



MEMORANDUM

Date: August 20, 2020
To: Delta Stewardship Councilmembers
From: Bethany Pane, Chief Counsel
Erika Giorgi, Senior Counsel
Subject: **Legal Update – August 2020**

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This memorandum discusses recent developments in the cases identified below:

Wetlands Preservation Foundation v. DWR, et al., San Joaquin County Superior Court, Case No. STK-CV-2018-8957

On July 9, 2020, the San Joaquin County Superior Court issued its final ruling in *Wetlands Preservation Foundation v. DWR, et al.*, holding for plaintiff (Wetlands Preservation Foundation (WPF)) on two of four causes of action. The court issued a statement of decision requiring Department of Water Resources (DWR) to exercise some level of discretion in overseeing The Nature Conservancy's (TNC's) activities on Staten Island. It also found that DWR failed to adequately consider the need to protect public trust resources in overseeing TNC's activities. In short, although the court did not go so far as to hold that TNC's activities violated the conservation easement, it did hold that DWR failed to make minimal effort. Please see below for additional information on the decision.

1. Background

In 2001, TNC purchased Staten Island using approximately \$35 million in public taxpayer money authorized by California Proposition 13 and California Proposition 204. (Decision, p. 2.) Half of the purchase money was provided by CalFED (pursuant to Proposition 204) and half was provided by DWR (pursuant to Proposition 13). (Decision, p. 2.) In exchange for the Proposition 13 funds that DWR granted to TNC so that TNC could acquire Staten Island, DWR obtained the Staten Island Perpetual Conservation Easement Deed (SPCE), which is an exclusive and perpetual easement requiring conservation of Staten Island's agricultural land and wildlife habitat. (Decision, p. 2.) The stated purposes of the SPCE are to preserve and protect each of the multiple and complementary benefits of Staten Island to encourage and promote wildlife-friendly agricultural practices on Staten Island. (Decision, p. 2.) The multiple and complementary benefits include agricultural land preservation, including the economic viability of agricultural operations; wildlife habitat protection; protection of a flood plain area from potential inappropriate and incompatible development; and, potential role in future flood

"Coequal goals" means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

management and water management improvements. (Decision, pp. 2-3.) The SPEC requires TNC to maintain Staten Island, including Staten Island levees, in the same or better condition as on the date it was acquired by TNC, subject to normal wear and tear. (Decision, p. 3.) DWR has authority in the SPCE to enjoin any activity or use of Staten Island that is inconsistent with the stated purposes of the SPCE and to enforce the restoration of such areas or features that may be damaged by any activity or use of Staten Island, which is inconsistent with the terms of the SPCE. (Decision, p. 3.)

2. WPF's Writ Action and the Court's Statement of Decision

In 2018, Plaintiff, WPF filed a Petition for Writ of Mandate and Complaint in San Joaquin County Superior Court against Defendants DWR and TNC, alleging DWR abused its discretion (traditional mandamus under Code of Civil Procedure section 1085) in conducting oversight of TNC's compliance with the SPCE, alleging violations of the public trust doctrine, public and private nuisance, and breach of contract against TNC. A trial was conducted in November and December 2019. The court issued a tentative decision on March 2, 2020, finding for WPF on two of its causes of action. DWR and WPF requested a statement of decision be prepared and the court continued to allow supplemental briefing and statements to be submitted in June 2020. The court issued a statement of decision on July 9, 2020, consistent with the tentative decision, holding for WPF on two of the causes of action.

First in the traditional mandamus action under Code of Civil Procedure section 1085, the court found that DWR abused its discretion by refusing to exercise its discretion. (Decision, pp. 7-8.) The court found that DWR took no action to oversee or monitor TNC's activities pursuant to the SPCE from 2001-2016 (15 years). When DWR began its monitoring programs (2017-2019), the court found that DWR did not investigate or do any studies; monitoring observers did not get out of their vehicles on site visits; and DWR took the word of TNC without verifying and signed off. The court found that DWR merely "rubber-stamped" TNC's activities, without exercising any discretion as required by the SPCE. (Decision, p. 7.)

The court did not grant WPF's requested injunctive relief to require specific goals and standards to be met by certain deadlines. Instead, the court mandated that DWR conduct a baseline study or evaluation of Staten Island to enable DWR to exercise its discretion in its oversight and monitoring of Staten Island pursuant to the SPCE, going forward. (Decision, p. 9.)

WPF also alleged violations of the public trust doctrine. Under the public trust doctrine, the State and its agencies (i.e., DWR) share responsibility for protecting natural resources and may not approve of destructive activities without giving due regard to the preservation of those resources. The court found that Staten Island is protected by the public trust doctrine and DWR has "an affirmative duty to take the public trust into account and to protect public trust uses whenever feasible." (Decision, p. 10, referencing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.) More particularly, DWR owes a public trust duty to protect the natural resources of Staten Island and DWR may not approve activities on Staten Island without giving due regard to the preservation of Staten Island's natural resources. (Decision, p. 10.) Similar to the first cause of action, the court found DWR abused its discretion by refusing

to exercise its discretion as part of its responsibilities under the public trust doctrine. (Decision, p. 10.)

Finally, WPF alleged violations of nuisance (public and private) against both DWR and TNC, and breach of contract against TNC. The court found in favor of DWR and TNC on WPF's cause of action on public and private nuisance. (Decision, p. 14.) In order to establish nuisance, an essential element is damage or injury. The court found that the evidence did not establish damage or injury. Specifically, WPF did not establish evidence that the activities of TNC on Staten Island have created a condition such that it is probable or imminent that Staten Island's levees will fail and/or Staten Island will flood. (Decision, p. 12.) The court also found in favor of TNC in the breach of contract claim because the court found that WPF failed to establish injury or damage resulting from the alleged TNC's contract breaches because it failed to establish that it is probable or imminent that Staten Island's levees will fail and/or Staten Island will flood. (Decision, pp.19-21.)

Both WPF and DWR filed objections to the court's statement of decision under relevant sections of the California Code of Civil Procedure. On August 18, 2020, the court issued a Preemptory Writ of Mandate.

Central Delta Water Agency, et.al. v. DWR, Sacramento Superior Court, Case No. 34-2020-80003457

On July 9, 2019, DWR adopted a Mitigated Negative Declaration and Initial Study (MND) for geotechnical investigations related to the Delta Conveyance Project. According to the MND, DWR proposed to conduct overwater drilling and on-land soil investigations in various locations in the Delta. Petitioners provided public comments on DWR's Initial Statement and MND concerning potential significant impacts from the proposed geotechnical investigations, the need for mandatory findings of significance, and the separation of review of the project from the larger Delta Conveyance Project. DWR provided responses to comments and finalized the MND. On August 10, 2020, Petitioners, Central Delta Water Agency, South Delta Water Agency and Local Agencies of the North Delta filed a Petition for Writ of Mandate in Sacramento County Superior Court against DWR, alleging DWR violated the California Environmental Quality Act (CEQA). Petitioners claim that the MND violates CEQA because DWR: (1) failed to follow the procedural mandates of CEQA, (2) piecemealed the project from the larger Delta Conveyance Project, and (3) failed to disclose, analyze and mitigate the potentially significant effects of the Project. The case has not been assigned.

We will continue to update you on this case as new information becomes available.