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DELTA STEWARDSHIP COUNCIL

A California State Agency

Chair
Susan Tatayon

To: Councilmembers

From: Vera Bezdicek, Senior Counsel
Through: Bethany Pane, Chief Counsel

Date: March 24, 2020

Re: Open Session Legal Update

Members
Frank C. Damrell, Jr.
Randy Fiorini
Michael Gatto
Maria Mehranian
Oscar Villegas
Ken Weinberg

Executive Officer
Jessica R. Pearson

The purpose of this memorandum is to provide the Council with a written, rather than oral, legal update for open session of the March 26, 2020 Council meeting. Below are summaries of Delta-related litigation that the legal office is monitoring for you.

DWR Environmental Impact Cases (Case No. 34-2017-00215965 (JCCP 4942))

The California Department of Water Resources (DWR) approved the California WaterFix project on July 21, 2017, after certifying the final environmental impact report (EIR). Shortly thereafter, nearly two dozen parties filed suit challenging DWR's validation action on CEQA and various other grounds.

While the litigation administrative record was being prepared, Governor Gavin Newsom issued an executive order detailing his approach to California's water challenges and announced a reconfiguration of WaterFix's design from two tunnels to one tunnel.

On May 7, 2019, in response to the Governor's reconfiguration plan, the DWR Director decertified the final EIR and previous approval of the WaterFix project. In light of these rescissions, all moving parties and plaintiffs voluntarily dismissed their claims against DWR, but several parties filed motions requesting attorney's fees and costs.

Judge Kevin R. Culhane presided over the hearing on the motion for attorney's fees and costs, and on February 11, 2020, issued an order denying the motion for attorney's fees and costs, finding that the petitioners were not successful or prevailing parties under the law.

The court found that DWR was motivated to decertify the EIR and previous approval by the Governor's State of the State Address and executive order, rather than the litigation. Petitioners have filed notices of appeal earlier this month.

We will keep you updated as the appeals move forward.

"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."

– CA Water Code §85054

State Water Board Cases (Bay-Delta Water Quality Control Plan Phase I Amendment; Sacramento Superior Court: JCCP 5013)

On December 12, 2018, the State Water Resources Control Board (SWRCB) adopted an update to the Bay-Delta Water Quality Control Plan (Bay-Delta Plan) for the Lower San Joaquin River and its tributaries, the Stanislaus, Tuolumne and Merced Rivers, and the Southern Delta, setting unimpaired flow objectives and salinity objectives. Several entities filed lawsuits in various counties against the SWRCB, challenging the Bay-Delta Plan update on CEQA and merits grounds. On February 21, 2019, the SWRCB petitioned for coordination of the lawsuits.

Judge Eurie has ordered the cases to be coordinated in Sacramento County, including the United States' CEQA claims and the claims of the South Delta Water Agency, the Central Delta Water Agency, and Rudy Mussi Investments L.P., for which the petition for coordination was delayed because the SWRCB was not served with the summons until January 15, 2020.

The SWRCB will prepare the administrative record for the coordinated proceedings.

The next case management conference is set for April 17, 2020. At an ex parte hearing held on March 16, 2020, the parties confirmed the case management conference will be conducted telephonically. We will keep you updated on significant new developments in the case.

Federal Biological Opinion Challenges (Environmental/Fisheries Lawsuit; State Lawsuit)

On March 5, 2020, in the Federal District Court for the Northern District of California, a coalition of fisheries groups and environmental groups filed a motion requesting the court issue a preliminary injunction to prevent the federal defendants, including the Bureau of Reclamation, National Marine Fisheries Service and the U.S. Fish and Wildlife Services, from implementing the new federal biological opinions for the Central Valley Project and State Water Project.

On March 20, 2020, the court ordered the matter to be transferred to the United States District Court for the Eastern District of California, based on the interests of justice, the judicial economy, convenience to the parties, and the Eastern District's significant ties and strong local interest in the case.

The court also ordered the State's lawsuit challenging the biological opinions, filed on February 20, 2020, against the same defendants, to be the transferred to the Eastern District.

We will continue to track and keep you updated on significant developments in both cases.