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CALIFORNIA WATER NEWS

TRIBES AND TRIBAL ORGANIZATIONS IN NEVADA AND OTHER WESTERN STATES RECEIVE FUNDING FOR WATER INFRASTRUCTURE PROJECTS

In April 2024, the Biden administration announced up to $320 million in funding through the U.S. Bureau of Reclamation to support water infrastructures projects being planned and constructed by federally recognized Tribes and Tribal Organizations in the western United States. This funding provides a significant investment in supporting Tribal communities in supporting critical infrastructure needs.

Background

Through the Biden administration's Investing in America initiative, the Secretary of the Interior Deb Haaland, stated that "investing in water infrastructure projects is crucial to ensuring the health, safety and prosperity of Indigenous communities." The commitment to provide these infrastructure investments in Indian County is important to support tribal communities in the repair and revitalization of key infrastructure facilities. Through these investments, those communities have access to greater opportunities to advance economic development by expanding access to clean and reliable water supplies, as well as conservation projects.

Importance of Investing in Tribal Communities in Nevada

Of the funding announced by the Biden administration, will support projects for Tribes in Nevada, including up to 100-percent of the cost for planning, design and construction of the infrastructure project. The monies are expected to be allocated through the 2021 Bipartisan Infrastructure Law.

Nevada's federally recognized tribes are mostly located in remote areas of Nevada, which inherently presents challenges for communities in developing appropriate infrastructure for drinking water and wastewater. Due to the remoteness, rural Tribal communities often struggle in securing adequate funding to support critical infrastructure projects. Health and Human Services Secretary Xavier Becerra stated, "It is critically important that Tribal communities have clean drinking water sources, reliable sewage systems, and effective solid waste disposal facilities. Investing in critical infrastructure helps to improve health and safety for children and families and advances economic opportunities throughout Tribal communities."

Opportunities for Tribal Communities

This announcement provides opportunities for Nevada's twenty-eight Tribes and Tribal Communities to seek federal funding to improve critically important water and wastewater infrastructure, which is essential to protect public health. The intent of the funding is to "accelerate completion of these critical projects and reduce barriers for tribal nations," said Roselyn Tso, Director of the Indian Health Service.

Ability to Address Nevada's Tribes Critical Needs

Nevada's Tribes and Tribal communities, like many throughout the United States, have systemically been underserved and have limited access to adequate water and wastewater infrastructure. In Nevada, Tribes have regularly faced health-based violations by the Environmental Protection Agency associated with drinking water systems. These violations are regularly the result of inadequate or non-existent drinking water infrastructure appropriate to treat and serve safe culinary water services in those communities. Many of these violations are related to groundwater contamination, as well as naturally occurring constituents exceeding Safe Drinking Water Act standards.

The funding announced by the Biden administration provides Nevada's Tribal communities opportunities to pursue and secure critical funding to plan, update, and construct infrastructure to protect the health of those communities. The funding opportunity not only improves opportunities for Tribal communities to address those critical infrastructure needs, but also serves to create economic opportunities, job

creation, and allow for infrastructure hardening to the impacts of a changing climate.

Conclusion and Implications

The continuing investment of the Biden administration in funding critical water and wastewater infrastructure is important to assuring that communities have access to safe drinking water, which is essential to support public health and economic development. This latest announcement is significant in that it continues to reflect a national priority of extending those investments to Tribal communities, which have historically been underserved and disadvantaged. Nevada's Tribes and Tribal communities have an unprecedented opportunity to seek funding through the Bureau of Reclamation's Tribal Domestic Water Supplies Program. More information regarding the program can be obtained through the Bureau's Water Supplies Projects website at https://www.usbor.us/native

(Micheline Nadeau Fairbank)

GROUNDWATER FEE LITIGATION IS ON THE RISE FOR SGMA BASINS

As the Sustainable Groundwater Management Act (SGMA) moves forward in its tenth year of implementation since three landmark pieces of legislation were passed in 2014 taking effect on January 1, 2015, much progress has occurred as required by SGMA (which is codified in California Water Code section 10720 *et seq.*), relatively speaking considering 127 basins statewide became subject to mandatory management by forming a Groundwater Sustainability Agency (GSA) and a Groundwater Sustainability (GSP) to regulate and manage the local groundwater resources.

Not all GSA formations and GSP adoptions went without disputes in administrative and judicial forums; after all, water rights and supplies are limited particularly when many of these SGMA basins require "ramp downs," or curtailed use of groundwater extractions in order to bring basins into "balance" so that the groundwater levels stabilize to better ensure long-term sustainability of the resource.

What is evolving in recent times is a string of disputes involving the funding of the GSAs, with several disputes now around the state. GSAs naturally need a revenue stream to fund administrative and implementation efforts, through the legal mechanism and/or the extent of the cost burden imposed on stakeholders are the topics of great contention.

The Madera County Litigation

One of the pending actions in the state is venued in Madera County Superior Court, brought by farmers against the County of Madera, contending that the County as the GSA has imposed unlawful assessment fees. In many areas, farmers are expected to extract less groundwater while also paying fees to help fund the GSAs, so one perspective is that the landowners endure two costs by less water production yielding less crops yet higher expenses for local regulation.

In the Madera County case, Proposition 218 was used by the GSA to impose land assessment fees, purportedly to pay to import water, construct recharge basins, amongst other actions. The GSA's boundaries encompass approximately 215,000 acres across parts of three subbasins. A coalition of farmers in the Madera subbasin sued, contending the Proposition 218 process failed to follow proper procedures and the farmers were carrying an unjust burden of the fees. They sought an injunction and won.

Most recently in the case on June 18, the court issued a ruling calling for more information, specifically relating to a California rule of "pay first, litigate later." This rule has become an issue in several SGMA-fee related pending around the state of California. [ ].

'Pay First, Litigate Later' Rule

While the Proposition 218 issues are worthy of a separate analysis, the focus here is on the "pay first, litigate later" rule. This rule has existed in California for some time, but is now rearing itself in the SGMA disputes.

The *Mojave Pistachio* Decision

Earlier this year, the Fourth District Court of Appeal ruled in *Mojave Pistachio, LLC et al. v. Superior*

Court of Orange County, Indian Wells Groundwater Authority, Case No. G062327, opinion published Feb. 8, 2024, this rule applies to fees imposed by a GSA. The Court of Appeal held that water users must pay the currently due prior to commencing their lawsuit, and to pay a fee that becomes due during litigation in order to maintain the lawsuit.

The court looked to tax disputes where the "pay first" rule traditionally arises, in which the remedy in those disputes is a refund if indeed the taxing authority was found to be wrong. The court reasoned that the same applies in the SGMA context for GSAs seeking to impose fees, reasoning in part that the "pay first" rule provides for due process so long as the stakeholders are given a meaningful opportunity "at some point" to challenge the legality of the fee. In a more fact-specific finding to the GSA at issue in *Mojave Pistachio, LLC*, the court reasoned that the GSA had a rational basis for assessing the fee.

Notably, Mojave Pistachio asked for an exception to be made to the general rule, particularly when the GSA's GSP is inconsistent with California water law. The court declined, indicating that to do so, at least during the demurrer stage (an early part of the lawsuit), would be to adjudicate the GSP. The court added that to create an exception could preclude GSAs from having sufficient review to manage the groundwater basin.

Conclusion and Implications

SGMA mandates that a GSA regulate local groundwater resources to ensure long-term sustainability of the basin. Stakeholders, often-times agricultural and other landowner interests, as well as public agencies, have water rights that SGMA explicitly says are not altered by SGMA. Yet, to achieve sustainability of the local groundwater supply, curtailing groundwater extractions is but one method to work toward SGMA's sustainability goal. That topic is contentious. Moreover, the funding, albeit to some extent necessary for the GSAs, the "pay first, litigate later" rule may not always be equitable or even possible in instances where the stakeholder simply does not have the funds to advance, or worse yet, the methodology being used by the GSA is so poor as to create draconian impacts to stakeholders that is highly inequitable. For instance, basing fees on quantity of land ownership rather than historical groundwater usage. As they issues evolve, the courts (or the Legislature) may be called upon to create exceptions that better ensure protection of stakeholders, while also providing accountability of GSAs to generate their revenue stream with lawful processes and methodologies. (Wes Miliband)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA BILL COULD TRANSFORM PRIME AGRICULTURAL LAND INTO SOLAR FARMS

California's agricultural landscape, particularly in the Central Valley, could significantly change from agricultural farms to solar farms, under Assembly Bill 2528. Assembly Bill 2528, introduced by Assemblyman Joaquin Arambula, D-Fresno, proposes a bill that would ease the process for farmers without adequate water resources to exit their Williamson Act contracts without incurring stiff penalties, potentially paving the way for the conversion of these lands into solar farms.

The Williamson Act and AB 2528

The Williamson Act, formally known as the California Land Conservation Act of 1965, was enacted to promote the conservation of agricultural and open-space lands. It provides property tax relief to landowners in exchange for a commitment to restrict the land's use to agriculture or open space for a minimum of ten years. This act has helped to preserve many acres of California's prime agricultural land, ensuring that vast tracts of prime farmland remain undeveloped and dedicated to agricultural use.

Assembly Bill 2528 introduces a notable exception to the stringent conditions of the Williamson Act. Under current law, a landowner seeking to cancel a Williamson Act contract must pay a cancellation fee equivalent to 12.5 percent of the land's assessed value. This fee serves as a significant deterrent against the premature termination of these contracts, thereby safeguarding agricultural and open-space lands from conversion to other uses. However, AB 2528 proposes that landowners who lack sufficient water resources should have this cancellation fee reduced to 6.25 percent, allowing them to exit their contracts with a less impactful financial penalty.

Water Supply Conditions Prompting Consideration of Alternative Revenue Sources

According to propontents fo the Bill, this legislative proposal stems from ongoing water scarcity challenges faced by farmers in California. The Central Valley, often referred to as the nation's breadbasket, has been severely impacted by prolonged droughts, the implementation of the Sustainable Groundwater Management Act, fluctuating crop prices, and increased costs to obtain water. For many farmers, the lack of reliable or affordable water sources has rendered traditional agricultural activities economically unviable. AB 2528 aims to provide farmers with an alternative pathway, allowing them to pivot from water-intensive agriculture to other uses, notably solar energy production.

Will the Bill Undermine Agriculture?

While the intention behind AB 2528 is to offer relief to water-strapped farmers, it has sparked some opposition from agricultural proponents including the California Farm Bureau. One concern is the potential for widespread conversion of fertile agricultural land into solar farms. The Central Valley's prime agricultural lands are among the most productive in the world, supporting a diverse range of crops and contributing significantly to the state's economy. One argument against the bill is that allowing these lands to be repurposed for solar energy could undermine food security and erode the agricultural foundation of the region.

Moreover, there is apprehension about the long-term implications of this potential policy shift. The Williamson Act has been a cornerstone of California's land conservation efforts for over five decades. Eroding its protections could set a precedent that jeopardizes other conservation initiatives. Environmental groups also worry that large-scale solar developments could disrupt local ecosystems, displacing wildlife and altering natural habitats.

Additional Consisderations for Agricultural Interests

Proponents of AB 2528 emphasize the potential benefits of integrating renewable energy production with agricultural land use. The argument is that solar

farms could provide a sustainable and economically viable alternative for farmers facing water shortages, who may otherwise lose the economic viability of their property altogether. Additionally, the transition to renewable energy is asserted to align with California's ambitious climate goals, reducing the state's reliance on fossil fuels and decreasing greenhouse gas emissions.

The legal landscape surrounding AB 2528 is complex, involving considerations of land use policy, water rights, and environmental law. If enacted, this bill would require special energy projects to provide a community benefits package that could include local employment, water services, and electricity discounts. Policymakers would need to establish clear guidelines to ensure that the conversion of agricultural land to solar farms is conducted in a manner that minimizes adverse impacts on the environment and rural communities.

Conclusion and Implications

Assembly Bill 2528 represents a significant legislative initiative with far-reaching implications for California's agricultural sector and renewable energy landscape. While it offers a potential lifeline for farmers grappling with water scarcity and affordabily issues, it also poses challenges to the preservation of prime agricultural land. As this bill progresses through the legislative process, it will require thorough scrutiny and balanced consideration to achieve a harmonious integration of agricultural sustainability and renewable energy development.
(Darien Key, Derek Hoffman)

REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY'S FINAL PHASE 2 RULES FOR NEPA STREAMLINE PROCESS BUT ALSO EXPAND AGENCY REVIEW

On May 1, 2024, the Council on Environmental Quality (CEQ) unveiled the final Phase 2 National Environmental Policy Act (NEPA) rule, also known as the Bipartisan Permitting Reform Implementation Rule (Rule or Phase 2 Rule). See 89 Fed.Reg. 35442. This Rule marks the culmination of the Biden administration's multi-year initiative to streamline and modernize NEPA's environmental review process. Effective on July 1, 2024, the Rule applies to all federal projects with reviews and supplemental reviews for certain incomplete or ongoing actions initiated after that date. Additionally, the Phase 2 Rule allows agencies to apply the regulations to ongoing activities and environmental documents under development. Individual federal agencies have until July 1, 2025, to revise their NEPA regulations to incorporate any necessary changes.

Key Amendments and Codifications

The Rule codifies several streamlining NEPA amendments included in the Fiscal Responsibility Act of 2023, including time limits for the lead agencies to conclude their environmental review and page limits for the environmental review documents. The Phase 2 Rule also made numerous regulatory framework changes to NEPA, including: expanding requirements for assessing climate change, environmental justice, and global effects principles.

Streamlining NEPA Review

The Rule incorporates several NEPA amendments from the Fiscal Responsibility Act of 2023, which aim to expedite and clarify the environmental review process. Key amendments include:

•*Time Limits*

Lead agencies now have set deadlines for NEPA reviews, with environmental assessments (EAs) required to be completed within one year and environmental impact statements (EISs) within two years, unless extensions are justified.

•*Page Limits*

EAs are limited to 75 pages, while EISs have a 150-page limit, extendable to 300 pages for complex proposals.

•*Draft NEPA Documents*

Agencies can allow project sponsors to prepare draft NEPA documents, encouraging programmatic and tiered documents.

•*Categorical Exclusions (CEs)*

The Rule encourages lead agencies to adopt and use CEs from other agencies, streamlining the review process and avoiding duplication.

Regulatory Framework Changes

As discussed above, the Rule introduces significant changes to the NEPA regulatory framework, including enhancing the consideration of climate change, environmental justice, and global effects. Some of the major regulatory changes include:

•*Redefining "Major Federal Action"*

The Rule expands the definition of "Major Federal Action." exempting certain categories from NEPA review. These exemptions include federal funding in the form of general revenue-sharing funds and financial assistance where federal agencies lack control over subsequent use. This provision aims to streamline federal funding and loan activities, reducing the regulatory burden on agencies

•*Addressing Climate Change and Environmental Justice*

The Phase 2 Rule mandates an expanded review of environmental effects, particularly analyzing foreseeable effects related to on climate change and environmental justice. Agencies must analyze conflicts with climate-related plans, quantify greenhouse gas emissions (where feasible), and consider the potential effects of climate change on proposed actions

and their alternatives. This analysis would ensure that projects align with climate goals and minimize adverse impacts on vulnerable communities.

Environmental Justice

CEQ has also codified a definition of "environmental justice" within NEPA, requiring agencies to consider disproportionate and adverse effects on communities with environmental justice concerns. This includes analyzing direct, indirect, and cumulative impacts. Alternatives analyses must also assess options that address adverse health and environmental effects on these communities. Indigenous Knowledge is recognized as a relevant information source, highlighting the importance of including diverse perspectives in environmental assessments.

•*Updated Factors for Determining Significance*
The Rule reverts to the original 1978 regulations, directing agencies to examine the context and intensity of effects to determine their significance. The ten-factor "intensity" test has been restored and revised, explicitly considering tribal sacred sites, environmental justice community concerns, and critical species or habitats under the Endangered Species Act.

•*Obligation to Undertake New Research*
Agencies are allowed to use any reliable data source for NEPA reviews and are not required to undertake new research unless essential for a reasoned choice among alternatives. This provision aims to balance the need for thorough environmental assessments with practical considerations of time and cost.

•*Expanded Scope of "Affected Environment" to Include Global Focus*
The Rule revises the definition of "human environment" to include a global focus, requiring agencies to consider the context and intensity of effects in determining their significance. This broader scope ensures that environmental assessments account for potential global, national, regional, or local impacts.

•*Broadened Scope of Alternatives*
The Phase 2 Rules now require the agencies to identify alternatives that avoid or minimize environmental effects, i.e. possibly requiring agencies to consider reasonable alternatives beyond their jurisdiction. The agencies should also "use all practicable means . . .to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."

•*New Requirements for Mitigated FONSI*
The Rule authorizes agencies to prepare a mitigated Finding of No Significant Impact (FONSI) if there are enforceable mitigation requirements or commitments. A monitoring and compliance plan is required when an EA relies on mitigation as an incorporated component of the proposed action. This ensures that mitigation measures are effectively implemented and monitored.

•*Increased Public Involvement:*
For the first time, agencies must make draft EAs available for public comment and consider this input in the final drafts. Additionally, agencies are required to provide public notification of NEPA-related hearings and meetings, and draft EISs must be available at least fifteen days before public meetings. These changes emphasize the importance of public participation in the NEPA process, ensuring that community voices are heard and considered.

Conclusion and Implications

By incorporating amendments from the Fiscal Responsibility Act of 2023 and introducing new regulatory changes, the Rule aims to enhance the efficiency and effectiveness of NEPA reviews. But the Rule also imposes certain new and expanded requirements on the agencies, including an expanded focus on climate change, environmental justice, broadened scope of alternatives analysis, and enhanced public engagement. It remains to be seen if the streamlining and efficiency amendments accompanied by the broadened scope of review would result in speeding NEPA reviews. However, the future of Phase 2 Rules is already in question as a group of twenty states sued the CEQ to block its Phase 2 Rules on May 21, 2024, in the U.S. District Court for the District of North Dakota arguing that the NEPA amendments proposed in the Rules have the effect of "stymying development of certain projects and resources …" and violates NEPA and the Administrative Procedure Act.
(Hina Gupta)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ADOPTS STATE WATER PROJECT LONG-TERM DROUGHT PLAN

The California Department of Water Resources (DWR) recently adopted a State Water Project Long-Term Drought Plan (Drought Plan). The Drought Plan provides a strategy for the State Water Project (SWP) to prepare for and address future droughts.

Background

California has a unique and diverse landscape and includes coastal shores, deserts, foothills, and mountain ranges. Similarly, California has a unique and diverse climate which is more variable than any other state in the United States. According to DWR, the annual precipitation across California can vary from a less than 11 inches to almost 43 inches. California experiences extended dry conditions, which often result in significant droughts. California droughts can also vary by location and scale, periods of time and duration, climate and landscape conditions, and impacts to communities and economies. This danger drives the need for DWR and California to prepare for more impactful droughts and water shortages in its future. DWR developed the Drought Plan to help ensure that California's massive State Water Project can deliver adequate water supplies.

State Water Project

The State Water Project is a critical backbone California water supply and water conveyance system that provides water to other water agencies through a complex system of canals, pipelines, reservoirs, and hydroelectric power facilities. The SWP delivers water from snowmelt and runoff from the northern Sierra mountains to 29 public agencies, which serve 27 million Californians and provide irrigation for approximately 750,000 acres of farmland. The SWP acts as a wholesale water provider, providing drinking water to up to two thirds of California residents.

The SWP, as a wholesale water supplier, makes no guarantee of annual water deliveries. Instead, the SWP stores and delivers available water to the maximum extent possible within regulatory, contractual, and operational constraints. During droughts, there is a risk that there is not enough water available to meet all needs within the state.

Long-Term Drought Plan

The SWP developed the Drought Plan based on its role as a wholesale water provider. The scope of the SWP's drought planning activities is driven by the role the SWP plays within California's water management system during times of drought. The Drought Plan consolidates information and actions taken during past droughts along with descriptions of the actions taken by the SWP to plan for and prepare for future droughts. This Drought Plan describes historical California climate and droughts, analysis of future climate and drought vulnerability, SWP water supply planning objectives, SWP water supply allocation planning and operations, SWP drought planning actions, lessons learned from previous droughts, and SWP actions to improve long-term drought resilience and enhance the physical capabilities and flexibility of the system. DWR will review the Drought Plan once every five years, at a minimum, and will update the plan following significant drought events.

Objectives of the Long-Term Drought Plan

The objectives of the Drought Plan include: (1) delivering water to meet minimum human health and safety needs; (2) preserve upstream storage for future drought protection; (3) meet regulatory requirements; (4) deliver water based on water rights priority; and (5) maximize diversion to storage and delivery of water supply. A summary follows:

- Deliver water supply to meet minimum human health and safety (HHS) needs. HHS demand for water is based on minimum unmet water demands to meet domestic supply, fire protection, and sanitation needs during the year. The current HHS demand for water is limited to 55 gallons per capita per day.

- Preserve upstream storage for future dry year and drought protection. To prepare for future dry conditions the SWP plans for targeted carryover storage, which is water that could have been delivered but was held in storage instead.

•Meet regulatory requirements. The State Water Board issued Water Rights Decision 1641 (D-1641) to DWR and U.S. Bureau of Reclamation (Reclamation) in 1999. D-1641 includes water right permit terms and conditions to implement water quality objectives to protect municipal and industrial and agricultural beneficial uses in the Delta as well as water quality and flow objectives to protect fish and wildlife beneficial uses. The objectives vary by month and by water year classification. In addition to D-1641 objectives, the SWP also provides for minimum instream flows to the Feather River as well as additional flows through export reductions in the south Delta for state and federal Endangered Species Act (ESA) protections as required by the biological opinions issued by the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) and the incidental take permit issued by the California Department of Fish and Wildlife (CDFW).

•Deliver water based on water rights priority. In addition to providing water to meet minimum HHS and Delta water quality and flow objectives, other deliveries are made pursuant to contracts with entities downstream of Lake Oroville that assert senior water rights. Pursuant to these agreements, DWR supplies up to approximately 955 taf of water each year during the contracted irrigation season. Outside of the irrigation season, these districts historically have taken delivery of water for beneficial uses, such as rice stubble decomposition and waterfowl habitat.

•Maximize diversion to storage and delivery of water supply. The SWP maximizes diversion during the winter and spring to upstream storage to be released later for re-diversion at the SWP south Delta export facility.

Conclusion and Implications

The Drought Plan establishes a framework and objectives to prepare for future droughts. The Drought Plan is designed to help the SWP deliver water supply to meet minimum HHS needs and preserve upstream storage for future dry year and drought protection. The Drought Plan is available on the DWR website at: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Files/Long-Term-Drought-Action-Plan_Final.pdf
(C. Suarez, Derek Hoffman)

DELTA STEWARDSHIP COUNCIL PROPOSES AMENDMENT TO CALIFORNIA CODE OF REGULATIONS TO PROTECT AND RESTORE THE SACRAMENTO-SAN JOAQUIN DELTA

On March 30, the Delta Stewardship Council announced proposed amendments (Proposed Regulation) to Title 23 of the California Code of Regulations (CCR) to implement certain previously adopted regulatory policies under the 2022 Ecosystem Amendment to the Delta Plan. In particular, the Proposed Regulation would update fifteen sections and add three new appendices to the CCR.

Background

The Delta Reform Act of 2009 (Act) amended the Public Resources Code (PRC) and the Water Code in order to:

> Achieve the two coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem … [to] be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. (PRC, § 29702(a).)

The Act established the Delta Stewardship Council (Council) as an independent state agency. (Water Code, § 85200.) The Act charged the Council with reviewing the economic sustainability plans of the existing Delta Protection Commission and required any agency proposing to undertake actions in the Delta or the Suisun Marsh to first submit to the Council a written certification of consistency with the Delta Plan. (*Id.* at § 85225.) The Council was tasked with developing "procedures for early consultation … on

the proposed covered action." To that end, the Council was to:

> . . .develop, adopt, and commence implementation of [a] Delta Plan … [to] include subgoals and strategies to assist in guiding state and local agency actions related to the Delta. (*Id.* at § 85300(a).)

The Council was instructed to review its Delta Plan at least once every five years. (*Id.* at subd. (c).)

The Council's Delta Plan policies "become enforceable state regulations" via the rulemaking process outlined in the State Administrative Procedure Act (APA). As with any public rulemaking process, it involves state review and a public comment period. (*See, e.g.*, Gov. Code, § 11340, *et seq.*) The Council's regulations, if they are approved, would be codified under Title 23 of the CCR. (*See* 23 CCR, § 5000, *et seq.*)

Previously, as part of this rulemaking process, the Council adopted Resolution 2022-05 on June 23, 2022. The Resolution "direct[ed] Council staff to initiate a rulemaking process to incorporate the new and updated policies adopted in the amendment."

The Proposed Rulemaking

By issuing its latest Notice of Proposed Rulemaking, the Council has set in motion a public review and comment process culminating in a public hearing. The Proposed Regulation

> . . .implement[s] five core strategies to achieve the coequal goals of protecting, restoring, and enhancing the Delta ecosystem … that form the basis for the policies, recommendations, and performance measures in the Delta Plan.

The Council summarized these "five core strategies" as follows:

> (1) [C]reate more natural, functional flows; (2) restore ecosystem function; (3) protect land for restoration and safeguard against land loss; (4) protect native species and reduce the impact of nonnative invasive species; and (5) improve institutional coordination to support the implementation of ecosystem protection, restoration, and enhancement.

The Proposed Regulation would: (1) require state and local public agencies to disclose contributions for ecosystem function restoration and the social benefits provided in the Delta; (2) require the disclosure of cultural, recreational, agricultural, and natural resources benefits anticipated from the completion of a covered action project; (3) require state and local public agencies that are proposing a project in the Intertidal Elevation Bank and Sea Level Rise Accommodation Band to explain how the project will accommodate future marsh migration, anticipated sea level rise, and tidal inundation. If that accommodation is not possible, it would require an explanation for the exception provided; (4) require state and local public agencies, based on best available science, to explain how the project is designed to safeguard against levee failure should the project take place in the Shallow Subtidal Elevation Band or the Deep Subtidal Elevation Band, focusing on accounting for future impacts with an added safeguard to reduce flood risk in the Delta; (5) redefine the range of levees included and incorporate the Stanislaus River, Consumnes River, Middle River, Old River, and Elk Slough while updating and clarifying the language for new flood control work that includes permanent structural changes or improvements in flood control functions, while allowing for future adaptations depending on Delta needs and climate changes.

Alternatives include: (1) taking no action, which would leave the existing Delta Plan Regulations in place unaffected, which already include an "updated Delta Levees Investment Strategy; (2) a policy modification to "reduce the occurrence of new ecosystem restoration projects on existing agricultural working lands or lands suitable for farming"; and (3) a revised policy "to disincentivize restoration associated with channel widening and other flood management (levee projects) activities."

The Council accepted public comments on the Proposed Regulation between March 29 and May 14, 2024. A public hearing was held that same day. The Council is presently considering the results of that hearing.

Conclusion and Implications

The Proposed Regulation represents a potentially significant expansion in the Council's consideration of proposed projects in the Delta, requiring project proponents to explain the proposed ecological, social,

recreational, and cultural benefits associated with their projects. Further, project proponents would have to demonstrate how their project would, in certain tidal areas, accommodate marsh migration and guard against sea level rise, while safeguarding against levee failure. It remains to be seen whether the Council will adopt the amended regulations. (Miles Krieger)

YUBA WATER AGENCY SEEKS EXTENSION FOR THE LOWER YUBA RIVER ACCORD WATER TRANSFER PROGRAM

On May 29, 2024, the California State Water Resources Control Board (SWRCB) issued notice of a petition for the long-term extension of the Yuba Accord Water Transfer Program (Transfer Program), filed by Yuba Water Agency (Yuba Water) on April 4, 2024. Yuba Water seeks a 25-year extension of the Transfer Program to continue the transfer of up to 200,000 acre-feet of water per year, through December 31, 2050. The petition also seeks to add new places of use, points of re-diversion, and purposes of use to facilitate the Program's operation beyond 2025.

Background

The Transfer Program was established in 2008 as part of the Yuba Accord, a comprehensive settlement by Yuba Water, federal, state and local agencies, and non-governmental organizations to protect and enhance fisheries and aquatic resources in the Lower Yuba River, while ensuring water supply reliability. The Yuba Accord is structured around four related agreements: a long-term water purchase agreement with the Department of Water Resources (DWR); a conjunctive use agreement authorizing Yuba Water's member units to substitute groundwater for surface water during dry years; a Lower Yuba River Fisheries Agreement that imposes minimum instream flow requirements during specified periods of the year; and a temporary water transfer option agreement between Yuba Water, Contra Costa Water District, and East Bay Municipal Utility District.

The Transfer Program is operated through the purchase agreement, conjunctive use agreement, and water transfer option agreement, and provides for stored water transfers of up to 200,000 acre-feet per year and groundwater substitution transfers of up to 90,000 acre-feet per year via authorized points of diversion and re-diversion. While the fisheries agreement remains in effect until the Federal Energy Regulatory Commission issues a new long-term license for the Yuba River Development Project, the Program's other agreements are set to expire on December 31, 2025, if they are not extended.

The SWRCB first authorized the Transfer Program under Order WR 2008-0014, following Yuba Water's preparation of an Environmental Impact Report (EIR) in 2007 that analyzed the Program's potential environmental effects. In April of 2024, Yuba Water issued a draft supplemental EIR for the extension of the Transfer Program and the relevant agreements under the Yuba Accord. The draft supplemental EIR indicates that the analyzed environmental impacts would be less than significant, so there is no further need to reduce those impacts through the adoption of other alternatives or mitigation measures. The draft supplemental EIR was circulated for public review and comment for a period of 45 days, which ended on May 20, 2024. A final EIR will include both written and oral comments on the draft EIR, Yuba Water's responses to those comments, and any revisions to the draft EIR.

Yuba Water's Petition

To continue the Transfer Program for another 25 years, Yuba Water must obtain approval by the SWRCB to extend its authorization of the existing places of use, purposes of use, and points of rediversion of transferred water, and amend certain terms in Yuba Water's water right permit 15026 to reflect those changes. The petition does not seek to alter any other terms or conditions imposed on the Transfer Program under WR 2008-0014. For the SWRCB to approve Yuba Water's petition, it must find that the extension will not result in injury against other legal users of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. The SWRCB's notice provides that interested parties may submit written protests by June 28, 2024.

In addition to the SWRCB proceeding, Yuba Water will need to determine whether the Transfer Program's extension constitutes a "covered action" under

the Delta Reform Act of 2009 and, potentially, certify consistency with that law. Yuba Water may also need to apply for and obtain an incidental take permit from the California Department of Fish and Wildlife if the Transfer Program requires additional coverage under the California Endangered Species Act.

Conclusion and Implications

By seeking an extension for the Transfer Program, Yuba Water seeks to continue the cooperative actions of the Yuba Accord. For the Transfer Program to continue beyond 2025, the SWRCB must approve an extension for both new and existing places of uses, purposes of use, and points of re-diversion. Yuba Water will also need to approve and certify a final EIR under the California Environmental Quality Act (CEQA). It remains to be seen whether Yuba Water will be subject to additional measures under the Delta Reform Act, the Endangered Species Act, or other laws. Yuba Water's draft supplemental EIR and additional information on the proposed extension of the Transfer Program can be found at: https://www.yubawater.org/DocumentCenter/View/7150/Yuba-Accord-Extension---Draft-SEIR.
(Zachary Schiffer, Austin Cho)

LAWSUITS FILED OR PENDING

TRIAL COURT GRANTS PRELIMINARY INJUNCTION RELATED TO DELTA CONVEYANCE PROJECT GEOTECHNICAL ACTIVITIES

In June 2024, the trial court in Sacramento County assigned to ten cases challenging the Delta Conveyance Project (DCP) granted a preliminary injunction filed by a number of plaintiffs under the Delta Reform Act seeking to halt the geotechnical activities of the Department of Water Resources (DWR) related to the DCP. The preliminary injunction is effective immediately. [*Tulare Lake Basin Water Storage v. California Department of Water Resources*, Cases 24WM0000006, *et seq*., (Sac. County Super. Ct., June 20, 2024]

Background

In December of 2023, DWR certified an Environmental Impact Report (EIR) approving the Delta Conveyance Project (DCP). The DCP is a proposed project consisting of a single conveyance tunnel that would convey high flows from the Sacramento River north of the San Joaquin Delta (Delta) to a point south of the Delta, where the existing export facilities for the State Water Project are located. The DCP, as defined in the EIR, included certain geotechnical activities such as soil borings, installation of test wells, electrodes, cofferdams, survey monuments, and excavation of test trenches.

In 2009, the California Legislature enacted the Delta Reform Act (DRA). In the Delta Reform Act, the Legislature found that the:

> Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources. (Wat. Code, § 85001, subd. (a).)

Accordingly, the Legislature established the "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem" as "the basic goals of the state for the Delta." (Pub. Resources Code, § 29702, subd. (a); Water Code, §§ 85001, subd. (c) [same], 85054 [defining the coequal goals].)

The DRA created the Delta Stewardship Council (Council) as an independent state agency (Wat. Code, § 85200, subd. (a)) and directed the Council to prepare a Delta Plan that furthers the coequal goals (*Ibid*., § 85300, subd. (a)). The Delta Plan is intended to be "the comprehensive, long term management plan for the Delta" to further the coequal goals and "assist in guiding state and local agency actions related to the Delta." (*Id*., §§ 85300, subd. (a), 85302, subd. (a)).

Legislative Intent

The Legislature declared its intent "that state and local land use actions identified as 'covered actions' pursuant to Section 85057.5 be consistent with the Delta Plan," (*Id*., § 85022, subd. (a)), and required that any state or local agency that proposed a covered action must prepare and file a certification of consistency with the Delta Plan before it may initiate implementation. (*Id*., § 85225). Under the Council's regulations, a certification of consistency with the Delta Plan must include detailed findings showing consistency with all applicable regulatory policies set forth in the Delta Plan and codified in the Code of Regulations. (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1) ["Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies contained in Article 3 [i.e., Cal. Code Regs., tit. 23, §§ 5003-5015] implicated by the covered action"].)

Covered Actions and Consistency

"Covered actions" subject to certification of consistency with the Delta Plan are actions that qualify as "projects" under the California Environmental Quality Act (CEQA) and that: (1) "will occur in whole or in part within the boundaries of the Delta or Suisun Marsh;" (2) "will be carried out, approved, or funded by a state or local agency;" (3) "is covered by one or more provisions in the Delta Plan;" and (4) will have a significant impact on one or both of the

coequal goals or the implementation of government-sponsored flood control programs." (Wat. Code, § 85057.5, subd. (a); 23 Cal. Code Regs., § 5001, subd. (j)(1) [same].)

Section 85225 of the Water Code provides that a certification of consistency for a covered action be submitted to the Delta Stewardship Council "prior to initiating the implementation" of a covered action.

The Court's Ruling

The preliminary injunction is based on Section 85225 of the Delta Reform Act. Generally speaking, a preliminary injunction is an "order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1260.):

> Trial courts evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. (*Amgen Inc. v. California Correctional Health Care Services* (2020) 47 Cal. App.5th 716, 731.). . . The potential merit and interim harm are described as *interrelated* factors because the greater the plaintiff's showing on one, the less must be shown on the other to obtain an injunction." (*Tulare Lake Canal Company v. Stratford Public Utility District* (2023) 92 Cal.App.5th 380, 396-397.)

Submission Prior to Initiating Implementation

In their motion for preliminary injunction, plaintiffs argued that DWR's plan to undertake geotechnical activities prior to submitting a certification of consistency for the DCP violated the requirement that such certification be submitted "prior to initiating implementation" of a covered action. The trial court found that DWR defined the DCP to include the geotechnical work at issue under the California Environmental Quality Act. Specifically, the trial court observed that the final EIR analyzed the geotechnical work as part of the DCP CEQA project, and that DWR's notice of determination under CEQA described the geotechnical work as a key component of the project. The trial court concluded that because the geotechnical work was part of the DCP as a defined CEQA project, it was "necessarily" a covered action within the meaning of Water Code section 85225.

Statutory Interpretation

In its ruling, the trial court determined that the question before it—whether the geotechnical work included in the DCP CEQA project was a covered action for purposes of the Delta Reform Act's prohibition on initiating implementation of a covered action before a certification of consistency has been submitted—was a matter of statutory interpretation, which involves determining the Legislature's intent in enacting the statute. The court agreed with plaintiff's interpretation of the statute, namely, that the DCP is a covered action under the Delta Reform Act, and because the geotechnical work was a component of the DCP CEQA project, section 85225 required DWR to prepare a certification of consistency prior to initiating implementation of the DCP, including its geotechnical component.

The court further found that the geotechnical work would likely cause a physical change in the Delta environment and "significantly impact the Delta's ecology or California's water supply," and thus such activities fell within the purview of the Legislature's intent in requiring a certification of consistency prior to implementing those activities. In other words, the trial court interpreted section 85225 to evince a Legislative intent to require certifications of consistency for activities that would significantly impact the Delta ecology or California's water supply, and that the geotechnical activities at issue had such significant impacts.

The trial court rejected DWR's interpretation of section 85225, namely, that the geotechnical activities were only preliminary activities intended to inform the final design of the DCP for which DWR would submit a certification of consistency.

Implementation and Covered Actions

The court found that "implementation" relates to a "covered action," which consisted of the DCP CEQA project that in turn included geotechnical activities. The court also rejected DWR's reliance on admin-

istrative materials and Delta Stewardship Council regulations and programs. Accordingly, the trial court determined that because plaintiffs had demonstrated a strong likelihood of success on the merits of their claims, the degree of harm they needed to show was relatively lower and they met that burden by alleging procedural, tribal, and physical harm (to real property). The court so found even though DWR would be responsible for paying $160,000 in contract penalties, higher project costs from delay due to inflation and overhead costs, and higher risks of harm to the state's water supply from a natural disaster.

Conclusion and Implications

It remains to be seen whether DWR will appeal the trial court's granting of the motions for preliminary injunction. For now, however, the geotechnical activities related to DCP are halted. The court's ruling available at https://www.courthousenews.com/wp-content/uploads/2024/06/delta-preliminary-injuction-granted.pdf
(Miles Krieger)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT LET'S STAND NINTH CIRCUIT'S DECISION REGARDING DREDGE MINING AND THE NEED FOR A PERMIT UNDER THE CLEAN WATER ACT

Idaho Conservation League v. Poe, Rev. Denied, (U.S. 2024).

On July 2, 2024, the U.S. Supreme Court in *Idaho Conservation League v. Poe* declined to review the decision of the Ninth Circuit Court of Appeals leaving stand the Ninth Circuit's decision that the grant of summary judgement in favor of the Conservation League by the U.S. District Court in Idaho was appropriate. In so doing the U.S. Supreme Court upheld the longstanding requirement that suction dredge miners must obtain a Clean Water Act permit before engaging in the activity. The Supreme Court rejected a petition to review prior federal court rulings that found gold miner Shannon Poe, of California, violated the Clean Water Act when he dumped suction dredge mining waste into Idaho's South Fork of the Clearwater River without a required pollution permit.

At the Ninth Circuit

In *Idaho Conservation League v. Poe*, ___F.4th___, Case No. 22-35978 (9th 2023) the Ninth Circuit Court of Appeal affirmed the decision of the District Court for Idaho in its summary judgment in favor of the Idaho Conservation League in its action under the federal Clean Water Act against Poe who engaged in instream suction dredge mining, a method of placer mining, in Idaho's South Fork Clearwater River without a National Pollutant Discharge Elimination System (NPDES) permit.

The Ninth Circuit held that to establish a violation of the federal Clean Water Act's NPDES requirements, (Section 402 permitting) a plaintiff must prove that the defendant (1) discharged, i.e. added (2) a pollutant (3) to navigable waters (4) from (5) a point source. As to the first element the court held that Poe's suction dredge mining "added" a pollutant to the South Fork.

The court followed *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), which upheld the U.S. Environmental Protection Agency (EPA) regulations interpreting the Clean Water Act as prohibiting discharges from placer mining sluice boxes unless done in compliance with a Section 402 permit. In two subsequent cases: *S. Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) and *L.A. County Flood Control District v. Natural Resources Defense Council, Inc.*, 568 U.S. 78 (2013), The U.S. Supreme Court held that the transfer of polluted water from one location to another within the same waterbody did not constitute an "addition" of pollutants.

The Ninth Circuit pointed out that in the instant case, Poe excavated from the riverbed materials that were not already suspended in the water. The Ninth Circuit concluded that the *Rybachek* decision was not "clearly irreconcilable" with the *L.A. County* or with the *Miccosukee Tribe* decisions, and therefore was "still good law."

The Ninth Circuit further held that the process material discharged from Poe's suction dredge mining was a pollutant, not dredged or fill material, and therefore required an NPDES permit under Section 402 of the Clean Water Act, rather than a permit from the U.S. Army Corps of Engineers under Section 404 of the act.

The court went on to find that because the meaning of the Clean Water Act and its implementing regulations was ambiguous, the court deferred to the "official joint conclusion of the EPA and the Corps."

The Ninth Circuit further explained:

> . . .even if the material starts as dredged material, that fact does not settle the issue of whether material that was dredged remains "dredged material" after it has been processed. Poe processed the materials dredged from the riverbed when he ran them through the sluice on his dredge, extracted heavy metals and other materials, and discharged the remaining was and sediments into the South Fork. In any event, the meaning of the CWA. . . remains sufficiently ambiguous

that deference to the agencies' official. . .conclusion is appropriate.

In the end, the Ninth Circuit affirmed the summary judgment of the U.S. District Court:

> The concern here "is not with the navigability of the water body, a concern that fall within the Corps' expertise"; rather the concern is with the health of the water body, a concern that lies at the heart of EPAs expertise. The Corps and the EPA reasonably could conclude that EPA was better suited than the Corps to make [these] types of water quality decisions.

The Ninth Circuit affirmed the grant of summary judgment by the District Court in favor of the Idaho Conservation League.

Conclusion and Implications

The U.S. Supreme Court apparently saw no reason to intervene in this case leaving the decision of the Ninth Circuit in its affirmation of the District Court's decision finding that Poe needed and failed to obtain a permit from EPA for his dredge mining operation. The 2023 Ninth Circuit's opinion [and it's detailing of the facts] is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/11/20/22-35978.pdf
(Robert Schuster)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT FINDS ABUSE OF DISCRETION IN ORDERS TO STRIKE PORTIONS OF WRIT REQUIRING COUNTY NEPA COMPLIANCE AND WITH SPECIFIC INSTRUCTIONS FOR CEQA COMPLIANCE

Duca v. County of Santa Barbara, *Unpub.*, Case No. 2D CIV. B325999 (2nd Dist. May. 15, 2024).

In an *unpublished* opinion filed on May 15, 2024, the Second District Court of Appeal affirmed the trial court's finding that the writ petition was timely but ordered to strike portions from the writ, mainly mandating the County to comply with NEPA and follow specific instructions to comply with CEQA, because it exceeded the trial court's authority.

Factual and Procedural Background

The Live Oak Trail Project Notice of Exemption

The Live Oak Trail, located in the Cachuma Lake Recreation Area managed by Santa Barbara County (County) under a management contract with the United States Bureau of Reclamation, has been reserved for the exclusive use of equestrians since the late 1980s. In 2011, the Bureau of Reclamation adopted a resource management plan that would allow hikers and mountain bikers to use the trail. In January 2021, the County announced the Live Oak Trail multi-use program, opening the trail to hikers and mountain bikers.

The County's notices under the California Environmental Quality Act (CEQA) are handled by the office of the Clerk of the Board of Supervisors (CBS). Because of COVID-19, at the time, CBS's website stated that its public counter was closed and that the public could submit claims, assessment appeals, and other documents electronically, via regular mail, or through a physical drop box in the lobby of the County Administration Building.

During the pandemic, CBS's Notices of Exemption (NOEs) were posted on a bulletin board in the clerk's office and on a clipboard (labeled "Notice of Exemptions") kept on a table labeled "Clerk of the Board" in front of the main sliding glass doors of the county administration building's first-floor lobby. NOEs were removed from the clipboard after 30 days. NOEs were available upon request from the clerk's office. Members of the public could call or email the clerk's office to request a document. However, the County did not post CEQA notices on any public-facing website during the pandemic. It did not post signs on the sliding glass doors indicating that CEQA notices were available for review upon entry to the building. None of the County's websites informed members of the public that CEQA notices were available for review upon entry to the administration building.

At a public meeting on January 11, 2021, the County Parks Department announced that the Live Oak Trail would be opened to hikers and mountain bikers. On January 12, 2021, the County posted a NOE for the program on the clipboard in the lobby of the county administration building. On January 15, 2021, the deputy clerk emailed a copy of the NOE to the Santa Ynez Valley Riders, which sent a lengthy written objection to the project to the County's community services department on January 31, 2021. In July 2021, petitioners filed their petition for writ of mandate.

At Trial Court

After a hearing, the trial court issued its statement of decision concluding the petition was timely because the County did not make the NOE available for public inspection. It further concluded that the project to open the Live Oak Trail to hikers and bikers was not categorically exempt from CEQA review because there was a fair argument that it could have a significant impact on the environment. The trial court issued a writ of mandate directing the County to set aside its approval of the project and suspend all activity on the trail other than horseback riding until the County has taken all actions necessary to

bring the Project's environmental review, decisions, and determinations into full compliance with CEQA, the CEQA Guidelines, the National Environmental Policy Act (NEPA) and the court's Statement of Decision. The trial court further mandated that the County restore any and all measures used to control access to Live Oak Trail that were removed or modified to support the Project in lieu of the former equestrian-only usage.

As to the declaratory and injunctive relief causes of action in the respondents' first amended petition for writ of mandate, seeking a declaration that the County had no right to change the use of the trail until it complied with CEQA, NEPA, and other applicable laws, the trial court found in favor of the County.

The County's appeal raised two issues: (1) the trial court erred when it concluded the petition was timely filed because CEQA's 180-day statute of limitations applied rather than the statute's alternate 35-day statute of limitations, and (2) the trial court abused its discretion when it mandated compliance with NEPA, required the County to suspend activities that are not part of the project, and when it retained jurisdiction if the County reapproves the project.

The Court of Appeal's Decision

The Second District Court reviewed the trial court's finding of the petition's timeliness and scope of writ of mandate *de novo* and for abuse of discretion.

Statute of Limitations

The court first examined the statute of limitations to commence a CEQA action. If a local public agency determines that a project that may cause a direct or reasonably foreseeable indirect physical change in the environment is exempt, it may file an NOE documenting that determination. In such cases, an action or proceeding alleging that the public agency has improperly determined that a project is exempt from CEQA review shall be commenced within 35 days from the date of the filing by the public agency of the NOE. If the public agency does not file a NOE, the action or proceeding shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project.

Like the trial court, the court concluded that the 180-day statute of limitations applied because the County did not make the NOE available for public inspection. The court reasoned that posting an NOE in an office that was closed to the public, or in a location unknown to the public was not sufficient to make the NOE available for public inspection within the meaning of the statute.

The court noted that the County or CBS took no action to inform the public that County-generated documents, such as CEQA NOEs, could be accessed and reviewed in the lobby of the county administration building, even though the office where those notices were usually posted was closed to the public. This information was not placed on the Clerk's website, or on any public-facing County website, and there were no signs containing this information were posted on the entry doors to the administration building. Under these circumstances, the court concluded that members of the public had no reason to believe they could access the county administration building or review NOEs in the lobby of that building. The court did not find the County's argument persuasive when it contended that notices were publicly accessible because staff was available during business hours to open the doors to the administration building and direct members of the public to the table that held the NOE clipboard.

Moreover, even though the County contended that the shorter limitations period should apply because interested members of the public had actual knowledge of the NOE and the County's approval of the project via email, the court, citing another case, stated "that the adequacy of a notice to trigger commencement of the short 35-day statute of limitations should not turn on whether a party had actual knowledge of the board's action."

The court further rejected the argument that CEQA itself requires only that an NOE be filed with the county clerk to trigger the statute of limitations, stating the CEQA Guidelines require NOEs to be posted and available for public inspection to the statutory filing requirement.

Scope of Writ and Abuse of Discretion

The Court of Appeal first explored the relevant statute, Public Resources Code section 21168.9(a), requiring a trial court to include in its order only one or more of three specified mandates necessary to achieve compliance with CEQA. Regardless of which mandates the trial court includes in its order, per

subdivisions (b) and (c), it may not direct any public agency to exercise its discretion in any particular way, and it may only include the mandates necessary to achieve compliance with CEQA.

For the trial court's first mandate, ordering the County to set aside its decision making a determination of exemption and to vacate all approvals, actions, and activities adopted and implemented to change the use of Live Oak Trail from equestrian-only to mixed hiking and mountain biking, the court found this falls squarely within the trial court's discretion because it requires the County to set aside the determination that the trial court found to be in violation of CEQA.

The second mandate requires the County to suspend all recreational activity on the trail other than horseback riding until the County has taken all actions necessary to bring the Project's environmental review, decisions, and determinations into full compliance with CEQA, the CEQA Guidelines, NEPA, and the Court's Statement of Decision. To the extent this mandate required the County to comply with NEPA, the court concluded it exceeds the trial court's authority under section 21168.9, subdivision (a) because it says nothing whatsoever about mandating compliance with other statutes. Moreover, the Court of Appeal noted that the record indicated that the parties did not litigate the question of whether the County's actions violated the federal statute, and the trial court's statement of decision includes no specific findings to that effect. Thus, the court found that the trial court abused its discretion when it included a mandate to comply with NEPA.

Lastly, Paragraph 3 of the writ required the County to take a series of very specific actions to restore any and all measures used to control access to Live Oak Trail that were removed or modified to support the Project in lieu of the former equestrian-only usage. The Court of Appeal concluded this mandate was an abuse of discretion because it purports to direct the County to comply with CEQA in particular ways, per section 21168.9, subdivision (c). For example, the trial court ordered the County not simply to void its approval of the multi-use plan but to restore equestrian-only access to the trail. Further, the trial court's order mandated that the County achieve that result by installing or restoring particular gates, a specific type of lock on those gates, a specific means of accessing the combination to those locks, and the precise location where day-use permits and lock combinations may be distributed. The trial court also mandated that the County exercise its police powers in a specific way by patrolling a parking lot "daily and ticketing any vehicle not displaying the user pass. Restating that section 21168.9 does not authorize the trial court to mandate specific actions the County must undertake or precise regulations it must adopt to achieve that compliance, the court found this paragraph 3 of the writ exceeding the trial court's authority under section 21168.9 subdivision (c).

Conclusion and Implications

This opinion by the Second District Court of Appeal illustrates that Notices of Exemption must be reasonably accessible for members of the public to be displayed even during state of emergency situations like COVID-19. Considering that the County of Santa Barbara used the clipboard NOE practice for a good portion of the pandemic, one could expect more decisions finding these NOE inadequate within the County and other counties that adopted a similar, overly simplified way of displaying NOEs. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B325999.PDF

(David Song)

YOLO COUNTY SUPERIOR COURT UPHOLDS ENVIRONMENTAL IMPACT REPORT FOR SITES RESERVOIR PROJECT

Friends of the River v. Sites Project Authority, Case No. CV-2023-2625 (Yolo County Super Ct. 2024).

On May 31, 2024, the Yolo County Superior Court found that the final Environmental Impact Report (EIR) for the Sites Reservoir Project (the Project) complied with the California Environmental Quality Act (CEQA) and its guidelines. Six non-profit organizations (the Organizations) challenged the EIR on a number of grounds, including that the Sites Project Authority (Authority) relied on an inaccurate environmental baseline, failed to consider a reasonable range of alternatives, inadequately described the environmental setting of the Project area, and provided an inaccurate project description. The court rejected all of the Organizations' arguments and denied the petition for writ of mandate.

Background

Planned for several decades, the Project includes the construction of a large, off-stream water storage reservoir in rural Glenn and Colusa Counties. At 1.5 million acre-feet, the Sites Reservoir would be the first major water storage project of its scale in California since 1978. Water will be diverted from the Sacramento River and pumped into the Reservoir between September 1 and June 15 and held in storage for release from May to November. Released water may be used within the Sacramento Valley, the Delta or exported for use south of the Delta. Operations of Sites Reservoir will be coordinated with the Central Valley Project (CVP) and State Water Project (SWP).

The Project has proceeded through various stages of CEQA since 2001, with draft EIRs released in 2017 and 2021. In November 2023, the Authority released the final EIR for the Project. Shortly thereafter, the Board of Directors for the Authority certified the EIR and the Organizations filed their legal challenges. Under the recently enacted CEQA streamlining bill, S.B. 149, Governor Newsom certified the Project for expedited CEQA review, requiring the court to rule on the challenges within 270 days.

CEQA requires lead agencies to inform the decision maker and the public of any significant environmental impacts of a proposed project through an EIR. (Pub. Resources Code, § 21001; Cal. Code Regs., tit. 14, § 15003. (Guidelines).) To analyze a project's impacts, an EIR must define baseline environmental conditions in the project's area. (Guidelines, § 15125.) An EIR must also include reasonable alternatives to a project that reduce a project's environmental impact. (*Id.* at 15126.6.)

The CEQA challenges include the EIR's reliance on 2019 Biological Opinions (BiOps) for the CVP and SWP to establish the Project's environmental baseline. In 2022, a federal court remanded the 2019 BiOps, "without invalidating or vacating them," so that federal agencies could revise them in accordance with the Biden Administration's environmental policies. (*Ruling*, at p. 18.) In the meantime, the court issued an interim plan to coordinate CVP and SWP operations until 2024. The Project EIR did not rely on the interim plan, nor did it rely on the State Water Resources Control Board's 2018 updated Water Quality Control Plan for the Bay-Delta (Bay-Delta Plan). The Organizations challenged the EIR's omission of the interim plan, the Bay-Delta Plan, future updates to the Bay-Delta Plan, and future biological opinions for CVP and SWP operations.

The Court's Decision

The Organizations argued that the EIR's reliance on the 2019 BiOps and exclusion of the 2018 Bay-Delta Plan formed an inaccurate environmental baseline assessment of the Project's effects. Since the 2019 BiOps were withdrawn and replaced by an interim plan, the Organizations argued that the Project's environmental baseline assessment was outdated. Employing substantial evidence review, the court held that the Authority properly acted within its discretion in relying on the 2019 BiOps because the 2019 BiOps were not actually vacated, the interim plan expired before 2024, and the Authority properly accounted for the laws and regulations at the time the EIR was prepared. Because the 2018 Bay-Delta plan was limited to water quality objectives for the lower San Joaquin River outside the Project area, the court held the Authority appropriately used its discretion to

omit it from the baseline. (*Ruling*, at p. 31.) Turning to future updates to the Bay-Delta Plan and biological opinions, the court found the Authority acted within its discretion to exclude future uncertain changes under substantial evidence review. (*Id.*)

Range of Alternatives

Next, the court addressed whether the EIR failed to include a reasonable range of alternatives. The Organizations argued that the three alternatives included in the EIR were "only minor variations of the Project" and that the Authority failed to consider operational alternatives. (*Id.* at p. 32.) After reviewing the entire record, the court found that the Authority considered a wider range of project variations and operational alternatives before arriving at the three alternatives in its EIR. The court held that these alternatives sufficiently informed decision-makers and the public about the Project's options, based on the Project's identified objectives. (*Id.* at p. 44.)

Reliability of Data

The court also considered the EIR's description of the Project's environmental setting of the Project area. The court employed substantial evidence review because the Organizations challenged the reliability of data and findings in the EIR. Specifically, the Organizations argued that, instead of modeling certain Project areas, the Authority should have physically surveyed those areas, including privately held parcels. The Organizations also challenged the Authority's use of pre-construction surveys, arguing that pre-construction surveys might be invalid by the time construction begins. The court found no substantial evidence that the Authority's description of the environmental setting amounted to a prejudicial abuse of discretion. (*Id.* at pp. 56-57.)

Project Description

Finally, the Organizations alleged the EIR's description of the Project was inaccurate. The Organizations argued that major Project components have yet to be designed and the EIR failed to sufficiently disclose the location of construction of infrastructure including new roads, recreation areas, and canal system upgrades. (*Id.* at p. 59.) To the contrary, the court found the "voluminous Project description" in the EIR provided "tremendous detail" on Project components, and that requiring more detail would exceed CEQA's general description standards. (*Id.* at p. 63).

Conclusion and Implications

The court ultimately concluded that the EIR did not mislead the public or governmental decision makers about the Project. The Authority acted within its discretion to consider an adequate range of alternatives and sufficiently described the Project and its environmental setting in compliance with CEQA. Accordingly, the court denied all of the Organizations' challenges.

The court's approval represents a significant step forward for the Sites Reservoir Project. As the first streamlined project under S.B. 149, the Ruling also demonstrates how quickly a project can move through normally lengthy CEQA proceedings. The Organizations filed an appeal of the trial court's Ruling on June 17, 2024. Separately, a hearing is also underway on the Project's pending water right application before the State Water Resources Control Board. A copy of the Ruling is available online at: https://sitesproject.org/wp-content/uploads/2024/06/CV2023-2626-ORDER4-1.pdf
(Dustin R. Messner, Austin Cho)

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