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CALIFORNIA WATER NEWS

GOVERNOR NEWSOM UTILIZES NEW INFRASTRUCTURE STREAMLINING LAW TO CERTIFY JUDICIAL STREAMLINING OF THE SITES RESERVOIR PROJECT

On November 6, 2023, Governor Newsom, acting under his authority under California's new Infrastructure Streamlining Law, certified judicial streamlining of the Sites Reservoir Project (Project). The Governor's action requires courts to decide challenges to the Project under the California Environmental Quality Act (CEQA) within 270 days (to the extent feasible) from the date the administrative record is filed. This action should accelerate the timeline for completing the project by avoiding costly litigation delays associated with challenges to the Project under CEQA.

Background

The Sites Reservoir Project is an off-stream water storage project proposed north of the Sacramento-San Joaquin Delta. It aims to maximize water capture and storage while minimizing deleterious environmental impacts to surrounding ecosystems by capturing and storing Sacramento River water during high river flow events.

Once completed, the Project is expected to increase water storage capacity in Northern California by up to 15 percent. The Project will allow for water capture and storage during wet years of up to 1.5 million acre-feet, enough to supply 3 million households annually. The Project is estimated to cost $4 billion total. It has already received $46.75 million in early funding from the state, and is eligible for $875.4 million in Proposition 1 funding.

Senate Bill 149 Streamlining Provisions

On July 10, 2023, Governor Newsom signed into law Senate Bill 149 (Chapter 60, Statutes of 2023, Public Resources Code (PRC) section 21189.80 et seq.) (SB 149), as part of the infrastructure streamlining law. SB 149 is just one component of this law; it gives the Governor of the State of California the authority to certify eligible infrastructure projects for expedited judicial review under the California Environmental Quality Act. It also sets out certain criteria Projects must first meet to be eligible for certification.

For any certified infrastructure project, any legal action challenging the certification of the final Environmental Impact Report (FEIR), including all appeals, must be resolved (to the extent feasible) within 270 days of filing the certified administrative record with the court. (PRC section 21189.85(a).)

Eligibility Requirements

Potentially eligible infrastructure projects may be sub-categorized as energy infrastructure projects, semiconductor or microelectronic projects, transportation-related projects, and water-related projects. (PRC § 21189.81(e)(4).) To be eligible for certification, a water-related project must meet the requirements of PRC sections 21189.81 subdivision (h) and 21189.82, subdivisions (a)(4)(A)–(C) and (c).

PRC section 21189.81 subdivision (h) defines "water-related" projects, including water storage projects funded by the California Water Commission (CWC). (PRC § 21189.81(h)(1)(B)(i).) For water storage projects:

> . . .the applicant must demonstrate that the project will minimize the intake or diversion of water except during times of surplus water and prioritizes the discharge of water for ecological benefits or to mitigate an emergency, including, but not limited to, dam repair, levee repair, wetland restoration, marshland restoration, or habitat preservation, or other public benefits. . . . (PRC § 21189.81(h)(1)(B)(ii).)

The project must also be a public works project for the purposes of Section 1720 of the Labor Code. (PRC §21189.81(h)(2).)

For water-related projects, the applicant must agree to additional measures. It must pay costs of the trial court and the court of appeal in hearing and deciding any case challenging a certified project (PRC

section 21189.82(a)(4)(B)(i)), as well as costs of preparing the administrative record concurrently with review and consideration of the project (PRC section 21189.82(a)(4)(B)(ii)). In cases where environmental review has already begun, the applicant must demonstrate the administrative record is being prepared in accordance with PRC section 21189.86. (PRC section 21189.82(a)(4)(B)(iii).) Next, the greenhouse gas (GHG) emissions resulting from the project must be mitigated to the extent feasible. (PRC section 21189.82(a)(4)(C).)

The applicant for any infrastructure project must avoid or minimize significant environmental impacts to disadvantaged communities. (PRC section 21189.82(c)(1).) Any according mitigation measures they do undertake must be undertaken in and directly benefit, the affected community. (PRC section 21189.82(c)(2).) Finally, applicants must enter into a binding and enforceable agreement to comply with subdivision (c) prior to certification of the Final EIR. (PRC section 21189.82(c)(3).)

The Sites Reservoir Project Certification

On September 27, 2023, the Sites Project Authority (Authority) applied for certification under SB 149, providing detailed information regarding its compliance with each requirement. The Governor relied on the Authority's application in finding that the Authority demonstrated that the P:roject meets all requirements to be eligible for certification for judicial streamlining.

First, the Project qualifies as a "water-related project" under PRC section 21189.81 subdivision (H)(1) because it is a water storage project funded by the California Water Commission pursuant to Chapter 8 of Division 26.7 of the Water Code. Second, the Authority demonstrated it would limit diversions and prioritize discharge for ecological and other public benefits by only allowing diversions when: the Sacramento River is not fully appropriated, flows exceed minimum criteria for ecological health of aquatic resources, the Delta is in excess conditions, senior downstream water rights have been satisfied, all other laws and regulations are satisfied, and there is available capacity needed for deliveries to existing users. The Authority's Board of Directors also voted unanimously to confirm their assent to pay court costs, as well as the costs of preparing the administrative record, thereby satisfying the requirements of PRC section 21189.8 subdivision (h)(3). Further, the Authority satisfied PRC section 21189.82 subdivision (a)(4)(C) by committing to develop and implement a plan to achieve net zero Project emissions using strategies such as the use of electric equipment and alternative fuels, minimizing idling time, performing preventive maintenance, electricity from renewable sources, and purchasing carbon credits.

Finally, the Authority included mitigation measures in the 2021 RDEIR/SDEIS and the Final EIR to reduce impacts to disadvantaged communities, and confirmed that all mitigation is being undertaken in a way to directly benefit the affected community. The Authority also committed to implementing the mitigation measures in its Final EIR, and indicated its intent to make a binding commitment as part of their adoption of the Project's Mitigation Monitoring and Reporting Plan.

Conclusion and Implications

In his November 6 certification statement, Governor Newsom confirmed the Project met all the above criteria of SB 149 for a water-related infrastructure project. On November 17, 2023, the Authority certified its Final EIR and approved the Project. Now, the Project is moving on into the final planning stages, with construction likely to start in early 2025. (Arley Titzler, Sam Bivins)

BENEATH THE SURFACE: A LOOK INTO THE HIGH DESERT WATER BANK

A new project, the High Desert Water Bank, will soon be realized as another tool in the toolbelt to aid in Southern California's response to future water supply challenges. With a budget of $211 Million, the Metropolitan Water District of Southern California (MWD) will bring the project to life in the Mojave Desert. The project comes as another crucial piece in improving the region's water supply resilience to combat the effects of climate change. Given the likelihood of more profound swings between wet and dry periods in the future, MWD has emphasized the importance of seizing opportunities to store water when abundant, and the High Desert Water Bank does just that.

With operations having just begun in October, the High Desert Water Bank has already started receiving water supplies from the State Water Project. A seven-foot-wide pipeline diverts water from the East Branch of the California Aqueduct into basins carved into the desert. This simple yet effective approach allows the water to gradually percolate into the desert soil, recharging the aquifer below.

Collaborative Development

In collaboration with the Antelope Valley-East Kern Water Agency, MWD's development of the High Desert Water Bank involved over three years of construction, marking it as one of MWD's most substantial investments in groundwater storage. Anticipated to be fully operational by 2027, the facility is expected to significantly contribute to MWD's ability to store and withdraw water, providing flexibility and a relatively reliable backup supply during extreme weather cycles.

The Antelope Valley groundwater basin, where the water bank is located, has the capacity to store up to 280,000 acre-feet of water, surpassing the storage capacities of other larger facilities like Castaic Lake and Big Bear Lake. Once fully operational, the facility will enable the withdrawal or addition of up to 70,000 acre-feet of water annually into existing water supplies, or enough water to provide for approximately 210,000 households.

Confronting Drought and Climate Change Challenges

The increased storage capacity is seen as a strategic measure to confront future droughts with greater confidence. By bolstering MWD's capacity to store and retrieve water along the California Aqueduct, the High Desert Water Bank provides California's largest urban water supplier with enhanced flexibility to navigate extreme weather patterns.

During periods of severe drought, the water bank is expected to ensure more reliable water supplies, mitigating the impact of reduced allocations from the State Water Project. The project also aims to reduce Southern California's dependence on the over-stressed Colorado River, offering an alternative source of water supply during shortages.

MWD officials have continued to emphasize the significance of this initiative in the context of climate change. MWD is concurrently developing a Climate Adaptation Master Plan for Water, which focuses on building flexibility into the water system to enhance water supply resilience. Alongside groundwater storage, the plan includes initiatives such as wastewater recycling and remediation of contaminated groundwater sources.

As water flows into the facility from the California Aqueduct, MWD estimates that it will be able to store about 12,000 acre-feet in the groundwater basin by the end of 2023. The Antelope Valley-East Kern Water Agency highlights the suitability of this region for underground water storage, utilizing vacant land and former farm fields. The project will also help the regions declining agriculture industry, which once produced crops such as peaches, onions, and carrots in the Antelope Valley. MWD plans to recover 90 percent of the stored water, compensating the Antelope Valley agency for withdrawals. The remaining 10 percent of water accounts for evaporation losses and water left underground.

The ongoing construction involves the construction of recharge basins and wells to receive water. When completed, the water bank will have 26 recharge basins and 27 wells in total. The project will also require the building of a facility to treat the

groundwater, particularly with an eye toward potential arsenic contamination, before reintroducing it to the California Aqueduct.

Conclusion and Implications

The establishment and operation of the High Desert Water Bank represents a key component of Southern California's response to the increasing challenges of drought and climate change. With the project backed by MWD, the High Desert Water Bank will be poised to play a transformative role in the region's water supply, with the potential to influence other regions in adopting similar strategies to combat water supply challenges.

Furthermore, the High Desert Water Bank sets a precedent for integrated climate change response strategies. The development of MWD's Climate Adaptation Master Plan, encompassing groundwater storage, wastewater recycling, and contaminated groundwater remediation, alongside new water supply development and storage facilities such as the water bank, reflects a comprehensive approach to safeguarding water supplies. The project's positive impact also has the potential to extend beyond urban water supply to help address the needs of the agriculture industry in the Antelope Valley, showcasing a multifaceted solution to regional water challenges.

By strategically expanding and diversifying water storage capabilities, the collaborative effort here aims to secure a more resilient water supply for Southern California, aligning with the imperative of adapting to the challenges posed by climate change. (Wesley A. Miliband, Kristopher Strouse, Farrah Ghaffarirafi)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA SENATE BILL 659 AIMS TO IMPROVE GROUNDWATER RECHARGE EFFORTS

The California Legislature enacted Senate Bill 659 (SB 659) earlier this year, which will take effect on January 1, 2024. SB 659 is designed to improve groundwater recharge efforts, including by requiring the California Department of Water Resources (DWR) to provide actionable recommendations for additional groundwater recharge opportunities in designated groundwater basins.

Background

In October, California Governor Gavin Newsom signed SB 659 into law, known as the California Water Supply Solutions Act of 2023 (Act). The Act is intended to improve groundwater recharge efforts. California's groundwater supplies face unique challenges arising from continued projections for dramatic swings between few extremely wet years to sustained periods of drought. To prevent flooding during rainy seasons, there is a need to release water from surface reservoirs to avoid overcapacity, but which also depletes the stored surface water supplies. By contrast, many of California's groundwater basins have capacity to store water for future use, including during dry periods when surface water supplies are strained or unavailable. The Act calls for the development of administrative regulations and funding to address the impacts of climate change on the State's water supply.

The bill was authored by California State Senator Angelique V. Ashby. It was co-sponsored by the California Association of Winegrape Growers (CAWG) and the Regional Water Authority (RWA). The Act was further supported by a coalition of 52 organizations representing the agricultural industry, builders, water agencies, local agencies, and environmental organizations.

Importance of Groundwater Recharge

Many Californians depend on groundwater as their regular source of water. Groundwater provides 30 to 60 percent of California's water, depending on precipitation and reservoir conditions. Water users pump more groundwater during dry years, which is why it serves as a crucial buffer against drought and climate change. There are several communities in California that rely entirely on groundwater for drinking water. When aquifers are depleted, natural contaminants can become concentrated making drinking water unsafe.

Additionally, groundwater is a critical resource for many farmers throughout the State, and is utilized to grow crops valued at more than $50 billion each year. Ensuring a steady replenishing supply of water is important for winegrape growers, for example, who indicate in SB 659 supporting statements that they are contending with threats to their water rights, curtailments, heightened regulations for new and existing wells, fallowing, and various other water-related challenges.

However, it takes a long time to replenish overpumped groundwater aquifers. Unlike lakes and reservoirs that can fill up after a year of above-average rain and snow, it can take years, and even decades, to replenish underground reservoirs. Because of this, there is a need for effective strategies to recharge groundwater aquifers.

Existing Law

Existing law requires DWR to update every five years the plan for the orderly and coordinated control, protection, conservation, development, and use of the water resources of the State, which is known as "The California Water Plan." Further, existing law requires DWR to establish an advisory committee, composed of representatives of agricultural and urban water suppliers, local government, business, production agriculture, and environmental interests, and other interested parties, to assist the department in the updating of the California Water Plan.

The Act

The Act focuses on replenishing groundwater basins through active recharge efforts. By prioritizing groundwater recharge, the Act addresses water-relat-

ed concerns and ensures a more secure water supply in the face of climate uncertainties. The Act puts a spotlight on groundwater as a climate change resilient resource by providing the impetus for California to optimize state infrastructure, operational protocols and regulatory mechanisms to harness and store excess water in the groundwater aquifer when it's available.

Under the Act, DWR is directed to provide actionable recommendations for additional opportunities to recharge groundwater basins. The recommendations shall identify immediate opportunities and potential long-term solutions to increase the State's groundwater supply, with a priority on multi-benefit projects.

DWR's recommendations shall include all of the following:

(1) An estimate of the volume of recharge that could potentially be realized by the enactment of the recommendations;

(2) A discussion of the variability of the quantities of water potentially available for recharge given varying hydrogeologic environments;

(3) An identification of the legal and regulatory requirements for recharge projects;

(4) A discussion of the possible financial or regulatory incentives that could support the development of recharge projects;

(5) An identification of locations and a description of how groundwater recharge at those locations can protect access to safe drinking water and provide water quality benefits; and

(6) An identification of best practices to advance all benefits of groundwater recharge, including, but not limited to: (i) analysis regarding where groundwater recharge will be effective and protective of access to safe drinking water consistent with Section 106.3 or (ii) Mapping that identifies areas where recharge is unlikely to degrade groundwater quality based on consideration of the quality and composition of the source water, the qualities of the soil upon which recharge will occur, and the proximity to drinking water wells.

DWR must also, to the extent feasible, evaluate the potential economic and noneconomic costs and benefits of implementing the recommendations. Further, the goals of the Act are to be achieved without compromising water availability for environmental purposes, and through safeguarding safe drinking water and maintaining high water quality standards.

Conclusion and Implications

Many California water supply experts and stakeholders assert that it has become imperative for California to capture stormwater and substantially accelerate its groundwater recharge efforts. SB 659 is intended to spur those efforts toward developing and maintaining reliable, long-term water supplies by better managing and directing the available natural water supply to storage withing California's vast and extensive groundwater basins.
(Christina Suarez, Derek Hoffman)

REGULATORY DEVELOPMENTS

EPA PUBLISHES FINAL RULE— REQUIRES PFAS REPORTING UNDER TSCA

On October 11, 2023, U.S Environmental Protection Agency (EPA) published a final rule, Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, at 88 Fed. Reg. 70516 (October 11, 2023), requiring reporting and recordkeeping requirements of per- and polyfluoroalkyl substances (PFAS) under the Toxic Substances Control Act (TSCA). The rule is the latest in the agency's efforts to regulate and address PFAS in the environment and supply chain.

Background

PFAS are a group of man-made chemicals that have been used in a variety of industrial applications and consumer products that resist heat, oil, stains, grease, and water. They are often referred to as "forever chemicals" due to their persistent nature in the environment and their tendency to accumulate in the human body. A wide range of manufactured goods make use of PFAS, including cleaning products, food packaging, water-resistant clothing, and nonstick cookware.

In 2019, as part of the National Defense Authorization Act, Congress amended TSCA section 8(a) directing EPA to promulgate a rule addressing PFAS reporting.

The Final Rule

The new rule requires commercial manufacturers or importers of products containing PFAS to submit information to disclose to the EPA PFAS uses, production volumes, byproducts, disposals, exposures, environmental and impacts, and worker exposure. Further, the final rule applies retroactively, requiring disclosure of PFAS use since January 1, 2011.

EPA's final rule contains a technical definition of PFAS for purposes of the regulation, and includes an additional 41 PFAS identified as being of concern. EPA reports that there are at least 1,462 PFAS known to have been made or used in the U.S. since 2011.

The rule contains no *de minimis* exemptions. As such, any amount of PFAS in qualifying products or processes triggers the reporting obligation. And the definition of "manufacture for commercial purposes" for purposes of the rule includes the:

> . . .coincidental manufacture of byproduct and impurities that are produced during the manufacture, processing, use, or disposal of another chemical substance or mixture.

Entities subject to the rule need only report information that is "known or reasonably ascertainable by" the entity. This includes all information in their possession or control, and all information a similarly situated person might be expected to possess, control, or know. As the rule explains, manufacturers will need to undertake some due diligence to satisfy this standard, and potentially undertake additional analysis not otherwise required in order to comply.

Regulated entities are required to submit reporting information to the EPA within 18 months of the rule's effective date, which is November 13, 2023, with an additional six months for reports from small businesses subject to the rule only due to importing PFAS contained in articles.

The final rule marks the latest in ongoing and multifaceted federal efforts to regulate PFAS contamination. In 2021, the EPA announced a PFAS Strategic Roadmap laying out the agency's approach to addressing PFAS contamination. The roadmap called for not only the PFAS reporting rule under TSCA but also for the publication of a national PFAS testing strategy, new approaches to address PFAS in drinking water, and designation of some PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act. And earlier this year the White House Council on Environmental Quality released a report documenting actions throughout the federal agencies to address PFAS. The report highlights dozens of completed and ongoing actions by the Food and Drug Administration,

Department of Agriculture, Department of Defense, National Oceanic and Atmospheric Administration, Department of Veteran Affairs, and others.

Conclusion and Implications

However, the ambitious regulatory push has not been without criticism. Publication of the finial rule was delayed in part due to concerns over its economic impact, particularly on smaller entities. Commenters expressing concerns during the rule's development prompted the EPA to convene a Small Business Advocacy Review of the rule in February 2022 to seek further feedback from small businesses, trade associations, and other small entity representatives. While the agency had initially estimated only $10.8 million in industry costs, following the additional study this increased dramatically to $876 million.

While the EPA acknowledges that the rule's benefits cannot be quantified, it maintains that the benefits do outweigh these costs. The agency reports that it has no other source for data of this nature, and that it plans to use the information to support activities and programs addressing PFAS, including to more effectively determine whether additional risk assessment and management measures are needed. But the manufacturers and importers remain concerned about the costs of reporting and the ability to comply with these new onerous requirements under the new rule. (Samuel Bacal-Graves, Hina Gupta)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES SGMA GUIDANCE DOCUMENT FOR GROUNDWATER SUSTAINABILITY PLANS

The California Department of Water Resources (DWR) recently released the much anticipated "Groundwater Sustainability Plan (GSP) Implementation Guide: A Guide to Annual Reports, Periodic Evaluations, and Plan Amendments."

Background

The Sustainable Groundwater Management Act (SGMA), enacted in 2014, comprised a landmark legislative effort to address statewide groundwater management in California. SGMA empowered local agencies to develop and implement GSPs tailored to their respective groundwater basins, with the goal of achieving sustainable groundwater management by 2040.

The GSP serves as a tool for Groundwater Sustainability Agencies (GSAs) in their ongoing efforts to comply with SGMA and the associated GSP Regulations. Additionally, this guidance release comes at a time when many GSAs in the most challenging basins within the State are planning to submit their first Periodic Evaluation in early 2025.

Goals of the Guidance: Clarify Language and Formatting

The newly released guidance by DWR aims to streamline the GSP reporting compliance process by providing further guidance for GSAs. The guidance covers the preparation of documents such as annual reports, periodic evaluations, and plan amendments, all of which are keystone components of the SGMA compliance framework.

One of the main points of the guidance is to help clarify language on what DWR is reviewing and what GSAs are required to submit to DWR. Part of this guidance focuses particularly on the colloquial use of "the terms 'GSP Update' or 'Revised GSP'" which many GSAs have used when looking at their compliance obligations.

DWR encouraged GSAs to use terminology consistent with SGMA and the GSP Regulations, which refer to a Plan Amendment, to avoid confusion on reporting and deliverable requirements. Below is the general framework of what documents a GSA must create to comply with reporting compliance obligations, as described in the DWR guidance document.

Annual Reports: Submitted Annually by a GSA and Submitted to DWR by April 1

An Annual Report is a report prepared and submitted to DWR by April 1 of every year, for all basins with a GSP or Alternative. The report acts as a yearly status update and presents data gathered over the previous water year for each applicable sustain-

ability indicator and provides an analysis of that data in relation to the sustainable management criteria established in the GSP. The report also identifies any issues or data gaps that still exist in the basin and provides an implementation status update on all the projects and management actions identified in the GSP. Additionally, data associated with the Annual Report are required to be submitted via the SGMA Portal Monitoring Network Module (see Water Code § 10728 and 23 CCR § 356.2).

Periodic Evaluations: Performed Every Five Years by a GSA

A Periodic Evaluation is an evaluation of the implementation of an approved GSP performed by the GSA, which is described in a written assessment submitted to the Department. The periodic evaluation represents a progress report for each evaluation cycle (*i.e.*, at least every five years after the initial GSP submission). It summarizes basin conditions in relation to sustainable management criteria established in the GSP, the implementation of projects and management actions, and other information as specified in SGMA (Water Code § 10728.2) and the GSP Regulations (23 CCR § 356.4) and describes whether GSP implementation is meeting interim milestones and is on track to meet measurable objectives and the sustainability goal for the basin. The Periodic Evaluation is a GSP implementation evaluation tool. The first Periodic Evaluations are due in 2025 for basins designated by DWR to be subject to conditions of critical overdraft.

Plan Amendments: Prepared as Needed by a GSA

A Plan Amendment is a revision made by a GSA to its previously adopted GSP, often to make warranted changes to ensure the GSP reflects the most current groundwater management approaches. A GSA must submit the amended GSP to DWR, along with a Periodic

Evaluation that explains and justifies the GSP Amendment. Prior to adopting the amended GSP, the GSA must hold a public hearing to adopt the amended GSP, at least 90 days after providing notice to cities, counties and stakeholders within the area of the proposed GSP Amendment. The GSA must review and consider comments from any city or county that receives notice and must consult with a city or county that requests consultation within 30 days of receipt of the notice. The GSA must also review and consider comments received from basin stakeholders.

Periodic Review: Conducted by DWR Every Five Years in Response to a Periodic Evaluation

A Periodic Review of a GSP is an evaluation and assessment of an approved GSP performed by the Department at least every five years. When performing a Periodic Review, the Department ensures the GSP, as implemented, remains compliant with SGMA, in substantial compliance with the GSP Regulations, and is being implemented in a manner that will likely achieve the sustainability goal. The Department may rely on Annual Reports and Periodic Evaluations prepared and submitted by the GSA as well as other available information when performing Periodic Reviews. The Department will issue a written assessment reporting the results of its Periodic Reviews, which includes a determination of the status of the GSP and its implementation (*i.e.*, Approved, Incomplete, or Inadequate).

Conclusion and Implications

While some GSAs undoubtedly wished this guidance had come out earlier as they started to prepare for their first Periodic Evaluation in 2025, the guidance ultimately will help to serve as a road map for how GSAs could format and display the information required by the above reports along with providing clarifying language of how GSAs should refer to these efforts. The guidance is available on the DWR website at: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/Sustainable-Groundwater-Management/Best-Management-Practices-and-Guidance-Documents/Files/GSP-Implementation-Guidance-Report.pdf
(Darien Key, Derek Hoffman)

SGMA UPDATE: DETERMINATIONS ON GROUNDWATER SUSTAINABLE PLANS CONTINUE AS YEAR-END DRAWS NEAR

The Department of Water Resources (DWR) announced on October 26, 2023, that it has made determinations on the groundwater sustainability plans for 17 non-critically overdrafted groundwater basins across the state. Of the 17 basins for which determinations were made, DWR approved the plans for 11 groundwater basins, including: the Cosumnes, Eel River Valley, Elsinore Valley, Mound, Ojai Valley, San Gorgonio Pass, San Pasqual Valley, Santa Monica, Sutter, White Wolf, and Yolo groundwater basins.

Nearing the Finish Line

The Sustainable Groundwater Management Act (SGMA) directs DWR to review groundwater sustainability plans to determine whether the plans are based on the best available science and information and whether the plans are reasonably likely to achieve the sustainability goal for each groundwater basin. This review is guided by specific criteria outlined in SGMA's regulations for groundwater sustainability plans. DWR's review can ultimately result in three potential determinations for a plan: (1) "Approved" with any recommended corrective actions as needed; (2) "Incomplete" with any required corrective actions; or (3) "Inadequate," which can trigger State intervention by the State Water Resources Control Board (State Water Board).

With several rounds of determinations being announced by DWR over the course of the summer months, DWR released additional determinations for another 17 groundwater basins. Although most of the determinations that were announced were approvals, the groundwater sustainability plans for six of the groundwater basins were deemed "incomplete." Those basins included: (1) Antelope; (2) Big Valley (5-004); (3) Colusa; (4) Corning; (5) Los Molinos; and (6) Red Bluff.

The plans that were deemed incomplete in this latest round of determinations may not face the same level of blowback as those deemed inadequate, but these plans will nonetheless require some form of revision moving forward. For basins that have been determined by DWR to be incomplete, GSP regulations mandate that the agencies responsible for the plan's development have 180 days to correct any deficiencies identified in the plan and to resubmit the revised plan to DWR. Once resubmitted, DWR will review the plans to evaluate their sufficiency and ultimately make a determination of either "approved" or "inadequate." If a basin's plan receives an inadequate determination, the responsible agencies will have to begin the consultation process with the State Water Board for possible state intervention.

DWR noted in their press release on this round of determinations that some of the common deficiencies identified in the basins deemed incomplete included a ". . .lack of a clear plan to eliminate overdraft, manage groundwater levels, and manage land subsidence."

It was also noted that the basins that received incomplete determinations have not faced significant land subsidence issues historically, but that these issues were becoming more prominent in those basins in recent years.

Despite these few determinations of "incomplete" for the six basins listed above, the majority of DWR's determinations were approvals. In fact, the incomplete determinations made in this recent round of releases are the first non-approval determinations DWR has released for any groundwater sustainability plan in almost six months.

94 total groundwater basins throughout the state were required to submit plans under SGMA. Out of those 94 basins, DWR has now provided determinations for 72 basins with 60 of those basins being recommended for approval at this time. With determinations still needed for 22 groundwater basins, DWR anticipates that these determinations will be made shortly after the new year, sometime in January of 2024.

Conclusion and Implications

The Department of Water Resources has made significant progress in releasing their determinations for groundwater sustainability plans over the last few months, having released 35 determinations since June. With 2023 coming to a close, DWR still appears to be hard at work in finalizing its review for all 94 basins that were required to submit a groundwater sustainability plan under SGMA. With just 22 basins left to review, DWR's anticipated timeline for

finishing the remaining determinations by the end of January 2024 is certainly optimistic but is by no means impossible given their recent progress. As for the basins that received a determination of incomplete this time around, newly submitted plans will be expected sometime by the end of April 2024, though there is still the possibility DWR makes additional incomplete determinations among the remaining plans currently under review. In any case, it remains likely that the sustainability plans for all 94 basins will have determinations made one way or another by mid-2024, just in time for the 10th Anniversary of SGMA's passage.
(Wesley A. Miliband, Kristopher T. Strouse)

STATE WATER RESOURCES CONTROL BOARD STAFF REPORT RECOMMENDS PROBATIONARY STATUS FOR TULARE LAKE SUBBASIN

In October 2023, the State Water Resources Control Board (State Water Board or Board) released the Tulare Lake Subbasin Probationary Hearing Draft Staff Report. The report articulated Staff's recommendation to designate the subbasin as probationary, a first under the Sustainable Groundwater Management Act (SGMA) and a potential template for how the State Water Board will handle other basins whose Groundwater Sustainability Plans (GSPs) have been deemed inadequate.

SGMA and Probationary Basins

Enacted in 2014, SGMA ushered in a paradigm shift in the local management of groundwater. Under SGMA, local Groundwater Sustainability Agencies (GSA) are tasked with achieving long-term sustainability of their groundwater basins. A single subbasin may be managed by multiple GSAs. For example, five GSAs manage the Tulare Lake Subbasin. These GSAs work in tandem to develop a plan to achieve the sustainability goals of SGMA, *i.e.* a Groundwater Sustainability Plan (GSP). GSPs are comprehensive documents for how groundwater sustainability will be achieved and how the basin will avoid undesirable results, such as groundwater depletion, land subsidence, and negative water quality impacts, among other negative results. SGMA uses "minimum thresholds" to set numeric values to define undesirable results.

Under SGMA, the Department of Water Resources first reviews GSPs as to whether they are complete or incomplete. If a GSP is deemed incomplete, for instance because it is missing required components under SGMA or because DWR determines the GSP will not achieve the sustainability goals of SGMA, DWR will typically return the GSP for further revision and resubmission. If, however, a GSP fails to meet the sustainability objectives of SGMA, DDWR will deem the GSP "inadequate." An inadequate designation results in a jurisdictional shift from DWR to the State Water Board. SGMA provides that:

> . . .in those circumstances where a local groundwater management agency is not managing its groundwater sustainably, the State needs to protect the resource until it is determined that a local groundwater management agency can sustainably manage the groundwater basin or subbasin. (Wat. Code, § 10735 *et seq.*)

To ensure SGMA is implemented successfully, the State Water Board may temporarily intervene in groundwater management after DWR determines that proposed management of a groundwater basin is inadequate due to deficiencies in the GSP(s) for the basin.

The State Water Board will first consider whether to designate a basin as "probationary," which triggers several requirements. The State Water Board may designate a basin probationary if state intervention authorities are triggered and after providing notice and holding a public hearing (Wat. Code, § 10735.2, subd. (a)). The overall goal of probation is to gather information to help local GSAs address deficiencies in their plans, so they can sustainably manage their groundwater resources as soon as possible. During a probationary designation, the State Water Board will require many groundwater extractors to report their extractions, which will help resolve data gaps related to groundwater use, and State Water Board staff will provide guidance to GSAs working to develop an adequate sustainability plan (or plans). Concurrently, GSA efforts to fix deficiencies should continue.

After GSAs have adopted a revised plan (or plans) that resolve the deficiencies, they can seek to exit probationary status by submitting the plan (or plans) to the State Water Board. If the State Water Board determines that deficiencies were addressed, the Board may resolve to have the GSA (or GSAs) exit probation. If, however, deficiencies in the GSP remain, the Board has authority to institute an interim plan, which includes corrective actions, a schedule for those actions, monitoring, and enforcement. To date, no basin has been placed on probation.

Tulare Lake Subbasin

The Tulare Lake Subbasin spans approximately 837 square miles of the Central Valley. Six urban areas lie within its geographical boundaries, but the vast majority its land is dedicated to agriculture and livestock. Groundwater is the area's primary water source, but Kings River and imported surface water supplement local groundwater supplies. In 2022, groundwater extraction totaled approximately 488,624 acre-feet, while the average annual total water use in the subbasin was 934,272 acre-feet.

Tulare Lake Subbasin is a high-priority basin subjected to critical overdraft. Its GSAs adopted a GSP for the Subbasin in early 2020, and submitted the plan to DWR for review. In March 2023, DWR determined that the GSP was inadequate.

The Decision for Probationary Status

The State Water Board's recently released Probationary Hearing Draft Staff Report (Report) focuses primarily on the Tulare Lake Subbasin GSP's apparent failure to address: (1) chronic lowering of groundwater levels, (2) land subsidence, and (3) degraded groundwater quality.

A GSP must avoid:

> . . .chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon.

Staff concluded that the Tulare GSP did not explain at what level the impacts of chronic lowering of groundwater levels would be considered significant and unreasonable. According to Staff, the failure to identify minimum thresholds for groundwater conditions that would result in chronic lowering leaves the shallowest aquifers susceptible to permanent productivity loss, which in turn could have pronounced impacts on domestic use that relies on such aquifers. As the Report states, without a clear description of degree of impacts that are "significant and unreasonable," GSAs and the state cannot evaluate whether minimum thresholds or broader quantitative definitions of undesirable results that will guide day-to-day basin management are appropriate for avoiding undesirable results. In sum, a clear understanding of what impacts the GSAs are trying to avoid is important because the existing minimum thresholds for a particular zone in the subbasin would allow for significant and unreasonable effects on beneficial uses in that zone.

Further, Staff concluded that the GSAs for the basin did not consider all beneficial uses and users in setting sustainable management criteria for groundwater levels or adequately describe the impacts of criteria on beneficial uses and users. For instance, Staff concluded that minimum thresholds in a particular zone of the basin would allow for significant and unreasonable water level declines, while for other zones it was not clear whether impacts to certain wells would be considered undesirable results or how other beneficial uses would be impacted. Further, Staff determined that the GSP's minimum thresholds were lower than recently set historical lows in groundwater levels in representative monitoring sites, and that the GSP's measureable objectives were not adjusted to reflect those revised minimum threshold values, potentially resulting in greater impacts to certain wells than described in the GSP. Staff also concluded that the monitoring network used did not provide sufficient coverage to monitor for impacts to beneficial uses and users, among other deficiencies related to well impact mitigation, halting chronic groundwater level lowering, and impacts on other sustainability indicators like subsidence or water quality.

Groundwater Lowering

With respect to chronic groundwater lowering, the Report provides a suite of potential actions to address groundwater level sustainable management criteria deficiencies. Potential actions include defining the undesirable result for the chronic lowering of groundwater levels consistent with SGMA; filling data gaps

in the subbasin water budget; quantifying based water budget inflows and outflows; set criteria to protect drinking water wells at minimum threshold elevations; fill data gaps in monitoring network; provide well mitigation programs; assess impacts on small farms; manage demand, including developing basin-wide allocations; evaluate the feasibility of supply augmentation projects; identify key indicator wells, and revise minimum thresholds to avoid undesirable results for other sustainability indicators.

Land Subsidence and Degraded Groundwater Quality Degradation

The two other deficiencies—land subsidence and degraded groundwater quality—directly relate to chronic overdraft. Lowering of groundwater levels can cause the land above to subside. At the same time, the relative concentration of particulates, such as nitrate, increases as water is pumped out, leaving the remaining water of lower quality. This has made the Tulare Lake Subbasin "a hot spot for unsafe drinking water, a problem that is most acute for small, poor, rural communities." Staff found the Tulare GSP failed to adequately address these undesirable results, indicating that it lacked realistic minimum thresholds to meet GSP regulations. The State Water Board thus made a host of recommendations related to the criteria necessary to better assess subsidence and water quality impacts that generally track the categories of suggestions made with respect to groundwater level lowering, e.g., refining undesirable results and related criteria and better assessing minimum thresholds paired with responsive measurable objectives to avoid undesirable results; better monitoring and infrastructural solutions; identifying funding sources; and stakeholder engagement.

Ultimately, Staff recommended that the Board place the entire subbasin on probation. Staff recommended that no GSAs within the subbasin be excluded for probationary status. Further, staff recommend that the Board require groundwater extractors who extract over 500 acre-feet per year to install meters and encourage those less than 500 acre-feet to install meters. The 500 acre-feet threshold targets 299 parcel owners that account for 87.6 percent of land and 86 percent of water in the basin. Only users extracting more than 2 AFY would be required to report groundwater extractions and pay fees, and users extracting 2 AFY or less were excluded from reporting and fee requirements.

Conclusion and Implications

The Report provides a potential blueprint for how the State Water Resources Control Board may handle other basins with GSPs deemed inadequate by DWR. Overall, the Report tended to adopt DWR's rationale for its inadequacy findings and identified additional bases for correcting the GSP. In sum, it appears that the State Water Board will require both a higher level of specificity in identifying and establishing sustainable management criteria, which in turn may beget multi-faceted efforts—including stakeholder outreach, infrastructural improvements, funding, and potentially demand management through allocations—to bring probationary basins into SGMA compliance. For more information, *see:* Tulare Lake Probation Draft Staff Report, available at: https://www.waterboards.ca.gov/water_issues/programs/sgma/docs/groundwater_basins/202310-tulare-lake-pbh-draft-staff-report.pdf
(Miles Krieger, Steve Anderson)

LAWSUITS FILED OR PENDING

SUPERIOR COURT PRELIMINARY INJUNCTION FORCES BAKERSFIELD'S HAND: CITY AGREES TO CURTAIL ALMOST HALF OF ITS DIVERSIONS ON THE KERN RIVER

In October 2023, a Kern County Superior Court ordered a preliminary injunction to curtail the City of Bakersfield's (City) diversions on the Kern River (River) to maintain "all fish" downstream of the Calloway Weir. Following the order, the parties agreed to keep at least forty (40) percent of the natural flow in the River. [*Bring Back the Kern et al v. City of Bakersfield*, Case No. BCV-22-103220 (Kern Cnty Sup. Ct. Oct. 30, 2023).]

Background

The Kern River, with waters originating near Mt. Whitney, flows down the Sierra Nevada towards the City of Bakersfield (City) before historically emptying into the Buena Vista Lake bed. Because of the variability of the Kern River environment, river management approaches have required planning for both severe flooding and drought. Lake Isabell was constructed to control flooding and address water conservation capacity on the Kern River. In order to determine the quantity of water available to various Kern River rights, the City (on behalf of various Kern River interests) calculates the "natural flow" based on a series of measurements taken at Lake Isabella. Water flow is measured at two points (First and Second Point) per an agreement. In particular, each day the Kern River operator determines the flow in the river, the entitlement of each right, and then distributes the water up to the full entitlement. The City (and its predecessors in interest) have continually measured, determined, and recorded the flow of water in the River on a daily, monthly, and annual basis from 1893 to the present.

The City diverts Kern River water under pre-1914 appropriative water rights. Flow rates in the River are controlled by manipulating series of six weirs, which the City owns or operates. The weirs span the length of the River, creating a barrier that can be raised or lowered to control the direction of flow. When the weirs are raised, gravity pulls the water away from its natural flow and into canals that bifurcate the River's banks. In recent decades, the River has largely stopped flowing west of the City near the Calloway Weir. According to the court in this case, the river flows before Lake Isabella was operational could be compared with the flows after it became operation by using a "computed natural flow" approach. Typical wet-year flow is almost 900,000 acre-feet, whereas dry-year flow is about 361,000 acre feet.

In 2022, plaintiffs (Plaintiffs), a coalition of environmental advocates, filed a complaint against the City seeking an injunction prohibiting the City's diversions in violation of Fish & Game Code section 5937 (§ 5937). In addition to the City, the complaint identified Buena Vista Water Storage District, Kern Delta Water Storage District, North Kern Water Storage District, and Rosedale-Rio Bravo Water District as real parties in interest (the City and Real Parties in Interests are referred to collectively as Defendants). In August 2023, the Plaintiffs moved for a preliminary injunction. In late October, the court ordered the preliminary injunction in favor of the Plaintiffs.

The Preliminary Injunction

A preliminary injunction is not an adjudication of the rights of the parties. Instead, it is a judicial determination that the right a defendant claims should be protected while the exercise or existence of that right is adjudicated. Thus, in considering whether to grant a preliminary injunction, the court must weigh: (1) the movant's likelihood of success on the merits and (2) the parties' relative burden on its issuance or non-issuance. The question before the Superior Court was whether section 5937 applied to Defendants and whether it required a certain amount of water to flow past the weirs.

Plaintiffs Are Likely to Prevail

The court first weighed the likelihood that Plaintiffs would prevail on the merits. This required the court to interpret § 5937's application to Defendants

and their diversions. The provision requires an "owner" of a "dam" to allow sufficient water to pass through to keep "fish" below in "good condition." In general, the court found § 5937's applicability to the City's operations "straightforward."

First, "dam," as defined in the section's chapter, includes "all artificial obstructions." The court declined to use an alternative definition for "dam" than found in section 5900 of the Fish and Game Code. Accordingly, the court determined that the City's weirs qualified as dams because they are "artificial obstructions" that are used to control the flow of water in the Kern River.

Second, "owner" includes a person, political subdivision, or district "owning, controlling, or operating a dam…" Because the court found that the City is a political subdivision of the state, and the City operates the weirs (*i.e.*, the "dams" for section 5937 purposes), the court concluded that the City met the definition of "owner" under section 5937.

Third, the court found that "fish" includes freshwater fish and was not limited to anadromous fish. Defendants had argued that section 5937 only applied to anadromous fish (which migrate from freshwater rivers to the ocean and back to spawn in their natal streams), and that the River has no anadromous fish. According to the court, a limitation to anadromous fish was omitted from a related statute in the Fish and Game Code division that contains section 5937, and in any event the limitation was never proposed for section 5937 itself. Similarly, the court found that no other published cases had so limited the definition of "fish" under section 5937. Finally, the court reasoned that the legislature would have articulated such a narrow definition if that were its intent. Accordingly, the Court found that section 5937 applies to "all fish."

The court also rejected Defendants' argument that Plaintiffs lacked standing to bring their claim under section 5937. The court reasoned that any member of the general public has standing to bring an action concerning the public trust doctrine, and that section 5937 is a "specific rule" concerning the public trust doctrine (citing *CalTrout I* in the *CalTrout* case series).

Finally, the court found § 5837 "certainly has minimum flow requirements." In other words, as the court stated, a dam owner cannot divert all the water in a river. The court reviewed several cases interpreting section 5937 and found that case law confirms that section 5837 was:

> . . .deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate.

Accordingly, the court concluded that Plaintiffs had a very high likelihood of succeeding on the merits.

Balancing Harms Weighs Against the City

After finding that Plaintiffs were likely to succeed on the merits, the court weighed the harm to the Defendants if the preliminary injunction were to be granted against the harm to the Plaintiffs (and the public trust) if the preliminary injunction were to be denied. Defendants argued that the preliminary injunction would greatly harm the City's ability to reliably deliver clean water for domestic use to more than 400,000 residents in the Bakersfield area. However, the court found there would be sufficient supply for Bakersfield area beneficial domestic uses if the court were to grant to injunction. In particular, the court found that the River's average flow is 726,000 acre-feet, and the median flow is 550,000 acre-feet. Meanwhile, the average water demand for the City is 130,000 acre-feet, below the typical dry-year flow of 361,000 acre-feet. Further, the court found that Defendants do not rely exclusively on the Kern River to satisfy demand, having access to State Water Project supplies, and that flows left in the river for fish could be recouped in the form of groundwater replenishment. Therefore, the court determined that the Kern natural flow seemingly provided sufficient water to supply the City's needs and the fisheries below the weirs. At the same time, if the preliminary injunction were denied, the River would remain dry to the alleged detriment of the fish.

The court was careful to note that the balancing of harms for preliminary injunction purposes was not an analysis as to whether using water to keep fish downstream of the weirs in good condition was an appropriate use of water, but rather confirms the legislature's determination that section 5937 imposes minimum flow requirements. Accordingly, the court debated whether to judicially set a flow necessary to keep fish in "good condition" and ordered that the Plaintiffs and Defendants engage in good faith consultations to establish the flow rates necessary for compliance. The court noted that the CalTrout and other section 5937 cases and State Water Board

orders provided guidance as to the practical meaning of "good condition." The parties have subsequently agreed to keep to set flows under the preliminary injunction at forty (40) percent of the River's natural flows, and the court signed an order accordingly.

Conclusion and Implications

This case is notable because section 5937 cases are not particularly common but have resulted in favorable outcomes for proponents of dam releases for the benefit of downstream fisheries. Whether the 40 percent natural flow requirement will remain in place remains to be seen. However, more complex litigation could arise related to future fish survival and water supply impacts to domestic and agricultural purposes resulting from the 40 percent natural flow requirement.
(Miles Krieger, Steve Anderson)

ENVIRONMENTAL GROUPS CHALLENGE STATE WATER RESOURCES CONTROL BOARD'S ORDER MODIFYING IRRIGATED LANDS PROGRAM ORDER FOR CENTRAL COAST REGION

A coalition of environmental plaintiff groups filed a petition for writ of mandate against the State Water Resources Control Board (State Water Board) on October 27, 2023, in the Sacramento County Superior Court. (*San Jerardo Cooperative, Inc., et al. v. State Water Resources Control Board, et al.*, Case No. 23WM000108 (Sac. Cty. Super. Ct.,).) The coalition, composed of San Jerardo Cooperative, Comité de Salinas, Monterey Coastkeeper, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, California Sportfishing Alliance, California Coastkeeper, and Santa Barbara Channelkeeper (collectively, Petitioners), seeks to overturn the State Water Board's Water Quality Order 2023-0081 (Order 2023-0081). (*San Jerardo Cooperative, Inc. v. State Water Resources Control Board, et al.*, Petition for Writ of Mandate.) Order 2023-0081 modified the Central Coast Regional Water Quality Control Board's (Central Coast Regional Board) General Waste Discharge Requirements for Discharges from Irrigated Lands Order No. R3-2021-0040 (Ag Order 4.0).

Background

The Porter-Cologne Water Quality Control Act (Porter-Cologne) charges the State Water Board and the nine Regional Water Quality Control Boards with enforcing California's water quality laws. (Wat. Code § 13000.) Under Porter-Cologne, Regional Boards develop Basin Plans, subject to State Water Board approval, which designate water quality objectives for pollutants to protect beneficial uses of water in the Basin Plan's jurisdiction. (Wat. Code §§ 13240–13245.) Additionally, Porter-Cologne requires Regional Water Quality Control Boards regulate both point-source and non-point source discharges through a permitting process to achieve compliance with the Basin Plan. (Wat. Code § 13263.) The Central Coast Regional Board's Ag Order 4.0 is one such general permit.

Ag Order 4.0

The Central Coast Regional Board adopted Ag Order 4.0 on April 15, 2021 after four years of deliberation and public participation. Ag Order 4.0 is the fourth iteration of the Central Coast Regional Board's attempt to regulate nonpoint source discharges of pollutants from irrigated agriculture in the Central Coast region. Specifically, Ag Order 4.0 sought to minimize nitrate discharges to groundwater, nutrient discharges to surface water, toxicity in surface water from pesticide discharges, sediment discharges to surface water, and protect riparian and wetland habitat.

Most relevant to Petitioners concerns, Ag Order 4.0 departed from previous Ag Orders by setting enforceable standards for nitrogen. Prior Ag Orders relied on voluntary "management practice implementation approach without clear and enforceable requirements." Instead, Ag Order 4.0 set numeric standards and timetable for nitrogen application and nitrogen discharge to groundwater below agricultural lands. And, if growers subject to Ag Order 4.0 violate the applicable standards, the Central Coast Regional Board would be able to initiate an enforcement action.

After the Central Coast Regional Board adopted Ag Order 4.0, environmental groups and agricultural interests filed petitions to the State Water Board seeking review of Ag Order 4.0. The State Water Board announced it would review Ag Order 4.0 on its own motion, pursuant to Water Code section 13320, subdivision (a) and California Code of Regulations, title 23, section 2050.5, subdivision (c). Then, after a hearing on September 20, 2023, the State Water Board adopted WQO 2023-0081.

In doing so, the State Water Board remanded Ag Order 4.0 to the Central Coast Regional Board because the use of numeric standards for nitrogen application and discharge was inconsistent with the State Water Board's precedent, Water Quality Order 2018-0002 ("Eastern San Joaquin Order"). (Pet. at ¶ 245.) In the Eastern San Joaquin Order, the State Water Board declined to use numerical standards for nitrogen application and discharge because it was "premature at this point to project" the utility of numerical standards as a regulatory tool. The State Water Board thus applied Eastern San Joaquin Order as precedent in Order 2023-0081 and eliminated the numeric standards for nitrogen application and discharge, and prohibits the Central Coast Regional Board from using numeric standards as the basis for bringing enforcement actions. Instead, the Central Coast Regional Board can only use numeric standards "for the limited purpose of requiring additional education for growers who exceed the [nitrogen] target."

Petition for Writ of Mandate

The Petitioners filed their petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 and Water Code section 13330. Petitioners assert 5 causes of action against the State Water Board, alleging that Order 2023-0081 violates Porter-Cologne, the State Antidegradation Policy and the State Nonpoint Source Policy. First, Petitioners allege that Order 2023-0081's removal of numeric standards is unlawful because it violates two key elements of the State Nonpoint Source Policy. Second, Petitioners allege that the State Water Board unlawfully amended the Nonpoint Source Policy by prohibiting the Regional Boards from imposing regulatory requirements for nitrogen discharge from irrigated agriculture. Third, the Petitioners allege that Order 2023-0081 is unlawful because it does not make any findings consistent with the State Antidegradation Policy. Fourth, the Petitioners allege that Order 2023-0081 violates Porter-Cologne by failing to adopt requirements consistent with the Basin Plan. And fifth, the Petitioners allege that Order 2023-0081 violates Porter-Cologne because does not make findings regarding environmental justice considerations and tribal impact considerations required by law.

Conclusion and Implications

Notably, agricultural interests also challenge Order 2023-0081 in *Grower-Shipper Association of Central California, et al., v. State Water Resources Control Board, et al.,* (Sac. Super. Ct., Case No. 23WM000092). The State Water Resources Control Board has not yet responded to the petitions for writ of mandate in either case, and it is not yet clear whether the court will consolidate the cases. (Nico Chapman, Sam Bivins)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT REVERSES GRANT OF WRIT PETITION CHALLENGING DESALINATION PROJECT—FINDS SUPPORT FOR STATEMENT OF OVERRIDING CONDITIONS

Marina Coast Water District v. County of Monterey ___Cal.App.5th___,
Case Nos. H049416 & H049170 (6th Dist. Sept. 8, 2023).

The Sixth District Court of Appeal in *Marina Coast Water District v. County of Monterey* reversed the trial court's decision granting in part a writ petition under the California Environmental Quality Act (CEQA) challenging a County of Monterey (County) permit for a desalination plant portion (Permit) of a Water Supply Project previously approved under CEQA by the California Public Utilities Commission (CPUC), finding that a supplemental Environmental Impact Report (EIR) was not required for the Permit and that the County Statement of Overriding Considerations (Statement) for the Permit was supported by substantial evidence.

Factual Background

Real Party in Interest California-American Water Company (Cal-Am) is an investor-owned utility that supplies water to much of the Monterey Peninsula. Cal-Am in this case seeks to implement its Monterey Peninsula Water Supply Project (Water Supply Project) to comply with a state order to cease its decades-long overuse of other water sources. The Water Supply Project consists of (1) construction of the desalination plant here at issue in unincorporated Monterey County and (2) the drilling of wells in coastal land administered by the City of Marina (City) to supply the plant. This case involves the approval of construction of the desalination plant by the County.

The Water Supply Project is intended to increase the region's supply of potable water by using the wells to draw unusable seawater and brackish water from coastal aquifers in the Salinas Valley Groundwater Basin.

As a hydrological matter, whether the Water Supply Project will serve its purpose depends on the nature of the water the planned intake wells draw from the "capture zone"—the volume of aquifer that contributes the water extracted by the wells—and, by extension, on the replenishment, or recharge, of the capture zone predominantly by ocean water and not fresh water from inland portions of the Salinas Basin.

Acting as a lead agency the CPUC undertook environmental review of Cal-Am's proposal for the Water Supply Project. The CPUC ultimately certified a final EIR and granted Cal-Am a Certificate of Public Convenience and Necessity authorizing commencement of a scaled-down version of Cal-Am's proposal, subject to Cal-Am's obtaining necessary approvals from various responsible agencies.

Among the various responsible agencies having jurisdiction over local components of the Water Supply Project, City denied Cal-Am coastal development permitting to install the intake wells. While Cal-Am's appeal from the City's denial was pending before the California Coastal Commission, the County approved Cal-Am's application for the Permit to construct the desalination plant and associated facilities in an unincorporated part of County.

Petitioner Marina Coast Water District (MCWD) challenged the County's approval of the Permit by filing a petition for writ of mandate and a complaint for declaratory relief. MCWD argued, among other things, that the County: (1) violated CEQA by (a) failing to prepare a subsequent or supplemental EIR; and (b) adopting a statement of overriding considerations that was unsupported by substantial evidence in the record; and (2) violated the County's general plan by approving a project that lacked a long-term sustainable water supply and adequate water supply system.

The trial court granted MCWD's writ petition in part and denied it in part. The court ruled that County was not required to prepare a subsequent or supplemental EIR and did not violate its own general plan, but held that County unlawfully relied on the

water-related benefits of the desalination plant in its statement of overriding considerations without addressing the uncertainty as to the water supply introduced by the City's denial of the coastal development permit.

The court issued a peremptory writ of mandate setting aside the County's approval of the Permit and entered judgment on April 29, 2021. County and Cal-Am appealed and MCWD cross-appealed.

The Court of Appeal's Decision

The Court of Appeal concluded that the County's Statement was supported by substantial evidence and that any remaining deficiency in the Statement as an informational document was not prejudicial. The Court of Appeal rejected the MCWD cross-appeal, holding that a subsequent or supplemental EIR was not required and that the Permit did not violate the County General Plan.

Supplemental or Subsequent EIR

When CPUC approved the Water Supply Project EIR, CPUC concluded that the ocean is a constant-head recharge boundary, an area from where the aquifers are consistently replenished. Thus, most of the water drawn into the slant wells would come from the ocean.

CPUC allowed that in the long term, the situation may be altered and the source of water drawn from the extraction well system may need to be reevaluated under the following conditions: (1) if pumping of water from inland areas is reduced to the point that the groundwater system is in equilibrium, and (2) the pumping depressions are reduced such that there is no longer a landward gradient.

In considering the Permit, County found that MCWD arguments did not constitute new information about environmental impacts of the Water Supply Project requiring a supplemental or subsequent EIR. Anticipating the risk that construction of the desalination plant might be delayed or interrupted for five years or more, or that operation of the desalination plant might become permanently infeasible due to a lack of water supply source, County had imposed Condition 22, which in the event of such contingencies would require Cal-Am to seek approval from the County to either continue leaving the site idle or else restore, reuse or otherwise develop the site.

The Court of Appeal likewise rejected MCWD arguments that there was new information about environmental impacts of the Water Supply Project.

The City's denial of permitting for the intake wells changed neither the plan for the Water Supply Project nor the circumstances under which the project was being undertaken. Just as when the CPUC issued its approval, the slant wells continued to require approval by a responsible agency other than the County. The change represented by City's denial of permitting was that Cal-Am, through its appeal, was now asking the California Coastal Commission to provide that permission which the City had denied.

Condition 22 does not compel future development or preclude Cal-Am from doing nothing with the site should the Water Supply Project stall or fail. Instead, if triggered, it provides a mechanism by which the County is empowered to compel further action, including restoration of the site to status quo ante, or to permit the site to remain idle for some further period.

The Court of Appeal rejected MCWD arguments that data showed the intake wells might capture more fresh water than anticipated and that adoption of a Groundwater Sustainability Plan for the Salinas Basin pursuant to the Sustainable Groundwater Management Act indicated that the gradient within the Salinas Basin would shift seaward during the useful life of the Water Supply Project.

The County found, based on substantial evidence, that monitoring well data made available after the CPUC's decision is not significantly different from monitoring data available prior to the CPUC decision and does not constitute new information requiring supplemental environmental review. The County further found that the steps taken to implement the Sustainable Groundwater Management Act were not new information that would trigger supplemental environmental review.

MCWD contends that new information regarding Cal-Am's user demand and progress with respect to expansion of a recycled water project entitled "Pure Water Monterey" precluded the County from dismissing this expansion as an infeasible alternative.

The Court of Appeal held that expansion of Pure Water Monterey—if completed with its resulting increase in supply made available to Cal-Am—would not generate enough new water to obviate the need for another water source: the anticipated increase in supply from Pure Water Monterey expansion was

in the range of 2 mgd to 2.6 mgd. Given the estimated demand and the Permit being at 6.4 mgd, the County's determination that expansion of Pure Water Monterey could not meet the basic project objectives was supported by substantial evidence.

Statement of Overriding Considerations

In its statement of overriding considerations, the County identified six benefits of the "proposed project." Five of these were water-related: (1) Cal-Am would cease its illegal diversions from the Carmel River and meet its obligations under existing cease and desist orders; (2) Cal-Am would not need to extract water from the Seaside Basin to meet demand; (3) The long-term water supply, reliability, and infrastructure in the Monterey Peninsula would improve; (4) Reduced pumping from the Carmel River would benefit habitat, wildlife, and marine species; and, (5) pursuant to its Salinas Basin return water obligation, Cal-Am would make water available to other water suppliers, such as Castroville Community Services District, that rely on the Salinas Basin.

The Court of Appeal concluded that the County was permitted to consider water-related benefits anticipated from completion of the multijurisdictional Water Supply Project as approved by the CPUC as lead agency. Even assuming that the County violated CEQA by failing to acknowledge the ongoing regulatory processes concerning source water or explain its reasons for granting the Permit before a water source had been secured, any such error was not prejudicial.

The trial court accepted MCWD's fundamental contention that the County could not in its statement of overriding considerations rely on water-related benefits because the attainment of those benefits was speculative. The trial court's finding was based on the fact of the City's denial of permitting, together with the potential that Cal-Am would be unable to secure a permit and, ultimately, source water by appealing the City's denial to the Coastal Commission. In MCWD's view, Cal-Am's ability to secure source water remains speculative even after the Coastal Commission's conditional approval of permitting.

The Court of Appeal read "project" as used in section 21081 in the same sense that it is defined in the Guidelines. That is, the benefits that a public agency may consider in deciding whether to approve a part of a larger project as a responsible agency *include the benefits of the project as a whole*. The Court of Appeal rejected the contention that a responsible agency can only consider the benefits inuring to it from its portion of the project, assuming the balance of the project is not completed. There is nothing in the plain language of the statute to suggest that such a blinkered analysis of a project's benefits is required.

The court found that a contrary interpretation would lead to the absurd result that multijurisdictional projects such as this one—where the constituent parts must be built in separate jurisdictions to secure the intended benefit—will be stymied by the multiplicity of responsible agencies, each one prevented from acting until the others had. Mutually beneficial projects would be made impossible by the mere fact that it crossed jurisdictional borders.

The General Plan

MCWD asserts that the County violated the state Planning and Zoning Law by approving a project that was inconsistent with its General Plan. MCWD contends that the County erred by: (1) finding, without substantial evidence in the record, that the desalination plant is exempt from a requirement to demonstrate a long-term sustainable water supply; and (2) failing to expressly discuss a handful of General Plan policies that "were potentially inconsistent with the desalination plant" in issuing its decision. The Court of Appeal rejected both contentions.

County Policy PS-3.1 provides, subject to express exceptions, that new development for which a discretionary permit is required, and that will use or require the use of water, shall be prohibited without proof, based on specific findings and supported evidence, that there is a long-term, sustainable water supply, both in quality and quantity to serve the development.

One express exception is for specified development designed to provide: a) public infrastructure or b) private infrastructure that provides critical or necessary services to the public, and that will have a minor or insubstantial net use of water (*e.g.* water facilities, wastewater treatment facilities, road construction projects, recycling or solid waste transfer facilities).

The Court of Appeal upheld the County determination that the Project is exempt from Policy PS-3.1. The desalination plant will provide water for Cal-Am's Monterey District service area and is necessary because Cal-Am must replace its existing diversions of water from the Carmel River in excess of Cal-Am's

legal entitlement. The project proposes an insubstantial new use of water by desalinating sea water and returning groundwater component that is used to agricultural users in the Salinas Valley Groundwater Basin in lieu of an equal amount of groundwater pumping. Thus, the County applied the exemption to Policy PS-3.1 on the grounds that the desalination plant was private infrastructure that provided necessary services and will have a minor or insubstantial net use of water.

Conclusion and Implications

This opinion by the Sixth District Court of Appeal illustrates the more limited nature of review by a responsible agency for a Statement of Overriding Considerations with respect to the overall goals of a project, a particular component of which is being reviewed by the responsible agency. The responsible agency should not be required to re-examine and re-weigh evidence considered by the lead agency. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/H049146.PDF (Boyd Hill)

THIRD DISTRICT COURT FINDS PG&E WAS NOT REQUIRED TO SHOW GROSS ABUSE OF DISCRETION WHEN CHALLENGING IRRIGATION DISTRICT'S RESOLUTION OF NECESSITY SUPPORTING EMINENT DOMAIN

Pacific Gas and Electric Company v. Superior Court of San Joaquin County, 95 Cal.App.5th 767 (3rd Dist. 2023).

In a decision filed on September 21, 2023, the Third District Court of Appeal granted a petition for writ of mandate by Pacific Gas and Electric (PG&E). PG&E's writ challenged a trial court's order finding that when challenging a the South San Joaquin Irrigation District's (SSJID or District) eminent domain action, PG&E was required to show that the District committed a gross abuse of discretion in adopting a resolution of necessity supporting its proposed eminent domain project. Instead, all that PG&E needed to do was prove, by a preponderance of the evidence, that one of the public necessity elements or the more necessary for public use element required to succeed in an eminent domain action, was not met.

Factual and Procedural Background

Real party in interest, SSJID provides irrigation water and domestic water service to customers in southern San Joaquin County. PG&E owns and operates electric distribution lines within the District's water service area. In 2016, the District filed an eminent domain action and adopted a resolution of necessity finding that: (1) the public interest and necessity require the eminent domain project, (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury, (3) the property is necessary for the proposed project, and (4) the public use by the District of PG&E's electric distribution system constitutes a more necessary public use than the use for which the property is appropriated by PG&E.

PG&E's response to the eminent domain action objected to the District's right to take its property under Civil Procedure Code section 1250.370 on the grounds that: (1) the public interest and necessity do not require the project, (2) the project is not planned or located in the manner that will be the most compatible with the greatest public good and the least private injury; and (3) the property described in the eminent domain complaint was not necessary for the proposed project. The answer did not state that PG&E challenged the validity of the resolution of necessity or reference section 1245.255 which provides that "judicial review of the validity of the resolution" of necessity as well as a challenge to the effect of the resolution on the grounds that "its adoption or contents were influenced or affected by gross abuse of discretion by the governing body."

The parties filed cross-motions to determine the standard of review and/or standard of proof at trial on the District's right to take and the trial court ruled that PG&E had the burden of proof to show that:

> ... the District committed a gross abuse of discretion in adopting the resolution by showing that

there is a lack of substantial evidence to support the public use and necessity determinations.

PG&E then filed a writ petition asking the Third District Court of Appeal to vacate the trial court's orders adopting the above burden of proof.

The Court of Appeal's Decision

The Third District would go on to grant PG&E's writ petition.

PG&E argued that it did not need to show that the District grossly abused its discretion or that the findings in the resolution of necessity were not supported by substantial evidence. Instead, it needed to prove that one or more of the public necessity elements, or the more necessary public use element for an eminent domain proceeding are not true by a preponderance of the evidence, a lower evidentiary bar.

The Third District agreed, finding that a challenge of the public necessity elements or the more necessary public use element is not inherently a challenge to the validity of a resolution of necessity that would require a showing of abuse of discretion or lack of substantial evidence under section 1245.250. In other words, statutory provisions in section 1250.360(f) and 1250.370 permit an objection on the different grounds than a challenge to the validity of a resolution of necessity.

The District's resolution of necessity created a rebuttable presumption that the public necessity elements are true. Overcoming a rebuttable presumption in this scenario and similar ones does not require the party rebutting the presumption to demonstrate the absence of substantial evidence supporting the findings of necessity, it only requires a showing of contrary evidence sufficient to give rise to a preponderance of the evidence that the findings may not be met.

Accordingly, the Third District granted PG&E's writ and held that in order to prevail at trial, PG&E needed to prove, by a preponderance of the evidence, that one of the public necessity elements or the more necessary public use element set forth in the resolution of necessity was not true.

Conclusion and Implications

The *PG&E* decision helps clarify the standard of proof that must be met by a party challenging a public agency's eminent domain action where that party is not challenging the actual validity of a resolution of necessity under section 1245.255. Where an entity challenges an eminent domain actin on the grounds that the proposed acquisition does not satisfy the public necessity or more necessary public use elements required for a public agency to succeed in an eminent domain action. A copy of the court's decision can be found here: https://www.courts.ca.gov/opinions/documents/C097529.PDF

(Travis Brooks)

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