“Water law is to law, as military music is to music.”

-- Legal maxim, source unknown

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20:18/01. TRIAL COURT RULES CALIFORNIA’S CENTRAL COAST AG POLLUTION CONTROLS INVALID: In what is sure to become a hotly contested ruling on appeal, on 10 August, Sacramento Superior Court Judge Timothy Frawley issued a final ruling that California’s recently adopted Central Coast agricultural pollution control waivers were invalid as simply too lax to meet the requirements of California’s Clean Water Act. Even though it’s a major source of water pollution in many states, particularly in California, agricultural-caused water pollution is categorically exempt from regulation under the federal Clean Water Act but is governed by state laws such as California’s Porter-Cologne Water Quality Control Act (CA Water Code Sec. 13000 et seq.), which was enacted to assure that “the quality of all waters of the state will be protected for use and enjoyment by the people of the state.”

A report issued by the Central Valley Regional Water Quality Control Board on 1 February 2010 admitted that many water segments throughout California’s Central Coast region are water quality impaired, which harms many other beneficial users, including fishermen whose economically valuable salmon runs depend on some of those same river systems. PCFFA, along with the California Sportfishing Protection Alliance (CSPA), were both co-Plaintiffs in the case Monterey Coastkeeper, et al. vs. California State Water Resources Control Board, Superior Ct. of Sacramento County, Case No. 34-2012-80001324). The Regional Board’s staff concluded in that report that “[i]mmediate and effective action is necessary to improve water quality protection and resolve the widespread and serious impacts on people and aquatic life.” The Court ruled that the resulting conditional waiver that ultimately resulted, after years of
Agribusness attacks on the process, was simply too weak (and too reliant on purely voluntary measures) to meet that statutory standard.

The ruling remanded the issue back to the Regional Board to do a better job that met statutory objectives. The ruling, which currently only affects certain farming operations in California’s Salinas Valley, is expected to be appealed and ultimately may have to be decided by the California Supreme Court, where it would have statewide precedential impacts. The California State Farm Bureau Federation and other major agricultural interest groups have already intervened to push for yet weaker regulations.

For more information, see this 14 August Monterey County Weekly article on the judge’s ruling. For more information on the Final Ruling contact Steve Shimek, Monterey Coastkeeper, W: (831)663-9460 or C: (831)241-8984. A copy of the 10 August 2015 final Ruling on Submitted Matter can be obtained through the Superior Court of California’s Sacramento County Public Case Files Access Portal using the case number above.

20:18/02. NEW ENGLAND GROUNDFISHERMEN REQUIRED TO PAY FOR OBSERVER COVERAGE: The New England Fishery Management Council (NEFMC) is set to begin requiring participants in that region’s groundfishery to pay for their own observer coverage, a cost that has to date been borne by the federal government. By NEFMC regulation, federally licensed observers are required on about 25% of commercial groundfishing trips in New England, with the cost of placing an observer onboard estimated at $710.00 per trip. The purpose observation is to ascertain the number and species of fish landed on the boat, so as to ensure compliance with bycatch regulations. Commercial fishermen are justifiably concerned that the cost of paying for observer coverage will negate a large percentage, if not all of any profit that may have been realized from the fishing trip: a recent federal report found that 59% of the New England groundfish fleet would lose money if required to pay for their own observer coverage. Compounding the problem is extremely restricted amount of fish groundfishermen may catch under that fishery’s catchshare program.

The problem is even more stark on the west coast, where groundfishermen are required to pay for 100% observer coverage if they want to participate in that fishery. That mandate, buttressed by the Pacific Fishery Management Council’s decision to consolidate the groundfish fishery into a limited number of trawl vessels, has all but eliminated the opportunity for small, sustainably operated fixed-gear vessels to participate in harvesting groundfish. The result has been difficulty for the small boat fleet to support itself given the concurrent decline of the west coast Chinook salmon abundance and the limited duration of economically sustainable Dungeness crab fishing.

For more information, see this 4 August Boston Globe article.

20:18/03. CALIFORNIA COURT REJECTS INITIAL AGRIBUSINESS CHALLENGES TO WATER CUTS DURING DROUGHT. A California Judge has reversed a previous tentative ruling and firmly rejected a challenge by a farmers’ group to agricultural irrigation water cuts sought by state regulators during the current record-breaking drought. Sacramento Superior Court Judge Shelleyanne Chang, in a ruling filed 3 August, declined to block state regulators from enforcing citations of illegal water diversions for crops.

The State Water Resources Control Board has sent thousands of letters to farmers, water districts and corporations holdings rights to divert water from rivers and streams that supplies were running too low in this fourth year of drought to meet their demands. Chang previously ruled that the state’s initial notices violated farmers’ rights because they ordered the
farmers to immediately stop taking water without a hearing. The state sent new letters stripped of mandatory-sounding language, but maintained it still has the power to fine those who take water even after they are told there’s not enough.

This is the first batch of hundreds of potential water law cases challenging California’s authority to control its internal water rights allocation system during droughts. Also at issue is the claim by many irrigators that their water rights are true “property rights,” and thus the curtailment of those property right without monetary compensation would be a violation of the U.S. Constitution’s Fifth Amendment prohibition against “takings” and similar protections in the California Constitution. Water lawyers for the state agencies, and most academics, argue that such water rights are only “usufructory” (i.e., beneficial use) rights and that in spite of such use rights, California’s water remains the property of the State and subject to its regulation for public trust and public welfare purposes (which includes curtailment in a drought) at all times.

The case law in the State of California is clearly opposed to consideration of water rights as true property rights. Property rights groups, however, are seeking to use these water law cases to establish opposite precedents, making water right curtailments prohibitively expensive even if necessary for public safety during droughts.

For more information see this CBS SF Bay Area 4 August Associated Press article.

20:18/04. WA GOVERNOR HALTS ALREADY WEAKENED ATTEMPTS TO IMPROVE WASHINGTON WATER POLLUTION CONTROLS: On 31 July, Washington Governor Jay Inslee ordered the Washington State Environmental Quality Commission (EQC) to halt its consideration of controversial draft fish consumption standard rules that were intended originally to tighten Washington’s currently very lax water quality standards, but which have since gotten so watered down as to have the opposite effect. The announcement meant the state missed a 3 August deadline to submit new draft standards to the U.S. Environmental Protection Agency (EPA) for approval. But the EPA was not expected to approve the very much weakened draft rules in any event, and EPA itself has been sued in the past by Washington-based Tribes, environmental groups and commercial fishermen’s groups (including PCFFA) for failing to require fish consumption standards that are adequately protective of Washington’s citizens in accordance with new national standards and modern science.

The heart of the new water pollution limits have to do with assumptions made by regulators about how much local fish and shellfish are consumed by Washington’s citizens on a daily basis. For water-borne pollutants, most of which are bioaccumulative in the human food chain, the more one eats locally caught fish and shellfish exposed to those chemicals, the greater the human health risk. Current WA fish consumption standards assume less than one-twentieth the documented rate of fish consumption of many of Washington’s citizens, and less than one-fiftieth of the average consumption of its most vulnerable consumers of seafood, including members of the Tribes and commercial fishing families. This means that Washington industries may be getting a free pass to pour so large a volume of toxic pollutants into its rivers that consumers may be getting far more exposure to toxic chemicals in their waterways than allowed by the Clean Water Act and most other states.

The draft new water quality rules were much criticized by health and safety groups as well as environmentalists, Tribes and sport and commercial fishermen for playing mathematical “tricks” by tightening fish consumption assumptions by a factor of ten (which appears to improve protections by ten times), while simultaneously allowing the allowable rate of cancer deaths of Washington citizens from exposure to toxic chemicals to grow to ten times larger – resulting (as many polluting industries lobbied hard for) in a net zero total regulatory change for most of the hundreds of chemicals being regulated. This, critics pointed out, resulted in a de facto
loosening of current standards, not their tightening. Washington states’ most polluting industries have fought these changes, citing purported high costs of compliance to their industries, every step of the way, including blocking progress on improved water quality and pollution controls in the Washington Legislature.

Governor Inslee’s rationale for the de facto loosening of current standards was his efforts to reduce overall pollution inflows to Washington’s waters from industrial sources through separate legislation. The legislative proposal was backed by a coalition that included local governments and some businesses. But it faced heavy opposition from the American Chemistry Council and others. The House passed the Governor’s bill (HB 1472) during the regular legislative session but the Senate failed to act on it.

"Without this legislation we lack the necessary broad approach to protecting our water in a way that advances human, environmental and economic health," Governor Inslee said. “The lack of legislative action is disappointing and forces us to reassess our approach.” Without that additional legislative component it was highly unlikely that EPA would have approved the proposal.

For more information see Governor Inslee’s 31 July 2015 Press Release.

20:18/05: NMFS REALLOCATES GULF OF MEXICO SNAPPER QUOTA IN FAVOR OF RECREATIONAL FISHERY: On Thursday, 13 August, the Gulf of Mexico Fishery Management Council voted to reallocate individual fishing quota (IFQ) in the red snapper fishery 51.5% - 48.5% in favor of the recreational fishery. The quota is currently split evenly between the commercial and recreational sectors, although the commercial sector includes the charter-for-hire sector as well. Total allowable catch for 2016-17 is set at 14 million pounds of this prized fish. Gulf coast commercial fishermen vehemently opposed the move, and see the move as unfairly rewarding the recreational sector, which has consistently exceeded its quota allotment since IFQ allocations were imposed on the fishery. PCFFA and IFR stand in solidarity with the Gulf of Mexico Reef Fish Shareholders Alliance, a collection of commercial fishermen who stand to lose from diminished access to the fishery.

For more information, see this 17 August Beuregard Daily News article, and this 14 August Gulf of Mexico Reef Fish Shareholders Alliance press release.

20:18/06: STUDY SHOWS 25-FOOT DROP IN KLAMATH BASIN GROUNDWATER LEVELS SINCE 2001: A new report by the U.S. Geological Survey (USGS) links a 15-year, 25-foot decline in groundwater levels in the Klamath River Basin to farm irrigation pumping by Klamath Project water users, as well as natural and climatic stressors. However, the relative contribution of each of those stressors is more difficult to discern. Declines in the water table can create increased stress on the overall water supply, which can in turn result in more demand on surface water on which migrating salmon rely. In response to the report, water officials have suggested that groundwater pumping in the Basin should not exceed 40,000 acre-feet per year.

For more information, see this 12 August KUOW article.

20:18/07: ROGUE RIVER DAMS REMOVED TO IMPROVE FISH PASSAGE: Fielder and Wimer dams on Evans Creek, an important salmon-supporting tributary to the Rogue River, have been removed, resulting in improved access for salmon and steelhead to over 70 miles of spawning ground. A private demolition company removed the dams, which were 19 and 11 feet tall, respectively, at a cost of approximately $700,000.00. Both dams were members of the top
ten of the Oregon Department of Fish and Wildlife’s statewide list of dams causing fish passage problems. The dam was removed pursuant to an agreement between the private landowners and Waterwatch of Oregon. PCFFA and IFR support dam removal as to improve fish passage and spawning opportunity, and we look forward to new generations of Evans Creek chinook that find their way into the commercial fishery.

For more information, see this 16 August Register-Guard article.

YOUR NEWS, COMMENTS, CORRECTIONS: Submit your news items, comments or any corrections to Editor at: tsloane@ifrfish.org, or call the IFR/PCFFA office with the news and a source at either: (415) 561-FISH (Southwest Office) or (541) 689-2000 (Northwest Office). If you have any trouble subscribing or unsubscribing, contact IFR/PCFFA directly at: tsloane@ifrfish.org. Sublegals is a weekly fisheries news bulletin service of Fishlink. “Fishlink” and “Sublegals” are registered trademarks of the Institute for Fisheries Resources. All rights to the use of these trademarks are reserved to IFR. All photos are by IFR unless otherwise accredited. This publication, however, may be freely reproduced and circulated without copyright restriction. Articles taken from Fishlink Sublegals may be freely reposted or reprinted with attribution to “Fishlink Sublegals.” If you are receiving this as a subscriber, please feel free to pass it on to your colleagues.

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