Legal Update February, 2013—Tori Sundheim, Legal Intern

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I. Request for Extension of New Smelt Biological Opinions: Consolidated Fish (Smelt and Salmonid) Cases

Facts: Early in January, US Fish and Wildlife Services (FWS) and the Department of Water Resources (DWR) requested a 3 year extension of the Biological Opinion due in December 2013. This request was made because the agencies stated that they wish to develop a collaborative science and adaptive management program and because of recent changes to the BDCP that would also allow for further collaboration for a better Biological Opinion (BiOp). On January 30, 2013, the U.S. District Court for the Eastern Court of California remanded FWS's request until March 1, 2013.

Legal Argument: FWS et al. relied on Fed. R. Civ. P. 60(b)(5). This rule was used to argue that applying the judgment (for FWS to produce a new BiOp in December 2013) prospectively is no longer equitable. A party invoking Rule 60(b)(5) must satisfy a two-prong standard:

1. **First, "[t]he moving party… must show a significant change either in factual conditions or in the law warranting modification of the [judgment]."**
   (1) the development of a "collaborative science and adaptive management program"; and
   (2) recent changes to the Bay Delta Conservation Plan ("BDCP").
2. **Next, "the proposed modification [must be] suitably tailored to resolve the problems created by the changed factual or legal conditions."** The Court did not make it to this part because prong 1 was not satisfied, but this foreshadows what FWS and DWR must prove:
   a. Modification should not be permitted "where a party relies upon events that actually were anticipated at the time it entered into a decree." "Modification should be granted only if the party satisfies the heavy burden of convincing the court that it agreed to the [judgment] in good faith, made a reasonable effort to comply, and should be relieved of the undertaking under Rule 60(b)."

Order: The court was "inclined" to deny the motion, but remanded the order permitting movants to submit a revised proposal and supporting documents filed on or before March 1, 2013. In particular, the court stated "Why would it be "less onerous" or "more beneficial to the public interest" to interrupt this process and begin an entirely new, and, as far as the Court can tell, largely undefined, collaborative scientific adaptive management process?" It also expressed that BDCP was considered in designing the amended judgment in the Consolidated Delta and Salmonid Cases.

Relevance to Council: the need to make decisions based on best available science/the continuing struggle to best design and incorporate adaptive management and scientific collaboration in decisionmaking.

We will continue to monitor the progress of this case

CEQA Reform – There appears to be some momentum for reform, as evidenced by the creation of the Senate's Environmental Quality Committee chaired by CEQA reform advocate Michael Rubio. Also, Senate President Pro Tem Darrell Steinberg has promised to make reviewing updates to the law a priority, and the Governor declared his of support of reform in his State of the State speech last month. We are in the process of assessing the universe of proposals and the implications they may have for the DSC.

CEQA Reform – What does it mean?

Pro – Reform: e.g. CEQA Working Group - "It's time to modernize CEQA to preserve the intent of the law – environmental protection and public participation – while limiting abuses of CEQA that have stopped responsible community improvements that benefit the economy and environment."

Abuses: Many lawsuits are brought or threatened for non-environmental reasons and often times these lawsuits seek to halt environmentally desirable projects like clean power, infill and transit

Other Problems: At the time CEQA was adopted 40 years ago, most of the current environmental protection laws did not exist; CEQA therefore lacks a comprehensive approach that acknowledges and compliments these modern environmental laws and regulations

Main Principles for Modernization:

1. Integrate Environmental and Planning Laws
2. Eliminate CEQA Duplication
3. Focus CEQA Litigation on Compliance with Environmental and Planning Laws
4. Enhance Public Disclosure and Accountability

Anti-Reform: e.g. CEQA Works (comprised of organizations like NRDC, the Sierra Club and the Center for Biological Diversity) – Fear that CEQA reform will result in weakened state environmental protections

Other Concerns: That a reformed CEQA will inhibit the public's input into land use planning decisions, could harm the public's health, and inadequately protect the environment.

Aims: (1) To protect the right of the public to weigh in on community land-use decisions; (2) Keep California's environmental laws strong to prevent air and water pollution and the public health risks they pose; (3) Advocate for sensible updates to CEQA that reduce bureaucracy without weakening key environmental safeguards.

Main Principles for Maintaining the Current CEQA Model:

1. **Transparency.** CEQA must continue to require public disclosure of the project, its potential environmental impacts and consideration of reasonable alternatives
2. **Mitigation.** CEQA must continue to require mitigation of all significant effects on the environment to the extent feasible
3. **Comprehensive protection.** CEQA must apply to all significant impacts on the environment, including cumulative impacts, and provide a safety net to cover holes in the existing regulatory structure

4. **Public participation.** CEQA must continue to require public participation in the review of environmental issues, including requiring a written response to public comments
5. **Community enforcement.** CEQA must continue to provide the public with the right to sue to enforce its protections, a key tool to protect communities, particularly those in disadvantaged areas.

Bottom Line: As the relevance is currently not fully understood, we will continue to keep an eye on this subject and provide updates as they arise.