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FEATURE ARTICLE

SCOTUS LIMITS WOTUS: JURISDICTIONAL WATERS AND WETLANDS UNDER THE CLEAN WATER ACT MUST BE RELATIVELY PERMANENT, STANDING, OR CONTINUOUSLY FLOWING BODIES OF WATER

By Nicole Granquist and Jaycee Dean

On May 25, 2023, the U.S. Supreme Court released its highly anticipated opinion in *Sackett v Environmental Protection Agency* (*Sackett*), delineating the appropriate standard to determine waters of the United States (WOTUS) under the federal Clean Water Act (CWA). The Supreme Court significantly reduced the reach of WOTUS from earlier jurisprudence by holding that under the CWA, the word "waters" refers only to geographical features that are described in ordinary parlance as "streams, rivers, oceans, and lakes" and adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection. The ruling is a critical blow to the "significant nexus" standard originally penned by Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006) and recently memorialized by the Biden administration's Revised Definition of Waters of the United States. The "significant nexus" standard set a controversially expansive definition of WOTUS and required in-depth, arduous, and often expensive consultant and legal analysis for applicability.

Regulatory Background and Jurisprudence to Date

Historically, the regulation of water pollution was achieved through common law nuisance suits against dischargers with state's gradually shifting to enforcement by regulatory agencies. Federal regulation was limited to interstate waters that were either *navigable in fact* and used in commerce or readily susceptible to use in commerce. (Rivers and Harbors Act of 1899, 20 Stat. 1151). In 1948, Congress enacted the Federal Water Pollution Control Act as an effort to directly regulate water pollution. (62 Stat. 1156.)

In 1972, Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1252, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas" and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1362(7), 1311(a).) Those in violation of the CWA potentially face criminal and civil penalties. (*Id.* §§ 1319(c), 1319(d).) The term "waters of the United States" is not defined further within the CWA thereby leaving federal agencies, through regulation and policy guidance, to attempt to define the what constitutes a WOTUS—including what wetlands are WOTUS. Courts have then been tasked, and rarely reached consensus, on identifying the boundaries of the geographic reach of "waters of the United States" to guide the scope of regulatory jurisdiction under the CWA.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), (collectively: Agencies) jointly enforce the CWA and have modified the WOTUS definition more than a handful of times. Upon initial enactment of the CWA, the Corps adopted the traditional judicial term for navigable waters—that the waters must be "navigable in fact." (39 Fed. Reg. 12115, 12119 (Apr. 3, 1974).) In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over "wetlands adjacent to traditional navigable waters." (EPA and Corps, Memorandum on Clean Water

Act Jurisdiction Following U.S. Supreme Court's Decision in *Rapanos v. U.S.* (2008).) In 2015, under the Obama administration, the Agencies issued the Clean Water Rule that amended the WOTUS definition to include eight categories of jurisdictional waters, including non-adjacent wetlands and other non-navigable water bodies. (80 Fed. Reg. 37054 (June 29, 2015).) In 2019, under the Trump administration, the Agencies repealed the 2015 rule and restored the pre-2015 WOTUS definitions. (84 Fed. Reg. 56626 (Dec. 23, 2019).) Then, in 2020, the Agencies under the Trump administration issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250 (Apr. 21, 2020)), which narrowed the conditions upon which non-adjacent wetlands would be considered WOTUS, but this rule was vacated in 2021 by a federal District Court in Arizona (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021)), thereby prompting the Agencies' re-implementation of the pre-2015 WOTUS definitions. On March 20, 2023, under guidance from the Biden administration, the Agencies most recent regulation, the "Revised Definition of Waters of the United States" went into effect. (88 Fed. Reg. 3004 (Jan. 18, 2023).) The 2023 WOTUS Rule relies heavily on the pre-2015 regulatory framework and associated case law, while simultaneously reinvigorating the "significant nexus" standard delineated by Justice Kennedy in *Rapanos*.

Contemporaneous to the Agencies' various iterations of the WOTUS definition, the Supreme Court has, over the years, provided parallel jurisprudence guiding the interpretation of WOTUS. In 1985, the Court held that wetlands actually abutting traditional navigable waterways were considered WOTUS. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).) In 2001, the Court held that WOTUS does not include "nonnavigable, isolated, intrastate waters" in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 (2001). Most relevant here, in 2006, the Court issued its fragmented opinion in *Rapanos v. United States*, holding that the CWA does not regulate all waters and wetlands, but failing to provide a majority approach to determining WOTUS jurisdiction. Justice Scalia, writing for the plurality, argued that wetlands that have a contiguous surface water connection to regulated waters "so that there is no clear demarcation between the two" are adjacent and may then be regulated as WOTUS. (574 U.S. at 742.) The concurring opinion, authored by Justice Kennedy, advanced a broader "significant nexus" test that would allow regulation of wetlands as WOTUS if wetlands "alone or in combination with similarly situated lands…significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." (*Id.* at 780.)

The Sacketts

In 2004, near Idaho's Priest Lake, the Sacketts purchased a residential lot that they planned to develop. In 2007, shortly after the Sacketts began filling the lot with sand and gravel, the EPA issued an administrative compliance order stating that the property contained wetlands subject to CWA protection. According to EPA the wetlands on the Sackett's lot are "adjacent to" an unnamed tributary on the other side of a 30-foot road. The unnamed tributary feeds into a non-navigable creek, which feeds into Priest Lake (an intrastate body of water that the EPA designated as traditionally navigable). In 2008, the Sacketts initially brought suit against the EPA asserting that the agency's jurisdiction under the CWA did not extend to their property. Various aspects of the case have been slowly making their way up and down the federal court system. In 2021, the Ninth Circuit Court of Appeals considered whether the Sackett's Idaho property contained wetlands subject to CWA jurisdiction. (*Sackett v. U.S. Envtl. Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021).) The Sacketts argued that Justice Scalia's reasoning in *Rapanos* controlled because their property does not have a continuous surface connection to a navigable water. The Ninth Circuit disagreed and ultimately upheld Justice Kennedy's "significant nexus" test as the controlling authority in the Ninth Circuit. On September 22, 2021, the Sacketts submitted their petition for writ of *certiorari* to the Supreme Court requesting that the Court revisit its decision in *Rapanos* and on January 24, 2023, the petition was granted. (595 U.S. __ (2022).)

The May 25, 2023 Supreme Court Opinion

The Supreme Court granted the Sackett's petition to consider whether the Ninth Circuit set forth the proper test for determining whether wetlands are

WOTUS under CWA § 502(7). In its May 25, 2023 ruling, the Supreme Court reversed and remanded the matter for further proceedings, consistent with the holding that the CWA extends only to waters or wetlands with a continuous surface connection with WOTUS— *i.e., relatively permanent, standing or continuously flowing* bodies of water connected to a traditional interstate navigable water—such that it is difficult to determine where the traditionally navigable water ends and the adjacent wetland begins.

In striking down the Ninth Circuit's reliance on Justice Kennedy's "significant nexus" test, the Supreme Court provided that, in order to assert jurisdiction over an adjacent wetland under the CWA, a party must establish that the wetland: (1) is adjacent to a WOTUS and (2) has a continuous surface connection with that WOTUS. The majority opinion was delivered by Justice Alito with Justices Barrett, Gorsuch, Roberts, and Thomas joining. Justices Thomas, Kagan, and Kavanaugh each filed concurring opinions. In the majority decision, Justice Alito considered: (1) the extent of the CWA's geographical reach and (2) whether the Court should defer to the Agencies' interpretation of WOTUS in the 2023 Revised Definition.

Extent of the CWA's Geographical Reach

In considering the geographical reach of the CWA, the Supreme Court in *Sackett* held that "waters" encompasses only relatively permanent, standing, or continuously flowing bodies of water for several reasons. First, the Supreme Court looked to the plural use of "waters" in Section 502(7) of the CWA, with the Court stating such use typically refers to bodies of water like streams, oceans, rivers, and is difficult to reconcile with classifying "lands" (wet or otherwise) as waters. (*Sackett* at 14; 33 U.S.C.§ 1362(7).) The Supreme Court also noted that use of the word "navigable" signals that the definition principally refers to navigable bodies of water. Second, the use of the term "waters" in other portions of the CWA (*e.g.*, CWA section 117) confirmed for the Supreme Court that the term refers to "bodies of open water" (*Sackett* at 16 and 33 U.S.C. §1267(i)(2)(D) pertaining to the waters of the Chesapeake Bay). Third, the CWA expressly "protects the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and the Supreme Court found that the state's role would not remain primary if the "EPA had jurisdiction over anything defined by the presence of water." (*Sackett* at 17 and 33 U.S.C. § 1251(b).)

Moreover, in determining CWA jurisdiction, the Supreme Court noted that while the ordinary meaning of "waters" might seem to exclude all wetlands, statutory context shows that some wetlands qualify as WOTUS. (*Sackett* at 18.) For example, Congress amended the CWA in 1977 to add CWA section 404(g)(1),) which authorizes state permitting programs to regulate discharges into any waters of the United States, except for traditional navigable waters, *including wetlands adjacent thereto*. (33 U.S.C.§1344(g)(1)) Justice Alito opined that while some wetlands are WOTUS, the above cited provision must be harmonized with CWA section 502(7) "water of the United States" language. (33 U.S.C. §1362(7); *Sackett* at 19) Because "adjacent wetlands" are included within water of the United States, Justice Alito found that these wetlands must qualify as WOTUS in their own right, *i.e.*, the wetlands must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. (*Id.*) Therefore, the Supreme Court concluded wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

As it now stands, the jurisdictional reach of the CWA extends to only those waters or wetlands that are "indistinguishable" from traditionally defined WOTUS, which must be relatively permanent, standing or continuously flowing bodies of water. As the Supreme Court noted, it must be difficult to determine where the "water" ends and the "wetland" begins. (*Sackett* at 22.)

Impacts to the 2023 Biden Administration's Definition of WOTUS

Justice Alito's majority opinion directly addresses the current Agencies' definition of WOTUS, and the majority of Justices agreed that finding jurisdiction based on a "significant nexus" to traditional navigable waters "lacks merit." (*Sackett* at 22-27.) Given the number of legal actions challenging the Agencies' new definition of WOTUS, alleging many of the same theories used by Justice Alito to criticize the new rules, the Supreme Court's opinion is likely to reverberate through the judicial system. (*See State of Texas v. U.S. EPA, Case* No. 3:23-cv-0007 (S.D. Tx. 2023); *Kentucky Chamber of Commerce v. U.S. EPA*, No. 3:23-cv-00008-GFVT (S.D. Ky.); *West Virginia, et*

al v. U.S. EPA, No. 3:23-cv-00032-ARS (D.N.D.).) Whether the Biden administration will act to modify the Agencies' definition of WOTUS consistent with the *Sackett* decision remains to be seen.

First, the majority found that the Agencies' interpretation is inconsistent with the CWA because Congress was not clear that it wanted to alter the federal/state balance of power over private property when it enacted the CWA. (*Sackett* at 23.) The Supreme Court enunciated its standard that Congress must enact exceedingly clear language if it wishes to alter that balance, which it did not do here. (*Id.*) They concluded that an overly broad interpretation of the CWA's reach would impinge on state authority to regulate land and water use—the core of traditional state authority. (*Id.*)

Second, the Agencies' use of the "significant nexus" test to determine jurisdictional waters present a due process issue, as it gives rise to serious vagueness concerns in light of statutorily authorized criminal penalties. (*Sackett* at 24.) Due process requires Congress to define penal statutes "with sufficient definiteness that ordinary people can understand what conduct is prohibited." (*Id.*) The Court noted that the only thing preventing the Agencies from interpreting WOTUS to cover every water in the country is the "significant nexus" test, and the boundary between significant and insignificant is far from clear. (*Id.*) Further, the Court observed the "significant nexus" test takes another step into vagueness by introducing "similarly situated waters" in the aggregate that are subject to CWA jurisdiction. (*Id.*) The majority found that these inquiries "provide little notice to landowners of their obligations under the CWA" and the Agencies lack "the clear authority from Congress" to create such an indeterminate standard. (*Id.* at 25.)

Third, the Court rejected the Agencies' argument that Congress ratified the regulatory definition of "adjacent" when the CWA was amended to include reference to "adjacent" wetlands in CWA section 404(g)(1), finding that adjacency cannot include wetlands that are merely "nearby" covered waters, existing jurisprudence repeatedly recognizes that CWA section 404 does not conclusively determine construction of other CWA provisions, and the Agencies failed to provide enough evidence to support their interpretation in the face of Congress's failure to amend CWA section 502(7). (33 U.S.C. § 1362(7)).

The Concurring Opinions

Justice Thomas filed a concurring opinion and was joined by Justice Gorsuch, ultimately arguing for an even narrower construction of the CWA. (*Sackett*, Thomas, J concurring at 1.) Thomas argues that the majority opinion focused on "waters" without determining the extent how the terms "navigable" and "of the United States" limit the reach of the statute. (*Id.* at 2.) The concurrence argues that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters.

Justice Kagan filed a concurring opinion and was joined by Justice Sotomayor and Justice Jackson, agreeing that textual construction is most important but arguing that "adjacent" is not only touching but includes nearby. (*Sackett*, Kagan, J concurring at 1.) Kagan argued a broader reading of adjacent would ultimately protect wetlands "separated from a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like" that have been regulated by the Agencies for decades. Kagan opined the majority's "continuous surface connection" test disregards the ordinary meaning of adjacent and narrows the CWA as Congress drafted it.

Justice Kavanaugh also filed a concurring opinion and was joined by Justice Kagan, Justice Sotomayor, and Justice Jackson essentially arguing similarly to Justice Kagan that the continuous surface connection test "departs from the statutory text, from 45 years of consistent agency practice, and from [the Supreme] Court's precedent," and that adjacency should include wetlands separated from a covered water by a man made barrier. (*Sackett*, Kavanaugh, J concurring at 2.) Kavanaugh argued that failing to include those wetlands will have "significant repercussions for water quality and flood control throughout the United States." (*Id.*)

Conclusion and Implications

While the *Sackett* ruling provides clarity to the regulated community, which has faced uncertainty with regard to the scope of federal CWA permitting and project approval(s) because of historic WOTUS ambiguity, the full ramifications of this ruling on project permitting remain to be determined. For example, in California, the regulated community will now have to more fully contend with the "State Wetland Definition and Procedures for Discharges of

Dredged or Fill Material to Waters of the State," (the "Procedures," effective May of 2020), for wetlands and waters that now fall outside the federal CWA's scope (losing the exemption the Procedures offered if the wetlands or waters were regulated under CWA section 404). This circumstance may increase, not lessen, regulatory permitting burdens. Project proponents should carefully evaluate (or re-evaluate) project features to determine the appropriate scope of federal and/or state requirements, and watch for guidance from the Agencies as to how projects that are in a current process of securing approvals (or recently approved but not yet commenced) might be handled in the face of shifting jurisdiction.

The now-defunct "significant nexus" test played a prominent role in the Agencies' 2023 Revised Definition of WOTUS. How the *Sackett* decision will procedurally and substantively impact the Agencies' recent rulemaking in the near term is still unclear, though the U.S. Supreme Court provided plenty of specific input as to the Agencies' rule's likely demise if the Biden administration does not take action and current judicial actions challenging the rule proceed. If there is anything the last three decades of WOTUS jurisprudence and regulatory rulemakings has taught, is not to get too comfortable with a defining "rule." Change in this arena is inevitable. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

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CALIFORNIA WATER NEWS

CARMICHAEL WATER DISTRICT SEEKS TO BOLSTER SUMMERTIME SUPPLIES WITH THE INSTALLATION OF ITS NEW LA SIERRA AQUIFER STORAGE AND RECOVERY WELL

The utilization of aquifer recovery and storage wells has become an increasingly popular method for water providers to bolster their supply management and resiliency. Following this trend, the Carmichael Water District (District) is currently in the process of sinking its own well to help combat water shortages in the future. With water curtailments occurring more and more frequently, the District's new La Sierra Aquifer Storage and Recovery Well (La Sierra ASR Well) comes as one of several major water supply projects the District has planned to help serve its 44,000 customers.

Securing Supplies for the Future

The District utilizes two primary sources of water for it water supplies: surface water from the American River and groundwater from the local aquifer—the North American Subbasin. This sort of conjunctive us practice is nothing new, but with surface water reaching dangerous levels of scarcity in dry years and groundwater use coming into regulation under the Sustainable Groundwater Management Act (SGMA), the practice of combining sources to diversify water supply portfolios has become more and more common. Similar to many water suppliers throughout the state, the District's conjunctive use practice maximizes surface water usage in the winter and spring months where surface water is usually plentiful, but during the dry summer months into early fall the District is able to shift its use to take advantage of banked groundwater supplies.

Thanks to these conjunctive use practices, the District has been able to keep up with their customers' growing needs. With that said, the District still gets the majority of its water supply in the form of surface water from the American River where the District has faced significant curtailments over the last decade. In particularly dry years, for instance, the District has seen their entire surface water supply from the American River restricted as a result of curtailment orders.

To better prepare itself for future droughts and curtailment orders, the District has shifted focus towards strengthening and diversifying its water supply portfolio by investing more heavily in underground water storage. That shift has been showcased, at least in part, by the District's newest addition to its water supply infrastructure: the La Sierra ASR Well.

The La Sierra ASR Well represents the District's first well to utilize underground water storage to store surplus water in the winter for use during the dry summer months. During the summer of 2022, the District was forced to cover water shortages by purchasing water from the nearby San Juan Water District. Although 2023 has seen much more favorable conditions, construction of the La Sierra ASR Well is already well under way as the District is hoping to avoid such drastic measures in the future.

With a price tag of $6 million, the District's shiny new facility won't break the bank for its customers either thanks to financial assistance from the state and federal government. Covering these costs, the Department of Water Resources has contributed $4 million towards the La Sierra ASR Well's installation with another $2 million coming from the federal Bureau of Reclamation. In addition to the 600-foot well itself, project construction will also include a chlorination facility, piping and a back-up generator to serve the facility during electrical outages. According to the District, the La Sierra ASR Well is expected to commence operations by late next year.

Conclusion and Implications

Sitting in the same boat as many other water districts across California, the Carmichael Water District is faced with managing an increasingly finite resource to fuel its ever-growing customer base. By taking advantage of supplies when they are at their peak and storing them in the local aquifer for later use, the District is hoping to significantly improve the its drought resiliency and sustainable groundwater management capabilities.

Conjunctive use projects with an emphasis on groundwater banking, such as the District's own La Sierra ASR Well, can vastly improve the availability and reliability of water supplies despite variable rainfall by storing groundwater during wet periods and using that water during drought or peak use periods where traditional supplies alone wouldn't normally be enough. Furthermore, programs like this provide potentially significant benefits for our environment and riparian ecosystems. In drier years, for example, when river conditions are stressful on many fish species due to decreased flows or heightened water temperatures, conjunctive use allows more surface water to remain in the river aiding in both areas.

The La Sierra ASR Well may not be the most innovative water supply solution the state has seen, but it is one that Californians will become more familiar with as groundwater banking becomes a major player in the state's water supply management.
(Wesley Miliband, Kristopher Strouse)

REGULATORY DEVELOPMENTS

NATIONAL MARINE FISHERIES SERVICE MAINTAINS ENDANGERED LISTING STATUS FOR SOUTHERN CALIFORNIA STEELHEAD

On May 2, 2023, the National Marine Fisheries Service (NMFS) issued its Five-Year Review (Review) of Southern California steelhead (*Oncorhynchus mykiss*) under the federal Endangered Species Act (ESA). The Review found that current conditions warrant the continued protection of Southern California steelhead as an endangered species.

Background

On August 18, 1997, NMFS listed Southern California steelhead as an endangered species under the ESA. (62 Fed. Reg. 43937.) Southern California steelhead are a distinct population segment (DPS) of *Oncorhynchus mykiss* that originate and reside below natural and manmade impassable barriers from the Santa Maria River south to the U.S.-Mexico border. (*See* 71 Fed. Reg. 834.) Southern California steelhead are one of 28 West Coast Pacific salmon and steelhead populations that NMFS listed in 1997 as a result of declining population numbers. NMFS attributed the declines to several factors, including loss of freshwater and estuarine habitat, poor ocean conditions due to anthropogenic activities such as water-supply and hydropower development, urban and agricultural land practices, overfishing and hatchery practices, and more recently, climate changes. (*See* 2023 Five-Year Review at 1.)

The ESA directs the Secretary of Commerce (who oversees NMFS) to review the listing classification of threatened and endangered species at least once every five years. (16 U.S.C. § 1533 (c)(2).) The purpose of the five-year review is to ensure that the listing classification remains accurate. To make this determination, NMFS examines the current biological viability of the species—including its abundance, productivity, spatial structure, and diversity—to determine whether and how its resilience and capacity to survive in the wild has changed. NMFS also uses any new information to analyze changes to the five factors considered in the original listing decision: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or man-made factors affecting the species' continued existence. (*Id.* at § 1533(a)(1).)

After completing the Review, the Secretary of Commerce must determine if the species should be removed from the endangered species list or have its status changed. (16 U.S.C. § 1533(c)(2).) If the five-year review recommends a change to the listing classification (*e.g.*, from endangered to threatened), the recommended change will prompt a separate rulemaking process. (2023 Five-Year Review at 2.)

The last Review of Southern California steelhead occurred in 2016. On October 4, 2019, NMFS announced the initiation of the 2023 Five-Year Review. (84 Fed. Reg. 53117.) NMFS invited the public to submit any new information that had become available since the 2016 review, and received responses from federal, state, and local agencies, Native American Tribes, conservation groups, angling groups, and individuals. NMFS considered the information received and information it routinely collects to complete the 2023 Five-Year Review based on the best available science. (2023 Five-Year Review at 5-6.)

2023 Five-Year Review of Southern California Steelhead

The 2023 Five-Year Review found that current conditions warrant the continued protection of Southern California steelhead as an endangered species. (2023 Five-Year Review at 144.) Among other things, NMFS found that extended drought conditions coupled with wildfires since 2016 have elevated threat levels to Southern California steelhead. (*Id.*) Over the past five to seven years, drought and wildfire have diminished stream flow conditions to the point that adult steelhead were not present at all on most streams. (*Id.* at 45.) Where adult steelhead were observed, counts were in the single digits. (*Id.*)

NMFS determined that the systemic anthropogenic threats to Southern California steelhead identified at the time of initial listing have remained essentially unchanged over the past five years. (*Id.* at 144.) NMFS recognized significant progress in removing small-scale fish passage barriers in a number of core recovery watersheds. (*Id.*) NMFS also recognized the completion, or progress toward completion, of several Biological Opinions and other regulatory measures consistent with NMFS' recommended recovery actions. (*Id.* at 60.)

NMFS also revealed new research on the genetic architecture of anadromous Southern California steelhead and non-anadromous rainbow trout, which indicates that endangered steelhead populations may be reconstituted from populations of rainbow trout in drought refugia if they exhibit certain genetic features. (*See id.* at 32-33, 45, 144.) Nearly all drought refugia, however, are currently inaccessible to endangered steelhead due to impassible barriers or other altered flow regimes. (*See id.* at 32-33.) For this and other reasons, NMFS concluded that although "the overall level of threat to Southern California steelhead DPS remains the same," actions to promote recovery should remain a top priority. (*See id.* at 145, 147.)

Conclusion and Implications

In recommending future actions, NMFS focused on activities to address ongoing and emerging habitat concerns over the next five year period. (*See id.* at 147.) NMFS' recommended actions include specific "high-priority habitat restoration projects" to remedy barriers to the movement of adult and juvenile steelhead. (*Id.* at 147-48.) The recommended actions also include measures to prevent local extirpations of steelhead populations, improve research, monitoring, and evaluation, promote key ESA consultations, and improve enforcement of ESA protections. (*Id.* at 147-153.)

NMFS will issue its next status review of Southern California steelhead in approximately five years. The next review will examine whether any new conditions from now until approximately 2028 warrant a change to the species' listing status. The 2023 Five-Year Status Review is available at: https://media.fisheries.noaa.gov/2023-05/5-year-status-review-sc-steelhead.pdf.

(Holly E. Tokar, Sam Bivins)

DEPARTMENT OF WATER RESOURCES APPROVES 12 GROUNDWATER SUSTAINABILITY PLANS FOR NON-CRITICALLY OVERDRAFTED BASINS

On April 27, 2023, the California Department of Water Resources (DWR) announced its approval of the Groundwater Sustainability Plans (GSPs) for 12 non-critically overdrafted groundwater basins under the Sustainable Groundwater Management Act (SGMA). With this announcement, DWR has now issued GSP determinations for 36 out of the 94 medium- or high-priority groundwater basins in the state. Of that total, the GSPs for six basins have been deemed "inadequate" and are now subject to pending intervention by the State Water Resources Control Board (State Water Board), while the plans for eight more basins are presently considered "incomplete." As with the previously approved GSPs, DWR's latest approvals include recommended corrective actions for the Groundwater Sustainability Agencies (GSAs) to consider implementing before the first five-year review.

Background

The California Legislature enacted SGMA in 2014 to achieve long-term sustainability of the state's groundwater basins by requiring that each medium- and high-priority basin be managed pursuant to an adopted and approved GSP or alternative plan that maps out how the basin can reach its sustainability goals and avoid undesirable results such as critical overdraft and subsidence. GSAs are special entities formed to develop and adopt GSPs or alternative plans. The GSPs for critically overdrafted basins and non-critically overdrafted basins were due to DWR by January 31, 2020 and January 31, 2022, respectively.

In addition to its GSP determinations for 36 basins, DWR has approved alternative management plans for nine others.

Within two years of a GSP submittal, DWR is charged with evaluating compliance with the statutory and regulatory requirements of SGMA, and determining whether implementation of the GSP is likely to achieve the identified sustainability goals for that basin. DWR's GSP review can result in one of three potential determinations: (1) approved with recommended corrective actions; (2) incomplete with required corrective actions; or (3) inadequate.

When DWR approves a GSP, it has found a reasonable likelihood that groundwater sustainability can be achieved for that basin within the prescribed 20-year horizon. Where a particular GSP could benefit from additional details or minor improvements, DWR will propose corrective actions to be taken within the following five years. The GSA may proceed with further implementation of its GSP upon approval.

A GSP may be deemed incomplete if it is missing information that DWR needs to conduct its review or to find that sustainability of the basin can be achieved within 20 years. Prior to an incomplete determination, DWR will notify the GSA of the identified deficiencies with an opportunity to cure. An incomplete determination will prompt the GSA to go back and submit a revised plan within 180 days. If problems persist or the GSA does not resubmit, then the GSP may be reclassified as inadequate. Earlier this year, DWR issued "incomplete" determinations for GSPs in the Westside, Paso Robles Area, Merced, Kings, Eastern San Joaquin, Cuyama Valley, and Madera groundwater basins.

DWR will find a GSP inadequate if it finds significant omissions or deficiencies that will take the GSA more than 180 days to correct. An inadequate determination acts as a referral to the State Water Board, which may then notice a public hearing to consider designating the basin as probationary and intervening with an interim plan. In March of 2023, DWR issued "inadequate" determinations for six critically overdrafted basins, including the Kern County, Tule, Tulare Lake, Kaweah, Delta-Mendota, and Chowchilla basins. The State Water Board has not yet issued a notice of hearing for the inadequate GSPs.

Approval of 'Single Plan' GSPs

DWR's latest approval covers 12 "single plan" GSPs that comprehensively manage the following basins or subbasins: San Jacinto; Upper Ventura River; Santa Margarita; San Luis Obispo Valley; Monterey; Langley Area; Upper Valley Aquifer; Forebay Aquifer; East Side Aquifer; Shasta Valley; Scott River Valley; and Big Valley.

Each approval includes a statement of findings and an attached staff report recommending approval and corrective actions. For the 12 approved basins, DWR finds that each GSP is complete, was prepared and submitted in compliance with the Water Code and SGMA regulations, and accounts for management of the entire basin. Sustainability goals and undesirable results have been reasonably formulated using appropriate thresholds and criteria, and the proposed projects and management actions are commensurate with the level of understanding of basin conditions. In each instance, DWR concludes its findings that the GSP is acceptable and DWR adopts the recommendations in its staff report.

The corrective actions DWR recommends differ slightly among the GSPs, but generally include suggested revisions of certain terms and definitions relating to sustainability metrics, the collection of additional information from well surveys and pumping meters, and refinements of how GSAs will investigate and enforce compliance with applicable management criteria. SGMA requires GSAs to evaluate their GSPs and submit written assessments to DWR every five years, by which point they are strongly encouraged to incorporate all suggested corrective actions.

DWR wrote in their news release on this topic that they were "impressed with the effort that local agencies have put into their groundwater sustainability plans." Highlighting the diligence of the local agencies in implementing their plans, DWR expressed optimism about the local agencies' ability to act proactively and to continue adapting and updating as necessary to face changing circumstances brought on by climate change and drought. More recently, DWR also released its determination for the Cuyama Valley basin's groundwater sustainability plan on May 25, recommending it for approval.

Out of the 94 total groundwater basins that were required to submit plans under SGMA, DWR has now provided determinations for 37 basins with 31 of those basins recommended for approval. According to

DWR's online SGMA Portal, review is currently in progress for the groundwater sustainability plans for the Cosumnes, South American, and North American basins. As for the rest, DWR anticipates issuing determinations for the remaining basins throughout 2023.

Conclusion and Implications

With the 10th Anniversary of SGMA's passage fast approaching, DWR is continuing to make progress on the onerous task of reviewing and providing determinations for each and every groundwater sustainability plan across the state.. About a third of all groundwater basins have had their sustainability plans so far and as the summer months move along the real question will be whether DWR can keep pace and finish the task at hand by the year's end. 63 basins are still awaiting approval from DWR, and with just over six months until 2024, DWR staff will no doubt have their work cut out for them.

Following DWR's approval, GSAs are free to proceed with the funding and implementation of the projects and management actions contemplated in their plans. GSPs will need to be updated as new data and information become available, or as physical conditions change over time. DWR will review annual progress reports and five-year plan updates to monitor continued compliance with SGMA and its regulations. As noted on DWR's SGMA website portal, determinations for the GSPs in 47 additional basins are forthcoming in 2023.

The SGMA portal with an up to date list of DWR's GSP evaluations is available at: https://sgma.water.ca.gov/portal/gsp/status.

(Austin C. Cho, Sam Bivins, Wesley Miliband, Kristopher Strouse)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT REQUIRES DISCHARGER TO RENEW NPDES PERMITS UNDER GENERAL COMPLIANCE REQUIREMENTS IN CONSENT DECREE

United States of America v. Southern Coal Corporation, 64 F.4th 509 (4th Cir. 2023).

The Fourth Circuit Court of Appeals recently determined a coal company, subject to a negotiated consent decree, cannot avoid a statutory requirement to renew federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) permits merely because the consent decree did not contain an explicit requirement to renew the permits.

Factual and Procedural Background

In 2016, multiple government agencies (government) sued Southern Coal Corporation and more than 30 other mining and mining adjacent companies for 23,693 violations of Clean Water Act NPDES permits over five years. The NPDES permits were issued for operations in Alabama, Kentucky, Tennessee, Virginia, and West Virginia. On the same day the lawsuit was filed, the government filed a proposed consent decree to resolve the allegations described in the complaint. The government published the proposed consent decree to the Federal Register and subsequently, the court entered the consent decree. The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas" except in compliance with a permit issued under Act. NPDES permits limit the types and quantities of pollutants and require monitor and reporting of the regulated pollutants. These permits expire every five years to require polluters to continuously comply with the requirements as they change. Permits may be administratively extended if the permittee files a renewal application more than 180 days before the previous permit's expiration.

In 2020, the government sent a notice of default and demand for stipulated penalties to Southern Coal for failing to comply with the consent decree. Specifically, Southern Coal allowed the NPDES permit for facilities in Alabama and Tennessee to lapse. In 2021, the government filed a motion requesting the district court to compel Southern Coal's compliance with the decree and imposing penalties of $2,523,000 for the failure to maintain permits and $21,000 for unpermitted discharges. Southern Coal argued that the consent decree did not require the NPDES permits to be renewed and thus, there was no violation under the decree and the decree was no longer valid. The district court agreed with the government and required Southern Coal to comply with the consent decree.

On appeal, Southern Coal challenges the District Court's order on the grounds that the district court improperly considered extrinsic evidence beyond the consent decree in determining that the decree required the renewal of the NPDES permits.

The Fourth Circuit's Decision

The Court of Appeals considered and rejected Southern Coal's zrguments that the consent decree did not require renewal of the NPDES permits. First, the court determined that the plain language of the "General Compliance Requirements" in the consent decree reasonably required Southern Coal to "submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals." This language and similar language throughout the decree requiring compliance with all applicable federal laws and all necessary permits was sufficient to establish that Southern Coal was required to comply with the Clean Water Act and renew the NPDES permit. The court rejected Southern Coal's argument that renewal was not required because the consent decree did not explicitly require such renewal. The court reasoned the decree's requirements to comply with federal law and acquire permits plainly imposed NPDES-permitting obligations and prohibited unpermitted discharges that run afoul of the CWA.

The court further reasoned that it would be unreasonable to allow Southern Coal to avoid its obligations under the consent decree by allowing the NPDES permit to lapse. First, this interpretation was unreasonable because allowing the NPDES permit to lapse was not an express term of termination. Second, it was unreasonable to expect the parties to intend to undermine the decree by allowing the NPDES permit lapse to terminate the decree. Third, the court reasoned that if Southern Coal intended such a "backdoor" termination, then it likely did not negotiate the decree in good faith.

Conclusion and Implications

In a partial concurrence, Judge Rushing distinguished the district court's ruling on the requirement to renew NPDES permits from the ruling regarding whether discharges of pollutants after NPDES permits expired constituted a separate violation of the consent decree. Judge Rushing concurred with the majority in holding that the decree required Southern Coal to renew the NPDES permits, but reasoned that unpermitted discharges, while a violation of the Clean Water Act, were not a violation of the decree. The decree did not specifically prohibit Southern Coal from discharging pollutants without a permit.

This case reinforces the need for careful drafting and good faith negotiation of consent decrees. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca4/22-1110/22-1110-2023-04-04.html.
(Anya Kwan, Rebecca Andrews)

DISTRICT COURT REDUCES ATTORNEY'S FEES AWARD IN CLEAN WATER ACT CITIZEN SUIT

Conservation Law Foundation, Inc. v. Mason,
___F.Supp.4th___, Case No. 1:18-cv-00996-PB (D. N.H. Apr. 26, 2023).

The United States District Court for the District of New Hampshire recently awarded certain fees and costs to an environmental organization related to the organization's successful federal Clean Water Act (CWA) claims against state officials. The court, however, excluded other fees and costs from the award, reasoning that the organization's unsuccessful claims were not sufficiently "interconnected" with its successful claims to entitle the organization to a full award. The court further reduced the organization's overall award due to inadequate documentation and maintenance of its timekeeping records.

Factual and Procedural Background

The CWA prohibits unpermitted discharges of pollutants into navigable waters. Point source discharges of pollutants are permitted through National Pollutant Discharge Elimination System (NPDES) permits. 33 U.S.C. § 1342. The CWA allows for "citizen suits" by private actors alleging that other actors, including states and their instrumentalities, have violated the statute. 33 U.S.C. § 1365(a).

In 2018, the Conservation Law Foundation (CLF) filed a Clean Water Act citizen suit against the New Hampshire Fish & Game Department and its Executive Director, as well as the New Hampshire Fish & Game Commission and its commissioners. CLF's lawsuit alleged that the fish hatchery (Hatchery) owned by New Hampshire and operated by the state defendants was discharging various pollutants into the Merrymeeting River in violation of a 2011 NPDES permit. CLF asserted two types of claims. First, CLF argued that the Hatchery was causing "Outfall Discharges" of pollutants directly from its two outfalls. Second, CLF claimed that the Hatchery was causing "Sediment Discharges," where past discharges of pollutants settled into sediments at the bottom of the river and continued to leach into the water. CLF sought declaratory judgment, injunctive relief, civil penalties, and an award of fees and costs. After the state agencies filed a motion to dismiss, CLF voluntarily dismissed the agencies from the lawsuit. CLF also voluntarily dismissed its request for civil penalties. The rest of CLF's complaint survived the motion to dismiss.

The parties filed cross-motions for summary judgment. The court granted summary judgment to the

defendants on CLF's Sediment Discharge claims because they sought retrospective relief barred by the Eleventh Amendment of the U.S. Constitution. With respect to the Outfall Discharge claims, the court granted summary judgment to the defendants on CLF's claim that formaldehyde discharges from the Hatchery exceeded limits prescribed by the 2011 NPDES permit. However, the court granted summary judgment to CLF on its claim that pH discharges from the Hatchery violated the 2011 NPDES Permit. The court denied summary judgment for both parties on CLF's remaining Outfall Discharge claims.

Subsequently, the U.S. Environmental Protection Agency (EPA) issued a new 2021 NPDES permit for the Hatchery that superseded the 2011 NPDES permit. CLF amended its complaint to restate its claims with reference to the 2021 permit. The court scheduled a status conference with the parties and representatives from the EPA regarding the agency's willingness to intervene and establish a compliance plan for the Hatchery. After a year of negotiation, the EPA joined the lawsuit as a plaintiff and intervenor. The three parties executed a consent decree requiring the defendants to achieve compliance with the 2021 NPDES permit, undertake interim measures, and evaluate options for addressing the Sediment Discharges. The court issued a final judgment in 2022 by adopting an order entering the consent decree.

Following the entry of the consent decree, CLF moved for a full award of attorney's fees and costs. Specifically, CLF sought attorney's fees, expert fees, deposition costs, and other costs. The citizen suit provision of the CWA allows a court to award reasonable attorney's fees and costs to "any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." A "prevailing or substantially prevailing party" is one that has "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. The party's success must "materially alter the litigants' legal relationship by modifying one party's behavior in a way that directly benefits" the successful party. The party seeking fees and costs has the burden of demonstrating that such fees and costs are reasonable.

Under the "lodestar method" employed by the court, the award amount equals the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." In determining the number of hours reasonably expended, courts will exclude hours "that are excessive, redundant, or otherwise unnecessary."

The CLF sought fees and costs for all of its claims, including those for which the Court granted summary judgment to the defendants.

The District Court's Decision

CLF raised three arguments in support of the claim to a full award of its fees and costs.

Consent Decree and the 'Prevailing Party'

First, CLF claimed to be the prevailing party as a result of the consent decree and the court granting summary judgment in its favor on the pH claim. The court agreed with CLF because the consent decree provided relief on at least some of CLF's outstanding claims against the defendants and in ways that have changed the parties' legal relationship. The consent decree also created new rights and obligations beyond those mandated by the 2021 NPDES permit.

'Interrelated' Sucessful Parties

Second, CLF argued the claims which the defendants prevailed on were "interrelated" with CLF's successful claims. A prevailing party may be awarded fees for unsuccessful claims where those claims are interconnected with successful claims. Claims are interconnected when they are based on "a common core of facts" or "related legal theories. The court rejected this argument, noting that CLF relied CLF relied on separate evidence and legal theories for the successful Outfall Discharge claim and the unsuccessful Sediment Discharge claims. Further, because CLF failed to adequately allocate time between the two types of claims, the court applied a "global reduction," wherein the court effectively estimated the hours spent on the unsuccessful claims and deducted those hours through its lodestar calculation. The court applied the same reduction to CLF's request for expert fees, deposition costs, and other costs.

Attorney's Fees Calculation

Third, CLF argued its hours and rates were "reasonable and well-documented." The court disagreed, imposing a 10 percent reduction in total hours because of CLF's failure to track its time contemporaneously. Relatedly, the court imposed a 50 percent

reduction on CLF's hours spent preparing its petition for fees and costs, reasoning that CLF likely spent the majority of its time reconstructing timekeeping records that should have been maintained contemporaneously.

Conclusion and Implications

This case provides guidance for both plaintiffs and defendants regarding the fee shifting provisions of the CWA's citizen suit mechanism. For plaintiffs, the case affirms that a consent decree will not preclude an award of fees and costs, so long as the plaintiff's lawsuit materially contributes to the development of the consent decree and the consent decree modifies the parties' rights and obligations. The case also sheds light on courts' evaluation of whether successful and unsuccessful claims under the CWA are interconnected for purposes of fee shifting. Finally, the case clarifies that proper documentation and maintenance of timekeeping records are critical to obtaining the greatest award. For defendants, the case provides direction on potential vulnerabilities in a plaintiff's request for fees and costs, including arguments against the interconnectedness of claims and deficiencies in documentation and maintenance of timekeeping records. The court's opinion is available online at: https://casetext.com/case/conservation-law-found-v-mason.

(Brendan P. Keenan, Jr., Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT AFFIRMS DWR'S ENVIRONMENTAL IMPACT REPORT AS LEGALLY ADEQUATE UNDER CEQA

County of Butte v. California Department of Water Resources, Cal.App.5th 147 (3rd Dist. 2023).

In April, the Court of Appeal for the Third District of California upheld the trial court's decision that the California Department of Water Resources (DWR) did not violate the California Environmental Quality Act (CEQA) and that its Environmental Impact Report (EIR) was legally adequate. Petitioners argued that the EIR fell short with respect to climate change, historical hydrological conditions, local impacts, water quality and beneficial use, and changes to the State Water Project (SWP). The trial court rejected Petitioners' claims, and the Court of Appeal affirmed.

Background

In the 1950s, the California Legislature authorized the construction of the SWP. The SWP is one of the largest water storage and delivery systems in the United States, consisting of a series of 21 dams and reservoirs, five power plants, 16 pumping plants, and 662 miles of aqueduct. (*County of Butte v. Dept. of Water Resources*, (2023) 90 Cal.App.5th 147, 870.)

The Oroville Facilities, located on the Feather River in Butte County, are a critical part of the SWP and provide most of the system's water collection and storage, flood management, and power production capacity. *Id* at 870-71. In 1957, California obtained a 50-year federal license for the Oroville Facilities. Such a license is necessary for the construction, operation, and maintenance of dams, reservoirs, and hydroelectric power plants.

In 1999, DWR, as operator of the SWP, began public preparations to apply to the Federal Energy Regulatory Commission (FERC) for renewal of the Oroville Facilities license. At the time, FERC allowed applicants to pursue a traditional licensing process or an alternative process. DWR opted for the alternative licensing process which requires those with interest in the project to cooperate in a series of hearings, consultations, and negotiations, with the end goal being the creation of an agreement that is subject to FERC's final approval. *Id* at 871. Once an agreement was reached, both DWR and FERC completed environmental reviews in connection with the proposed relicensing. FERC prepared an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), and DWR prepared an EIR under CEQA. *Id* at 872. FERC has yet to relicense the Oroville Facilities and has instead allowed DWR to operate the facilities under annual, interim licenses. *Id*.

In 2008, Butte County, Plumas County, and Plumas County Flood Control and Water Conservation District (Counties) filed writ petitions challenging the sufficiency of DWR's EIR. Both petitions were later consolidated. The Counties made four principal contentions: DWR failed to analyze climate change; DWR failed to properly evaluate fiscal impacts to Butte County and public health impacts from toxic contaminants; DWR wrongly assumed that current facility operations comply with water quality standards, and DWR failed to account for potential changes to the SWP that could affect operations. *Id* at 872. The trial court ruled for DWR finding that the Counties' arguments failed on the merits.

The Court of Appeal initially reviewed the case and determined that the Counties' claims were largely preempted by the Federal Power Act. However, the California Supreme Court vacated the decision and asked the Court of Appeal to re-consider in light of *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 220 Cal.Rptr.3d 812. The Court of Appeal re-considered the case and reached the same conclusion. The California Supreme Court reviewed the case a second time and remanded for further consideration finding that although the Counties could not challenge the environmental sufficiency of the settlement agreement, they could still challenge the sufficiency of the DWR's EIR. *Id* at 873.

The Court of Appeal's Decision

Climate Change Impacts

The Court of Appeal rejected the Counties' claim that DWR's discussion of climate change was inadequate. Specifically, the court recognized that DWR covered climate change and its potential impacts in the project operations section of its EIR. *Id* at 875. DWR's EIR generally discussed global warming and that most scientists agree it has occurred. *Id*. Further, the EIR acknowledged that continued climate change could affect the project, such as by altering the timing of inflows into Lake Oroville. *Id*. DWR ultimately found climate change impacts to be too uncertain to evaluate due to the quantitative uncertainties regarding impacts during this century, and that any potential changes to the project due to climate change would be too speculative. *Id*. The court found this conclusion to be reasonable as CEQA only requires an agency to note the conclusion of particular impact that is too speculative, and then to terminate its discussion. *Id* at 876.

Project Modeling and Hydrologic Conditions

The court also rejected the Counties' claim that DWR failed to model project operations using the full range of 20th-century hydrologic conditions. The Counties contended that the model used in the EIR only noted data from years 1922 to 1994, but did not include the year 1907, which was a historically high flow. The model also did not include the year 1977, which was a historically low flow. The Counties further alleged that DWR utilized hypothetical flow data under a fictitious scenario that included no upstream storage or diversion operations. *Id* at 884. The court rejected these contentions finding that DWR did in fact account for the year 1977, and that the Counties failed to explain why it was a fatal flaw to not include the year 1907. *Id* at 885. Further, the court found the Counties' claim that DWR used hypothetical data for its model to be unfounded. *Id*.

Local Impacts

Similarly, the Court of Appeal rejected the Counties' argument that DWR failed to properly evaluate and mitigate local impacts. The Counties alleged two types of local impacts: fiscal impacts to Butte County from increased demand for public services, and public health impacts from mercury and bacteria in the waters of the Oroville Facilities. The court rejected the fiscal impact contention because the Counties failed to persuasively demonstrate how the alleged fiscal impacts are linked to physical changes in the environment, as is required by CEQA. The court rejected the public health impact contention because the EIR adequately explained that the project nor any alternative "would result in a change to either the rate or the amount of mercury accumulation within the FERC Project boundary." *Id* at 888. Additionally, the EIR also adequately described the bacteria levels to be less than significant. As a result, the court found the discussions and considerations in the EIR to be adequate.

Treatment of Water and Beneficial Uses

The Court of Appeal rejected the Counties' contention that DWR's EIR failed to appropriately address treatment of water quality and beneficial uses. The Counties alleged that the project's objective wrongfully excluded a serious discussion on how the project will operate in the next half-century. However, because the Counties never explained why the exclusion was wrongful, the court rejected the argument. The Counties further alleged that the EIR's discussion of the environmental setting incorrectly assumed that current operations comply with water quality standards. The court disagreed, finding that the EIR's discussion of the environmental setting properly stated that "before FERC issues a new license, the State Water Resources Control Board must find 'that the project complies with appropriate requirements of the... Basin Plan, which includes the water quality objectives for protection of designated beneficial uses." *Id* at 890. The Counties also alleged that the EIR failed to adequately discuss potential impacts to beneficial uses. However, the court rejected this contention because the Counties failed to identify any alleged failure relating to beneficial uses.

Potential SWP Changes

Furthermore, the Court of Appeal rejected the Counties' contention that DWR failed to account for potential SWP changes that could affect project operations. The Counties alleged that the EIR failed to address biological opinions as to certain fish species

that could eventually require changes to SWP operations. *Id* at 894. The court rejected this contention because the opinions were minor and not final at the time the EIR was prepared, and thus the EIR treated the opinions appropriately. *Id* at 894-95. The Counties further alleged that the use of the phrase "normal operation" in the agreement discussing potential reductions in minimum flow releases could cause confusion as to whether a new normal or an older version of the word normal should prevail *Id* at 895. The court rejected this contention due to the Counties' failure to offer legal support. Lastly, the Counties argued that the EIR should have accounted for impacts from future changes to SWP water deliveries. DWR responded to comments that changes to the SWP were outside the scope of the EIR, and that it could not predict how deliveries might change in the future. *Id* at 896. The court found this response to be adequate and thus rejected the Counties' contention.

Costs Award

Finally, the Court of Appeal rejected the Counties' contention that the trial court abused its discretion in requiring the Counties to pay over $675,000 in court costs. *Id.* The court rejected this contention after recognizing the uniqueness of this case as well as relying on precedent in *River Valley Presentation v. Metro Transit* (1995) 37 Cal.App.4th 154. *Id* at 897. The Counties also argued that the costs were simply too high, but failed to support its position with authority and thus the court rejected this position. *Id* at 899.

Conclusion and Implications

This holding reinforces the general requirements of public agencies and opponents of public projects relating to CEQA. In particular, while public agencies must make good faith efforts in disclosing relevant environmental impacts pertaining to a project, an agency is not required to speculate about uncertain or unknown future impacts. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C071785M.PDF.
(Jovahn Wiggins, Miles Krieger, Steven Anderson)

THIRD DISTRICT COURT UPHOLDS STATE WATER BOARD'S ORDER AUTHORIZING AGRICULTURAL DISCHARGES IN CALIFORNIA'S CENTRAL VALLEY

Environmental Law Foundation, et al. v. State Water Resources Control Board, et al., ___Cal.App.5th___, Case No. C093513 (3rd Dist. 2023).

In late March, the Third District Court of Appeal upheld the State Water Resources Control Board's (State Water Board) water quality order authorizing agricultural discharges in the Central Valley subject to monitoring and reporting requirements. Certain environmental groups challenged the order under California's water quality laws related to non-point source discharges and the state's anti-degradation policy. The trial court upheld the program and the Court of Appeal affirmed.

Background

The State Water Resources Control Board and its several Regional Water Quality Control Boards, including the Central Valley Regional Water Quality Control Board (Central Valley Water Board), generally govern water quality in California. *Id.* at 6 (citing the Porter-Cologne Water Quality Control Act at Wat. Code, § 13000 *et seq.*). The Boards are responsible for regulating waste discharges from irrigated agricultural operations in the Central Valley. *Id.* at 4 (citing Wat. Code, § 13263). The Boards work with growers and third parties, including East San Joaquin Water Quality Coalition (Coalition), to address water quality issues. *Id.*

In particular, "Regional Boards formulate water quality control plans for their regions, commonly known as 'basin plans.'" *Id.* Basin plans and waste discharge regulations broadly include both point and nonpoint source pollution. *Id.* at 8. Point source pollution comes from definite discharge locations,

such as pipes, ditches, or canals. *Id.* Nonpoint source pollution is not similarly traceable to a single source; runoff is one example of a nonpoint source. *Id.* Regulation of nonpoint sources is admittedly challenging, and typically relies upon the implementation of management practices to ensure reduction. *Id.* at 8–9.

In February 2018, the State Water Board adopted WQ 2018-0002 (Order) to authorize, with monitoring and reporting requirements for agricultural discharge in the Central Valley. *Id.* at 4–5. The Order included requirements for planning, reporting, monitoring, and recordkeeping. *Id.* at 13–23.

Plaintiffs and Appellants Environmental Law Foundation (Foundation), Protectores del Agua Subterranea (Protectores), and Monterey Coastkeeper (Coastkeeper) (collectively: Appellants) each challenged "various aspects of the Order." *Id.* at 5. "The trial court consolidated the cases and granted a motion for leave to intervene by the Coalition and others." *Id.* The trial court ultimately denied the petitions, and Appellants appealed, arguing that (1) the Order violates the State Water Board's policy for implementation and enforcement of the nonpoint source pollution control program (the Nonpoint Source Policy), and (2) the Order violates resolution No. 68-16, also known as the antidegradation policy (the Antidegradation Policy). *Id.* at 5–6.

The "Nonpoint Source Policy provides guidance for structuring nonpoint source pollution control implementation programs to achieve water quality objectives." *Id.* at 9. The policy itself acknowledges that nonpoint source pollution programs take time and creativity. *Id.* at 9. The policy requires that nonpoint source control implementation programs incorporate five key elements, which elements are foundational to the Nonpoint Source Policy. *Id.* at 9–11. In turn, the Antidegradation Policy "establishes a state policy to regulate the granting of permits and licenses for the disposal of wastes into the waters of the state" to achieve water quality standards. *Id.* at 11 (citing *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.*, 210 Cal.App.4th 1255 (2012) (*AGUA*)).

The Court of Appeal's Decision

The court was tasked "with deciding whether the Order implements state policies for water quality control—the Nonpoint Source Policy and Antidegradation Policy—in the manner required by law." *Id.* at 23. The court systematically rejected the Appellants' various challenges, and concluded that the Order did so comply with the law.

Foundation Arguments: Alleged Violations of Nonpoint Source Policy

First, the Foundation argued that "the Order violates key element four of the Nonpoint Source Policy . . . by: (1) keeping data secret; (2) failing to provide sufficient feedback mechanisms; and (3) failing to require permanent recordkeeping." *Id.* at 25. The Foundation asserted that anonymized data was insufficient to satisfy element four's requirements.

The court disagreed. The court found that anonymization of data did not violate element four because (1) there was no express prohibition of such anonymization in element four, and (2) element four mentioned the publishing of programs, not data. *Id.* at 28. The State Water Boardtherefore reasonably interpreted element four and used appropriate discretion in establishing the Order. *Id.* at 28–29.

'Feedback Mechanisms'

Second, the Foundation argued that "feedback mechanisms" could not be linked to specific management practice implementation data by field. *Id.* at 38. The court again—and for similar reasons—found that the Order's "imperfect window" of information through anonymized data permitted sufficient feedback mechanisms to ensure the nonpoint source discharge control program was linked to expected water quality outcomes. *Id.* at 30–31, 32 n. 17. Evidence presented at trial support this outcome: as nonpoint source pollution is difficult to pinpoint, aggregate data was sufficient. *Id.* at 33–34. Moreover, "complete transparency" was not required under element four. *Id.* at 39.

Record Keeping

Third, the Foundation argued that maintaining records for ten years, as required by the Order, is not in compliance with the "permanent" records required under element four. *Id.* at 40. The Court disagreed because: (1) element four requires only that permanent records "should"—and not "must" or "shall"—be maintained, and (2) the Order's ten-day requirement was within the State's Board discretion and was reasonable. *Id.*

Coastkeeper's Arguments Rejected—Nonpoint Source Policy

Coastkeeper argued that the Order violated elements two and four of the Nonpoint Source Policy. *Id.* at 40. Element two requires nonpoint source control implementation programs to describe the management practices implemented. *Id.* at 40–41. "But key element two applies to nonpoint source control implementation programs, not orders." *Id.* at 42 (emphasis added). Because the Order was part of broader plans implemented by the Boards, which plans as a whole satisfied element two by expecting implementation to ensure attainment of the program's stated purposes, the court rejected Coastkeeper's argument. *Id.* at 42–45.

Coastkeeper also argued that the Order violated element four of the Nonpoint Source Policy. *Id.* at 49. Among other arguments rejected by the court, Coastkeeper claimed that "aggregated and anonymized data obscures the link between implemented management practices and expected water quality outcomes, and thus fails to provide sufficient feedback mechanisms." *Id.* at 50. For the same reasons the Foundation's arguments on this ground were rejected, Coastkeeper's arguments were also rejected. *Id.*

'Management Practices and Outcomes'

Coastkeeper further argued that the trial court's finding that the Order provided "a clear link between management practices and outcomes" was not supported by substantial evidence. *Id.* at 46. The court again disagreed, and discussed specifically how "irrigation and nitrogen management plans and irrigation and nitrogen summary reports are expected to improve water quality outcomes." *Id.* at 46–47. The court further rejected Coastkeeper's argument that the Order permitted "unfettered discretion" to develop water management plans. *Id.* at 47–49.

Protectores' Arguments Rejected—'Antidegradation Policy'

"Unlike the Foundation and Coastkeeper, Protectores argue[d] the Order violates the Antidegradation Policy" for numerous reasons—all of which the court rejected." *Id.* at 53. For example, the court rejected Protectores' argument that the Order's consistency with the maximum benefit of the people was not supported by substantial evidence. *Id.* at 53–54. The court also dismissed Protectores' argument that the Order required "no" costs be incurred by the public—rather, the court found that the Order's language that "no *additional*" costs would be incurred was consistent with the overall plan. *Id.* at 55–57 (emphasis added).

Protectores' final argument was that the State Water Board wrongly "distinguish[ed] *AGUA* and conduct[ed] a 'nontraditional' antidegradation analysis." *Id.* at 58. Once more, the court disagreed, and found "the Order does not announce any departure from *AGUA*." *Id.* at 58–59.

Conclusion and Implications

The Order remains in place. In the Court of Appeal's view, the Order reflects a careful balance of regulating discharges without unduly burdening the regulated party with regulatory costs and information disclosure requirements. The court ultimately found the Order reasonable in light of complex goals of the non-point source programs. Future courts may likewise consider the complexity of competing demands when assessing future nonpoint source pollution programs, including agricultural discharge programs. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093513.PDF. (Alison Toivola, Miles Krieger, Steve Anderson)

FIFTH DISTRICT COURT ORDERS VACATING ORDER OF PREJUDGMENT POSSESSION SOUGHT BY AN INVESTOR-OWNED PUBLIC UTILITY—HOLDS PUBLIC UTILITY WAS NOT REQUIRED TO COMPLY WITH CEQA

Robinson v. Superior Court of Kern County, 88 Cal.App.5th 1144 (5th Dist. 2023).

Southern California Edison Company (Edison), an investor-owned public utility, filed a complaint in eminent domain seeking to condemn two easements on a private property. Edison further filed a motion for prejudgment possession. The Superior Court granted the motion for prejudgment possession. On appeal, the Fifth District Court of Appeal issued a peremptory writ directing the trial court to vacate its order of prejudgment possession and conduct further proceedings that are not inconsistent with the Court of Appeal's opinion.

Factual and Procedural Background

Edison, which is an *investor-owned public utility corporation*, filed a complaint in eminent domain against husband-and-wife landowners Clyde David Robinson and Kathryn Ann Devries (collectively: Robinson) seeking to condemn easements across the Robinson's 5-acre property in Kern County. Edison sought the easements for purposes of accessing and maintaining existing power transmission lines. The first easement requested by Edison was 50 feet in width, located under the existing power transmission lines, and would have provided Edison with the right to maintain and repair the lines. The second easement requested by Edison was 16 feet in width, looped across the Robinson property, and would have provided Edison with the right to construct and maintain a road to access the area underneath the power transmission lines.

In addition to filing a complaint in eminent domain, Edison also filed a motion for prejudgment possession as permitted under Code of Civil Procedure § 1255.410. Robinson failed to file an opposition to the motion for prejudgment possession within the required 30-day period. Following the 30-day period however, Robinson filed its opposition and a request for relief for the untimely opposition. Robinson's opposition argued Edison was not entitled to take the easements because it had failed to adopt a resolution of necessity; had failed to comply with the California Environment Quality Act (CEQA); and had failed to satisfy the requirements for exercising the power of eminent domain in Code of Civil Procedure § 1240.030 subdivisions (a) through (c). Following Edison's filing of a reply to Robinson's opposition, the trial court adopted its tentative ruling granting Edison's motion for prejudgment possession. In so doing, the Court of Appeal did not make any explicit findings other than stating that "all of the criteria seems to be satisfied."

In response, Robinson filed a petition for writ of mandate requesting the Court of Appeal's take action to vacate the trial court's order granting Edison prejudgment possession.

The Court of Appeal Decision

Edison, a Privately Owned Public Utility, Is Authorized to Exercise the Power of Eminent Domain

The first issue before the Court of Appeal was whether Edison, a privately owned public utility, had the authority to exercise the power of eminent domain. The Court of Appeal first looked to Code of Civil Procedure § 1240.020, which provides that:

> . . .[t]he power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

Turning next to the Public Utilities Code, the Court of Appeal found that under the express provisions of the Public Utilities Code and the legislative history to the pertinent sections, Edison qualified as a "public utility" for purposes of the Public Utility Code's provisions that permit a public utility to condemn property. The Court of Appeal thus found that Edison was authorized under Code of Civil Procedure § 1240.020 to exercise the power of eminent domain.

Edison Is Not a 'Public Entity' Required to Adopt a Resolution of Necessity Before Initiating Condemnation of an Easement

The second issue before the Court of Appeal was whether Edison was required to adopt a "resolution of necessity" prior to initiating its condemnation action. Under Code of Civil Procedure § 1240.040, "[a] public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity…"

Turning first to the plain meaning of the statute, the Court of Appeal found that Edison, which is an investor-owned public utility corporation, did not qualify as a "public entity" because the relevant provisions of the Code of Civil Procedure distinguished between public entities and corporations. The Court of Appeal also found that disregarding the plain meaning would produce unintended consequences, such as allowing a privately owned public utility to make its own determination about the public necessity of a condemnation and thereby subvert the ordinary burden of proof imposed on the issue of necessity under Code of Civil Procedure § 1240.030.

Accordingly, the Court of Appeal found that Edison was not a public entity for purposes of the requirement for a resolution of necessity, and therefore Edison was not required to adopt a resolution of necessity prior to initiating its condemnation action.

Edison Not Required to Obtain CPUC Approval Before Filing the Condemnation Action

The third issue before the Court of Appeal was whether the Public Utilities Code required Edison to obtain the approval of the California Public Utilities Commission (CPUC) prior to filing the condemnation action. Under Public Utilities Code § 625(a)(1)(A), "a public utility that offers competitive services" is prohibited from condemning any property "for the purpose of competing with another entity in the offering of those competitive services" unless the CPUC approves the condemnation.

The Court of Appeal found that the prohibition in Public Utilities Code § 625(a)(1)(A) did not apply to the Edison's proposed condemnation regarding the existing transmission lines because such condemnation was not for competitive purposes.

Edison Not Required to Comply with CEQA Because it is Not a Public Agency—No Public Agency Approval Was Required to Condemn the Easement

The fourth issue before the Court of Appeal was whether Edison was a "public agency" that is required to comply with CEQA before commencing an eminent domain action.

The definition of a public agency is set forth in the CEQA Guidelines at § 15379 as well as in Public Resources Code § 21063, which provides that a public agency:

> . . .includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision.

Based on the definitions set forth in the CEQA Guidelines and the Public Resources Code, the Court of Appeal determined that CEQA's definition for a "public agency" does not include investor-owned public utilities such as Edison.

The Court of Appeal did note that had Edison been required to obtain the approval of the CPUC prior to condemning the easement, then the CPUC would have been a public agency for purposes of CEQA and would have been responsible for CEQA compliance. Here however, where no such approval was required, the Court of Appeal found that the proposed condemnation and subsequent maintenance activity would fall outside the scope of CEQA.

Prejudgment Possession

The Court of Appeal then reviewed then reviewed the trial court's granting of Edison's motion for prejudgment possession to determine whether the procedural requirements for granting prejudgment possession were met.

As authorized under the California Constitution, the Code of Civil Procedure at § 1255.410 permits an eminent domain plaintiff to move the court for an order of prejudgment possession, thereby allowing the plaintiff to more quickly take possession of a property that is the subject of the eminent domain proceedings.

Under Code of Civil Procedure § 1255.410, if the defendant fails to timely oppose a motion for pre-

judgment possession, then the trial court is required to make an order for possession of the property if it makes the findings set forth in § 1255.410(d)(1). Robinson argued that the trial court failed to make such findings.

In analyzing this claim, the Court of Appeal turned to the requirements for taking a particular property set forth in Code of Civil Procedure § 1240.030, which provides that the power of eminent domain to acquire property requires "all" of the following to be established: the public interest and necessity require the project; the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and the property sought to be acquired is necessary for the project.

In reviewing the trial court's decision, the Court of Appeal first found that the trial court failed to make explicit findings on its review of the motion for prejudgment possession. The Court of Appeal stated that while generally a trial court is not required to issue a statement of decision in ruling on a motion, the trial court was required to do so here based on the significance of the deprivation of the property rights at issue. The Court of Appeal thus held that the trial court was required to make explicit findings either "in writing or orally on the record" in order to grant the motion for prejudgment possession.

Further, the Court of Appeal found that even if the trial court was not required to make explicit findings (*i.e.*, if the doctrine of implied findings instead applied), there was no substantial evidence in the record to support such required findings. The Court of Appeal thus found that:

> . . .[t]he absence of substantial evidence…[is] sufficient to carry Robinson's burden of showing prejudicial error.

Consistent with these holdings, the Court of Appeal issued a peremptory writ directing the trial court to vacate its order of prejudgment possession and conduct further proceedings that are not inconsistent with the Court of Appeal's opinion.

Conclusion and Implications

This case is significant because it (1) contains substantive discussion regarding how a privately owned public utility will be characterized for purposes of an eminent domain action; (2) establishes that a privately owned public utility exercising its eminent domain power is not a public agency for purposes of CEQA; and (3) establishes new requirements for a trial court's review on a motion for prejudgment possession. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F085211.PDF. (E.J. Schloss, Eric Cohn)

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