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Selected Litigation Affecting the Delta

1. Designation of the legal Delta. (Water Code section 12220.)

There has been no published case regarding the boundaries of the legal Delta. The description of the legal Delta was enacted as part of a Delta Protection Act in 1959. Other parts of that Act, Water Code sections 12200-12205, have been litigated.

State Water Resources Control Board Cases, 136 Cal.App. 4th 674 (2006).

Delta Protection Act provides no clear standard for determining what is an adequate supply of water for users in the Delta. "[S]ince the Delta Protection Act seeks to serve the dual goals: (1) maintaining and expanding agriculture, industry, urban and recreational development in the Delta; and (2) providing fresh water for export to areas of water deficiency, it is for the Board in the first instance to balance 'in-Delta needs and export needs' and to determine whether in-Delta needs receive an adequate supply of water." The Delta Protection Act does not give Delta riparians and appropriators a right to water stored upstream by others. Nothing in the Act purports to grant any kind of water right to any particular party.

2. Delta Protection Commission.

There are no published cases in which the Delta Protection Commission has been a party.

In *Akins v. State of California* (1998) 61 Cal. App. 4th 1, the Delta Protection Commission filed an amicus brief, noting the plight of land use agencies who get sued for disallowing private property development in floodplains and then get sued when developed lands are flooded.

In *Delta Wetlands Properties v. County of San Joaquin* (2004) 121 Cal.App.4th 128, the court upheld a San Joaquin County zoning ordinance that prohibited the location of water storage reservoirs in zones other than agricultural zones and required a conditional use permit for location in a permitted zone. The court noted that the Johnston-Baker-Andal-Boatwright Delta Protection Act of 1992 created the Delta Protection Commission and that the Act did not preempt the County's land use authority.

In trial court litigation, Wheelabrator Clean Water Systems, Inc., BioGrow Systems Div. sued the Commission, asserting that a DPC resources management plan policy prohibiting the deposit of sewage sludge in the primary zone had to go through the Office of Administrative Law (OAL) process. The trial court agreed, and DPC did not appeal.

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Rather, it adopted the regulation following the OAL process.

Concerned citizens of Clarksburg and NRDC brought an appeal of Yolo County's approval of the Clarksburg Old Sugar Mill Project to the Delta Protection Commission. The Commission determined that it had jurisdiction and decided in early 2007 that the project was inconsistent with the Commission's resource management plan for the Delta. The Commission sent the matter back to Yolo County for further action. There is presently no litigation over the matter.

3. **Flood Cases.**

State Flood Cases:

Galli v. State of California (1979) 98 Cal.App.3d 662.

This case arose from the 1972 flooding of Brannan-Andrus Island in the Delta, resulting from failure of a "nonproject" levee on the San Joaquin River. The court held that the State Reclamation Board did not have a mandatory duty to review and approve the Brannan-Andrus Levee District's maintenance or repair work, and the district was not a state agency for whose acts and omissions the state is liable. Thus, the state was not liable for damages from the flood.

Belair v. Riverside County Flood Control Dist. (1988) 47 Cal.3d 550.

Where a public flood control feature fails, resulting in flooding to land that has been historically subject to flooding, the property owners cannot recover damages in inverse condemnation from the public agency operating the project, unless they prove that the agency acted unreasonably. Strict liability does not apply.

Locklin v. City of Lafayette (1994) 7 Cal.4th 327.

Where a public entity made storm drainage improvements that increased the runoff in a natural watercourse, it would not be liable for damages from a landslide caused by erosion resulting from the increased runoff, unless it acted unreasonably. The case sets forth several factors to be used to determine reasonableness, based on a balancing of the public benefit and private damage in each case.

Bunch v. Coachella Valley Water Dist. (1997) 15 Cal.4th 432 (*Bunch II*).

The reasonableness rule (not strict liability) applies to cases in which a public entity diverts and rechannels water under a flood control system of dikes and levees that fail in a

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severe rainstorm, causing damage to properties historically subject to flooding.

Akins v. State of California (1998) 61 Cal.App.4th 1.

The standard of unreasonable conduct set forth in *Belair* and *Bunch II* does not apply where public works, operating as intended, divert water to properties which were *not* historically subject to flooding. In such cases, property owners do not need to prove unreasonable conduct on the part of the public agency. The importance of flood control has not conferred on government entities a privilege to use private property which was not historically subject to flooding as a retention basin to protect downstream property, without paying compensation.

Paterno v. State of California (2003) 113 Cal.App.4th 998.

When a public entity operates a flood control system built by someone else, it accepts liability as if it had planned and built the system itself. The State was liable for damages in inverse condemnation for the failure of the Linda levee, which had been built of unconsolidated mining debris, because its plan for the Sacramento River Flood Control Project, which included the levee, was unreasonable. It was unreasonable to accept the levee as built without any measures to ensure it met design standards.

Federal Flood Cases

Central Green Co. v. United States, 531 U.S. 425 (1999).

Landowner alleged damage due to subsurface flooding from Madera Canal, part of the Friant Division of the CVP. The general rule is that the U.S. is not liable for damages from flood waters, but it is necessary to look at the particular waters that caused the damage and the purpose for which they were released, and not just the flood control purpose of the overall project, to determine whether they are flood waters. The case was remanded so the proper test could be applied.

State of California v. United States, 271 F.3d 1377 (Fed. Cir. 2001)

The State of California and the United States, through DOI, entered a contract to share the cost of operation and maintenance of the joint-use facilities of the San Luis project. When California sought reimbursement for the federal share of claims paid by California to compensate property owners for flood damages resulting from the joint-use canal's effect on local streams, the United States claimed immunity from liability under the Flood Control

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Act. The Court held that California stated a breach of contract claim and that the United States had waived immunity under the Tucker Act. The case was remanded to the Court of Claims to determine the amount due to California.

4. **Levees.**

Galli v. State of California, above, involved the failure of a Delta levee.

Paterno, above, is a levee case arising in the Sacramento Valley.

Bunch II, above also involved levees. Although the facts of that case arose in another part of the state, the legal principles will apply in the Central Valley.

NRDC v. State Reclamation Board, Sacramento County Superior Court, Case No. 068801228

Petitioners challenge the Reclamation Board's approval of fill and encroachment permits for the River Islands Project, alleging that the Reclamation Board, as a responsible agency under CEQA should have prepared a supplemental EIR for the project, and that it violated its own regulations. A tentative ruling found no CEQA violations, but determined that Reclamation Board had violated its own procedures. The order has not yet become final.

5. Infrastructure.

Intertie.

Planning and Conservation League v. U.S. Bureau of Reclamation, U.S. District Court for the Northern District of California, Case No. C 05-3527.

In February, 2006, a federal court enjoined construction of the Delta-Mendota Canal/California Aqueduct Intertie until an Environmental Impact Statement was prepared. Reclamation is now preparing the EIS.

Jones Tract Levee Repair.

BNSF Railway Co. v. Upper Jones Reclamation Dist. No. 2039

Three lawsuits were filed against local and state flood control

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agencies for damages arising from the Upper Jones Tract levee break in June 2004. One of them was brought by a railway company.

Pipeline spill in Suisun Marsh

In April, 2004, the rupture of an underground pipeline operated by Kinder Morgan Energy Partners L.P. resulted in a spill of 2,947 barrels of diesel fuel into Suisun Marsh and adjoining shores. The United States Department of Justice, the California Attorney General, the California Department of Fish and Game, and the San Francisco and Lahontan Regional Water Quality Control Boards brought suit against Kinder Morgan and Santa Fe Pacific Pipeline Partners. Kinder Morgan and SFPP settled, agreeing to pay $5.3 million dollars as a result of this spill and two others. They also agreed to re-route the pipeline to avoid most of Suisun Marsh. A separate settlement agreement was reached between Kinder Morgan, SFPP and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration.

Delta Wetlands

Central Delta Water Agency v. State Water Resources Control Board, (2004) 124 Cal.App.4th 245.

SWRCB granted water rights permits for Delta Wetlands, a private project that would turn two Delta islands into reservoirs and two islands into habitat islands. The court ordered the permits to be set aside, because they did not identify the place the water would be used or the actual uses to be made and thus the Board could not determine the reasonable amount of water that could be put to any specific beneficial use. Also, by failing to evaluate the impacts of delivering water to actual customers, the Environmental Impact Report was inadequate under CEQA. This case also involved claims relating to levee stability and impacts on a road in the Delta, but the court did not disturb the Board's findings in those areas.

In *Delta Wetlands Properties v. County of San Joaquin* (2004) 121 Cal.App.4th 128, the court upheld a San Joaquin County zoning ordinance that prohibited the location of water storage reservoirs in zones other than agricultural zones and required a conditional use permit for location in a permitted zone.

6. Water Quality

Central Valley Regional Water Quality Control Board's Irrigated Agricultural Waiver Program.

This program requires monitoring of waters that receive discharges from irrigated agriculture. Details, including existing monitoring reports

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are available on the Water Board's website, www.waterboards.ca.gov (go to Regional Boards, Region 5, Central Valley).

California Sportfishing Protection Alliance v. California Regional Water Quality Control Board, Sacramento County Superior Court, filed on or about June 18, 2007.

CSPA and Baykeeper have sued the Regional Water Quality Board for the Central Valley Region, challenging the CEQA Initial Study and Negative Declaration and final decision of the Board adopting two Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands The suit alleges that the agricultural waiver program has been ineffective, contributes to damage to threatened and endangered fish and violates state and federal clean water laws.

In earlier litigation, involving Deltakeeper and the Farm Bureau among other parties, the irrigated agriculture waiver program had been largely upheld, with some modifications.

Litigation involving Municipal Wastewater Treatment Plants.

City of Brentwood v. Central Valley Regional Water Quality Control Board (2004) 123 Cal.App.4th 714.

Court upheld penalties on City of Brentwood for violating dissolved oxygen effluent limitations in its wastewater treatment plant permit. The plant discharges to a tributary of the San Joaquin River and Delta.

Litigation involving drainage that may affect San Joaquin River water quality.

Firebaugh Canal Co. et al., v. United States, 203 F.3d 568 (9th Cir. 2000)

San Luis Act requires U.S. Bureau of Reclamation to provide drainage service to the San Luis Unit, but it need not be in the form of the San Luis Drain. United States has now completed an EIS and issued a Record of Decision on the San Luis Drainage matter. Negotiations between Reclamation and Westlands Water District are considering the possibility of Westlands assuming the drainage obligations in exchange for certain agreements by the United States.

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7. Endangered Species.

Department of Fish and Game v. Anderson-Cottonwood Irrigation District (1992) 8 Cal.App.4th 1554.

The definition of "take" in the California Endangered Species Act is broader than hunting or fishing and includes taking by otherwise lawful irrigation activity. irrigation district was not entitled to continue pumping water in a manner that took listed fish.

United States v. Glenn-Colusa Irr. Dist. (E.D.Cal. 1992) *788 F. Supp. 1126*.

National Marine Fisheries Service brought suit against Glenn-Colusa Irrigation District to enjoin the taking of winter-run chinook salmon at the District's pumps on the Sacramento River. The Injunction was issued.

San Luis/Delta-Mendota Water Authority v. Badgley (E.D. Cal. 2000) 136 F.Supp.2d 1136.

Plaintiff water agency successfully challenged, as arbitrary and capricious, U.S. Fish and Wildlife Service's listing of the Sacramento splittail as a threatened species under the federal Endangered Species Act.

Association of California Water Agencies, et al., v. Evans (E.D. Cal.2002)

In 2001, ACWA, the State Water Contractors and others sued the National Marine Fisheries Service challenging its critical habitat designation for salmon and steelhead. The case was dismissed as moot in 2002, after the regulations at issue were vacated and remanded as the result of a consent decree in another case.

California Farm Bureau Federation v. Badgley (Not published).

Farm Bureau filed suit to require the U.S. Fish and Wildlife Service to perform a five-year status review of the Delta smelt "in order to determine whether a change in listing status is warranted." The suit was settled in April, 2003, with the Fish and Wildlife Service agreeing to begin a status review within 60 days of the court ruling approving the settlement.

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Bay Institute, Center for Biological Diversity and NRDC–Potential Suit

On May 24, 2007, the Bay Institute, Center for Biological Diversity, and NRDC sent a 60-day notice letter of intent to sue the U.S. Fish and Wildlife Service for allegedly violating the federal ESA by failing to respond to a March 2006 petition to "up-list" smelt from a threatened to an endangered species. The groups also sent a request letter to the California Fish and Game Commission requesting that the Commission reconsider an emergency state listing of endangered for the smelt under CESA.

Coalition for a Sustainable Delta–Potential Suit

In September, 2007, the Coalition for a Sustainable Delta, made up of a group representing agricultural water agencies, filed a notice of intent to sue Mirant Delta LLC and the U.S. Army Corps of Engineers for violating the Endangered Species Act. Mirant operates gas-fired electric power generation plants that pull in Delta water for cooling, and entrain fish in the process.

California Coastkeeper Alliance v. Department of Fish and Game

Recent case against Department of Fish and Game regarding streamflow protection standards (Public Resources Code sectio 10000 et seq.).

Longfin Smelt

The California Fish and Game Commission recently denied a petition for an emergency listing of longfin smelt.