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# ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

## LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

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## ENVIRONMENTAL NEWS

# BIDEN ADMINISTRATION INVESTS $50 MILLION IN CALIFORNIA WATER STORAGE PROJECTS AS PART OF LARGER INVESTMENT

Investment by the Biden administration into California water storage projects aims to improve water security, drought resiliency, improved resource management, and water to support native species and water dependent ecosystems.

### Background

On November 6, 2021, the Bipartisan Infrastructure Investment and Jobs Act (IIJA) passed Congress for the purpose of investing in the deteriorating infrastructure as well as expanding infrastructure investments throughout the United States. Since the adoption of the IIJA, the United States is investing more than $48 billion in drinking and wastewater infrastructure, $2.6 billion in ecosystem restoration, and $17 billion in direct funding to Army Corps of Engineers to mitigate impacts of climate change.

### July 2023 Announcement

On July 27, 2023, President Biden announced that $152 million from the IIJA is being dedicated to bringing clean, reliable drinking water to communities in the western United States through investments in six water storage and conveyance projects in California, Colorado and Washington. As part of this investment, California is receiving $50 million for three projects aimed at building drought resiliency and infrastructure stability. These projects include the B.F. Sisk Dam Raise and Reservoir Expansion Project, the Los Vaqueros Reservoir Expansion project, Phase II, and the North-of-Delta Off-stream Storage (Sites Reservoir) Project.

### B.F. Sisk Dam Raise and Reservoir Expansion

The B.F. Sisk Dam and San Luis Reservoir, located approximately 35 miles west of the City of Merced is part of the Central Valley Project and California State Water Project. The dam, completed in 1967, impounds the nation's largest off-stream reservoir, San Luis Reservoir, with a capacity of more than 2 million acre-feet. San Luis Reservoir provides storage water for irrigation, municipal, and industrial uses. The Department of Interior is utilizing IIJA funding to upgrade the dam safety to better meet seismic risks. As part of those improvements, the B.F. Sisk Dam is being raised by an additional ten feet, creating an additional 130,000 acre-feet of storage in San Louis Reservoir. The additional 130,000 acre-feet will be used to serve existing contractual obligations to South-of-Delta water contractors and wildlife refuges.

### Los Vaqueros Reservoir, Phase II Expansion

Located approximately nine miles from the City of Livermore, the Los Vaqueros Reservoir was originally completed in 1998 added 100,000 acre-feet of storage water to support water supplies in Contra Costa County. The dam height was raised and the reservoir was expanded to a maximum capacity of 160,000 acre-feet in 2012. The second phase of the reservoir expansion will raise the height of the Los Vaqueros Dam again, allowing the storage capacity of the reservoir to expand to 275,000 acre-feet. The additional capacity of the Los Vaqueros Reservoir will improve water supply reliability, develop water supplies for environmental management, allow emergency water supplies, and improve flexibility of the Central Valley Project water management.

### North-of-Delta Off-stream Storage Project

The North-of-Delta Off-stream Storage project, otherwise known as Sites Reservoir, is a joint project between the U.S. Department of the Interior, Bureau of Reclamation and the Sites Project Authority. The Sites Reservoir will be constructed approximately 65 miles northwest of Sacramento with a capacity between 1.3 and 1.5 million acre-feet. In addition to providing greater operational flexibility to the Central Valley Project, the Sites Reservoir will supply water to meet agricultural, municipal and environmental needs. Sites Reservoir will increase the supply and

reliability of water deliveries statewide, particularly during periods of drought. The operation and management of Sites Reservoir will improve water flows to support anadromous fish and improvements to habitat management in the Sacramento River above the Red Bluff Diversion Dam. Additionally, water from Sites Reservoir will be used to support wildlife refuges and support enhancement of the Delta ecosystem. Project advocates assert that the Sites Reservoir will enhance the resiliency, reliability and flexibility of statewide water supplies during period of drought. Construction is expected to commence in 2025.

### Conclusion and Implications

As California, and the rest of the western United States, continues to face the challenges of increased aridification and periods of prolonged drought and extreme weather events, the investment by the Biden Administration and Congress is a significant step in building a more water resource resilient future with improved capacity to manage California's resources both during periods of excess and periods of drought. These projects reflect the prioritization of developing water security as well as improving water availability to ease challenges presented in serving existing commitments to California's agricultural and municipal users while allowing for improved habitat and ecosystem management to support California's endemic species.
(Micheline Nadeau Fairbank, Derek Hoffman)

## PFAS MANUFACTURERS PRELIMINARILY SETTLE CLAIMS FOR DRINKING WATER CONTAMINATION

Earlier this summer, certain manufacturers of PFAS settled claims brought by entities operating water systems across the United States. The settlements cover public water systems in the United States that have one or more impacted water sources as of the settlement date, and systems that are either required to test for PFAS or serve more than 3,300 people. Public water systems owners affected by PFAS can opt-in to the settlements or, conversely, can opt-out to pursue their own claims.

### Background

Per- and polyfluoroalkyl substances (PFAS) is a class of manufactured chemicals that can be found in items such as non-stick cookware, clothing, carpeting, cosmetics, electronics, food packaging, and firefighting foam. PFAS are known as "forever chemicals" due to their resistance to environmental decomposition and ability to build up within the human body, animals, and the environment. Scientific studies have shown that exposure to some PFAS substances in the environment may be linked to harmful health effects in humans and animals.

In June, 2023, PFAS manufacturers 3M Company (3M), Chemours Company (Chemours), DuPont de Nemours, Inc. (DuPont), and Corteva, Inc. (Corteva) settled claims brought by water systems across the United States (collectively: Settlements). The Settlements cover public water systems in the United States that have one or more impacted water sources as of the settlement date, or public water systems in the U.S. that are either required to test for certain PFAS or serve more than 3,300 people.

Preliminary approval for the 3M Settlement is anticipated to occur in mid-August of this year. However, the approval date may be delayed due to challenges by state attorney generals, including by California's Attorney General. Preliminary approval of settlements for Chemours, DuPont, and Corteva occurred on August 22, 2023. Final approvals of the settlements typically happen ten days after preliminary approvals.

Under the proposed settlements, public water system owners may also opt out. The deadlines to do so are 60 days after final approval of a settlement. For the 3M settlement, less any delays, public water system owners can opt out by mid-October. Opt-out deadlines for the Chemours, DuPont, and Corteva will occur toward the end of November.

### The Settlements

Several billion dollars may be collectively available to public water system owners under the Settlements.

Under the 3M Settlement, $10.5-12.5 billion will be available for distribution. Under the Chemours, Dupont, and Corteva Settlements, approximately $1.185 billion will be available.

Under the Settlements, public water systems are rated based on a PFAS score. The PFAS score is a source-dependent determination that relies on the highest measured concentration of any PFAS in a water system, and the size of the source, *i.e.* the capacity of the source and the highest three years of historical use over the last ten years. The PFAS score is also adjusted based on how long a public water system owner has participated in the litigation and if PFAS levels are above a proposed or state maximum contaminant level.

The Settlements also create three funds: the Action Fund, the Supplemental Fund, and the Special Needs Fund.

The Action Fund covers remediation costs and operation and maintenance costs for a water source, adjusted based on the PFAS score. Models are currently being developed to calculate entitlement amounts based on the final calculation of PFAS scores.

The Supplemental Fund provides funding for water sources that were not initially eligible for funding under the Action Fund, but later became eligible as determined by PFAS testing. Relatedly, the Special Needs Fund provides funding to cover PFAS sampling costs.

As part of the Settlements, settling public water systems release their ability to make claims against the manufacturers related to PFAS that has entered or may reasonably be expected to enter public water systems. Nor may settling parties make claims related to the transport, disposal, or arrangement for disposal of PFAS-containing waste or wastewater, or any use of PFAS-containing water for irrigation or manufacturing. Finally, settling parties may not make claims for punitive or exemplary damages related to or involving PFAS or any product manufactured with or containing PFAS. This release does not apply to claims related to stormwater, wastewater, or real property that have PFAS issues which are separate from drinking water claims. Indemnity provisions are not yet final.

For public water systems choosing to opt out of the Settlements, such systems will not receive any money from the Settlements but may potentially recover damages on an individual basis. However, individual claims may face obstacles due to potential bankruptcies of the allegedly responsible companies and the need to prove that a particular contaminant came from a particular manufacturer.

### Conclusion and Implications

The PFAS Settlements represent substantial sums that may be available for distribution. It is not clear how much settlement money will be available to any given public water system opting in to the settlements, or if the amount of money received will adequately remedy PFAS-related problems experienced by the public water systems. Nonetheless, there appears to be an opportunity for PFAS-affected public water systems that are eligible to opt in to the Settlements to recover some portion of the funding available for distribution, but in exchange public water system owners opting-in to the Settlements will likely relinquish claims they may otherwise have for drinking-water related PFAS issues. For more information, *see:* DuPont Preliminary Settlement Approval, available at: https://www.documentcloud.org/documents/23924041-2023-08-22_dupont_preliminary_approval_of_settlement_agreement; 3M Press Release re Settlement, available at: https://d1io3yog0oux5.cloudfront.net/_f0311ba28b9a4f94ce7281423dfff33a/3m/news/2023-06-22_3M_Resolves_Claims_by_Public_Water_Suppliers_1784.pdf.
(Miles Krieger, Steve Anderson)

# NEW MEXICO WATER SCARCITY CONCERNS RISE AS PROLONGED DROUGHT, INCREASED PECAN AND CANNABIS FARMING STRAIN SYSTEM

It is no surprise that a state like New Mexico, in the arid Southwest, is facing water shortage concerns. However, as New Mexico faces one of the longest droughts in its history, growing industrial pressures are also mounting. New Mexico grows over a fourth of the United States's production of pecans. Pecans are an incredibly thirsty crop, and yet, the New Mexican desert climate is perfect for pecan cultivation. Additionally, the recent legalization of cannabis in New Mexico has proven to be an additional challenge when navigating the already serious water shortage concerns.

## The Viability of Desert Agriculture in Times of Water Scarcity

Questions about the viability of desert agriculture are becoming more prevalent. Increased drought, disappointing snowpack, and overall water scarcity are driving increased concerns about agriculture's impacts in New Mexico. In 2021, in an attempt to address the immediate water challenges, hydrologists with the New Mexico Interstate Stream Commission took the rare step of requesting farmers, specifically hobbyist farmers along the Rio Grande as well as a major tributary, the Rio Chama, to either cut back their farming this year or brace for a short irrigation season. Due to water scarcity, it is not uncommon for irrigation farmers to not receive their full water appropriations. This scarcity issue has caused some farmers to grow less and, in some instances, forced some out of the industry entirely. New Mexico's agriculture, while important to the state's economy, usually accounts for a small percentage of the state's yearly GDP. Nonetheless, irrigated agriculture is by far the largest consumer of water; irrigation accounted for 76 percent of water withdrawals in recent years according to the Office of the New Mexico State Engineer.

Pecans are among New Mexico's highest revenue producing crops, which as noted above, also happen to be an incredibly thirsty crop. For example, a single pecan tree needs up to 200 gallons of water daily in the warmer months. Pecans have been one of New Mexico's most successful and prolific crops since the early 1900s. Since then, the industry has flourished in southern New Mexico, and today, southern New Mexico is home to over 51,000 acres of pecan orchards. The Middle Rio Grande Valley south of Albuquerque has also developed large pecan orchard operations in recent years. However, the ongoing record-breaking drought does not make pecan farming any easier, or popular, within the State. New Mexico has been in a drought for over 20 years making irrigated agriculture of water intensive crops more difficult and controversial. Many pecan farmers cannot obtain their water from surface water, such as from the Rio Grande, due to scarcity. Therefore, many pecan farmers have turned to groundwater to attempt to alleviate the surface water irrigation challenges. However, groundwater requires recharging, and when the Rio Grande runs dry as it is now in the summer of 2023 in large sections, there is no source of recharge for the groundwater sources being used to farm the pecans. As the drought continues in New Mexico, the pecan industry will continue to face challenges. Additionally, with groundwater levels decreasing with not enough surface water recharge, pecan farmers along and generational old family farms, have much at stake.

The New Mexico agriculture industry has seen an increase in criticisms for its high use of the state's scarce water resources. Recently, a new agricultural boom hit New Mexico in the form of legalized recreational cannabis. In June of 2021, New Mexico legalized recreational cannabis for adult use through the New Mexico Cannabis Regulation Act. *See* NMSA 1978 Section 26-2C-25. With the legalization came a multi-million-dollar industry overnight, which also requires a lot of water to succeed. From the get-go, the development of a new industry that only further taxes the New Mexico's limited water supplies is a concern for water users. In a rush to get to the new market, many cannabis producers and manufacturers did not sufficiently or adequately understand local water laws and regulations and, as a result, did not have adequate water supply to meet their needs. This proved to be disastrous for some individuals seeking to participate in the new market, but was also a sign of the strain to come to the State's already stressed

water systems. For the time being, the New Mexico Regulation and Licensing Department's Cannabis Control Division (CCD) is tasked with overseeing the commercial and medical markets within the state. The CCD has also shaped the Cannabis Regulation Act's requirement concerning commercial water resources into rules and regulations that may help alleviate the stress on New Mexico's water scarcity in the short term by insisting that a business provides proof of adequate commercial water supply at the time of application. However, despite these helpful and practical regulations, it is unclear whether the CCD or any other state agency will be able to hold back the almost inevitable growth of the cannabis industry in New Mexico and its corollary increased use of water supplies.

## Conclusion and Implications

As the ongoing drought continues within New Mexico, the question of how to allocate water in a more appropriate manner is beginning to become more prevalent throughout the State. The issue of urban versus agricultural use has always existed, however, ongoing drought only brings these issues to the forefront of public discussion. New Mexico has always benefitted greatly from its agricultural industry, and yet crops such as pecans with their water intensive cultivation are a point of public contention within the state. Brand new water intensive industries such as the cannabis industry only make these discussions more contentious and make any possible solutions only more complex.
(Christina J. Bruff)

## LEGISLATIVE DEVELOPMENTS

# U.S. SENATE BILL AIMS TO REPURPOSE IRRIGATED FARMLANDS IN WESTERN STATES TO REDUCE WATER CONSUMPTION AND PREPARE FOR DROUGHTS

On June 22, 2023, Senator Alex Padilla (D – California) introduced the Voluntary Agricultural Land Repurposing Act (Repurposing Act)—S.2166. The Repurposing Act seeks to amend two environmental legislations, the Bureau of Reclamation States Emergency Drought Relief Act (Drought Act) and the Secure Water Act, by adding provisions that would allow the Secretary of the Interior (Secretary) to fund states' projects specifically designed to repurpose irrigated farmlands to conserve water.

### Changes to the Reclamation States Emergency Drought Relief Act

In response to the escalating drought conditions in western states, President George H. W. Bush signed the Drought Act into law in 1992. The primary objective of this act was to offer emergency drought assistance to 17 western states (Reclamation States), including California, Nevada, and Colorado, which are overseen by the Bureau of Reclamation. Under the Drought Act, the Secretary was authorized to engage in various measures to alleviate the impacts of drought on the environment and agricultural communities in the Reclamation states. These measures included undertaking construction projects, participating in states' water bank programs, facilitating water acquisition between buyers and sellers, and purchasing waters from the willing sellers.

Since its enactment, the Drought Act has undergone only minimal changes, primarily limited to funding increases, an extension of its effective period, and some minor procedural revisions. If approved, the proposed Repurposing Act would be the first major substantive update to the Drought Act.

The Repurposing Act aims to provide the Secretary with the authority to engage in proactive water conservation activities in Reclamation States and the State of Hawaii by encouraging voluntary repurposing of agricultural lands. The proposed amendments enable the Secretary to offer competitive price-matching grants to the states, state agencies, and tribes to run programs designed to repurpose irrigated farmlands to reduce water consumption (Covered Programs).

For a program to qualify as a Covered Program, it must fulfill the following criteria: the program must be implemented at the basin-scale; the program must focus on repurposing irrigated farmlands for periods of at least ten years; the program must reduce overall consumptive water use; and the program must provide measurable benefits, such as restoring wildlife habitat, creating parks, facilitating renewable energy, and reestablishing tribal land use.

Moreover, the Repurposing Act prioritizes the granting of funds for Covered Programs that directly benefit disadvantaged communities and that are developed through a multi-stakeholder planning process. The Repurposing Act would allocate a grand total of $250,000,000 from 2024 through 2028 to the Secretary for the purpose of funding the eligible entities' Covered Programs.

### Changes to the Secure Water Act

In 2009, the Secure Water Act was signed into law as part of the Omnibus Land Management Act. The Secure Water Act aimed to safeguard the clean water resources in the United States. To further this goal, the act permitted the Secretary to create cost-sharing grants to fund certain water conservation programs. Subsequently, in February 2010, the Secretary established the WaterSMART grant, as permitted by the Secure Water Act. The WaterSMART grant provided price-matching funds to the eligible entities to fund the planning, design, or construction of any improvements or activities that would help conserve water. The grant was only limited to entities and Tribes that are located within the Reclamation States, Alaska, Hawaii, or Puerto Rico.

The Repurposing Act seeks to establish the repurposing of farmlands for water conservation as one

of the express objectives of the Secure Water Act and, hence, the WaterSMART grant. The proposed amendments to the Secure Water Act closely resemble those proposed to the Drought Act. The new amendments to the Secure Water Act would allow the Secretary to provide price-matching funds for eligible state programs that encourage the repurposing of irrigated agricultural land for periods of ten or more years to reduce water consumption and provide measurable benefits.

If approved, this amendment would provide significant budgetary flexibility for the Secretary to fund the Covered Programs. While the proposed amendment to the Drought Act "only" allocated $250,000,000 over four years to the Secretary, the Secure Water Act has authorized the Secretary to spend a staggering $820,000,000 for the purpose of the WaterSMART grant. If an amendment to the Secure Water Act is approved, the Secretary would be permitted to fund the Covered Programs using the funds allocated to the WaterSMART grant. Therefore, with an additional budgetary option, the Secretary would be able to expand the Repurposing Act grants to more states and entities.

### Conclusion and Implications

The Repurposing Act was only recently introduced to the Senate, so it is unclear how much of the proposed bill will see changes by the time it clears the legislative pipeline. Based on the current language of the bill, however, the Repurposing Act grants would incentivize states to establish programs akin to the highly successful Conservation Reserve Program (CRP), which currently supports over 22 million acres of retired farmlands for environmental conservation purposes. Under the CRP, private landowners directly enter into agreements with the Department of Agriculture to retire their farmlands for ten to 15 years in exchange for annual rents. The implementation of the Covered Programs that the Repurposing Act aims to finance seem likely to adopt a similar structure, albeit at the state level with a narrower goal to conserve water in preparation for future droughts.

Various conservation groups, including Trout Unlimited, the Native Seed Group, and Audubon have endorsed the Repurposing Act, commending its proactive approach to emergency drought response. Whether or not the Repurposing Act passes the legislature in its current form, the act as proposed demonstrates a willingness to take preventative measures to mitigate damages to the Nation's water resources and the environment. To that end, implementing future-oriented programs with a focus on conservation, such as the Repurposing Act, is a clear step in the right direction for western states in combating the tenacious drought conditions we have seen over the last decade-and-a-half. To track the status of S.2166, *see:* https://www.congress.gov/bill/118th-congress/senate-bill/2166.

(Andrew J. Hyun, Wesley A. Miliband, Kristopher T. Strouse)

## CALIFORNIA GOVERNOR SIGNS SENATE BILL 147 INTO LAW WHICH ALLOWS AGENCY TO ISSUE 'TAKE' PERMITS FOR OTHERWISE FULLY PROTECTED SPECIES IN CONNECTION WITH RENEWABLE ENERGY AND INFRASTRUCTURE PROJECTS

On July 10, 2023, Governor Newsom signed Senate Bill 147 (SB 147) into law. The bill authorizes the Department of Fish and Wildlife (DFW) to issue a permit under the California Endangered Species Act (CESA) authorizing developers of specified renewable energy and infrastructure projects to take species designated as "fully protected" in the Fish & Game Code. Such permits can only be issued if certain conditions are satisfied, including the conditions required for the issuance of an incidental take permit. The bill is an urgency statute, taking effect immediately and sunsetting on December 31, 2033.

### Background

Existing law requires DFW to establish a list of endangered or threatened species and to add or remove species from either list if it finds, upon the receipt of sufficient scientific information, that the classifica-

tion is warranted. CESA prohibits the taking of an endangered of threatened species, except in certain situations, through the issuance of an incidental take permit. CESA also lists several "fully protected species." Before enactment of SB 147, CESA prohibited the taking of fully protected species, except in limited circumstances involving scientific research or in conjunction with the preparation of a natural community conservation plan. This meant that an infrastructure or renewable energy project could be halted entirely if a "fully protected" species was identified on a project site.

### New Take Authorization Permit for Qualified Energy and Infrastructure Projects

Before DFW may issue a take authorization permit pursuant to SB 147, several conditions must be satisfied. These include:

(1) the permit must be processed in accordance with incidental take permit procedures in the California Endangered Species Act.

(2) the permit must satisfy certain conservation standards requiring the applicant to identify methods and procedures necessary to ensure that any take is avoided to the maximum extent possible as to the species for which the take is authorized. These go beyond those that would typically be required for incidental take permits.

(3) the permit must provide for the implementation and development, in cooperation with DFW, federal and state agencies, of a monitoring and adaptive management plan that minimize and fully mitigate the impacts of an authorized take.

(4) The applicant is also required to pay a permit application fee.

The projects eligible for SB 147's new take authorization permits are limited to those involving:

(1) maintenance and repair or improvement to the State Water Project, including existing infrastructure, when undertaken by the state Department of Water Resources.

(2) maintenance, repair, or improvement projects critical to regional or local water agency infrastructure;

(3) transportation, including any associated habitat connectivity and wildlife crossing projects, that does not increase highway or street capacity for automobile or truck travel;

(4) wind projects and any appurtenant infrastructure improvements, and any associated electric transmission project carrying electric power from a facility that is located in the state to a point of junction with any California-based balancing authority.

(5) A solar photovoltaic project and any appurtenant infrastructure improvement, and any associated electric transmission project carrying electric power from a facility that is located in the state to a point of junction with any California-based balancing authority.

### Updates to List of Fully Protected Birds and Fish

In addition to the above, SB 147 updated the list of "fully protected species" by removing the American peregrine falcon, brown pelican, and the thicktail chub, a fish. No other "fully protected" species were removed.

### Conclusion and Implications

SB 147 is notable because, prior to its enactment, there was no express authorization for a fully protected species to be taken except in very limited circumstances. An effort to further the state's infrastructure improvement and climate change goals, SB 147 creates a new pathway to lawfully permit the take of fully protected species in areas that may have previously been considered un-developable. It is yet to be seen how complicated and costly the new take authorization permit process will be for qualifying projects.

Text of the bill can be found here: https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240SB147&showamends=false. (Travis Brooks)

## REGULATORY DEVELOPMENTS

# COUNCIL ON ENVIRONMENTAL QUALITY'S PROPOSED PHASE 2 REGULATIONS MODIFYING THE NATIONAL ENVIRONMENTAL POLICY ACT ARE OPEN FOR COMMENT

On the last day of July 2023, the White House Council on Environmental Quality (CEQ) released its highly-anticipated Phase 2 proposed rule (Phase 2 Regulations) that CEQ claims will "modernize and accelerate" environmental review under the National Environmental Policy Act (NEPA).

### Background on NEPA and CEQ's Recent Rulemakings

Congress enacted NEPA in 1969 to ensure that federal decision-making took into account the environmental effects of proposed federal actions and considered reasonable alternatives before the proposed action is undertaken. By statute, NEPA created CEQ to be the agency responsible for implementing NEPA. In recent years, and over changing presidential administrations, CEQ has made several changes to NEPA's implementing regulations. Specifically, the Biden Administration has taken a phased approach to implementing priority changes to NEPA that focus on targeting changes made to NEPA in 2020 under the Trump Administration (2020 Rule).

### A Summary of CEQ's Phase 1 Regulations

In October 2021, CEQ released its Phase 1 proposed rulemaking (Phase 1 Regulations) to modify the NEPA regulations, which focused on three key areas of change.

First, the Phase 1 regulations modified the definition of the "effects" to be considered under NEPA review. NEPA requires federal agencies to consider the environmental effects of proposed federal actions. Prior NEPA regulations segregated "direct" and "indirect" effects caused by the action. The 2020 Rule removed the subcategorization of "direct" and "indirect" effects to be examined. The Phase 1 regulations returned the distinction and explicitly requires analysis of "direct" and "indirect" as well as "cumulative" impacts of a proposed federal action. This includes an evaluation of climate change impacts and an assessment of consequences relating to releasing additional pollution in communities that may already be overburdened by pollution.

Second, the Phase 1 regulations increased the flexibility of agencies to determine and define the "purpose and need" of proposed projects and actions. Whereas the 2020 Rule in certain ways limited federal agencies' ability to develop and consider alternatives that did not "fully align" with the stated goals of a project, the Phase 1 Regulations encourage analysis of common-sense alternatives that could be outside a complete alignment with the project's stated goals.

Third, the Phase 1 regulations establish that NEPA regulations are a "floor, rather than a ceiling." In other words, the CEQ is encouraging federal agencies to tailor NEPA procedures in order to meet the specific needs of the agency, public, and stakeholders involved by using the CEQ's NEPA regulations as the baseline, with room for additional consideration.

The Phase 1 Regulations became effective on May 20, 2022, allowing CEQ to proceed with the rulemaking for Phase 2 Regulations.

### The Proposed Phase 2 Regulations

CEQ's proposed rule for the Phase 2 Regulations further reverses the 2020 Rule and extensively revises NEPA regulations so comprehensively that CEQ released a 76-page redline to illustrate the breadth of the changes. By CEQ's own categorization, the Phase 2 Regulations fall into five general categories of change:

- Implementing amendments made to NEPA by the Fiscal Responsibility Act of 2023 (FRA). The FRA was signed into law on June 3, 2023 and included amendments to NEPA to codify that Environmental Impact Statements (EISs) should include discussion of the reasonably foreseeable environmental effects of the proposed action, adverse environmental effects

that cannot be avoided, and a reasonable range of alternatives. The FRA also requires federal agencies to "ensure the professional integrity" of the analysis in environmental documents and use reliable data and resources as part of the discussion. FRA further added guidelines on determining the appropriate level of NEPA review. For example, an agency is only required to prepare an environmental document when the action is final agency action or a "major Federal action," as redefined under FRA. FRA also codified CEQ regulations regarding categorical exclusions (CEs), Environmental Assessments, and EISs.

•Rolling back certain language changed under the 2020 Rule and reverting to the language from 1978 regulations, which were in effect for over 40 years. For example, the 2020 Rule deleted text regarding the "purpose" and "policy" sections of NEPA, which the Phase 2 Regulations seek to restore. CEQ proposes to delete the language from the 2020 Rule repeatedly focusing on procedural nature of NEPA for fear that it may become a mere "check-the-box exercise," and undermine broader goal of NEPA of "better informed Federal decision making and improve environmental outcomes." The Phase 2 Regulations also restore the pre-2020 regulations' concept of consideration of context and intensity in determining the significance of effects. For context, this means the agencies should analyze not just the project area, but also the potential global, national, regional, and local contexts, and consider the duration of an action's effects, including short- and long-term effects in terms of intensity.

•Removing provisions that CEQ considered "imprudent or legally unsettled." For example, the 2020 Rule established a process whereby an agency must first request in its Notice of Intent comments on all relevant information, studies, and analyses; summarize that information in an EIS and specifically seek comment on it; certify in a Record of Decision that it considered the information; and forfeit comments not made during the comment period as "unexhausted." Under the Phase 2 Regulations, CEQ considered it "unsettled" as to whether CEQ has the authority under NEPA to set an exhaustion requirement that would bar Administrative Procedure Act claims alleging the agency violated the APA by not complying with NEPA.

•Enhancing consistency and providing clarity in order to improve the environmental review process. For example, one of the changes under the Phase 2 Regulations would clarify federal agencies' preparation of concise and informative documents by providing examples of the mechanisms that agencies can use in this preparation and reduce delays. This includes clarifications that even in circumstances where there are significant adverse effects, if the agency determines that a proposed action would be overall beneficial, then no Environmental Impact Statement (EIS) would be required. CEQ gave an example of a renewable energy project that could have short-term adverse impacts but long-term beneficial effects. CEQ also proposes adding new forms and means to adopt CEs, providing flexibility and broadening the availability of using CEs in the NEPA process. The Phase 2 Regulations also propose provisions allowing "[i]nnovative approaches to NEPA reviews," following CEQ review, to address extreme environmental challenges, such as sea level rise, increased wildfire risk, water scarcity, and species loss, among others.

•Implementing science-based decision making in a way that accounts for climate change and environmental justice to better effectuate NEPA's statutory purposes. Under the Phase 2 Regulations, CEQ proposes that agencies must discuss the potential for health and environmental effects on communities with environmental justice concerns and include an environmental justice analysis.
Further, the Phase 2 Regulations define "effects" to include:

. . .climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives.

### Conclusion and Implications

The proposed Phase 2 Regulations include numerous changes to the NEPA regulations that generally restore the pre-2020 Rule scenario with some clarifications and modifications. Moreover, for the first time, the Phase 2 Regulation incorporate explicit regulatory requirement to evaluate climate change and environmental justice affects under NEPA regulations, but it lacks detailed guidance on how such analysis should be conducted.

Overall, CEQ's Phase 2 Regulations are an effort to streamline NEPA review and make it more efficient, but it remains to be seen if these goals would materialize. The proposed rule is currently undergoing public comment. The public comment period ends on September 29, 2023 and can be found on the Federal Register under the citation 88 FR 49924 and agency/docket number CEQ-2023-0003.
(Alexandra L. Lizano, Hina Gupta)

## CALIFORNIA PUBLIC UTILITIES COMMISSION PROPOSES INCREASED STORAGE CAPACITY AT ALISO CANYON

The California Public Utilities Commission recently issued a proposed decision that would increase the storage capacity at the Aliso Canyon Natural Gas Storage Facility in the same proceeding in which the Commission is simultaneously considering the permanent retirement of the facility. Aliso Canyon, located in the San Fernando Valley, was the site of a massive gas leak that began in October 2015 and was finally brought under control in February 2016. The leak prompted legislation requiring the CPUC to analyze the feasibility of retiring Aliso Canyon while maintaining energy and electric reliability for the region. Since early 2017, the CPUC been considering Aliso Canyon's future operations through Investigation No. 17-02-002. The July 28, 2023 proposed decision increases the interim storage capacity at Aliso Canyon to protect natural gas and electricity customers from reliability and economic impacts during the upcoming winter months, while the CPUC continues to explore replacement options for Aliso Canyon. The proposed decision demonstrates the ongoing challenge of balancing reliability, affordability, and safety concerns relating to natural gas storage.

### Background

Following the leak, Senate Bill 380 authorized the CPUC's Executive Director, in consultation with the State Oil and Gas Supervisor, to direct Southern California Gas Company (SoCalGas), the operator of Aliso Canyon, to maintain a specified range of working gas at the storage field. In August 2020, the Administrative Law Judge (ALJ) in the CPUC Investigation issued a ruling directing that Aliso Canyon capacity be maintained at or below 34 Bcf. This cap was informed by several CPUC reports that assessed the range of working gas necessary at Aliso Canyon to ensure safety and reliability under a 1-in-10 peak day standard, while also keeping customer rates at a reasonable level. In November 2020, the CPUC issued Decision 20-11-044, which maintained the 34 Bcf maximum inventory level established in the ALJ Ruling, while the CPUC continued to conduct additional modeling to understand the impacts to system reliability and gas rates of reducing or eliminating Aliso Canyon.
In November 2020 and January 2021, the CPUC completed an Economic Analysis Report and a Modeling Report that discussed the role of Aliso Canyon in stabilizing gas prices and customer rates while maintaining reliability. The Economic Analysis Report found that gas prices for SoCalGas customers rose following the Aliso Canyon leak and resulting capacity limitations. The report also found that the limitations put on Aliso Canyon affected electricity prices because Aliso Canyon plays a critical role in the electric power system's ability to meet regional demand by supplying gas-fired electric generation customers. The Modeling Report also found that Also Canyon is necessary to provide gas reliability. Simulations for a sustained cold period demonstrated that Aliso Canyon inventory between 41.2 and 68.6 Bcf would be needed to ensure reliability depending on pipeline capacity.

The CPUC, in Decision 21-11-008, set the maximum storage limit at 41.16 Bcf. Although the Model-

ing Report found that a higher inventory would be required to maintain reliability, the Decision found that the available gas transmission pipelines restricted the amount of gas that could physically flow into the storage fields to 41.16 Bcf.

### The Proposed Decision

The proposed decision grants SoCalGas and San Diego Gas and Electric's (SDG&E) petition to increase the interim storage limit of working gas at Aliso Canyon from 41.16 Bcf to 68.6 Bcf. The proposed decision finds that increasing the interim limit is necessary to protect natural gas and electricity customers from reliability and economic impacts during the upcoming winter months.

SoCalGas and SDG&E's petition was prompted by unusually high commodity gas prices in California and the West during the 2022-2023 winter. SoCalGas, SDG&E, and Southern California Edison reported that their customers experienced high natural gas and electricity bills during the 2022-2023 winter. The petition reasoned that the high gas prices and customer bills during the 2022-2023 winter reflected an increased need for higher inventory at Aliso Canyon to reduce customer bills for the upcoming winter. The proposed decision finds that higher inventory at Aliso Canyon could potentially dampen price volatility because increased gas volumes provide the ability to buy cheaper gas during the summer months and store it for the winter months, when natural gas is usually more expensive. If there is less gas inventory and more reliance on pipeline flowing supplies, then there is more exposure to price spikes.

The proposed decision was also influenced by the fact that SoCalGas expects to have sufficient supply to fill Aliso Canyon to 68.6 Bcf for the upcoming winter. The CPUC, in the decision setting the previous interim storage inventory at 41.16 Bcf, found that there was no evidence that a higher limit could be reached that winter because pipeline outages restricted the amount of gas that could physically flow into the storage field. Conversely, SoCalGas's Summer 2023 Technical Assessment predicts that there will be enough excess pipeline supply to fill Aliso Canyon to 68.6 Bcf by November 1, 2023.

Parties opposed to the petition argued that raising the interim storage capacity would prejudge the issues being considered in the Investigation—whether and under what circumstances Aliso Canyon can be permanently retired—or might otherwise preempt future CPUC actions. The proposed decision emphasizes that increasing the limit of working natural gas is an interim solution to address immediate needs of ensuring reliability and protecting customers rate impacts while the CPUC comprehensively evaluates the portfolio of resources that could replace Aliso Canyon. Investigation No. 17-02-002 remains open and permanent closure scenarios are still being considered.

### Conclusion and Implications

While only an interim solution, the decision underscores the difficulties in reducing reliance on Aliso Canyon. The proposed decision has been met with opposition from the surrounding community and local politicians who wish the facility shut down sooner. State regulators have the challenging task of balancing these calls for closure with the need to ensure safe, reliable, and affordable energy for ratepayers. For more information on the proposed decision, *see:* https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M515/K329/515329559.PDF.

The proposed decision is not final until and unless the CPUC hears the item and votes to approve it. The item is on the agenda to be heard at the CPUC's upcoming August 31, 2023 Business Meeting. (Breana Inoshita, Megan Somogyi, Hina Gupta)

## COLORADO WORKS TO PROTECT WETLANDS IN THE WAKE OF THE *SACKETT* DECISION

The Colorado Department of Public Health and Environment, Water Quality Control Division recently issued a new wetlands policy in an effort to provide a greater level of protection to the state's wetlands in light of the recent Supreme Court decision in *Sackett v. EPA*. The new Clean Water Policy 17 allows the state to continue to regulate discharges of dredged or fill material into state waters that are no longer subject to federal Clean Water Act authority following the *Sackett* decision.

### Background and *Sackett* Decision

The federal Clean Water Act allows the federal government to regulate discharge of pollutants into "waters of the United States" (WOTUS). 33 U.S.C. §§ 1311, 1362(12), 1362(7). However, Congress never defined WOTUS, leading to more than 50 years of debate and litigation on that definition and the resulting federal jurisdiction. In more recent history, a divided Supreme Court outlined three possible views on how courts might determine whether a water or wetland constitutes a WOTUS. *Rapanos v. United States*, 547 U.S. 715 (2006). In 2015, the EPA issued a new regulation (2015 Rule) using the "significant nexus" test from *Rapanos*. Under this test, wetlands are subject to the Clean Water Act if the wetlands "either alone or in combination with similarly situated land in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable."

In April 2020, under the Trump administration, the EPA repealed and replaced the 2015 Rule with the Navigable Waters Protection Rule (NWPR). The NWPR narrowed the definition of WOTUS to align more closely with Justic Scalia's opinion in *Rapanos* (generally defined as requiring a continuous surface connection). The NWPR was also challenged by numerous states, resulting in a spilt system of WOTUS jurisdiction as several states obtained circuit court injunctions staying the implementation of NWPR. The Biden administration later declined to defend NWPR, therefore reverting the regulatory regime back to the 2015 Rule.

Meanwhile, in the background of the various regulatory changes and challenges, the *Sackett* case was slowly working its way through the federal court system. Briefly, the Sacketts own a property in Idaho that they were attempting to develop. Part of the development work involved filling in portions of the property with gravel. The EPA determined the property contained a federally protected wetland, and therefore halted all work until the Sacketts could obtain proper Clean Water Act permitting. The Sacketts sued in 2008, claiming that the wetlands on their property were not WOTUS because there was dry land between the wetlands and other WOTUS bodies.

In a 5-4 opinion on May 25, 2023, Justice Alito endorsed Justice Scalia's definition of WOTUS: a wetland must have a surface connection to another recognized WOTUS to qualify for federal protection. The decision has been widely critiqued by environmental groups who argue this decision defies the underlying purpose of the Clean Water Act and also runs contrary to undisputed hydrologic science that water often flows underground and connects multiple bodies of water even without a surface connection. Justice Kavanaugh disagreed with the conservative majority and echoed the concerns of many environmental groups that, under the *Sackett* WOTUS rule, many "long-regulated and long-accepted-to-be-regulated wetlands" will no longer be under the EPA's regulatory authority.

### Colorado Clean Water Policy 17

In response to the *Sackett* decision, the Colorado Water Quality Control Division (WQCD) issued Clean Water Policy 17 on July 6, 2023. According to WQCD, the *Sackett* decision "will result in less water quality protections for Colorado" because it will likely result in:

> . . .all ephemeral and many intermittent waters, which constitute the majority of Colorado's stream miles, being outside the scope of federal Clean Water Act jurisdiction.

Therefore, WQCD believes Policy 17 is necessary to address:

> . . .the protection of state waters impacted by discharges of dredged or fill material that are outside of federal Clean Water Act jurisdiction as a result of the *Sackett* decision.

Importantly, Policy 17 does not apply to any exempt activities under the Clean Water Act section 404(f), including normal farming activities, construction of farm and stock ponds, and construction and maintenance of irrigation ditches. The policy also will not apply to any pre-*Sackett* non-WOTUS waters such artificially irrigated areas that would dry-up without irrigation, or ponds created by excavating or diking dry land.

Policy 17 first defines "Sackett Gap Waters" as:

> State waters that were under the jurisdiction of the federal 404 permitting program as WOTUS pursuant to the pre-2015 federal regulations and

the 2008 guidance, but that are no longer considered WOTUS because of the change in the scope of federal jurisdiction resulting from the *Sackett v. EPA decision*. Sackett Gap Waters do not include the subset of state waters that were outside the scope of federal jurisdiction under the pre-2015 federal regulations and the 2008 guidance.

"State waters" are in turn defined as any and all surface and subsurface waters in the state, excepting sewage and potable water distribution and treatment facilities. In short, WQCD will continue to regulate all waters that are no longer part of WOTUS after the *Sackett* decision. However, Policy 17 grants WQCD "enforcement discretion" in the "Sackett Gap Waters." In practical terms this means that WQCD will not require permitting, provided the owners of these projects adhere to certain conditions prescribed by Policy 17. Under Policy 17, WQCD will exercise enforcement discretion (i.e., allow) discharge of dredged and fill materials into Sackett Gap Water if the owner adheres to the following conditions:

### Notification

WQCD strongly encourages owners to notify the division of discharge of dredged or fill material into Sackett Gap Waters. This notification will be a key part of WQCD's enforcement discretion. For projects that would not have required pre-construction notification pre-*Sackett*, notification should be submitted no later than 30 days following commencement of the discharge. If construction notice was previously required, owners should notify WQCD at least 10 days prior to the start of the activities.

### Scope of Unpermitted Discharges

If the project would have qualified for an Army Corps of Engineers nationwide permit (NWP) or regional permit (RGP) pre-*Sackett*, WQCD will exercise enforcement discretion for new discharges into Sackett Gap Waters. However, if the project would have required an individual Section 404 permit, Policy 17 directs owners to contact WQCD to discuss an individualized path forward. In sum, projects that rise to the level of individual permits involving Sackett Gap Waters will still require WQCD permitting.

### Protective Conditions

WQCD will exercise enforcement discretion if the discharge into Sackett Gap Waters complies with conditions in the Section 404 permit that would have applied pre-*Sackett*. Specifically, the owner must:

Design and construct the project to minimize the loss of Sackett Gap Waters so that either the combined loss of Sackett Gap Waters and WOTUS does not exceed 0.1 acre of wetlands or 0.03 acre of streambed; or the project would not have required pre-construction notice under an NWP or RGP pre-*Sackett*;

Design and construct the project to minimize adverse effects to Sackett Gap Waters to the maximum extent practicable;

Comply with general conditions and Colorado regional conditions that would have been required prior to *Sackett*; and

Maintain all documentation required by conditions normally required by an NWP or RGP for three years after the end of the discharge.

### Limitations

Policy 17 does not preclude WQCD from enforcement action for any discharge into Colorado state waters, rather it outlines the procedures under which owners of projects in Sackett Gap Waters can benefit from enforcement discretion. WQCD will specifically continue to enforce its regulations in situations involving criminal violations or those in which there are "egregious circumstances" including environmental harm.

## Conclusion and Implications

The regulatory scheme surrounding WOTUS has been a complex and ever-changing landscape since the passage of the Clean Water Act in 1972. The *Sackett* decision is merely the latest change to the definition of WOTUS, although it is the first major judicial definition of WOTUS in decades. With the enactment of Policy 17, Colorado's WQCD attempts to impart some level of certainty as to when a discharge requires a permit, and the circumstances and requirements for unpermitted projects in Sackett Gap

Waters. Several states have already enacted legislation to address Sackett Gap Waters within their boundaries. It is unclear if the Colorado General Assembly will pursue such legislation during its next session, however Policy 17 will serve to guide WQCD and Colorado residents until then.
(John Sittler)

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—Air Quality

**August 28, 2023**—The U.S. Environmental Protection Agency announced that Congdon Packing Company, LLC, and D&H Properties Yakima, LLC, agreed to pay $194,302 for violations of Section 112(r) of the Clean Air Act

Under the Clean Air Act, facility owners or operators handling or storing 10,000 pounds of anhydrous ammonia are required to develop and implement a risk management plan to prevent accidental chemical releases.

In violation of this requirement, the owner and operator of the facility failed to: Keep safety information up to date; Adequately address process hazard analysis recommendations; Perform a timely process hazard analysis every five years; Provide initial safety training for three employees; Replace and maintain process equipment for safe operation.

Exposure to ammonia may result in chemical-type burns to skin, eyes and lungs. Accidental ammonia releases can cause injuries and death to employees, emergency response personnel and people in surrounding communities.

This settlement is part of EPA's National Enforcement and Compliance Initiative, "Reducing Risks of Accidental Releases at Industrial and Chemical Facilities." Additional details can be found in the Consent Agreement.

Congdon Packing Company, LLC operated a cold storage facility in Yakima, Washington, which was owned by D&H Properties. In October 2021, Congdon Packing Company, LLC terminated operations at the facility. D&H Properties Yakima, LLC subsequently sold the ammonia refrigeration facility and removed ammonia from the refrigeration system.

**August 21, 2023**—The U.S. Environmental Protection Agency (EPA) announced a settlement with Arctic Glacier U.S.A., Inc., that resolves claims of violations of federal environmental rules at the company's ice processing facility in Fremont, Calif. Under the settlement, Arctic Glacier has certified that the facility is in compliance with Clean Air Act regulations that are designed to ensure the safe manufacture, use, storage, and handling of anhydrous ammonia, a toxic substance used as a refrigerant. Arctic Glacier will pay a $169,400 penalty as part of the settlement.

Arctic Glacier owns and operates an ice processing, production and storage facility in Fremont that includes a refrigeration system containing about 14,000 pounds of anhydrous ammonia, a toxic substance regulated by EPA under the Clean Air Act's Risk Management Program. Anhydrous ammonia is very corrosive, and exposure may result in chemical-type burns to skin, eyes, and lungs.

Based on an inspection of the Arctic Glacier facility in 2018, EPA determined that the facility's piping, operating equipment, and safety systems were not in compliance with regulatory requirements. The company has addressed the EPA identified deficiencies at the facility.

EPA's Risk Management Program (RMP) regulations work to prevent accidental chemical releases in our communities and the environment. Facilities holding more than a threshold quantity of a regulated substance are required to comply with EPA's RMP regulations. The regulations require owners or operators of covered facilities to implement a risk management program and to submit a risk management plan to EPA.

**August 21, 2023**—The U.S. Environmental Protection Agency (EPA) announced a new review of the Ozone National Ambient Air Quality Standards

(NAAQS) to ensure the standards reflect the most current, relevant science and protect people's health from these harmful pollutants. EPA Administrator Michael Regan reached this decision after carefully considering advice provided by the independent Clean Air Scientific Advisory Committee (CASAC). In October 2021, EPA announced a reconsideration of the previous Administration's decision to retain the NAAQS for ozone. EPA will incorporate the ongoing reconsideration into the review announced today, and will consider the advice and recommendations of the CASAC in that review. The Agency will move swiftly to execute this new review of the underlying science and the standards—prioritizing transparency, scientific integrity, inclusive public engagement, and environmental justice.

Nationally, due in part to strong EPA emission standards that reduce air pollution, ozone air quality is improving. Between 2010 and 2022, national average ozone air quality concentrations have dropped 7 percent. In many of the areas designated as not meeting the current 2015 standards, work remains. To continue progress in reducing ozone, EPA has initiated important regulatory actions including strong new federal emissions standards for cars and trucks and strengthening rules to reduce pollution from the oil and natural gas industry—a leading source of ozone forming volatile organic compounds. Taken together, the projected benefits of these and other actions addressing industrial and power sector emissions, such as with the Good Neighbor Plan, would cut emissions of ozone precursors by hundreds of thousands of tons with estimated health benefits adding up to billions of dollars.

The new review will allow EPA to consider fully the information about the latest ozone science and potential implications for the ozone NAAQS provided by the CASAC and the Ozone Review Panel. EPA will conduct the review according to well-established best practices and processes that embrace scientific integrity and the role of the public to provide input at multiple steps along the way.

Concrete, transparent and public next steps include:

- Issuing a call for information in the *Federal Register* in the next few days;
convening a public science and policy workshop in spring 2024 to gather input from the scientific community and the public;

- in summer 2024, EPA will summarize the proceedings of the workshop to consider how the information gathered can be used to inform the next review, including specific areas of science that warrant particular focus and analytic enhancements;

- in fall 2024 the agency plans to release its Integrated Review Plan, Volume 2 to guide CASAC consideration and development of the Integrated Science Assessment.

EPA established the current standards at a level of 70 parts per billion in 2015 and retained them in 2020, after concluding that there was little new information to suggest the need for revision. The CASAC, however, has identified studies published more recently and also recommended that EPA conduct additional risk analyses that might support more stringent standards. EPA has determined that incorporating the ongoing reconsideration into a new review will best ensure full consideration of this new information and advice.

## Civil Enforcement Actions and Settlements—Water Quality

**August 3, 2023—** The U.S. Environmental Protection Agency (EPA) has settled with CMA CGM, the world's third largest shipping container company, over claims of violations of EPA's Vessel General Permit issued under the Clean Water Act. Under the terms of the settlements, CMA CGM will pay $165,000 in penalties for claims of violations by four of the company's ships involving ballast water discharge, recordkeeping, inspection, monitoring, and reporting.

CMA CGM is a privately-owned company headquartered in Marseille, France.

Vessel self-inspections are required as a means of identifying, for example, potential sources of spills, broken pollution prevention equipment, or other issues that might lead to permit violations. Self-inspections empower the owner or operator to diagnose and fix problems in a timely manner to remain compliant with the permit and with U.S. law. Because the Clean Water Act relies on self-reporting of permit-

tees, violations tied to failures or delays in inspection, monitoring, and reporting are serious and undermine the permit program.

In addition, it is important that such discharges by ships be monitored to ensure that aquatic ecosystems are protected from discharges that contain pollutants. Invasive species are a persistent problem in U.S. coastal and inland waters. Improper management of ballast water can introduce invasive species or damage local species by disrupting habitats and increasing competitive pressure. Discharges of other waste streams regulated by the Vessel General Permit (e.g., graywater, exhaust gas scrubber water, lubricants, etc.) can cause toxic impacts to local species or contain pathogenic organisms.

EPA's settlement with CMA CGM resolves claims of Clean Water Act violations and are subject to a 30-day public comment period prior to final approval.

**July 2, 2023—**National Grid has agreed to pay $5.38 million to federal and state natural resource trustees to resolve claims for natural resource damages from releases of hazardous chemicals connected to the former Gloucester Gas Light Company located in Gloucester, Massachusetts.

Between 1854 and 1952, the former Gloucester Gas Light Company operated a manufactured gas plant along the Gloucester waterfront. The plant used industrial processes to produce manufactured gas from coal and oil. Manufactured gas plants, which were common before the development of natural gas pipelines, often yielded by-products such as tars, sludges, and oils. Production at the gas plant ended in the early 1950s, and ownership changed to the North Shore Gas Company, a predecessor of the current owner, National Grid. Hazardous chemicals released by the former manufactured gas plant contaminated soils and groundwater, as well as sediment in the adjacent Gloucester Harbor. Those contaminants resulted in injuries to natural resources in Gloucester Harbor.

"Coastal wetlands provide vital habitat for many species of fish and wildlife as well as protect neighboring communities from storm surges and rising sea levels from climate change," said Acting Regional Director Kyla Hastie of the Fish and Wildlife Service Northeast Region. "The settlement will allow the trustees to fund restoration projects in Coastal Massachusetts to make communities safer and improve wildlife habitat for impacted species."

Under the Comprehensive Environmental Response, Compensation, and Liability Act, parties that have disposed of hazardous substances at a site are liable for damages, injury to, destruction of, or loss of natural resources. The natural resource trustees for the site are the U.S. Department of the Interior, through the U.S. Fish and Wildlife Service, the NOAA, and the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs. Massachusetts state law affords the Commonwealth a similar right to recover damages for injuries to natural resources. The trustees determined that the hazardous substances released from the former Gloucester Gas Light Company's manufactured gas plant contaminated waters and sediments in Gloucester Harbor, resulting in injury to these natural resources that serve as habitats for fish and wildlife species. National Grid is remediating those contaminants under Massachusetts state law.

In settlement of the trustees' natural resource damages claims, National Grid has agreed to pay $80,000 to reimburse federal and state trustees for damage assessment costs and $5.3 million to compensate the public for natural resource injuries to Gloucester Harbor, which the trustees, working with the public, will use to implement one or more natural resource restoration projects. The defendant previously paid about $475,000 to reimburse federal and state trustees for prior damage assessment costs incurred at the site.

## Civil Enforcement Actions and Settlements—Hazardous Chemicals

**August 22, 2023—**The Atlantic Richfield Company and ARCO Environmental Remediation, L.L.C. (collectively, Atlantic Richfield) have agreed to the cleanup of community soils—including both residential and non-residential yards and soil affected by the refinery's operations—at the ACM Smelter and Refinery Superfund Site (Site) in Black Eagle, Montana, the U.S. Environmental Protection Agency (EPA) announced today. Under the proposed consent decree, Atlantic Richfield is required to pay for past response costs and implement a multi-million-dollar cleanup for community soils at the Site.

The former smelting and refining facility, referred to as the Great Falls Refinery, operated for nearly 80 years near the unincorporated community of Black Eagle. The smelter and refinery's operations produced large quantities of slag, tailings, flue dust and other

smelter and refinery wastes containing lead, arsenic and other metals that contaminated soil, groundwater and surface water resources at the Site. EPA placed the Site on the Superfund National Priority List in March 2011.

The proposed consent decree requires Atlantic Richfield to implement remedial design and remedial action in the community soils portion of one of the Site's three operable units, OU1, at an estimated cost of $2,286,000 and pay $464,475.12 for past response costs incurred by EPA through September 30, 2022.

**August 3, 2023—** The U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice have settled a case against FrieslandCampina Ingredients North America, Inc. (Friesland) of Delhi, NY for violations of the Clean Water Act and the Clean Air Act. The company's Clean Water Act violations led to excessive pollution that interfered with and passed through the Village of Delhi wastewater treatment plant (WWTP) into the West Branch of the Delaware River which is part of the watershed supplying drinking water to NYC and other water systems. This action also addresses the company's Clean Air Act violations which led to excessive emissions of toluene, a volatile organic compound and hazardous air pollutant. The company will pay a civil penalty of $2.88 million and has already addressed the causes of the violations. Additionally, the company will perform a supplemental environmental project (SEP) to significantly reduce its discharges of heated water to the river at a cost of $1.44 million.

As a significant industrial source under the Clean Water Act, Friesland must first treat its wastewater—a process referred to as pre-treatment—before discharging it to the local municipal wastewater treatment plant. Proper pre-treatment prevents excessive pollution levels, which can interfere with the effectiveness of the wastewater treatment plant and can cause untreated pollutants to pass through the plant into receiving waters. In this case, the pollution levels that the company discharged exceeded levels set by the Village of Delhi on at least 65 occasions. The company also failed to comply with the requirement of New York's industrial stormwater permit, which prohibits the exposure of industrial materials and activities to rain, snow, snowmelt, or runoff that can transport pollutants to surface waters.

The company is also a major source of toluene emissions under the Clean Air Act. Exposure to toluene can harm the nervous system and negatively impact the kidney, liver, and immune system. Friesland failed to obtain the proper permit coverage for its toluene emissions and to install the necessary emission controls and violated other permitting and reporting requirements.

As a result of EPA's enforcement actions, Friesland has completed approximately $6 million worth of work to come into compliance with all applicable CAA and CWA requirements by, among other things, installing equipment to properly control its toluene emissions, upgrading its wastewater pretreatment plant to properly treat its wastewater, and taking other corrective measures.

Furthermore, Friesland will perform a supplemental environmental project to reduce its discharges of heated water by converting its non-contact cooling water system to a recirculating closed-loop system. The new system will reduce Friesland's discharges of heated water to the West Branch of the Delaware River by approximately 85 percent. The river is habitat for several species of trout, and water temperature is essential to this habitat because trout are a cold-water species that cannot survive in warmer water temperatures.

The consent decree for this settlement, lodged in the U.S. District Court for the Northern District of New York, is subject to a 30-day public comment period and approval by the court.
(Robert Schuster)

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
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## RECENT FEDERAL DECISIONS

# NINTH CIRCUIT DENIES PETITION FOR REVIEW OF ENVIRONMENTAL PROTECTION AGENCY'S REJECTION OF SAN FRANCISCO'S WASTEWATER DISCHARGE PERMIT

*City of San Francisco v. United States Environmental Protection Agency*, ___F.4th___, Case No. 2170282 (9th Cir. July 31, 2023).

The Ninth Circuit Court of Appeals recently upheld the Environmental Protection Agency's (EPA) authority to deny review of the City and County of San Francisco's federal National Pollutant Discharge Elimination System (NPDES) permit for its Oceanside combined sewer system and wastewater treatment facility. The court decided that the EPA did not act arbitrarily and capriciously in including in the permit two general prohibitions of discharges that would result in violations of water quality standards, as the decision was rationally related to evidence in the administrative record. Furthermore, the court found that the Environmental Protection Agency did not exceed its authority under the Combined Sewer Overflow Control Policy by requiring the city to update its Long-Term Control Plan.

### Factual and Procedural Background

San Francisco has two combined sewer systems, and sought an NPDES permit from both the EPA and California's Regional Water Quality Control Board for one of the system's discharges into waters partially in California's jurisdiction and partially in the Pacific Ocean. The issued NPDES permit included two provisions that San Francisco challenged. First, the permit included narrative prohibitions on discharges that violated water quality standards. Second, the permit required that San Francisco update its Long-Term Control Plan, a precautionary measure required by EPA regulation designed to protect water quality during heavy rain or snowfall.

In 2019, EPA and the Regional Water Board published a draft of the NPDES permit, including the challenged provisions, and sought public comments, which San Francisco provided. EPA included a memorandum detailing its reasoning for the challenged provisions, and responded to San Francisco's counterarguments by noting that similar narrative prohibitions had been included in almost all NPDES permits since 1993. After the public comment period closed, the agencies decided to keep the challenged provisions based on findings that: (1) in three years there had been 100 million gallons of discharge from the San Francisco combined sewer system, (2) 20 percent of beach-goers had been in contact with combined sewer overflows (CSO) over the course of six years, (3) 56 out of 468 samples collected at shoreline locations exceeded water quality standards, and (iv) between 2004 and 2014 the sewer system's CSOs exceeded water quality standards as well.

San Francisco filed a petition for review of the two provisions with the EPA's Environmental Appeals Board, claiming that the provisions were inconsistent with the CWA and the facts in the administrative record. The Board denied review, and San Francisco timely petitioned for review in the Ninth Circuit Court.

### The Ninth Circuit's Decision

The threshold issues were whether EPA's decision to enforce the NPDES permit including the two challenged provisions (1) was arbitrary and capricious with regard to the general narrative prohibitions, and (2) exceeded the agency's authority with regard to the Long-Term Control Plan update requirement. The court recognized that a highly deferential standard of review applied so as to not substitute the court's judgment for that of the agency.

### The General Narrative Prohibitions

San Francisco first challenged the general narrative prohibitions included in the final NPDES permit by claiming that the language of the prohibitions was "too vague to ensure the city's control measures will

protect water quality," thereby making the prohibitions inconsistent with the federal Clean Water Act (CWA). In determining whether there was an inconsistency, the court looked at the plain text of the CWA and found that the statute provides NPDES permitting agencies with broad discretion to impose limitations that they deem necessary to ensure compliance with applicable water quality standards. The court found that not only does the CWA and its regulations allow EPA to issue such prohibitions, but they actually *require* EPA to impose narrative limitations on discharges such as this when necessary to comply with water quality standards. Supreme Court and other Ninth Circuit precedent supported their finding, whereas several narratives, open-ended limitations have been upheld to enforce environmental quality standards. Thus, the Ninth Circuit Court rejected San Francisco's assertion that the prohibitions were inconsistent with the CWA.

An agency's decision is arbitrary and capricious if it offers an explanation for its decision that runs counter to the evidence before the agency. A rational connection must be established between the facts presented and the decision made. The court looked at EPA's response to San Francisco's comments on the draft permit and found that EPA had a legitimate concern about the city's wet-weather discharge from the combined sewer systems. EPA had cited that the number of city sewer discharges predicted in a 1979 Ocean Plan Exception order made by the State Water Board was not accurate enough to ensure compliance with water quality standards today, thereby warranting further limitations on the city's discharges. Based on these findings, the Ninth Circuit Court found that EPA's decision to impose the prohibitions was rationally related to evidence in the record, and that the agency did not act arbitrarily or capriciously in including the prohibitions in the final permit.

## The Long-Term Control Plan Update Requirement

San Francisco's second challenge to the final NPDES permit was regarding the requirement that the city update its Long-Term Control Plan. The city argued that EPA did not make the necessary factual findings to require the update, and secondarily, by requiring it to specifically address "sensitive areas" in the update, EPA exceeded its authority.

The EPA's *Combined Sewer Overflow Control Policy* (CSO Control Policy), made legally binding by Congress in the Wet Weather Water Quality Act of 2000, is the legal basis for requiring municipalities to develop Long-Term Control Plans in order to protect water quality during wet weather. San Francisco argued that under the CSO Control Policy, the only legally permissible purpose for requiring an update to the Long-Term Control Plan is if the city is found to be in violation of water quality standards. Without factual findings of noncompliance, the city argued, EPA could not require the update.

However, the court agreed with EPA that the CSO Control Policy includes provisions that grant EPA authority to:

> . . .reassess, modify, and require revisions to NPDES permits, even for those programs exempted from initial planning requirements, in support of its interpretation.

Based on the plain language in the CSO Control Policy, the court found that NPDES permitting agencies are authorized to require municipalities to:

> . . .periodically reassess their combined sewer overflow control programs for potential improvement with respect to designated uses, irrespective of any failure to meet water quality standards.

Therefore, the court rejected San Francisco's argument that EPA needed a factual finding of noncompliance with water quality standards to require the Long-Term Control Plan update.

San Francisco secondarily argued that EPA exceeded its authority by requiring San Francisco to "report on its consideration of options to eliminate, relocate, or reduce the magnitude or frequency of discharges to *sensitive areas*" in the required Long-Term Control Plan update. The city contended that the "Consideration of Sensitive Areas" requirement was unduly burdensome, and that the requirement exceeded EPA's authority under the CSO Control Policy. The court agreed with EPA in that the CSO Control Policy grants NPDES permitting agencies broad discretion to impose revised requirements, including a requirement that municipalities reassess overflows to sensitive areas. It reasoned that this discretion aligns

with the CSO Control Policy's objective that municipalities' Long-Term Control Plan "give the highest priority to controlling overflows to sensitive areas." Thus, the Ninth Circuit Court found that EPA did not exceed its authority by requiring the city to address "sensitive areas" in its Long-Term Control Plan update.

### Conclusion and Implications

This case upholds EPA's broad discretion under the CWA and CSO Control Policy to impose limitations on the issuance of NPDES permits. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/ca9/21-70282/21-70282-2023-07-31.html.
(Claire Copher, Rebecca Andrews)

## DISTRICT COURT VACATES NATIONAL MARINE FISHERIES SERVICES' BIOLOGICAL OPINION AND ENVIRONMENTAL ASSESSMENT FOR SAFE HARBOR AGREEMENTS REGARDING SHASTA RIVER COHO SALMON

*Environmental Protection Information Center, et al. v. Alicia Van Atta, et al.*,
___F. Supp. 4th___, Case No. 47, 3:22-cv-03520-TLT (N.D. Cal. July 11, 2023).

In *Environmental Protection Information Center, et al. v. Alicia Van Atta, et al.*, the U.S. District Court for the Northern District of California granted plaintiffs' cross-motion for summary judgment and vacated the National Marine Fisheries Services' (NMFS) Biological Opinion and environmental assessment. NMFS' Biological Opinion and Environmental Assessment analyzed the effect of so-called "Safe Harbor Agreements" between NMFS and landowners nearby the Shasta River. (Order at 2.) As a result of the court's order, NMFS must now prepare a new Biological Opinion that adequately accounts for the effects of the Safe Harbor Agreements and prepare an environmental impact statement. *Id.* at 28.

### Background

In 1997, NMFS listed the Southern Oregon/Northern California Coast (SONCC) coho salmon as a threatened species. Order at 3. The Shasta River, a tributary to the Klamath River, contains an evolutionary significant unit of SONCC coho salmon, the Shasta River coho population. *Id.* NMFS' "depensation threshold," or the minimum number of adult coho in the Shasta River necessary the for survival of the population, is 144 adult coho salmon. *Id.*

After settling federal Endangered Species Act litigation with environmental plaintiffs groups in 2012 regarding take of Shasta River coho salmon, a group of water districts and landowners initiated the administrative process for "safe harbor agreements" with NMFS. Order at 4. "Safe harbor agreements" derive from NMFS' 1999 "Safe Harbor Policy." *Id.* Under the Safe Harbor Policy, private and non-federal landowners may enter into agreements with NMFS to adopt voluntary conservation measures to benefit listed species that provide a "net conservation benefit" for the listed species. *Id.* at 5. The landowner is then immune from take liability under Section 9 of the Endangered Species Act if the landowner's later actions incidentally "take" species in excess of a baseline established by the Safe Harbor Agreement. *Id.*

NMFS developed Safe Harbor Agreements and complementary Site Plan Agreements and Enhancement of Survival Permits (*i.e.*, incidental take permits), with fourteen parties after the conclusion of the administrative process. Order at 5-6. As required by Section 7 of the Endangered Species Act, NMFS consulted on the effects of the Safe Harbor Agreements, Site Plan Agreements, and Enhancement of Survival Permits under Section 7 of the Endangered Species Act. Order at 8. The resulting Biological Opinion found the proposed action would not jeopardize the continued existence of the SONCC coho salmon. *Id.* NMFS also conducted environmental review pursuant to the National Environmental Protection Act, and issued an environmental assessment. *Id.*

Plaintiffs Environmental Protection Information Center and Friends of the Shasta River sued to

invalidate the Biological Opinion and environmental assessment. Order at 2. The parties then filed cross-motions for summary judgment. *Id.* at 3.

### The District Court's Decision On Summary Judgment

After finding the plaintiffs had organization standing to sue to invalidate the administrative process that led to the issuance of the permits and agreements, the court found that NMFS abused its discretion in adopting the Biological Opinion and environmental assessment. Order at 14. NMFS' no-jeopardy Biological Opinion was inadequate because it: (1) improperly limited the action area; and (2) relied on conditions that were not reasonably certain to occur. Order at 17-21. First, the Biological Opinion only considered the effects within the property owned by the parties to the Safe Harbor Agreements. As a result, it unlawfully limited NMFS' review of the effects of the proposed action because it ignored "all areas to be affected directly or indirectly." Order at 18 (quoting 50 C.F.R. § 502.02).

Second, NMFS abused its discretion by relying in part on voluntary actions by the landowners subject to the Safe Harbor Agreements to find the action would not jeopardize the species. Order at 20. While relying on voluntary actions in a Safe Harbor Agreement is not in itself dispositive, the court found they were not certain to occur because only one of the landowners had given a timeline for the work and the other actions were not yet confirmed to be "feasible, let alone subject to completion." *Id.* Thus, these mitigation measures were not a "clear, definite commitment of resources . . . under agency control or otherwise reasonably certain to occur." *Id.* (citing *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020).

Plaintiffs also argued that the Biological Opinion was void because it violated the Safe Harbor Policy. Order at 16. The court rejected this argument, and held that NMFS' application of the Safe Harbor Policy was lawful and not a basis for invalidating the action because it is an interpretive rule that does not carry the force of law. *Id.*

The court also took issue with NMFS' assumptions and actions in adopting the environmental assessment. Order at 21. NMFS abused its discretion because in considering the intensity and context of the potential effects of the proposed action, NMFS should have recognized that the effects are highly controversial and mandated an environmental impact statement. *Id.* at 22 (citing 40 C.F.R. § 1508.27(b)(4)–(5)). The record demonstrated that the Shasta River coho salmon population is below the depensation threshold, and that the population was at a "high risk of extinction." *Id.* at 25. Additionally, the court held NMFS abused its discretion in adopting the Environmental Assessment because the cumulative effects analysis was lacking because it did not consider data on critical habitat before the implementation of the action. *Id.* at 26.

### Conclusion and Implications

The U.S. District Court remanded the matter to NMFS with instructions to prepare a new Biological Opinion and environmental impact statement. As of this writing, NMFS has not filed a notice of appeal. The court's order is available online at: https://westernlaw.org/wp-content/uploads/2023/07/2023.07.11-Shasta-River-Coho-Salmon-Victory-Order.pdf. (Nicolas Chapman, Sam Bivins)

## U.S. DISTRICT COURT DISMISSES GROUNDWATER PFAS COMPLAINT SEEKING TO HALT ONSHORE TRENCHING FOR LACK OF STANDING

*Mahoney v. United States Department of the Interior*,
___F. Supp. 4th___, Case No. 22-CV-1305 (E.D. N.Y. July 17, 2023).

The U.S. District Court Eastern District of New York recently dismissed the complaint of a group of citizens seeking to halt construction of an onshore trenching project for a wind farm in East Hampton. The plaintiffs claimed that the project would worsen existing levels of perfluoroalkyl and polyfluoroalkyl substances (collectively: PFAS) in their groundwater. The court determined that the group of citizens

lacked standing to bring the claim, as they could not establish that their injury was "fairly traceable" to the conduct of the defending agencies. The court thus granted the agencies' motion to dismiss for lack of subject matter jurisdiction.

## Factual and Procedural Background

Pamela and Michael Mahoney and Lisa and Mitch Solomon sued the U.S. Department of the Interior (Interior), the Bureau of Ocean Energy Management (BOEM), the U.S. Department of the Army, and the U.S. Army Corps of Engineers (Army Corps), collectively as defendants, to stop construction of a wind farm being built near East Hampton, New York.

The construction project consisted of both offshore and onshore trenches containing a cable that would transfer energy from the wind farm to an electric grid located in East Hampton. A portion of the onshore cable route was to pass under land adjacent to the plaintiffs. The plaintiffs worried that the construction would exacerbate existing levels of PFAS in their groundwater.

The portion of the project that the plaintiffs complained of–was under the jurisdiction of the New York Public Service Commission (NYPSC). The defendants had issued the necessary permits for the offshore portion of the project. NYPSC issued the necessary permits for the onshore trenching portion of the project.

The plaintiffs had participated in the notice and comment period before NYPSC issued the final permit for the project, and had unsuccessfully challenged the final permit in state court. BOEM issued a Final Environmental Impact Statement approving of the project, and the Army Corps adopted it. The Army Corps then issued the final permit pursuant to § 404 of the federal Clean Water Act. Plaintiffs brought this action claiming that the Final Environmental Impact Statement did not consider the potential increase in groundwater contamination in violation of the National Environmental Policy Act, the Clean Water Act, the Outer Continental Shelf Lands Act, and the Administrative Procedure Act. The defendants made a motion to dismiss for lack of standing and for failure to state a claim for which relief could be granted.

## The District Court's Decision

In reviewing whether plaintiffs had standing, the court considered three factors: (i) whether plaintiffs suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) whether the injury was likely caused by the defendants; and (iii) whether the injury would likely be redressed by judicial relief. The specific element of focus was causation, and whether the plaintiffs' alleged injuries were:

> . . .fairly traceable to the defendant's actions, "not the result [of] the independent action of some third party not before the court.

The plaintiffs claimed their injury in fact was that the project would exacerbate existing PFAS contamination levels, and that their property value would decrease as a result of the onshore trenching. Their complaint alleged that the injuries were caused by the agencies' actions because the trenching company:

> . . .would not be planning to trench a cable. . .[near their property]. . .but for Defendants requiring [the company] to use the route for the onshore cable as a condition of their approvals and permits.

Lastly, the plaintiffs claimed that their injuries were redressible by a judicial order to revise or withdraw the Army Corps' construction permit, as doing so would prevent further contamination.

The court, however, found that a "but for" test is not enough to meet the causation element for standing. The defendants claimed that while they issued the building permits for the trenching project, they had no jurisdiction over the construction itself. Interior's delegation of jurisdiction to BOEM extended only to the "outer continental shelf" of the project, which "extended seaward from New York state waters." Meanwhile, the Army Corps was granted authority under the Clean Water Act to permit discharge material into disposal sites located in United States waters, however, the plaintiffs did not claim that the affected water on their land was water of the United States. The defendants thus had no jurisdiction over the onshore portion of the trenching project; so while issuing the required permits necessarily would be a "but for" cause of the project, it was found

unlikely that issuing the permits alone would make the groundwater contamination "fairly traceable" to the defendants.

Alternatively, both parties had cited documents stipulating that the state and local agencies were responsible for choosing the location of the trenching, and that they had done so before the defendants issued the permit. The court found that the injury was more directly traceable to the NYPSC, the agency who had exclusive jurisdiction over the location choice and construction of the trenching. The court further found that the NYPSC's conduct was precisely the "independent action of some third party not before the court" that the standing test prohibits.

### Alleged Injuries 'Too Attenuated from the Agencies' Conduct'

The court determined that the plaintiffs' injuries were too attenuated from the agencies' conduct to establish causation. Because the causation element of the standing test was dispositive, the plaintiffs were found to have failed to establish standing and thus failed to show that the court had subject matter jurisdiction over the case.

The court granted the defendants' motion to dismiss and dismissed plaintiff's complaint with prejudice.

### Conclusion and Implications

This case clarifies which agencies face potential liability for offshore versus onshore trenching projects. The federal agencies named as defendants in this case were found only to have jurisdiction over the offshore trenching portions of the project. The state and local agencies were found to have jurisdiction, and potential liability, over the onshore portions of the project. The court's ruling is available online at: https://casetext.com/case/mahoney-v-us-dept-of-the-interior-1. (Claire Copher, Rebecca Andrews)

## RECENT STATE DECISIONS

# CALIFORNIA COURT OF APPEAL HOLDS INFORMATIONAL HARM TO THE PUBLIC INTEREST MUST BE CONSIDERED WHEN EVALUATING CEQA INJUNCTION RELIEF

*Tulare Lake Canal Co. v. Stratford Public Utility District*, 92 Cal.App.5th 380 (5th Dist. 2023).

A mutual water company, Tulare Lake Canal Company (TLCC) filed a petition for writ of mandate alleging the Stratford Public Utility District (SPUD) failed to comply with the California Environmental Quality Act (CEQA) when it granted an easement for a 48-inch water pipeline (Pipeline) to Sandridge Partners, L.P. (Sandridge). TLCC subsequently sought a temporary restraining order (TRO) and preliminary injunction to stay construction and operation of the Pipeline pending CEQA compliance. A few weeks after first granting the TRO, the trial court denied the preliminary injunction concluding that the relative balance of harms from granting or denying injunctive relief favored denying the injunction as there was nothing in the record addressing how allowing the Pipeline to move forward would cause harm to the public generally. TLCC appealed the preliminary injunction denial, and the Court of Appeal reversed the trial court's order with instructions for the trial court to reconsider the preliminary injunction in accordance with the principles set forth in the Court of Appeal's opinion.

### Factual and Procedural Background

Sandridge Partners, L.P. desired to construct a 48-inch water pipeline for irrigation of its crops. The Pipeline route determined by Sandridge ran across land owned by Sandridge, but subject to an easement held by a mutual water company, Tulare Lake Canal Company, as well as land owned by the Stratford Public Utility District. Sandridge sought and SPUD approved, at its October 6, 2021 board meeting, an easement to Sandridge for the Pipeline. The relevant SPUD meeting documents made no mention of the California Environmental Quality Act or potential environmental impacts of the Pipeline.

After filing a trespass lawsuit against Sandridge, TLCC, on February 16, 2022, filed a petition for writ of mandate alleging SPUD failed to comply with CEQA when it granted the easement for the Pipeline to Sandridge. On February 24, 2022, TLCC sought a temporary restraining order and preliminary injunction to stay construction and operation of the Pipeline pending CEQA compliance. On March 4, 2022, the trial court granted the TRO, which the trial court subsequently amended on March 18, 2022. On April 4, 2022, the trial court denied the preliminary injunction and dissolved the TRO, concluding that the relative balance of harms from granting or denying injunctive relief favored denying the injunction as there was nothing in the record addressing how allowing the Pipeline to move forward would cause harm to the public generally. On April 20, 2022, TLCC appealed the denial of the preliminary injunction and on April 21, 2022 filed a petition for writ of *supersedeas* with a request for an immediate stay. On April 29, 2022 the Court of Appeal stayed, effective immediately, the trial court's order dissolving the TRO. On May 20, 2022, the Court of Appeal for the Fifth Judicial District granted TLCC's petition for writ of supersedeas, which maintained the TRO during the pendency of the appeal. The Court of Appeal's opinion on the preliminary injunction denial followed.

### The Court of Appeal's Decision

The Court of Appeal reviewed the trial court's denial of the preliminary injunction.

#### Balancing of Interim Harms in a CEQA Action Requires the Consideration of Harms to Public Interests

The Court of Appeal first discussed the usual interrelated factors in determining to grant or deny a preliminary injunction—(1) the likelihood that the plaintiff will prevail on the merits, and (2) the

relative balance of harms that is likely to result from the granting or denial of interim injunctive relief. The Court of Appeal observed that various judicial decisions address the balance of harms with respect to the involved parties, while other decisions use more general terms that do not specifically reference the involved parties. The Court of Appeal determined that based on those decisions and the fact that CEQA is designed to further public interests, the balancing of the harms likely to result from granting or denying a preliminary injunction in a CEQA action requires consideration of harms to public interests.

### TLCC has Likelihood of Prevailing on Merits of the CEQA Action

The Court of Appeal next reviewed the trial court's determination that TLCC was likely to prevail on the merits of its CEQA action. The Court of Appeal, first, determined that SPUD's granting of the easement to Sandridge was a project subject to CEQA. More specifically, the Court of Appeal found that each of the necessary requirements to be determined a CEQA project were met—(1) that SPUD's granting of the easement to Sandridge constituted a "project" pursuant to Public Resources Code § 21065(c) as it involved the "issuance to a person of [an] entitlement for use" by a public agency as well as, alternatively, a "form[] of assistance from" a public agency pursuant to Public Resources Code § 21065(b); (2) that SPUD's granting of the easement to Sandridge involved the exercise of discretionary powers by a public agency as the record reflected SPUD's board of directors exercising their personal judgment on whether or not to grant the easement to Sandridge; (3) with emphasis of the need to review the "whole of an action," the project was not limited to the physical granting of the easement, but also the construction and operation of the Pipeline, which would cause a direct physical change in the environment because, among other things, (i) the equipment used during construction will generate noise and dust and (ii) the operation of the Pipeline would transfer groundwater from one area for use in another area—and accordingly SPUD could not determine "[t]he activity will not result in a direct or reasonably foreseeable indirect physical change in the environment."

The Court of Appeal, next, held that because, based on the above holdings, SPUD's granting of the easement was a project subject to CEQA and the record was bereft of any CEQA assessment by SPUD, it was a near certainty that SPUD failed to comply with CEQA and TLCC had a likelihood of prevailing on the merits of its CEQA action.

### Informational Harm to the Public Interest is Relevant When Deciding Whether to Issue a Preliminary Injunction

The Court of Appeal proceeded to evaluate the balancing of harms factor in the preliminary injunction evaluation. Within this context, the Court of Appeal identified an error made by the trial court, which had stated that the record lacked any information about potential harm to the public if the Pipeline project were allowed to continue. The Court of Appeal clarified that due to SPUD's failure to consider CEQA, as discussed above, the absence of such consideration resulted in harm to the public interest in informed decision-making by a public agency. In other words, SPUD's failure to conduct an initial environmental review and gather crucial information necessary for that review was deemed detrimental to the public's ability to make well-informed decisions.

Moving forward, the Court of Appeal explored the significance of harm to the public interest in informed decision-making in a court's evaluating the "relative balancing of harms" in the context of a preliminary injunction determination. In other words, whether harm to public interests related to informed decision-making and public disclosure should be a factor in determining whether a preliminary injunction should be issued. The Court of Appeal concluded, considering the fundamental goals of CEQA, that these particular public interests must indeed be taken into account when weighing the balance of harms in preliminary injunction decisions.

The Court of Appeal next found that no published California legal precedent had directly addressed the question: In CEQA cases, is harm to the public's interests in informed decision-making and public disclosure sufficient grounds for issuing a preliminary injunction, or should it be coupled with a demonstration of environmental harm. In other words, does harm stemming from noncompliance with CEQA's information disclosure requirements alone justify a preliminary injunction. Drawing on federal case law, the issue of establishing a judicially created presumption that a CEQA violation inherently constitutes significant public harm, justifying preliminary injunc-

tions except in unique cases, was considered. Nevertheless, the Court of Appeal rejected this notion as incompatible with the legislative approach to CEQA violations and their consequences, which do not always constitute a prejudicial abuse of discretion requiring reversal.

Similarly, the Court of Appeal held it inappropriate to adopt a rigid rule mandating that harm to the public, resulting from CEQA noncompliance, must be accompanied by a showing of likely environmental harm before granting a preliminary injunction. This was particularly true when CEQA noncompliance involved the absence of both an initial review and a comprehensive project description. The Court of Appeal noted that rigidly requiring a CEQA plaintiff to establish an adverse environmental impact at such an early point in the CEQA review process would benefit project proponents who withhold information in violation of CEQA and hinder a public agency's ability to evaluate the activity's environmental impact.

The Court of Appeal ultimately concluded, that based on the circumstances presented, there was a reasonable probability TLCC would have obtained a preliminary injunction if the harm to the public interest had been recognized and included in the relative balance of harms. The Court of Appeal, thus, reversed and remanded TLCC's preliminary injunction request for further proceedings in the trial court.

### Conclusion and Implications

The case is significant because it holds that the harms to the public interest in informed decision-making must be considered by the trial court in deciding whether or not to issue a preliminary injunction in a CEQA action. The published opinion of the Court of Appeal is available online at: https://www.courts.ca.gov/opinions/documents/F084228.PDF. (Eric Cohn, E.J. Schloss)

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