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Superior Court of California
County of Sacramento
06/20/2024
M. Lu, Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

TULARE LAKE BASIN WATER STORAGE DISTRICT, **Petitioner,** **v.** **CALIFORNIA DEPARTMENT OF WATER RESOURCES,** **Respondent,** And Related Cases.	Case Nos. 24WM000006 24WM000008 24WM000009 24WM000010 24WM000011 24WM000012 24WM000014 24WM000017 24WM000062 24WM000076 Judge: Stephen Acquisto Dept.: 36

Nature of Proceedings:	**Ruling on Submitted Matter – Petitioners' Motions for Preliminary Injunction**

BACKGROUND

On December 21, 2023, Respondent the California Department of Water Resources approved the Delta Conveyance Project (the DCP) and certified its final environmental impact report (FEIR). The DCP is an expansive water infrastructure project to divert water, through a large tunnel, from the Sacramento River and the Sacramento-San Joaquin Delta. The DCP aims to improve the reliability and resiliency of the State Water Project, the existing infrastructure that delivers drinking water to millions of Californians. Following its approval, several writ petitions were filed challenging the DCP and the FEIR under the California Environmental Quality Act (CEQA), the Water Code, and other laws. There are now ten such related cases pending before this Court.

The Department intends to undertake geotechnical investigations prior to construction. According to Chapter 3 of the FEIR, titled "Description of the Proposed Project and Alternatives," the geotechnical investigations will "identify geotechnical, hydrogeologic, agronomic, and other field conditions that will guide appropriate construction methods and monitoring programs for final engineering design and construction." (Baykeeper RJN, Ex. A, p.

3-2.) The Notice of Determination for the DCP, which provided notification that the Department had approved the DCP, describes such geotechnical work as part of the "key components and actions" of the project. (*Id.*, Ex. B, Attachment 2.) The geotechnical work includes the following:

- soil borings up to 250 feet deep;
- installation of test wells;
- installation of an array of electrodes to perform electrical resistivity tomography;
- installation of in-river cofferdams;
- installation of metal survey monuments; and
- excavation of test trenches up to 1,000 feet long, 3 feet wide, 20 feet deep.

(Resp. RJN, Ex. 1, § 3.15.2; Marquez Decl., Ex. B, p. 4 [describing depth of soil borings].)

Petitioners in five of the related cases (case nos. 24WM000009, 24WM000010, 24WM000012, 24WM000014, and 24WM000017) filed motions for preliminary injunction seeking to enjoin the Department from undertaking this geotechnical work in the Delta. Petitioners contend that before beginning, the Department must first self-certify that the DCP is consistent with the Delta Plan as required by the Sacramento-San Joaquin Delta Reform Act of 2009 ("Delta Reform Act"), set forth in Water Code section 85000, et seq. On May 31, 2024, the Court held a hearing on the motions, heard argument from counsel, and took the matter under submission. Having now considered the parties' filings and oral arguments, the Court renders this decision granting the motions.

DISCUSSION

I. Preliminary Matters

A. Requests for Judicial Notice

County of Sacramento, et al. (24WM000014), San Francisco Baykeeper, et al. (24WM000017), and the Department each filed an unopposed request for judicial notice for various documents including different parts of the FEIR, the Notice of Determination for the project approval, and documents published by the Delta Stewardship Council. Each request is granted. (Evid. Code, § 452, subds. (c), (h).)

B. Evidentiary Objections

In its opposition to the motions, the Department filed objections to evidence submitted by Petitioners. In their replies, City of Stockton (24WM000009), County of San Joaquin, et al.

(24WM000010), County of Sacramento, et al. (24WM000014), each filed objections to evidence submitted by the Department. The Court is issuing rulings on these objections separately.

II. Merits

A preliminary injunction is an "order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1260.) "Trial courts evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Amgen Inc. v. California Correctional Health Care Services* (2020) 47 Cal.App.5th 716, 731.) "The potential merit and interim harm are described as *interrelated* factors because the greater the plaintiff's showing on one, the less must be shown on the other to obtain an injunction." (*Tulare Lake Canal Company v. Stratford Public Utility District* (2023) 92 Cal.App.5th 380, 396-397.)

A. Petitioners' Likelihood of Success on the Merits

All of the motions raise a single identical issue with respect to likelihood of success on the merits—the Department's compliance with the Delta Reform Act. Petitioners contend that the Department's plan to undertake geotechnical investigations prior to certifying the DCP as consistent with the Delta Plan violates Water Code section 85225, which requires such certification "prior to initiating the implementation" of a "covered action."

In opposition, the Department argues that the geotechnical investigations do not trigger the certification requirement under section 85225, because they constitute planning and design activities needed to finalize the DCP's design, which do not amount to "implementation" of the "covered action." The Department argues that Petitioners' interpretation is unworkable, claiming that it is afraid that, even though it has completed all of the in-depth studies, analysis, and specificity required under CEQA, it does not yet have enough information to self-certify that the DCP is consistent with the Delta Plan. The Department argues it will not be able to prepare such a certification until it has completed the geotechnical work.

The question before the Court is an issue of statutory interpretation. The courts' primary task in statutory interpretation is "to determine the lawmakers' intent." (*Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 193.) "Where the statutory language is clear and unambiguous,

that language controls and there is no need for judicial construction." (*Ibid.*) But courts must "construe the words of the statute in context, keeping in mind the statutory purpose," and "will not follow the plain meaning of the statute" when doing so would frustrate "the manifest purposes of the legislation as a whole or [lead] to absurd results." (*Ibid.*)

The Delta Reform Act establishes a self-certification process for agencies to demonstrate that projects in the Delta are consistent with the Delta Plan. Specifically, Water Code section 85225 provides: "A state or local public agency that proposes to undertake a covered action, *prior to initiating the implementation of that covered action, shall prepare a written certification of consistency* with detailed findings as to whether the covered action is consistent with the Delta Plan and shall submit that certification to the [Delta Stewardship C]ouncil." (Wat. Code, § 85225 [emphasis added].) "Covered action" is defined as a "plan, program, or *project as defined pursuant to Section 21065 of the Public Resources Code* that meets" a number of conditions, including that the action "[w]ill have a significant impact on achievement of one or both of the coequal goals" of the Delta Plan.[1] (*Id.*, § 85057.5, subd. (a) [emphasis added].) Public Resources Code section 21065 is a CEQA provision that defines "project" as "an activity directly undertaken by any public agency," "*which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment*[.]" (Pub. Resources Code, § 21065, subd. (a) [emphasis added].) Thus, the Legislature defined "covered action" to mean "project" as defined under CEQA.

The Department defined the DCP to include the geotechnical work at issue here. The FEIR analyzed the geotechnical work as part of the project (Baykeeper RJN, Ex. A, pp. 3-2, 3-134 to 3-141), and the Notice of Determination described it as a "key component" of the project (*Id.*, Ex. B, Attachment 2). Because the geotechnical work is part of the "project" within the meaning of CEQA, it is necessarily part of a "covered action" within the meaning of Water Code section 85225.

1. *Petitioners' Statutory Interpretation*

Petitioners' argument in support of their preliminary injunction motions is premised on a straightforward reading of the statutes cited above. They contend that because the DCP is a project that qualifies as a "covered action" under the Delta Reform Act, and because the

[1] The coequal goals of the Delta Plan are "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." (Wat. Code, § 85054.)

geotechnical work at issue here is a component of the DCP, the plain language of section 85225 requires the Department to prepare a certification of consistency prior to initiating the implementation of the DCP, including its geotechnical component.

Moreover, this interpretation would give effect to the apparent purpose of the certification-of-consistency requirement. Boring holes 250 feet deep and digging trenches 1000 feet long, 20 feet deep, and 3 feet wide, for example, certainly appear to be the type of activity that would cause "physical change in the environment" (as provided in Public Resources Code section 21065) and have "a significant impact on achievement of one or both of the coequal goals" of the Delta Plan (as provided in Water Code section 85057.5, subdivision (a)(4) as part of the definition of "covered action"). When there are proposed activities that would likely cause a physical change to the Delta's environment and significantly impact the Delta's ecology or California's water supply, it seems reasonably clear that our Legislature wanted consistency with the Delta Reform Act to be certified *before* those activities are implemented. Thus, requiring the Department to prepare a certification of consistency before undertaking the geotechnical work appears consistent with both the letter and intent of the Delta Reform Act.

2. *The Department's Statutory Interpretation*

In opposition, the Department acknowledges that the DCP qualifies as a "covered action" under Water Code section 85057.5, and that it will need eventually to prepare a certification of consistency. The Department argues, however, that even though the geotechnical activities are included as part of the project in the FEIR for CEQA purposes, "implementation" under Water Code section 85225 should not be read to encompass the geotechnical work at issue here because they are "preliminary activities" that merely serve to inform the final design.

But this argument ignores that "implementation" relates to "covered action," which is defined as consisting of the "project" under CEQA, and the CEQA project in this case includes the geotechnical investigations. The Department offers no case law or other legal support for its position that it should be allowed to define "covered action" more narrowly than section 85057.5 defines that term. Just because the purpose of the geotechnical work is to gather information to aid in making the final design decisions, does not mean that it is not a component of the project that requires implementation. The geotechnical work, just like the ultimate project construction, will likely have an impact on the environment in the Delta that not only requires CEQA review and approval but also certification of consistency with the Delta Plan. The Department's

interpretation would require the Court to ignore the plain language of the Delta Reform Act and create a new exemption for the DCP. The Court has no such authority.

3. *The Department's Reliance on the Council's Covered Action Checklist*

Next, the Department cites to the "Covered Action Checklist," which is an informational tool the Council created to help state and local agencies determine if a plan, program, or project is a "covered action" as defined in the Delta Reform Act. (Resp.'s Opp. Br., p. 17:14-22.) Notably, the Department cites to the explanatory text under one of the checklist questions *but omits the question itself*. (*Ibid*.; Henderson Decl., Ex. B, p. 234.) The question the Department fails to acknowledge or answer is set forth in the Checklist in bold type as follows: "**Has CEQA been completed at the time of filing a Certification of Consistency with the Delta Stewardship Council?**" (Henderson Decl., Ex. B, p. 234.) The answer here is clearly yes, which indicates that this particular factor would serve to undermine the Department's argument that it is premature to file a certification of consistency.

Having ignored the question, the Department focuses on the explanatory text below the question, quoted here with the emphasis included in the Department's brief:

> *When other permits are required* for implementation, project proponents should consult with Council staff on appropriate timing for filing the Certification of Consistency. Filing a Certification of Consistency *prior to finalizing the design* and operational elements of the project may result in a proposed covered action that is significantly altered through the CEQA or other processes. *If, after filing a certificate of consistency, the project is significantly changed, a new Certification of Consistency will need to be filed* with the Delta Stewardship Council.

(Resp.'s Opp. Br., p. 17:18-22.)

It is unclear why the Department chose to emphasize the language stating, "when other permits are required," because the Department does not discuss in its opposition brief any additional permits that are required, or how the outcome of the geotechnical work would potentially affect its ability to secure any such permits. The Department seems to focus on the part of the excerpt that refers to filing the certification "*prior to finalizing the design*" of the project. But when read in the context of the overarching question, the explanatory language appears to simply caution project proponents against filing a certificate of consistency prior to finalizing the project's design and operational elements *under CEQA*. Again, the DCP's design and operational elements have been finalized sufficiently under CEQA. It is also unclear why the Department emphasized, *"if, after filing a certificate of consistency, the project is*

significantly changed, a new Certification … will need to be filed," because the Department does not explain how the geotechnical work at issue here could significantly change the project especially now that the FEIR has been certified.[2]

4. *The Department's Claimed Compliance with Water Code Section 85225.5*

The Department cites to section 85225.5 to argue that it is in compliance with its obligations by engaging in "early consultation" with the Council. (Resp.'s Opp. Br., p. 16:20-24.) Section 85255.5, however, does not impose any obligations on lead agencies such as the Department. Rather, the section directs and authorizes the Council, in order to assist lead agencies in preparing the required certification, to develop procedures for early consultation with the Council on the proposed covered action. The fact that the Council possesses the authority to develop procedures for early consultation has no bearing on whether the geotechnical investigations are part of a "covered action." Neither does the Department's early consultation with the Council. The Department's argument in opposition is not aided by claiming compliance with a statute that imposes no obligations on it. The only notable observation the Court makes from the Department's citation to this authorizing statute is that the Council has not issued any regulations supporting the Department's narrow interpretation of sections 85057.5 and 85225.

5. *The Department's Attempt to Extract Designing Activities from "Covered Actions"*

Citing to Water Code section 85052 and section 5001 of the Council's implementing regulations, the Department argues that the Delta Reform Act treats "planning" and "designing" activities (which it argues include the geotechnical work in the DCP) as distinct from "construction" and "implementation," and that such activities are not meant to be considered part of the implementation of the covered action. (Resp.'s Opp. Br., pp. 20:23–21:6.) The Department misreads these provisions. Both Water Code section 85052 and regulation section 5001 contain the identical definition of "*adaptive management*" as meaning "a framework and flexible decisionmaking process for ongoing knowledge acquisition, monitoring, and evaluation

[2] The declaration of Graham Bradner, submitted by the Department in support of its opposition, explains that the geotechnical work will gather additional information that will refine, and, if necessary, modify project feature layouts and configurations. (Bradner Decl., p. 5.) Neither the declaration nor the Department's opposition brief, however, assert or explain how any potential adjustments could be of such magnitude to constitute a significant change to the project. For example, the Department does not contend that the project's location, scope, or operational components could change significantly based on the outcome of the geotechnical work.

leading to continuous improvement in *management planning and implementation* of a project to achieve specified objectives." (Wat. Code, § 85052; Cal. Code Regs., tit. 23, § 5001, subd. (a).) In this context, "management planning and implementation" clearly refers to the *post-completion* implementation phase of a project. Thus, the use of the word "planning" in this provision refers to the planning that occurs *after* a certification of consistency has been filed, *after* the project has been constructed, and during the time period in which the completed project is in operation.

Yet, the Department takes the word "planning" out of this context, and argues that these sections support the notion that the pre-construction planning phase of a project is not part of the "covered action." This argument does not withstand scrutiny. Similarly, the Department's attempt to draw support from the reference in section 85089 to "[t]he costs of the environmental review, planning, design, construction, and mitigation" is also unpersuasive. These statutes, which use these terms in different contexts, do not stand for the proposition that the extensive geotechnical work that the Department included in the DCP's project description in the FEIR should now be excised from the project definition under the Delta Reform Act simply because they serve a planning and design function.

6. *The Department's Reliance on the Mitigation Monitoring and Reporting Program*

The Department also points to language in the Mitigation Monitoring and Reporting Program ("MMRP"), which the Council adopted in April 2018 to ensure compliance with the mitigation measures established in the recent amendments to the Delta Plan. (Resp.'s Opp. Br., p. 18:8-27.) The MMRP includes in, Table 1, the mitigation measures identified in the 2018 Delta Plan Amendments Program EIR and, in Table 2, the mitigation measures identified in the 2013 Delta Plan Program EIR. Lead agencies of covered actions are required to implement the mitigation measures in these tables. Specifically, the Department points to a portion of mitigation measure 11-1, which states, "Lead agencies shall ensure that *geotechnical design recommendations* are included in the design of facilities and construction specifications to minimize the potential impacts from seismic events and the presence of adverse soil conditions. Recommended measures to address adverse conditions shall conform to applicable design codes, guidelines, and standards." (Resp.'s Opp. Br., p. 18:16-18 [with Dept.'s emphasis]; Henderson Decl., Ex. A, p. 197.)

Contrary to the Department's position, this mitigation measure can reasonably be interpreted as requiring that the agency *certify* that the facility designs and construction

specifications *will include* geotechnical design recommendations, rather specifying the actual geotechnical recommendations themselves. Such an interpretation is consistent with a plain reading of both mitigation measure 11-1 and the self-certification requirement of section 85225. And importantly, such an interpretation would not pose any obstacle to the Department's ability to prepare a certification of consistency prior to undertaking the geotechnical work now that the FEIR has been certified.

In fact, the FEIR in Appendix 3E, entitled, *Delta Reform Act Considerations*, spends 21 pages discussing the Delta Reform Act and how the DCP serves the Act's policies. (Buckman Decl., Ex. A, Appendix 3E.) The FEIR explains that the DCP "is consistent with and furthers the achievement of the coequal goals [of the Delta Reform Act] by providing water supply resilience needed to address seismic risks, sea level rise, and other reasonably foreseeable consequences of climate change and extreme weather events. [The DCP] will have a substantial positive impact on achievement of the coequal goals in a manner consistent with state policy." (*Id.*, p. 5:1-6.) The FEIR further explains the Department would be able to certify "any of the project alternatives," and includes Table 3E-1, spanning 11 pages, which addresses how the DCP project alternatives would be consistent with each of the Delta Reform Act's specific policies. (*Id.*, pp. 7-17.) The FEIR also includes detailed analyses of the DCP's environmental impacts on the Delta, explaining that, "[t]o the extent that the [DCP] will cause potentially significant impacts on the physical environment, such environmental impacts are disclosed and analyzed in the EIR and, where feasible, mitigation measures have been proposed. The practical effect of many of the mitigation measures and environmental commitments is to protect Delta values." (*Id.*, p. 20:1-9.)

The Department essentially argues that, even though the FEIR includes Appendix 3E as well as numerous studies and discussions relevant to showing consistency with the Delta Plan, it needs *even more* information before it would be able to self-certify consistency. It seems that in the Department's view, anything less than fully finalized designs will not suffice. The problem with this argument is that neither the applicable statutes nor the regulations indicate this level of detail is required. Thus, the Court is not persuaded that the Department needs more information than what it already has, or that it will be "caught in a catch-22 paradox" if it is required to self-certification consistency prior to undertaking the geotechnical work. (See Resp. Opp. Br., p. 19:23–20:3.) While the Court is certainly not ruling that the Department's not-yet-prepared

certification will be satisfactory, the Court sees no reason why the Department is not currently in position to prepare a satisfactory certification, supported by the relevant studies, data, explanations, and project specifications that are ostensibly included in the certified FEIR.

The Court rejects the interpretation of this mitigation measure as requiring that geotechnical work be conducted *prior to* certification for a few reasons. First, this interpretation is not clear from the language of the mitigation measure itself, as just discussed. Second, to read this mitigation measure as requiring that the lead agency conduct geotechnical work (which is part of the covered action) prior to preparing the certification of consistency would conflict with the plain language of section 85225. Third, such an interpretation would contravene the apparent purpose of the certification requirement given that the extensive geotechnical work at issue here, will likely—*on its own*—have a physical impact on the Delta's ecosystem. Given the apparent environmental impact of this geotechnical work, it makes sense that the Department certify that it is consistent with the Delta Plan *before*, rather than after, it is conducted.

B. Likelihood of Respective Harms to Petitioners and the Department

The next step in the analysis is the comparison of interim harms resulting from the granting or denying of the requested preliminary injunction. Petitioners claim a number of harms, including (1) the procedural harm of not being able to appeal the Department's certification under section 85225 until *after* the end of geotechnical investigations, (2) potential harm to living and buried tribal cultural resources in the Delta, and (3) physical harm to real property. The Department cites the following harms that would result from a preliminary injunction enjoining geotechnical investigations: (1) contractual penalties of up to $160,000 that the Department would have to pay to geotechnical consultants, (2) higher project costs resulting from delay due to inflation and additional overhead costs, and (3) the higher risk of harm to the state's water supply from a natural disaster.

Given the plain statutory language, Petitioners have established a strong likelihood of success on the merits on the mostly legal question of whether certification under Water Code section 85225 is required prior to the geotechnical investigations. As such, a minimal showing of likelihood of harm is sufficient to justify the issuance of a preliminary injunction. The Court finds that the procedural harm of being denied the opportunity to appeal the Department's certification prior to the completion of geotechnical investigations is sufficient to justify the issuance of a preliminary injunction.

C. Whether the Petitions' Allegations Preclude Issuance of a Preliminary Injunction

The Department argues that Petitioners nonetheless cannot receive injunctive relief because of deficiencies in their petitions. The Court disagrees.

With respect to County of Sacramento, et al., (24WM000014), Sacramento Area Sewer District (24WM000012), and City of Stockton (24WM000009), the Department argues that they are not entitled to injunctive relief because they did not specifically request injunctive relief in connection with their Delta Reform Act causes of action. With respect to County of San Joaquin, et al. (24WM000010), the Department argues that the petition is deficient because although the petition seeks an injunction with respect to the Delta Reform Act claim, it only seeks to enjoin the Department from "constructing or operating" the DCP, which will not happen for many years to come.

A preliminary injunction, though, is available as a "provisional or auxiliary remedy to preserve the status quo until a final judgment," even where "the main action seeks another remedy." (*Southern Christian Leadership Conference v. Al Malaikah Auditorium Co*. (1991) 230 Cal.App.3d 207, 223 [preliminary injunction available even where the complaint seeks damages on breach of contract]; compare Code Civ. Proc., § 526, subd. (a)(1) with subd. (a)(3).) The preliminary injunction sought in these motions would be appropriately issued to maintain the status quo with respect to the Delta Reform Act claims even if the respective petitions do not contain a prayer for the same injunctive relief.

With respect to San Francisco Baykeeper, et al. (24WM000017), the Department argues that the petition impermissibly seeks to enjoin the Department from making its discretionary decision with respect to consistency with the Delta Plan. The Court disagrees. The petition only seeks an injunction to restrain the Department from implementing the DCP without first certifying it in violation of Water Code section 85225. (Baykeeper Pet. ¶¶ 280-281, 284.) It does not seek to impermissibly enjoin the Department from exercising its discretion. Rather, it seeks to ensure that the Department, should it decide to implement the DCP, perform its mandatory duty of certifying the DCP under section 85225 before implementation.

CONCLUSION

The motions for preliminary injunction are granted. The geotechnical work at issue here is part of the covered action, which requires certification of consistency with the Delta Plan before it is implemented. The Department is, therefore, enjoined from undertaking the

geotechnical work described in Chapter 3 of the FEIR prior to completion of the certification procedure that the Delta Reform Act requires.

* * *

This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc., § 1019.5; Cal. Rules of Court, rule 3.1312.)

CERTIFICATE OF ELECTRONIC SERVICE

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing Ruling on Submitted Matter – Petitioners' Motions for Preliminary Injunction by electronic service to the below addresses:

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I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: June 20, 2024

Superior Court of California,
County of Sacramento

By: M. Lu
Deputy Clerk