Volume 35, Number 6
March 2025

CALIFORNIA WATER™ LAW & POLICY Reporter

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CALIFORNIA WATER NEWS

UPPER DIVISION STATES ON THE COLORADO RIVER REFINE MARCH 2024 ALTERNATIVE FOR POST-2026 RIVER OPERATIONS TO INCLUDE CONSERVATION MEASURES

In late January 2025, the Upper Division States on the Colorado River—Colorado, Utah, New Mexico, and Wyoming—submitted refinements to their March 2024 proposal for guidelines to govern water allocations and cuts once the current guidelines expire in 2026. The refinements come after negotiations to develop a consensus alternative for Colorado River management with the three Lower Division States—California, Arizona, and Nevada—stalled over fundamental disagreements. With additional conservation measures to be provided by the Upper Division States, the refined alternative proposal could be a step toward resuming those discussions.

Background

In 2007, the U.S. Bureau of Reclamation (Reclamation) adopted interim guidelines for water supply shortages on the Colorado River in response to persistent drought conditions and the fact that prior rules only addressed operating criteria for normal and surplus water supply conditions. Water levels across the Colorado River Basin experienced decline beginning the early 2000s that has yet to fully recover. In total, Colorado River flows have decreased by about twenty percent since the twentieth century. With the interim guidelines set to expire in 2026, Reclamation gave the Upper and Lower Division States a deadline of March 2024 to submit a consensus-backed alternative for updated guidelines to manage the river's water supplies going forward.

However, in March 2024 the Divisions were unable to reach a consensus and instead submitted two separate alternative proposals. The competing proposals differed significantly in how future Colorado River flows and responsibilities would be allocated. The Upper Division States' proposal called for mandatory cuts to the Lower Division States' supply should Lake Mead fall below a specified level, while reductions to the Upper Division States' supplies would be wholly voluntary. The Upper Division States' proposal was based on a long-held position that they should not be subject to further supply reductions since their water users already deal with shortages in dry years. The Upper Division States have historically not used their entire allocation, while higher demands have caused the Lower Division States to frequently divert more than their assigned share.

The Upper Division States have previously considered conservation and reduction measures, including a demand management program under review by the Colorado Water Conservation Board, and the federally funded System Conservation Pilot Program employed across the four Upper Division States. Both of these programs are structured around paying Upper Division States water rights holders to leave their allocated water in the River for downstream use. The System Conservation Pilot Program, however, has been scrutinized for its high cost, limited water savings, and potential negative implications for local economies.

The Refinements

The Upper Division States in late January submitted refinements to their proposed 2024 alternative guidelines (Refined UDS Alternative). The Refined UDS Alternative involves the creation of two water "savings accounts" in Lake Powell: a Lake Powell Conservation Account to store up to 200,000 acre-feet of water per year generated by Upper Division conservation efforts, and a Lake Powell Protection Account to release water from upstream reservoirs when water elevation at Lake Powell drops below 3,535 feet. The Lake Powell Protection Account would store water released from reservoirs located upriver when water levels in Lake Powell dip below the specified threshold, which could potentially be recovered or credited when water levels improve. This storage would be limited to 500,000 acre-feet of water per year and would be subject to the project-specific criteria at each upriver reservoir, including adherence to existing Records of Decision, Biological Opinions, authorized purposes for each reservoir, and

legal obligations, including existing and future water and hydropower contracts and states' water right administration requirements.

The proposed savings accounts would work in concert with other "parallel activities," such as a proposed Upper Basin Tribal Forbearance Program, which would compensate Tribes for their quantified but unused water to help ensure long-term reductions in demand. Additional parallel activities and conservation measures are intended to be developed under separate agreements.

Conclusion and Implications

After the seven basin states failed to reach a consensus by March 2024, the Refined UDS Alternative indicates the Upper Division States are willing to incorporate additional conservation measures for periods of severe drought. While the extent of the impact of the Refined UDS Alternative remains uncertain, stakeholders have recently resumed talks to come to an agreement on a workable set of guidelines for the Colorado River for 2026 and beyond. See: http://www.ucrcommission.com/wp-content/uploads/2024/03/UDS-Alternative-Submittal-Press-Release.pdf
(Sarah Nagle, Austin Cho)

CALIFORNIA EXPANDS EFFORTS TO CAPTURE EXCESS FLOOD FLOWS FOR GROUNDWATER RECHARGE VIA GOVERNOR NEWSOM'S EXECUTIVE ORDER N-16-25

California continues to face challenges balancing its water supply amid cycles of drought and extreme precipitation. Recent wet years have provided significant flood flows, and legislative attempts to harness it, but groundwater depletion remains an issue throughout the state. Most recently Governor Gavin Newsom issued Executive Order N-16-25 on January 31, 2025, which builds upon previous executive orders and legislation to facilitate flood flow capture and promote groundwater recharge.

This new order suspends certain regulatory barriers to flood flow diversions, building upon provisions from Senate Bill 122 and Water Code sections 1242.1 to 1242.3. The goal is to maximize water storage potential and ensure that excess flows are used efficiently when atmospheric events do hit the State.

Key Provisions of Executive Order N-16-25

Executive Order N-16-25 makes several significant modifications to existing Water Code provisions to enable the more effective use of flood flows such as covered below.

•Suspending the Local Flood Control Plan Requirements

The order suspends the requirement in Water Code section 1242.1(a)(1) that a local or regional agency must have adopted a local flood-control plan or considered flood risk in its general plan before providing notice required to divert flood flows for groundwater recharge.

•Providing Direction to State Agencies To Ease Regulatory Restrictions

The order requires that the Department of Water Resources, the State Water Resources Control Board, and other relevant agencies must identify and remove regulatory obstacles to flood flow diversion and ensure that diversions are conducted in a manner that does not harm infrastructure or environmental resources.

•Expanding Diversions to Infrastructure

The order calls for increased use of storage facilities, including the San Luis Reservoir, to capture flood flows before they are lost to the ocean.

These provisions try to build upon the current regulatory frame work governing flood flows and how they are harnassed from atmospheric events to mitigate the impacts of prolonged droughts while avoiding regulatory delays.

Streamlined Diversons: Building upon Water Code 1242.1 and SB 122

The current executive order also builds upon Senate Bill 122 and Water Code sections 1242.1 to 1242.3, which were enacted in 2023 to streamline

floodflow diversion for groundwater recharge. Under this bill and Watercode sections, flood flows may be diverted without obtaining an appropriative water right if specific conditions are met including that a local agency has adopted a flood control plan or has considered flood risk as part of its adopted general plan has given public notice that flows downstream of the point of diversion are at imminent risk of flooding and inundation of land, roads, or structures.

Once the agency has adopted such a plan and then given notice the following types of "flood flows" can be diverted:

- Where a waterbody is subject to a defined flood stage, flows in excess of flood stage where actions are necessary to avoid threats to human health and safety.

- Surface water has escaped from or is likely to imminently escape from a channel or waterbody causing or threatening to cause inundation of residential or commercial structures, or roads needed for emergency response.

- Where flows would inundate ordinarily dry areas in the bed of a terminal lake to a depth that floods dairies and other ongoing agricultural activities, or areas with substantial residential, commercial, or industrial development.

While the above areas are defined as flood flows, diverted water may not be applied to any of the following: (1) Barns, ponds, or lands where manure/waste from an animal facility; (2) Agricultural fields that have been identified as an outlier with respect to nitrogen application by relevant State or Local Agencies; (3) Areas that could exacerbate the threat of flood and other health and safety concerns or cause damage to: (a) critical levees or other infrastructure; (b) wastewater/drinking water systems; (c) drinking water wells/supplies; except for existing facilities constructed for the purpose of groundwater recharge or managed wetlands, areas that have not been in active irrigated agricultural cultivation within the past three years.

As such while SB 122 laid the groundwork for streamlined diversions, Executive Order N-16-25 recognizes that more water can be captured during these events and that in part regulatory burden is the reason more water is not being captured.

In an attempt to ease this the Executive Order eliminates one of the primary barriers to implementation: the requirement for local planning adoption before diversions can occur. By suspending this requirement, the order significantly expedites the ability of agencies and landowners to utilize floodwaters for groundwater recharge in the coming storm seasons.

Conclusion and Implications

Executive Order N-16-25 represents another step in California's attempts to capture water from extreme precipitation events. By removing regulatory restrictions associated with local planning requirements, the order facilitates the diversion of floodwaters for groundwater recharge by allowing affected parties to divert floodflows merely once a local agency provides the appropriate notice.

Ultimately, while the executive order provides some immediate regulatory easing, further work is needed ahead of when atmospheric events occur to capture future flood flows. It is a positive sign though that the Governor has ordered the Department of Water Resources, the State Water Resources Control Board, and other relevant agencies to identify and remove regulatory obstacles to flood flow diversion, which hopefully may result in successor legislation to SB 122. Executive Order N-16-25 is available online at: https://www.gov.ca.gov/wp-content/uploads/2025/01/Executive-Order-N-16-25-FINAL.pdf
(Darien Key, Derek Hoffman)

EXECUTIVE ORDERS BY GOVERNOR NEWSOM EXPEDITE REBUILDING EFFORTS FOLLOWING CALIFORNIA WILDFIRES BY RELAXING CEQA AND COASTAL ACT REQUIREMENTS

In response to the Southern California wildfires that have impacted Los Angeles and Ventura counties, Governor Gavin Newsom issued Executive Orders N-4-25 and N-14-25 to remove certain environmental and land use requirements to expediate the rebuilding process for affected communities. These orders suspend certain statutory and regulatory requirements to facilitate reconstruction efforts, particularly concerning the California Environmental Quality Act (CEQA) and the California Coastal Act.

Suspension of CEQA Requirements for Affected Communities

One of the most significant aspects of these executive orders is the suspension of CEQA for specific rebuilding projects. CEQA typically mandates environmental review processes that can be time-consuming and costly in the form of either a CEQA exemption, a Mitigated Negative Declaration, or an Environmental Impact Report (EIR). Under normal circumstances, projects which require any discretionary permit from a local agency must undergo an environmental impact analysis. This requirement ensures that developments do not negatively impact certain identified environmental categories such as traffic, air quality, noise, *etc*.

CEQA already has certain exemptions that would usually facilitate this type of reconstruction efforts: such as: (1) exemptions for ministerial projects which only need a building permits or demolition permits; (2) exemptions for projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor are exempt from CEQA; and (3) exemptions for construction, installation, or conversion of small structures, facilities, or equipment (which typically includes single family homes and certain apartments).

However, under Executive Order N-4-25, projects to repair, restore, demolish, or replace properties substantially damaged by the fires are exempt from CEQA review. This exemption applies as long as the new structures do not exceed 110 percent of the footprint and height of the original buildings, which is slightly different than the exemptions above. By removing the CEQA requirement, the executive order eliminates procedural delays and enables property owners to begin rebuilding without undergoing extensive environmental assessments.

Permitting Exemptions under the California Coastal Act

The executive orders also suspend the requirement to obtain permits under the California Coastal Act for eligible rebuilding projects. Normally, construction or redevelopment within California's coastal zone must secure approval from the California Coastal Commission or local coastal programs. These permits are designed to regulate land use and protect coastal resources.

Executive Order N-4-25 suspends the need for these permits, allowing property owners to rebuild promptly. Executive Order N-14-25 further clarifies that statutory exemption criteria, appeal or review periods, and all submission requirements under the California Coastal Act are also suspended. This directive is intended to counter guidance issued by the California Coastal Commission in late January 2025, where the California Coastal Commission suggested that the statutory permit exemption process still applied, creating confusion among local authorities and property owners. The Governor's order in N-14-25 specifically rejected these arguments by the California Coastal Commission.

State and Local Government Involvement and Further Administrative Actions

The executive orders also direct several state agencies, including the Department of Housing and Community Development (HCD), to collaborate with local governments in streamlining the permitting and approval processes. HCD is tasked with identifying regulatory barriers that could impede rebuilding efforts and recommending solutions such as pre-approved building plans and waivers of local permitting requirements.

Additionally, the administration is working with the California Legislature to explore statutory amendments that may provide long-term solutions to expedite future recovery efforts. These potential legislative changes may include enhancements to fire mitigation standards and incentives for incorporating fire-resistant construction materials in rebuilding efforts.

Conclusion and Implications

The suspension of certain CEQA and California Coastal Act permit requirements will likely accelerate the rebuilding of homes and businesses in wildfire-affected regions in what will likely none the less be a slow rebuilding process given the amount of damage. By allowing removing these regulatory requirements, the orders provide immediate relief to displaced individuals who may need to rebuild.

Overall, these executive orders follow traditional actions taken by the Governor for emergency regulatory relief in California, and likely are only the beginning of state-wide efforts to streamline the rebuilding process. For more more information on Executive Order N-4-25, *see:* https://www.gov.ca.gov/wp-content/uploads/2025/01/EO-N-4-25-Rebuilding-Final-signed.pdf

For more information on Executive Order N-14-25, *see:* https://www.gov.ca.gov/wp-content/uploads/2025/01/Short-Term-Housing-and-Coastal-EO-N-14-25_4-Final-GGN-Signed-.pdf
(Darien Key)

PACIFIC GAS & ELECTRIC SEEKS TO SURRENDER ITS POTTER VALLEY HYDROELECTRIC PROJECT

Built over 100 years ago, the Potter Valley Project includes dams, reservoirs, and a powerhouse that have historically generated power and diverted water from the Eel River to the Russian River watershed in northern California. This water diversion supported agriculture and communities in several counties, much like many other hydroelectric projects around the state. While salmon and steelhead are able to use a fish ladder to get around the Cape Horn Dam at Potter Valley, the anadromous fish are unable to get past the Scott Dam. As it continued to age, the Potter Valley Project became uneconomic for Pacific Gas & Electric (PG&E). In 2019, PG&E decided to not relicense the project. PG&E plans to remove Cape Horn and Scott Dams and is collaborating with various entities to create a new water diversion facility for ongoing community needs.

The Potter Valley Project

The Potter Valley Project (Project) is located in northern California, in the Upper Eel River and Russian River watersheds, in Lake and Mendocino counties. The main storage reservoir for the Project, Lake Pillsbury, is formed behind Scott Dam, which is located on the Eel River. Water captured and stored in Lake Pillsbury is released into the Eel River and then captured again in Van Arsdale Reservoir, an approximately 65-acre reservoir formed behind Cape Horn Dam. Water captured in Van Arsdale Reservoir is diverted and conveyed to the Potter Valley Powerhouse, which is located just north of a predominately agricultural area known as the Potter Valley. After generating power, water is discharged via canal into the East Branch Russian River, or into irrigation canals, used by the Potter Valley Irrigation District (PVID) to provide irrigation water to farmers in the Potter Valley. The water discharged to the East Branch Russian River is captured in Lake Mendocino, which is administered by the U.S. Army Corps of Engineers for flood protection, but also stores water used by the Sonoma County Water Agency (SWCA).

FERC's Surrender Process

In 2019, PG&E determined that it would be contrary to the best interests of its electric ratepayers to continue relicensing the Project and filed a Notice of Withdrawal of the Notice of Intent (NOI) and Pre-Application Document (PAD) for the Project, both previously filed on April 6, 2017. In response to PG&E's Notice of Withdrawal, on March 1, 2019, the Federal Energy Regulatory Commission (FERC) issued a Notice Soliciting Applications from any party interested in filing a license application for a new license for the Project, stating that applicants must first file a NOI and PAD. FERC's solicitation did not result in a viable new applicant, and on May 11, 2022, FERC directed PG&E to provide a plan and schedule for submitting a Surrender Application by

July 11, 2022. PG&E's approved plan and schedule stated that PG&E would file a Surrender Application with FERC within 30 months after FERC approval of the proposed plan and schedule. The FERC approved PG&E's proposed plan and schedule on July 29, 2022; the deadline for filing of the Draft Surrender Application was January 31, 2025.

Ecosystem Changes and Water Diversion Impacts

The removal of the dams will alter the flow of the Eel River, potentially restoring more natural river dynamics. However, this could also lead to changes in sediment transport and water temperature, which might impact aquatic life.

The project has historically diverted water from the Eel River to the Russian River watershed, supporting agriculture and communities. Decommissioning will reduce or eliminate these diversions, which could affect water availability for downstream users. More specifically, the project has historically diverted water from the Eel River to the Russian River watershed, supporting agriculture and communities in Mendocino, Sonoma, and northern Marin counties. Decommissioning will reduce or eliminate these diversions, potentially affecting water availability for irrigation and municipal use.

Plans for a new water diversion facility aim to balance environmental restoration with community water needs. However, the construction and operation of this facility could have its own environmental footprint. Plans for a new seasonal diversion facility, the New Eel Russian Facility (NERF), aim to provide some water during wetter months. However, this will leave communities without diverted water during dry summer months, increasing reliance on groundwater storage and conservation measures.

Conclusion and Implications

Dam removal, while perhaps restoring natural flows, imposes significant alterations to existing conditions and reliance of habitat and humans. Local governments, water agencies, and stakeholders are working together to find solutions, such as groundwater storage and new infrastructure, to mitigate the impacts on water supply availability and quality for fisheries. This project may serve as an example for similar projects.
(Wes Miliband)

REGULATORY DEVELOPMENTS

EPA RELEASES DRAFT RISK ASSESSMENT ASSOCIATED WITH PFAS CHEMICALS IN BIOSOLIDS

On January 14, 2025, the U.S. Environmental Protection Agency (EPA) released a draft risk assessment, or scientific evaluation of the potential human health risks associated with the presence of toxic per- and polyfluoroalkyl substances (PFAS) chemicals in biosolids, also known as sewage sludge.

The findings for the draft risk assessment show that there may be human health risks associated with exposure to the "forever chemicals" PFOA or PFOS with all three methods of using or disposing of sewage sludge – land application of biosolids, surface disposal in landfills, or incineration. Once finalized, the assessment will help EPA and its partners understand the public health impact of forever chemicals in biosolids and inform any potential future actions to help reduce the risk of exposure.

EPA Acting Administrator Jane Nishida, said:

> EPA under President Biden's leadership has taken unprecedented actions to advance research and science on PFAS and to protect people from these dangerous forever chemicals," "This draft assessment provides important information to help inform future actions by federal and state agencies as well as steps that wastewater systems, farmers and other stakeholders can take to protect people from PFAS exposure, while ensuring American industry keeps feeding and fueling our nation.

Defining Biosolids

Wastewater produced by households and businesses, and sometimes industrial dischargers, is conveyed to a wastewater treatment plant, and ultimately treated. These treatment processes also produce a semi-solid, nutrient-rich product known as "sewage sludge" or "biosolids." EPA typically uses the term "biosolids" to mean sewage sludge that has been treated to meet regulatory standards and is thereby suitable to be land applied as a soil conditioner or fertilizer. In turn, biosolids can be beneficially reused as land applied fertilizer on agricultural fields or on nonagricultural lands to promote plant health and productivity.

The Draft Risk Assessment

This draft risk assessment focuses on a specific and narrow population of people that EPA considers most likely to be exposed to PFOA or PFOS from the land application of biosolids or through consumption of products from land where biosolids were used as fertilizer. The draft risk assessment scientifically models hypothetical human health risks for people living on or near sites impacted by PFOA or PFOS or for people relying primarily on those sites' products (e.g., food crops, animal products or drinking water). The preliminary findings of the draft risk assessment indicate that there can be human health risks exceeding EPA's acceptable thresholds, sometimes by several orders of magnitude, for some scenarios where the farmer applied biosolids containing 1 part per billion (ppb) of PFOA or PFOS (which is near the current detection limit for these PFAS in biosolids). These modeled scenarios include farms with one application of biosolids at a rate of 10 dry-metric-tons per hectare and 40 consecutive years of biosolids land application at this same rate. The modeling in this assessment also finds human health risks exceeding the EPA's acceptable thresholds in some scenarios where biosolids containing 1 ppb of PFOA or PFOS are placed in an unlined or clay-lined surface disposal unit. Once finalized, EPA will use the risk assessment to help inform future risk management actions for PFOA and PFOS in sewage sludge. For the incineration scenario, risk is not quantified due to significant data gaps.

EPA's analysis does not suggest that the general food supply is impacted by the use of biosolids that contain PFOA or PFOS. The U.S. Department of Agriculture and Food and Drug Administration are monitoring for PFAS in the food supply broadly and have taken protective actions to address impacted products from domestic and imported sources. Based on the best available data, biosolids account for less than one percent of the fertilized acreage of productive agricultural land in the United States per year. EPA recognizes that certain "hot spots" and specific farming operations may have higher levels of PFOA

or PFOS if contaminated sludge was applied, and that further collaboration with impacted operations and other federal agencies will be important to fully understand risks and support impacted farmers.

EPA's analysis finds that the risks of exposure to PFOA and PFOS through biosolids increases proportionally with the amount of those chemicals in the biosolids. This means that if you lower the concentration of PFOA or PFOS in biosolids or the amount of biosolids applied to agricultural land, you lower the risk. The actual risks from exposure to PFOA or PFOS will vary at farms that land-apply biosolids or at biosolids disposal sites based on the amount of PFOA or PFOS applied, as well as geography, climate, soil conditions, the types of crops grown and their nutrient needs and other factors. Where smaller amounts of PFAS-contaminated biosolids have been spread, or fewer applications have been made over time, or lower concentrations of PFOA and PFOS were in the biosolids, the risk will be reduced.

The findings of the draft risk assessment underscore the importance of proactive federal and state policies to control and remove PFAS at their source. Under EPA's PFAS Strategic Roadmap, the agency has provided tools to restrict PFAS from entering the environment and to hold polluters accountable, including increasing reviews of new PFAS before they enter commerce and encouraging states to use their Clean Water Act permitting authorities and industrial pretreatment programs to require industrial dischargers of PFAS to remove them before sending their effluent to the environment or to wastewater treatment plants. Moving forward, EPA is working to set technology-based limits on discharges from several industrial categories—including PFAS manufacturers, electro- and chrome-platers and landfills—under the agency's Effluent Limitations Guidelines program.

Forever Chemicals in Wastewater

PFOA and PFOS get into sewage sludge via the wastewater that enters municipal wastewater treatment plants (WWTPs), which do not intentionally use or add these substances in their treatment processes. WWTPs may receive PFOA or PFOS from manufacturers and other facilities that currently use, or historically have used, these PFAS and release contaminated wastewater to WWTPs. Households and businesses can also be sources, as PFAS from consumer products (*e.g.*, cookware, clothing or cosmetics that may contain certain PFAS) are washed down drains and make their way to a WWTP.

EPA and State Actions on Forever Chemicals

Under EPA's PFAS Strategic Roadmap, the agency has made historic progress in advancing the science and establishing standards to protect communities from PFAS pollution. These actions include finalizing the nation's first drinking water standards for PFAS, holding polluters accountable to clean up PFAS across the country and declaring PFOA and PFOS hazardous substances under the Superfund law. By releasing this draft risk assessment, EPA is providing stakeholders with a rigorous, data and science-driven report that, once finalized it may help the agency determine whether regulating PFOA and PFOS in sewage sludge under the Clean Water Act is appropriate.

Several states have begun monitoring for PFAS in sewage sludge and published reports and data that are publicly available. EPA's draft risk assessment document provides an overview of PFOA and PFOS occurrence data from peer-reviewed literature and state reports in Section 2.4 and Appendix A. Some states continue to collect additional sewage sludge PFAS monitoring data.

Conclusion and Implications

EPA's draft risk assessment document, *Draft Sewage Sludge Risk Assessment for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS)*, will be available for public comment for 60 days following announcement in the Federal Register. To learn more about the draft risk assessment and how to comment on it, *see:* https://www.epa.gov/biosolids/draft-sewage-sludge-risk-assessment-perfluorooctanoic-acid-pfoa-and-perfluorooctane

EPA risk assessments follow a scientific process to characterize the nature and magnitude of health risks to children, adults, and the environment from pollutants based on modeled exposure scenarios. An environmental risk assessment considers three primary factors: 1) presence (i.e., how much of a pollutant is present in the environment), 2) exposure (i.e., how much contact a human or wildlife has with the pollutant), and 3) the toxicity of the pollutant (*i.e.*, the health effects the pollutant causes in humans or wildlife).

(Robert Schuster)

UNITED STATES ARMY CORPS OF ENGINEERS MAKES UNPLANNED RELEASES FROM TWO TULARE LAKE BASIN DAMS

Over the weekend of January 31, 2025, at the direction of the Trump administration, the United States Army Corps of Engineers (the Corps) released 6,300 acre-feet (AF)—roughly two billion gallons of water—from Lake Kaweah and Success Lake in the Tulare Lake Basin for unclear purposes and with little advance notice to downstream local agencies in charge of flood management.

Background

Terminus Dam and Success Dam are federal facilities built and operated by the United States Army Corps of Engineers on rivers in the Tulare Lake Basin. The Terminus Dam impounds flow from the Kaweah River at Lake Kaweah, which has a maximum storage capacity of 185,000 AF. Success Dam enables the storage of up to 82,000 AF of Tule River water at Success Lake. The Kaweah and Tule Rivers ultimately terminate at Tulare Lake, a typically dry lakebed with no natural outlet to a larger body of water. Under extremely wet conditions, water managers are able to divert floodwaters from Tulare Lake to the California Aqueduct through the Kern River Intertie. Under these limited circumstances, water from the Tulare Lake Basin can be moved over the Tehachapi Mountains for use by State Water Project (SWP) contractors in Southern California.

The Corps manages the Terminus and Success Dams for flood control purposes during the non-irrigation season. (Corps, Sacramento District, Water Control Data System (accessed Feb. 25, 2025) https://www.spk-wc.usace.army.mil/glossary.html.) Generally, the Corps seeks to maintain storage levels in the reservoirs near or below the "top of conservation pool level," a value that corresponds to a certain amount of authorized flood space that the Corps must keep available to store inflow from sudden storms and high inflow. (*Id.*)

January Releases

Prior to January 31, 2025, Lake Kaweah and Success Lake held 39,890 AF and 17,265 AF of stored water, respectively. Storage levels in the two lakes were above top of conservation pool levels—Lake Kaweah's storage encroached by over 26,000 AF, while Success Lake encroached by approximately 4,000 AF. During the five days before January 31, the Corps had been maintaining respective releases of 5 cubic feet per second (cfs) and 52 cfs on average from Terminus and Success Dams to manage flood capacity levels in the corresponding reservoirs. *[The data in this section are reported by the California Department of Water Resources, California Data Exchange Center. (cdec.water.ca.gov.) Data for Success Dam releases can be found here: https://cdec.water.ca.gov/dynamicapp/QueryF?s=SCC&d=30-Jan-2025+20:11&span=12hours; and data for Terminus Dam releases can be found here: https://cdec.water.ca.gov/dynamicapp/QueryF?s=TRM&d=31-Jan-2025+08:11&span=12hours. Similarly, data for Top of Conservation Conditions for Lake Kaweah can be found here: https://cdec.water.ca.gov/resapp/ResDetailTop?resid=TRM; and data for Top of Conservation Conditions for Success Lake can be found here: https://cdec.water.ca.gov/resapp/ResDetailTop?resid=SCC]

On January 30, 2025, at 6:00 p.m., the Corps began to dramatically increase releases from the two dams. By 10:00 a.m. on Friday, January 31, Terminus Dam releases had increased from 5 cfs to 1,545 cfs. Success Dam operation followed a similar curve—releases increased from 56 cfs at 10:00 a.m. January 30, to 986 cfs the following day. Releases from the two dams remained high throughout the weekend, as Lake Kaweah releases averaged 903 cfs on Saturday, February 1, and 502 cfs on Sunday, February 2, and Success Lake releases averaged 562 cfs on Saturday and 272 cfs on Sunday. By Monday, February 3, the Corps drew down its releases from Lake Kaweah and Success Lake down to 13 cfs and 49 cfs, respectively.

According to Corps spokesperson Gene Pawlik, the sudden weekend releases were "consistent with the direction" in the Trump administration's Executive Order regarding Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas, dated January 24, 2025. Mr. Pawlik further stated the releases were to "ensure California has water available to respond to the wildfires" that were ravaging parts of Los Angeles at the time. It is unclear, however, how federal officials

planned for the approximately 6,300 AF of water to reach Southern California, as the Tule and Kaweah Rivers themselves do not directly connect to any conveyance infrastructure that crosses the Tehachapi mountains. While some of the released water ultimately reached Tulare Lake, there is no indication any of that water was subsequently conveyed through the Kern River Intertie for rediversion into the California Aqueduct.

Conclusion and Implications

The US Army Corps of Engineers' sudden water releases were met with controversy. Some decried the releases for the Corps' lack of coordination with downstream water managers and local officials with flood control responsibilities. Others applauded the releases as an indication that the Corps can and will act quickly to deliver stored water to meet irrigation or other demands. The releases are particularly notable given the critical role the agency serves with California's vast water supply and flood protection networks.
(N. Chapman, Austin Cho)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD PROPOSED REGULATIONS TO ADDRESS GROUNDWATER CONTAMINATION CAUSED BY DAIRY WASTE

California's proposed regulatory changes to dairy waste management aim to address nitrate contamination in groundwater by introducing stricter controls on land application practices, while balancing the economic challenges faced by the dairy industry and ensuring safe drinking water for affected communities.

Background

The California State Water Resources Control Board (SWRCB) has proposed new regulations to address nitrate contamination in groundwater caused by dairy waste, particularly in the Central Valley. These draft regulations aim to reduce nitrates in drinking water by imposing stricter water quality standards on dairies that apply dairy waste to land. While existing regulations focus only on milk-cow dairies in the Central Valley, the proposed framework would expand these requirements statewide, affecting all California dairies that utilize manure, wastewater, and fertilizer in agricultural operations.

After reviewing the older regulations, known as the Dairy General Waste Discharge Requirements (WDRs) the SWRCB's rationale for the new regulations in the draft order states that new data has shown that the practice of land application of manure, process wastewater, and fertilizers on dairy croplands has been the major contributor to nitrogen contamination. Initial regulations assumed that the primary source of nitrogen loading to groundwater was from seepage of dairy waste stored in earthen retention ponds. This shift has led the SWRCB to recognize that dairy waste should no longer be treated simply as a fertilizer source with incidental groundwater impacts. Instead, the SWRCB finds that waste should be viewed primarily as a waste product that requires careful management to prevent environmental harm. Therefore, the new proposed regulatory framework focuses on controlling nitrogen discharges from dairies through more stringent land application practices.

The draft order highlights the serious public health consequences of nitrate contamination in groundwater. The SWRCB's draft order notes that rural communities in the Central Valley have been dealing with unsafe drinking water for years, leading to various health issues, including conditions like methemoglobinemia, commonly known as blue baby syndrome, which affects infants. Nitrate contamination has also had severe economic and social consequences for these communities. In light of these impacts, the Board is prioritizing the need to regulate dairy waste management practices in a way that ensures both the health of local populations and the long-term sustainability of water resources in the region.

The revised regulations will be subject to further review and discussion, with workshops planned for mid-2025 and the possibility of final adoption by the end of 2025 or early 2026. These changes are

intended to mark a new phase in regulating the dairy industry's waste management practices, with a focus on protecting groundwater quality and ensuring that all Californians have access to safe drinking water.

The Proposed Regulations

The proposed regulations aim to curb the significant nitrate contamination caused by dairies, a concern that has been raised since before 2007, when the state first adopted its dairy waste discharge requirements. The new regulatory framework is seen as a response to address concerns from environmental groups over the years. The newer data relied on by the SWRCB is the primary objective support for the stringent shift.

The new draft regulations would require dairies to meet a nitrogen discharge limit of 10 milligrams per liter to comply with the nitrate drinking water standard. This includes new provisions for land application of manure, waste retention ponds, and the provision of alternative drinking water to affected residents.

Such a shift is not without resistance. Several stakeholders, including dairy farmers and agricultural groups, have expressed concerns about the practicality and economic impact of these proposed regulations. Farmers argue that the regulations mischaracterize the role of manure as a beneficial fertilizer, stating that the rules would create excessive economic burdens, particularly with the requirement to retrofit waste retention ponds. Additionally, some critics believe that the new regulatory framework duplicates efforts already undertaken by local agencies like the Central Valley Regional Water Quality Control Board, which has worked extensively on addressing water quality issues in the region.

SWRCB's response to these concerns are two-fold. To mitigate the economic and practical impacts of the new regulation, the SWRCB stresses continued collaboration between the dairy industry, governmental agencies, and technological innovators to develop solutions for more efficient waste management. The SWRCB also points out that looking at dairy waste as a valuable resource, rather than a by-product of the dairy industry, can benefit the agricultural industry when used properly.

Conclusion and Implications

In conclusion, the proposed revisions to the Dairy General WDRs represent a significant shift in how California will regulate the dairy industry's impact on groundwater quality. The new framework focuses on reducing nitrate contamination by imposing stricter limits on the application of dairy waste to land and aims to protect public health, address environmental concerns, and support the long-term sustainability of the dairy industry in California. It is unclear how far reaching the economic and practical impacts of the regulation will be for the dairy industry but the details of SWRCB's proposal and how it will attempt to mitigate such impacts have yet to be finalized. The California State Water Resources Control Board's draft order available at: https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/r5-2013-0122/a2283bdrftordr.pdf
(Miles Krieger, Steve Anderson)

STATE WATER BOARD UPDATES TECHNICAL GUIDANCE FOR WATER CODE SECTION 1242.1 REGARDING GROUNDWATER RECHARGE TO INCLUDE EXECUTIVE ORDER N-16-25 MODIFICATIONS

On January 31, 2025, Governor Newsom issued Executive Order N-16-25 (Executive Order). The Executive Order temporarily suspends certain requirements for the diversion of flood water under recently enacted law, namely, Water Code section 1242.1. The State Water Resources Control Board recently provided updated technical guidance for local agencies related to Water Code section 1242.1 to address Executive Order N-16-25. (*See related coverage on EO N-16-25 at page 120*)

Background

On January 31, 2025, Governor Gavin Newsom issued Executive Order N-16-25 to modify California's Water Code Section 1242.1, related to the use of floodwaters for groundwater recharge in specific regions of the state. The Executive Order suspends certain requirements of the original regulation, specifically, the need for local or regional agencies to determine imminent flood risks based on local planning documents. Instead, the order allows agencies to use readily available information to assess flood conditions.

Section 1242.1, added to the California Water Code on July 10, 2023, is designed to address mitigation of flood risks and replenishment of groundwater supplies. The law allows for the diversion of floodwater without requiring a water right, a significant departure from state water law, in order to reduce flood impacts and support groundwater recharge. Diversions under this law are permitted only when certain conditions are met, such as the issuance of a public notice by local or regional agencies confirming that downstream areas face imminent flood risks. The law also includes a set of protective conditions intended to minimize negative impacts on ecosystems, infrastructure, and existing water rights holders. Additionally, the statute is set to expire on January 1, 2029, establishing a temporary framework for floodwater diversion.

The Executive Order N-16-25 modifies the original Water Code Section 1242.1 by suspending the requirement for a local or regional agency to determine imminent flood risks based on specific planning documents, *i.e.* flood control plans or general plans. The stated purpose of the suspension of this requirement is to facilitate local agencies' use of the statute even if they have not yet adopted the otherwise requisite planning document, which can take substantial time to develop and adopt. In the areas covered by the order, agencies can now rely on alternative methods and available data to assess flood conditions, potentially accelerating the decision-making process. This modification is designed to improve the efficiency and responsiveness of floodwater diversion in high-priority regions. Despite the changes, the Executive Order still requires local or regional agencies to issue public notifications when flood conditions are imminent and to report diversions as outlined in the original regulation, ensuring that the overall goals of flood risk reduction and groundwater recharge are still met while maintaining accountability.

The Executive Order and Water Code Section 1241.1

Section 1242.1 is intended to support flood management and groundwater sustainability by permitting the diversion of floodwaters during extreme events. While section 1242.1 allows local agencies to divert flood flows if they have an applicable flood management or General Plan related to flood risks in place, diversions of flood flows are required to stop once flood conditions described in the public notification of the diversion have abated. Water may not be diverted where it would be diverted to locations generating animal waste, agricultural fields associated with certain nitrogen applications, areas where the diversions could damage infrastructure or drinking water supplies, fallowed fields (for at least three years), and when water rights holders for Delta tributaries are not making releases of stored water or reoperating facilities for regulatory purposes, among other limitations. Accordingly, the provisions set forth by the law, including the reporting requirements and protective measures, are designed to balance the need for flood control and groundwater recharge with

long-term environmental and infrastructure protection. Despite the above limitations, the statute relies on local agencies to comply with diversion requirements and limitations.

Executive Order N-16-25 presents a significant shift in how flood risks are assessed and managed in the affected areas. By suspending certain documentation requirements and allowing local agencies to use alternative methods for flood risk determination, the order disjoins flood condition decisions from publicly adopted planning documents. Accordingly, the reliance on local agencies to assess flood conditions and issue public notices could result in variability in how different regions implement the provisions of the law, potentially leading to inconsistencies in flood management practices.

Conclusion and Implications

While Section 1242.1 provides a flood risk and recharge management tool in some areas of the state, it will be important for local agencies to properly conduct public notice, reporting, and cessation of diversions once flood conditions abate to maintain accountability and minimize the risk of mismanagement. However, the temporary nature of Section 1242.1, with its expiration date in 2029, raises questions about how sustainable this approach will be in the face of California's ongoing water challenges. The expiration may necessitate further legislative action to continue this regime of floodwater diversion and groundwater recharge. The revised Technical Guidance is available here: https://www.waterboards.ca.gov/waterrights/water_issues/programs/groundwater-recharge/docs/1242-1-tech-guidance.pdf
(Miles Krieger, Steve Anderson)

RECENT CALIFORNIA DECISIONS

FIFTH DISTRICT COURT UPHOLDS WATER DISTRICT'S EIR PURSUANT TO CEQA FOR PROPOSED RESERVOIR ALONG THE DELTA-MENDOTA CANAL

Friant Water Supply Protection Association v. Del Puerto Water District, *Unpub.*, Case No. F085535 (5th Dist. Jan 30, 2025).

In an *unpublished* decision filed on January 30, 2025, the Fifth District Court of Appeal in *Friant Water Supply Protection Association v. Del Puerto Water District* denied a challenge under the California Environmental Quality Act (CEQA) against the Del Puerto Water District's Environmental Impact Report (EIR) for a proposed dam and water storage reservoir that would store allotments from the federal Central Valley Project. The court held that the EIR was not fatally flawed for failing to analyze what would occur if the Bureau of Reclamation decided in the future to alter pumping operations in the Bay-Delta.

Factual and Procedural Background

Water Conveyance Infrastructure and Geography

The Central Valley Project (CVP) is a collection of water conveyance infrastructure projects that generally transfer water from northern California to southern California to hundreds of water contractors pursuant to various delivery contracts. Two portions of the CVP are relevant here: the Friant Division and the Delta-Mendota Canal, which are hydrologically connected via the San Joaquin River.

The Friant Division impounds the waters of the San Joaquin River at Friant Dam and delivers water to several water agencies, including ten of Friant Water Supply Protection Association's (plaintiff) member agencies, through the Madera Canal to the north and the Friant-Kern Canal to the south. The remaining water continues west along the San Joaquin River and intersects with the endpoint of the Delta-Mendota Canal (DMC) at the Mendota Pool. The DMC pumps water south from the Bay-Delta through the San Luis Reservoir, and finally to the Mendota Pool. The remaining DMC waters are delivered to the San Joaquin River, replacing water delivered to Plaintiffs and other water agencies at the upstream Friant Division.

In the 1930's, the United States Bureau of Reclamation (Reclamation) purchased the water rights necessary to operate the Friant Division. To execute this transfer, Reclamation entered into a Purchase Contract and an Exchange Contract with the water rights holders. Under the Purchase Contract, the water rights holders sold all their water rights to Reclamation, except for "reserved water." Under the Exchange Contract, the water rights holders promised not to exercise their rights to the "reserved water," provided that the water rights holders received substitute waters from the federal DMC. Today, the water rights described in those contracts are held by Reclamation and the San Joaquin River Exchange Contractors Water Authority (collectively: Exchange Contractors).

The State Water Project (SWP) is a system of water conveyance and storage infrastructure projects operated by the California Department of Water Resources (DWR). DWR and Reclamation entered into an operating agreement in 1986 which governs the interplay between the CVP and the SWP.

The Del Puerto Water District (DPWD) has existing contractual rights directly with Reclamation to divert from the DMC 840,000 acre-feet of water during wet years and 650,000 acre-feet of water during dry years. DPWD and the Exchange Contractors seek to build a reservoir just west of the City of Patterson to impound and store up to 85,000 acre-feet of their pre-existing share of DMC water received during wet years for use during subsequent dry years (Project).

Procedural History

Respondent DPWD issued an NOP for the Project in June 2019 and received comments from DWR and the State Water Resources Control Board (SWRCB).

Collectively, DWR and SWRCB requested information regarding the underlying water rights for the Project and a thorough environmental analysis of the effects of diverting the water to support the Project. Defendants confirmed that all water diverted from the DMC for purposes of the Project would be diverted pursuant to existing contractual entitlements with Reclamation.

Defendants circulated a Draft EIR (DEIR) in December 2019. The SWRCB commented, again requesting a thorough environmental analysis of the effects of the Project. The SWRCB again commented on the Project, inquiring what would happen if CVP deliveries are stored in the proposed Project's reservoir instead of the San Luis Reservoir. As a result, the SWRCB suggested that Reclamation may export additional water at times when lack of storage space and real time demand would limit water exports. According to the SWRCB, the EIR should therefore analyze what effect these potential export modifications might have on the Delta's hydrological and biological conditions. Defendants addressed this comment in the Final EIR (FEIR) by asserting that the Project could provide Reclamation with additional flexibility to increase pumping if it so chose, because of increased storage capacity and increased flexibility to alter when water would be pumped to Project Partners. The FEIR also noted that "any such modification of Delta pumping *by Reclamation* would be evaluated *by Reclamation* in a separate National Environmental Policy Act (NEPA) document if such pumping is determined to be outside existing certified environmental documentation and/or operating agreements."

In October 2020, DPWD certified the FEIR and approved the Project. Shortly thereafter, plaintiff filed a petition for writ of mandate in the Stanislaus Superior Court ordering DPWD to decertify the FEIR and set aside the Project approvals. The trial court denied the petition, and plaintiff appealed.

The Court of Appeal's Decision

The Fifth District Court of Appeal reviewed the lower court's ruling for abuse of discretion. Generally, the appellate court reviewed de novo the DPWD's procedural choices while according greater deference to the DPWD's factual determinations. The Fifth District ultimately upheld the EIR, finding that the EIR: (1) sufficiently discussed Reclamation's hypothetical ability to increase Bay-Delta pumping, (2) adequately described the relevant water rights and the Project's infrastructure, and (3) effectively notified SWRCB regarding Reclamation's water rights amendments and otherwise adequately responded to SWRCB's comments.

EIR Did Not Need to Address Hypothetical, Future Excess Pumping from the Bay-Delta

Appellants argued that the FEIR failed to analyze impacts related to using existing CVP supplies for storage at a new location and storage at different times. Citing the SWRCB's comment letters, appellants claimed that increased capacity at the San Luis Reservoir might give Reclamation the hypothetical ability to increase the amount of water pumped from the Bay-Delta, and those increased outflows could have environmental impacts. The Fifth District ruled that this impact was too speculative to be evaluated in the EIR because Reclamation's potential increase in Delta pumping was not the underlying project at issue. Additionally, that impact would only materialize after Reclamation, a third-party agency, made a future, hypothetical decision to increase pumping from the Bay-Delta. While CEQA does require analysis of both direct and indirect impacts flowing from a project, Reclamation's decision to increase pumping from the Bay-Delta is too speculative to constitute a direct impact.

Additionally, the court noted that if Reclamation increased the amount of pumping from the Bay-Delta, that decision would either be permitted by existing approvals that have satisfied their own environmental reviews or be subject to additional environmental analysis at the federal and/or state level—two points that the EIR had previously explained. Finally, the court affirmed that while the SWRCB is the final arbiter when it comes to issuing water rights permits, their status as a responsible agency for purposes of this Project does not render their comments requesting certain analyses mandatory.

Piecemealing

Appellants also argued that the FEIR improperly piecemealed the Project. Appellants urged the court to treat the proposed construction and operation of the Project's reservoir and Reclamation's hypothetical future increase in Bay-Delta outflows as a single

project disguised as two. The court declined to do so, finding appellants failed to demonstrate that this was the case. The court explained that the Project does not "presume" or "practically compel" Reclamation's future decision to increase pumping from the Bay-Delta; it merely allows that decision to be made. Moreover, Appellants did not point to anything about the Project that would result in its demands exceeding the Project Partners' water allotments, which would in turn trigger additional review.

EIR Sufficiently Described the Project Partners' Water Rights and Adequately Analyzed the Project's Proposed Infrastructure

Appellants argued that the EIR failed to account for the need to amend the Exchange Contract to permit: (1) water deliveries through a new turnout connecting the DMC to the Project, (2) the storage of DMC waters for later use, and (3) the storage of DMC waters at the Project site. The appellate court did not decide whether those future contractual amendments may be necessary to effectuate the Project. Instead, the appellate court simply noted that the EIR sufficiently analyzed the Project as it would physically exist if those contractual amendments occurred, or if Reclamation approved those actions.

Appellants also argued that the court must "evaluate the accuracy of a project proponent's claim of existing water entitlements" as is required by *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal.App.4th 715, 722 (2003) (*Santa Clarita*). There, the court found an EIR to be insufficient for failure to distinguish between the amount of water described in an "entitlement" to SWP waters and the amount of water that could actually be delivered. Here, though, if defendants do not receive a delivery of either 840,000 or 650,000 acre-feet of water in wet or dry years, respectively, they can take water directly from the San Joaquin River to make up the difference. Additionally, the EIR clearly and accurately distinguished between defendants' contractual rights to receive water deliveries from Reclamation, and Reclamation's potential modification of its own water rights to shift some storage criteria across various CVP projects. For these reasons, the court held that the EIR accurately described defendants' "water rights" and correctly concluded that the Project Partners would not need to seek separate water right permits themselves.

EIR Put SWRCB on Notice Regarding Reclamation's Water Right Amendments and Adequately Addressed SWRCB's Comments

Appellants argued that the FEIR failed to list the SWRCB as a responsible agency and failed to note SWRCB's need to approve changes to Reclamation's existing water rights. However, the court noted that the SWRCB was listed in the EIR as a responsible agency, but, even if it was not, such an error was merely technical and not prejudicial. The court noted that "everyone was aware of the potential need for the Water Board to approve an alteration to Reclamation's CVP water rights..." Although these proposed modifications to Reclamation's existing water rights permits should have been noted in the EIR for "maximal clarity and convenience," its absence did not render the EIR fatal or prejudicially preclude dissemination of relevant information.

Finally, Appellants argued that the SWRCB was not allowed to fully participate because the FEIR failed to include or perform certain analyses that the agency had requested be performed. The court initially responded by contending that, just because a responsible agency requests that a certain type of analysis be performed does not necessarily mean that it must be included in the EIR. Here, while the SWRCB will be the final arbiter on future changes to the water rights licenses it issues, it is not the ultimate authority on what must be included in the Project Partners' EIR. To this end, the SWRCB essentially asked for an analysis of environmental impacts that would occur *if* Reclamation decided to alter its pumping operations in response to the increased storage capacity occasioned by the Project's construction. As the court had previously noted, the EIR was not required to analyze the speculative possibility that Reclamation might alter its behavior in response to the Project. Therefore, under CEQA, the EIR did not need to address these uncertain future actions.

Conclusion and Implications

The Fifth Circuit upheld Del Puerto Water District's EIR despite its failure to analyze Reclamation's hypothetical ability to pump more water from the Bay-Delta due to the increased storage capacity provided by the Project along the DMC. Ultimately, the court affirmed that an EIR need not analyze hypothetical, future, third-party actions. A copy of

the Fifth District's unpublished opinion is available at: https://www4.courts.ca.gov/opinions/nonpub/F085535.PDF
(Blaine R. Dyas, Bridget K. McDonald)

Note: The author's firm represented the respondent in this matter.

REAFFIRMING TAXPAYER PROTECTIONS: FOURTH DISTRICT COURT FINDS WATER DISTRICT'S RATE STRUCTURE RAN AFOUL OF THE CALIFORNIA CONSTITUTION

Howard Jarvis Taxpayers Association v. Coachella Valley Water District, ___*Cal.App.5th*___, Case No. E080870 (4th Dist. Jan. 31, 2025).

In January of this year, the California Court of Appeal for the Fourth District affirmed the trial court's decision in *Howard Jarvis Taxpayers Association v. Coachella Valley Water District* holding that the Coachella Valley Water District's (Water District) rate structure was an improper tax under Article XIII C of the California Constitution. The Court of Appeal upheld a refund of at least $17 million to affected customers.

Background

The case is centered around canal water from the Coachella Canal (Canal) that is being provided to consumers through the Coachella Valley Water District. The Canal branches off from the All-American Canal in Imperial County and carries water (Canal Water) for about 120 miles to the Coachella Valley in Riverside County. The Canal's water is mainly used for agriculture, golf courses, and groundwater replenishment. In the past seven years, approximately 75 percent of Canal Water has been used for agriculture and 18 percent for groundwater replenishment. Domestic customers indirectly pay for Canal Water through the Water District's interfund transfers.

Propositions 218 and 26

The main issue in the Howard that the court addressed was whether a charge imposed by the local agency a tax. To understand how the court answers this question, we must first understand the mechanics of Propositions 218 and 26. Propositions 218 and 26 expand on the definitions of and procedures for enacting taxes under the Constitution. Proposition 26 added a new definition of "tax" to the California Constitution. Under Proposition 26, all levies, charges, or exactions of any kind imposed by a local government are taxes unless they meet one of seven exceptions. Under Proposition 218, if a levy, charge, or exaction imposed by a local government does not fall under any of the exceptions, it is a tax and requires voter approval by a majority (or two-thirds majority for a special tax.) Proposition 218 defines Combined, Propositions 218 and 26 restrict local governments from levying taxes without voter approval.

Procedural Posture

The *Howard* case officially began in 2019, when plaintiff Randall Roberts (Roberts), who was later substituted by plaintiff Howard Jarvis (Jarvis), filed a combined petition and putative class action complaint against the Water District for the rates for Canal Water. Robert's claims were regarding the Water District's two-tiered rate system for Canal Water. The Water District classified customers as Class 1 or Class 2.

Class 1 customers were those Canal Water for commercial agricultural activities. Class 2 customers were non-agricultural users. Roberts defined the putative class as domestic water customers of Water District who have paid and/or are paying Class 2 Canal Water rates. Roberts alleged that the Water District was charging Class 1 customers $34.32 per acre-foot, while charging Class 2 customers $102.12 per acre-foot of Canal Water. Roberts (and later Jarvis) was suing on behalf of domestic water customers of the Water District who were paying Class 2 Canal Water rates.

According to Roberts, Class 2 customers were subsidizing the water rates of Class 1 customers by paying a much higher rate for the same product. The Water District imposed the Class 2 rate without prior voter

approval. Thus, according to Roberts, the Water District violated the California Constitution, including Propositions 218 and 26. In November 2021, the trial court held that the Water District Canal Water rates violated Proposition 218.7 and the California Constitution. In March 2023, the trial court entered judgment awarding the Class 2 customers approximately $17.5 million for invalid charges by the Water District. The Water District appealed the decision.

The Court of Appeal's Decision

The Water District contended that the trial court erred in both its liability and remedies rulings. The Water District argued that it qualified under one of the exceptions for tax under Proposition 26. If the Class 2 rate qualified under one of the seven exceptions, then the Water District did not need voter approval to impose the Class 2 rate. Thus, the Water District argued that the rate was not invalid under the California Constitution. Specifically, the Water District argued that the Class 2 rate qualified under two potentially applicable exceptions: (1) Article XIII C, section 1, subdivision (e)(7) (Property Fee Exception), which excludes "[p]roperty-related fees imposed in accordance with the provisions of Article XIII D,"; and (2) subdivision (e)(2) of the same section (Charges for Specific Government Services or Products Not Exceeding Reasonable Costs Exception) , which excludes:

> . . .charge[s] imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

The Court of Appeal held that neither exception applied to the Class 2 rates.

For the Property Fee Exception to apply, the Water District attempted to show that the Class 2 rate does not exceed the proportional cost of providing Class 2 customers with Canal Water. This argument would rest on whether Class 2 customers paid for the Canal and irrigation distribution system. However, the court held that this argument was invalid because Class 2 customers did contribute significantly to the Canal and irrigation distribution system. Thus, the Class 2 customers were not paying a proportional rate, and the Class 2 rate did not fall under the Property Fee Exception.

For the Charges for Specific Government Services or Products Not Exceeding Reasonable Costs Exception to apply, the court found that the Water District must prove, government must also prove that:

> . . .the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

The court held that this exception did not apply for the same reasons that the Property Fee Exception did not apply.

Thus, the Court of Appeal affirmed the trial court's decision and upheld the judgment awarding approximately $17 million to affected Class 2 customers.

Conclusion and Implications

If a local government, such as a city or local agency, wishes to impose a charge or rate for a service, the government must ensure that they are applying the rate fairly and in compliance with the processes outlined by the California Constitution. If the local government wishes to impose a charge without needed to obtain voter approval, then the government must ensure that the charge falls squarely within one of the exceptions in Proposition 26. Charges that do not fall into one of the exceptions and that are not approved by voters are invalid. Charges that are imposed disproportionately between different classes of users disproportionately and without valid reason likely do not fall under one of the Proposition 218 exceptions, as shown in the case.

The results of the Howard case reinforce the tax protections afforded to customers and citizens by the California Constitution. Local governments such as the Water District must take great care to ensure that they comply with the requirements of the California Constitution when imposing charges. The court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/E080870.PDF
(Christina Suarez, Darien Key, Derek Hoffman)

SECOND DISTRICT COURT AFFIRMS GRANTING 473(B) RELIEF IN CEQA CHALLENGE BECAUSE RESPONDENTS TIMELY FILED MOTION AND DID NOT MAKE UNREASONABLE MISTAKE OF LAW

Parents Against Santa Susana Field Lab et al. v. California Department of Toxic Substances Control et al., *Unpub.*, Case No. 2D CIV. B337733 (2nd Dist. Dec. 16, 2024).

In an *unpublished* opinion filed on December 16, 2024, the Second District Court of Appeal affirmed the trial court's order granting respondents' motion to set aside the judgment under Code of Civil Procedure section 473, subdivision (b) (473(b)). The court found that the 473(b) request was a legitimate form of relief for respondents, and it was timely requested. Additionally, it was not unreasonable for respondents to believe that their alternative writ of mandate met the hearing request under Public Resources Code section 21167.4.

Factual and Procedural Background

The Santa Susana Field Lab is a decommissioned nuclear reactor and testing site located in southeast Ventura County. In 2017, the California Department of Toxic Substances Control (Department) released a draft Environmental Impact Report (EIR) discussing the remediation of soils and groundwater around the lab. The Parents Against Santa Susana Field Lab, Physicians for Social Responsibility/Los Angeles Chapter, Inc., and Public Employees for Environmental Responsibility, Inc. (collectively: respondents) submitted comments to the Department on the draft EIR.

In May 2022, before releasing a final EIR, the Department announced it had entered into a settlement agreement with The Boeing Company regarding cleaning up the area around the field lab. The agreement stated that it was not effective until the Regional Water Quality Control Board, Los Angeles Region (Regional Board), approved a memorandum of understanding. The Regional Board did so in August.

Trial Court Proceeding

In October, respondents filed a California Environmental Quality Act (CEQA) writ petition challenging the settlement agreement. They also filed an *ex parte* application for an alternative writ of mandate to compel the Department, the Regional Board, and Boeing to either vacate the agreement or show cause why it should not be vacated. The trial court denied the alternative writ application in December and ordered the parties to meet and confer regarding scheduling. A joint stipulation proposing a briefing and hearing schedule for the case was filed seven months later. By January 2023, respondents did not request a hearing before the 90-day deadline for respondents to request a hearing on their CEQA writ petition.

In June, the Department moved to dismiss respondents' writ petition for failing to request a hearing. The trial court granted the Department's motion in December. In doing so, the court rejected the respondents' argument that their *ex parte* application satisfied section 21167.4's hearing-request requirement, concluding that a request for "provisional remedies" does not satisfy the statute. Rather, to satisfy section 21167.4, a request must specify that it is for a "hearing on the merits of the petition." Respondents' application requested that the court issue an alternative writ, which is not a final determination on the merits.

The trial court dismissed the action and entered judgment for the Department. Later that day respondents moved for 473(b) relief, arguing that their error in assuming that the alternative writ satisfied section 21167.4's hearing-request requirement was excusable.

The trial court found that while compliance with section 21167.4 "is not complex," "there is no case law specifying that an application for an alternative writ does not constitute a request for a hearing." Respondents also had a:

> . . .good faith belief that it was appropriate to rely on a writ practice guide for the proposition that the issuance of an alternative writ places the matter on the court's calendar for a hearing on the merits," and "demonstrated early diligence in pursuing the case.

The court therefore granted respondents' request for 473(b) relief and vacated the judgment of dismissal.

The Court of Appeal's Decision

473(b) Relief Available to Respondents as Interim Procedure

Appellants contended that the order granting respondents' motion to set aside the judgment must be vacated because 473(b) relief was "categorically unavailable" when a party fails to timely request a hearing under section 21167.4, subdivision (a). Respondents countered that the Department forfeited this contention because it was not raised during the proceedings below.

The Second District Court of Appeal first rejected respondents' argument that the contention was forfeited because the relevant decisions confronting this issue unanimously concluded that 473(b) relief is available when a party misses a section 21167.4 deadline.

However, the court rejected the appellants' contention on the merit because there was clear case law holding that 473(b) relief is available when excusable error leads to a section 21167.4 dismissal. The court cited *McCormick v. Board of Supervisors*, 198 Cal.App.3d 352 (1988), where that court noted that 473(b) relief was permitted "unless absolutely forbidden by statute." *McCormick* relied on *Simpson v. Williams*, 192 Cal.App.3d 285 (1987) for the proposition that 473(b) relief is available unless a statute or court rule precludes it, a proposition the appellant argued was undermined by the California Supreme Court's decision in *Maynard v. Brandon*, 36 Cal.4th 364 (2005) (Maynard), which analyzed whether 473(b) relief was available under the mandatory fee arbitration act (MFAA). The Maynard court likened the request for a post-arbitration trial to the filing of a notice of appeal, a jurisdictional requirement not subject to 473(b) relief, and concluded that the 473(b) relief was unavailable because the terms, goals, and legislative history evidenced the Legislature's intent to deny relief for missing MFAA deadlines.

However, the court pointed out that while the *Maynard* court disapproved *Simpson*'s broad conclusion that 473(b) relief is available unless a statute specifically precludes it, *Maynard* also acknowledged that *Simpson*'s conclusion continues to hold true with regard to "interim procedural deadlines." The court found from case law that section 21167.4 is essentially a procedural provision to expedite the CEQA litigation. Thus, the court distinguished section 21167.4's procedure from the filing of a notice of appeal or the post-arbitration request for a trial at issue in *Maynard* and concluded that *McCormick* and its progeny remained good law to allow 473(b) relief available to respondents.

No Delay in Respondents' 473(b) Relief Request

The court further disagreed with the appellants' contention that the trial court abused its discretion when it granted respondents' request for 473(b) relief. According to McCormick, a motion for 473(b) relief is granted liberally where the party in default moves promptly to seek relief and where the party opposing the motion will not suffer prejudice if relief is granted. While an attorney's failure to take reasonably prudent steps to avoid entry of judgment will not justify the granting of 473(b) relief, the attorney's honest mistake of law will create an exception to that rule.

The court noted that respondents moved for 473(b) relief the afternoon the trial court entered the judgment of dismissal and concluded that that was not a "long delay" in seeking a section 21167.4 hearing that resulted in prejudice. Moreover, because appellants' opening brief did not address this issue, the court found this argument forfeited.

Additionally, the court found that any delay that occurred after respondents missed section 21167.4's hearing-request deadline was largely due to the Department's decision to wait five months to assert that respondents had missed that deadline. Because the relevant time period for calculating any delay is how long it takes a party to request 473(b) relief, not how long it takes for a party to request a section 21167.4 hearing, the court concluded respondents' request for relief the day the trial court entered the dismissal judgment was a prompt request for relief.

No Unreasonable Mistake of Law

Finally, finding that the trial court needed only very slight evidence of an honest mistake of law to justify granting their motion, the court concluded that respondents easily exceeded this threshold.

The court noted that there was no case law specifying that applying for an alternative writ does not satisfy that hearing-request requirement. Additionally, the court found it was reasonable for respondents to rely on the Code of Civil Procedure, a Supreme Court case, and an often-consulted writs practice guide to believe that an alternative writ could satisfy the hearing-request requirement because CEQA petitions for writs of mandate are governed by the same rules of civil procedure as any other writ of mandate proceeding.

The court also rejected the appellants contention that respondents' misconception was unreasonable because the trial court denied their application for an alternative writ more than a month before the deadline to request a section 21167.4 hearing had passed, which should have prompted them to request a hearing. The court pointed out that nothing in section 21167.4 requires a party to make multiple hearing requests, and nothing in the denial order mentioned whether respondents had fulfilled section 21167.4's requirements.

Finally, appellants argued respondents were unreasonable because case law demonstrates that section 21167.4 requires strict compliance. However, the case law appellants cited dealt with a party that only stipulated a hearing date. In contrast, the court found respondents had filed and served a written request for a hearing when they applied for the alternative writ, so the case law would not apply if respondents reasonably misunderstood their alternative writ's hearing request satisfied the 21167.4 request. Thus, the court concluded there was no abuse of discretion in the trial court's conclusion that the respondents' misconceptions about the law were reasonable.

Conclusion and Implications

Ironically, the existence of this case would close the door for another honest or reasonable mistake of law but helps clarify the law that alternative writs cannot replace a proper hearing request to one's original CEQA writ petition. Also paradoxically, while the Second District Court of Appeal stated the trial court only needed very slight evidence to liberally grant its order for the 473(b) relief, this case highlights the importance and benefit of conducting thorough and ample legal research, even if it somehow reaches an erroneous conclusion, to qualify for an honest mistake of law, especially when the law is not so clear and obscure on the subject issue.
(David Song)

REGIONAL WATER QUALITY CONTROL BOARD SECURES SUPERIOR COURT RULING AGAINST BOEING

The Boeing Company vs. Regional Water Quality Control Board, Los Angeles Region, et al., Case No. 23STCP04550 (LA County Super. Ct. Dec. 30, 2024).

A Los Angeles Superior Court judge ruled largely in favor of the Los Angeles Regional Water Quality Control Board (Regional Board) in the matter captioned *The Boeing Company vs. Regional Water Quality Control Board, Los Angeles Region, et al.* The dispute involves the Santa Susana Field Laboratory (SSFL) in Ventura County and the Regional Board's regulations on stormwater pollution at the SSFL site. Boeing had sued to overturn these regulations.

Background

The SSFL is a site previously used for rocket engine testing and nuclear experiments. The lawsuit involved allegations that the SSFL caused significant contamination of soil and water with toxic chemicals, radioactive waste, and heavy metals like lead and mercury, all of which pose public health risks for nearby communities. During heavy rains, contaminants from the SSFL flow into local waterways like the Los Angeles River, affecting drinking water, agriculture, and recreation. Boeing, which owns most of the SSFL site, has faced over 350 violations of stormwater discharge permits and has been fined over a million dollars.

In 2023, a stricter pollution permit was issued to Boeing, requiring improved monitoring and updated testing methods for pollutants like PCBs. Boeing challenged the permit in court, but in December

2024, the court upheld most of the permit's terms, confirming the authority of the Los Angeles Regional Water Quality Control Board. New monitoring has revealed alarming levels of contaminants, including PCBs, lead, PFAS, and radioactive substances, in the site's runoff. Environmental groups continue to advocate for holding Boeing accountable and ensuring public awareness of the ongoing pollution.

Contaminants at the SSFL

The contaminants at the SSFL can pose significant health risks to nearby communities. The Regional Board sought to regulate the following: (1) PCBs (Polychlorinated Biphenyls): These are highly toxic and can cause cancer, as well as other illnesses. They are particularly dangerous due to their persistence in the environment and ability to bioaccumulate. (2) Lead: Detected at levels far exceeding safe drinking water limits, lead exposure can lead to neurological damage, developmental delays in children, and cardiovascular issues in adults. (3) PFAS (Per- and Polyfluoroalkyl Substances): Known as "forever chemicals," PFAS are linked to cancer, immune system suppression, and hormonal disruptions. (4) Radioactive Materials: Substances like radium-226, strontium-90, and uranium have been found at the site. Exposure to these can increase the risk of cancer and cause other radiation-related health issues.

These contaminants can enter the body through various pathways, including ingestion of contaminated water, inhalation of airborne particles, and dermal contact with polluted soil or water. The risks are particularly concerning for the over 700,000 people living within ten miles of the site.

The Superior Court's Ruling

The petition for writ of administrative mandate was granted in part and denied in part. The court issued the writ with respect to the "[a]dditional remaining COPCs for all media as identified in the SRAM," but this order does not disturb the monitoring requirements of any chemical specifically identified in Table E-2 or any chemical subject to monitoring through a different WDR. The court issued the writ with respect to effluent limits for antimony, nickel, selenium, thallium, and TCDD at Outfall 008. The court remanded the matter to the Regional Board to set aside these requirements and to reconsider them in light of the court's decision and judgment. This order does not prevent the Regional Board from re-imposing these requirements, provided the Board makes clear findings that are supported by sufficient evidence. The petition for writ of mandate was otherwise denied.

Conclusion and Implications

The Superior Court's ruling affirms, even if indirectly, the vast authority of the Regional Water Quality Control Board to regulate water. Boeing argued that some of the regulations were overly stringent and not based on sound science. While the court upheld most of the stricter requirements, it excluded some provisions, such as monitoring for naturally occurring substances like titanium. Also of important note is the Regional Board's focus on groundwater, not simply surface water. The Superior Court's ruling on the motion for writ of mandate is available online here: 2024.12.30+Boeing+Final+Order.pdf
(Wes Miliband)

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