



Drought Water Transfers Still Require Environmental Review

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Water transfers initiated pursuant to an emergency drought proclamation must still be reviewed under the California Environmental Quality Act ("CEQA"). (*Butte Environmental Council, et al. v. California Department of Water Resources, et al.*, Alameda Superior Court Case No. RG09446708). In a recent opinion, Alameda Superior Court Judge Alice Vilardi ruled that the State of California acted improperly when it did not conduct a CEQA environmental review for emergency water transfers under the State Drought Water Bank. The court's opinion may have significant implications for the timely delivery of water to those experiencing shortages due to extreme drought conditions and regulatory pumping curtailments.

On February 27, 2009, Governor Schwarzenegger issued a proclamation under the authority of the California Emergency Services Act declaring a state of emergency in California due to a drought-induced water shortage. Relying on the emergency exemptions under CEQA, the State determined that water transfers under the Drought Water Bank could proceed without environmental review. The Drought Water Bank is a one-year transfer program implemented by the California Department of Water Resources to obtain water from willing sellers upstream of the Delta for sale to water users experiencing shortages due to prolonged drought conditions and environmental regulatory restrictions.

The Butte Environmental Council, California Sportfishing Protection Alliance, and the California Water Network brought suit against the California Department of Water Resources ("DWR"), the California Natural Resources Agency and Governor Arnold Schwarzenegger, arguing that the water transfers are improper without an environmental impact review under CEQA.

The court agreed with the plaintiffs, rejecting arguments that compliance with the Governor's proclamation provided an alternative to a CEQA "emergency exemption" review, and rejecting arguments that circumstances made it impossible to complete a CEQA review in time to respond to the drought emergency. In fact, the court questioned whether there was an actual "emergency" within the meaning of the Public

Resources Code. For example, the court stated: "The proclamation states that the drought has continued for years, and had worsened. These words describe a condition that is ongoing, not one that is sudden or unexpected."

Analyzing the specific emergency exemption language in Public Resources Code sections 21080(b)(3) and (b)(4), the court further concluded: "The evidence in this record indicates that the purposes of the [Drought Water Bank] are not confined to restoring real property or facilities that were damaged or destroyed as a result of the drought but appear to be addressed in larger part to the economic and social consequences of reduced availability of water during the drought."

The defendants will likely appeal the trial court's opinion. If upheld by the appellate courts, this decision may complicate the ability to timely deliver water for beneficial use during emergency drought conditions.