



## Environment, Land Use & Natural Resources ADVISORY ■

**FEBRUARY 13, 2015**

### California Court of Appeal Issues Important Decision on Underground Regulations

**By Damien M. Schiff**

On Monday, the California 3rd District Court of Appeal issued a groundbreaking published decision under the California Administrative Procedure Act (APA). In *California Association for Recreational Fishing (CARF) v. Department of Fish & Wildlife*, the court held illegal several department mitigation measures governing fish stocking in California waters.<sup>1</sup> Specifically, the court held that the mitigation measures—crafted as part of an environmental impact report governing all of the department’s fish stocking and related permitting activities—violated the APA’s prohibition on underground regulations. Although the case arises within the context of fish stocking regulation, the decision’s interpretation of the APA will affect administrative practice throughout a state where broadly applicable policies and procedures are frequently imposed on the regulated public with no notice or opportunity for comment.

#### **Background on California Fish Stocking**

The California Fish and Game Code authorizes the department to issue permits for the stocking of fish in private and public waters throughout the state. Under the department’s regulations, a stocking permit must be issued once the department has determined that the proposed stocking will be consistent with the department’s fisheries management plans and will avoid the introduction of diseased or parasitized fish into the state’s waters.

The department also operates the Fishing in the City program. Under that program, the department contracts with private aquaculture firms to stock public lakes and ponds in urban areas. The program has been successful at affording city residents, especially inner-city youth, with angling opportunities.

<sup>1</sup> Alston & Bird attorneys Maureen Gorsen and Damien Schiff, joined by attorneys from the Pacific Legal Foundation, represented CARF in the trial and appellate courts.

## The Fish Hatchery Environmental Impact Report

Following an environmentalist lawsuit under the California Environmental Quality Act, the department produced its Fish Hatchery Environmental Impact Report. Although focusing principally on assessing the environmental impacts of the department's own fish hatcheries, the report also analyzed the impacts of the Fishing in the City and private stocking programs. The department then proposed several mitigation measures for these programs, including the three that formed the basis for the *CARF* lawsuit. Mitigation Measures BIO-226 and BIO-233b required that, prior to authorizing the stocking of fish under the Fishing in the City or private fish stocking program, a department biologist would have to determine whether the stocking would substantially affect any "decision species" (a list of several dozen species chosen by the department, about half of which receive no special protection under federal or state law). If the stocking would have such an impact, then the permit would have to be denied. Mitigation Measure BIO-229 provided that vendors to the Fishing in the City program had to monitor their stock for invasive species and submit quarterly reports to the department.

## The Underground Regulation Lawsuit

In 2011, *CARF*—a nonprofit organization representing the interests of fish vendors, private fish stockers and fishermen—filed suit challenging the those mitigation measures. The lawsuit argued that the measures were underground regulations, i.e., broadly applicable rules that were not adopted pursuant to the rigorous notice-and-comment procedures of the APA. The department prevailed in the trial court, and *CARF* appealed. Before the 3rd District Court of Appeal, the department defended on the grounds that the mitigation measures were exempt from the APA. Specifically, the department argued that BIO-226 was exempt because it relates wholly to the department's "internal management." BIO-229 and BIO-233b were exempt, argued the department, because they represented "the only legally tenable interpretation" of the department's permitting regulations.

The court of appeal rejected each of these arguments. The court determined that BIO-226 was not exempt as an internal management rule because the mitigation measure would effectively determine which public lakes and ponds would be stocked. For that reason, the measure would "significantly affect[] numerous citizens, both those who run established fish stocking businesses and those, especially children, who enjoy participating in the Fishing in the City program." The court also rejected the department's "only legally tenable interpretation" defense. That defense failed with BIO-229 because no provision of law requires the particular monitoring and reporting regime that BIO-229 mandated. Similarly, the defense failed with BIO-233b because nothing in the department's existing permitting regulations mandates the particular "decision species" protocol that BIO-233b established.

## The Impacts of *CARF*

The court of appeal's decision in *CARF* will have important impacts not just on the recreational fishing industry, but also on all citizens who may be subject to the regulatory jurisdiction of California administrative agencies. The decision establishes the critical proposition that an agency cannot escape the APA's stringent rulemaking standards through an expansive understanding of what constitutes "internal management" or through a narrow understanding of what existing law may authorize. Thus, the decision will give regulated entities a powerful litigation tool to contest agency practices and procedures that have not been subject to notice and comment under the APA.

If you would like to receive future *Environment, Land Use & Natural Resources Advisories* electronically, please forward your contact information to [environmental.advisory@alston.com](mailto:environmental.advisory@alston.com). Be sure to put “**subscribe**” in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Doug Arnold  
404.881.7637  
[doug.arnold@alston.com](mailto:doug.arnold@alston.com)

Nicki Carlsen  
213.576.1128  
[nicki.carlsen@alston.com](mailto:nicki.carlsen@alston.com)

Mark Johnson  
213.576.1089  
[mark.johnson@alston.com](mailto:mark.johnson@alston.com)

Beverlee Silva  
404.881.4625  
[beverlee.silva@alston.com](mailto:beverlee.silva@alston.com)

Sarah Babcock  
404.881.7632  
[sarah.babcock@alston.com](mailto:sarah.babcock@alston.com)

Edward Casey  
213.576.1005  
[ed.casey@alston.com](mailto:ed.casey@alston.com)

Clay Massey  
404.881.4969  
[clay.massey@alston.com](mailto:clay.massey@alston.com)

Jocelyn Thompson  
213.576.1104  
[jocelyn.thompson@alston.com](mailto:jocelyn.thompson@alston.com)

Paul Beard  
916.498.3354  
[paul.beard@alston.com](mailto:paul.beard@alston.com)

Skip Fulton  
404.881.7152  
[skip.fulton@alston.com](mailto:skip.fulton@alston.com)

Elise Paeffgen  
202.239.3939  
[elise.paeffgen@alston.com](mailto:elise.paeffgen@alston.com)

Andrea Warren  
213.576.2518  
[andrea.warren@alston.com](mailto:andrea.warren@alston.com)

Ward Benshoof  
213.576.1108  
[ward.benshoof@alston.com](mailto:ward.benshoof@alston.com)

Maureen Gorsen  
916.498.3305  
[maureen.gorsen@alston.com](mailto:maureen.gorsen@alston.com)

Bruce Pasfield  
202.239.3585  
[bruce.pasfield@alston.com](mailto:bruce.pasfield@alston.com)

Jonathan Wells  
404.881.7472  
[jonathan.wells@alston.com](mailto:jonathan.wells@alston.com)

Meaghan Goodwin Boyd  
404.881.7245  
[meaghan.boyd@alston.com](mailto:meaghan.boyd@alston.com)

Ronnie Gosselin  
404.881.7965  
[ronnie.gosselin@alston.com](mailto:ronnie.gosselin@alston.com)

Geoffrey Rathgeber  
404.881.4974  
[geoff.rathgeber@alston.com](mailto:geoff.rathgeber@alston.com)

Diane Wizig  
404.881.4954  
[diane.wizig@alston.com](mailto:diane.wizig@alston.com)

Andrew Brady  
213.576.2527  
[andrew.brady@alston.com](mailto:andrew.brady@alston.com)

Maya Lopez Grasse  
213.576.2526  
[maya.grasse@alston.com](mailto:maya.grasse@alston.com)

Damien Schiff  
916.498.3320  
[damien.schiff@alston.com](mailto:damien.schiff@alston.com)

# ALSTON & BIRD

[WWW.ALSTON.COM](http://WWW.ALSTON.COM)

© ALSTON & BIRD LLP 2015

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100

NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333