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CALIFORNIA WATER NEWS

WATER RECYCLING AND DESALINATION PROJECTS RECEIVE NEARLY $29 MILLION INVESTMENT FROM U.S. BUREAU OF RECLAMATION

The United States Department of the Interior, Bureau of Reclamation (Reclamation) recently announced $28.97 million to support planning and feasibility studies for 31 water recycling and desalination projects throughout the western United States, including projects in the States of California, Idaho, Nevada, New Mexico, Texas, and Utah.

Background

This latest investment, announced September 27, 2023, as part of the Reclamation's WaterSMART Program, adds to the agency's historic investments in water conservation, recycling and reuse projects throughout the western United States. This is part of the Biden-Harris administration's Investing in America agenda, aimed to supplement existing freshwater supplies through 31 projects for planning, design and related activities to support the development of new construction projects that will be implemented under Desalination Construction, Title XVI Water Reclamation and Reuse, and Large Scale Water Recycling programs.

Water Reclamation and Reuse Program

Reclamation's WaterSMART Water Recycling and Desalination program is part of the initiative to sustain America's natural resources for tomorrow through stretching and securing water supplies to serve present and future generations. The Title XVI Water Reclamation and Reuse Program, authorized pursuant to P.L. 102-575 in 1992, provides assistance to water agencies for the planning, design and construction of water reclamation and reuse projects. The planning and development of these projects increases water management flexibility, the reliability of western water supplies, provides supplemental and new water resources to support irrigation and urban water supplies.

California Projects

This funding announcement includes 21 California projects. These include feasibility and other studies to support the use of recycled water for direct and indirect potable use by the Cities of Burbank, Cloverdale, Los Angeles, Oceanside, San Diego, Santa Monica, as well as the Inland Empire Utilities Agency, Metropolitan Water District of Southern California, Montecito Water District, Palmdale Water District, Rancho California Water District, San Bernardino Valley Municipal Water District, Santa Clara Valley Water District, Town of Windsor, Valley Sanitary District, and Western Municipal Water District.

Additionally, several of these water reuse and recycling projects are also aimed to stabilizing or offsetting impacts to groundwater supplies. Specifically, the Los Angeles Donald C. Tilman Water Reclamation Plant Advanced Water Purification Facility Project will not only provide up to 17,000 acre-feet annually of recycled water for indirect potable reuse, but aims to replenish the San Fernando Valley aquifer. The City of Santa Monica's OneWater Project not only is exploring indirect and direct potable reuse, but is also addressing deteriorating groundwater quality due to of groundwater supplies. Another project focused on utilizing recycled water is the Inland Empire Utilities Agency's Chino Basin Advanced Treated Recycled Water, Storage and Production project, which strives to produce approximately 15,000 acre-feet annually to recharge the Chino Basin and offset degradation to the groundwater supply. The Montecito Water District is preparing a Groundwater Augmentation program through the direct injection of recycled water.

Other projects funded support studies exploring expansion of desalination for the City of Oceanside in addition to expansion of the City's water reuse and recycling options. County of San Luis Obispo is exploring desalination of brackish and saline water sources to develop new water supplies to offset projected long-term shortages. The City of Yuba City is studying the conversion of the existing wastewater treatment facility to a tertiary treatment facility allowing the distribution of recycled effluent in a cost-effective manner for outdoor and agricultural uses.

Idaho, Nevada and New Mexico Projects

The City of Boise, Idaho, received $1,000,000 to support the development of a feasibility study, planning, preliminary design and environmental compliance activities to support the City's Recycled Water Program. The project seeks to support site selection and the development of a recycled water, groundwater recharge, and recycled water facilities and infrastructure. This project aims to develop 5,000,000 gallons per day to be recharged into groundwater supplies that not only addresses aquifer concerns, but support stability of water supplies for later use.

The Southern Nevada Water Authority received $1,000,000 to evaluate water reuse expansion options for the Boulder City wastewater facility, which may provide an additional 800 acre-feet of recycled water for direct or indirect reuse. The purpose of this project is to provide a mechanism for Boulder City, which cannot return treated effluent to Lake Mead for return flow credits, to augment the City's Colorado River supply.

New Mexico was awarded $300,000 to conduct a feasibility study for the desalination of brackish groundwater from the Salt Basin and to evaluate brackish groundwater availability throughout southern New Mexico, particularly in the Lower Rio Grande area. This region of New Mexico experiences limited water supplies, which are influenced by growth, aridification, and regional water supply conflicts. The development of brackish groundwater will support a more resilient water supply for the region.

Texas Projects

Five projects were awarded in Texas including $1,000,000 each to the Canadian River Municipal Water Authority and El Paso Water Utilities Public Service Board, $250,000 to the City of San Marcos, $365,500 to the Gulf Coast Water Authority, and $490,000 to the Laguna Madre Water District. The Canadian River Municipal Water Authority is developing two feasibility studies relating to its Salinity Control Project in New Mexico and a proposed desalination facility near Lake Meredith to support enhanced drinking water supplies and meeting secondary drinking water standards, which are currently compromised due to chloride concentrations that exceed federal standards. The City of San Marcos is planning a feasibility study to explore potable and non-potable projects to support drought resiliency through potential expansion of the existing reclaimed water system and building on the City's efforts to increase reliance on water reuse, reducing its reliance on groundwater and preservation of critical habitat in the San Marcos River.

The El Paso Water Utilities Public Service Board is performing a feasibility study intended to explore water reuse options to meet the growing demands and to balance groundwater use and wastewater risks impacting the Rio Grande River. The Gulf Coast Water Authority and Laguna Madre Water District are each evaluating the feasibility of sweater desalination projects in an effort to augment current water supplies and meet future demands and potential supply deficits.

Utah Projects

The City of South Jordan received $734,904 to complete planning for the development of a full-scale direct potable reuse project projected to produce up to 30 million gallons per day. The City has identified water reuse as an important component of securing its water supply in response to drought and climate change. Washington County Water Conservancy District received $1,325,638 to support planning for a Regional Reuse System, which is intended to incorporate recycled water into the water portfolio of the District allowing for 47,000 acre-feet of recycled water to be used for potable and secondary irrigation uses.

Conclusion and Implications

As the western United States continues to navigate the challenges associated with aridification and a changing climate, communities are exploring how to maximize available water supplies through water reuse, recycling and desalination of saline and seawater. Continued investments by the federal government through the Bureau of Reclamation's WaterSMART program provides critical funding to offset the costs of these programs. Additional information on these and future grant funding opportunities can be found at the Bureau of Reclamation's WaterSmart website at https://www.usbr.gov/watersmart/index.html.
(Micheline Nadeau Fairbank, Derek Hoffman)

LEGISLATIVE DEVELOPMENTS

NEW LAW GIVES THE STATE WATER RESOURCES CONTROL BOARD AUTHORITY TO INVESTIGATE PRE-1914 WATER RIGHTS

On October 8th, 2023, Governor Newsom signed Senate Bill 389 (Bill) into law. The Bill, which amends Water Code section 1051, enables the State Water Resources Control Board (State Water Board) to investigate and ascertain the validity of pre-1914 appropriative and riparian rights. [S.B. 389, 2023-24 Leg., Reg. Sess. (Cal. 2023).]

Background

The Water Commission Act of 1913 created a permitting and licensing scheme for surface water rights established after the effective date of the Act—1914. The State Water Resources Control Board (State Water Board) has permitting and licensing jurisdiction over post-1914 surface water appropriations, in addition to its jurisdiction over the reasonable use of water to prevent waste. The State Water Board has reasonable use jurisdiction over pre-1914 appropriative rights to surface water, but does not have permitting and licensing jurisdiction over such rights because those rights pre-date the Water Commission Act. Accordingly, surface water rights in California are divided into two categories: (1) pre-1914 appropriative rights and (2) post-1914 appropriative rights. The board also exercises reasonable use jurisdiction over riparian rights, which are rights to use the natural flow of water from a lake, river, stream, or creek.

Appropriative rights allow rights holders to divert surplus surface water in excess of the needs of riparian rights holders, including for use on non-riparian land. After 1914, people or entities seeking to appropriate water were required to apply to the State Water Board for a water right permit that included the place of use for diverted water, the purpose of use, the method of diversion, and amount of water to be diverted. Accordingly, a water right holder must apply to the board to change any of those features of the water right. On the other hand, pre-1914 rights holders established their rights by providing notice of their diversions and actually diverting water; pre-1914 rights holders thus do not have permits. Importantly, pre-1914 water rights holders may freely change the purpose or place of use of water under their rights to the extent the changes do not injure other water rights holders or initiate a new water right (e.g., by increasing the amount of water appropriated under the right). Historically, pre-1914 rights have enjoyed greater flexibility in their exercise compared to post-1914 rights, making them valuable rights limited primarily by reasonable use.

Senate Bill 389

The Bill highlighted tensions in the regulated community. As initially introduced, the Bill would have granted authority to the State Water Board to "determine" the validity of riparian and pre-1914 water rights, thus potentially extending substantial regulatory authority over the exercise of such rights. Substantial opposition to the Bill prompted several significant changes.

In particular, the Legislature replaced "determine" with "investigate and ascertain," which recognizes State Water Board investigatory authority but stops short of granting authority to determine the validity of the right, thus aligning the Bill's language with the board's existing authority granted under Water Code section 1051. In particular, the Bill authorizes the State Water Board to:

> . . .[i]nvestigate and ascertain whether or not water heretofore filed upon or any claimed riparian or appropriative right is valid under the laws of this state. Wat. Code, § 1051(a)(3), *as amended by* S.B. 389.

Investigatory powers include:

> . . .issuing information orders to holders, claimants, and users. Under the orders, the holder or claimant must provide the State Water Board with information on the basis for the water right, including the patent date for the place of

> use, the notice date of the appropriation, and when the water was actually delivered. Orders issued to holders, claimants, and users may require information on prior diversions and use, including direct diversions and diversions to storage . . . . § 1051(b)(2)(E), (b)(3)(A), *as amended by* S.B. 389.

By authorizing the State Water Board to collect diversion and usage information, the board will be able to more closely scrutinize water usage under its reasonable use jurisdiction for pre-1914 and riparian rights holders.

Constraints

Despite granting investigatory powers to the State Water Board, the Bill imposes certain constraints on their exercise. For instance, the board must show that the benefit in issuing an information order must "bear a reasonable relationship" to the burden on the person under investigation. § 1051(c), *as amended by* S.B. 389. Additionally, the State Water Board must provide a written explanation of why the investigation is needed, along with supporting evidence. These procedural safeguards are important pre-requisites to the board exercising its investigatory powers and provide water rights holders an initial foundation from which to understand why the board is considering an investigation.

No Expansion of Circumstances Resulting in Forfeiture

Importantly, the Legislature also eliminated a provision that would have expanded circumstances resulting in the forfeiture of pre- and post-1914 water rights (riparian rights are not subject to forfeiture, although they may lose their historical priority in certain circumstances). As currently provided by statute, a water right may be forfeited after five consecutive years of non-use. However, under the common law, a right subject to forfeiture may be revived if water use is restarted and there was no conflicting claim asserted to the unused water. As originally proposed, the Bill would have allowed the State Water Board to determine a forfeiture occurred absent a conflicting claim. Such a change would have constituted a statutory override of the common law rule that "a forfeiture cannot occur in the absence of a 'clash of rights'. . . ." *Millview Cnty. Water Dist. v. State Water Res. Control Bd.*, 177 Cal.Rptr.3d 735, 752 (2014).

Although the Bill's elimination of the conflicting-claim requirement was itself dropped, the board's authority to order disclosure of diversion and usage information may result in more frequent findings of non-use against which a conflicting claim may be asserted, thus increasing forfeiture litigation and findings in the future.

Conclusion and Implications

How the State Water Resources Control Board will implement its new authority is unclear. Investigations that reveal inflated claims or abandoned rights may ultimately result in the diversions being deemed a trespass, subjecting the rights holder or user to a court order injunction. At a minimum, pre-1914 and riparian holders, claimants, and users should maintain detailed records of their diversion moving forward. (Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

EPA ISSUES NEW CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION RULES TO EXPAND AUTHORITY OF STATES AND TRIBES AND CLARIFY CERTIFICATION PROCEDURES

In September 2023 the U.S. Environmental Protection Agency (EPA) issued a final rule revising and replacing the 2020 regulatory requirements for water quality certifications under Section 401 of the federal Clean Water Act. EPA's final rule expands state and tribal powers to grant or deny water quality certifications for large infrastructure projects like pipelines and dams over water quality concerns. According to EPA, the rule is also intended to improve the certification process to make the procedures and timeline for obtaining water quality certifications more clear and efficient. This entire process has been the subject of multiple legal challenges and litigation, however, so it remains to be seen whether EPA's new rule will accomplish EPA's objectives.

Background

Under Section 401 of the Clean Water Act, any project applicant or proponent for a federal license or permit to conduct any activity, including the construction or operation of a facility, which may result in any discharge into navigable waters (*i.e.*, Waters of the United States), must provide the federal licensing or permitting agency a certification from the state in which the discharge originates or will originate, that any such discharge will comply with other applicable provisions under the Clean Water Act (*e.g.*, water quality standards, effluent limitations, new source performance standards) and other potentially applicable water quality requirements of state or tribal law. The federal agency may not issue the underlying federal permit or license unless the certification is issued or waived. States and authorized tribes where the discharge activities occur are generally responsible for issuing water quality certifications, but in situations where a state or tribe does not have authority, EPA is responsible for issuing the water quality certification. (*See generally* 33 U.S.C. § 1341.)

In addition, Clean Water Act Section 401 provides that certifying authorities (*i.e.*, states, authorized tribes, and EPA), must act on a water quality certification request "within a reasonable period of time (which shall not exceed one year) after receipt of such request." (33 U.S.C. § 1341(a)(1).) A certifying authority may waive certification expressly, or by failing to act within a "reasonable period of time." A federal agency may not issue a federal license or permit for an activity that may result in a discharge into waters of the United States prior to the completion of the Clean Water Act Section 401 water quality certification process.

EPA promulgated its first implementing regulations for Clean Water Act Section 401 in the early 1970s. Since that time, EPA's implementing regulations have undergone several changes. More recently, in 2020 EPA issued a new version of the rule (the "2020 Rule") that many viewed as an effort to roll back state and tribal authority to substantively review and actively participate in the water quality certification process. (*See:* EPA, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020).) The 2020 Rule also introduced several new procedures, including one that allowed federal agencies to review certification decisions and determine that the certification was waived if it was not consistent with other rules and requirements. The 2020 Rule also prohibited a certifying authority from requesting a project applicant to withdraw and resubmit a certification request to restart the clock for purposes of processing the water quality certification.

EPA's 2023 Rule

EPA's new rule is intended to roll back the 2020 Rule and reinstate the prior scope of the Clean Water Act Section 401 certification process. More specifically, EPA's new rule restores and strengthens the role of state and tribes to review and participate in the water quality certification process. States and tribes now have expanded and clarified authority to assess whether the proposed project or activity in its

entirety will comply with water quality requirements. However, the rule also emphasizes that states and tribes may only consider water quality related impacts from the activity, including the activity's construction and operation.

In addition, the new rule is intended to provide more regulatory certainty and to advance federally permitted projects such as pipelines and dams. EPA explained that the "reasonable period of time" will begin on the date that a request for certification is received by the certifying authority in accordance with its applicable submission procedures. The new rule also allows federal agencies and certifying authorities with the ability to jointly set the reasonable period of time, provided it does not exceed one year from the date that the request for certification was received (*i.e.*, the one-year statutory maximum). The final rule further clarifies that the joint determination of the reasonable period of time may happen on a case-by-case basis or categorically, but if the federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable period of time will be six months from the date that the request for certification was received. Finally, in order to try and limit delays, the rule sets forth required contents in a request for certification.

Conclusion and Implications

EPA's new rule becomes effective on November 27, 2023. While many are hopeful that EPA's new rules will lead to more efficient and clear procedures for processing water quality certifications, it is too early to tell whether EPA's objectives will be achieved in practice. For more information, *see:* EPA, Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023).)

(Patrick Veasy, Megan Somogyi)

PROGRESS CONTINUES FOR U.S. ARMY CORPS OF ENGINEERS' FOLSOM DAM RAISE PROJECT

In response to the increasingly prevalent flood risks affecting the greater Sacramento area, the U.S. Army Corps of Engineers, Sacramento District (Corps), commenced with the Folsom Dam Raise Project (Project). The Project, announced in December of 2017, is currently scheduled for completion in 2027 and will help tackle the flooding issues faced by the Sacramento area.

The Project includes a three-and-a-half-foot raise to several dikes along Folsom Lake, including the Mormon Island Auxiliary Dam, Left Wing Dam, and Right Wing Dam. This three-and-a-half foot raise to the dikes will allow Folsom Lake to temporarily store an extra 42,000 acre-feet of water. The Project also includes modifications to Folsom Dam's Tainter gates, construction of automated temperature control shutters at the main dam, and habitat restoration to both the Bushy Lake Restoration Site and Woodlake Restoration Site.

Why the Dam Raise is Needed

Construction of the original Folsom Dam began back in 1951 as a response to the frequent flooding that occurred in the Sacramento area. With this flooding continuing to present a problem during its construction, the Folsom Dam faced challenges prior to its official completion in 1956. In 1955, record storms on the American River filled Folsom Lake to capacity, but the portion of work already completed on the then unfinished Dam held strong. Nearly 70 years later, the Folsom Dam has stood the test of time. With increasing risks brought on by flood events affecting the greater Sacramento area, exacerbated in part by California's frequent and severe drought condition, proponents of the Project are optimistic that the Dam raise will further protect nearby residents from flood events while increasing reservoir capacity to be utilized in future periods of drought.

While the official Project wasn't announced until the end of 2017, the Project expands on construction that was completed to the Folsom Dam Bridge in 2009. Upon completion in 2027, the Folsom Dam Raise Project will serve to reduce flood risks for nearly 500,000 people and 125,000 structures in the surrounding areas downstream. The project will also incorporate technological developments that

take advantage of forecast-informed decisions, a new method that helps the Bureau of Reclamation (Reclamation) make determinations for releases of water from the reservoir. Through this new advancement, the dam's modified Tainter Gates will allow Reclamation to keep or release water depending on how much rainfall Reclamation expects the reservoir to receive on certain days.

Dike Improvements Currently Underway

The Project has been well underway for the past few years, with the first raise on Dike 8 completed in 2020.

As of September of 2023, the raises to Dikes 1 through 6 have begun and are expected to be completed in the summer of 2025. Maloney-Odin Joint Venture, the prime contractor for the project on Dikes 1 through 6, has already started clearing and grubbing work on the site at Dike 1. To make the scheduled improvements to Dike 1, Park Road, which sits atop Dike 1, is set to be removed one lane at a time. The upstream lane will be the first lane to have its asphalt removed so that the dike can be raised up by three-and-a-half feet. After the work on the upstream lane has been completed, traffic will reopen on for that side and the asphalt will be removed on the downstream lane's side and raised by three-and-a-half feet.

As Folsom Lake is home to a wide array of outdoor activities that much of the surrounding community has come to appreciate, such as boating, fishing, hiking, swimming, and biking, the project does have the potential to have some impact on these activities, especially as there have already been closures to hiking trails along Dikes 1 through 3 for their construction.

As of October 2023, construction near Dike 5 has begun. The next steps in the project, beyond the completion of the modifications to Dikes 1 through 6, are the modifications to Dike 7, the Left Wing Dam, Right Wing Dam, Mormon Island Auxiliary Dam, and the main dam. All of these Project facilities are to be raised by three-and-a-half feet.

Conclusion and Implications

Progress on the Project is set to continue over the course of the next four years and will bring positive changes to Folsom Dam's ability to store floodwaters during periods of abnormally heavy precipitation. The Folsom Dam Raise Project is also just one of several currently underway in the State, with dam raises proposed and planned for the Shasta Lake Dam and the San Vicente Dam.

With a growing population, increased frequency of high precipitation events, and a general need for increased water supply storage, it seems likely that other dams across the State will look be assessed for raises of their own as a way of addressing the water supply issues described above. Future dam raises have the potential to not only provide Californians with increased water supply resiliency during periods of drought, but also to protect residents in high flood risk areas downstream from the affected reservoirs, particularly in light of California facing historical rainfall in the last year. Additionally, the technological advancements to the dams that will be implemented by Reclamation will assist in their ability to make important decisions relating to water storage capacity and downstream flow levels, and whether and when to store or release water based on more consistent and predictable forecasts in surrounding areas.

(Wesley A. Miliband, Kristopher Strouse, Farrah Ghaffarirafi)

DEPARTMENT OF WATER RESOURCES RELEASES DRAFT CALIFORNIA WATER PLAN UPDATE 2023

The California Department of Water Resources (DWR) has released the draft "California Water Plan Update 2023" This document is the state's strategic plan for sustainably and equitably managing, developing, and stewarding water resources as required by the Water Code. The plan presents the status and trends of California's water-dependent natural resources; water supplies; and agricultural, urban, and environmental water demands for a range of plausible future scenarios.

Background

The California Water Plan, initially introduced in 1957, has been a cornerstone in how the state looks to manage sustainable use and allocation of water resources in the state. The 2023 update adds additional focus to innovation and investments in California's watersheds, water systems, and what communities need for a resilient and equitable future.

The Water Plan Update

The California Water Plan Update 2023 details multiple Objectives. Below is a summary of those Objectives as described in the plan.

Objective 1—Support Watershed Resilience Planning and Implementation

The plan indicates that watersheds are currently experiencing major climate change challenges that will be magnified in the future. Improving and accelerating climate resilience planning and implementation at the watershed scale will improve water resilience where impacts are most acutely experienced. Recommendations under this objective seek to support and accelerate watershed resilience through priority state actions.

Objective 2—Improve Resiliency of 'Backbone' State, Federal, and Regional Built Water Infrastructure

Recognizing that most watersheds in California are interconnected and dependent on State, federal, and regional built water infrastructure, statewide water resilience can only be achieved with improvements to the resiliency of these "backbone" systems. The recommendations under this objective seek to improve the state of existing built backbone infrastructure systems, adapt operations for climate change, increase integration of these systems, and improve information sharing.

Objective 3—Improve Resiliency of Natural 'Backbone' Infrastructure

The resilience of built infrastructure is intrinsically linked to the resilience of natural infrastructure. Recognizing this interdependence, the recommendations under this objective seek to improve the resilience of natural infrastructure through accelerated ecosystem restoration and prioritizing critically important ecosystem hubs and groundwater basins.

Objective 4—Advance Equitable Outcomes in Water Management

The plan finds that current inequities exist in California's institutional systems and that resilience for California must include resilience for all, the recommendations under this objective emphasize improving community outreach and engagement, local capacity building efforts, and access to state assistance programs.

Objective 5—Support and Learn from Tribal Water and Resource Management Practices

The plan indicates that California Native American Tribes have a long history of sustainable water and resource management practices. It also finds that Tribal communities also face a growing number of the water management challenges related to water rights, infrastructure development, engagement, and funding. The recommendations under this objective seek to support strategies to address these challenges and support and learn from Tribal water management practices.

Objective 6—Support and Increase Flexibility of Regulatory Systems

Update 2023 details how climate change is driving a need for planning and projects capable of addressing future uncertainties. It also discusses the need to further support regulatory programs and to ensure that they are flexible and adaptive enough to meet the challenges of a changing hydrology. The recommendations under this objective seek to support that and other related outcomes.

Objective 7—Provide Guidance and Support Continued Resources for Implementation of Actions toward Water Resilience.

The plan finds that sustainable resources create more resilient water-resource management systems, which are foundational to adapting to an increasingly variable hydroclimatic regime of swings between drought and flood. Developing statewide and watershed resilience requires local, state, and federal investments and unique approaches to sustainable

funding. The recommendations under this objective seek to align resources with the needs of California water management.

Public Outreach

DWR hosted the Water Plan Plenary Meeting on October 3-4, 2023, to provide an overview of the plan and to allow participants to provide comments. The California Water Plan Update 2023 additionally just finished its public comment period which ran from September 20, 2023, through October 19, 2023. The California Water Plan Update can be found on the California Department of Water Resources website at: https://water.ca.gov/Programs/California-Water-Plan/Update-2023. The final version will likely be released in early 2024.

Conclusion and Implications

While the California Water Plan Update 2023 serves as a high-level strategy guidance document and thus does not place any new specific mandates currently on the regulated community, it does shed light on where the state will start to spend both time and materials in future legislation and regulations. Those who frequently interact with the State Water Resources Control Board or the Department of Water Resources would be well served to give the Plan Update a brief review to see what plans, strategies, projects, and programs may be in the works. (Darien Key, Derek Hoffman)

STATE WATER RESOURCES CONTROL BOARD RELEASES DRAFT STAFF REPORT IN SUPPORT OF SACRAMENTO/DELTA UPDATES TO THE BAY-DELTA PLAN

The State Water Resources Control Board (State Water Board) released its draft Staff Report (Draft Report) supporting Sacramento/Delta updates to the Bay-Delta Plan (Plan) on September 28, 2023. The Draft Report is now available for public review, with written comments due December 15, 2023.

Background

The Bay-Delta watershed includes the San Francisco Bay, the Delta, Suisun Marsh, and two of California's major river systems, the San Joaquin and Sacramento Rivers. The watershed is home to "the largest estuarine ecosystem on the West Coast," with the Delta spanning roughly 738,000 acres. (Draft Report (Sept. 2023) at p. 1-8.) The watershed supports a variety of beneficial uses throughout the state, including drinking water for more than two-thirds of California's population, irrigation, and recreation. (*Id.*) The watershed also serves as the water source for California's two largest water projects, the U.S. Bureau of Reclamation's Central Valley Project and the California Department of Water Resources' State Water Project.

The State Water Board has the authority to adopt state water quality control plans under the Porter-Cologne Act (Water Code § 13000, *et seq.*) (*Id.* at p. 1-10.) In adopting the Plan, the State Water Board recognized the importance of the Bay-Delta watershed for both its water supply and its ecology. (*Id.*) The Plan manages the Bay-Delta watershed's water use and diversions in the context of water quality control planning. (*Id.*) The water quality objectives in the Plan are designed to protect the State Water Board's identified beneficial uses, which include industrial, municipal, agricultural, and fish and wildlife uses. (*Id.*) The water quality objectives include flow, dissolved oxygen, and salinity standards. (*Id.*) The Plan also sets forth the program for implementing and achieving the water quality objectives. (*Id.*) The program includes monitoring protocols for compliance, time schedules, and descriptions of necessary actions. (*Id.*)

The current water quality objectives in the Plan for the Sacramento/Delta watershed are flow-based and were created in 1995. (*Id.*) The State Water Board's last major update to the Plan occurred in 2018, when it adopted amendments changing flow standards in the Lower San Joaquin River and three of its major tributaries—the Tuolumne, Stanislaus, and Merced Rivers. (*Id.* at p. 1-1.) The 2018 amend-

ments also set a new salinity objective in the southern Delta, aimed at protecting agricultural uses. (*Id.*)

The State Water Board prepared this Draft Report to support the consideration of updates to the Plan that focus on protecting fish and wildlife in the Delta, the Sacramento River and its tributaries, and the Delta eastside tributaries. (*Id.* at p. 1-2.) The Draft Report only presents proposed amendments to the Plan. (*Id.* at p.1-2.) The State Water Board has not made a decision on any definitive amendments – all alternatives presented in the Draft Report can still be considered and adopted. (*Id.* at p. 1-2.)

Draft Report Contents

The proposed amendments in the Draft Report address various concerns with the Bay-Delta watershed. These concerns include, but are not limited to, temperature management problems during drought periods, dams that disconnect migratory corridors for native species, and flows that:

> . . .are completely eliminated or significantly reduced at certain times in some streams in the Sacramento/Delta watershed. (*Id.* at pp. 5-7, 5-8.)

The Draft Report posits that changes to the Plan for the Sacramento/Delta may create a regulatory structure that addresses these issues in the watershed:

> . . .by providing comprehensive minimum instream flow and cold water habitat provisions and distributing the responsibilities more broadly across the watershed in a way that adjusts to available supplies and provides for flexibility. (*Id.* at p. 5-9.)

For example, the Draft Report discusses potential amendments that would allow for flows that would purportedly mimic conditions that native fish species have adapted to and thus, according to the Draft Report, will improve native species protection. (*Id.* at pp. 5-14, 5-15.) The inflows would also purportedly provide:

> . . .appropriate habitat conditions for adult salmonid immigration and holding and juvenile rearing and outmigration. (*Id.* at p. 5-15.)

The Draft Report proposes a flow range for the Sacramento/Delta tributaries between 45 and 65 percent of unimpaired flow. (*Id.* at pp. 5-16, 5-17.) The Draft Report proposes a starting point of 55 percent of unimpaired flow. (*Id.*) This would replace the current inflow requirement of minimum monthly average flows of 3,000 to 4,500 cubic feet per second on the Sacramento River. (*Id.* at p. 5-13.)

The State Water Board also discussed cold water habitat objectives to complement the proposed inflow requirements. These objectives are intended to "ensure that there are no redirected impacts on cold water habitat from the new inflow and Delta outflow objectives," and address other concerns for salmonids and native species on the tributaries. (*Id.* at p. 5-22.) The objectives would require measures that protect cold water habitat on the Sacramento/Delta tributaries for salmonids and other native cold water fish, including measures for managing cold water storage and releases or installing and operating temperature control devices. (*Id.* at p. 5-22.)

The Delta outflow objective aims to provide outflows sufficient to maintain natural production of estuarine fish, native anadromous fish, and aquatic species that rear in or migrate through the Bay-Delta estuary. (*Id.* at p. 5-28.) The outflow requirements are intended mimic the inflow requirements for the Sacramento/Delta tributaries and the San Joaquin River, "with adjustments for downstream natural depletions and accretions." (*Id.* at p. 5-29.) The required outflow under the proposed amendment:

> . . .would be calculated by adding up the applicable required inflows in the Bay-Delta Plan and making appropriate adjustments for natural losses and gains, including floodplain inundation flows. (*Id.* at p. 5-29.)

Although the outflow objective as proposed would apply year-round, its greatest effect would occur during the spring and winter seasons. (*Id.* at pp. 5-28, 5-29.)

Conclusion and Implications

The Draft Report is now open for public comment through December 15, 2023. During this time, the State Water Board will hold workshops to provide the public with information on the substantive content in the Draft Report. (*Id.* at p. 1-19.) Following the

public comment period, the State Water Board will consider the comments it received. The State Water Board will then develop and release proposed regulatory text for Sacramento/Delta changes to the Plan, as well as a program of implementation; these amendments will also be part of a public process that allows for public comment. (*Id.* at p. 1-20.) The State Water Board anticipates this language will be released to the public for comment and review in 2024. (*Id.*)
(Taylor Davies, Sam Bivins)

STATE WATER RESOURCES CONTROL BOARD HOLDS AN EVENTFUL PUBLIC HEARING ON ITS URBAN WATER CONSERVATION REGULATION

The State Water Resources Control Board (State Water Board or Board) held a public hearing on its proposed *Making Conservation a California Way of Life* regulation (Regulation). The Regulation establishes individualized conservation standards for Urban Retail Water Suppliers (Suppliers) across commercial and residential sectors. The hearing featured multiple panelists and public commenters comprising diverse Suppliers from across the state. Suppliers shared recommendations and concerns about the potential impacts the Regulations will have on their districts. [Making Conservation a California Way of Life (proposed Aug. 18, 2023) (to be codified in 23 C.C.R. 965 – 78)]

Background

In 2018, California passed two water conservation laws, Senate Bill (SB) 606 and Assembly Bill (AB) 1668. These bills establish an updated framework for urban water conservation and drought planning to address state-wide aridification and diminishing water supplies. As codified, AB 1668 directs the State Water Board to establish efficiency standards for indoor and outdoor water use, variances for unique conditions, and performance measures for Commercial, Industrial, and Institutional (CII) water use. SB 606 requires Suppliers to annually calculate and meet urban water use objectives using the State Water Board's standards set pursuant to AB 1668.

Under the proposed Regulation, Suppliers calculate urban water use objectives by summing efficiency budgets for residential indoor water use, residential outdoor water use, real water loss, CII landscapes with dedicated irrigation meters (DIM), qualified variances, and a reuse bonus incentive. Each water use budget is calculated using efficiency standards set to take effect in 2025 and ratchet until 2035. A Supplier is not expected to meet any one water use budget but must meet the overall water use objective through whatever means it deems most cost-effective. Failure to meet a water use objective may result in an enforcement order from the State Water Board. The State Water Board may issue informational orders beginning on January 1, 2024, written notices on January 1, 2025, and conservation orders on January 1, 2026.

Throughout the hearing, the State Water Board stressed the Regulation's flexibility to accommodate Suppliers' unique circumstances. For example, the Board may grant a variance if a Supplier can demonstrate:

> . . .unique uses that can have a material effect on an urban retail water supplier's urban water use objective. Water Code § 10609.14(a).

A variance may cover a Supplier's seasonal population change or prevalent livestock and agricultural activities. Moreover, "special landscape areas"—including but not limited to recreational areas, edible plant areas, ponds, and landscapes irrigated with recycled water—receive a "landscape efficiency factor" (LEF) of 1, essentially excluding these landscapes from reductions. In addition to special landscape areas, the Suppliers will receive a 20 percent bonus for landscape areas called Irrigable Not Irrigated (INI). This INI buffer is meant to approximate existing brown lawns. Together, these features increase a Supplier's urban water use objective and ease reduction requirements. Lastly, the regulations provide alternative pathways for suppliers serving disadvantaged and non-disadvantaged communities.

The Proposed Regulation

If adopted, the State Water Board estimates the Regulation will save 6.5 million acre-feet between 2025 and 2040, assuming no variances. Based on current use, the State Water Board expects 27 percent of the roughly 400 Suppliers will need to make reductions to meet 2025 standards. Ten Suppliers will need to make reductions greater than 30 percent. Almost 80 percent of Suppliers will need to make reductions to meet 2035 standards, with 84 Suppliers needing to reduce use by more than 30 percent. Suppliers in the Inland Empire and Central Valley face the most significant cuts.

Cost of Implementation

During the hearing, several Suppliers expressed concern over the cost to implement. For some suppliers, the Regulation means hiring dedicated staff or outside consultants to classify and calculate landscape areas and to comply with annual reporting requirements. DWR plans to provide Suppliers with landscape data. Still, that information will not come until after 2025, and several Suppliers expressed concern about the data's accuracy as landscapes continue to evolve. Other Suppliers cited the hardening demand for already established conservation programs. In other words, Suppliers have already picked the low-hanging fruit for water conservation opportunities, leaving only costly means to achieve further reductions. This is a particular concern for Suppliers serving disadvantaged communities, where ratepayers cannot afford to invest in high-efficiency landscapes even with rebates. Even when conservation programs are successful, demand reductions mean less revenue to cover fixed costs, such as water transportation. Whether it is decreased demand for conservation programs or increased supply costs, many Suppliers believe rate hikes will be necessary, and ratepayers—specifically low-income ratepayers—will bear the burden.

To address these cost concerns, Suppliers provided an array of recommendations that would ultimately reduce the cost of compliance. Recommendations include increasing the compliance timeline, lowering the thresholds for variances, streamlining reporting requirements with other regulations, and permanently retaining the INI buffer. Suppliers also wanted State funding for mixed-use metering replacement, rebate programs, and technical assistance. Currently, the Regulation and the underlying statutes do not provide for this assistance.

Indoor Versus Outdoor Residential Water Use

Additionally, some Suppliers suggest that the Regulation's flexibility is overstated. Indeed, the Regulation allows Suppliers to choose the best means to achieve the overall objective. But, according to some, the choice is illusory. Across the most state, indoor residential water use efficiency has reached its maximum, and CII landscapes with DIM account for a small portion of water use. This leaves reductions in outdoor residential water use as the only means to achieve compliance. Transforming landscapes using best management practices can be costly and, for disadvantaged communities, unaffordable.

Conclusion and Implications

Throughout the hearing, the Statte Water Resources Control Board expressed appreciation for Supplier concerns and expressed a willingness to work one-on-one with any Suppliers expecting significant cuts. Currently, the State Water Board anticipates that the Regulation will be adopted in Summer 2024, with it going into effect the following October. For more information on the the proposed "Making Conservation a California Way of Life" regulation, *see:* https://www.waterboards.ca.gov/conservation/regs/docs/conservation-a-way-of-life.pdf and for the rulemaking, *see:* https://www.waterboards.ca.gov/conservation/regs/water_efficiency_legislation.html. (Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT DISMISSES CONSTITUTIONAL CHALLENGES TO CURTAILMENTS ON DEER CREEK AND MILL CREEK, BUT ALLOWS RELATED CHALLENGES AGAINST CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE TO PROCEED

On September 28, 2023, the U.S. District Court for the Eastern District of California granted a motion to dismiss claims against the members of the State Water Resources Control Board (State Water Board), its Executive Director, and its Deputy Director for the Division of Water Rights brought by plaintiffs Los Molinos Mutual Water Company (Los Molinos), Peyton Pacific, LLC (Peyton), and Stanford Vina Ranch Irrigation Company (Stanford Vina). The court also granted in part and denied in part a motion to dismiss regarding claims made against the California Department of Fish and Wildlife (Department) and its Director, Charlton Bonham, by Stanford Vina. [*Los Molinos Mutual Water Company, et al. v. Erik Ekdahl, et al.*, Case No. 2:21-cv-01961-DAD-DMC (E.D. Cal. Sept. 28, 2023).]

Background

On February 25, 2022, the three plaintiffs filed an amended complaint challenging the curtailment orders promulgated by the Board in response to extreme drought conditions in 2021. *Los Molinos Mut. Water Co. v. Ekdahl (hereinafter, Los Molinos)*, 2023 WL 6386898, at *1. The plaintiffs challenged the State Water Board's September 22, 2021, decision to approve emergency regulations regulating diversions from Deer Creek and Mill Creek. *Id.* at *2. These emergency regulations set minimum instream flow requirements, making any diversions that reduced the flow below the minimum threshold an "unreasonable use." *Id.* Plaintiffs alleged that they were prohibited from diverting water because the diversions would interfere with achieving minimum instream flows for fish. *Id.* at *3. The plaintiffs asserted nine claims against the members of the Board, including a claim for taking real property without compensation in violation of the Fifth and Fourteenth Amendments, a claim the Board violated plaintiff's procedural due process rights by not holding an evidentiary hearing, a claim for violation of the public trust doctrine, and a claim under Article X, Section 2 of the California Constitution. *Id.* at *3.

Stanford Vina also asserted claims against the Department and its executive director, Charlton Bonham, for allegedly abandoning fish ladders and screens it had historically maintained to protect the Central Valley spring run chinook salmon and California Valley steelhead. *Id.* at *1. Stanford Vina asserted five claims against the Department, including a claim brought under section 9 of the federal Endangered Species Act (ESA), a claim for taking real property without just compensation violating the Fifth and Fourteenth Amendments, a procedural due process violation under the Fifth and Fourteenth amendments, a claim for declaratory relief, and a state law nuisance claim. *Id.* at *3. All defendants filed motions to dismiss the plaintiffs' claims. *Id.* at *4.

The District Court's Decision

Takings Claims

The U.S. District Court first examined the defendants' motion to dismiss the plaintiffs' takings claims, brought under the Fifth and Fourteenth Amendments of the U.S. Constitution, by analyzing whether the Eleventh Amendment barred the claims. *Id.* at *7. The court concluded the Eleventh Amendment prevented it from hearing the case because plaintiffs failed to allege that they would be prevented from seeking just compensation for an alleged future taking of their water rights in state court. *Id. at* *7. The court granted the motion to dismiss with leave to amend. *Id.* at *8.

State Law Claims

Next, the court examined the defendants' motion to dismiss the state law claims, which included claims

against the Board members for violating the public trust doctrine, a claim brought under Article X, Section 2 of the California Constitution, and Stanford Vina's nuisance claim brought against the Department and Bonham. *Id.* at *3. All defendants moved to dismiss these state law claims based on the Eleventh Amendment. The court concluded that it must dismiss all state law claims because plaintiffs brought claims against state officials in their official capacity thus were required to pursue their claims in state court. *Id.* at *9, 16.

Procedural Due Process Claims

The court then examined the plaintiffs' procedural due process claims against the Board members. To determine if the Board members denied the plaintiffs procedural due process, the court had to decide if the emergency regulations were "legislative" acts. *Id.* at *12. The court concluded the emergency regulations were legislative in nature because they affected large areas and were directed at all water right holders in those areas as opposed to one or only a few water rights holders. *Id.* at *13. After making this determination, the court looked to see if the Board acted in the usual manner prescribed by law. *Id.* at *12. The court held the Board acted appropriately and highlighted that the plaintiffs participated in meetings where the Board adopted the emergency regulations. *Id.* These two determinations led to the dismissal of the plaintiffs' due process claim against the Board members. *Id.*

Claims Moving Forward

However, the court did allow two of Stanford Vina's claims against Bonham to move forward. Stanford Vina claimed that by abandoning the fish screens and ladder, the Department allowed debris to build up and threatened the ability of the fish to use the structures, resulting in a take under section 9 of the ESA. *Id.* at *17. The court denied the Department's motion to dismiss Stanford Vina's claim, holding that Stanford Vina's complaint alleged the abandonment was ongoing, and in 2010, a similar lapse by the Department led to the death of 21 salmon. Therefore, the court held that Stanford Vina's complaint alleged sufficient facts to represent a definitive future threat to the threatened species. *Id.* at *18.

Denial of Motion to Dismiss Stanford Vina's Procedural Due Process Claim Against Bonham

Lastly, the court denied the Department's motion to dismiss Stanford Vina's procedural due process claim against Bonham. The court held that Stanford Vina's complaint sufficiently alleged that the Department abandoned the operation of the fish screens and ladders, which prevented water from entering Stanford Vina's diversion and canal. *Id.* at *19. The court found Stanford Vina's complaint contained allegations sufficient to establish that its water rights were private property and that the Department infringed upon those rights without providing due process. *Id.*

Conclusion and Implications

The court's order on defendants' motion to dismiss highlights the difficulties associated with challenging the actions of the Board and the Department in federal court. Plaintiffs filed a Second Amended Complaint on October 18, 2023. As of the date of this writing, the defendants have not yet filed a responsive pleading. The court's ruling of September 28, 2023 is available online at: https://casetext.com/case/los-molinos-mut-water-co-v-ekdahl-3.
(Jake Voorhees, Sam Bivins)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT UPHOLDS NINTH CIRCUIT RULING IN *SAN LUIS OBISPO COASTKEEPER V. SANTA MARIA VALLEY WATER CONSERVATION DISTRICT* REGARDING WATER RELEASES FROM DAMS TO COMPLY WITH THE ESA

In last year's case of *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District* (9th Cir. 2022) 49 F.4th 1242, the Ninth Circuit Court of Appeals held that the operators of a Southern California dam were required to make releases of water, consistent with the dam's authorizing legislation, in order to comply with the federal Endangered Species Act (ESA). Bringing this case to a close, the U.S. Supreme Court, on October 2, 2023, denied the request for further review brought by the operator's dam, leaving in place the decision made by the Ninth Circuit on September 23, 2022.

The Ninth Circuit's Ruling

The Twitchell Dam is located on the Cuyama River about six miles upstream from its confluence with the Sisquoc River and is ultimately a tributary to the Santa Maria River. The Southern California steelhead is an endangered species of salmonoid with a habitat ranging from the Santa Maria River system in the north to the US-Mexico border in the south. While the lower Santa Maria River remains dry most of the time, periods of heavy precipitation create enough flows in the Santa Maria River and its tributaries to allowed Southern California steelhead to migrate to and from the ocean to mature and replenish their population before the construction of Twitchell Dam.

In 2019, the San Luis Obispo Coastkeeper and Los Padres ForestWatch filed a lawsuit against the Bureau of Reclamation (Reclamation) and Santa Maria Valley Water Conservation District (District), claiming that their operation of dam interfered with the reproductive migration of Southern California steelhead and therefore amounted to an unlawful take in violation of the ESA. Accordingly, the core issue of the case revolved around the question of whether Reclamation and the District could be required to time releases of water in certain volumes and durations that would support Southern California steelhead reproduction.

Reclamation is responsible for setting the operational rules for the Twitchell Dam. From this responsibility, Reclamation argued that Public Law 774 ("PL 774"), the legislation from 1954 which authorized the construction of the Twitchell Dam, did not allow it for releases of water for the purpose of supporting Southern California steelhead migration, therefore creating a conflict with the requirements of the ESA. The rule in such a situation, as was argued by Reclamation, is that where two statutes are mutually prohibitive, an irreconcilable conflict exists that may cause the court to enforce one statute over the other. Naturally, Reclamation's main point of contention here was that the operational criteria for the Twitchell Dam took precedence over the ESA.

In this instance, however, the Ninth Circuit held that there was no irreconcilable difference between PL 774 and the ESA. The Ninth Circuit supported its decision by pointing to the language in PL 774 that allows the Twitchell Dam project to operate "for other purposes." From this generalized language, the Ninth Circuit held that Reclamation has discretion to provide for releases of water to support Southern California steelhead migration, thus preventing an irreconcilable difference with the ESA. On October 2, following a request for review from Reclamation and the District, the US Supreme Court denied review of the case. *See:* https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/23/21-55479.pdf.

Conclusion and Implications

As recently as the 1950s, prior to the construction of the Twitchell Dam, the Santa Maria Watershed was one of the largest steelhead runs along the central coast, with over 10,000 fish utilizing the Santa Maria River and its tributaries for vitally important spawning habitat. Since the introduction of the Twitchell

Dam and other major projects in the watershed, however, those numbers have plummeted, with the Southern California steelhead being listed as an endangered species by the ESA in August of 1997.

The decision of the Supreme Court not to review the case affirms the Ninth Circuit's ruling that Reclamation and the District do in fact have the ability to release water from the Twitchell Dam and remain in compliance with both PL 774 and the ESA. Advocacy groups and proponents of the steelhead have claimed that amount of water necessary to provide sufficient flows to promote steelhead migration and pawning would only constitute equate to about 4 percent of the reservoir's average annual amount of stored water. Although this number may seem trivial to some, Californians have battled to maximize the utilization of the state's limited water supply, and the balancing of human versus environmental needs has been a difficult equation to say the least. In balancing these needs, however, the Ninth Circuit ultimately concluded—and the Supreme Court has now upheld that conclusion—that "the Agencies have discretion to operate Twitchell Dam for other purposes besides irrigation, conservation, and flood control—including, potentially, adjusting water discharges to support the migration and reproduction of Southern California Steelhead."
(Wesley A. Miliband, Kristopher Strouse, Farrah Ghaffarirafi)

FIFTH CIRCUIT UPHOLDS U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT 404 PERMIT FOR LIQUID NATURAL GAS PROJECT

Healthy Gulf v. United States Army Corps of Engineers, 81 F.4th 510 (5th Cir. 2023).

The United States Court of Appeals for the Fifth Circuit denied a petition for review of the U.S. Army Corps of Engineers' (Corps) decision to grant a permit for a facility that would convert natural gas into liquefied natural gas.

Factual and Procedural Background

Driftwood LNG and Driftwood Pipeline (jointly: Driftwood) proposed a facility that would convert natural gas produced in the United States to LNG to export internationally. This undertaking involved building an LNG production and export terminal and pipeline on the Calcasieu River in Louisiana. The Corps granted Driftwood a dredge and fill permit under section 404 of the federal Clean Water Act (404 Permit).

When issuing a 404 Permit, the Corps performs a three-step analysis of (1) avoidance, (2) minimization, and (3) compensatory mitigation. To satisfy these elements, the discharge of dredged material must be the least environmentally damaging practicable alternative (LEDPA); permittees must take "appropriate and practicable steps" to minimize potential deleterious consequences due to the discharge; and compensatory mitigation is required. There are three types of mitigation are to be considered in order of hierarchy: (1) mitigation banks, (2) in-lieu fee programs, and (3) permittee-responsible mitigation. This hierarchy sets as a default but the Corps may override it as appropriate.

Under state and federal law, Driftwood needed to offset the negative environmental impacts of its project. First, under Louisiana law, Driftwood had to use the dredged material beneficially because the project involved dredging more than 25,000 cubic yards. Second, under the Clean Water Act, Driftwood needed to provide compensatory mitigation for the permanent and unavoidable loss of coastal wetlands. As part of its compensatory mitigation, Driftwood proposed to offset 134.3 acres of impacted wetland by purchasing credits from an approved mitigation bank. But it would offset the remaining 185.0 acres through the beneficial use of dredged material by using it to restore an estimated 3,000 acres of emergent, estuarine intertidal, and scrub or shrub wetlands.

Petitioners, Health Gulf and Sierra Club, challenged the Corps' issuance of the 404 Permit, on two grounds. First, Petitioners alleged the Corps failed to identify an alternative site (Alternative Site 6) as the LEDPA. Second, Petitioners alleged the Corps did

not adequately justify its deviation from the statutory hierarchy of compensatory mitigation schemes, and that even if the hierarchy were flexible, the Corps failed to address serious concerns about the viability of the proposed dredged material plan.

The Fifth Circuit's Decision

The Court of Appeals first considered and rejected Petitioners' argument that the Corps did not adequately consider Alternative Site 6, and thereby failed to demonstrate the current location for the project was the LEDPA. The court rejected this argument, reasoning that Petitioners did not mention Alternative Site 6 during the public comment period or any sites, collections of sites, or even general areas as potential alternatives, despite recognizing that an alternatives analysis would need to include alternative locations. Ordinarily, a reviewing court will not consider arguments that parties failed to raise in a timely fashion before an administrative agency, and the court declined to do so here.

Petitioners argued that their failure to submit a comment on Alternative Site 6 should be excused for two reasons: (1) the obvious flaw exception; and (2) the independent knowledge exception. Under the obvious-flaw exception, the question is whether the flaw is so evident that there is no need for it to be pointed out at all during the public comment period. The court rejected this argument because Petitioners did not offer anything other than a conclusory contention that the Corps should have analyzed Alternative Site 6. Under this exception, when an agency has "independent knowledge of the very issue" that a petitioner is raising in challenge to the agency action, failure to raise that issue during the administrative process may be excused. The court similarly rejected the independent knowledge exception because it is not recognized in the fifth circuit and even if it were recognized, comments specifically identifying Alternative Site 6 were not submitted until months after the comment period closed.

The court next considered Petitioners' argument that the Corps violated the regulatory hierarchy for compensatory mitigation by allowing Driftwood to use permittee-responsible mitigation and failing to justify the grounds for allowing Driftwood to deviate from the established hierarchy. The court noted that the Corps has authority to override the regulatory preference where appropriate, such as where a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis. The court deferred to the Corps' reasoning for overriding the default hierarchy, as documented in the administrative record.

The Court of Appeals denied the petition for review of the permit issued by the U.S. Army Corps of Engineers to Driftwood.

Conclusion and Implications

This case reinforces the need for parties interested actions of administrative agencies to build a strong administrative record by participating in the comment and hearing processes. It also provides an example of a court deferring to an agency's scientific and technical expertise as the U.S. Supreme Court prepares to hear a case about the appropriateness of such deference. The Fifth Circuit's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca5/22-60397/22-60397-2023-09-06.html.

(Rebecca Andrews)

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