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& POLICY REPORTER

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FEATURE ARTICLE

GOVERNOR NEWSOM RELEASES FINAL WATER RESILIENCE PORTFOLIO FOR CALIFORNIA'S WATER FUTURE

By Wesley A. Miliband and Andrew D. Foley

Governor Gavin Newsom has released a final version of the Water Resilience Portfolio (Portfolio). The Portfolio represents the state's comprehensive effort to develop a coordinated strategy for the management of California's water resources over the coming years and even decades by focusing on approaches that can mitigate the increasing uncertainties and challenges associated with hydrological shifts in climate change. The resulting Portfolio outlines strategic actions and tactical directives for mitigation of the impacts of these conditions on wildlife preservation (including fisheries) and water supply reliability, while also seeking to balance complex and often competing regional, environmental and economic interests. Ultimately, development of the Portfolio is no easy undertaking nor is its anticipated implementation; however, necessity breeds innovation and the time is now to improve upon water resources management in this great state.

Background

Under Governor Brown and now Governor Newsom, the state has demonstrated a sense of urgency with respect to the critical but highly complex water management challenges posed by climate change, and frankly also implicated are political, policy, regulatory and technical issues that come into play when trying to preserve California's water rights regime while also establishing good public policy to ensure water supply reliability and health of fisheries and habitat. Hydrological shifts and temperature changes (both air and water) have exacerbated ongoing water management concerns such as flood and drought conditions, groundwater sustainability and water quality main-

tenance. Moreover, climate change has given rise to new concerns that complicate an already complex water management equation, particularly the threat of sea level rise to coastal communities and water infrastructure and headwater regions—namely, the state's mountain areas—having less predictability as to how much snow will fall and how much water content will actually be in the snow. Any attempt by the state to strategically address these threats must also balance that effort against the multi-faceted consideration associated with economic interests, increasing supply demands associated with population growth, limitations of current infrastructure and environmental conservation.

In response to these challenges, the Governor issued Executive Order No. N-20-19 (Order), calling for the creation of the Portfolio. The Order directs the California Natural Resources Agency, the California Department of Food and Agriculture and the California Environmental Protection Agency (collectively: Agencies) to collectively develop the portfolio by assessing the current state of affairs in California and recommending approaches that respond to projected future needs in the era of climate change. While reflecting overall goals generally consistent with existing state water policies developed under former Governor Brown's 2014 Water Action Plan, the Order called for broad reconsideration of the means by which the State would undertake to achieve those aims. After all, stating a general public policy is one thing, but developing a detailed plan with direction, or at minimum guidelines or criteria, for regional and local water agencies and water users to evaluate presents a whole different challenge.

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Principles to Govern Preparation of the Portfolio

The Order specifically outlines principles to govern the preparation of the Portfolio, which emphasize the importance of seeking multiple-benefit solutions, utilizing natural infrastructure, embracing novel solutions pursued outside California, promoting innovation and facilitating cooperation and coordination among federal, state and local agencies, as well as developing solutions that operate at the regional level.

In accordance with the Order, the Agencies conducted an extensive outreach effort in connection with the assessment and development of solutions that would be encompassed by the Portfolio. The Agencies not only sought input from the numerous government entities and agencies at all levels relevant to the state's water management, but also from a broader array of interested parties, such as sovereign tribes, environmental organizations, agricultural groups, business leaders and academic experts. The final Portfolio includes 14 new actions not contained in the draft plan released for public comment in January, reflecting input on the draft provided by more than 200 separate individuals and organizations. Generally, the revisions to the draft arising out of the outreach and comment process led to a final Portfolio with an increased emphasis on tribal interests and leadership, upper watershed health and cross-border water issues.

The Final Portfolio

As mandated by the Order, the Portfolio consists of assessment and action components. The assessment conducted under the direction of the Agencies gives a broad and comprehensive overview of current conditions and in the state, while further examining conditions and risk factors specific to ten distinct commonly-recognized hydrologic regions within the state. The solutions in the Portfolio reflect a continued focus on regional approaches supported by the state, and also provide specific direction to many of the key public agencies in order to clarify their role in carrying out the actions prescribed.

Assessment

Outlining Primary Needs and Threats

The Portfolio includes an overview of California's water system and uses, and defines particular threats

to sustainable water management in the state. As noted, the effects of climate change are of particular long-term concern, presenting threats such as a potential for increasingly extreme and prolonged drought, flood and other weather conditions, as well as the potential impact of a rise in sea level on coastal communities and infrastructure. In some ways, the particular threats posed by climate change do not alter the ever-present challenges inherent developing effective water policy in California, but rather exacerbate the scale of those existing problems and the urgency of developing a plan to address areas of inefficiencies.

Such existing challenges include groundwater sustainability, vulnerable infrastructure, mitigation against drought and flood, population growth and environmental protection. The Portfolio stresses the state's reliance on water supply stored in groundwater basins (as compared to reservoir water), and depletion of those resources as a result of decades of over-pumping from the basins in many, but not all, areas. The sufficiency of major water conveyance infrastructure has long been of concern, particularly with the expectancy of a major earthquake in northern California that could imperil the levees supporting conveyance infrastructure in the San Francisco Bay-Delta region that is essential to the water supply to over half of the state, and more recently reported to be concerns by some scientists that southern California is due for a large earthquake which also poses a significant threat to water infrastructure and supplies. Closely linked to these threats are significant risks to habitat, both wildlife and fisheries. Accordingly, the often-existing perception of human water resources needs being exclusive, or at least competing, with habitat needs are inextricably linked and bear a common interest for sustainability.

Comparison of Regional Vulnerabilities

Consistent with the terms of the Order, the assessment of current conditions and future needs examine the situation within the state broadly and more narrowly at the regional level. The Portfolio describes the particular circumstances present within ten distinct commonly-recognized hydrologic regions within the state. Specifically, the vulnerability of each region to specific was rated with respect to 12 separate risk categories outlined in the assessment, which included drinking water threats, water scarcity, beach

conditions, water quality, flood, drought preparation, threats to local ecosystems, groundwater management challenges, sea level rise, affordability issues, agricultural sustainability and significant reliance on aging state infrastructure.

Regions were given a rating between one to four in each category, with a higher number representing greater risk. The ratings reveal noteworthy stresses within key regions, including acute threats to drinking water sources, with five of the ten regions analyzed assigned the highest risk rating in that category, including the San Joaquin, South Lahontan, Central Coast, Tulare Lake and Colorado River regions. General water scarcity issues are considered most immediate in the San Joaquin, Central Coast and Tulare Lake regions. Risk of flooding was determined to be greatest in the Sacramento River, San Francisco, San Joaquin and Tulare Lake regions, with drought preparation deemed most severely limited in the North Coast, North Lahontan, South Lahontan and San Joaquin regions. According to the assessment, groundwater management challenges are greatest in the San Joaquin, Central Coast and Tulare Lake regions. Relatedly, agricultural sustainability risks were rated highest in the San Joaquin and Tulare Lake regions. These two regions, in addition to the Sacramento River region, also had the highest risk rating assigned to them with respect to their reliance on aging state infrastructure.

Low-risk grades assigned to regions are also worthy of note. For instance, drinking water supplies do not appear to be at risk in the North Coast and San Francisco regions, each of which were assigned the lowest vulnerability rating of 1 in that category. The San Francisco and South Coast regions also received the lowest vulnerability rating with respect to drought readiness. The Portfolio rated the risk from reliance on aging state infrastructure lowest in the North Coast, North Lahontan and Colorado River regions, and other than the three high-risk regions for this category noted above, no other region was assigned a risk rating higher than 2 in this category.

Notably, ratings assigned in certain categories reflect more of a shared vulnerability among regions. All regions were deemed to have significant vulnerability with respect to affordability challenges, excepting only the San Francisco region. All regions in which sea level rise was an applicable risk category received a rating of 3 or 4, reflecting high vulnerabil-

ity. All regions were given a moderate or relatively high vulnerability rating for ecosystem vulnerability, with no single region assigned the lowest risk rating, and only one (Central Coast), assigned the highest. Lastly, water scarcity and impaired water quality appears to be at least a moderate threat in every region, with three regions given the highest vulnerability rating in the water scarcity category as noted above and one region (San Francisco) assigned the highest vulnerability rating to impaired water quality vulnerability.

In a general sense, the breadth of risk categories illustrates the range and complexity of issues the Portfolio confronts, while the variety among ratings assigned to different regions within those risk categories underscores the difficulty of developing a broad strategy at the state level that can adequately respond to the unique circumstances present in each region. Moreover, the results of the regional assessment detailed by the Portfolio appear to support the Order's emphasis on developing a plan involving coordinated regional solutions wherever possible. Indeed, a major theme of the strategic approach outlined by the Portfolio is programs administered regionally and supported at the state level, as further described below.

The assessment of broad and regional risks led to certain key insights described in the Portfolio, which guided the ultimate solutions presented in the document and described above.

Solutions

Informed by the assessment, the Portfolio describes over 100 distinct actions intended to address the challenges of sustainable, responsive water management and policy within the State. These solutions are primarily aimed at protecting the long-term viability of the State's water supply while promoting environmental sustainability.

Emphasis on Coordinated Regional Efforts with State Support

The Order and Portfolio make clear, both expressly and through the assessment data presented, that an effective state-wide policy cannot be a "one size fits all" approach. Accordingly, a core element of solutions outlined in the document involves coordinated efforts at the regional level bolstered by commitments and support at the State level.

A primary recommendation of the Portfolio is the

diversification of regional supply, citing the danger of relying too greatly on individual sources of supply due to the projected reduction of snowpack and potential for extreme drought conditions in the coming years. The Portfolio notes that diversification will vary by region, but provides several general examples of how water supply might be diversified within a region, including the promotion of higher use efficiency and waste elimination as well as recycled water programs. Additionally, the Portfolio suggests desalination as a potentially beneficial option where feasible.

The Portfolio further identifies a number of specific proposals for how state agencies can support the regional supply diversification effort. The Portfolio recommends that agencies work with local water districts to promote conservation. This aspect could become challenging from a practical and legal set of perspectives, as conservation mostly is a necessity a “new way” of managing the resource the long-term sustainability, but local agencies often become confronted with realities that strong conservation reduces water demand but not to the same extent for operational and maintenance needs, thus requiring in some instances water rate increases despite customers doing the “right thing” by trying to conserve their water use. Hence, a local challenge throughout the state to conserve the stream of water while still needing to preserve the stream of revenue.

Building on Progress, Policies and Programs

Another common theme among the solutions offered by the Portfolio is an effort to build on previous efforts and otherwise maximize the implementation of certain existing laws, regulations and water programs in the state, in order to realize their usefulness in addressing various needs.

For example, the state is now pursuing the Delta Conveyance Project, which is to a large extent an iteration, albeit a separate project, from California WaterFix, more commonly known as the “twin tunnels” project during Governor Brown’s tenure. Also ongoing are the Salton Sea Management Plan, Integrated Regional Water Management Program, efficiency programs (“Make Conservation a Way of Life” laws, State Water Efficiency and Enhancement Programs), among various others identified in the Portfolio.

In addition to the above-referenced programs, the Portfolio evidences an overall goal of streamlining processes and coordination of interests relating to

California water management. Many such actions involve the reduction of permitting and other legal hurdles that hinder the development of projects and other initiatives that the Portfolio contemplates as part of California’s water resilience strategy.

Technological and Analytical Efforts

Ongoing monitoring and modeling of relevant conditions represents another clear priority of the Portfolio generally, particularly with respect to environmental protection efforts. If effectively implemented, such efforts would generally facilitate the collection of precise and reliable information, which information will be critical to developing and enhancing a level of responsiveness to the complex challenges addressed by the Portfolio.

Many recommended actions involve the development of technologies and analytical tools beyond what is currently available. For instance, the Portfolio calls for the development of new programs to detect and manage invasive species disrupting ecosystems, as well as programs to protect and manage threatened wildlife habitats and species. Other key innovations and improvements recommended in the Portfolio include tools for monitoring infrastructure and technologies for promoting efficient water use.

Responsible Agencies

The Portfolio also provides some detail on the means of implementation for the proposals and solutions described. Such detail includes clarification of the roles envisioned for a number of the agencies that will be central to the implementation of the Portfolio’s strategies. In addition to the Agencies charged with developing the Portfolio, relevant agencies include the State Water Resources Control Board (SWRCB), Department of Water Resources (DWR), California Department of Fish and Wildlife (CDFW), Delta Stewardship Council and the Regional Water Quality Control Boards (RWQCBs).

Many of the Portfolio actions require participation by multiple agencies. For example, both DWR and the SWRCB are described as key agencies with respect to the implementation of the “Make Conservation a Way of Life” laws and the Sustainable Groundwater Management Act (SGMA), funding of multiple-benefit groundwater recharge programs, support for aquifer enhancement initiatives and development of desalination technologies, among others. The

Agencies continue to be jointly tasked with outreach efforts to various stakeholders for the development of voluntary solutions promoting resilience, which appears to be an extension of the outreach conducted by the Agencies during the Portfolio's development. CDFW is to work with partner agencies on a number of initiatives, such as expanding the use of the Regional Conservation Investment Strategies developed in 2017 guiding water project mitigation needs, eradicating a South American rodent species threatening important Central Valley wetlands and levees, as well as developing analytical tools related to the identification of functional ecosystem flows and modeling for assessing streamflow depletion caused by groundwater pumping. In other contexts, a single agency will be charged with taking the lead.

State Programs

The Portfolio also summarizes some of the state water programs and which will play a role in the execution of the Portfolio's strategies, generally and as part of the support to be provided by the state in connection with regional efforts. The programs are classified under broad categories including monitoring

and modeling, management, climate change, flood, planning, environment, State Water Project and funding.

In the end, by whatever measure one chooses to utilize, the Portfolio is bold, innovative and detailed to state clear policy from this State Administration on how to ensure the state, and all of its water users, continue to have a clean and reliable water supplies available for use over the long term.

Conclusion and Implications

Because the Portfolio calls for broad strategies and solutions, clarification regarding the implementation of those actions is essential given the number of public entities and other stakeholders involved. Accordingly, the Portfolio identifies the agency or agencies associated with the implementation of many of the recommended actions. In addition, the Portfolio describes some of the key state programs that will play a role, thus creating expectations and even accountability for performance and ultimately success of the Portfolio and California's future for water resource management. The Portfolio is an extensive look to the future of California resources.

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WESTERN WATER NEWS

IN THE MIDST OF DROUGHT, WATER CONSERVATION DISTRICTS IN COLORADO ASK VOTERS FOR WATER-BENEFITTING TAX INCREASES

Two Colorado water districts have put questions on the ballots for November asking voters to approve tax increases to fund water-related projects and programs. The Colorado River Water Conservation District (River District) and the St. Vrain and Left Hand Water Conservancy District (St. Vrain) are both asking for increases in the property tax mill levy. While River District increases have occurred in the past, an approval of the St. Vrain increase would be the first of its kind in St. Vrain's almost 50 years existence.

**The Colorado River
Water Conservation District**

The Colorado River Water Conservation District was created in 1937 "to fight to keep water on the West Slope." The River District covers a large portion of Colorado including 15 counties and more than 500,000 residents. The Colorado River, as well as its major tributaries—the Yampa, White, Gunnison, and Uncompahgre rivers—are all located within the River District boundaries.

In addition to its stated primary goal of keeping water on the West Slope, the River District also works to lobby the state legislature, inform voters, protect western Colorado drinking water supplies, protect fish and wildlife through water quality programs, and to ensure water security.

The November ballot question, approved by the River District Board on July 21, will ask West Slope voters to increase the property tax mill levy by 0.248 mills, bringing the total River District mill levy to 0.50 mills. The tax increase would generate an additional \$4.9 million in 2021. If passed, the River District's annual revenue would double, from approximately \$4 million to \$8 million. While the proposed mill levy increase almost doubles the current rate, the practical effect will be an increase of approximately \$1.90 for every \$100,000 in assessed residential home value.

The River District, which receives up to 97 percent of its revenue from taxes on real property includ-

ing fossil fuel reserves and energy production within the District, has stated that it needs the money after several years of declining revenues due to shrinking oil and gas taxes and lower residential assessments. The ballot question states that the increased revenues will "enable the Colorado River District to protect and safeguard Western Colorado Water" through its core goals, as outlined above.

The Ballot Measure

The ballot question includes a provision that would prohibit the River District from using the "additional funds for the purpose of paying to fallow irrigated agriculture." The funding restriction is in reference to various programs in the State, through which irrigators may be compensated to not divert, and instead that water is used to offset other consumptive uses or left in the stream. Colorado is currently working on developing a demand management program at the state level that it hopes will bolster flow in the Colorado River. Although the River District has expressed interest in demand management programs in the past, such programs would not be funded through this proposed tax increase. This restriction was especially important to representatives from more rural areas where agricultural users might be more affected by such demand management programs.

Instead, the property tax revenues would be used for certain categories of water projects that include productive agriculture, water infrastructure, conservation and efficiency, watershed health, and water quality. Although the River District has recently had to reduce its staff, none of the money would be used for new staff positions. The River District's vote to move forward with the ballot initiative had one nay vote by the River District's representative for Pitkin County, John Ely. His chief concern was that the ballot initiative should include a commitment that the River District work with local elected officials to choose and implement water projects. Because the River District Board members, who are unelected,

will be responsible for deciding how the money is spent, Ely requested more community involvement in allocating funding for specific projects. The River District agreed to add Ely's requested language to the fiscal implementation plan, but declined to include the language in the ballot question itself.

Early polling by consultants for the River District suggests that the ballot measure could be one of the more popular in recent years. A survey in March indicated that 65 percent of voters would support the new tax. In late June, a second survey had similar results with 63 percent supporting the increase. Meanwhile, the Board of county commissioners for Pitkin County has since passed a resolution indicating that it does not support the ballot question without more details on the .

The St. Vrain and Left Hand Water Conservancy District

The St. Vrain and Left Hand Water Conservancy District includes most of Boulder County along the St. Vrain and Left Hand Creeks in Colorado's Front Range. In contrast to the River District increase, the St. Vrain proposal would only be in effect for 10 years, although the increase is much steeper.

St. Vrain was established in 1971 to "develop, manage, and protect water resources in the Longmont area." More specifically, the goals of St. Vrain are to protect water rights, encourage improved water management, and support the development of additional water storage.

The Ballot Measure

The current mill levy for St. Vrain residents is 0.156 mills, but the ballot measure asks voters to

approve an increase of 1.25 mills. This additional tax would increase St. Vrain revenues from \$416,000 to \$3.3 million, annually. Practically, this would add \$9 per every \$100,000 of assessed value on a residential property. St. Vrain had originally considered increasing the property tax up to 1.50 mills, but came down to the 1.25 number in hopes of making the increase more appealing to voters. The ten-year sunset provision is also targeted at getting votes from residents who might originally take issue with the tax increase since this would be the first increase in the St. Vrain mill levy since the district was founded in 1971.

According to St. Vrain, the additional tax revenue from the ballot proposal would be used to fund the district's Water Vision and Action Plan which includes the following goals: 1) the protection of water quality and drinking water supply; 2) infrastructure for agricultural water use; 3) water education; 4) creek improvement facilities; and 5) conservation.

Conclusion and Implications

Given the current political climate, two major Colorado water districts requesting tax increases underscores the fraught water situation in the state and the need for sufficient funding to accomplish strategic plans and public water projects throughout the state. St. Vrain has not released any polling data, but the River District's polls suggest that Colorado's voters along the western slope are willing to approve increased taxes to fund public water projects within their district. Election Day is November 3, however Colorado's mail-in voting system allows residents to submit their ballots early and polling centers open to early voters on October 19.

(John Sittler, Jason Groves)

TREASURE VALLEY IDAHO: TWO MUNICIPALITIES WITH SEPARATE PROPOSALS FOR DISCHARGING RECYCLED WASTEWATER INTO NEARBY CANALS ARE GENERATING VERY DIFFERENT REACTIONS

Two municipal proposals, one by the City of Boise and the other by the City of Nampa, seeking to discharge Class A Recycled Wastewater to nearby irrigation canals are receiving markedly different reactions. While the Nampa proposal has largely been supported, the Boise proposal is generating considerable opposition for the time being.

The Regulatory Burden

At present, both the City of Boise and the City of Nampa (both located in southwest Idaho's Treasure Valley) discharge their municipal wastewater treatment plant effluent to regulated waters of the United States (the Boise River and Indian Creek, respectively). Consequently, both plant discharges are governed by federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permits.

Both cities face phosphorus and temperature compliance schedules requiring treatment plant capital improvement planning of several millions of dollars for engineered solutions to address these issues. These capital improvement costs, and projected operation and maintenance costs, have led both municipalities to engage local irrigation entities regarding the possibility of discharging wastewater to nearby irrigation canals for reuse on the lands irrigated from the canals downstream. Both propose the construction of infrastructure designed to yield Class A Recycled Wastewater under Idaho's Recycled Water Rules for purposes of irrigation reuse within the boundaries of the Farmers Union Ditch Company (Boise) and the Pioneer Irrigation District (Nampa).

Discharging Class A Recycled Wastewater to the irrigation canals for irrigation reuse would avoid a variety of expensive treatment plant upgrades associated with additional phosphorus removal/polish, as well as the installation of end-of-plant chillers needed to cool effluent prior to discharge. This is because the manmade irrigation canals are considered "irrigation" or "agricultural" water supply, thus the canals as receiving water bodies are not subject to the more stringent discharge limits imposed on discharges to the Boise River and its tributaries.

Class A Recycled Wastewater When Weighed against Canal Supply

Recycled Wastewater in Idaho ranges from Class A (the cleanest) to Class E (the "dirtiest"—though still comparatively "clean" when compared to natural background for certain receiving water bodies). From a human health/contact and wildlife standpoint (based primarily upon pathogenic bacteria standards), Class A Recycled Wastewater is much cleaner than that encountered in the natural background, and even more so when compared against the background water quality existing in most irrigation canals and drains in the Treasure Valley.

For example, the natural background Idaho water quality standard for bacteria for primary contact recreation (e.g., swimming, full immersion in water with incidental ingestion) is 126 *e.coli* cfu/100ml (geometric mean), or 406 cfu/100ml single sample maximum. IDAPA 58.01.02.251. The natural background bacteria standard for secondary contact recreation (physical contact, but less than full immersion, e.g., boating, fishing, wading) is also 126 *e.coli* cfu/100ml, with the single sample maximum is 576 cfu/100ml. IDAPA 58.01.01.251.

By comparison, the Class A Recycled Wastewater bacteria standard requires disinfection to 2.2 cfu/100ml (geomean), or 23 cfu/100ml single sample maximum (exponentially less than natural background water quality standards for bacteria). IDAPA 58.01.17.602 (Tables 1 and 3). Consequently, Class A Recycled Wastewater can be used to water/irrigate parks and playgrounds when in use, as well as golf courses and schoolyards when children are present. Class A Recycled Water can also be used for ground-water recharge purposes (direct well-based injection, as opposed to seepage/percolation).

Public Response to the Two Proposals

While the Nampa proposal to discharge Class A Recycled Wastewater to Pioneer Irrigation District's Phyllis Canal was widely supported, the Boise-proposed discharge to the Farmer's Union Canal is experiencing significant public resistance. Though both

cities are located in the Treasure Valley, Boise and Nampa (and their respective surroundings) are different. Boise and its immediate surroundings are more urban and suburban, while Nampa's are more rural and agricultural (for the time being anyway, as population growth in the valley continues to explode).

It is fair to say that local residents of both communities have, generally speaking, different views/philosophies when it comes to irrigation canals and ditches. In the Boise area, canals and ditches are viewed more as recreational and aesthetic amenities than they are as working ditches supplying irrigation water. For better or worse, the Boise proposal is experiencing significant "NIMBY-ism" not encountered in and around Nampa to the west. Vocal opponents of the Boise project view the proposed Class A Recycled Wastewater discharge as pollution. Conversely, opposition to the Nampa project complains of lost water use opportunity (i.e., Nampa's removal of discharge to Indian Creek in favor of the Phyllis Canal will allegedly deprive other water users of the opportunity to continue using Nampa's wastewater via their own downstream diversions from the creek; thus, Nampa objectors are fighting for their continued use of the water—they want the Nampa discharge for their own uses).

For the irrigation entities (Farmers Union Ditch Company and Pioneer Irrigation District), the Class A Recycled Wastewater is not only cleaner than the water already in their respective systems (at least in terms of bacteria), but it presents a very reliable supply source that is largely immune from climate-related issues (people will always need and use domestic potable water supply, and that necessary supply and use will always generate wastewater output).

Conclusion and Implications

While Nampa and Pioneer Irrigation District have already received a recycled water Reuse Permit from the Idaho Department of Environmental Quality, the Boise project is "paused" for now in hopes that more intensive public outreach and education will help address constituent concerns. Nampa's project seeks to commence discharge no later than 2025, pending the outcome of a water right-related challenge currently before the Idaho Department of Water Resources whereby the petitioner seeks to perpetuate their historical access to Nampa discharges to Indian Creek (i.e., an issue entirely different than the environmental water quality concerns plaguing the proposed Boise project).

(Andrew J. Waldera)

SAN DIEGO COUNTY WATER AUTHORITY AGAIN CONSIDERS A COLORADO RIVER PIPELINE PROJECT

The San Diego County Water Authority (Authority) is again exploring the possibility of an ambitious pipeline project to grant the Authority direct access to its primary water supplies in the Colorado River. In August 2020, the Authority released a report evaluating strategies for regional water needs finding that a new conveyance system would be cost competitive as compared to the Authority other main long-term options, chiefly increased supplier diversification or further reliance on water obtained from the Metropolitan Water District of Southern California (MWD). Despite the report and apparent enthusiasm for the initiative among some Authority officials, the viability of the project remains dubious at this preliminary stage, given the serious questions that exist as to the conclusions in the August report, the

financial burden that would be incurred by members before cost-effectiveness could be realized, and the Authority's history of studying and abandoning similar proposals.

Background

The Authority is a county water authority created in 1944 by the California Legislature under the Water Authority Act to administer the rapidly-growing San Diego region's rights to water in the Colorado River. Initially consisting of 11 member agencies, the Authority now acts as wholesale supplier to 24 retail member agencies. The Authority's members account for many of the primary retail distributors in the region and with several municipalities, the City of San Diego among them, as well as water districts, irriga-

tion districts a public utility district and military base.

Reliance on water from the Colorado River has necessitated a historical reliance on purchases from MWD, the operator of the existing conveyance system since the Authority's inception. Until 2003, all of the Authority's imported water came from MWD. While in recent years the Authority has significantly reduced that reliance and diversified its Colorado River suppliers, the Authority remains largely reliant on MWD purchases.

The Authority has long coveted its own infrastructure for direct access to the Colorado River in order to secure necessary water supply for the San Diego region on a long-term basis independent of MWD's influence, whom the Authority has an ongoing history of conflict. Without the proposed conveyance infrastructure, the Authority is likely to remain subject to increases in MWD's rates with no viable alternative but to bear the costs to a large degree regardless of supply diversification efforts. The Authority contends that their 2021 rates are mostly attributable to the impact of MWD increases and currently objects to MWD's alleged failure to pursue cost-cutting measures during the pandemic.

Current Project and Reaction

Preliminary plans for the pipeline essentially call for a modern version of MWD's existing pipeline, extending through the desert and Cleveland National Forest to reach the Colorado River. As envisioned, the project would carry an estimated construction cost of approximately \$5 billion, with expected annual maintenance costs of almost \$150 million. Almost \$100 million of that amount would be attributable to energy needs associated with the system.

Some observers are skeptical, noting that the project is not critical to ensuring regional water supply because MWD's system is projected to have ample capacity to accommodate the Authority's expected needs over the coming years. In addition, the costs of the project are such that even if the project were cost-effective to the Authority in the long-term, the near-term costs are so substantial that actual savings could not be realized for decades.

Even member agencies of the Authority appear uneasy with the plan. Notably, a majority of the Authority's member agencies separately undertook

an independent review of the Authority report's findings. In direct contradiction with the Authority report, the member agencies' report determined that the pipeline project would not be cost-competitive with the Authority's other long-term supply options and was likely to be "substantially more costly" than those other options, such that the Authority report's conclusion otherwise was "not reasonable."

Adding to the skepticism of the plan's viability is the lack of results produced by several prior studies conducted by the Authority examining possibilities for its own pipeline. Apart from the disputed Authority report conclusions, there is little to suggest that this push for a pipeline is significantly different than prior efforts abandoned following initial study. In August, the Authority Board discussed the merits of the plan but ultimately balked at funding a second round of studies regarding the project prior to further consideration scheduled for November.

Conclusion and Implications

The San Diego County Water Authority report's finding that the proposed Colorado River pipeline project could be cost competitive as compared to other long-term supply strategies suggests that the project may have some momentum, but at this preliminary stage the likelihood of the project proceeding much further appears questionable at best, given the size and cost involved, as well as the Authority's history of repeated and ultimately abandoned flirtations with similar incarnations of the pipeline project dating to the 1990s.

One question that might be considered is the extent to which the Authority's strained relationship with MWD and desire to be out from under MWD's authority and control, has led to an over-eagerness to pursue the project or to accept the cost-competitiveness conclusion in a report that appears curious, having been apparently contradicted by an independent review undertaken by Authority member agencies. Even if those findings are well-founded, the Authority still faces an uphill climb to generate necessary support for an enormously expensive project with up-front costs making financial benefits to Authority members unlikely to be realized for many years, to say nothing of legal or other procedural hurdles that the Authority would face in realistically moving forward.

REGULATORY DEVELOPMENTS

FEDERAL AGENCIES RELEASE COLUMBIA RIVER SYSTEM OPERATIONS FINAL EIS THAT, FOR FIRST TIME, CONSIDERS IN DETAIL ALTERNATIVE OF BREACHING FOUR LOWER SNAKE RIVER DAMS

After almost 30 years since the first salmonid was listed under the federal Endangered Species Act (ESA) in the Columbia River Basin and 25 years since issuance of the last broad-scale Environmental Impact Statement (EIS) addressing operation of the Columbia River Hydropower System (System) pursuant to the National Environmental Policy Act (NEPA), on July 31, 2020, three federal agencies issued a new Final EIS addressing the effects of the System's operations (CRSO FEIS).

Background

The impetus for its preparation was the 2016 opinion of the U.S. District Court for the District of Oregon in *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 184 F.Supp.3d 861 (D. Or. 2016) (*NWF v. NMFS*) in which the court ruled that the previous NEPA documents on which the agencies sought to rely to establish compliance with the statute were either outdated or too narrow in scope to satisfy that purpose; that the series of actions prescribed to avoid having System operations be likely to jeopardize the continued existence of listed species or result in adverse modification of their designated critical habitat in a previous Biological Opinion should be evaluated in a single EIS; and, in reaching these rulings, looked ahead to the composition of that new single EIS to clearly telegraph that one of the "reasonable alternatives" it would need to consider in detail is breaching the four Lower Snake River dams that form a portion of the fourteen federal dams comprising the overall system.

The Final EIS

In that light, the CSRO FEIS represents a milestone because it does in fact for the first time provide detailed consideration to an alternative that would breach the four Lower Snake River Dams that has been, as the FEIS puts it, "a topic of public discourse for decades." In addition to discussing how the FEIS

addresses this alternative, this article will also briefly highlight some of the other noteworthy features of the newly released document.

Size

As is not surprising for a document addressing the environmental effects of the operations, maintenance, and configuration of the Columbia River Hydropower System comprising 14 federal dams and associated reservoirs across four states (Washington, Oregon, Idaho, and Montana) on the river and its major tributaries, the CRSO FEIS is immense. The body of the document comprises nearly 2500 pages, and the 24 supporting appendices, which range from a compendium and analysis of substantive issues raised in the nearly 59,000 comments submitted on the Draft EIS, to the two Biological Opinions that NOAA Fisheries and the U.S. Fish & Wildlife Service issued on the Preferred Alternative, collectively run to more than another 9000.

Complexity

The analysis in the CRSO FEIS is also highly complex, a characteristic that stems from myriad factors. One of the major ones is simply that operating the System is quite literally a perpetually ongoing action requiring a tremendous degree of coordination and orchestration across a huge swath of territory and multiple agencies, jurisdictions, and large-scale projects designed to serve myriad purposes. In addition, considerable complexity arises from the multiplicity of variables that affect the primary focus of effects analysis in the document, the thirteen species of salmon and steelhead listed under the ESA, in particular given the multi-dimensional life cycles and often-vast ranges and migratory patterns of anadromous fish that span freshwater, estuarine, and marine habitats. Indeed, these factors alone call to mind the quip former Forest Service Chief and wildlife biologist Jack Ward Thomas proffered when heading up

the team that performed viability analyses for the numerous species associated with late-successional and old-growth forests that laid the environmental groundwork for the Northwest Forest Plan: “Ecosystems are not only more complex than we think, they are more complex than we can think.”

Importance of Modeling for Projecting Effects to Listed Fish Species

The CRSO FEIS breaks down its effects analysis into 17 categories across a wide spectrum of natural resources, values, and interests, from Hydrology and Hydraulics to Indian Trust Assets and Tribal Perspectives and Interests. The main focus of its analysis of environmental effects, however, is the 13 salmon and steelhead species listed under the ESA, in part because the CRSO FEIS was prepared in conjunction with two new Biological Opinions that evaluated the effects of the Preferred Alternative on those (and other) listed species pursuant to the ESA, and in many ways the focus of the trade-offs reflected in the FEIS revolve around taking steps to benefit those species vis-à-vis hydropower generation and operations to serve other ends (such as supporting the use of other renewable sources of power that are variable in nature such as solar and wind).

In addressing effects to listed fish species, the co-lead agencies relied heavily on the use of models. This follows in large measure because of the multitude of biotic and abiotic factors and variables that affect the health, distribution, and abundance of species affected by the System at various life stages, and thus, modeling becomes one way to try to account for and predict how modifying one or more such factors will influence fish and their viability over time, at least in relative terms. Unlike scientific inquiries that proceed based on the classic scientific method involving the testing of a hypothesis that can be replicated under tightly controlled conditions and holding certain variables constant, making projections related to effects on the life cycle of species in the natural world involves a considerably different exercise. In that light, the CRSO FEIS used several models that produced quite different results regarding the expected projected benefits to fish species from potential System actions such as increased spill and dam removal, and sought to draw inferences on likely effects based on a consideration of all such results.

Multi-Faceted and Multi-Layered Purpose and Need-Plus Statement

The NEPA implementing regulations the Council on Environmental Quality (CEQ) has promulgated provide that EISes must include a “Purpose and Need” statement that, as its name implies, “briefly specif[i]es the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” (The new version of these CEQ regulations were set to go into effect as of Sept. 14, 2020, retain a similar, but slightly varied formulation, of this requirement.) The reason the Purpose and Need Statement is critical to any NEPA analysis is because it becomes the filter agency uses to determine which alternatives are worthy of full-blown, detailed consideration in its EIS.

In addressing the primary purposes the System is designed to serve, the CRSO FEIS looks to the underlying statutory authority under which the Congress has directed the Corps and Bureau to construct, operate, and maintain the 14 CRS projects, which it collectively and broadly articulates as flood control, navigation, hydropower production, irrigation, fish and wildlife conservation, recreation, municipal and industrial water supply, and water quality. The FEIS in turn extrapolates from these to produce a longer list of 13 more specific purposes of System operations. The overarching need to which the co-lead agencies are responding is stated as “reviewing and updating the management of the System, including evaluating measures to avoid, offset, or minimize impacts to resources affected by the management of the System.” The FEIS also cites their need to respond to the rulings and observations of the District Court in *NWF v. NMFS*.

The co-lead agencies then took a further step and, in conjunction with the more than 30 cooperating agencies involved in preparing the CSRO FEIS, identified eight principal objectives deriving from the Purpose and Need Statement to be achieved in fashioning and adopting a strategy for operating the System, even though such a procedural measure is not prescribed by CEQ’s NEPA implementing regulations. These objectives then formed the primary criteria against which each of the different action alternatives were evaluated in the FEIS.

Alternatives

The alternatives section of an EIS has long been

referred to as its “heart” in CEQ’s implementing regulations (although this characterization is not carried forward in the new version of the regulations set to go into effect on Sept. 14, 2020). In the CRSO FEIS, the co-lead agencies evaluated five Multiple-Objective (MO) Alternatives in detail in addition to the “No Action” alternative. Because operating the System is quite literally a perpetually ongoing action, the CSRO FEIS chose to define the “No Action” alternative as constituting those operations and other measures in effect or planned when work on it commenced in Sept. 2016. The five action alternatives can be described in shorthand as using Block Spill Design to improve outcomes for fish beyond those provided by the No Action alternative (MO1); prioritizing hydropower production and flexibility to more substantially reduce Greenhouse Gas emissions and to instead rely mostly on structural and transportation measures in an effort to benefit fish (MO2); breaching the four lower Snake River Dams per the court’s strong admonition that such an alternative be considered in detail in the EIS (MO3); maximizing spill to benefit ESA-listed salmonids (MO4); and the Preferred Alternative, which the CRSO FEIS presents as the one that reflects the optimal “balance” among all of the multiple purposes and objectives of the System.

More on MO3

Because it has never before been considered in detail by a federal agency and given the intense public interest from various stakeholders in the alternative of breaching the four Lower Snake River dams, a few additional remarks about how the CSRO FEIS analyzes MO3 are in order. First, the FEIS explains that new congressional authorizing legislation and appropriations would be required to implement the MO3 alternative given that the 14 CRS projects were built and are operated pursuant to explicit statutory direction. As the court noted in urging consideration of the alternative in *NWF v. NMFS*, however, the current version of CEQ regulations under which the FEIS was prepared expressly state that reasonable alternatives do not need to be “within the jurisdiction of the lead agency” (a provision that, again, was not carried forward in the new version set to go into effect on Sept. 14, 2020). Second, not surprisingly, the FEIS notes that its modeling revealed the highest

predicted potential benefits for Snake River salmon and steelhead from MO3 among the alternatives considered in detail, but goes on to note that it would not allow operation of the Lower Snake River dams for their other congressionally authorized purposes of navigation, hydropower, recreation, and water supply. In particular, it explains that MO3 would not satisfy the objective of ensuring a reliable and economic power supply for the Pacific Northwest, due in large measure to the reduction in hydropower generation that would result from breaching the dams as well as the loss of storage capabilities that greatly enhance the System’s flexibility to readily supply load as needed to help avoid the risk of power shortages.

Conclusion and Implications

The CSRO FEIS evaluates five action alternatives in detail, including for the first time one that would provide for breaching the four Lower Snake River dams, which, as the court itself openly acknowledged in *NWF v. NMFS*, it has been trying to get the co-lead agencies to consider adopting for decades. 184 F.Supp.3d at 942 (describing the alternative as one the federal agencies under various administrations “have done their utmost to avoid considering for decades,” notwithstanding the court’s having “repeatedly and strenuously encouraged the government to at least study the costs, benefits, and feasibility of such action, to no avail”).

At the same time, it is almost certain that the co-lead agencies will eventually adopt the Preferred Alternative in their Record(s) of Decision scheduled for release by Sept. 30, 2020. This follows for two main reasons. First, and most important, the Preferred Alternative forms the basis of the proposed action on which both NOAA Fisheries and FWS have issued “No Jeopardy” Biological Opinions (included as Appendices V-2 and V-3 to the CSRO FEIS) and thus confirm the consulting agencies’ position that the Preferred Alternative complies with the co-lead agencies’ substantive ESA duties. Second, as has been conclusively established since *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980), NEPA’s mandates are procedural in nature only, and only require federal agencies to consider environmental effects, not give them priority.

The CSRO FEIS is available online at: <https://www.nwd.usace.army.mil/CRSO/Final-EIS/#top> (Steve Odell)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements— Water Quality

• August 24, 2020 - EPA has ordered the Lee Bar Ranch mobile home park on the Pala Band of Mission Indians Reservation to comply with federal drinking water requirements and to identify and correct problems at its sewer and drinking water systems that present a danger to the residents of the park. The sewer and water systems serve approximately 90 residents and are privately owned. A boil water notice has been issued to all customers. During several inspections between January and May 2020, the Pala Environmental Department (PED) learned that untreated human sewage was regularly discharged onto the soil throughout the property as a result of septic system failures. Additionally, PED observed a broken drinking water line, which may lead to a loss of pressure and a reversal in the water flow. Both the potential exposure of an underground source of drinking water to human waste and reversal in the water flow may lead to fecal contamination of the drinking water or contamination by other disease-causing organisms. Lastly, the drinking water system on Lee Bar Ranch was not registered with the EPA and has failed to comply with all applicable monitoring and reporting regulations under the Safe Drinking Water Act. Under the terms of the agency's administrative order, the owners of the water system are required to: 1) Issue a boil water notice to all customers; 2) Take drinking water samples from different points in the drinking water system for the presence of total coliform bacteria; 3) If any of the water samples have a positive *E. coli* result, owners must provide at least one gallon of water per person per day for every individual served by the system; 4) Conduct a technical review of the drinking water and wastewater infra-

structures to identify problems, and draft and follow a plan to correct those problems; 5) Provide verification that the system has a qualified water operator; 6) Properly monitor the system's drinking water and report findings to the EPA. The Pala Band of Mission Indians has no direct control or ownership of the water system.

• August 27, 2020 - EPA has announced a settlement agreement with the City of San Juan Bautista over violations of the federal Clean Water Act. The settlement requires the City to make major updates to the way it treats wastewater after EPA found the City was discharging wastewater into San Juan Creek, a tributary to the San Benito River. The EPA inspection found that the discharges violated federal standards. This action was referred to EPA for enforcement by California's State Water Resources Control Board and the Central Coast Regional Water Quality Control Board (Water Boards). EPA works closely with the Water Boards to ensure the protection of water bodies in California. EPA and the Water Boards inspected the treatment plant in June 2019 and found multiple violations of the Clean Water Act. Those violations included discharges of pollutants—primarily chlorides and sodium—in excess of its permit, failure to properly monitor and maintain records, and failure to adequately operate and maintain its wastewater treatment system. The settlement requires the City to complete all work in the plan and return to compliance with the Clean Water Act by December 31, 2023. The treatment system currently has the capacity to treat approximately half a million gallons per day of wastewater generated by a population of about 2,500 and three vegetable processors.

• September 2, 2020 - EPA recently ordered North Edwards Water District to address ongoing arsenic violations of the Safe Drinking Water Act. The California's State Water Resources Control Board—Division of Drinking Water (DDW) referred the system to EPA for enforcement. The North Edwards Water District system serves approximately 600 residents through more than 200 connections. The

system's current source of drinking water is groundwater from two wells. Arsenic, a naturally occurring mineral found throughout the U.S., can be found in groundwater. Drinking high levels of arsenic over many years can increase the risk of lung, bladder, and skin cancers, as well as heart disease, diabetes, and neurological damage. As part of EPA's order, North Edwards Water District must comply with the arsenic maximum contaminant level (MCL) of 10 micrograms per liter no later than April 30, 2023. The system has been serving water with arsenic levels above the MCL since at least 2013. The District must provide a compliance plan by the end of October 2020 outlining how it will comply with the arsenic MCL standard. The District has applied for funding from the California State Water Resources Control Board—Division of Financial Assistance to provide residents with alternative water until the system complies with federal and state drinking water requirements. EPA will continue to monitor North Edwards Water District's efforts to provide safe drinking water and may levy penalties if the utility fails to meet the compliance provisions in the order.

- September 11, 2020—EPA issued a new emergency drinking water order to the Oasis Mobile Home Park, which is located on the Torres Martinez Tribe's lands in California. The order calls on Oasis to comply with federal drinking water requirements and to identify and correct problems with its drinking water system that present a danger to the residents of the park. The mobile home park must provide alternative drinking water, reduce the levels of arsenic in its distribution system and monitor the water for contamination. EPA is also requiring Oasis Mobile Home Park to conduct a study to identify a long-term compliance option based around consolidating the current privately-operated Oasis system to a local public water system. The Oasis Mobile Home Park's current drinking water system serves approximately 1,900 residents using groundwater that has naturally occurring arsenic. In August 2019, EPA issued the first emergency order to the water system for failure to comply with the regulatory Maximum Contaminant Level (MCL) for arsenic, which is 10 parts per billion (ppb). Arsenic, a naturally occurring mineral found throughout the United States, can be found in groundwater. Drinking high levels of arsenic over many years can increase the risk of lung, bladder, and skin cancers, as well as heart disease, diabetes, and

neurological damage. The Torres Martinez Desert Cahuilla Indians tribe has no direct control or ownership of the water system and has been consulted about the violations. The new order, issued for failure to properly maintain and operate its primary drinking water well and distribution system, requires Oasis Mobile Home Park and its owner to: 1) Provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; 2) Hire an outside consultant to assess the arsenic treatment and distribution systems; 3) Submit a compliance plan for approval; 4) Identify long-term compliance options for the system; 5) Increase sampling and reporting of arsenic and iron levels throughout the distribution system.

Indictments, Convictions, and Sentencing

- September 2, 2020 - In an order issued, the U.S. District Court for the Eastern District of California agreed with the Justice Department that John Sweeney and his company, Point Buckler Club LLC, committed "very serious" violations of the Clean Water Act associated with the construction of a nearly mile-long levee in sensitive tidal channels and marsh without a permit. The violations occurred on Point Buckler Island, an island in the greater San Francisco Bay that Sweeney had purchased in 2011. More particularly, Point Buckler Island is part of the Suisun Marsh, the largest contiguous brackish water marsh remaining on the west coast of North America. The Island is located in a heavily utilized fish corridor and is critical habitat for several species of federally protected fish. When Sweeney acquired the Island, nearly 40 acres of it supported and functioned as a tidal channel and tidal marsh wetlands system. As the court found, at that time Sweeney knew that Solano County, California, had zoned it as "Marsh Land." Sweeney had also, by that time, sought and obtained a Clean Water Act permit for activities in other areas of the Suisun Marsh. Beginning in 2014, without a permit, Sweeney excavated and dumped thousands of cubic yards of soil directly into the Island's tidal channels and marsh. This unlawful conduct, the court found, eliminated tidal exchange, harmed aquatic habitat, and adversely impacted water quality. The court noted that the Island's waters are "extremely acidic and saline." As the court's order provides, further proceedings will be conducted to determine the appropriate remedy.
 (Andre Monette)

LAWSUITS FILED OR PENDING

STATE ATTORNEYS GENERAL CHALLENGE TRUMP ADMINISTRATION'S REVAMP OF THE NATIONAL ENVIRONMENTAL POLICY ACT

In July 2020, the Council on Environmental Quality adopted sweeping revisions to its longstanding 1978 regulations detailing implementation of the National Environmental Policy Act (NEPA). In late August 2020, several states and local government entities brought an action against the council alleging that the agency's newly adopted regulations violated NEPA and the Administrative Procedure Act. As this article went to press, a motion seeking to enjoin implementation of the Final Rule on NEPA was made before the court. [*States of California, et al. v. Council on Environmental Quality, et al.*, Case No. 3:20-cv-06057 (N.D. Cal. 2020).]

Background

Enacted on January 1, 1970, the National Environmental Policy Act is a federal law that promotes the protection of the environment and established the President's Council on Environmental Quality (CEQ or Council). NEPA was developed at a time of heightened awareness and growing concern about the environment in response to a series of high-profile environmental crises in the late 1960s, such as the Cuyahoga River fire. As a result, NEPA has been described as the foundation for many state-level environmental protections across the country and is often referred to as the "Magna Carta" of United States environmental law. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir. 1991).

To ensure that the policies outlined by NEPA are "integrated into the very process of decision-making," NEPA outlines "action-forcing" procedures. *Andrus v. Sierra Club*, 442 U.S. 347, 349-50. These procedures require federal agencies to prepare a detailed environmental review or Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the environment, including those impacting regulated waters. *Id.* In short, NEPA requires federal agencies to make well-informed and transparent decisions based on a thorough review of

environmental and public health impacts, and input from states, local governments, and the public.

In 1978, CEQ promulgated regulations that have guided the implementation of NEPA for more than 40 years. These longstanding regulations have directed federal agencies, and in some situations, state agencies and local governments involved in major Federal actions significantly affecting the environment, on how to comply with NEPA's procedural requirements and its environmental protection policies. *See*, 40 C.F.R. pt. 1500 (1978) (1978 regulations). These regulations have remained largely unchanged with the exception of two minor amendments enacted in 1986 and 2005.

In 2017, President Donald Trump issued Executive Order 13,807, which called for revisions to the NEPA regulations, to expedite infrastructure projects and boost the economy. In response to this Executive Order, CEQ announced a plan to overhaul the 1978 regulations, including a list of topics that might be addressed by the rulemaking process, and taking public comments. *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 Fed. Reg. 28,591 (June 20, 2018) (Advance Notice). On January 10, 2020, CEQ released its proposal (Proposed Rule) to revise the 1978 regulations, which included revisions that would significantly alter the current implementation of NEPA.

After the publication of the Proposed Rule, CEQ provided 60 days for the public to review, analyze, and submit comments. During this timeframe, interested parties submitted over 1.1 million comments, a significant portion of which opposed the Proposed Rule. Four months after the close of the comment period, the Final Rule was published in the *Federal Register* on July 16, 2020. The Final Rule adopted a majority of the changes outlined by the Proposed Rule's revisions to the 1978 Regulations.

In response to the publication of the Final Rule, several states and local government entities filed a

lawsuit against CEQ in the U.S. District Court for the Northern District of California, alleging that CEQ's adoption of the Final Rule violated NEPA and the Administrative Procedure Act (APA).

The NEPA Claims

An agency does not have authority to promulgate a regulation that is "plainly contrary to the statute." *Babbitt v. Sweet Home Chapter of Cmty. For a Great Or.*, 515 U.S. 687, 703 (1995). Plaintiffs allege that the Final Rule violates NEPA by adopting provisions that, both individually and collectively, conflict with NEPA's overriding purposes of environmental protection, public participation, and informed decision-making. Specifically, the Final Rule may potentially restrict the number of projects subject to detailed environmental review, while also limiting the scope of environmental effects to be considered by federal agencies when conducting NEPA review. For example, if a project could potentially impact a local water source, the conducting agency may be required to consider only direct impacts of the imposed action on the water source, rather than future/cumulative actions. According to plaintiffs, these two changes directly conflict with NEPA's goal of applying the statute to the "fullest extent possible" and addressing the "long-range character of environmental problems." See, 42 U.S.C. §§ 4311, 4322. As a result, according to plaintiffs, the Final Rule should be set aside because it is plainly contrary to NEPA.

Additionally, NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). CEQ is a federal agency subject to NEPA. An EIS must discuss:

...the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any irreversible and irretrievable committed of resources involved in the proposed action. *Id.*

Under CEQ's 1978 regulations, a "major Federal action" included "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a) (1978). As a result, plaintiffs allege that CEQ was required, but failed to address the Final Rule's significant environmental impacts and reasonable alternatives to the

Final Rule in an EIS or, at a minimum, an Environmental Assessment (EA). Given CEQ's failure to prepare an EA or EIS, the states argue that the Final Rule should be declared unlawful and set aside.

The APA Claims

The Administrative Procedure Act provides that a court shall "hold unlawful and set aside" agency action that is arbitrary and capricious without the observance of procedure required by law or in excess of statutory authority. 5 U.S.C. § 706(2). Pursuant to the APA, in promulgating a regulation an:

...agency, must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

Plaintiffs allege that in promulgating the Final Rule, CEQ failed to provide a rational explanation for its changes to its longstanding NEPA interpretations and policies, relied on factors Congress did not intend for CEQ to consider, and offered explanations that ran counter to the evidence before the agency. Similarly, plaintiffs allege that CEQ lacked the statutory authority to implement certain provisions of the Final Rule, such as defining "major Federal action" to exclude an agency's failure to act, directly contradicting the 5 U.S.C. § 551(13). Plaintiffs also allege that CEQ failed to properly follow the APA's notice and comment requirements by failing to respond significant comments. As a result, plaintiffs argue that the Final Rule should be ruled unlawful and set aside on these grounds, in addition to the NEPA ground discussed above.

Conclusion and Implications

The Final Rule marks a significant alteration of the current NEPA scheme that will likely alter the environmental analysis undertaken for future federal and federalized projects, including those related to water. This suit led by a variety of state and local governments is the latest in a line of legal challenges of the Final Rule. In early August, a coalition of environmental groups led by the Natural Resources Defense Council, filed suit against the administration, challenging the rollback of environmental protections as

outlined by the Final Rule. Ultimately, it remains to be seen if these legal proceedings will result in a roll-back of the changes outlined in the Final Rule. The lawsuit can be found online here: <https://oag.ca.gov/system/files/attachments/press-docs/%5B1%5D%20Complaint%20for%20Declaratory%20and%20Injunctive%20Relief.pdf>

Editor's Note:

On September 22, 2020, the California Attorney General issued a 60-day notice of intention to sue the CEQ, along with several other states, on a new cause of action in relation to the NEPA Final Rule—violation of the federal Endangered Species Act. For the notice of intention, see: <https://oag.ca.gov/sites/default/files/Notice%20Letter%20to%20CEQ.pdf.pdf> (Jeremy Holm, Miles Krieger, Steve Anderson)

JUDICIAL DEVELOPMENTS

SECOND CIRCUIT DECISION EXTENDS
THE POTENTIAL SCOPE OF OIL POLLUTION ACT CLAIMS

Power Authority of the State of New York v. M/V Ellen S. Bouchard, 968 F.3d 165 (2nd Cir. 2020).

Although it is not the statute most commonly involved in water pollution litigation, the Oil Pollution Act (OPA) has played a major role in addressing marine spills. Disasters such as the Exxon Valdez spill have led to legislative strengthening of the statute from time to time since its origin in the late 19th Century, when it was regarded as more concerned with refuse than with oil spills.

On July 30, 2020 the Second Circuit reversed the decision of the U.S. District Court in a case that shows the potential breadth of the law.

Background

The facts involve a tugboat and barge in Long Island Sound waters that put down an anchor at just the wrong place. The anchor snagged an important specially constructed cable that transmitted high voltage electricity. The cable was fitted with a system that used a dielectric fluid as an insulator for the electricity in the cable. The dielectric fluid pressure was monitored and pressure in it was maintained by physical pump stations at either end of the cable where it came ashore.

The anchor cut the electric cable, and the result included a release of several thousand gallons of the dielectric fluid into the waters of the harbor. The clean-up cost was nearly \$10 million for the utility company alone.

Because the case involved vessels on navigable waters, there are special legislatively imposed limitations on the recovery of damages from mishaps. The law that so provides is called the Limitation Act. Although the defendants in the case had brought a Limitation Act proceeding, the Limitation Act accommodates claims that are provided for by other specific laws. In this case, the Power Authority brought an OPA claim.

At the District Court

The District Court heard the OPA claim and determined that the facts did not show the requisite ele-

ments for maintaining an OPA claim. The principal reason for that ruling was the holding of the District Court that the specialized electric cables were not within the definition of “facilities” under the OPA. “Facility” is defined as follows:

[A]ny structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes. (OPA, 33 USC § 2701(9).)

Under the law, the term “oil” has a broad definition:

... means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act; (33 USCS § 2701)

The Second Circuit’s Decision

The Second Circuit Court of Appeals noted that in reviewing a grant of summary judgment, especially whether a trial court has correctly applied a statute, the court’s decision is a matter of law for which it makes a *de novo* determination.

Defining ‘Facility’ and ‘Used for’ under the OPA

In this case, the Court of Appeals indicated that the plain meaning of the “facility” definition fits what happens to the dielectric fluid within the cable. It

observes that the fluid is “transferred” by the operation of the cables. It elaborated:

The crux of the question, then, is whether the utilization of this [transfer] capability suffices for the cables to be considered ‘used for’ that ‘purpose[.]’ 33 U.S.C. § 2701(9). We hold that it does. The definition’s language requires nothing more than that the cables be employed to transfer the dielectric fluid. And it is clear from the undisputed facts in the record that the cables are regularly used to, among other purposes, convey dielectric fluid along the length of the cables and between the cables and the pressurization plants, as the system calibrates and adjusts the volume of fluid required to maintain proper pressure in light of external conditions. Indeed, the record establishes that this movement of dielectric fluid—that is, its transfer in and out of the cables—is vitally important for the system to function properly.

In the end, the Second Circuit found as follows:

The district court entered summary judgment on the basis that the cable was not a “facility” as defined by the OPA because it was not “used for” one of the statutory definition’s enumer-

ated purposes, meaning the discharge was not governed by the OPA. We disagree, finding that the cable system is used for at least one of the enumerated purposes, and that it was therefore error to conclude the system was not a “facility” on that basis. For this reason, we **VACATE** the order of the district court and **REMAND** for further proceedings consistent with this opinion.

Conclusion and Implications

The court engaged in a discussion by which it made clear that it sees the definitions in the Oil Pollution Act as extending beyond the traditional oil spill, whether from a vessel or a facility onshore. The only doubt it expresses is a degree of uncertainty over whether the dielectric fluid in the cables is a true “oil”. It expects that the District Court will determine that more specifically upon remand. However, the record quoted in the opinion makes clear that some, if not all, the dielectric fluid is a hydrocarbon derived oily material. The definition itself would seem to permit the law’s application to virtually any sort of oil, including vegetable oils. The Court of Appeals’ opinion is available online at: <https://www.hklaw.com/-/media/files/insights/publications/2020/09/y49secondcircuitopinion.pdf> (Harvey M. Sheldon)

DISTRICT COURT REVERSES ARMY CORPS’ CLEAN WATER ACT JURISDICTIONAL DETERMINATION—APPLIES BOTH JUSTICE KENNEDY AND JUSTICE SCALIA’S ANALYSES IN RAPANOS

Lewis v. United States, ___F.Supp.3d___, Case No. CV 18-1838 (E.D. La. Aug. 18, 2020).

The U.S. District Court for the Eastern District of Louisiana recently reversed and remanded a U.S. Army Corps of Engineers (Corps) federal Clean Water Act (CWA) jurisdictional determination regarding two grass-covered, majority dry fields. The court noted a lack of appropriate evidence supporting the Corps’ determination under two different Supreme Court tests.

Factual and Procedural Background

Plaintiff Gary Lewis owns two tracts of land, both of which are grassy, predominantly dry, and were previously used for timber farming. When water is

present on the property, it flows from the tracts’ roadside drainage ditches to an unnamed tributary, then to Colyell Creek (an “impaired” water), and then to Colyell Bay (a traditional navigable water). Water from Lewis’ property travels some 10-15 miles before reaching Colyell Bay.

Lewis made plans to develop his land in July 2015 and therefore sought a jurisdictional determination from the Corps to determine whether the property was considered a wetland subject to the CWA. The following summer, the Corps issued its Approved Jurisdictional Determination, concluding that some portions of each of Lewis’ tracts were jurisdictional

wetlands, and both tracts in their entirety were therefore subject to the CWA. Lewis challenged the Corps' decision, arguing in particular that the Corps incorrectly determined the size and location of the property's adjacent wetlands and improperly concluded that a significant nexus between Lewis' property and the adjacent wetlands existed. The Corps thereafter reviewed its decision and in November 2017 reached the same conclusion.

Lewis then appealed to the judiciary and filed a motion for summary judgment, explaining the Supreme Court's *Rapanos* decision required a different outcome. The Corps filed a cross-motion for summary judgment, contending that the district court owes the Corps' decision great deference and that the record establishes a significant nexus between Lewis' wetlands and the waterway.

In light of the parties' cross motions, the threshold issue before the District Court became whether factual evidence in the record supported the Corps' conclusion that portions of Lewis' property were wetlands subject to the CWA.

The District Court's Decision

Under the Administrative Procedure Act, agency actions, findings, and conclusions can be set aside only if the court finds the decision is arbitrary, capricious, or otherwise not in accordance with the law.

The *Rapanos* Decision and the Scalia and Kennedy Analyses for Corp Jurisdiction of Wetlands

In *Rapanos v. United States*, 547 U.S. 715 (2006), the United States Supreme Court delivered a plurality opinion explaining when a wetland is subject to the CWA. In it, Justice Scalia's plurality adopted the "adjacency test," under which only wetlands with a "continuous surface connection" to other navigable water bodies are subject to the CWA. Justice Kennedy filed a concurring opinion advancing the "significant nexus test," which subjects wetlands to the CWA when there is a "significant nexus between the wetlands in question and [traditional] navigable waters." Justice Kennedy's test relies on hydrologic and ecologic factors to determine if a wetland's connection with other water bodies is significant.

Circuit Courts have split on which approach is correct, and the Fifth Circuit has not endorsed any approach. The District Court is within the Fifth Circuit's jurisdiction.

District Court Hedges Its Bet: Uses Both Approaches to Jurisdictional Determination

The court here declined to adopt either approach to wetlands and Corps jurisdiction, and, instead, evaluated the facts under both tests.

First, the court noted that the Corps acknowledged Lewis' land did not meet Justice Scalia's adjacency test. There was, therefore, no basis for CWA jurisdiction under this approach.

Second, the court considered Justice Kennedy's significant nexus test and concluded the nexus between Lewis' property and other water bodies was not significant. Regarding hydrologic factors, the court emphasized that the Corps observed only evidence of water flow from which it made inferences regarding the property's actual water flow and its impacts. But evidence of flow, the court explained, is not actual flow. Furthermore, the Corps relied on "field indicators" which likewise can only predict surface flow at some points during any given year. Since the Corps' analysis regarding the property's actual water flow relied only on inferences and predictions rather than actual observations, the court concluded the property's hydrologic factors weighed against CWA jurisdiction.

Considering the property's ecologic factors, the court again emphasized that the Corps' report was lacking. Because Lewis' land lies within a 500-year flood plain, the court explained, a portion of the property's pollutants will no doubt at some point flow downstream. Even still, the Corps' report failed to determine whether significant rain or flooding events occur often enough to have a substantial impact on the downstream water bodies. Therefore, since the Corps' report did not indicate the amount of pollutants actually traveling downstream and whether their collective effects were significant, the court concluded the ecologic factors, too, weighed against CWA jurisdiction.

Summary Judgment

After determining that both the hydrologic and ecologic factors weigh against the Corps' decision, the court concluded Lewis was entitled to summary judgment as a matter of law and granted Lewis' motion. In doing so, the court dismissed the Corps' argument that its budgetary constraints limited its ability to determine with perfection whether a significant

nexus existed. The court made clear that, regardless of budgetary or other constraints, Justice Kennedy's significant nexus cannot be established without demonstrating through the record a wetland's substantial effects on a traditional navigable waterway.

The court remanded the decision to the Corps for further consideration.

Conclusion and Implications

This case recognizes but does not specifically endorse any approach to Clean Water Act jurisdictional

determinations for wetlands within the Fifth Circuit. It does, however, suggest that parties seeking to challenge a Clean Water Act jurisdictional determination in the Fifth Circuit should be prepared, when possible, to argue under each of the plurality's approaches. This case also evaluates the type of evidence needed to support a jurisdictional determination. The court's opinion is available here: https://www.govinfo.gov/content/pkg/USCOURTS-laed-2_18-cv-01838/pdf/USCOURTS-laed-2_18-cv-01838-0.pdf (Melissa Jo Townsend, Rebecca Andrews)

DISTRICT COURT BARS CITIZEN SUIT AGAINST COUNTY IN GEORGIA DUE TO THE DILIGENT PROSECUTION PROVISION OF THE CLEAN WATER ACT

South River Watershed Alliance, Inc. v. DeKalb County,
___F.Supp.3d___, Case No. 1:19-cv-04299-SDG (N.D. Ga. Aug. 31, 2020).

The U.S. District Court for the Northern District of Georgia recently dismissed a citizen suit seeking to enforce the federal Clean Water Act against a defendant that had previously executed a consent decree with the U.S. Environmental Protection Agency and state Environmental Protection Department. The court found that the plaintiffs' citizen suit sought to enforce the same "standard, order, or limitation" as the consent decree and that the plaintiff did not plausibly allege a lack of "diligent prosecution" by the government agencies. The court therefore held that the Clean Water Act's diligent prosecution provision barred the plaintiffs' action.

Factual and Procedural Background

The Clean Water Act (CWA) governs the discharge of pollutants into the navigable waters of the United States and prohibits the "discharge of any pollutant" from any point source without a permit authorizing such discharge. The CWA grants the U.S. Environmental Protection Agency (EPA) authority to issue such permits, known as National Pollutant Discharge Elimination System (NPDES) permits. The CWA also authorizes private citizens to file a civil action (citizen suit) against an alleged polluter in violation of an effluent standard or limitation under the CWA or an order issued by the EPA or a state with respect to such standard or limitation. However,

this right is limited by the CWA's diligent prosecution provision, which prohibits the commencement of a citizen suit when the EPA or state has commenced and is diligently prosecuting a civil or criminal action to require compliance with a "standard, limitation, or order."

DeKalb County, Georgia (DeKalb), owns and operates a Water Collection and Transmission System (WCTS) designed to collect and transport wastewater to three locations. DeKalb is required to treat wastewater at these locations before discharging the water into surface water pursuant to NPDES permits issued by the Georgia Environmental Protection Department (EPD). In December 2010, the United States and the state of Georgia filed a complaint against DeKalb on behalf of the EPA and the EPD, respectively, alleging that, since 2006, DeKalb's WCTS experienced hundreds of untreated wastewater overflows that contained pollutants in violation of the CWA and the Georgia Water Quality Control Act (GWQCA). In 2011, the District Court approved a consent decree executed by DeKalb, the EPA, and the EPD. Pursuant to the consent decree, DeKalb was to undertake several actions to achieve the stated goal of full compliance with the CWA and the GWQCA.

In 2019, plaintiffs initiated a citizen suit, alleging DeKalb violated the consent decree, the CWA, and its NPDES permits. DeKalb thereafter filed a motion

to dismiss, arguing the plaintiffs' claims were barred by the CWA's diligent prosecution provision. Plaintiffs argued the 2011 consent decree was insufficient to ensure DeKalb's compliance and, alternatively, the government was not diligently prosecuting DeKalb for its violations.

The District Court's Decision

Prior to reviewing the motion to dismiss, the District Court determined whether the motion to dismiss was governed by Federal Rules of Civil Procedure (FRCP) Rule 12(b)(1), lack of subject-matter jurisdiction, or 12(b)(6), failure to state a claim. If the diligent prosecution provision is jurisdictional, the court stated, then Rule 12(b)(1) controls. Otherwise, FRCP Rule 12(b)(6) applies. The District Court determined that, because Congress did not provide a clear statement in the CWA that the diligent prosecution provision is a jurisdictional requirement, the provision was non-jurisdictional. Therefore, FRCP Rule 12(b)(6) applied.

Diligent Prosecution Provision

The District Court next determined whether the CWA's diligent prosecution provision barred the plaintiffs' citizen suit. The court applied the following two-part inquiry: first, the court must determine whether a prosecution by the state (or the EPA Administrator) to enforce the same "standard, order, or limitation" was pending on the date that the citizen suit commenced. If so, the court must then determine whether the prior pending action was being "diligently prosecuted" by the state or EPA at the time that the citizen suit was filed.

'Same Standard, Limitation or Order'

Under the first prong, the court may rely primarily on a comparison of the pleadings in the two actions to make its determination. The claims need not be identical for the action to cover the same standards and limitations. Comparing the plaintiffs' amended complaint with the 2010 complaint and the 2011 consent decree, the court concluded that there was substantial overlap in the standards and limitations on which the government and plaintiffs based their claims such that the two actions concerned the same "standard, limitation, or order." The court therefore addressed the second prong of the analysis: whether

the EPA and the EPD were diligently prosecuting the claims raised in their 2010 complaint and addressed by the 2011 consent decree.

'Diligent Prosecution'

In analyzing the second prong, a court ordinarily considers a CWA enforcement prosecution "diligent" if the judicial action is capable of requiring compliance with the CWA and is in good faith calculated to do so. Diligence is presumed, and the burden for proving non-diligence is heavy. A plaintiff must do more than show that the agency's prosecution strategy is less aggressive than the plaintiff would like or that it did not produce a completely satisfactory result. That is, a plaintiff must show that the government's actions are incapable of requiring compliance with the applicable standards.

The District Court quickly dismissed DeKalb's first argument—that the 2011 consent decree alone was sufficient to establish diligent prosecution—noting that the consent decree's language did not limit the rights of third parties, not a party to the consent decree, against DeKalb. Moreover, such a conclusion would diverge from clearly established law, the court stated.

The District Court, however, agreed with DeKalb's second argument that the government agencies' ongoing efforts to require compliance with the 2011 consent decree established diligent prosecution. Specifically, plaintiffs had alleged that sewage discharges from the WCTS into watersheds had not decreased in either priority or non-priority areas since the entry of the 2011 consent decree, the fines were too low to force compliance, DeKalb failed to meet a June 20, 2020 deadline to rehabilitate priority areas, the consent decree did not establish a timeline to rehabilitate nonpriority areas, and DeKalb implemented a different type of hydraulic model, with permission, than that required by the consent decree.

With regard to DeKalb's continued sewage discharges, the court focused on the government's repeated fining of DeKalb for noncompliance, reasoning that an "unsatisfactory result does not necessarily imply lack of diligence." The court was also unpersuaded by the plaintiffs' criticisms of the fine amounts, concluding that the appropriate fine amount is the type of discretionary matter to which the court should defer to the government agencies' expertise. Further, the court noted the plaintiffs did not allege the bad

faith needed to overcome the heavy presumption of diligence. As to DeKalb's failure to meet the June 20 deadline, the court reasoned that DeKalb's breach did not translate into a factual allegation of non-diligent prosecution by the government. Finally, as with the determination of the fine amount, the court reasoned that the government agencies' decision to not include a timeline for nonpriority areas and to permit DeKalb to implement a different hydraulic model than required by the consent decree were discretionary decisions best left to the agencies' expertise. Thus, the court held that the plaintiffs failed to allege any facts that could plausibly overcome the heavy presumption of diligence afforded to the government agencies.

Conclusion and Implications

This case demonstrates that an alleged polluter is not immunized from citizen suits under the CWA simply by entering into a consent decree with the government. However, for such an action to survive a motion to dismiss, a plaintiff must allege facts that state a plausible lack of diligence by the government agencies beyond mere disagreement with the agencies' approach. Instead, the plaintiff must allege facts that plausibly state the government's actions are incapable of requiring compliance with the applicable standards. The court's opinion is available online at: <https://www.courtlistener.com/recap/gov.uscourts.gand.268968/gov.uscourts.gand.268968.57.0.pdf> (Heraclio Pimentel, Rebecca Andrews)

CALIFORNIA SUPREME COURT HOLDS COUNTY'S BLANKET CLASSIFICATION OF ALL WELL CONSTRUCTION PERMIT ISSUANCES AS MINISTERIAL VIOLATES CEQA

Protecting Our Water and Environmental Resources v. County of Stanislaus,
___Cal.5th___, Case No. S. 251709 (Aug. 27, 2020).

The California Supreme Court in *Protecting Our Water and Environmental Resources v. County of Stanislaus* found that the County of Stanislaus (County) had violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*) by making a "blanket classification" that all permits issued under Chapter 9.36 of its groundwater well permitting ordinance, other than those requiring a variance, were "ministerial." The Court found the practice unlawful under CEQA because, "... while many of its decisions are ministerial. . . some of County's decisions may be discretionary."

Factual and Procedural Background

In 1968, the California Department of Water Resources (DWR) issued Water Resources Bulletin No. 74, Water Well Standards: State of California. As revised and supplemented, Bulletin No. 74 has been described as a "90-page document filled with technical specifications for water wells."

Under Water Code § 13801, subdivision (c), counties are required to adopt well construction ordinances that meet or exceed the standards in Bulletin No. 74. Many counties have incorporated the bulletin's

standards into their well permitting ordinances.

In 1973, the County of Stanislaus enacted Chapter 9.36 of its County Code regulating the location, construction, maintenance, abandonment, and destruction of wells that might affect the quality and potability of groundwater. Many of the permit standards in Chapter 9.36 incorporate by references standard set forth in Bulletin No. 74, including Standards 8.A, 8.B, and 8.C.

Standard 8.A addresses the distance between proposed wells and potential sources of contamination such as storm sewers, septic tanks, feedlots, etc. It requires that all wells "be located an adequate horizontal distance" from those sources and provides specific separation distances that are "generally" considered to be adequate—but allows an agency to increase or decrease suggested distances, depending on circumstances.

Standard 8.B provides that "[w]here possible, a well shall be located up the ground water gradient from potential sources of pollution or contamination." Under Standard 8.C, "[i]f possible, a well should be located outside areas of flooding."

Chapter 9.36 of the County Code also allows for variance permits to be issued by the County Health

Officer authorizing an exception to any provision of Chapter 9.36 “when, in his/her opinion, the application of such provision is unnecessary.” When authorizing a variance, the health officer may prescribe “such conditions as, in his or her judgment, are necessary to protect the waters of the state.”

In 1983, the County adopted its CEQA regulations generally classifying *all* well construction permits as ministerial projects absent a variance permit. In 2014, the County amended Chapter 9.37 of the County Code to prohibit the unsustainable extraction and export of groundwater. Chapter 9.37 requires that permit applications also satisfy Chapter 9.36.

Since 2014, the County has had a practice of treating all non-variance permit approvals as ministerial. Plaintiffs sued the County, alleging “a pattern and practice” of approving well permits without CEQA review. Plaintiffs asserted that all permit issuance decisions under Chapter 9.36 are discretionary because the County can:

. . .deny [a] permit or require changes in the project as a condition of permit approval to address concerns relating to environmental impacts.

The trial court ruled that the County’s approval of all non-variance permits was ministerial. The Court of Appeal reversed, concluding that issuance of well construction permits is a discretionary decision, but acknowledged that many of the decisions the County may make under Chapter 9.36 would be ministerial. Nevertheless, the appellate court found that the County’s compliance determination under Standard 8.A involved sufficient discretionary authority to make the issuance of all permits under Chapter 9.36 discretionary—which would trigger CEQA compliance.

The Supreme Court granted the County’s petition for review.

The Supreme Court’s Decision

The Supreme Court began its inquiry by distinguishing discretionary projects from ministerial projects. A project is discretionary if the government can shape the project in any way which could respond to any of the concerns which might be identified” during an environmental review. The Court noted that when a project involves an approval that

contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary.

De Novo Review

In setting forth the standard of review, the Supreme Court articulated that because the County’s position that the permits were regardless of the circumstances is based on the County’s legal interpretation of Chapter 9.36, the Court reviews that interpretation *de novo*.

Standard 8.A Confers County Discretion to Deviate from General Standards

The Court concluded that the plain language of Standard 8.A authorizes the County to exercise judgment or deliberation when it decides to approve or disapprove a permit. Although the standard sets out distances generally considered adequate, individualized judgments may be required. For example, Standard 8.A notes that an:

. . .adequate horizontal distance may depend on ‘[m]any variables’ and ‘[n]o set separation distance is adequate and reasonable for all conditions.

The Court acknowledged that the standard does provide a list of minimum suggested distances, but notes that Standard 8.A expressly provides that “[l]ocal conditions may require greater separation distances.” Moreover, if, in the opinion of the enforcing agency adverse conditions exist, Standard 8.A requires that the suggested distance be increased, or special means of protection be provided. Finally, approval of lesser distances may be allowable by the enforcing agency on a “case-by-case basis.” The Supreme Court concluded that the language in Standard 8.A confers significant discretion on the County to deviate from these general standards depending on the circumstances. Such permit issuance cannot therefore be classified as ministerial.

Limited Discretion is Not the Same Thing as Lacking Discretion

The Supreme Court rejected the County’s argument that permit issuance is ministerial because under Standard 8.A the County may only adjust the

location of a well to prevent groundwater contamination. Chapter 9.36 does not allow the County to address other environmental concerns or impose other measures that might prevent groundwater contamination, such as regulating pesticides or fertilizers. In response, the Court stated that “[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything.” That the County has the authority to require a different well location, or deny the permit, is sufficient to make the issuance of the permit discretionary.

The Appropriate Remedy

The Supreme Court, however, disagreed with the appellate court that permits issued under Chapter 9.36 are always a discretionary project. The fact that an ordinance contains provisions that allow an agency to exercise independent judgment in some instances does not mean that all permits are discretionary. The Court observed that sometimes the discretionary provisions are not relevant to a particular permit. For example, Standard 8.A only applies when there is contamination source near a proposed well.

The Supreme Court concluded by reversing the Court of Appeal holding that all permit issuances under Chapter 9.36 are discretionary but finding that plaintiffs were not entitled to a declaration to that effect nor an injunction requiring the County to

treat all permit issuances as discretionary. Rather, the Court held that plaintiffs were entitled to a declaration that the County’s blanket ministerial categorization is unlawful:

Accordingly, classifying all issuances as ministerial violates CEQA. Plaintiffs are entitled to a declaration to that effect. But they are not entitled to injunctive relief at this stage, because they have not demonstrated that *all* permit decisions covered by the classification practice are discretionary.

Conclusion and Implications

In light of this decision, a local agency that categorically classifies the issuance of a particular permit as ministerial may want to review its permitting ordinance to ensure that it complies with the Supreme Court’s holdings. When an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not categorically classify the issuance of permits as ministerial. But the agency may classify a particular permit as ministerial and develop a record in support of that classification.

<https://www.courts.ca.gov/opinions/documents/S251709.PDF>

(Christina Berglund)

CALIFORNIA COURT OF APPEAL AFFIRMS STATE WATER BOARD’S AUTHORITY TO REGULATE UNREASONABLE WATER USE THROUGH TEMPORARY EMERGENCY REGULATIONS AND CURTAILMENT ORDERS

Stanford Vina Ranch Irrigation Company v. State of California, 50 Cal.App.5th 976 (3rd Dist. 2020).

The California Third District Court of Appeal recently upheld a determination that the State Water Resources Control Board’s (SWRCB or Board) possesses broad authority to issue temporary emergency regulations and curtailment orders which establish minimum flow requirements, regulate unreasonable use of water, and protect threatened fish species during drought conditions.

Background

Plaintiff/appellant Stanford Vina Ranch Irriga-

tion Company (Stanford Vina) diverts water for agricultural uses from Deer Creek, a tributary to the Sacramento River. Stanford Vina is entitled to use 66 percent of the flow of Deer Creek and holds both riparian and pre-1914 appropriative water rights.

Two species of anadromous fish, Chinook salmon (fall run and spring run) and steelhead trout migrate from the Pacific Ocean to Deer Creek each year to spawn. The spring Chinook salmon and steelhead trout are listed as a threatened species under the California Endangered Species Act and the federal

Endangered Species Act. Federal and state agencies have concluded that Deer Creek has “high potential” for supporting viable populations of both spring-run salmon and steelhead trout. The water diversion structures operated by Stanford Vina on Deer Creek were alleged to have the potential to dewater Deer Creek during low flow periods and to also negatively affect the outmigration of juvenile spring-run salmon and steelhead trout.

In 2014, California was in the midst of one of the most severe droughts on record. Extreme drought conditions threatened to dewater high priority streams during critical migration periods for threatened and endangered fish species. In response, then-Governor Jerry Brown declared a drought state of emergency and signed urgency legislation that included authority for the SWRCB to adopt emergency regulations. Those emergency regulations included, among other provisions, Board authority to prevent waste and unreasonable use of water, to promote water conservation, and to require curtailment of certain surface water diversions. The SWRCB thereafter began promulgating regulations implementing in-stream flow requirements for Deer Creek and other surface water courses.

Specifically, the regulations declared that any diversion reducing flows beneath drought emergency minimums would be a per se waste and unreasonable use in violation of Article X, § 2 of the California Constitution. The emergency regulations barred water from being diverted from Deer Creek and other specific streams during the effective period of any SWRCB curtailment orders issued pursuant to the regulations.

On June 5, 2014, the Board issued the first curtailment order for Deer Creek, which directed all water rights holders to immediately cease or reduce their diversions in order to maintain the drought emergency minimum flows specified by the regulation. Between June 2014 and October 2015, the Board issued three more curtailment orders to Deer Creek water users.

Procedural History

Stanford Vina filed suit against the SWRCB in October 2014 asserting causes of action for inverse condemnation and declaratory relief over the temporary emergency regulations. Stanford Vina argued that the emergency regulations and curtailment orders were

unreasonable, violated due process requirements, and amounted to a taking of vested water rights without just compensation.

The trial court concluded that the Board possessed quasi-legislative authority to adopt the challenged emergency regulations without first holding an evidentiary hearing. It found that under the extreme drought conditions, the Board rationally determined that allowing diversions to reduce flows below the minimum amounts necessary for fish migrations and survivability would be an unreasonable use of water. The trial court also rejected Stanford Vina’s taking argument and rule of priority argument and entered judgment against Stanford Vina on all causes of action.

The Court of Appeal’s Decision

The Third District Court of Appeal affirmed the trial court’s decision and held that the Board has broad authority to regulate the unreasonable use of water. This authority, the court found, included the right to adopt regulations, establish minimum flow requirements to protect the migration of threatened fish species during drought conditions, and to declare unreasonable diversions of water would cause in-stream flows to fall below levels needed by those fish. Because different standards of review apply to the Board’s quasi-legislative rule making power and its quasi-adjudicative enforcement actions, the court addressed the validity of the challenged regulations and challenged curtailment orders separately.

Validity of the Challenged Regulations

The Court of Appeal determined that the emergency regulations were within the Board’s regulatory authority in furtherance of its constitutional and statutory mandate to prevent waste and unreasonable uses of water and consistent with Article X, § 2 of the California Constitution and Water Code §§ 100, 275, 1058, and 1058.5:

- Section 100: Provides in relevant part that ‘the right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unrea-

sonable method of use or unreasonable method of diversion of water.’

- Section 275: The Board is authorized to ‘take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.’

- Section 1058: The Board is authorized to ‘make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties.’

- Section 1058.5: The Board is authorized to adopt emergency regulations to prevent ‘unreasonable use, unreasonable method of use, or unreasonable method of diversions’ during severe drought conditions.

The court further held that adoption of the regulations was not arbitrary, capricious, or lacking in evidentiary support.

The court then concluded that, contrary to Stanford Vina’s arguments, the Board was not required to hold an evidentiary hearing before making a “reasonableness determination” as to plaintiff’s use of water. According to the court, neither the due process clauses of the federal or California Constitutions, nor article X, § 2 of the California Constitution, require the Board to hold an evidentiary hearing prior to adoption of a regulation governing reasonable water use.

Citing heavily to and expanding upon *Light v. State Water Resources Control Bd.*, 226 Cal. App.4th 1463 (2014) (*Light*) and the line of reasonable use cases before it, the Court of Appeal also concluded that the Board’s authority included the direct regulation of riparian and pre-1914 appropriative water rights holders without first holding an evidentiary hearing, and the ability to adopt curtailment orders that notified the affected water rights holders the emergency regulations were put into effect.

Validity of the Challenged Curtailment Orders

The Court of Appeal next analyzed whether the SWRCB had properly implemented the emergency regulations by issuing the challenged curtailment or-

ders. Contrary to Stanford Vina’s assertion, the court found that Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations regardless of its status as a senior riparian and that it held pre-1914 water rights. Thus, the court applied the substantial evidence standard of review in assessing the validity of the curtailment orders.

Upon review of the record, the court found that substantial evidence supported the SWRCB’s conclusion that curtailed diversions would have caused or threatened to cause the flow of water in Deer Creek to fall below the emergency minimum flow requirements. The court further held that the curtailment orders were not a taking of the company’s water rights, because the mere regulation of the use and enjoyment of a property right for the public benefit is a permissible exercise of the state’s police power and does not amount to a taking under eminent domain. Therefore, the Board had acted within its authority to determine that diversions from Deer Creek threatened to violate the emergency regulations minimum flow requirements constituted an unreasonable use of water.

The court further rejected the argument that the curtailment orders were a taking of private property without just compensation since it found that Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations. Along those lines, the court dismissed any claims that the regulations and curtailment orders impermissibly interfered with a prior judicial decree declaring its water rights, because rights declared by a judicial decree are subject to the rule.

Conclusion and Implications

The *Stanford Vina* decision is an interesting and consequential case among those pertaining to the applicability and use of the reasonable use doctrine. Whereas in *Light* the court acknowledged that the curtailment and regulation of riparian and pre-1914 water users would be pursuant to local programs and not by the State Water Resources Control Board itself, the Third District Court of Appeal in this case found that the Board may, under certain circumstances itself declare diversions unreasonable and issue curtailment orders to cease all diversions of water without first holding an evidentiary hear-

ing. While the SWRCB authority during the unique circumstances of an extraordinary multi-year drought is made more-clear by the court's opinion, it leaves unanswered whether a similar approach would work

during less extreme circumstances. The court's opinion is available online at: <https://www.courts.ca.gov/opinions/documents/C085762.PDF> (Paula Hernandez, Derek R. Hoffman)

NEVADA SUPREME COURT ANSWERS CERTIFIED QUESTIONS FROM THE NINTH CIRCUIT COURT OF APPEALS REGARDING THE STATE'S PUBLIC TRUST DOCTRINE

Mineral County, et al. v. Lyon County, et al., Case No. 75917, 136 Nev.Adv.Op. 58 (Sept. 17, 2020).

On September 17, 2020, the Nevada Supreme Court issued an eagerly awaited ruling regarding the public trust doctrine in the long-running Walker River litigation. Answering certified questions from the Ninth Circuit Court of Appeals, the court held that the public trust doctrine, as implemented through Nevada's comprehensive water statutes, does not permit a court to reallocate water rights that were adjudicated and settled under the prior appropriation doctrine. In reaffirming that the public trust doctrine applies in Nevada, the Court recognized it to include all waters of the state, not just those that were navigable at statehood. A dissenting opinion by two of the seven justices took issue with both of these conclusions

The Walker River

The Walker River runs from the Sierra Nevada mountains in California into the Great Basin of Nevada, where it terminates in Walker Lake. The majority of precipitation and surface water flow into the Walker River Basin occurs in California, but most of the water is consumed by irrigators in Nevada. Since agricultural appropriations from the river and its tributaries first commenced in the mid-nineteenth century, the size and volume of Walker Lake have shrunk significantly, and the concentrations of total dissolved solids have risen to the point where the lake can no longer sustain a fishery. Disagreement exists as to the causes of these changes, but there is general consensus that upstream diversions play at least some part.

Litigation over the Walker River

Litigation over the Walker River commenced in

1902 as a trans-border dispute in the U.S. District Court for Nevada between two ranching operations, one in California and one in Nevada. The case ended in 1919, but five years later, the United States commenced a new action in the same federal court seeking to establish a federally reserved water right for the Walker River Paiute Tribe (Tribe). The court issued a decree in 1936 (subsequently amended in 1940) that distributed water rights to the Tribe and various other claimants and that retained jurisdiction in the decree court for future modification.

In 1991, the Walker River Irrigation District filed a petition with the decree court to enforce its decreed rights in response to regulatory action by the California State Water Resources Control Board to prevent the District from dewatering portions of the river. The Tribe and the United States filed counterclaims, asserting new rights for a reservoir built on the tribal land. In 1994, Mineral County—in which Walker Lake it located—moved to intervene, requesting that the court reopen and modify the decree “to recognize the rights of Mineral County ... and the public to have minimum [water] levels to maintain the viability of Walker Lake.” Invoking the public trust doctrine, Mineral County requested that the court require at least 127,000 acre-feet annually to reach Walker Lake.

In 2015, the decree court dismissed Mineral County's complaint in intervention for lack of standing but nevertheless proceeded to address, in detail, the applicability of the public trust doctrine. The court concluded that the public trust doctrine could not be used to reallocate decreed rights without constituting a taking for which just compensation must be paid. Mineral County appealed.

Certified Questions from the Ninth Circuit Court of Appeals

The Ninth Circuit held the District Court erred by dismissing Mineral County's complaint in intervention for lack of standing and certified two questions to the Nevada Supreme Court:

- Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?
- If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

The Nevada Supreme Court accepted both certified questions and ordered briefing. Nearly 30 interested parties filed amicus briefs, including the Nevada State Engineer, municipal water purveyors, environmental groups, farmers, ranchers, the Pacific Legal Foundation, the Nevada Mining Association, and a group of law professors. Also participating as an amicus was the State of California, which discussed its own implementation of its public trust responsibility to the Walker River based on the groundbreaking *National Audubon Society v. Superior Court* case related to Mono Lake. 33 Cal.3d 419, 452 (1983).

The Nevada Supreme Court's Majority Opinion

The court's analysis went through the origins of public trust doctrine jurisprudence, from the seminal *Illinois Central Railroad* case issued by the United States Supreme Court to its own decision in *Lawrence v. Clark County*, which was the first to expressly adopt the public trust doctrine in Nevada. 127 Nev. 390, 406, 254 P.3d 606, 617 (2011). The Court cited the sources of Nevada's public trust doctrine as the common law, the state's constitution and statutes and the inherent limitations on state sovereignty. As to water, the Court noted that the Nevada Legislature "effectively codified" public trust principles when declaring that all waters within the state, whether above or beneath the surface, belong to the public. NRS 533.025.

Acknowledging that this precedent makes clear

that the public trust doctrine applies to the waters of the state, the Supreme Court rephrased the first certified question to ask:

Does the public trust doctrine permit reallocating rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?

Although the Court "explicitly recognize[d] that the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation, such that the doctrine has always inhered in the water law of Nevada as a qualification or constraint in every appropriated right," the Court nevertheless answered the first certified question (as rephrased) "no."

To reach this conclusion, the Supreme Court looked to the state's comprehensive water statutes. Although the Legislature has declared that all water belongs to the public, it also embraced the prior appropriation doctrine, which makes all appropriations subject to existing rights. The state's water statutes also incorporate the concept of beneficial use as a fundamental principle governing water appropriations. To that end, the statutes allow a multitude of uses, including not only traditional uses such as irrigation, stockwater, mining, municipal, commercial and industrial, but also recreation and wildlife.

When considering an application to appropriate or change the use of water, the State Engineer must follow numerous legislatively established guidelines. Among those guidelines are whether the proposed use is environmentally sound, is appropriate for the long term without unduly limiting future growth and development, or threatens to prove detrimental to the public interest. The court deemed these statutory guardrails as "consistent with the public trust doctrine" and, therefore, as fulfilling the state's responsibility to protect the public trust.

Although water rights are usufructuary, the Court concluded that:

...this does not necessarily mean that water rights can be reallocated under the public trust doctrine. Rather, it means that rights holders must continually use water beneficially or lose those rights.

As a result, although recognizing the "tragic decline of Walker Lake" and the "resulting negative

impacts on the wildlife, resources and economy of Mineral County,” the Court determined that it could not, under the public trust doctrine, “uproot an entire water system, particularly where finality is firmly rooted in our statutes.”

The Court deemed this a matter of policy for the Nevada Legislature, not the courts, to address. It is in that important respect that the court reached the opposite conclusion than the California Supreme Court reached nearly 40 years ago in the *Audubon* case.

Because the Court answered the first certified question in the negative, it did not need to address the second.

Clarification of the Public Trust Doctrine as to Nonnavigable Tributaries

In an interesting turn, the Court:

...clarif[ied] that the public trust doctrine applies to all waters of the state, whether navigable or nonnavigable, and to the lands underneath navigable waters.

In reaching this result, the Court expanded the public trust beyond how it was originally envisioned in *Illinois Central* and its progeny. In explaining its interpretation, the Court relied on the Legislature’s recognition of all water sources as belonging to the public. For that reason, the Court concluded that nonnavigable tributaries are within the scope of the public trust doctrine. Although not expressly mentioned, the decision leads to the conclusion that groundwater is also within the public trust doctrine’s reach.

The Dissent

Two Justices concurred in part and dissented in part, taking issue with the manner in which the majority both reframed and then answered the certified question. Citing the *Audubon* case, the dissent complained:

As revised, the question suggests an all-or-nothing approach that is fundamentally inconsistent with the public trust doctrine. Nevada’s appropriative water rights system and the public trust doctrine developed independently of each other. The goal is to balance them and their competing values, not set them on a collision course.

By reframing the certified question, the dissent protested, the majority “misdirects the analysis, because it excludes the balancing that lies at the heart of the public trust doctrine.” The dissent disagreed that Nevada’s water statutes, as implemented by the State Engineer’s discretionary decision making, is the exclusive means by which the state carries out its public trust responsibility, “This view fundamentally misapprehends the public trust doctrine and its constitutional and sovereign dimensions.”

Even if the State Engineer might conclude that an appropriation is in the public interest, the dissent noted, it still might harm public trust values.

As emphasized by the dissent, to the extent the public trust doctrine is enshrined in Nevada’s water statutes, there must still be a “judicial check” on how the Legislature implements it:

[T]he public trust doctrine, enforced by a separate and independent judiciary, is one intentionally endowed with flexibility—to consider a multitude of needs and impacts, to encompass more and different protections over this state’s water sources, to check the actions by legislative and executive actors for absolute compliance with their fiduciary obligations—that those limited statutory sections cited lack.

This conclusion derives from two sources: 1) the Court’s constitutional responsibility to provide judicial oversight over legislative actions that purport to convey property held in trust for the public; and 2) separation of powers principles. As summarized by the dissent:

...it cannot be that with the enactment of [the water statutes], the Legislature effectively delegated to an administrative officer its own public trust obligations and the judiciary’s responsibility to police constitutional and sovereign limits on the Legislature’s own authority.

The desire for finality does not abdicate this oversight role particularly when, the dissent noted, Mineral County identified several potential remedies that would not disturb vested rights or impinge on principles of finality. In any event, the dissent observed, finality would be one piece of what the trial court would take into account when reexamining existing rights within the framework of the public trust

doctrine. Because even vested water rights are subject to the public trust, the dissent concluded, the trial court's enforcement of the public trust doctrine would not affect a reallocation of rights and therefore would not "divest anyone of legal title previously held."

Interestingly, while decrying what it deemed the majority's abandonment of the judiciary's role in enforcing the public trust doctrine, the dissent also criticized the majority for expanding the public trust doctrine to include nonnavigable waters. Although the dissent recognized this as consistent with how the public trust doctrine is evolving in various jurisdictions, the dissent deemed this conclusion to be outside the ambit of the certified questions and beyond the scope of facts presented in the case.

Conclusion and Implications

Although the members of the Supreme Court disagreed as to how the public trust doctrine should be implemented in stressed river systems such as the Walker River, they agreed that it is enshrined in Nevada law. Ultimately, the Supreme Court's holding was narrowly tailored to address the question of reallocation of vested water rights. It left open the potential use of other remedial strategies, such as those urged by Mineral County, to protect public trust values. That will be the task for the federal decree court on remand.

(Debbie Leonard)

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