

November 2015 Legal Update

Natural Resources Defense Council, et al. v. Department of Interior, et al.

Natural Resources Defense Council (NRDC) and other environmental organizations recently amended a complaint alleging that the U.S. Bureau of Reclamation and Sacramento River Settlement Contractors (SRSC) have mismanaged water supplies and unlawfully diverted limited water supplies from above Shasta Dam for agricultural use. The NRDC claims in 2014 the Bureau's actions led to the death of more than 95 percent of young winter-run Chinook salmon emerging from eggs and rearing below Shasta Dam and appear to have done the same to this year's generation of young salmon. NRDC is requesting injunctive relief to stop the Secretary and SRSC from releasing water from the Shasta Reservoir. A motion hearing is set for December 7, 2015 in the Eastern District Court.

SRSC denies these allegations and claims that they have voluntarily deferred their diversions in the spring to help provide cold water for salmon, and in the fall for birds along the Pacific Flyway. This year SRSC operated under a crop-reduction/water conservation plan approved by the State Water Resources Control Board, Department of Fish and Wildlife, and the National Marine Fisheries Service.

Clean Water Act Sixty-Day Notice Letter from the Natural Resources Defense Council to the United States Environmental Protection Agency

On October 29, 2015, the Natural Resources Defense Council (NRDC) and other environmental organizations sent a 60-day notice of their intent to sue the United States Environmental Protection Agency (USEPA or Agency) to the Agency's Administrator. The 60-day notice letter is a requirement of the citizen-suit provision of the Clean Water Act (33 U.S.C. § 1365).

In its 60-day letter, NRDC alleges that USEPA failed to exercise federal oversight of the State Water Resources Control Board's (State Water Board's) approaches to water quality standards in its Bay-Delta Water Quality Control Plan. First, NRDC argues that under the recent drought Executive Orders, the State Water Board has been approving temporary urgency change petitions from permittees and licensees that affect water quality standards in the Delta. The permit and license modifications approved by the State Water Board include changes to Delta outflow objectives, export requirements, gate closure requirements, and salinity standards requested by the Department of Water Resources and Bureau of Reclamation to operate the Central Valley and State Water Projects. NRDC argues that USEPA should have reviewed these temporary modifications under the Clean Water Act (*see* 33 U.S.C. § 1313(c)(2) – (4)).

Second, the Clean Water Act requires states to conduct triennial public reviews of water quality standards, and to modify or adopt new standards as appropriate. Since the State Water Board hasn't conducted a review since its 2006 update of the Bay-Delta Plan, NRDC argues that USEPA has failed to ensure that review of water quality standards in the Bay-Delta Plan have occurred every three years (*see* 33 U.S.C. §1313(c)(1); 40 C.F.R. §131.20(a)).

The sixty-day period lapses on Monday, December 28, 2015. We will have an update for you at the January 2016 Council meeting as to the status of any suit brought by NRDC against USEPA.

Governor's Third Drought-Related Executive Order

On November 13, 2015, Governor Brown issued a third Executive Order proclaiming a state of emergency due to the drought (Executive Order 8-36-2015). Among other things, the earlier state of emergencies (proclaimed in January and April 2014):

- Mandated statewide conservation measures;
- Notified water rights holders of water shortages;
- Expedited water transfers;
- Suspended Water Code section 13247, to afford the State Water Board greater flexibility in approving temporary urgency change petitions that are at issue in the NRDC notice letter discussed above;
- Offered technical and financial assistance to communities facing drinking water shortages;
- Required the Department of Water Resources to enhance its groundwater and subsidence monitoring efforts, and the Department of Fish and Wildlife to monitor Delta smelt and Winter-run Chinook salmon in the Delta; and
- Lifted CEQA and public contracting requirements for specified actions required in the Executive Orders.

The new State of Emergency proclamation continues these orders, and also:

- Prioritizes State and Regional Water Board approvals for local projects that capture and store or recharge stormwater;
- Provides \$5 million in drinking water assistance for households served by small water systems (i.e., systems serving fewer than 14 drinking water connections) or by domestic wells or other individual water supplies; and
- Maintains statewide urban potable conservation requirements (i.e., 25% reduction target) through October 2016, if drought conditions persist through January 2016.

Qualified Initiative: "California Public Vote on Bonds"

On November 2, 2015, the Secretary of State's office announced that the "California Public Vote on Bonds Initiative," sponsored by Dean Cortopassi, qualified for the November 8, 2016, ballot. The measure would require voter approval for public infrastructure revenue bonds amounting to more than \$2 billion when repayment on those bonds requires new or increased taxes or fees. The proposed measure is broadly drafted to include large public infrastructure projects, but the press generated over the initiative's qualification to date has focused on the effect the measure would have on the Department of Water Resources' proposed WaterFix project for Delta water supply reliability (i.e., likely subjecting any revenue bond funding to statewide voter approval).

Proposed Initiative: "The Water Priorities Public Interest and Public Trust Constitutional Amendment and the New Surface Water and Groundwater Storage Facilities Bond Act of 2016"

On November 13, 2015, Board of Equalization Vice Chair George Runner and California State Senator Bob Huff (R-San Dimas) filed a proposed initiative with the Attorney General's Office to reappropriate unspent High Speed Rail (Prop 1A, 2008) and above ground water storage (Prop 1, 2014) funds. Those funds would be redirected towards building new surface and groundwater storage. The proposed measure would also amend the California Constitution to make drinking water and irrigation the beneficial water use priorities in the state ahead of all other needs (e.g., industrial supply, groundwater recharge and freshwater replenishment, navigation, hydropower generation, recreation or habitat).

The Attorney General has opened a public comment period to assist in its preparation of the proposed initiative's circulating title and summary. That comment period closes on December 13, 2015. The Attorney General will then forward the circulating title and summary to the Secretary of State who will clear it for circulation (i.e., signature gathering). We will keep you updated on the signature gathering deadlines that are established by the Secretary of State, as they become available.