (Wesley A. Miliband, Kristopher T. Strouse)

GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER TERMINATING PROVISIONS OF PRIOR DROUGHT EMERGENCY PROCLAMATIONS AND EXECUTIVE ORDERS

In late March 2023, Governor Newsom issued Executive Order N-5-23 (Order), terminating numerous provisions of multiple drought executive orders and state of emergency proclamations related to drought conditions. While the Governor did not go so far as to declare an end to the statewide drought, the Order eases certain drought restrictions, though other water conservation regulations remain in effect.

Background

In response to the current multi-year drought, Governor Newsom issued a series of state of emergency proclamations and executive orders between April 2021 and February 2023 related to drought conditions and water conservation. Conservation measures identified in these orders included: a request for the State Water Resources Control Board to require water suppliers to implement Stage 2 demand reduction measures identified in suppliers' Water Shortage Contingency Plans, as well as a call for all Californians to voluntarily reduce their water use by 15 percent from 2020 usage levels.

However, after years of prolonged drought, recent storms resulted in the wettest three-week period on record in California. The Department of Water Resources (DWR) found that, in part due to the significant precipitation during the winter of 2022–2023, surface water supplies have been partially rehabilitated in some parts of the state. In particular, DWR and partner agencies found that most regions of the Sierra Nevada are above average for snow water content, and some regions are nearing record amounts of snow, with snow and rain continuing to fall across many regions of the state with more precipitation forecasted. Accordingly, the Governor's office determined that improved conditions have helped rehabilitate surface water supplies but have not abated severe drought conditions that remain in some parts of the state, including the Klamath River basin and the Colorado River basin, and that many groundwater basins throughout the state remain depleted from overreliance and successive multi-year droughts. While the Order observed that the drought is ongoing, it calls for the implementation of "an even more targeted

State response," such that certain provisions of prior orders and proclamations can be rolled back.

The Executive Order

The Order rescinds portions of four state of emergency proclamations made in 2021, as well as portions of Executive Orders N-10-21, N-7-22, and N-3-23. Among these changes, it rescinds the Governor's direction to the State Water Resources Control Board (Water Board) to adopt emergency regulations requiring local agencies to move to Stage 2 of their Water Shortage Contingency Plans. However, those emergency regulations that have already been adopted by the Water Board remain in effect until June 2023. Termination of Stage 2 water shortage demand reduction measures before the emergency regulations expire or before the Water Board rescinds them could be deemed a violation punishable by fine of up to \$500 per day and enforcement action by the Water Board under Water Code § 1058.5, subdivision (d).

The Order also withdrew the Governor's previous direction that all Californians voluntarily reduce their individual water use by 15 percent of 2020 usage levels.

What the Order Leaves in Place

Perhaps equally significant are those declarations, rules, and regulations that the Order *leaves in place*. Among them is the declaration that the drought state of emergency declaration remains in effect in all 58 California counties.

In addition, before issuing a permit for non-exempt, new groundwater wells or alterations to existing wells, well-permitting agencies such as cities and counties are still required to:

- In high and medium priority groundwater basins, obtain a verification from the applicable groundwater sustainability agency that the proposed well is consistent with the groundwater sustainability plan for that basin; and
- In all groundwater basins, determine whether

the proposed well is unlikely to interfere with nearby wells and cause subsidence that would damage nearby infrastructure.

The prohibition on watering certain non-functional turf remains effective.

Local agencies cannot prohibit the hauling of water outside the basin of origin if such hauling is necessary for human health and safety in communities threatened with the loss of affordable, safe drinking water.

State agencies must prioritize and assist local agencies with capturing water from high precipitation events for local storage or recharge.

The Water Board must continue to increase its efforts to investigate illegal diversions and waste and to stop such actions with its enforcement powers.

The Order also directs the State Water Board, DWR, and the Department of Fish and Wildlife to continue collaborating on expediting permitting of recharge projects and working with local water districts to facilitate recharge projects. The purpose of this directive is to maximize the extent to which winter precipitation recharges underground aquifers, for instance by capitalizing on high-flow events and percolating flood waters below ground for the benefit of local aquifers.

Finally, the Order directs the Water Board to “consider” modifying requirements for reservoir releases

or diversion limitations in the Central Valley Project or State Water Project facilities to (1) conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead, (2) enhance instream conditions for fish and wildlife, (3) improve water quality, (4) protect carry-over storage, (5) provide opportunities to maintain or to expand water supplies north and south of the Sacramento-San Joaquin Delta. Importantly, the Order suspends the applicability of the California Environmental Quality Act (CEQA) and the state’s water quality law, Porter-Cologne, as well as their implementing regulations, to effectuate actions taken pursuant to the Order and any approvals granted in furtherance thereof.

Conclusion and Implications

Governor Newsom’s Executive Order acknowledges recent improvements to certain surface water supplies, and rescinds certain high-level directions from the Governor to reduce water usage. However, the drought emergency declaration persists statewide. It remains to be seen whether the Order will facilitate the capture of high flows throughout the state for the benefit of water supplies and beneficial uses thereof.

The *Executive Order N-5-23* (March 24, 2023) is available online at: <https://www.gov.ca.gov/wp-content/uploads/2023/02/Feb-13-2023-Executive-Order.pdf?emrc=b12708>

(Miles Krieger, Steve Anderson)

NAPA COUNTY GROUNDWATER PUMPING EXCEEDED SUSTAINABLE YIELD IN WATER YEAR 2022

On March 24, 2023, the Napa County Groundwater Sustainability Agency (NCGSA) released its Napa County Groundwater Sustainability Annual Report—Water Year 2022 (Report). The Report revealed that the Napa Valley Subbasin’s (Subbasin) total groundwater extractions for Water Year (WY) 2022 exceeded the Subbasin’s sustainable yield of 15,000 acre-feet (AF). (Report at ES-6.)

Background

The Sustainable Groundwater Management Act (SGMA) was signed into law in 2014. The objective of SGMA is “to provide for the sustainable management of groundwater basins.” (Wat. Code § 10720.1.)

Accomplishing sustainable groundwater management under SGMA means managing and using groundwater in a way that can be maintained during SGMA’s planning and implementation horizon without producing undesirable results. (Wat. Code § 10721.)

To reach this goal, each groundwater subbasin is managed by one or more Groundwater Sustainability Agencies (GSAs) pursuant to either a single Groundwater Sustainability Plan (GSP) or multiple coordinated GSPs. (Wat. Code §§ 10721, 10725, 10727.2.) SGMA aims for its subbasins to reach sustainability within 20 years of adopting their individual or coordinated GSPs. (Wat. Code § 10727.2.) The GSPs ensure that the applicable basin operates with its determined sustainable yield. (Wat. Code § 10721.)

The sustainable yield for each basin is “the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result.” (Wat. Code § 10721.)

SGMA provides six undesirable results to avoid while reaching sustainable groundwater management:

- (1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon...
- (2) Significant and unreasonable reduction of groundwater storage.
- (3) Significant and unreasonable seawater intrusion.
- (4) Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies.
- (5) Significant and unreasonable land subsidence that substantially interferes with surface land uses.
- (6) Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water. (Wat. Code § 10721.)

The Department of Water Resources designated the Napa Valley Subbasin as “high priority” under SGMA. (See Water Code., § 10722.4(a)(1).) The NCGSA, the only Groundwater Sustainability Agency in the Subbasin, is the group responsible for implementing the Subbasin’s GSP. (See Water Code., § § 10721, 10725, 10725.2.) The NCGSA submitted the Subbasin’s GSP in 2022 and the Department of Water Resources approved the GSP in 2023. (Report at 6.)

Each year, GSAs are required to present an update on water use, groundwater conditions, and GSP implementation. (Cal. Code Regs., tit. 23, § 356.2) The NCGSA released its Report this March, revealing the Subbasin’s sustainable yield exceedances in WY 2022.

Napa Valley Subbasin Groundwater Extractions

In WY 2022, groundwater extractions in the Subbasin totaled about 18,790 AF. (Report at ES-6.) The

Subbasin’s sustainable yield is estimated at 15,000 AF per year. (*Id.*) This shows a nearly 3,700 AF discrepancy between the sustainable yield and total extractions during a “Normal (below average)” water year. (Report at ES-7.) Although WY 2022 was categorized as a “Normal (below average)” year, the Report noted that the “Very Dry” conditions in WY 2020 and WY 2021 are still impacting the Subbasin, as seen in its susceptibility “to substantially reduced recharge and the propensity for increased groundwater pumping during dry periods.” (Report at 80.)

2022 was not the first year the Subbasin exceeded its sustainable yield. Such exceedances occurred previously in water years 2016 (17,980 AF), 2018 (17,960 AF), 2020 (19,610 AF), and 2021 (22,840 AF). (Report at ES-6.) As a means of comparison, the Report compared WY 2022 to WY 2016, which was the last “Normal (below average)” year. (Report at 79.) In WY 2016, while groundwater extractions were lower than WY 2022 at 17,980 AF, the surface water uses accounted for roughly 8,740 AF of the Subbasin’s supplies. (Report at 79.) In comparison to WY 2016, surface water supplies in WY 2022 were significantly reduced to only 5,560 AF. (Report at 79.)

The Report noted that in addition to exceeding the Subbasin’s sustainable yield, the groundwater pumping seven-year average qualified as an undesirable result for WY 2022. (Report at 79.) The Subbasin’s GSP states that if the seven-year average annual net groundwater pumping exceeds the 15,000 AF sustainable yield, then an undesirable result for reduction of groundwater storage has occurred. (Report at ES-9, 79; see also Wat. Code § 10721.) The seven-year average for WY 2022 was 18,023 AF—roughly 3,000 AF over the sustainable yield. (Report at 79.)

The Report also showed the Subbasin had a second undesirable result in WY 2022 with the depletion of interconnected surface water. (Report at ES-9; see also Wat. Code § 10721.) The Subbasin’s GSP states:

. . . [u]ndesirable results for interconnected surface water occur when groundwater levels at 20 percent of the representative groundwater level monitoring network are below the [minimum threshold] in the fall for three consecutive years of fall measurements. (Report at 97.)

One of the five monitoring sites met this undesirable result criteria. (Report at 97.)

Conclusion and Implications

Although these undesirable results were not unforeseen because of the state's historic drought, the NCGSA is using the results as a means of emphasizing "the importance of GSP implementation activi-

ties." (Report at ES-8.) With continued GSP implementation efforts and monitoring, NCGSA hopes to help mitigate dry-year hydrologic impacts and continue its path to sustainability. (Report at ES-9.) (Taylor Davies, Sam Bivins)

POTTER VALLEY PROJECT SEES LONG AND SHORT-TERM STRUGGLES AS PG&E PURSUES LICENSE SURRENDER APPLICATION AND ANNOUNCES REDUCED CAPACITY AT LAKE PILLSBURY

Since the Potter Valley Project began operation more than a hundred years ago, the Project has fueled Sonoma County water users by diverting water from the Eel River into the Russian River watershed. Comprising the Project are the Scott and Cape Horn dams, an intake tunnel that diverts water from the Eel into the Russian River watershed, and the Potter Valley Powerhouse. Scott Dam and its impounded Lake Pillsbury have helped downstream water users for years now by holding water for later use during the dry season, but with Pacific Gas & Electric's (PG&E) decision not to renew its license for the Potter Valley Project, water users may be forced to craft new solutions of their own.

License Surrender Process

PG&E's license for the Potter Valley Project expired a little over a year ago on April 14, 2022. A week after the license expired, the Federal Energy Regulatory Commission (FERC) issued a notice authorizing PG&E to continue its operation of the Potter Valley Project under an annual license in accordance with the terms of its original 1983 FERC license and accompanying amendments. On July 8, 2022, PG&E filed a proposed timeline with FERC whereby it would submit a license surrender application for the Project within 30 months of FERC's approval (Proposed Plan). In late July, FERC officially approved PG&E's Proposed Plan, establishing a timeline where the surrender application is expected to be filed by January of 2025.

The Russian River Water Forum

According to PG&E's Proposed Plan, months three through eight of the timeline were set to include a public outreach component, with PG&E planning

to "conduct initial outreach to agencies and other stakeholders to solicit relevant information for the preparation of the surrender application and decommissioning plan." However effective that public outreach component was, the Russian River Water Forum (Water Forum) was formed shortly thereafter by Sonoma Water and a collection of other partners to function as a united group in negotiations with PG&E regarding the Project's future.

With its website up-and-running in mid-March, the Water Forum has expressed that its primary mission is:

...to identify water-supply resiliency solutions that respond to PG&E's planned decommissioning of the Potter Valley Project while protecting Tribal interests and supporting the stewardship of fisheries, water quality, and recreation in the Russian River and Eel River basins.

The website continues, writing that:

...[m]ore broadly, the Water Forum will support ongoing regional collaboration on water supply and watershed restoration issues in the Russian River and Eel River basins.

If this all sounds familiar, that's because it is. Prior to the lapsing of PG&E's license for the Potter Valley Project, a coalition of regional interests came together to form the Two-Basin Partnership. The partnership was made up of California Trout, Humboldt County, Mendocino County Inland Water and Power Commission, the Round Valley Indian Tribes, and Sonoma County Water Agency. The Two-Basin Partnership worked towards submitting a license application of its own for the Potter Valley Project, but

failed to meet FERC's April 14, 2022 deadline and dissolved shortly thereafter.

The Water Forum seeks to build upon the efforts of the Two-Basin Partnership and is already taking advantage of the groundwork it performed, as evidenced by the Water Forum's website. With just under two years remaining in PG&E's Proposed Plan before it expects to submit a license surrender application, however, the Water Forum will certainly have its work cut out in crafting a solution that balances the needs of both Eel River and Russian River water users and environmental interests in the two watersheds.

Draining Lake Pillsbury to Mitigate Scott Dam's Seismic Risks

As if the long-term water supply issues surrounding the Potter Valley Project's uncertain future weren't enough, PG&E announced it would be holding open Scott Dam's spillway gates in response to recent analyses and forecasts showing that the Dam could be threatened by seismic activity:

Despite 2023 starting off as a normal or above-normal water year, the spillway gates atop Scott Dam at Lake Pillsbury in Lake County will not be closed this spring or in future years.

By holding open the spillway gates at Scott Dam, Lake Pillsbury's maximum capacity is expected to be reduced by roughly 20,000 acre-feet—a nearly 30 percent decrease compared to a full reservoir.

On the risk management side of things, this results in a significantly lower water load faced by the aging Dam. On the water management side of things,

however, this means that more water be kept flowing down the Eel River during the spring, but less water will be available in Lake Pillsbury for later use in the summer and fall to meet water demands in the Russian River watershed, environmental needs in the Eel, and recreational uses on the lake itself:

With the dam gates remaining open, water availability will be similar to dry year conditions experienced in 2020 and 2021, when Lake Pillsbury's spring top-off did not reach the spillway crest elevation and the project operated under FERC-approved flow variances.

Conclusion and Implications

The handling of the Potter Valley Project has stirred up significant controversy since PG&E announced it would not be renewing its license in 2019. Four years later and the Project's future remains as uncertain now as it did then. With Lake Pillsbury providing up to 67,000 acre-feet of water storage for water users in the Eel River and Russian River watersheds, the Project's disposition will have a significant impact on the region as a whole. Come 2025, PG&E could very well decide to have both the Scott Dam and Camp Horn Dam removed if an appealing alternative hasn't been proposed by that time. If the Water Forum is able to come together and participate in meaningful negotiations with PG&E, however, the collective could very well come up with a plan that is less disheartening than the removal of a regional icon that has served as a key element in the Russian River watershed's supply management system and a recreational getaway for northern Californians. (Wesley A. Miliband, Kristopher T. Strouse)

ARGENT COMMUNICATIONS GROUP HOSTS JUNE CALIFORNIA WATER LAW & POLICY MCLE CONFERENCE—IN PERSON

There is still time to register for the 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 U.S. Supreme Court
- 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!

LEGISLATIVE DEVELOPMENTS

FEDERAL OPEN ACCESS EVAPOTRANSPIRATION DATA ACT IN CONGRESS PROPOSES SIGNIFICANT UPDATES TO WATER MEASUREMENT AND MANAGEMENT

The Open Access Evapotranspiration Data Act (HR 2429) (OAEDA) is once again on the United States House floor after Sen. Catherine Cortez Masto, D-Nev., and Rep. Susie Lee, D-Nev., reintroduced the OAEDA alongside Sen. John Hickenlooper, D-Colo., and Reps. Chris Stewart, R-Utah, Jared Huffman, D-Calif., and Burgess Owens, R-Utah. The version currently under consideration in Congress has the potential to significantly change how water resources are managed and measured in the United States. The OAEDA would require the development of a system for measuring evapotranspiration using satellites, which would provide valuable data for farmers, water managers, and policymakers.

A similar bill was introduced in the 2021-2022 session but did not make it out the House Natural Resources Subcommittee on Water, Oceans, and Wildlife.

Measuring Evapotranspiration

One primary purpose of the OAEDA is to measure evapotranspiration, which is the process by which water is transferred from the land to the atmosphere through evaporation from soil and plant surfaces, as well as through transpiration from plants. It is a key component of the water cycle and is critical for understanding water availability and uses in agricultural and natural systems. However, OAEDA sponsors assert that current methods for measuring evapotranspiration are often time-consuming and costly, and may not be representative of the entire landscape.

Satellites and OpenET Data Program

OAEDA sponsors state that the value of improved evapotranspiration reporting is widely understood in the water resources science and management community, and that satellites offer a promising solution to these challenges, as they can provide a more comprehensive view of evapotranspiration across large areas.

The OAEDA would require the development of a system for measuring evapotranspiration using satellites, and would require that this data be made available to the public through an open-access platform called the Open Access Evapotranspiration (OpenET) Data Program. This would allow researchers, farmers, and water managers to access the data they need to make informed decisions about water use and management.

The OAEDA finds one of the key benefits of using satellites to measure evapotranspiration is the ability to obtain data across large areas, particularly in agricultural regions. By providing data on evapotranspiration across entire watersheds or regions, farmers and water managers could make more informed decisions about when and how much to irrigate, and how to allocate water resources among different crops and uses.

OAEDA sponsors assert that satellite data can also provide a more accurate picture of evapotranspiration than current methods, which often rely on point measurements or estimates based on weather data. Satellites can provide continuous, spatially explicit data that can capture variability in evapotranspiration across different land cover types, soil types, and other factors. This may lead to more accurate estimates of water use and availability, and better predictions of drought and other water-related risks.

OAEDA Challenges

OAEDA also faces challenges. One of the main challenges is the technical complexity of developing a satellite-based evapotranspiration measurement system. This will require significant investment in research and development, as well as coordination among multiple agencies and organizations. The OAEDA looks to share these costs among project partners, though at this time it is not exactly clear which partners those might be. The OAEDA as drafted currently expects the project to have a \$23,000,000 annual impact from 2024 to 2028.

Conclusion and Implications

The potential impacts of the OAEDA are significant, but several many important aspects will likely require refinement before making it to the President's desk for signature. By providing open access to evapotranspiration data obtained through satellite measurements, the OAEDA could help to transform

how water resources are managed and measured in the Western United States. The OAEDA has the potential to benefit farmers, water managers, and natural resource managers alike, by providing the data needed to make informed decisions about water use and management.

(Darien Key, Derek Hoffman)

REGULATORY DEVELOPMENTS

EPA PROPOSES FIRST-EVER ENFORCEABLE NATIONWIDE PRIMARY DRINKING WATER STANDARDS FOR PFAS

On March 29, 2023 the U.S. Environmental Protection Agency (EPA) published a preliminary regulatory determination and a proposed rule that would establish first-ever legally enforceable federal primary Maximum Contaminant Levels (MCLs) for six per- and polyfluoroalkyl substances (PFAS) in drinking water. In addition to creating these enforceable national drinking water standards, these MCLs, if adopted, could be used as a benchmark for establishing groundwater remediation goals or be used in other regulatory or litigation contexts. EPA expects to finalize the rulemaking by the end of this calendar year.

The Proposed Rule and its Requirements

PFAS are a large family of synthetic chemicals that have been in use since the 1940s, and are highly stable and resistant to degradation in the environment, thus colloquially being named as “forever chemicals.” People can be exposed to PFAS through use of consumer products, and/or consuming food and drinking water containing these forever chemicals. The scientific evidence demonstrates that PFAS consumption by humans can result in harmful health effects, including:

...negative impacts on fetal growth after exposure during pregnancy, on other aspects of development, reproduction, liver, thyroid, immune function, and/or the nervous system; and increased risk of cardiovascular and/or certain types of cancers.

As such, the rulemaking, also referred to as EPA’s National Primary Drinking Water Regulation (NP-DWR), proposes to establish primary MCLs for the following six different PFAS compounds:

- Perfluorooctanoic acid (PFOA)
- Perfluorooctane sulfonic acid (PFOS)
- Perfluorononanoic acid (PFNA)
- Hexafluoropropylene oxide dimer acid (HFPO-

DA, commonly known as GenX Chemicals)

- Perfluorohexane sulfonic acid (PFHxS)
- Perfluorobutane sulfonic acid (PFBS).

Under the proposed rule, PFOA and PFOS would be treated as individual contaminants, both with primary MCLs set at 4.0 parts per trillion (ppt or ng/L). For PFHxS, PFNA, PFBS, and HFPO-DA (commonly referred to as GenX Chemicals), EPA proposes the use of a “Hazard Index” MCL where the maximum limit is based on any mixture containing one or more of the four compounds. Compliance with the Hazard Index MCL is calculated as the sum of the ratios of the measured concentration compared to the allowable concentration. To determine the Hazard Index, water systems will need to monitor and compare the amount of each PFAS compound in drinking water to its associated Health-Based Water Concentration (HBWC), which is the level at which no health effects are expected for that compound. The HBWC levels of each GenX Chemical is as follows:

- PFNA: 10.0 ppt
- PFHxS: 9.0 ppt
- PFBS: 2000 ppt
- GenX chemicals: 10.0 ppt.

Water systems will need to then add the comparison values for each compound contained within the mixture. A value greater than 1.0 (the index is unit less) would be considered an exceedance of the proposed Hazard Index MCL. Therefore, the proposed MCL for any mixture containing PFHxS, HFPO-DA and its ammonium salt, PFNA, and/or PFBS is a Hazard Index exceedance of 1.0.

EPA also proposed health-based, non-enforceable MCL Goals (MCLGs) for each of the six PFAS compounds. An MCLG is the maximum level of a contaminant in drinking water where there is no known or anticipated negative effects in an individual’s health. The proposed MCLG for PFOA and PFOS is 0.0 ppt, based on EPA determination that each PFOA and PFOS is “likely to cause cancer,” whereas

the proposed MCLG for PFNA, PFHxS, PFBS, and/or GenX Chemicals is a Hazard Index equal to or less than 1.0

Conclusion and Implications

If adopted, EPA's proposed rule will require public water systems to monitor for the six PFAS compounds, notify the public of the concentrations detected, and reduce concentrations in drinking water if they exceed the proposed primary MCLs. While there are existing methods available to monitor for the constituents (e.g., method 1633 for PFOA and PFOS), treatment technologies to remove the constituents (e.g., granular activated carbon (GAC), anion exchange resins (AIX), reverse osmosis (RO), and nanofiltration) are like to be seen by the regulated community as expensive and cost of compliance a significant concern. Importantly, if adopted, for states

delegated authority to regulate their own programs under the Safe Drinking Water Act, the Proposed Rule would require these states to establish PFAS-related drinking water standards in-line with EPA's final rule and conform to EPA's standards.

Some level of debate regarding the EPA's scientific basis for its proposed MCLs and MCLGs can be anticipated, as the federal Safe Drinking Water Act [<https://www.epa.gov/sdwa>] obligates the agency to use best available science when setting standards. As such, challenges to the proposed rule related to the costs of implementing it, procedural mechanisms, and the sufficiency of the scientific evidence supporting EPA's conclusions, are also anticipated. The proposed rule is available online at: <https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking> (Jaycee Dean, Hina Gupta)

U.S. BUREAU OF RECLAMATION RELEASES SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON COLORADO RIVER OPERATIONS AT LAKE MEAD AND LAKE POWELL

On April 14, the United States Bureau of Reclamation (Bureau) released for comment a draft Supplemental Environmental Impact Statement (SEIS) for proposed modifications to interim guidelines pertaining to the management of the Colorado River. The SEIS focuses on modifications to operational guidelines for Lake Powell and Lake Mead, and specifically on those guidelines governing shortage conditions, elevation and release tiers for the reservoirs, and mid-year reviews of reservoir operating conditions. The Bureau expects to release a final SEIS by late summer 2023.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire

flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states (lower Basin states) are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River ba-

sin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, developed and implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet. The 2007 Interim Guidelines are currently set to expire by January 1, 2027.

The 2007 Interim Guidelines have four operational elements: shortage guidelines, coordinated reservoir operations, storage and delivery of conserved water, and surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the 2007 Interim Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, the Bureau will apportion the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

Also, in 2019, the lower Basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and the Bureau must consult and determine what additional measures will be taken by the Bureau and the lower basin states if Lake Mead levels are forecast to be at or below 1,030 feet during the succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau releases

operational studies called "24-Month Studies" that project future reservoir contents and releases.

Analysis

The SEIS focuses on the 2024 operating year. The operating year for Glen Canyon Dam, which forms Lake Powell, begins October 1. For Hoover Dam, which forms Lake Mead, the operating year begins January 1. The modified guidelines will also take into account the August 2023 24-month study. The SEIS nonetheless will inform operating guidelines for 2025 and 2026, although guidelines for those years may be further refined based on the outcome of the 2024 operating year. The Bureau will release a new environmental impact statement for post-2026 operations in the future.

The SEIS proposes three alternatives: a No Action Alternative, Alternative Action 1, and Alternative Action 2. The No Action Alternative would continue the existing 2007 Interim Guidelines without change. Notably, under the existing guidelines, reservoir releases are assessed at a scheduled mid-year review, and any changes to projected releases must only be for increasing, not reducing, releases.

Alternative Action 1

Alternative 1 proposes reduced releases from Lake Mead based on the concept of priority, *i.e.*, the Law of the River. Reductions are limited to a total of 2.083 million acre-feet from Lake Mead because that is the maximum amount of reductions analyzed in the final EIS for the 2007 Interim Guidelines. According to the Bureau, using that previously analyzed figure will help finalize the SEIS by late summer, before the 2024 operating year begins.

Alternative Action 1 also contemplates 6-8.23 maf of releases from Lake Powell when Lake Powell is below 3,575 feet elevation. In particular, Alternative Action 1 modifies coordinated reservoir operations at Lake Powell and Lake Mead. When elevations at Lake Powell (projected as of January 1) are below 3,575 feet, an initial annual release in the amount of 6 maf would be set. Adjustments based on the April 24-Month Study would be made depending on projected end-of-year lake levels. Depending on end-of-year projections, releases could total from 6 maf to 8.23 maf. However, Alternative Action 1 preserves water levels of 3,500 feet at Lake Powell because the

minimum power pool at that reservoir, *i.e.* the lowest lake level where power can still be generated from Glen Canyon Dam, is 3,490 feet. If lake levels are below 3,500 feet in any month, the Bureau would impose a 6 maf maximum release limit and such releases would be set to maintain or increase lake elevations consistent with existing operating criteria for Glen Canyon Dam. Finally, under Alternative Action 1, the mid-year review would allow for further reductions in deliveries.

Alternative Action 2

Under Alternative Action 2, the Bureau proposes to reduce releases from Lake Mead in the same amount as contemplated by Alternative Action 1, *i.e.*, to a maximum of 2.083 maf. However, reduced releases would not be based exclusively on the concept of priority. Instead, reductions are distributed in the same percentage across all lower Basin water users. Depending on levels at Lake Mead, additional percentage reductions (*i.e.* in excess of reductions

already contemplated by the 2007 Interim Guidelines and DCP), range from 2.67 percent to 13.11 percent for each lower Basin state. Coordinated reservoir operations and allowances for further reductions following mid-year review are the same under Alternative Action 2 as they are for Alternative Action 1.

Conclusion and Implications

The draft SEIS is not a final document. Written comments are due May 30. At this time, the Bureau does not have a preferred alternative. It remains to be seen which action the Bureau adopts, or whether additional changes will be made based on public responses. Nonetheless, the likelihood of further reductions in releases for water users is likely in operating year 2024. The Supplemental Environmental Impact Statement is available online at: <https://www.usbr.gov/ColoradoRiverBasin/documents/NearTermColoradoRiverOperations/20230400-Near-termColorado-RiverOperations-DraftEIS-508.pdf>
(Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES SPELLS OUT NEXT STEPS FOR INADEQUATE GROUNDWATER SUSTAINABILITY PLANS AT STATE WATER BOARD MEETING

On April 4, the State Water Resources Control Board (State Water Board) conducted a public meeting during which it addressed its ongoing implementation of the Sustainable Groundwater Management Act (SGMA). The California Department of Water Resources (DWR) presented six groundwater basins to the State Water Board that were deemed to have inadequate Groundwater Sustainability Plans (GSPs) after DWR review, and outlined the next steps that the State Water Board could take to correct those deficiencies. DWR and the State Water Board emphasized that no action would be taken during the meeting; rather, the meeting focused on addressing the process that the Board was required to implement to address GSP deficiencies and conduct probationary hearings.

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 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.

In January 2022, after reviewing GSPs that had been submitted by 24 basins, DWR determined that 12 of those GSPs 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. In July 2022, all 12 of the basins that had been deemed incomplete and inadequate resubmitted their GSPs. In March of 2023, DWR determined that six of the 12 had been adequately completed and were approved, while the other six remained inadequate and were not approved.

Six Basins Remained Inadequate after Resubmittal

The six basins that remained inadequate even after resubmittal were the (1) Chowchilla Subbasin, (2) Delta-Mendota Subbasin, (3) Kaweah Subbasin, (4) Tule Subbasin, (5) Tulare Lake Subbasin, and (6) Kern Subbasin, all in central California. According to DWR, these basins did not sufficiently address deficiencies in how GSAs structured their sustainable management criteria. In particular, DWR described 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 they would prevent undesired effects on groundwater users in the basins or on critical infrastructure.

After deeming the six basins inadequate, DWR referred those to the State Water Board to decide whether to move forward with state intervention, as required by SGMA. SGMA required that the State Water Board go through a public process, including public notice and hearing, to determine whether the inadequacies identified by DWR in the six GSPs warranted those basins being placed in probationary status. Those six basins are required to continue to be in communication with DWR and the State Water Board regarding the ongoing process.

On April 4, 2023, the State Water Board held a meeting to discuss, among other things, an update on the implementation of SGMA. Prior to the meeting, the State Water Board announced that discussions at the meeting would focus on DWR’s determinations and the process that the Board might implement to conduct probationary hearings, as well as what the public could expect from the process. The meeting would mainly address the Board’s options regarding its overall approach to SGMA and probationary hearings.

Next Steps

During the April 4 Board meeting, DWR noted that, for the six basins whose GSPs were deemed inadequate, DWR had afforded a 60-day public comment period and given each basin 180 days to correct any deficiencies and re-submit their GSPs. DWR also listed the steps that had been taken by the six basins that had started with inadequate GSPs and had resubmitted GSPs that were then deemed adequate, including (1) taking an inventory and disclosing all groundwater uses and users in the basin, including domestic wells; (2) taking responsibility as stewards of the basin; (3) making plans to minimize or eliminate land subsidence by identifying critical infrastructure that could be impacted and coordinating to identify next steps; and (4) identifying interconnected surface water. In terms of interconnected surface water, DWR had recommended corrective actions in most basins, and while the agency plans to release more guidance for interconnected surface water in 2025, basins can identify stream reaches that are interconnected, beneficial uses including groundwater ecosystems, and data gaps in their GSPs.

DWR then addressed the six basins that remained inadequate even after resubmittal and listed some of the general deficiencies in their GSPs, including: (1) failure to conduct analysis to show the GSP’s impacts on groundwater levels for beneficial users and failure to develop a sufficient management criteria for groundwater levels; (2) failure to modify criteria related to land subsidence and failure to identify critical infrastructure that could be affected by subsidence or to coordinate with key interested parties; and (3) failure to establish sufficient management criteria for water quality. DWR mentioned that the Tule and Kern basins were continuing to overdraft groundwater by over 500,000 acre-feet per year, and that Delta-Mendota was the only one of the six that was not over-drafting groundwater. DWR also mentioned that the Tule, Tulare Lake, and Kaweah basins were experiencing up to six and seven feet of land subsidence in some areas.

DWR then outlined the next steps in the process for addressing the six inadequate GSPs. DWR noted that their finding of inadequate GSPs was the “trigger” in the system that led to potential state intervention. The inadequate GSPs will then be referred to the Board, which will evaluate DWR’s inadequacy

determination and decide whether further state intervention is necessary. If the State Water Board decides further intervention is necessary to achieve groundwater sustainability, the State Water Board will issue public notice of a probationary hearing to the basin and the affected cities and counties. The State Water Board will then conduct a probationary hearing to determine whether the basin should be placed in probationary status until the GSP deficiencies are corrected. If a basin is placed in probationary status, the State Water Board must identify the deficiencies in that basin's GSP and certain remedial actions, and the basin will have a minimum of one year to correct its GSP before an interim plan is put into place. During probation, the basins must continue to implement the parts of their GSPs that are adequate.

Within 90 days after the State Water Board determines a GSP to be inadequate, extractors will begin to collect data in the correlating basin and prepare an extraction report. The basin must report all groundwater extraction in the GEARS reporting system at that time, including well locations and the amounts extracted there. The State Water Board can enact fees for well pumping, if necessary, as an emergency regulation, although small domestic well owners would likely be exempt from such fees. If the deficiencies in the GSP are not cured within the probationary period, which would be a minimum of one year long, the State Water Board would issue public notice

for a hearing for adoption of an interim plan for the deficient basin.

DWR noted that, because there are currently six basins with inadequate GSPs, the State Water Board would need to space out the probationary hearings. DWR suggested that the Board could hold one or two hearings per month for a period of three months, or could conduct three hearings at a time, with a gap of six to 12 months until the next three hearings are held. DWR also noted that, at this point, DWR has provided the inadequacy determinations to the State Water Board, so if the board were to issue notices of probationary hearings in May of 2023, the first hearings could potentially be held in September of 2023.

Conclusion and Implications

DWR has now referred six basins with inadequate and incomplete GSPs to the State Water Resources Control Board. The State Water Board now must make a determination as to whether the DWR was correct in those deficiency determinations, and whether further state intervention is warranted in the six basins. If the State Water Board determines further state action is warranted, it could release notices of probationary hearings for any of the 6 basins as early as May of 2023. It remains to be seen how the State Water Board will proceed.
(Miles Krieger, Steve Anderson)

CALIFORNIA WATER COMMISSION RECEIVES STATUS UPDATE ON MULTI-BENEFIT LAND REPURPOSING PROGRAM

The California Water Commission (Commission) recently received an overview and update on the California Department of Conservation's (Department) Multi-benefit Land Repurposing Program (MLRP). The MLRP is designed to encourage regions to repurpose lands, including agricultural land, to deliver multiple benefits, in response to evolving groundwater management programs.

Background

In late 2021, California Governor Gavin Newsom signed legislation that created the MLRP. The purpose of the MLRP is to increase regional capacity to repurpose agricultural land in order to reduce regional

reliance on groundwater while also improving community health, economic wellbeing, water supply, renewable energy, and climate benefits. The MLRP aims to provide low-income rural communities and smaller-scale agricultural operators more involvement in land and water use planning.

One of the Department's stated concerns is to protect farmland and long-term water availability. The Department states that as water availability decreases, it anticipates seeing simultaneous reductions in quality farmland to produce food. The Department is also concerned that if land use decision-making at the parcel level is left to traditional processes, agricultural lands will become scattered across the state.

Description of the Multi-Benefit Land Repurposing Program

The stated goals of the MLRP are: (1) to support coordinated regional efforts; (2) provide short and medium-term drought response strategies; (3) repurpose agricultural lands; (4) sustain land-based economies; (5) reduce groundwater use; (6) create and restore habitat; and (7) provide benefits to disadvantaged communities.

The MLRP works through issuing regional block grants in an attempt to reach its goals. The Department grants up to \$10 million to regional or basin-scale organizations to develop and implement land repurposing programs. The types of projects that the MLRP funds include habitat preservation, multi-benefit recharge areas, facilitation of renewable energy projects, re-establishment of tribal land uses, transitioning to dryland farming or rangeland or less waterintensive crops, planting cover crops, creation of parks or community recreation areas, incentive payments to landowners, farmers, and ranchers to implement multi-benefit projects, land acquisitions, and pumping allocation acquisitions.

The MLRP requires several deliverables from participants. The first is a Multi-benefit Agricultural Land Repurposing Plan, which grantees must develop after they receive grant funds. A Multi-benefit Agricultural Land Repurposing Plan is a strategic plan to utilize landscape to achieve the different benefits identified as most important. Additionally, the MLRP provides for repurposing project development, permitting, and implementation requirements. The MLRP also provides funding to support the capacity needs of partners, as well as outreach and training and monitoring.

The program also includes a Statewide Support Entity that is meant to coordinate technical assistance and outreach for the program. The Department seeks to encourage meaningful Tribal involvement in the MLRP and similar programs. To do so, the Department offers a rolling, non-competitive \$5 million grant carve out for tribes. All funds not granted to other organizations through the MLRP will roll back into the program through the carveout for Tribes.

Current Status of MLRP

The Department has awarded Round-1 awards through the MLRP. The Department originally received applications seeking a total \$113 million in funds, of which it awarded a total \$40 million in May 2022, through four grants in the amount of \$10 million per grant. Grant awardees and regions included: (1) Pixley Irrigation District, (2) Madera County, (3) Kaweah Subbasin, and (4) Upper Salinas Valley. Grant awards will fund habitat and groundwater recharge projects, agricultural conservation and fallowing programs, flood managed area recharge (Flood MAR) programs.

The Department recently received MLRP Round 2 applications. The Department has also modified its guidelines for the program to include adding disadvantaged community benefits as its own selection criterion, as well as clarifying project eligibility, the application review process, project monitoring expectations, and eligible costs.

Conclusion and Implications

The Multi-Benefit Land Repurposing Program states that it is designed to engage low-income rural communities and smaller-scale agricultural farmers in long-term land and water use planning. The Department of Conservation has already awarded the first round of funds to certain communities, which are already developing plans to manage agricultural lands and local habitats. While some of the MLRP objectives are understood, many local agricultural operators remain understandably frustrated by the challenges, programs and management actions arising from SGMA implementation. In some areas, a lack of Groundwater Sustainability Agency transparency in the development and implementation of Groundwater Sustainability Projects and management actions has undermined trust and cooperation in implementation. Many local operators may understandably question why re-purposing is required at all. In some areas, repurposing or multi-purposing may serve both local landowners and long-term benefits to groundwater basins. Implementation of the MLRP is evolving and its effect (and effectiveness) remains to be seen. (Christina Suarez, Derek Hoffman)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT UPHOLDS VIRGINIA'S CLEAN WATER ACT SECTION 401 PERMIT FOR NATURAL GAS PIPELINE

Sierra Club v. State Water Control Board, 64 F.4th 187 (4th Cir. Mar. 29, 2023).

The United States Court of Appeals, Fourth Circuit upheld Virginia's grant of a section 401 water quality certification for an in-stream natural gas pipeline.

Background

This appeal is the latest installment in a series of challenges to Mountain Valley Pipeline, LLC's (MVP) plans to build a natural gas pipeline (Pipeline) that will span approximately 304 miles from Wetzel County, West Virginia to Pittsylvania County, Virginia.

In February 2021, MVP submitted an application requesting both a Virginia Water Protection individual permit (VWP Permit) from Virginia's Department of Environmental Quality (DEQ) and the State Water Control Board (Board) (collectively: the Agencies) and a certification from the United States Army Corps of Engineers (Corps) pursuant to Section 404 of the federal Clean Water Act (CWA). On December 14, 2021, the Board adopted DEQ's recommendation to approve MVP's application.

The Sierra Club, Appalachian Voices and eight other conservation groups (collectively: Petitioners) sued the Agencies and several individuals associated with the Agencies (Respondents), alleging that its approval of a state water protection permit and water quality certification violated the Clean Water Act.

Petitioners asserted that the VWP Permit should be vacated because the Agencies failed to: (1) evaluate whether alternative crossing locations would be environmentally preferable and practicable; (2) independently verify whether each of MVP's proposed water crossing methods was the least environmentally damaging practicable alternative (LEDPA); and (3) determine whether the Pipeline will comply with Virginia's narrative water quality standards. In addition, Respondents contended that the court lacked jurisdiction to review the petition.

The Fourth Circuit's Decision

Petitioners argued that the Agencies' issuance of the VWP Permit was not in accordance with the law because the Agencies failed to: (1) evaluate alternative crossing locations; (2) verify MVP's crossing methods were the least environmentally damaging practicable alternative (LEDPA); and (3) evaluate whether the Pipeline will comply with Virginia's narrative water quality standards. The court rejected each argument.

Evaluation of Alternative Crossings

Petitioners' first argument turned on whether the Agencies were required to ask:

...on a crossing-by-crossing basis, whether alternative sites for MVP's proposed crossings would avoid or result in less adverse impact to state waters.

Respondents explained that the Pipeline is a large, contiguous project, and, as such, changing one stream crossing would alter the Pipeline's siting in other places. The Court of Appeals found that Petitioners failed to present any evidence indicating that any crossing could be moved without altering the Pipeline's siting elsewhere and concluded that the Agencies correctly applied Virginia law by approving MVP's proposed crossing locations.

Least Environmentally Damaging Practicable Alternatives Analysis

Petitioners next argued that the Agencies acted arbitrarily and capriciously by failing to independently verify whether each of MVP's proposed water crossing methods was the LEDPA. Specifically, that the Agencies failed to address Petitioners' expert report. The court noted that DEQ did not simply grant

MVP's application without considering its merits. Rather, the agency held multiple public meetings where it heard directly from the public, considered nearly 8,000 public comments, addressed several recurring issues raised by the commenters, and provided a Final Fact Sheet detailing its reasons for recommending that the Board grant MVP's application for a VWP Permit. The court found evidence in the record indicating that the Agencies asked a number of clarifying questions to ensure they were satisfied that the project minimizes the impact on the environment. The court was satisfied that the Agencies considered the relevant data and provided a satisfactory explanation for their conclusion. The court concluded that the Agencies' review of MVP's proposed crossing methods was neither arbitrary nor capricious.

Compliance with Virginia's Narrative Water Quality Standards

Lastly, Petitioners argued that the Agencies acted arbitrarily and capriciously by failing to address whether the Pipeline would comply with Virginia's narrative water quality standard. DEQ addressed this issue in its responses to the public comments, in which it listed a host of conditions that it placed on the VWP Permit to ensure that Virginia's water quality is protected both during and after construction. In addition, DEQ described the indicators it uses to measure water quality, which Petitioners have not challenged. The court concluded that the Agencies did not act arbitrarily and capriciously by determining

that the Pipeline will comply with Virginia's narrative water quality standard.

Federal Court Jurisdiction

Finally, the court addressed Respondents' argument that the court lacked jurisdiction. Respondents argued that the court lacked jurisdiction because (1) Petitioners' claims were rooted in state law and (2) Virginia did not waive sovereign immunity by participating in the regulatory schemes of the Natural Gas Act and Clean Water Act.

The court explained that DEQ was acting pursuant to the authority granted to it through the CWA when it issued the VWP Permit, which provided the court jurisdiction to hear this case. As for the second argument, the court explained that a state's voluntary participation in the NGA and CWA's regulatory schemes resulted in federal jurisdiction over the state's decisions made pursuant to that scheme and concluded that the State waived the defense of sovereign immunity by issuing the VWP Permit.

Conclusion and Implications

This case provides a reminder that large projects with multiple layers of regulatory oversight typically undergo extensive public review and evaluation. A challenge based on a deficiency of the factual record is difficult to prove. The Court of Appeals' opinion is available online at: <https://www.ca4.uscourts.gov/opinions/212425.P.pdf>
(Tiffany Michou, Rebecca Andrews)

DISTRICT COURT AWARDS DEFENDANTS THEIR COSTS IN THE GOLD KING MINE RELEASE

In re Gold King Mine Release in San Juan County, Colorado, ___F.Supp.4th___,
Case No. 18-CV-744-WJ-KK (D. N.M. Feb. 21, 2023).

The U.S. District Court for New Mexico awarded costs to defendants in the Gold King Mine release case against plaintiffs who filed their case more than two years after the state statute of limitations on state law claims.

Factual and Procedural Background

In 2015, Environmental Restoration, LLC, a contractor for Environmental Protection Agency, re-

leased contaminated water from the King Gold Mine into Cement Creek, a tributary of the Animas and San Juan Rivers in southwest Colorado. The rivers continue into New Mexico. Multiple federal Clean Water Act lawsuits were centralized in multidistrict litigation in the District of New Mexico.

In 2019, farmers and livestock raisers brought a state law nuisance claims against Environmental Restoration. Their action was consolidated with the multidistrict litigation in New Mexico. In a 2022

decision, the Tenth Circuit Court of Appeals determined that Colorado's two-year statute of limitations, and not the Clean Water Act's five-year statute of limitations, applied to the state law negligence claims. The District Court then dismissed plaintiffs' state law claims because they fell outside of the two-year statute of limitations.

Environmental Restoration moved to recover their costs against the farmers and livestock raiser plaintiffs under Federal Rule of Civil Procedure Rule 54. Under Rule 54, costs are generally allowed to the "prevailing party." To deny a prevailing party its costs is considered a severe penalty. As a result, a District Court can only deny costs under one of six circumstances: (1) the prevailing party is only partially successful, (2) the prevailing party was obstructive and acted in bad faith during the course of the litigation, (3) damages are only nominal, (4) the non-prevailing party is indigent, (5) costs are unreasonably high or unnecessary, or (6) the issues are close and difficult.

The District Court's Decision

Environmental Restoration asserted that, as the prevailing party, it was entitled to an award of approximately \$70,000 in costs for filing fees and deposition costs. Plaintiffs argued the court should deny Environmental Restoration's costs because: (1) the legal issues were close and difficult and the claim was brought in good faith; and (2) Environmental Restoration was only partially successful. In the alternative, the plaintiffs contended the court should deny deposition costs that were not reasonably necessary to defeat the claims.

The court first considered whether the legal issues were close and difficult. Plaintiffs argued the statute

of limitations question raised an issue of first impression. The court rejected this argument, reasoning that the Tenth Circuit Court of Appeals applied existing law that the point source's state law applies to state actions brought as part of a federal diversity action in federal court.

The court next considered whether Environmental Restoration was only partially successful. Plaintiffs argued that the defendants may still be found liable in the larger multi-district litigation. The court rejected this argument because the state law action was centralized with the multi-district litigation only "for coordinated or consolidated pretrial proceedings" but otherwise the actions were separate.

Finally, the court considered whether certain deposition costs should be denied and determined that because Environmental Restoration agreed to deduct approximately \$10,000 in deposition costs, the total award of costs would be reduced by that amount. The court awarded approximately \$60,000 in costs against the plaintiffs.

Conclusion and Implications

This case reminds potential plaintiffs of the risks of bringing an unsuccessful action in federal court. Statutes of limitations questions can be challenging in environmental actions, and as this case demonstrates, a late filing may result in more than just a dismissal of the action. Under Rule 54 of the Federal Rules of Civil Procedure, a successful defendant may receive costs, and if the underlying substantive law allows it, a successful defendant may also receive attorneys' fees. The District Court's opinion is available online at: <https://cases.justia.com/federal/district-courts/new-mexico/nmdce/1:2018cv00744/397922/648/0.pdf> (Rebecca Andrews)

COURT OF FEDERAL CLAIMS PARTIALLY GRANTS MOTION TO IMPOSE SANCTIONS FOR SPOILIATION OF EVIDENCE RELATING TO CLEAN WATER ACT PERMITTING OF WASTE DISCHARGES

United Affiliates Corp. v. United States, 164 Fed. Cl. 565, 571 (Feb. 28, 2023).

The United States Court of Federal Claims recently imposed sanctions on a mining company for destroying documents relevant to its ongoing lawsuit against the U.S. Environmental Protection Agency (EPA). The Federal Court of Claims found that the mining company misled the federal government about the existence of documents, which were highly relevant to determining the central claims of the ongoing litigation.

Factual and Procedural Background

Mingo Logan Coal LLC (Mingo) leased land in West Virginia owned by United Affiliates Corp. (United) to operate a surface coal mine. Mingo sought a federal Clean Water Act Section 404 permit to discharge mining-generated waste into two nearby streams. The permit was issued in 2007, after a ten-year application process and environmental impact study. Four years later, in 2011, the EPA withdrew the permit. Shortly thereafter, United and Mingo filed suit alleging that the permit withdrawal constituted a categorical and regulatory taking of Mingo's property under the Fifth Amendment.

In May 2019, the United States Court of Federal Claims partially granted the federal government's motion to dismiss. The court agreed that the plaintiffs failed to allege a compensable property interest and thus could not state a categorical takings claim as a matter of law, but found the taking sufficiently alleged to support a regulatory takings claim.

During the subsequent discovery process, the federal government sought from Mingo mine models and forecasts that supported the 2007 permit. Mingo provided the modeling files it created in 2006, but the government believed more recent models existed because Mingo conducted contract mining operations for a neighboring mine after the Section 404 permit was issued in 2008. After a series of discovery conferences that failed to resolve the issue, the federal government deposed Mingo Logan in August 2021 in order to obtain the mine modeling it had.

Two days before the scheduled December 8, 2021, deposition, Mingo informed the federal government that certain requested data was lost. The files were on the hard drive of the engineer chiefly responsible for the mine planning and modeling. However, Mingo did not place a litigation hold on the engineer's files. Therefore, when the engineer left Mingo four months after it filed the complaint, his computer and files were not preserved. The federal government moved for evidentiary sanctions against Mingo and United for their failure to preserve those documents.

The Court of Federal Claims' Decision

The court granted in part the motion for sanctions against Mingo and United for committing spoliation of evidence. The court observed that a party has a legal duty to preserve evidence when litigation is 'pending or reasonably foreseeable. Where a party fails in that duty, it commits spoliation. In reviewing the reasonableness of sanctions against a spoliator, the court applied a four-part policy rationale. First, sanctions for spoliation of evidence are imposed to "punish the spoliator" and prevent that party from benefiting from the misdeed; second "to deter future misconduct"; third, to remedy or mitigate damages, evidentiary or otherwise, caused by the spoliation; and fourth, to uphold the judicial process and "its truth-seeking function."

Spoliation of Evidence

Here, the court concluded Mingo committed spoliation. The engineer's files for updated mine models and alternative disposal sites were lost, although Mingo initially asserted that such files did not exist. Only shortly before the deposition did Mingo verify the existence of those deleted files. In actuality, the engineer's files were deleted four months after Mingo filed its complaint. Although Mingo had instructed its employees about data preservation, the court found that Mingo failed to adequately follow up in ensuring compliance with those instructions. Thus, Mingo committed spoliation.

Measuring the Impact of Spoliation

In measuring the impact of that spoliation, the court examined the relevance of the lost evidence as well as the extent the lost evidence prejudiced the federal government. Here, the court determined the lost evidence to be relevant to the litigation. The updated mine models and alternative disposal sites would have provided the government the mine site's conditions at the time of the alleged taking, as well as Mingo's available alternatives for dumping mining waste. Both topics would help determine the economic value of the permit revocation upon which the plaintiffs' regulatory takings claim was based. The court rejected Mingo's argument that the economic value could be based on the 2006 calculations, finding that the updated files would provide a more accurate record when the Section 404 permits were revoked in 2011. Thus, the spoliated evidence was relevant to the litigation.

Prejudice

Further, the court concluded that the federal government was prejudiced by the spoliation. Only Mingo possessed those files, and the government had no way to obtain the information through other means or otherwise verify Mingo's calculations without source data. Again, the court found Mingo's argument that the 2006 models were sufficient to be unpersuasive. Mingo could be correct in that assertion, the court reasoned, but there is no way to know if it is telling the truth without the lost files.

Sanctions

The court found sanctions to be warranted against Mingo, as they failed to produce the requested evidence, intentionally deleted it, and did not provide an adequate substitute for the deleted files. The sanction awarded attorney's fees and costs against Mingo, as the federal government held unnecessary depositions stemming from the spoliation, as well as increased costs from their attempts to reconstruct the lost evidence from available data. However, the sanction awarding attorney's fees did not apply to United, as the court found no evidence to suggest United had anything to do with Mingo's spoliation, thus rejecting part of the federal government's motion. The court's sanction also precluded all plaintiffs, including the United, from relying on the spoliated evidence. Although United was not responsible for the spoliation, the court agreed with the federal government's argument that United, as a co-plaintiff, could still make use of the destroyed evidence, and it would be reasonable to extend the prohibition on spoliated evidence to both plaintiffs.

Conclusion and Implications

This case demonstrates the extent to which spoliation of evidence can extend beyond the spoliator and affect a co-plaintiff. The case also upholds the application of spoliation to acts where the party failed to adequately ensure subordinates' compliance with required litigation holds on relevant documents. The court's opinion is available online at: <https://law.justia.com/cases/federal/district-courts/federal-claims/cofce/1:2017cv00067/33981/138/> (Michael Ervin, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS STATE WATER RESOURCES CONTROL BOARD'S GENERAL WASTE DISCHARGE REQUIREMENTS IN WQO 2018-0002

Environmental Law Foundation v. State Water Resources Control Board, Case No. C093513, ___Cal.App.5th___, 305 Cal.Rptr.3d 862 (3rd Dist. 2023).

The California Third District Court of Appeal in *Environmental Law Foundation v. State Water Resources Control Board (ELF)*, affirmed the Sacramento County Superior Court's judgments upholding the State Water Resources Control Board's (State Water Board) adoption of general waste discharge requirements in Water Quality Order 2018-0002 (WQO 2018-02) and denying three petitions for writ of mandate.

Background

Under the Porter-Cologne Water Quality Act, the Central Valley Regional Water Quality Control Board (Central Valley Regional Board) and State Water Board are charged with "primary responsibility for the coordination and control of water quality" in the Central Valley. (*ELF*, 305 Cal.Rptr.3d at 869 [quoting Wat. Code § 13001.].) In doing so, the State Water Board adopted a Nonpoint Source Policy for regulating discharges of waste into waters of the state from non-point sources, *i.e.*, runoff from irrigated agriculture. (*Id.* at 871.) The Nonpoint Source Policy encourages Regional Water Quality Control Boards to be "as creative and efficient as possible in devising approaches to prevent or control pollution." (*Ibid.*) In doing so, the Nonpoint Source Policy requires the Regional Boards incorporate forth five key elements in nonpoint source control programs. (*Ibid.*; Cal. Code Regs., tit. 23, § 2915.)

The Central Valley Regional Board issued Waste Discharge Requirements General Order R5-2012-0116, establishing categorical requirements for non-point source discharges for a category of farmers whom are members of the East San Joaquin Water Quality Coalition (Coalition). Various groups filed petitions for reconsideration of that order to the

State Water Board. (WQO 2018-02, at 6.) The State Water Board revised the order and adopted WQO 2018-02. (*ELF*, 305 Cal.Rptr.3d at 868.) WQO 2018-02 manages discharges from irrigated lands to waters of the state within the Eastern San Joaquin River watershed and assigns monitoring and reporting duties to the Coalition and individual growers within the watershed that are members of the Coalition. (*Ibid.*)

Under WQO 2018-02, members of the Coalition must take three steps for compliance. (*ELF*, 305 Cal.Rptr.3d at 873.) First, Coalition members must implement management practices that minimize waste discharge into surface waters from irrigation, and record and report implemented management practices in farm evaluations, irrigation and nitrogen management plans, and irrigated and nitrogen summary reports. (*Ibid.*) Second, Coalition members must take additional actions, such as additional training and certification of their practices, when water quality conditions suggest compliance issues. (*Ibid.*) Third, the Regional Board must verify that implemented management practices are effective in addressing water quality problems. (*Ibid.*)

Three different environmental groups—Environmental Law Foundation, Monterey Coastkeeper, and Protectores del Agua Subterranea (collectively: Petitioners)—filed separate petitions for writ of mandate challenging WQO 2018-02 on numerous grounds. (*ELF*, 305 Cal.Rptr.3d at 868-69.) The trial court consolidated the cases, granted a motion for leave to intervene by the Coalition and others, and then held a trial on the merits. (*Id.* at 869.) The trial court held that the State Water Board did not abuse its discretion in adopting WQO 2018-02 and denied the Petitioners' writ petitions. (*Ibid.*) The Petitioners timely appealed.

The Court of Appeal's Decision

The Court of Appeal addressed each of Petitioners' arguments on appeal and affirmed the trial court's opinion in its entirety. (*ELF*, 305 Cal.Rptr.3d at 869.) Most of Petitioners' arguments took issue with how WQO 2018-02 permits the Coalition to aggregate and anonymize individual members' data when it reports compliance to the Central Valley Regional Board. (*Ibid.*) As a result, they claim that WQO 2018-02 does not implement the Board's Nonpoint Source Policy in a manner required by law because it conflicts with the language of various key elements of the Nonpoint Source Policy. (*Id.* at 880.)

Nonpoint Source Policy

The Court of Appeal analyzed the Nonpoint Source Policy and distinguished the key elements into two parts. (*Id.* at 881-82.) First, there is the "element" component, which sets forth the binding requirement for how regional boards may implement the policy. (*Id.* at 882) Second, there is the "commentary" component, which describes how regional boards can comply with the element. (*Ibid.*) The Court of Appeal found that the Petitioners arguments cited and relied upon the commentary component of the key elements, which was non-binding and did not preclude reporting of data on an anonymous and aggregated basis. (*Id.* at 882-83.) Instead, the State Water Board reasonably construed its own regulations in the Nonpoint Source Policy and determined that the data reporting was sufficient to enable the Central Valley Regional Board assess the Coalition members' compliance. (*Ibid.*)

Feedback Mechanisms

Petitioners also argued that WQO 2018-02 does not provide the Regional Board with sufficient feedback mechanisms and was unsupported by the evidence. (*ELF*, 305 Cal.Rptr.3d at 869.) Specifically, the Petitioners took issue with the scale by which WQO 2018-02 required the Coalition report data to the Central Valley Regional Board. (*Id.* at 883.)

The State Water Board concluded, based on expert reports and testimony, that it could not reasonably require data reporting on a field-level basis because it was nearly impossible to determine what field pollutants came from. (*Id.* at 883-85.) The expert reports and testimony concluded that it was "completely sufficient" to assess performance and compliance with discharge requirements was on a township-level scale. (*Ibid.*) The Court of Appeal found these expert reports and testimony constituted substantial evidence supporting the State Water Board's conclusion to require reporting on a township level. (*Id.* at 885-86.)

Looking to Precedent

Finally, certain Petitioners argued that WQO 2018-02 violated established precedent, *California Sportfishing Protection Alliance et al. v. California Regional Water Quality Control Bd., et al.*, Sacramento Super Ct. Case No. 34-2012-80001186 (CSPA) and *Asociacion De Gente Unida Por El Agua, et al., v. Central Valley Regional Water Quality Control Bd.*, 210 Cal.App.4th 1255 (2012) (AGUA). (*ELF*, 305 Cal.Rptr.3d at 894, 900.) As to CSPA, the Court of Appeal noted that the trial court did not rely on that case, and as an unpublished case, it is neither citable nor binding on the court. (*Id.* at 894.) The Court of Appeal also affirmed that the State Water Board correctly distinguished AGUA because it was "inappropriate to apply a discrete point source discharge approach in the context of" nonpoint source discharges. (*Id.* at 900.)

Conclusion and Implications

The Court of Appeal discussed Petitioners' arguments at considerable length and eventually upheld WQO 2018-02. *ELF* is notable because it affirms that the State Water Board and the regional boards can regulate waste discharges from irrigated agriculture without the use of field-level data or revealing individual grower operations. The court's opinion is available online at: <https://www.courts.ca.gov/opinions/documents/C093513.PDF> (Nicolas Chapman, Sam Bivins)

FIRST DISTRICT COURT HOLDS INVERSE CLAIM FOR ALLEGED FAILURE OF SUBDIVISION DRAINAGE IMPROVEMENTS NOT ACCEPTED BY THE COUNTY

Shenson v. County of Contra Costa ___Cal.App.5th___, Case No. A164045 (1st Dist. Mar. 30, 2023).

The First District Court of Appeal in *Shenson v. County of Contra Costa* upheld the trial court's decision granting summary judgment to the County after drainage improvements the subdivision developers had constructed 40-plus years earlier failed and serious erosion and subsidence damaged homeowners' properties.

Factual Background

Plaintiffs and appellants (collectively: Owners) are two couples who purchased residential properties in neighboring subdivisions within Contra Costa County (County) in 2010 and 2016. Both properties are adjacent to a creek. Owners sued the County and a flood control district for inverse condemnation and parallel tort causes of action after drainage improvements the subdivision developers had constructed 40-plus years earlier failed and serious erosion and subsidence damaged Owners' properties.

In the mid-1970s, the County approved subdivision maps for two subdivisions containing the parcels later acquired by Owners. Murderers Creek (Creek) that runs along Owners' properties is a natural watercourse that functions as the main receptacle for storm runoff emanating from the watershed above Owners' properties and is the only reasonable means of collecting and conveying that runoff.

Pursuant to the Subdivision Map Act, the County required the developers to make certain drainage improvements to collect and convey water from the two subject subdivisions as well as one adjacent subdivision, to the Creek. Among the properties that contribute runoff to the Creek by way of the improvements were three roads, two private roads serving as ingress and egress to the subdivisions and one county owned road that is adjacent to one of the subdivisions.

The developers designed and constructed the improvements, not the County. However, a county ordinance required developers to submit plans for required improvements to the County's Public Works Department for review and required the Department

to inspect the work and, when satisfied it was complete and met county requirements, to recommend that the County Board of Supervisors (Board) accept the improvements. The limited purpose of such acceptance was to establish an end date for the contractor's liability under a provision requiring it to guarantee performance of the work and repair of defects for a one-year period after acceptance.

The Board by resolution accepted the improvements as completed for the purpose of establishing a terminal period for filing liens in case of action under the subdivision agreement. As also required by ordinance, the Board adopted a resolution at the end of the one-year period finding the improvements have satisfactorily met the guaranteed performance standards for one year after completion and acceptance.

As provided by the Subdivision Map Act, the County also required the subdivision developers to offer to dedicate drainage easements to the County. The offer of dedication expressly states that the County:

...shall incur no liability with respect to such offer or dedication, and shall not assume any responsibility for the offered parcel of land or any improvements thereon or therein, until such offer has been accepted by appropriate action of the Board of Supervisors, or of the local governing body of its successor or assign.

When it approved the subdivision maps, however, the County *did not* accept the offers of dedication for the drainage improvements, which remained in the ownership of the developers and later the homeowners who purchased the property.

There is no record of the County indicating it has ever performed maintenance or repair of the drainage improvements. Nor are there any County records indicating the County performed maintenance or repairs to the Creek at or upstream of the subdivisions.

In early 2016, the spillway the developer had

constructed four decades earlier failed and collapsed into the Creek bed. The uncontrolled discharge of water into the Creek caused a scour hole to form and expand, eventually onto the neighboring private subdivisions. Owners allege the scour hole caused erosion and subsidence damage to their respective properties. Owners contend the County and the Contra Costa County Flood Control and Water Conservation District (District) are responsible for the formation of the scour hole because they failed to maintain the Creek's bed and banks and refused to repair or replace the spillway after it failed.

Lawsuit Allegations of County Ownership/Control

Owners alleged the County was responsible for the damage the Creek and drainage improvements caused to their properties for several reasons. First, the County approved the subdivisions; second, it required the developer of that subdivision to construct the drainage improvements, including a pipeline, a spillway and a catch basin; third, it used those facilities to discharge water from another subdivision and from city streets into the Creek; fourth, it required the developer to offer to dedicate to the County an easement over the property containing those improvements and portions of the bed and banks of the Creek; and fifth, it permitted and encouraged private development of properties upslope from Owners' properties.

Owners further alleged that the County accepted the drainage improvements from the developer, used them for public purposes, approved subdivision maps depicting the drainage easements and now "owns and controls" the land within the drainage easements. They alleged that the County "approved, owned, operated, controlled, repaired and/or maintained a public drainage system" of which the Creek is a part and that the drainage system caused damage to Owners' properties.

Owners alleged that the Contra Costa County Flood Control and Water Conservation District incorporated the Creek into the public drainage system through its establishment of a statutory drainage area known as Drainage Area 46 that includes the Creek, Owners' properties and other properties in the area. They alleged the County and District assessed and continue to assess "storm drainage fees" from property owners within Drainage Area 46 to offset the in-

creased burden that new and expanding development in the area has put on the public drainage system. They further alleged that the District chose to hold the funds from the collected drainage fees to be used for a future project instead of using them to install mitigation measures against the increased water runoff or to repair the spillway.

The County and the District filed motions for summary judgment or summary adjudication. The County argued it was not liable to Owners for inverse condemnation because: (1) the Creek was not a public improvement owned or controlled by the County; (2) its acts in approving the subdivisions and requiring drainage improvements and offers of dedication did not transform the Creek into a public storm drain system or otherwise make it or the improvements a public work; (3) it had not accepted the offers of dedication of drainage easements after they were made; and (4) it had not made repairs or maintained the improvements or otherwise impliedly accepted the offers.

The Superior Court granted the motions for summary judgment, concluding there was insufficient evidence to support the assertion that the County and District exerted control over or assumed responsibility for either the Creek or the drainage system and that the County's use of the Creek to drain surface water from county roads and to require other riparian owners in the watershed to do the same did not transform the Creek into a public drainage system.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's judgment under the *de novo* standard of review to decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. Under that standard, the undisputed facts did not establish any public entity exercise of actual ownership or control over a waterway or drainage improvements to render them public works for which the public entity is responsible.

Local Government Authority over Drainage Improvements under the Subdivision Map Act

The Subdivision Map Act (Map Act) vests the regulation and control of the design and improvement of subdivisions in the legislative bodies of local agencies, which must promulgate ordinances on the

subject. The Map Act generally requires all subdividers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances.

Ordinarily, subdivision under the Map Act may be lawfully accomplished only by obtaining local approval and recordation of a tentative and final map. A local agency will approve a tentative and final map or a parcel map only after extensive review of the proposed subdivision and consideration of such matters as the property's suitability for development, the adequacy of roads, sewer, drainage, and other services, the preservation of agricultural lands and sensitive natural resources, and dedication issues.

By generally requiring local review and approval of all proposed subdivisions, the Map Act aims to control the design of subdivisions for the benefit of adjacent landowners, prospective purchasers and the public in general. The Map Act defines design to include, among other things, drainage and sanitary facilities and utilities, including alignments and grades thereof. Indeed, requiring the subdivider to install drainage has been described as one of "several salutary purposes" of the Map Act.

It is typical for a subdivision agreement to require a subdivider to perform the work constructing improvements in accordance with plans and specifications previously approved by the local agency and to require security to ensure performance of the work. Another common condition is that the subdivider dedicate or make an irrevocable offer of dedication for such purposes such as streets, drainage, public utilities or public access.

Inverse Condemnation with Respect to Drainage Improvements Requires Public Acceptance or Use of Improvements

A public entity may be liable as a property owner when alterations or improvements to its own upstream property result in the discharge of an increased volume of or velocity of surface water in a natural watercourse causing damage to the property of a downstream owner. As with any upstream property owner, whether public or private, a government entity is only liable if, considering all of the circumstances, its conduct was unreasonable and the lower property owner acted reasonably.

Further, a government entity may be liable in inverse condemnation where the increased volume or velocity of surface waters and resulting damage are caused by discharge of increased surface waters from public works or improvements on publicly owned land or if it has incorporated the watercourse or public improvements into a public drainage system.

A storm drainage system constructed and maintained by a public entity is a public work. To convert an existing watercourse into a public work, a governmental entity must exert control over and assume responsibility for maintenance of the watercourse if it is to be liable for damage caused by the streamflow on a theory that the watercourse has become a public work.

The same is true of converting privately constructed improvements into public works. Official acts of dominion and control constituting acceptance of the private drainage system can be shown if the public entity does maintenance and repair work. Use of land for a public purpose over time may constitute implied acceptance of the offer of dedication.

On the other hand, where there is no acceptance of a street or the drainage system within it, there is no public improvement, public work or public use and therefore there can be no public liability for inverse condemnation.

Drainage Improvements' Conveyance of Off-Property Flows did not Convert Them to Public Works

Owners argue that the required drainage improvements served an adjacent subdivision and an adjacent street owned by the County (Gloria Terrace) by diverting surface water to catch basins and pipelines to convey it to the Creek. Thus, according to Owners, the County in effect converted the improvements into public works.

The Court of Appeal referred to the California Supreme Court case of *Locklin v. City of Lafayette*, 7 Cal.4th 327 (1994) (*Locklin*), which held that using an existing natural watercourse for drainage of surface water runoff and requiring other riparian owners to do so does not transform the watercourse into a public storm drainage system. The Court of Appeal likewise held that requiring and using drainage improvements within a subdivision to convey water, including from an adjacent public road and adjacent subdivision,

does not convert the improvements into public works either.

As noted by the County, drainage improvements in all developments are designed to accommodate the anticipated storm water runoff quantities to be received by the development—including any runoff flows emanating from beyond a subdivision’s boundary. Because developments disrupt the natural drainage patterns, installation of artificial drainage facilities that collect and convey the runoff that before may have been conveyed as natural sheet flows is necessary to ensure the waters will safely pass through the community without causing damage.

Contrary to Owners’ arguments, requiring artificial drainage facilities and conveying water across properties over which it might not have flowed when the area was undeveloped does not convert those improvements into public works. Development requires that drainage systems be constructed to channel water beneath or around the obstacles development creates. A government could not require owners whose properties are not adjacent to a natural watercourse (*i.e.*, landlocked) to drain waters from their properties into such a watercourse without allowing them to flow through properties that are closer to and/or adjacent to the watercourse. Thus, waters from landlocked properties must at least sometimes be conveyed through drainage improvements on other properties to reach a natural watercourse.

For these reasons, it is not surprising that the Act contemplated that improvements would be used for the good of the subdivision and properties beyond it. Its aim was to require local governments to exercise control over the design of subdivisions for the benefit of adjacent landowners as well as prospective purchasers and the public in general. It defined improvement to include work necessary for the general use of the lot owners in the subdivision and local neighborhood needs. (Govt. Code, § 66419, subd. (a),)

Conclusion and Implications

This opinion by the First District Court of Appeal helps define the broad extent to which local government can regulate subdivision improvements for the broader public benefit under the Map Act, without incurring liability should it choose not to accept such improvements. A rule that government-required improvements on one subdivision are public if they serve drainage needs of properties outside that subdivision or convey water that might not naturally have flowed through the servient subdivision would undermine the purposes of the Subdivision Map Act. Indeed, local governments would be reluctant to facilitate orderly community development, coordinate planning with the community pattern and assure proper improvements are made. The court’s opinion is available online at: <https://www.courts.ca.gov/opinions/documents/A164045.PDF> (Boyd Hill)

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